

ORIGINAL DOCUMENTS IN SAFE

Case No. 346

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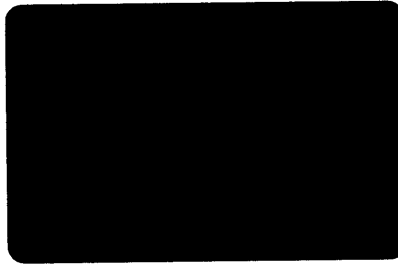
** CONCURRING OPINION of Mr. Mosk
 - Date 25ep83
3 and 4 in addit. pages in English 40 pages in Farsi

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 - Date _____
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** DISSENTING OPINION of _____
 - Date _____
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- Date _____
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CASE NO. 346
CHAMBER THREE
AWARD NO. 71-346-3

ALAN CRAIG,

Claimant,

and

MINISTRY OF ENERGY OF IRAN; WATER
ENGINEERING SERVICE (MAHAB);
KHUZESTAN WATER AND POWER AUTHORITY
(KWPA); KHADAMAT IRAN-ZEMIN ENGINEER-
ING CONSULTANT SERVICES COMPANY (KIZ),

Respondents.

AWARD

Appearances:

For Claimant:

Mr. Alan Craig
Mr. Donaldson, Mr. E. Sumner,
Mr. H. Sabi,
Attorneys

For Respondents:

Mr. A. Kashan,
Agent of the Islamic Republic
of Iran
Mr. M.S. Alle Mohammad,
Attorney of KWPA
Mr. I. Bakhshi,
Attorney of MAHAB
Mr. K. Samimi,
MAHAB
Mr. M. Shambayati,
KIZ

Also present:

Ms. Jamison M. Selby,
Deputy Agent of the United
States of America
Mr. John B. Reynolds,
Adviser to the Agent of the
United States of America

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
۱۳۶۲ / ۶ / ۱۱	
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DUPLICATE ORIGINAL نسخه برابر اصل

I. THE PROCEEDINGS

Claimant Alan Craig filed his claim on 18 January 1982, naming as Respondents the Ministry of Energy of Iran and its agencies and controlled entities, the Water Engineering Service ("MAHAB"), Khuzestan Water and Power Authority ("KWPA") and Khadamat Iran-Zemin (Engineering Consultant Services Company) ("KIZ"). Craig seeks damages for alleged breach of contract by MAHAB and KWPA (Claim A), breach of contract by KIZ (Claim B) and damages for the alleged expropriation of property (Claim C).

On 6 July 1982, MAHAB, KWPA, KIZ and the Ministry of Energy filed their Statements of Defence. Together with its defence, MAHAB also asserted a counterclaim for refund of money paid to Craig, for taxes and social insurance premiums and for certain expenses. On 29 July 1982, MAHAB filed a "Supplementary Statement of Defence", in which the counterclaim was limited to seeking refund of monies paid to Craig.

On 21 September 1982, the Tribunal held a Pre-Hearing Conference, following which the parties made various submissions to the Tribunal. On 5 April 1983, the Hearing was held. Respondents were granted permission to file a post-hearing affidavit and did so.

Both Craig and MAHAB subsequently filed unauthorized submissions discussing the merits of the case and the evidence presented. Fairness, orderliness and possible prejudice to parties in the case require that the Tribunal disregard these submissions.

II. CONTENTIONS OF THE PARTIES

1. Claimant's Contentions

Claimant asserts that at all times he has been and is a citizen of the United States. He further asserts that the Respondents are entities controlled by the Government of Iran within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration.

Craig is a professional engineer and a graduate of the Massachusetts Institute of Technology. He claims that for a number of years he has specialized in the fields of hydrology, hydraulics, irrigation, drainage and climatology and that he has performed engineering services in connection with water and land resource planning and development throughout the world. He asserts that during periods from 1958 to 1969 and 1974 to 1978 he performed such services in

Iran, including establishing a technical operations department within KWPA and providing consultation on the Karkheh Basin Development Project, the Dashte Mishan Project and the Pahlavi Reservoir Dredging Project.

Craig's principal claim (Claim A) arises out of an alleged contract with MAHAB. Craig asserts that in 1977 he learned that KWPA desired his services to assist in implementing a long-term integrated resources master plan for Khuzestan, Iran. In February 1978 Craig made a proposal by letter to KWPA, whereby he offered his advisory and consulting services on water and land resource planning and development either non-exclusively at the rate of US \$300 per day net of Iranian taxes or exclusively to KWPA pursuant to a two year contract under the terms of which he was to work a minimum of 500 days in any two year period and not more than 300 days in any one year, at the rate of US \$300 per day net of Iranian taxes for all days in Iran on assignment.

According to Craig, KWPA accepted the offer for such services by telephone in April 1978, but took the position that for administrative reasons the contract would have to be with MAHAB. Craig maintains that KWPA requested that he begin working immediately and promised that the contract would be signed later.

Craig contends that he arrived in Ahwaz on 27 April 1978 to begin work and met with the KWPA representative.

According to Craig, he and KWPA agreed upon the work he was to perform. After having allegedly received assurances that MAHAB would prepare and submit a contract, Craig continued to work on hydrology studies for and with KWPA personnel. According to Craig, KWPA personnel would request certain studies, and he would conduct the studies and submit reports. Craig has listed a number of reports submitted and asserts that they have been utilized by KWPA.

On 19 June 1978, Craig and MAHAB signed a contract which provided that Craig was to act as a consultant to MAHAB for a period from 21 April 1978 to 26 April 1980 at a monthly salary of 1,100,000 rials, plus certain expenses and other benefits. The contract could be terminated on six months notice by either party. Craig was to pay Iranian income taxes on this amount. Craig contends that the contract was not an employment contract, but rather a consulting agreement pursuant to which Craig was an independent contractor. He further alleges that there was also an agreement between MAHAB and KWPA whereby Craig's services were, in effect, loaned to KWPA.

Craig states that for a number of months neither MAHAB nor KWPA paid Craig his salary or expenses. In September 1978 KWPA made a payment of \$18,000, as an "on-account" payment. A second payment, he asserts, was in progress during October 1978, but was never completed because of a general strike.

Craig claims that he continued to work in Iran through January 1979, except for two brief leaves from the country. In the beginning of January 1979, Craig submitted a summary statement of account to KWPA for the period 27 April 1978 to 18 January 1979. The statement was requested by KWPA in anticipation of suspension of activities in Khuzestan. According to Craig, KWPA's Director of Finance and Administration confirmed that Craig had performed the work and services reflected in his account and did not object to the amount.

On 26 January 1979, Craig wrote to MAHAB requesting payment of amounts owing him and notifying it that he would continue to remain available for services.

According to Craig, on 31 January 1979, a Mr. Ahmad Al Yassin, then the Managing Director of KWPA, informed Craig by telephone that temporarily KWPA could not continue the program upon which Craig was working and that therefore he was instructing Craig to return to London and "stand by" there for "a couple of months" and await developments in Iran. Craig contends that neither KWPA nor MAHAB terminated his contract and that at no time did anyone from KWPA or MAHAB suggest that Craig was not owed money.

After leaving his files with KWPA personnel for safe-keeping, Craig departed for London on 8 February 1979. Thereafter, Craig wrote to KWPA concerning payment, also requesting to be released from his contract obligations "if

Iran has no intention of proceeding with the work in the reasonable future". In May 1979, KWPA notified Craig that his services had been released to MAHAB's control and that KWPA had informed MAHAB that his services had been accomplished up until 22 January 1979 enabling MAHAB to settle his accounts expeditiously. Craig alleges that he continued to perform some services for KWPA in London and kept KWPA informed of these activities. Craig says that he attempted to obtain work from other employers, but on the condition that he could be released upon short notice, so that he could return to Iran to resume his work there. These efforts were unsuccessful until September when he secured employment in Kenya beginning 4 November 1979. He worked in Kenya until 26 April 1980 as an employee of a firm which agreed to release him on two months notice if he was called back by MAHAB or KWPA.

Craig contends that his contract with MAHAB was terminated at the end of September 1979 by the conduct of MAHAB in failing to make payments and give instructions to him and that thereafter his obligations to MAHAB terminated.

The total amount sought under Claim A is US \$451,262.90. Out of this amount, US \$215,984.86 represents unpaid fees and expenses allegedly accrued between 27 April 1978 - 26 September 1979 and US \$57,278.04 damages in relation to the remainder of the contract period. The remaining US \$178,000 represents certain alleged additional United States tax obligations caused by Respondents' failure to pay monies when due.

Craig argues that MAHAB is liable under the contract, but that if for any reason the contract is not enforceable, KWPA is liable for services rendered under a theory of quasi-contract or unjust enrichment. He further argues that he acted reasonably and fulfilled whatever duty he had to mitigate his damages.

Claimant contends that it was the intention of the parties that all payments under his contract with MAHAB were to be made in US dollars. In support of his position, Claimant cites the \$18,000 on-account payment made to him by KWPA in September 1978 and the provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights regarding payment of US nationals for services rendered. Therefore, Claimant seeks an award in US dollars with the amount to be determined by application of the exchange rate in effect at the time the amounts under the contract were owing.

Craig's second claim (Claim B) involves an amount allegedly owed to Craig for services previously rendered by him under a contract with KIZ. Claimant, maintaining that in July 1978 KIZ admitted indebtedness to Claimant in the amount of US \$5,760, seeks US \$6,800 plus interest for this claim, having now revised and corrected his billing. Claimant asserts that by virtue of the contractor-subcontractor relationship between KIZ and KWPA, this amount is owed by both KIZ and KWPA.

In a third claim (Claim C) Claimant seeks US \$2,250 from KWPA in damages for the alleged confiscation of his technical, working and business archives in Iran, or, alternatively, the return of those effects.

Finally, Claimant seeks interest on the principal amounts claimed and costs of the arbitration.

2. Respondents' Contentions

Respondents assert that Craig has not established his United States citizenship and that the Tribunal has no jurisdiction over claims against KIZ because it is not controlled by the Government of Iran.

With regard to Claim A, MAHAB argues that since the alleged contract upon which that claim is based is governed by Iranian law, jurisdiction lies exclusively with competent Iranian courts and that, therefore, the Tribunal lacks jurisdiction over that claim. MAHAB further contends that the alleged contract was illegal because it was not executed in compliance with MAHAB's internal procedures or with provisions of Iranian law concerning the employment of foreign nationals. MAHAB asserts that the contract, although signed, was merely a draft. MAHAB further contends that, under the alleged contract, Craig was to be paid in Rials, not in US Dollars and that, in any event, Craig's claim under the alleged contract is barred by the applicable Iranian statute of limitations.

KWPA asserts that it has no liability because it was not a party to the alleged contract.

Respondents MAHAB and KWPA assert that Craig has not submitted sufficient evidence of the value of his services, that he did not perform the services he was required to provide under the alleged contract, and that he abandoned the contract before its completion by leaving Iran without seeking the permission of the Employer. They further contend that once Claimant left Iran he had no authority to "stand by" in London and be paid for such period and that Claimant's alleged work in London was contrary to the provisions in the alleged contract specifying Iran as the place for services to be rendered. Thus, if there was a valid contract, it was breached by Claimant.

MAHAB maintains that even if there was a valid contract and even if Respondents breached it, Craig did not take reasonable steps to mitigate his damages, as it was his duty to do.

With regard to Claim B, Respondent KIZ asserts that no amounts are owing under the KIZ contract.

Respondent KWPA denies liability under Claim C, stating that Claimant's files and other property were left in the possession of a KWPA employee and not with KWPA. KWPA declares that it will now make available to Craig the possessions to which he is entitled.

Respondents assert that if Craig is entitled to any compensation, Iranian taxes must be deducted and that in that event Craig should be taxed as an employee on a monthly basis and not as an independent contractor. The net monthly amount to be deducted would therefore be 583,793 rials. Respondents also assert that Craig owes Iranian taxes for housing provided at the site and for an automobile.

By its counterclaim, MAHAB seeks the return of monies previously paid to Craig in the amount of US \$18,000, or 1,294,506 rials, alleging that this amount was not an on-account payment of salaries or remunerations earned, but an advance paid by KWPA's managing director because of their personal relations in order to assist Craig in his financial difficulties.

Respondents also seek their costs of arbitration.

3. Claimant's Response to Respondents' Contentions

With regard to Respondents' assertion concerning tax deductions, Craig contends that the amount of Iranian taxes which should be withheld is 7,225,307 rials which corresponds to a monthly deduction of 239,358 rials. He asserts

that as an independent contractor he can only be taxed on 80% of his income, and that having been paid out of Iranian government funds, he is entitled to certain exemptions. Craig denies that he should be taxed for housing provided or for an automobile which was never provided.

Craig denies liability under the counterclaim.

III. JURISDICTION

Claimant submitted evidence that since his birth he has held United States citizenship. Thus, he is a national of the United States under the Claims Settlement Declaration and is therefore entitled to bring the claim.

Respondents KWPA and MAHAB both admit that they are "governmental corporations". The evidence shows that their shares are owned by the Government of Iran and that Iranian Government officials are principals in, or involved in, both corporations. Both entities perform essentially governmental tasks. Accordingly, the Tribunal finds that both KWPA and MAHAB are agencies, instrumentalities or entities controlled by the Government of Iran and that they are therefore subject to the jurisdiction of this Tribunal under the Claims Settlement Declaration. It is noted that the Tribunal has previously found that KWPA is such a controlled entity. See Award No. ITL 23-120-2, Chas T. Main v. Khuzestan Water & Power Authority, et al.

Claimant presented no significant evidence concerning the status of KIZ. Accordingly, the Tribunal does not have sufficient evidence to establish that it has jurisdiction over the claim against KIZ (Claim B).

The alleged contract between Claimant and MAHAB contains no clause "specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts..." (Claims Settlement Declaration, Article II, paragraph 1), which clause would divest this Tribunal of jurisdiction. Moreover, even if, as argued by MAHAB, the alleged contract is subject to the Iranian Labour Code, which provides for the submission of certain types of disputes to an administrative agency, this Tribunal's jurisdiction over the claim would not be affected. Article II, paragraph 1, includes no provision excluding claims on this ground.

Accordingly, the Tribunal finds that it has jurisdiction over all of the claims except Claim B insofar as it is directed against KIZ.

The counterclaim clearly arises out of the same "contract, transaction or occurrence" that constitutes the subject matter of the claim, and it is therefore within the Tribunal's jurisdiction (Claims Settlement Declaration, Article II, paragraph 1).

IV. THE MERITS OF THE CLAIM

1. Claim A

a. Validity of the Alleged Contract

The contract between MAHAB and Craig was executed by both Craig and a person who, in the pleadings, has been identified, alternatively, as the Deputy or Acting Managing Director of MAHAB and the Managing Director of MAHAB Water Division. There is nothing in the text of the contract to support MAHAB's contention that it was a mere draft. That the contract did not specify the exact services to be rendered by Craig in his capacity of "General Consultant" does not affect the enforceability of the contract. Moreover, even if internal MAHAB provisions required the signatures of more than one MAHAB representative, such a provision, even under Iranian law, would not affect the validity of the contract. See Commercial Code of Iran, Articles 118, 135.

The Foreign Technical Experts Employment Law of June 1970, cited by MAHAB in this case, does not provide, as claimed by MAHAB, that each specific contract must be approved by the Council of Ministers in order to be valid. Even if such explicit approval was necessary, its absence would not affect the validity of the contract vis-a-vis the foreign contractor.

The Tribunal's conclusion is therefore that the 19 June 1978 contract was valid and binding on the parties.

b. Statute of Limitations

Under Article 740 of the Civil Procedure Code of Iran, there is a one year statute of limitations applicable to "lawsuits concerning a fee which is payable monthly or at a shorter period of time such as tuition, maintenance and training expenses of a minor child, fee payable to technicians and artisans, servants and janitors which are agreed upon to be paid monthly or at a shorter period of time, in respect of each instalment". See Civil Procedure Code of Iran, Article 740. The parties are in dispute as to whether Article 740 applies in the instant case.

Whether or not Craig's claim comes under Article 740 is an issue which the Tribunal need not resolve. Municipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim. See, J. Simpson and H. Fox, International Arbitration 124 (1959). In the Claims Settlement Declaration, the Governments have provided for a period in which claims

may be filed (Article III, paragraph 4). In the instant case, there was no unreasonable delay in pursuing the claim. Therefore, even assuming that Craig's claim was covered by the statute of limitations in Article 740, this would not bar the claim in this Tribunal.

c. Liability for Amounts Claimed

The Respondents assert that Craig is not entitled to any fees on the ground that he did not perform his services in accordance with the contract with MAHAB. The evidence shows that Craig was assigned by MAHAB to work with KWPA, as the parties had originally contemplated. It has not been asserted that Respondents questioned Craig's performance during the 9 months he spent in Iran. Moreover, the evidence shows that a representative of KWPA stated in a letter to Craig of 22 January 1979 that "we are in complete agreement that your services have been provided as described" and thanked him for "providing the best services to K.W.P.A.". In light of these circumstances there is prima facie evidence that Craig performed services under the contract as from the end of April 1978 until the end of January 1979. In the absence of any convincing rebuttal evidence, the Tribunal concludes that Craig performed his obligations under the contract.

It is not disputed that Craig did not receive any fees for his services as required by the contract, except for the US \$18,000 paid to him by KWPA in September 1978 at the request of MAHAB, which amount must be deemed to have been partial remuneration for those services. Craig is therefore entitled to such fees from MAHAB for the 9 month period in question, less the amount of US \$18,000, and less taxes which would have been withheld.

Craig concedes that the applicable amount of Iranian income tax should be deducted from the contract amount owing him, but the parties disagree as to the amounts to be deducted. While not determining in the present case whether and to what extent the Tribunal has jurisdiction over counterclaims for Iranian taxes, the Tribunal holds that a reduction for taxes should be made based on Craig's admission.

The Tribunal finds that as a result of the Declarations of Algiers and of the establishment of the Security Account in US dollars, approved claims in a dispute of the present kind shall be satisfied through payment out of the Security Account.

It is evident that it was the parties' intention that payment would be made in US currency, despite the fact that the fee was stated in rials in the contract. This is confirmed by the fact that Craig had received his September

1978 payment in US dollars. Using the rate of exchange in effect during this period, the Tribunal finds that US \$92,664 should be awarded to Craig for the period April 1978 - January 1979.

Craig also claims fees for a period of time after his departure from Iran in early February 1979. This claim is based on the allegation that Craig's contract with MAHAB was not terminated until September 1979. Moverover, Craig contends that he had an agreement with KWPA that he would remain on "stand by" outside Iran at KWPA's disposal. Instructions to that effect, Craig contends, were given to him during a telephone conversation with a representative of KWPA on 31 January 1979.

In support of his allegation that a stand-by agreement was reached, Craig refers, inter alia, to a letter from KWPA of 23 May 1979 which stated that Craig's services had been released to MAHAB's control. This statement of KWPA appears, however, to bear on the question of when and by whom Craig would be paid for services previously rendered. In addition, and more importantly, the letter indicates that the "release" back to MAHAB had been previously conveyed to Craig in KWPA's letter of 22 January 1979. In view of this, the 23 May letter does not support Craig's allegation as to a stand-by agreement. Nor is there any other convincing evidence of any such agreement between Craig and KWPA.

The evidence - including the above-mentioned letter of 22 January 1979 from KWPA - rather suggests that it was the understanding in January 1979 of both Craig and KWPA that, in view of the general conditions then prevailing in Iran, Craig would not perform any more services under the contract on assignment to KWPA - subject to the possibility of Craig resuming work for KWPA in the future.

The Tribunal notes, however, that it has not been alleged that the contract was terminated by either side in accordance with its termination provision. Furthermore, the Tribunal finds no evidence that the contract was breached, as contended by MAHAB, by Craig's departure from Iran at the beginning of February 1979; Craig's departure from Iran was clearly approved by KWPA, and Craig cannot be blamed for not seeking such an approval also from MAHAB, taking into regard the apparent close link between the two organizations and the fact that MAHAB evidently was not operating at that time. That Craig departed from Iran, thereby making himself unavailable for further services there, should rather be taken as an election on Craig's part to regard the contract as having been terminated by reason of MAHAB's longstanding failure to pay him the contract fees. The Tribunal holds that MAHAB's non-payment constitutes a breach of contract justifying such an election.

In light of the contract thus having been terminated prior to its expiration by MAHAB's breach, Craig is entitled to damages incurred by him as a result of such termination. Those damages, for which MAHAB is liable, are the payment Craig would otherwise have received under the contract if it had not been prematurely terminated, less an amount attributable to steps that were taken or that should have been taken by Craig to mitigate his loss. Craig asserts that it would normally take between 2 and 6 months for him to find comparable employment. Taking the circumstances of the case into account, the Tribunal finds it reasonable to award damages in the amount of US \$36,000 which corresponds, approximately, to 3 months' net fee.

The Respondents have in a general way denied liability for the expenses claimed, but have raised no specific objection with regard to the different expense items sought. The Tribunal finds that Craig is entitled to compensation for expenses incurred in the amount sought, US \$9,454.40.

Craig has not invoked any ground on which the Respondents could be held liable with regard to the possible effect of United States income tax laws through MAHAB's failure to pay monies due. Therefore, this part of the claim cannot be granted.

The Tribunal finds no ground for holding either of the Respondents Ministry of Energy or KWPA liable under Claim A. This claim should therefore be dismissed in as far as it is directed against the Ministry and KWPA.

2. Claim B

Claim B is based on an alleged breach of contract by KIZ. The Tribunal has found that it lacks jurisdiction over Craig's claim in so far as it is directed against KIZ (see above at III). Craig has not established any legal basis upon which KWPA would be responsible for such alleged contract breach by KIZ. This claim is therefore unsubstantiated and cannot be granted.

3. Claim C

Craig seeks compensation for certain of his possessions in Iran. There is, however, no significant evidence as to the value of these possessions. Furthermore, there is no evidence supporting the allegation that these materials were confiscated by Iran. This claim cannot therefore be granted. The Tribunal notes that at the Hearing the Government of Iran agreed to make such possessions available to Craig.

4. Interest

Craig is entitled to damages for non-payment of the principal amounts owing to him. Accordingly, the Tribunal determines that interest at the fair rate of 10 per cent shall be awarded on the total amount due, US \$138,118.40, calculated as from 1 February 1979. Interest shall run until the date the Escrow Agent instructs the Depositary Bank to pay the award.

V. THE MERITS OF THE COUNTERCLAIM

The Tribunal has found that Craig is entitled to payment for his services rendered from April 1978 up to and including January 1979. In establishing the amount due, the September 1978 payment of US \$18,000 has been taken into account. Accordingly, MAHAB's counterclaim for refund of this amount cannot be granted.

VI. COSTS

In the circumstances of this case, and applying Articles 38 and 40 of the Tribunal Rules, the Tribunal determines that Craig shall be awarded costs of arbitration from MAHAB in the amount of US \$10,000 and that each of the Respondents shall bear its own costs.

VII. AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

Claimant's Claim A is dismissed insofar as it is directed against the Respondent MINISTRY OF ENERGY OF IRAN and KHUZESTAN WATER AND POWER AUTHORITY.

Claimant's Claims B and C are dismissed.

The counterclaim of Respondent WATER ENGINEERING SERVICE (MAHAB) is dismissed.

Respondent WATER ENGINEERING SERVICE (MAHAB) is obligated to pay and shall pay to Claimant ALAN CRAIG

1. the amount of One Hundred and Thirty Eight Thousand One Hundred and Eighteen United States Dollars and 40 cents (US \$138,118.40) plus interest at the annual rate of ten (10) per cent calculated from 1 February 1979 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

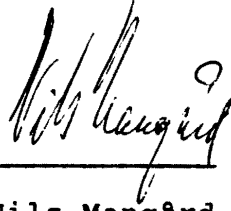
2. the amount of Ten Thousand United States Dollars (US \$10,000) as costs of arbitration.

Such payment shall be made out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

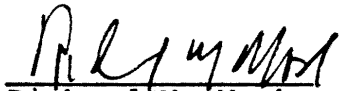
Dated, the Hague

2 September 1983



Nils Mangård
Chairman
Chamber Three

In the Name of God



Richard M. Mosk
Concurring Opinion

M. Jahangir Sani

EXPLANATION FOR FAILURE OF
JUDGE SANI TO SIGN AWARDS

The deliberations in this case were held, with members Mangård, Jahangir Sani and Mosk present, after the Hearing which was held on 5 April 1983 and before the Tribunal's summer recess, which began on 11 June 1983. During the Chamber's final meeting prior to the recess, it was determined that the Chamber would reconvene in early August 1983. In conformity with this determination, the Chairman issued a memorandum on 13 June 1983, requesting the arbitrators to reserve 8, 10 and 12 August 1983 for deliberations. Presidential Order No. 10, dated 15 June 1983, provided that, in cases involving requests for interim relief or other urgent matters, Chamber Two was authorized to act in lieu of Chamber Three until 31 July 1983. Furthermore, the Tribunal's official schedule of proceedings, dated 6 June 1983, indicated that a meeting of the Full Tribunal was scheduled for 15-17 August 1983, that Hearings before Chamber Three were scheduled for 18, 19, 25 and 30 August, and that a Pre-Hearing Conference before Chamber Three was scheduled on 1 September 1983.

On 6 August 1983, the Chairman of Chamber Three issued a schedule of meetings under which the finalization of awards was to take place in Case Nos. 84, 124, 185 and 346 on 11 and 12 August 1983, and further deliberations were to be held in Case Nos. 35, 62, 67 and 127 on 13 August 1983.

By a letter dated 10 August 1983, the Agent of the Islamic Republic of Iran stated to the Tribunal,

that Judge Mostafa Jahangir Sani the Iranian Arbitrator of Chamber Three of the Tribunal has submitted his resignation to the Government of the Islamic Republic of Iran. His resignation has been accepted by the Government and will be effective as of 10 August 1983. His successor will be introduced to the Tribunal in due course.

No reasons were cited for the purported resignation.

The President of the Tribunal ordered that certain Hearings before the Full Tribunal, which were scheduled to take place during its 15-17 August 1983 meetings, be postponed. In addition, the Chairman of Chamber Three cancelled the meetings set for the finalization of awards and further deliberations during the week of 8 August 1983.

Judge Jahangir Sani did not appear at the Full Tribunal meeting held on 15 August 1983. At the 17 August 1983 Full Tribunal meeting, the President stated that the Tribunal had as yet received no valid reasons for Judge Jahangir Sani's absence and had not authorized that absence. The President also declared that it would be for Chamber Three and the Full Tribunal to determine the legal consequences of that

absence in the individual cases pending before them. Thereafter, the Chairman of Chamber Three ordered that the Hearings scheduled for 18, 19 and 25 August and the Pre-Hearing Conference scheduled for 1 September be postponed.

By a letter dated 18 August 1983 and conveyed by post and telex, the Chairman of Chamber Three informed Judge Jahangir Sani of the President's declarations and notified him that a new schedule had been set under which, inter alia, the finalization and signing of the award in this case would take place on 2 September 1983.

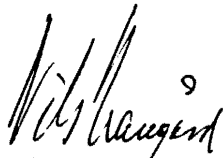
In a telex dated 24 August 1983 to the Chairman of Chamber Three, Judge Jahangir Sani acknowledged receipt of the letter of 18 August 1983 and informed the Chairman that he considered his resignation to the Islamic Republic of Iran to be effective upon the Tribunal and that he was no longer legally authorized or empowered to participate in the taking of decisions or the issuance of awards except for "the preparing and drafting, or drawing up and elaborating, of a judicial opinion or award which has previously been communicated or announced".

Neither in this telex nor in a telex received on the following day, addressed to the Full Tribunal, did Judge Jahangir Sani state that it would be physically impossible for him to take part in the meeting of 2 September.

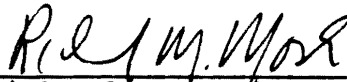
Judge Jahangir Sani was not present for the signing of the Award in this case at the 2 September Chamber meeting.

Under the above circumstances, the Tribunal has determined that it may proceed with the signing of the Award in the absence of Judge Jahangir Sani pursuant to Article 32, paragraph 4, of the Tribunal Rules.

Dated, The Hague
2 September 1983

A handwritten signature in dark ink, appearing to read 'Nils Mangård', written over a horizontal line.

Nils Mangård
Chairman
Chamber Three

A handwritten signature in dark ink, appearing to read 'Richard M. Mosk', written over a horizontal line.

Richard M. Mosk

CASE NO. 346
CHAMBER THREE
AWARD NO. 71-346-3

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MINISTRY OF ENERGY OF IRAN; WATER
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IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
فیت شد - FILED	
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2 SEP 1983	
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DUPLICATE
ORIGINAL

نسخه برابر اصل

CONCURRING OPINION OF RICHARD M. MOSK

I concur in the Award in order to form a majority for it.

Under general principles of law, the Claimant is entitled to damages for the breach of contract sufficient to put him in the economic position he would have occupied had the Respondent performed its obligations. Ryan, An Introduction to the Civil Law 86-87 (1962); 5 Corbin on Contracts §992, at 5 (1964); 11 Williston on Contracts §1338, at 198 (3d ed. 1968); H. Afchar, "Iran", in Minnatur (ed.), Contractual Remedies in Asian Countries 100-01 (1975).

The Claimant is not entitled to damages for losses he could have avoided by reasonable efforts. Thus, if proven by the Respondent, gains that the Claimant could have made by reasonable efforts as a result of opportunities that he would not have had but for the breach are deductible from the amount that would otherwise be receivable. G. Treitel, "Remedies for Breach of Contract" in 7 Int'l Ency. of Comp. Law, Ch. 16, Contracts in General 75-77 (1976); Afchar, supra, at 103; 5 Corbin on Contracts, supra, §1039 at 251.

In the instant case one must start from the premise that as a result of the breach of the MAHAB contract, Claimant is being deprived of not only the monies that should have been paid to him for services already rendered but also for promised compensation for the life of the contract.¹

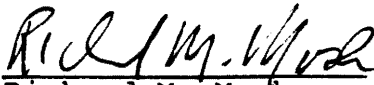
The Claimant had a duty to take only "reasonable" steps to mitigate his damages. This means that if the contract was terminated, Claimant must make "reasonable efforts to seek other employment of a comparable nature." Id. at 76. But that does not mean that the party is required to actually obtain alternative work.

¹ Although Claimant ultimately terminated the contract after Respondent's breach thereof, Claimant is still entitled to damages. See Treitel, supra at 147.

It is important to recognize that Respondent has the burden to establish that Claimant has not sufficiently mitigated his damages. See Article 24 of the Tribunal Rules; 5 Corbin on Contracts, supra, §1039 at 251.

Claimant made efforts to continue working in Iran. He believed that after the Revolution his services would be needed there. He attempted to find other employment with the condition that he could be released if recalled to Iran. And, according to Claimant, it generally takes him up to six months to find employment. From hindsight, Claimant may have been overly optimistic about his opportunities in Iran, but that does not necessarily mean there is sufficient evidence to support the conclusion that the failure to find comparable work in three months was not reasonable. Nevertheless, since "[t]he rule that an aggrieved party must, but need only, act reasonably to avoid loss gives a good deal of flexibility to the mitigation rule," (Treitel, supra at 77), the Tribunal decision is supportable. Therefore I concur in the Tribunal Award awarding Claimant the amount of \$138,118.40 plus interest thereon and costs in the amount of \$10,000.²

Dated, The Hague
2 September 1983


Richard M. Mosk

²My attached legal discussion expands upon the explanation as to why the Tribunal could proceed in the absence of the signature of one of its members.

Additional Comments Related to the
Reasons for the Absence of Signature

I have concurred in the statement concerning the absence of a signature of one of the members of the Tribunal. Article 32, paragraph 4, of Tribunal Rules.

There is ample authority for the proposition that the Tribunal may proceed with its work despite the circumstances concerning Judge Mostafa Jahangir Sani's purported departure. See Sabotage Claims (U.S. v. Ger.) 8 R. Int'l Arb. Awards 458 (Decision of Roberts, Umpire) and 238-41 (Opinion of Garnett, Commissioner) (1939); Decisions 21 and 22, French-Mexican Claims Commission, 5 R. Int'l Arb. Awards 510-14 (1936); Columbia v. Cauca Co., 190 U.S. 524, 47 L. Ed. 1159 (1902); see also Lena Goldfields Ltd. v. Union of Soviet Socialist Republics, reprinted at 36 Cornell L.Q. 42 (1930). Legal scholars have also suggested that the Tribunal can proceed under circumstances similar to those present in the instant case. See 2 Hyde International Law 1629 (1945); 1 J. Voet, The Selective Voet 749 (Gane ed. and trans. 1955); 3 Phillimore, Commentaries on International Law 4 (1885); A. Merignhac, Traité theorique et pratique de l'Arbitrage international 276-77 (1895).

In his Report on Arbitration Procedure to the International Law Commission, Georges Scelle wrote:

Spontaneous withdrawal [of an arbitrator] is inadmissible. The arbitrator was not bound to accept the task entrusted to him; but he can no more give up his functions once they have been conferred upon him than an officially installed magistrate can insist on resigning. Municipal law is categorical on this point [W]ithdrawal of an arbitrator cannot prevent the tribunal from acting nor from rendering a binding award whenever it is materially able to do so.

Scelle, supra at 32-33.

Among municipal law provisions consistent with this position are those of Iran and the United States. The Civil Procedure Code of Iran (Sabi trans. 1972) provides as follows:

Article 649

After accepting to act as arbiters, the arbiters do not have the right to resign, except where they have a plausible excuse such as a sojourn or sickness and so on

Note 1 - Where one of the arbiters of choice resigns during the last third part of the period of arbitration his resignation shall be treated as null and void and he shall be regarded as abstaining.

. . . .

Article 660

Where one of the arbiters after he has been informed, does not appear in the session held for proceedings or consultations, or he appears but refuses to give award, the award given by the majority of votes shall be valid even if unanimity of votes has been a condition in the agreement for arbitration. Non-appearance or refusal of arbiter to give an award or signing the same shall be recorded in the award.

Similarly, the Uniform Arbitration Act promulgated by the American Bar Association and enacted by a number of states in the United States provides, in Section 5(c), that when an arbitrator ceases to act, the proceedings may continue.

Authorities which might be construed as leading to a different conclusion are not persuasive, especially when applied to this Tribunal. Because of its nature, schedule and caseload, this Tribunal cannot be subjected to periods of inaction and delay. Parties have expended monies in connection with their claims in reliance on the Tribunal deciding their cases. To delay deciding them is not only unfair, but contrary to generally accepted standards. See Canon. IV(B), Code of Ethics for Arbitrators in Commercial Disputes (Amer. Bar Assoc. and Amer. Arb. Assoc. 1977); Civil Procedure Code of Iran, Sec. 641 (Sabi trans. 1972); Arbitration in Sweden 115 (Stockholm Ch. of Com. 1977).

The Claims Settlement Declaration to which Iran and the United States of America adhered suggests that the Tribunal "conduct its business expeditiously" (Article III, paragraph 1) in order "to ensure that [the] Agreement can be carried out" (Article III, paragraph 2). Delays in deciding cases are inconsistent with the spirit of the Claims Settlement Declaration and with the sound administration of the Tribunal.

Finally it should be noted that another Chamber of the Tribunal has proceeded to issue awards in the absence of one of its members. See e.g., Award Nos. 59-220-2 (Intrend); ITL24-49-2 (Gould); ITL 23-120-2 (Main); 61-188-2 (Gruen).