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** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Mr Ansari
- Date 18. March 87
14 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
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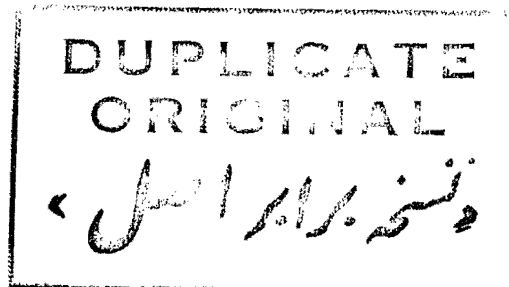
In the Name of God

CASE NO. 167

CHAMBER THREE

AWARD NO. ITL 65-167-3

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 PARVIZ ANSARI

In the present Separate Opinion, I shall discuss a number of basic points and premises wherein I disagree with the majority. The points raised here are not all those in which we disagree; but in view of their significance, I shall limit the present discussion to those points.

Before entering into these matters, it is necessary to preface the discussion with the point that the Technical Assistance Agreement ("TAA") entered into by the Parties has basic and surprising dissimilarities to many other contracts which the Tribunal has examined in other cases brought before it. These dissimilarities can be deemed to derive from at least two causes:

One, is Chile's nationalization of its copper industry and corporations, including Anaconda, in 1971. The other is the influence and meddling in Iran's administrative apparatus engaged in by Anaconda's officials at the time that the TAA was executed. See: Document No.19, page 9. As a result, the Parties did not enter into the TAA On an equal footing. This inequality is manifest in the TAA's over-all structure and framework, as well as from the tenor of many of its provisions. For this reason, the Tribunal's duty to dispense justice would require that it be particularly meticulous and sagacious in interpreting and applying the TAA's terms.

FORCE MAJEURE AND TERMINATION OF THE TAA

1. Early in 1979 the Claimant, invoking force majeure, proceeded to withdraw its personnel from Iran. The Respondent reacted at once by notifying the Claimant that it was objecting to this step, and that it regarded withdrawal of the said employees as a breach of contract. Up to this time, the Claimant had never asserted that the Respondent was in breach of contract by virtue of default on, or delinquency in, payment of invoices (Interlocutory Award, para. 17). It is thus clear that the Claimant has taken the Respondent's failure to pay during the period of force majeure conditions, as the principal basis of its claim. Therefore, one of the principal points requiring examination is, whether or not the Claimant is entitled to demand amounts falling due during the time that force majeure conditions prevailed; and whether or not the Respondent's non-payment of the total amount in arrears during the period of force majeure can constitute grounds for the Claimant's entitlement to terminate the TAA and to seek recovery on damages arising out of the said termination.

2. In a general examination relating to the period from December 1978 through May 1979 (when the Claimant terminated the TAA), the Tribunal has taken notice of the existence of conditions which constituted force majeure, and it has taken the legal consequences thereof into account in making its Award. The Tribunal is correct in taking the said conditions and their consequences into account, for they constitute a typical and objective reality quite apart from the pleadings and legal positions of the Parties. However, in arriving at the logical consequences thereof, the majority makes inferences which are inconsistent with those facts which it itself accepts. The first point which the Tribunal considers, based on its acceptance of the existence of force majeure conditions, is that the recall and departure of the Claimant's employees under force majeure conditions cannot be deemed to constitute a violation of the terms of the TAA, or a breach of contract, and that the Claimant was as a result excused from the obligation to perform on, or to continue with, the TAA (Interlocutory Award, paras. 40-50).

Furthermore, the Tribunal has drawn the conclusion, in view of the Claimant's statements, that although there were amounts in arrears commencing from May 1978 onwards, this alleged breach was not invoked as a ground for termination at any time prior to 22 March 1979 (Interlocutory Award, paras. 51 and 58).

At the same time, the Tribunal recognizes that parties to a contract can agree to and specify those effects which force majeure may have on their respective obligations. However, the Agreement at issue in this Case contains no provision, either explicit or implicit, suspending the Respondent's obligation to make the contractual payments during the period when the Claimant was excused from performing on the Agreement due to force

majeure. At the same time, however, the Tribunal also notes that the TAA does not contain any explicit provision to the contrary, either (Interlocutory Award, para. 56).

3. In view of these findings accepted by the Tribunal, the first issue which must be reached is, whether or not the Claimant was entitled to claim the contractually payable amount during the period of force majeure conditions.

The greater part of the majority's argument where it takes up the Claimant's entitlement to lay claim to such payments for the period covering the time that force majeure conditions prevailed, is reflected in paragraph 56 of the Interlocutory Award. That argument is based upon the interpretation given to Section 2.06 of the TAA; the first inconsistency in the premises of the majority's argument arises from this same interpretation. For on the one hand, the Tribunal correctly concedes that the Agreement at issue in this Case contains no provisions, either explicitly or implicitly, relating to payment of the contractually provided amounts during the period of force majeure conditions (para. 56). On the other hand, the majority concludes, in interpreting Section 2.06-- which is a part of Section 2 of the TAA under the heading, "AI'S OBLIGATIONS," and which relates to the effects of force majeure conditions on the Claimant's obligations and to termination of contract by the Respondent during that period-- that the Respondent is required to make the contractually provided payments relating to the period of force majeure conditions. For a number of reasons, this conclusion by the majority is incorrect:

(a) Where the parties to a contract do not explicitly specify the risks relating to a period of force majeure conditions, they are in actuality leaving the

matter up to those general principles which apply to this issue. One important principle of the law of contracts is, the "interdependence of obligations" of the parties. On principle, neither of the parties to a contract can be held liable to the other, unless he receives a consideration vis-à-vis such obligation. In the instant Case, it has been established that the Claimant did not perform on its contractual obligations during the period of force majeure conditions, a point acknowledged by the Tribunal itself. In other words, if the Parties had intended that the Claimant be paid during the period of force majeure conditions without performing any services therefor, they would have made express provision to that effect. Therefore, in the absence of any explicit obligation on the part of the Respondent to make contractually provided payments over the period of force majeure conditions, the majority's decision is contrary to binding principles of law, and results in unjust enrichment of the Claimant and injury to the Respondent. See Anson, Law of Contract, Oxford, 26th ed. (1984), p. 460ff; Mazeaud, Droit Civil (Obligations), T.2, v.1, para. 580, 581, Montchrétien, 6^{ème} ed. (1978); Alex Weill and François Terré, Droit Civil (Obligations), para. 279, 498, Dalloz, 3^{ème} ed. (1980).

(b) The Tribunal's practice in a number of analogous cases, inter alia a case involving the same Respondent as in the instant Case and relating generally to the Sar Cheshmeh copper mine project, stands contrary to the majority's decision in the present Case.

Invoking the rule governing the effects of force majeure, namely that "the loss must lie where it falls", the above-mentioned Awards have exonerated the Respondents therein of any contractual obligation to pay amounts falling due. This rule, which is the logical

consequence of "interdependence of obligations" in synallagmatic contracts, has regrettably not been taken into account by the majority. See: Queens Office Tower Associates and Iran National Airlines Corp. (Award No. 37-172-1); International Schools Services, Inc. and National Iranian Copper Industries Company (Award No. 194-111-1); and International Schools Services, Inc. and The Islamic Republic of Iran (Award No. 290-123-1).

4. In view of the foregoing, I hold that the Respondent is under no obligation to pay reimbursable costs, salaries and benefits, or technical service fees, at least for the period of force majeure conditions.

5. Another issue on which I fundamentally disagree with the majority, relates to the termination of the TAA during the period of force majeure conditions, and to the Claimant's entitlement to damages arising therefrom in the present Case.

As has been noted above (supra 1), the Claimant suspended performance on the TAA after giving notice of the existence of force majeure conditions and withdrawing its personnel from Iran. The correspondence between the Parties clearly shows that the Claimant never intended to terminate the Agreement on grounds of default by the Respondent on its contractually provided payments. In its letter of 5 January 1979, the Claimant explicitly stated that

"Due to the internal disruptions in Iran, it has become impossible for Anaconda-Iran seconded employees to function in their assigned tasks with respect to the Sar Cheshmeh project..."
(emphasis added)

In its Memorial, the Claimant elaborates on the conditions leading to its invocation of force majeure:

"In December 1978 the internal disruptions in Iran had reached a level that made it impossible for seconded SC employees to function with respect to the mining project. On January 5, 1979 the Claimant notified the Respondent that due to (1) a curtailment in the construction program at NICIC's mine site and metallurgical facilities, (2) an inadequate supply of electrical power and fuel for the facilities, (3) an interruption of the flow of funds to pay for services rendered, and (4) disruption of basic services, such as postal, customs, internal air transportation, and fuel distribution, the Claimant was unable to perform its obligations under the Technical Assistance Agreement. The curtailment of construction programs at the mine site and metallurgical facilities was a direct result of the prime contractor removing its employees. Due to these disruptions, the Claimant sent Respondent a notice of force majeure according to the Technical Assistance Agreement. Thereupon steps were taken to reassign the seconded SC employees to locations outside Iran. Claimant further instructed Respondent that Claimant's objective was to have the seconded SC employees available to return to Iran when the force majeure conditions ceased, and work could be resumed." (emphasis added) (Doc. 131, page 13)

Moreover, as is reflected in paragraph 17 of the Interlocutory Award,

"The Parties appear to agree that, following meetings held in June 1978, a procedure was mutually agreed for timely payment of amounts agreed to be due. Although the Claimant alleges that, in spite of this agreement, NICIC remained in default all through the rest of 1978, it is undisputed that AI did not invoke this apparent breach as a ground for termination of the TAA during the course of 1978."

6. In light of the proceeding, it is clear that the Claimant had no intention, even for some time following its cessation of work on the TAA and its departure from Iran, of terminating the TAA on grounds of default by the Respondent. Furthermore, not only has there been no documentary evidence produced to the contrary, but the

foregoing is confirmed by both the available evidence and the Claimant's own statements. It should therefore be seen just what motivated the Claimant in changing its position and course of action during the period of force majeure conditions.

First, it should be pointed out that the Claimant's duties, were to provide the Respondent with technical assistance in connection with the Sar Cheshmeh copper mine project, the prime contractor in which was Parsons-Jurden. As the Claimant itself states, Anaconda-Iran withdrew from Iran "subsequent to the withdrawal of the prime contractor Parsons-Jurden..." (See: Claimant's Memorial, Doc. 131, page 36)

Moreover, the Claimant expressly states that "in addition, conditions in Iran were such that continued performance of Claimant's obligations was impossible." (emphasis added) (loc cit).

It will be clear from the foregoing that the Claimant regarded the Agreement at issue in the present Case as a nonviable contract, one which could not be performed upon and whose basic purpose had been frustrated, due to the withdrawal of the prime contractor and to conditions to whose existence it has itself attested.

On the other hand, the Claimant arrives at the conclusion that even if the TAA was terminated by invocation of Section 9.03 thereof, on grounds of the Respondent's failure to make its contractually provided payments, the contractually provided Termination Damage (of which no mention had been made until then) could remain viable and binding. For this reason, on 22 March 1979-- that is, approximately three months after the occurrence of force majeure and withdrawal of the Claimant's employees from Iran-- the Claimant notified the

Respondent for the first time that the latter was in default on its contractual payments. The Respondent's answers to the said notice and to subsequent notices by the Claimant, setting forth the necessity to solve differences in the accounts and to reconcile the documents, are reflected in the Interlocutory Award (paragraphs 23 ff); I thus do not see any need to reiterate them here.

7. It is now necessary to examine what legal grounds the Claimant might have had for terminating the TAA and whether or not, on principle, the Agreement still existed as at 31 May 1979, such as to be capable of termination.

In view of the foregoing, it is my opinion that the Claimant cannot, for the reasons set forth below, benefit from the consequences of the measure taken by it under the label of "termination of contract":

(a) As at the date in question, there did not exist any Agreement capable of being terminated.

This fact can be proved through an examination of two corollary issues, namely:

i) Frustration of the purpose and subject of the TAA.

There can be no doubt that the purpose in entering into the Agreement at issue was, to provide the Respondent with the necessary technical and scientific assistance in connection with the primary Sar Cheshmeh copper mine project. After the primary project had come to a halt and been suspended, and the prime contractor had withdrawn, the purpose and subject of the present Agreement were frustrated and no longer viable, as well. I do not consider it necessary to cite a whole corpus of

authoritative and learned legal opinions and judicial precedents in support of this conclusion. Instead, I shall refer only to precedents which are reflected in Awards by this Tribunal itself on analogous issues. Among these are, the Coronation Cases (eg. Krell v. Henry), and 119 Fifth Ave. v. Taiyo Trading Co. See: Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1.

ii) Impossibility of performance on the TAA on the part of the Claimant.

There will be no need to take up this point, once the first has been examined. Supposing in arguendo, however, that we do not take the frustration of the purpose and subject of the TAA into consideration, the TAA had in any event become nonviable and impossible of performance some months prior to its termination, for reasons which the Claimant has itself conceded and indeed invoked in defense of its abandonment of the TAA. In its decision, the majority acknowledges that force majeure conditions prevailed at least through 31 May 1979, the date of termination (paragraph 50 of the Award). Therefore, it must be concluded that on 31 May 1979-- or even by 22 March 1979-- there did not, on principle, exist any Agreement capable of being contractually terminated, because owing to force majeure it had already become impossible of performance by some time prior to that date.

(b) The Claimant's conduct demonstrates its waiver of the right to contractual termination.

8. The amounts allegedly due the Claimant relate to the period commencing from 1978, and pertain for the most part to the period after April of that year. Throughout 1978, the Claimant never took any steps to give notice of

termination of the Agreement on grounds of delinquency on the contractually provided payments, even though the Parties had differences over the accounts and though the nonpayment of amounts owing would presumably continue even in the event that these differences over accounts were resolved. There is no evidence whatever to refute-- or even to impugn-- this fact. (See: paragraph 51 of the Interlocutory Award.) In January and February of 1979, and until 22 March of that year, this situation continued unchanged. Nor was the Respondent notified of any such intent even when the Claimant's employees left Iran. On the contrary, rather, as the Claimant itself states in its Memorial, its aim was to return to Iran and resume work once the situation returned to normal. See: Claimant's Memorial, Doc. 131, page 13.

It is therefore clear, not only that the Claimant never expressed any intention of terminating the TAA on grounds of nonpayment of amounts allegedly due it from the Respondent throughout 1978 and during the early months of 1979, but also that its statements and conduct demonstrate its willingness to continue with the TAA and thus that it had waived such right of termination.

9. In view of the foregoing, the Claimant's motive in terminating the Agreement at issue in this Case under the conditions elaborated upon above, was based upon a desire to reap benefits to which it was not entitled, in other words, on abuse of right, rather upon any legal grounds. For this reason, the Tribunal should have decided the issue by taking into account all of the relevant circumstances, and not by merely referring to the provisions of the Agreement itself. See: Treitel, Remedies for Breach of Contract, 7 Int'l Ency. Comp. L., 1976; Prof. S. Litvinoff, Louisiana Civil Law of Obligations, sec. 138, 1975.

THE INTEREST STIPULATED TO UNDER THE TAA

10. Another issue wherein I dissent to the majority opinion, relates to the majority's interpretation of Section 7.04 of the TAA, which pertains to the contractually provided interest. I have already expressed my basic view on the awarding of interest on a number of occasions and in connection with various Awards (see, inter alia: McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3, Separate Opinion of Judge Parviz Ansari, dated 20 May 1986). On top of that, on principle the relevant Section excludes the accrual of interest on termination damage (the subject of paragraph 84 of the Interlocutory Award). In drafting Section 7.04, it was the mutual intent of the Parties to the TAA to specify those items of payment on which interest could accrue; and for that reason, those items were limited to "fees and costs." In other words, it was the mutual intent of the Parties to express that interest would accrue to those two items, and to exclude other items, inter alia termination damage, from any award of interest. Expressio unius est exclusio alterius.

The majority's interpretation, to the effect that the issue of the interest due on termination damage does not fall under an award of contractually provided interest and yet does come under a general award of ordinary (noncontractual) interest, is unfounded, because:

First, the Parties to the TAA fixed a lump sum amount for the termination damage; and if the Parties had mutually intended interest to accrue to this lump sum indemnity, they would have made an express provision to that effect in Section 7.04 of the TAA.

Second, since interest is in itself a variety of damages, and since the Parties had delimited the quantum

of the lump sum damage by setting forth the amount thereof in the TAA, an award of interest on such damage in actuality constitutes an award of damages on damages, something which was never the mutual intent of the Parties. Article 713 of the Iranian Civil Procedure Code forbids an award of damages on damages. The Iranian Supreme Court has also denied the awarding of interest, where the parties to a contract have already made provision for liquidation of a lump sum amount as termination damage. See: Judgement No. 1450, Chamber Four of the Supreme Court of Iran, dated 3.9.1329 [17 November 1950].

Third, as set forth above, the Claimant is estopped by its previous conduct from asserting any right to seek any interest whatsoever. This position is supported by legal principle and numerous judicial precedents. See: Ralston, The Law and Procedure of International Tribunals, Nos. 210-230, 439, 443, 467, 650; Lauterpacht, Private Law Sources with Analogies of International Law, Nos. 63, 64; and Jean Personnaz, La Réparation du Préjudice en Droit International Public, p. 230, Sirey, Paris, 1938.

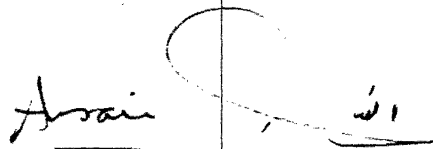
CONCLUSION

11. In light of what has been set forth above, I hold that the Claimant has no entitlement whatever to:

- (a) receive contractually provided amounts for the period during which force majeure conditions prevailed;
- (b) terminate the TAA On the ground of the Respondent's alleged default;
- (c) seek termination damage by virtue of the Respondent's alleged breach of contract, or to
- (d) demand the interest allegedly accruing thereto.

12. In view of the interlocutory nature of the present Award, in light of the need to continue with the adjudication of this Case, and in order to avoid making a prejudgment on the remaining issues in this Case, I shall defer comment on those issues until a more appropriate occasion.

Dated The Hague,
18 March 1987



Parviz Ansari