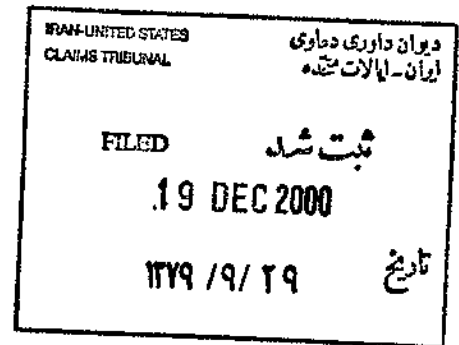


CASE NO. A28

FULL TRIBUNAL

DECISION NO. DEC 130-A28-FT

THE UNITED STATES OF AMERICA and
THE FEDERAL RESERVE BANK OF NEW YORK,
Claimants,
and
THE ISLAMIC REPUBLIC OF IRAN and
BANK MARKAZI IRAN,
Respondents.



CONCURRING AND DISSENTING OPINION OF BENGT BROMS

1. To begin with, I concur with Paragraph 95A of the Decision and the first sentence of Paragraph 95B. The second sentence as well as the opening word "Consequently" of the third sentence of Paragraph 95B raise, however, serious doubts in my mind. As Paragraph 95 in its present form was proposed by the President after the final deliberations had ended, and as the President did not call the members to open further deliberations, the purpose of the two sentences remains unclear. Does the narrowest possible majority mean that the

second sentence falls into the class piae desiderata with no particular legal consequences or does the sentence obligate Iran to replenish immediately to the level of U.S.\$500 million until such time as the President of the Tribunal has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied? The addition of the word "Consequently" connected to the denial of the order for replenishment and for additional relief might well lead into a request for clarification by either party. When I also think of the way the assumptions, expectations and anticipations of the Tribunal are formulated in Paragraphs 92, 93 and 94, it seems probable that the majority itself does not understand what the purpose of the Decision really is.

2. During the deliberations I have defended the view that it is the duty of the Tribunal to investigate the facts carefully to find out whether the United States is in need of the requested orders? While I cannot accept all the arguments Iran presented at the Hearing of this Case to prove that there was no such need, there were some weighty arguments to prove that stand.

3. First of all, while I admit that since 5 November 1992 Iran has not maintained a minimum balance of U.S.\$500 million in Account B, the remaining amount has always made it possible for Iran to pay every award decided against Iran. There have been no complaints in this respect and all members of the Tribunal accept this to be true.

4. In the second place, by the time of the Hearing there were only four undecided dual national cases. On 28 November 2000 Chamber Two filed a final Award in Cases Nos. 815, 816, and 817. The Award ordered Iran to pay to the Claimants altogether U.S.\$2,418,711 with interest at the rate of 7.75 percent per annum. The existing balance in Account B may now

be used towards a future award in the only remaining dual national Case No. 485. Without prejudice to the outcome of that Case, the members of the Tribunal know that at the hearing the Claimant reduced the Claim to U.S.\$33,508,923 and interest together with costs. It is known to all members that the existing balance in Account B fully covers any possible Award in Case No. 485.

5. The Claimants in the present Case have argued that the Counterclaim in Case B1 might one day exceed the balance in Account B, even if the balance may suffice for all other remaining cases. Therefore, I have proposed several times during the deliberations that the jurisdiction of the Tribunal over the Counterclaim in Case B1, which has always been a disputed issue between the two Governments, be decided before the final Decision is issued in Case A28. In addition to the issue of jurisdiction, the Tribunal could also decide the issue whether any amount that could possibly be condemned against Iran, if there is jurisdiction, would be limited to any offset against any amount to be awarded to Iran in Case No. B1. Should the majority have accepted this proposal which was supported by three other members then the Tribunal would have been in a correct position to decide Case A28. I trust that both Governments would have understood this kind of a delay to be necessary for the Tribunal to reach the best possible consensus Decision.

6. In the third place, the Decision fails to pay sufficient appreciation to the solemn pledge made by the Agent of Iran during the Hearing. The Tribunal declares in Paragraph 92 that none of the remedies suggested by Iran is a remedy for non-compliance. In my opinion the conclusion is wrong because, for the reasons I have explained above, there is no need to rely upon the Tribunal's expectations. The Tribunal should have based the denial of the requests by the United

States on the basis of the lack of interest on the side of the United States and on the relevant provisions of the Vienna Convention on the Law of Treaties. The majority pays all too much importance to the fact that Paragraph 7 of the General Declaration is "clear and unambiguous" and it leaves no room for alternative interpretations (Paragraph 54). The textual interpretation preferred by the majority is the simplest way to interpret Paragraph 7. This choice fails, however, to understand that even the clearest treaty provision need not be applied in a situation when the present circumstances show as clearly as in the present Case that the end result would be onesided and unfair. In this Decision the majority denies the requests quite correctly, but the majority leaves at the same time the door open to a different interpretation by using the fulfilment of the expectations of the Tribunal as a basis. It would have been a better choice to base the decision on the reasoning I have outlined above.

7. Turning to the last sentence of Paragraph 95B I concur with the decision to deny the request for additional relief. Again, I regret the fact that the expectations of the Tribunal concern also this denial. Furthermore, in my opinion the majority should not have avoided the making of a decision as to the power and jurisdiction of the Tribunal. That decision should have been reached in the present Decision.

8. In this context, I want to emphasize the fact that the Tribunal has no jurisdiction or power to grant the request by the United States for additional relief. The reason is simple. There is nothing in the General Declaration to support the interpretation that also the United States would be entitled to make payments into the Security Account. The Tribunal cannot either be regarded as an organ with an implicit power to decide favourably the Claimants' request for additional relief. I want to remind the majority of the

finding of the Tribunal in Cases Nos. A15(IV) and A24, which reads as follows:

In interpreting the Algiers Declarations, the Tribunal cannot ignore the express terms agreed upon by the Parties, nor can it replace those terms with others that would unavoidably change the original meaning.

Partial Award No. 590-A15(IV)/A24-FT (28 December 1998), paragraph 91.

To reach the conclusion I have presented above concerning the request for additional relief my proposal would have brought to an end any possible doubts and requests for clarification of Paragraph 95B in so far as the request for additional relief is concerned.

The Hague, 19 December 2000


Bengt Broms