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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحدہ



4 May 1983

CASE NO. 91

CHAMBER THREE

THE MANAGEMENT OF ALCAN ALUMINIUM LIMITED, ON BEHALF OF ITS SHAREHOLDERS WHO ARE UNITED STATES NATIONALS and JAMES P. MONAGHAN, ON BEHALF OF HIMSELF AND OTHER SHAREHOLDERS OF ALCAN ALUMINIUM LIMITED WHO ARE UNITED STATES NATIONALS,

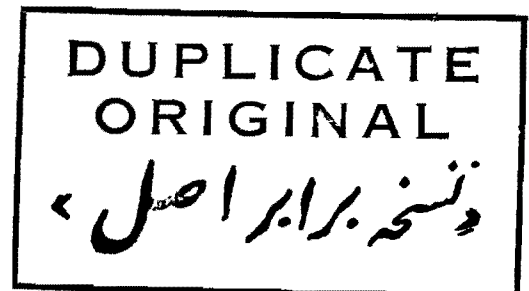
Claimants,

and

IRCABLE CORPORATION,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	۱۳۶۲ / ۲ / ۱۴
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CONCURRING OPINION OF RICHARD M. MOSKIN AWARD NO. 41-91-3JURISDICTION OVER CLAIM

I concur in the award in this case because I agree with the Tribunal that the Claimants did not submit sufficient evidence to show that their claims were "[c]laims of nationals" of the United States, as that term is defined in Article VII, paragraph 2, of the Declaration of the Government of the Democratic and Popular Republic of Algeria

Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration").

The Claimants -- the management of, and a United States citizen shareholder of, a Canadian corporation -- purport to be representatives of the United States national shareholders of that corporation.

In the past there has been controversy over whether and to what extent a claim for injury to a corporation may be brought by or on behalf of that corporation's shareholders when the claim has not been or could not be asserted by or on behalf of the corporation itself. See Lillich, International Claims: Their Adjudication by National Commissions 90-94 (1962); Lillich, International Claims: Postwar British Practice, 40-52 (1967); Clay, Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporations, 45 Geo. L.J. 1 (1956); Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 225 (1949); Lillich and Christenson, International Claims: Their Preparation and Presentation, 17-20 (1962); Weston, International Claims: Postwar French Practice 169-71 (1971); Barcelona Traction, Light and Power Company, Limited (Judgment), 1970 I.C.J. 3.

Article VII, paragraph 2, of the Claims Settlement Declaration provides that claims of nationals that may be maintained before this Tribunal include

claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement.

In the instant case Claimants assert that United States national shareholders held sufficient stock in the Canadian corporation to control it at the time the claim arose. To support this contention Claimants have submitted only evidence of the United States addresses of shareholders to show that, at the time the claim arose, United States "nationals" (not necessarily natural persons) owned 50 percent or more of the voting shares of the corporation.* Claimants made no showing that the United States nationals, by virtue of any other device, did or could control the corporation, even if they did not own 50 percent or more of its shares.

The Tribunal can make inferences concerning the nationality of shareholders based on certain statistics. Without any evidence other than a showing that about 52 percent of

* One can argue that fifty percent can constitute control -- at least joint control -- because it might be that no decision could be made over the objection of those owning 50 percent of the shares of the entity.

the shareholders of a non-United States corporation had addresses in the United States, the Tribunal is justified on the specific facts of this case in concluding that it cannot infer that 50 percent or more of the shares were owned by United States nationals. And without any other evidence of ownership interests of United States nationals collectively at the time the claim arose sufficient to control the corporation, the Tribunal may conclude that it lacks jurisdiction over the claim.

The Claimants had every opportunity to supply some other evidence at or prior to the hearing. Such evidence might have consisted of such material as statistical and sampling results, governmental filings or other data. See Vagts, The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise, 74 Harv. L. Rev. 1489, 1536-1538 (1961); Award No. 21-132-3 (Rexnord Inc.); Order in Case 36, 20 Dec. 1982 (Flexi-Van Leasing, Inc.). The Tribunal should rely only on the evidence submitted to it in a timely manner or on facts it can judicially notice. See my Concurring Opinion in Award No. 27-84-3 (Ultrasystems Incorporated). In certain cases, in order to avoid an injustice, the Tribunal may give parties an opportunity to provide additional, available and necessary evidence. See Article 24, paragraph 3, of the Tribunal Rules. But in the instant case, there is no indication that Claimants could or would submit such additional evidence.

PROCEDURAL RULES

The Claimants assert they should be able to bring a representative or class action because to name the thousands of shareholders of the corporation at the required time would impose a substantial burden on the Tribunal and the parties. The Claims Settlement Declaration provides shareholders of corporations the right to assert indirect claims in certain instances. In the case of widely-held and publicly-traded corporations, such a right would often be meaningless unless the Tribunal has rules and procedures providing for representative claims.

The Claimants suggest that even though their claim purports to be a representative one, any recovery should go to the corporation because the costs associated with establishing each United States shareholder's rights and making distribution to each United States shareholder could exceed the amount of the award. Claimants also argue that an award to the corporation would constitute, in effect, a method of compensating shareholders by increasing the value of their stock. Of course, even under this theory, the beneficiaries would be present shareholders, but not necessarily the shareholders at the appropriate time. Moreover, by virtue of the Claims Settlement Declaration, a non-United States

corporation is not entitled to be the named and actual beneficiary of a Tribunal Award as if it were a party. Article II, paragraph 1; Article VII, paragraph 1(b).*

There is no inherent reason precluding this or any international tribunal from providing for representative or class claims, despite difficulties they present. In recent years procedures have been developed to deal with a multitude of cases having common issues of fact and law, large numbers of parties similarly situated or other cases presenting unusual problems which require extraordinary treatment.** Procedures for international adjudications can and should keep pace with present-day commercial realities and litigation techniques. Indeed, the Governments and the Tribunal have an obligation to provide mechanisms to handle Tribunal "business expeditiously" and to "ensure" that the Claims Settlement Declaration "can be carried out." Claims Settlement Declaration, Article III, paragraphs 1 and 2; see also Barcelona Traction, supra at 31; Feller, The Mexican Claims Commissions 318 (1935).

* It may be that parties can designate a person or entity not eligible to be a party to receive or hold the proceeds of an award. See, e.g., Award No. 28-307-3 (Gulf Ports Crating Company).

** Such obvious problems presented by representative or class actions include awards for costs against those represented, the costs of identifying and notifying members of the class and the right of the members of the class to opt out of the class. But there are possible solutions for such problems. See Debelle, Class Actions For Australia? Do They Already Exist?, 54 Aust. L.J. 508 (1980).

If the Tribunal adhered to conventional procedures in every case, it would take close to a decade, if not longer, to resolve all of the cases. The history of international tribunals demonstrates that innovative techniques are essential to a disposition of claims within a reasonable period. See Carlston, The Process of International Arbitration 14-35 (1972 ed.).

The Tribunal Rules lack some of the modern or innovative case-resolution techniques. There are no explicit provisions for joinder or consolidation of cases; for coordination of cases; for intervention; for representative or class claims; for the application of a decision in one case to other cases; for the elimination of unnecessary pleadings; for meaningful discovery; for the use of special masters; or for the elimination of various formal procedures for the claims of less than \$250,000, which are presented by the Governments under Article III, paragraph 3, of the Claims Settlement Declaration.

The Tribunal can, of course, without formal rule, utilize many of these devices to expedite cases. Indeed, its "internal guidelines" and Presidential Orders contain some of these provisions. In practice, however, even these are rarely or inadequately used. The Tribunal's failure to promulgate and enforce modern innovative procedures has been and will be reflected in its case-disposition rate.

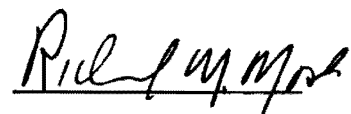
It is arguable that only if both governments have a genuine desire for an efficient and successful operation can the Tribunal carry out its task. But this is no reason for failing to provide and follow adequate procedures. It might also be said that the Rules reflect compromises. But one cannot compromise between efficiency and inefficiency or between unwarranted delay and reasonable dispatch.

I would have preferred that the Tribunal provide procedures necessary to resolve the claims within a reasonable period of time and thereby to create a model which would encourage nations in the future to refer to peaceful arbitration a large number of disputes.

JURISDICTION OVER RESPONDENT - "CONTROL"

It is not necessary to discuss again in detail the issue of whether an entity is one controlled by one of the Governments so as to subject the entity to the jurisdiction of this Tribunal under Article VII, paragraphs 3 and 4, of the Claims Settlement Declaration. See my Concurring and Dissenting Opinion in Award No. 30-16-3 (Raygo Wagner Equipment Company). In the instant case, Respondent has been subsidized by the Government, continues to operate despite reported losses and is in an important government industry dealing with the production of metals -- an industry which has been nationalized according to The Iranian Law For

Protection and Growth of Iranian Industry.* Moreover, one of Respondent's principals has apparently departed. Despite such facts, Respondent contends, as have similarly situated respondents in other cases, that it is not an entity controlled by the Government of Iran. It is difficult to take such a contention seriously when Respondent itself has written a letter to Alcan stating that since July 15, 1979 it is "under the management and direct control of the Ministry for Industry and Mineral Resources of the Government of Iran." This is not the first time that a Respondent has contended it was not an entity controlled by the Government of Iran, despite having taken a contrary position at an earlier time. See Award No. 30-16-3 (Raygo Wagner Equipment Company). Indeed, in the latter case, it was disclosed that the Government of Iran, in United States litigation, had contended that a law "required private corporations to be administered by the Government of the Islamic Republic of Iran." These earlier positions, at the very least, constitute significant evidence that such entities have been under the control of the Government of Iran.



Richard M. Mosk

* Article 1(a) quoted in II Masouduzzafar, A Digest of Laws and Regulations Approved by the Islamic Revolutionary Government of Iran 23, 24 (1980).