IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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.

IRAN-UNITED STATES CLAIMS TRIBUNAL دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
19 DEC 2000
تاریخ ۱۳۷۹ /۹/ ۲۹

CONCURRING OPINION OF
RICHARD M. MOSK

1. I concur in the Decision.

2. I agree with the majority that Iran has breached, and is in breach of, its obligation under Paragraph 7 of the General Declaration to replenish the Security Account with an amount necessary to maintain it at U.S.$500,000,000.

3. The Tribunal's statement that it expects Iran to comply with its obligations hereafter should be sufficient. Under international law, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, Article 26. In practice, treaties are normally observed. *See* Harvard Research on International Law, *Comment on Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. SUPP. 657, 990 (1935). Such a manifestation of expectation should be viewed as the equivalent of an order. Indeed, Tribunal practice so suggests.[1] I believe that there has been no justification for Iran's long-time refusal to comply with its obligation to replenish the Security Account. Also, the Tribunal should have rendered the declaration requested by the

[1] *See* Order of 5 August 1998 [Doc. 62] in *The United States of America, et al.* and *The Islamic Republic of Iran, et al.*, Case No. A28, Full Tribunal, in which the Tribunal said, "The Tribunal expects that the United States will pay that amount promptly and directly to Iran." The United States made the payment.

United States that if Iran is in breach of its obligation to replenish, the United States could pay amounts of any awards against it in favor of Iran into the Security Account to the extent of a deficiency in that account. Lastly, the Tribunal should have accepted jurisdiction over Bank Markazi and make it subject to the Tribunal Decision.

4. In my view, Iran needed no declaration by this Tribunal to recognize its replenishment obligation. The language of Paragraph 7 of the General Declaration concerning the replenishment obligation is so patently clear that no one could reasonably interpret the provision to relieve Respondents of their obligation to replenish prior to the time the President of the Tribunal certifies that all claims against Iran have been properly satisfied.

5. Iran's principal argument is that it is unfair to require it to keep U.S.$500,000,000 in the Security Account when the amount of the claims outstanding against Iran is less than that amount. The very fact that Claimants and Respondents are arguing about whether the claims, including counterclaims, are more than U.S.$500,000,000 is one of the reasons why the absolute requirement of replenishment is logical. It makes no sense to impose upon the Parties the obligation to assess continuously the amount of outstanding claims in order to determine Respondents' replenishment requirements. The replenishment requirement ends at a specific, ascertainable time – when the Tribunal President gives the certification specified by Paragraph 7 of the General Declaration. It should be noted that theoretically the Security Account secures claims under Paragraph 17 of the General Declaration, including claims that might be brought hereafter. This provision further complicates any determination of the amount in the Security Account sufficient to secure all claims against Iran until the last pending claim is resolved and the certification is given.

6. Requiring replenishment notwithstanding the amount of pending claims does not result in an unusual situation and is not unfair. The Security Account was initiated with the required amount of U.S.$1,000,000,000. At that time, and for years thereafter, the amount claimed against Iran at the Tribunal far exceeded U.S.$1,000,000,000. Thus, the United States and United States claimants were undersecured despite Iran's replenishment obligation. Iran stopped replenishing the Security Account at a time when outstanding claims by United States claimants exceeded U.S.$1,500,000,000. This fact suggests that there was

no relationship between Respondents' failure to provide the required replenishment and the amounts claimed in pending Tribunal cases.

7. At the time of the Algiers Declarations, the Parties had to have recognized that there would come a time when it was likely that U.S.$500,000,000 would exceed the aggregate amount of the pending claims against Iran. Thus, it was foreseeable that such claims might well be oversecured. There is nothing irregular about the value of the security not being equal to the amount of claims or debts being secured. Many real and personal property security transactions involve situations in which the debt is oversecured. This may result from increases in value of the security or payments of the debt without changes in the security. The Parties here provided for a specified amount in the Security Account whether that amount was enough to secure the outstanding claims or exceeded the amount of the existing claims. As noted in the Tribunal Decision, the Parties could have provided for reducing the amount in the Security Account to match the amount of existing claims against Iran, but they did not do so.

8. Iran suggests that the United States' request that Iran pay into the Security Account an amount unnecessary to secure outstanding claims serves no purpose and is punitive in nature. The replenishment requirement, however, was a bargained-for provision. In return for this and other obligations, the United States agreed to many undertakings, including precluding clearly justified claims by the United States and its nationals related to the illegal seizure of the United States Embassy and 52 United States nationals. *See* General Declaration, Paragraph 11. If isolated, preclusion of such American claims could be viewed as much more unfair than the mere possibility of some excess security in the Security Account. It would be inequitable to forgive one of Iran's obligations when the United States' obligations have already been implemented.

9. Iran has been in violation of its replenishment obligation for eight years and for a period when such a violation could not be related to the amount in the Security Account. Iran clearly knew that it was in violation of its obligation. There was no *force majeure*; the agreement was not contrary to any other general principle of law; and there was no relevant evidence of an actual impediment to payment. That Iran now finds burdensome an obligation

to which it agreed is not sufficient justification for its breach. The Tribunal's conclusion on this issue is consistent with my position.

10. The United States requested a declaration that as one possible remedy in the event Iran is not in compliance with its replenishment obligation the United States may pay amounts of any awards against it in favor of Iran into the Security Account to the extent Iran has not replenished the Security Account.

11. Under Paragraph 17 of the General Declaration, "[i]f any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal . . . [and] [a]ny decision of the Tribunal with respect to such dispute . . . may be enforced by the prevailing party in the courts of any nation in accordance with its laws." Here, there is a dispute between the United States and Iran as to whether the United States may satisfy any awards against it by paying amounts to the Security Account to the extent Iran has not replenished the Security Account. There being such a dispute over the "interpretation" and "performance" of the General Declaration, the Tribunal should have resolved it as required by Paragraph 17 of the General Declaration.

12. Had the Tribunal addressed the issue, it should have concluded that there is nothing that precludes the United States from satisfying an award in the way the United States proposes. Another possible alternative could have been for the Tribunal to have declared that if at such time it makes an award against the United States, the Tribunal would be able to include as part of the remedy in that award a provision that payment of the award could be made into the Security Account. That arbitrators have "broad discretion in fashioning relief," even "the power to grant relief that a court could not," is a widely accepted principle. Gary B. Born, *International Commercial Arbitration in the United States* 525 (1994); *see also* Stephen J. Toope, *Mixed International Arbitration* 164 (1990) ("In essence, arbitrators often seem to choose a remedy which is loosely described as being 'fair and equitable in the circumstances'."); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators have flexibility to meet "a wide variety of situations" especially "when it comes to formulating remedies"); *International Molders & Allied Workers Union v.*

Brooks Foundry, Inc., 892 F.2d 1283, 1288 (6th Cir. 1990) ("an arbitrator is to be given broad latitude and discretion in formulating remedies"); *General Tel. Co. of Ohio v. Communications Makers of Am.*, 648 F.2d 452, 457 (6th Cir. 1981) ("remedy need not be specifically authorized by the agreement"); *Advanced Micro Devices v. Intel Corp.*, 885 P.2d 994, 1002 (Cal. 1994) ("arbitrators, unless expressly restricted by the agreement or the submission to arbitrators, have substantial discretion to determine the scope of their contractual authority to fashion remedies . . . .").[2]

13. If Iran should fail to meet the Tribunal's expectations by not complying with its replenishment obligation, the United States must have some right or remedy. *See* Arnold Duncan McNair, *Law of Treaties* 539-540, 553-580 (1961) (discussion of rights and remedies for breach of a treaty). Payment into the Security Account seems to be the least drastic remedy of those available to the United States in the event of Iran's breach of its duty of replenishment.

14. The Tribunal should have determined that it has jurisdiction over Bank Markazi in this case and that Bank Markazi's responsibility is identical to that of Iran. This dispute is covered by the jurisdictional provision of Clause 18(b) of the Technical Agreement. Bank Markazi had not only apparent but actual authority to sign the Technical Agreement with the consent and authority of Iran. Iran itself has taken the position that the Technical Agreement is one of "the basic agreements regarding all banking and financial relations between the two governments" and is an "inseparable part . . . of the Algiers Declarations." *Bank Markazi Iran* and *The Federal Reserve Bank of New York*, Award No. 595-823-3, para. 31 (16 Nov. 1999), *reprinted in* ___ Iran-U.S. C.T.R. ___.

15. It cannot seriously be argued that jurisdiction in this case is affected by the phrase in Clause 18(b) of the Technical Agreement that "[a]ny dispute arising under this Agreement, *which cannot be amicably resolved,* may be submitted by any of the parties to the court of competent jurisdiction . . . or to the Tribunal . . . ." (Emphasis added.) This language establishes no condition precedent to maintaining a claim. Moreover, the 19 January 1993

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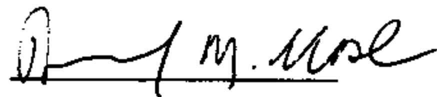
[2] Although most of these authorities are American, they represent a formulation of a general arbitral principle.

letter from the Agent of the United States to the Agent of Iran demanding that Iran and Bank Markazi replenish the Security Account and the refusal of the Respondents to do so certainly satisfy any requirement of a non-amicable resolution of the dispute. Clearly, no further action by the United States or the Federal Reserve Bank was necessary. The law does not require an idle or superfluous act.

16. Accordingly, there was jurisdiction over the claim against Bank Markazi, and it too should be the subject of the Tribunal Decision. The absence of such a jurisdictional determination, however, may not be of practical significance. Presumably, Iran's central bank has an incentive to comply with its international obligations so as not to jeopardize its position in world financial markets.

17. Notwithstanding any of the views set forth above, I concur in the Tribunal's Decision.

Dated, The Hague



19 December 2000

Richard M. Mosk