

Case No. 30

GRANITE STATE MACHINE CO., INC.

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
BANK MARKAZI IRAN and BANK  
SEDERAT IRAN,

Respondents.

CONCURRING OPINION OF  
RICHARD M. MOSK

|                                       |               |                                            |       |
|---------------------------------------|---------------|--------------------------------------------|-------|
| IRAN UNITED STATES<br>CLAIMS TRIBUNAL |               | دادگاه داوری دعاوی<br>ایران - ایالات متحده |       |
| ثبت شد - FILED                        |               |                                            |       |
| Date                                  | ۱۳۶۱ / ۱۱ / ۵ | تاریخ                                      |       |
|                                       | 2 5 JAN. 1983 |                                            |       |
| No.                                   | 30            | ۳.                                         | شماره |

DUPLICATE  
ORIGINAL  
«نسخه برابر اصل»

I am restrained by Tribunal Rules<sup>1/</sup> and other considerations<sup>2/</sup> from commenting fully on the accuracy of the description of the deliberations in this case in the "opinion" of Judge Jahangir Sani, who did not sign the award. If I were free at this time to discuss these deliberations, I would be able to set forth a true, accurate and complete statement of events.

<sup>1/</sup>Article 31, note 2, Provisionally Adopted Tribunal Rules -- "The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret. Only the members of the arbitral tribunal shall take part in the deliberations. The Secretary-General may be present. No other person may be admitted except by special decision of the arbitral tribunal."

<sup>2/</sup>Canon VI of the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes; Rule 2(2) of the Internal Rules of the Court of Arbitration of the International Chamber of Commerce; Nuclear Test Case (Australia v. France) 1973 I.C.J. 99; 1974 I.C.J. 253, 273 (declaration of Lachs, J.) and 293-296 (separate opinion of Gros, J.)

Having refused to sign the award, it was not for the non-signing arbitrator to write his reasons for such refusal. Rather, the reasons are to be stated, and were stated, in the award by those who sign it. Article 32, paragraph 4, of the Provisionally Adopted Tribunal Rules; Sanders, Commentary On Uncitral Arbitration Rules, II Yearbook Commercial Arbitration-1977 172, 208.<sup>3/</sup>

It should be noted that confidentiality of deliberations is widely recognized as desirable and was supported by both the Governments of the Islamic Republic of Iran and the United States of America. Such confidentiality is particularly essential in arbitration proceedings such as these in which arbitrators may, as Professor Sanders wrote, be "forced to continue their deliberations until a majority, and probably a compromise solution, has been reached." Id.

In the event that the Tribunal remains unwilling or unable to enforce its own rules and other generally recognized rules of conduct, such rules may no longer be of any effect.

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<sup>3/</sup> The non-signing arbitrator has refused to sign other Tribunal awards and decisions, including one issued by the Full Tribunal. The eminent Dutch expert, Pieter Sanders has noted: "Refusal to sign is not looked upon favourably in arbitration practice." Sanders, supra.

To suggest that the Chamber has not had sufficient time to deal with this case and did not devote adequate time to the case is contradicted by the facts, including those which appear in the record of this case. The claim in this case was filed on November 10, 1981. There was a pre-hearing conference on March 30, 1982. The hearing was held on May 31, 1982. The partial award was issued on July 30, 1982. Thus, this Tribunal had seven months from the date of the hearing and five months from the date of the interim award to determine the issues of interest and costs. In the year-and-a-half of the existence of the Tribunal, this case is one of only a few contested cases in which an award has been issued. Thus, obviously there was sufficient time to give full consideration to the case.

If proper attention had not been given to the issues in this case, one might justifiably wonder what the members of the Tribunal were doing during these many months. In fact, there were numerous deliberations among all the members of Chamber Three of the Tribunal on all of the issues in this case. That the Tribunal took so long with such a relatively simple case should be a cause for concern. See Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 30-31.

In order to maintain its authority, this Tribunal must be free of unreasonable delay, as well as of intimidation and other improper acts and conduct.

I concurred in the award in this case so as to end protracted deliberations which must, as noted above, "continue ... until a majority, and probably a compromise solution, has been reached." Sanders, supra; see also Separate Opinion of Members Aldrich, Holtzmann and Mosk on the Issue of the Disposition of Interest Earned on the Security Account, Case A-1 (Aug. 1982).

It is a well established principle of international law that an international tribunal has authority to award interest as part of a damage award. 8 M. Whiteman, Digest of International Law 1186 passim (1967); J. Ralston, The Law and Procedure of International Tribunals 129 (1925); C. Eagleton, The Responsibility of States in International Law 203-05 (1928); Lucas Claim (U.S. Foreign Claims Settlement Commission), 30 I.L.R. 220 (1957); cf. Banco Nacional de Cuba v. Chase Manhattan Bank, 514 F. Supp. 5 (S.D.N.Y. 1980) (pre-judgment interest allowed for period during which payment of principal debt was prevented by U.S. Government regulations). Indeed, Iranian governmental entities have, in many claims before this Tribunal, requested interest on amounts they claim should have been paid them. Moreover, in the instant case, Respondents had the use of the money withheld from the Claimant. Also, Iran's money in blocked accounts in the United States accrued interest at prevailing rates.

A reasonable standard for determining the rate of interest "is indicated by the answer to the question, what could the claimant reasonably have expected had he had the use of the property?" O'Connell, International Law 1123 (2d. ed. 1970). In this respect, Iran itself has requested awards of interest based on commercial bank rates.

The rate arrived at in this case may not be sufficient to compensate the Claimant fully. Nevertheless, I concurred in the majority decision on the rate specified in the award in order to form the majority for the award.

An award of interest does not always fully compensate a claimant. See III M. Whiteman, Damages in International Law 1975 passim (1943). It has been said that the interest rate can be determined on the basis of such flexible standards as "just compensation" (Eagleton, supra at 205) or on what is "fair" (Wimbledon Case, [1923] P.C.I.J., ser. A., No.1, at 32). A tribunal may decide to apply a fixed rate, such as is sometimes done in municipal systems, so as to avoid difficulties in determining rates in each case. See A. Feller, The Mexican Claims Commissions 310-311 (1935). Or, based on the facts of the case, a tribunal may apply the rate prescribed by applicable municipal law. (See Award No. 7-14-3, 25 June 1982).

I also believe that the prevailing party should normally be awarded its full costs of arbitration, including reasonable fees incurred for legal representation.

According to an authority, under the UNCITRAL rules, upon which the Provisionally Adopted Tribunal Rules (Articles 38 and 40) are based, the determination of whether legal fees are recoverable "depends on the decision of the arbitrators whether they deem legal assistance necessary under the circumstances of the case." Sanders, supra at 217. For example, a commercial arbitration over the condition of certain products may require no legal assistance at all. But no one could deny that legal assistance is justified in most of the cases presented to the Tribunal by claimants themselves. Thus, legal costs to the successful party should normally include fees incurred for legal assistance. Moreover, the arbitrators must determine the reasonableness of those fees. Sanders, supra at 216. <sup>4/</sup>

In the instant case, the costs, including attorneys fees, claimed by Claimant appeared reasonable. It must be remembered that Respondents denied liability until after the Hearing. Thus, Respondents, in effect, required Claimant to produce evidence and make appearances in connection with the amount of principal ultimately admitted to be owing.

Nevertheless, recognizing that the Tribunal has flexibility in the determination of costs, I concurred in the decision as to the amount of costs specified in the award so as to provide a majority for the award.

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<sup>4/</sup> The UNCITRAL Rules are required to be used by the Tribunal "except to the extent modified by the parties or by the Tribunal to ensure that the agreement can be carried out." Claim Settlement Declaration, Art. III, paragraph 2. Certainly, modifying the UNCITRAL Rules in connection with costs is not necessary to carry out the Treaty.

Accordingly, I concur in the Final Award in favor of  
Claimant Granite State Machine Co., Inc.

Richard M. Mosk

Richard M. Mosk

Dated, The Hague  
25 January 1983