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

** DECISION - Date of Decision _____
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** CONCURRING OPINION of MR. MOSK
- Date 17 MARCH 84
7 pages in English _____ pages in Farsi

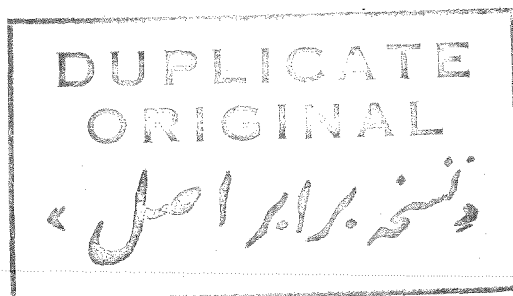
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IRAN-UNITED STATES CLAIMS TRIBUNAL



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دیوان داوری دعاوی ایران

Case No. 1

Chamber Three

Award No. 116-1-3

WILLIAM L. PEREIRA ASSOCIATES, IRAN,

Claimant,

and

ISLAMIC REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL		ایران - ایالات متحده
FILED = ثبت شد		
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Concurring Opinion of Richard M. Mosk

I concur in the Award in order that a majority can be formed. As I explain, I believe that it would have been preferable to award the Claimant additional sums. I shall also set forth reasons as to why the Tribunal does not have jurisdiction over the counterclaims for taxes and social insurance premiums.

Costs

On this major project, encompassing a multitude of complex buildings, Claimant worked continuously over a several year period, producing 32 bound volumes of specifications and 2350 pages of drawings. From the record there

appeared to have been few disputes between the parties or complaints by the Iranian Medical Center. It seems that it was only when the Iranian Medical Center encountered financial problems that its new management began to conceive of ways to avoid payment. There was no doubt that monies were due. Claimant has had to wait years to obtain compensation. Because of a contractual term, Claimant has only been able to receive 6% interest on its receivable, a rate far below prevailing rates. In order to obtain this award, Claimant has had to undergo a costly and time-consuming proceeding before this Tribunal. Accordingly, the Tribunal should have awarded Claimant its full costs incurred in the arbitration, including its reasonable attorneys' fees. Article 38, Tribunal Rules.

Reduction of Fees

A claimant does not have the burden of proving its claim to an absolute certainty or beyond a reasonable doubt. It need only establish its case by a preponderance of the evidence. The decision by the Tribunal to reject some portions of Claimant's claim suggests that the Tribunal placed too heavy a burden on Claimant to establish its claims. The Claimant introduced more than sufficient evidence to establish those elements of claims rejected by the Tribunal. The Tribunal's decisions on these elements, in my view, is contrary to the weight of the evidence.

The evidence shows that the Claimant and the Iranian Medical Center worked together on a regular basis. The

Organization's 15 billion rial budget. Yet, the so called budget limitation was in response to Partia's Phase II estimate which did not include the Basic Sciences Buildings; thus it should be assumed that the budget limitation also excluded the cost of the Basic Sciences Buildings.

Moreover, the establishment by the Planning and Budget Organization of a 15 billion rial budget after the completion of Phase II could not affect compensation for work already done. Rather, it would then be the obligation of the Claimant, or a successor contractor, in Phase III to have the project constructed for that amount. The Tribunal limits Claimant to a fee based on the 15 billion rial budget on the theory that such a fee was all that was requested. But the Tribunal overlooks the fact that Claimant also requested an amount for the work on the Basic Sciences Buildings.

The reduction of the fees for the non-translation of the Phase II Report is questionable. The practice of the parties had been not to translate documents. Earlier reports were accepted without translation. Claimant's willingness to translate the report in order to receive payment to which it was already entitled should not be converted into a legal obligation. Also the amount specified by the Tribunal appears arbitrary.

Jurisdiction over Tax and Social Insurance Counterclaims

I believe that the Tribunal has no jurisdiction over

the counterclaims for taxes and social insurance premiums. Under Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal has jurisdiction to decide

"... any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims . . . arise out of debts, contracts . . . expropriations or other measures affecting property rights...."

It might be that the tax and social insurance premium obligations would not exist but for the contract which is the subject of the claim, but these obligations do not arise out of the contract; rather they arise by operation of law. See Government of India v. Taylor, A.C. 491, 514 (1955) (U.K.) ("Tax gathering is not a matter of contract, but of authority and administration as between the state and those within its jurisdiction"). Even if a provision in the contract in issue allocates responsibility for such revenue obligations as between the contracting parties, such a provision does not impose these obligations and thus they do not arise out of the contract. Accordingly, the Claims Settlement Declaration does not provide a jurisdictional basis for such counterclaims.

Moreover, the Tribunal is authorized by Article V of the Claims Settlement Declaration to apply "principles of commercial and international law" it finds relevant. The concept of general principles of law constitutes one source of international law. See Statute of the International Court of Justice, Article 38(1)(e); I. Brownlie, Principles of Public International Law 15-19 (3d ed. 1979).

A widely accepted principle of law is that a municipal legal system will not enforce foreign revenue laws. 1 Dicey and Morris, The Conflict of Laws, 92-3 (10th ed. 1980); Cheshire and North's Private International Law 131-134 (10th ed. 1979); A. Von Mehren and D. Trautman, The Law of Multi-state Problems 797 (1965); Government of India v. Taylor, A.C. 491, 514 (1955) (U.K.); Her Majesty, Queen in Right of Province of British Columbia v. Gilbertson, 597 F.2d 1161, 1163 (9th Cir. 1979); cf. Convention on the Recognition and Enforcement of Foreign Judgments, entered into force 20 August 1983, Art. 1, reprinted in 5. I.L.M. 636 (1966).

Just as courts recognize that they are not equipped to apply and enforce the revenue laws of a foreign jurisdiction (See Moore v. Mitchell 30 F. 2d 600, 603-04 (2d Cir. 1929) (Hand, J. concurring), neither is this Tribunal so equipped. The application of complicated revenue laws and their underlying regulations often involves issues of domestic policy. Surely this is an area in which this Tribunal should not intervene. Moreover, in the first instance, the taxpayer deals with an administrative agency. If there is still a dispute, there is often an administrative proceeding. If this Tribunal were to resolve such disputes, it would, in effect, be taking the place of a specialized administrative agency -- a role for which it is not always well-suited.

Finally, it should be noted that Iran itself has had numerous mechanisms for insuring compliance with its revenue laws. These have included withholding and other security

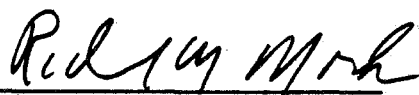
provisions. Indeed, with respect to social insurance premium obligations, the foreign contractor would not be liable until there was proof that the payment was made by the Iranian entity to the appropriate agency. Case No. 60, Tehran General Courts, Ch. 8, October 2, 1982 (in files in Tribunal Case Nos. 10853-56).

The Tribunal's reduction of awards by amounts that would have been withheld for taxes is not necessarily inconsistent with the position that the Tribunal lacks jurisdiction over Iranian tax counterclaims. That the Tribunal will not enforce a revenue law does not mean "that such a law is to be totally ignored." Cheshire and North's Private International Law 134 (10th ed. 1979). Although I do not necessarily endorse reducing awards by such withholding provisions, it is arguable that a claimant should not receive as compensation a sum in excess of that which it would have actually received under a contract that provides for withholding.

Accordingly for the foregoing reasons, the counterclaim for taxes and social insurance premiums should have been dismissed on jurisdictional grounds.

I concur in the award in favor of Claimant in the instant case.

Dated, The Hague
17 March 1984


Richard M. Mosk