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Case No.

B1 CH

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**** AWARD**

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**** DISSENTING OPINION** of _____

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Co & Dis of Mr Brouner

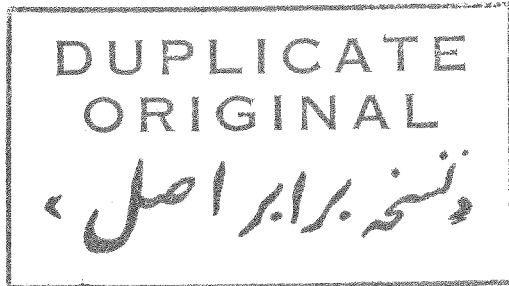
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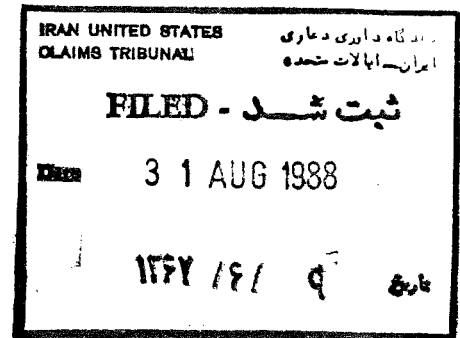
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CASE NO. B1 (CLAIM 4)
FULL TRIBUNAL
AWARD NO. 382-B1-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.



CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. My concurrence in this Award is rendered incomplete only by my concern that the date for valuation has been chosen somewhat mechanically¹ and without regard to the particular circumstances of this quite unique case.

2. To place upon the Respondent the entire burden of loss in value of the property in question since 26 March 1981, when it informed the Claimant it would not deliver such property, unfairly penalizes Respondent, given the fact that it promptly proposed to sell the property and credit the proceeds to Claimant, which objected in unmistakably blunt terms and hence thwarted optimum realization of the

¹The date appears to result from the Tribunal hewing too closely to the concept of expropriation in addressing this claim notwithstanding its disclaimer of any intention to determine whether there was an expropriation here.

property's value.² Equally I reject the notion, advanced by Judge Holtzmann, that such loss must be borne solely by the Claimant, which, after all, was pursuing what it deemed to be its legitimate legal entitlement. I believe instead that the Parties rightly should share such loss because both have contributed to it.

3. This Tribunal was established pursuant to the Claims Settlement Declaration of 19 January 1981 and hence was actually operating reasonably soon after 26 March 1981 and after the issues here were clearly posed by Claimant's refusal to consent to the proposed sale. Indeed, the Statement of Claim was filed 18 November 1981. Thereafter either Party could have made an appropriate request of the Tribunal. Whether it were the Respondent seeking authorization of a sale of the property, or the Claimant seeking to prevent the same, the Tribunal necessarily would have had to address the merits of this Claim 4 at that time. Neither Party moved promptly and, finding such failure to act equally difficult to understand in both,³ I am inclined to hold they should share the consequences.

4. The proper solution to me would be to value the property as of the notional date this Tribunal could be expected to have decided a timely application by either Party for an early determination of the respective rights in the

²The Award suggests (para. 72) Claimant was justified in refusing such proposal because of its terms, e.g., that the proceeds would be paid into the FMS Trust Account rather than to Iran directly. I believe the record is clear, however, that Iran refused principally because acquiescence would vitiate its claim to actual delivery of the property and hence would have objected to any other disposition of such property regardless of the terms.

³The Award implies it was Respondent that had the burden of approaching the Tribunal without offering a basis for this conclusion.

premises. Given the extensive filings involved in this Claim, as well as the preoccupation of the Tribunal in its formative years with broad issues of principle, see, e.g., Case No. A/1, DEC No. 8-A/1-FT (17 May 1982), reprinted in 1 Iran-U.S. C.T.R. 144; Case No. A/2, DEC 1-A/2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101; Case No. A/18, DEC No. 32-A/18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 251, it would be appropriate to place the date at 31 December 1984.⁴ I believe this would result in a fair division of responsibility between the Parties.

Dated, The Hague

31 August 1988

Charles N. Brower

Charles N. Brower

⁴I make this suggestion conscious that it was only on 5 March 1986 that the Joint Report was filed and hence prior to that date the Tribunal would have had to confront a situation not yet fully defined by the Parties. I think the Tribunal nonetheless would have been in a position to act since only property the Respondent claimed to have in its possession and proposed to sell would have been relevant to the posited application.