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IRAN UNITED STATES CLAIMS TRIBUNAL

دادگاه دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

Case A/1

Request for decision regarding four issues of dispute arising in connection with the establishment and operation of the Security Account provided for in the Algiers Declarations.

Parties: The Islamic Republic of Iran,
represented by
Mr. Mohammad K. Eshragh, as Agent
of the Islamic Republic of Iran to the Tribunal,

Mr. Asghar F. Kashan, head of delegation from Bank Markazi Iran,
Mr. Ali Manavi Rad, as Adviser,
Mr. Roger Brown, Representative and Adviser,
Mr. Daniel Levitt, Adviser,
Mr. Chr. Gibbons, Adviser,
Mr. Thomas Shack, Adviser;

and

The United States of America,
represented by
Mr. Arthur W. Rovine, Legal Counselor, Embassy of the United States of America, as Agent,

Mr. Timothy E. Ramish, Attorney-Adviser, Department of State, as Deputy Agent,
Ms. Jamison M. Selby, Attorney-Adviser, Department of State, as Deputy Agent,
The Honourable Davis R. Robinson, Legal Adviser, Department of State, as Counsel,
Mr. Stefan A. Riesenfeld, Counselor on International Law, Department of State, as Counsel,
Mr. Mark Rudzick, Attorney-Adviser, Department of Justice, as Counsel.

DECISION

INTRODUCTION

On 19-20 January 1981 - after negotiations through the Government of the Democratic and Popular Republic of Algeria as intermediary - the Islamic Republic of Iran ("Iran") and the United States of America ("United States") entered into a series of Agreements with a view to concluding the crisis in the relations between the two states arising out of the detention of United States nationals in Iran and the counter-measures taken by the United States. These Agreements consisted of five separate documents, the main elements of which are embodied in two declarations by the Government of Algeria ("the Algiers Declarations") to which Iran and the United States adhered: The Declaration of the Government of the Democratic and Popular Republic of Algeria ("the Declaration") and 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 ("the Claims Settlement Declaration").

The Declaration and the Claims Settlement Declaration

Within the framework of and pursuant to the provisions of the two Algiers Declarations the United States undertook in the Declaration to restore the financial position of Iran, in so far as possible, to that which existed prior to 14 November 1979. The Declaration also provided for the nullification of restraints, including judicial attachments, on various Iranian assets and for the transfer of assets to a number of escrow accounts, from which portions would in turn be transferred to Iran. To achieve this end the United States committed itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction as set forth in the Declaration.

Furthermore, the Declaration stated that it was the purpose of both Iran and the United States to terminate all litigation as between the Government of each State and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. In order to fulfil this purpose, the Claims Settlement Declaration provided for the establishment of the Tribunal, as well as its jurisdictional and procedural framework.

As to the financial arrangements, Iran and the United States undertook immediately to select a mutually agreeable central bank ("the Central Bank") to act under the instructions of the Government of Algeria and the Central Bank of Algeria as Escrow Agent of the escrow and security funds which were prescribed in the Declaration. The two Governments also agreed promptly to enter into depositary arrangements with the Central Bank in accordance with the terms of the Declaration.

In this connection the Declaration prescribed that all funds placed in escrow with the Central Bank pursuant to the Declaration were to be held in an account in the name of the Algerian Central Bank.

The Declaration also dealt with the transfer of assets under United States jurisdiction. The provisions concerned assets both in the Federal Reserve Bank of New York and in foreign and domestic branches of United States banks. Of particular interest in this case are paragraphs 6 and 7 of the Declaration which dealt with the transfer of assets held in domestic branches of the United States banks. These paragraphs read as follows:

> 6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United

States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S. $1 (one) billion. After the U.S. $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S. $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S. $500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

Other Related Agreements

The financial arrangements provided for in the Declaration and the Claims Settlement Declaration were further delineated in three other related agreements: (1) Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981 (the "Undertakings"); (2) the Escrow Agreement of 20 January 1981 (the "Escrow Agreement"), among the Government of the United States, the Federal Reserve Bank of New York as Fiscal Agent of the United States, Bank Markazi Iran and Banque Centrale d'Algérie as Escrow Agent; and (3) the Technical Arrangement of 20 January 1981 (the "Technical Arrangement"), among Banque Centrale d'Algérie

as Escrow Agent, the Federal Reserve Bank of New York as Fiscal Agent of the United States and the Governor and Company of the Bank of England, which bank has been selected as the Central Bank.

The Undertakings contain, inter alia, provisions regarding the transfer of funds held in escrow by the Central Bank, once the United States nationals detained in Iran had been released. The provisions authorized the Algerian Central Bank, as Escrow Agent, to instruct the Central Bank to transfer $3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest on loans made by syndicates of banking institutions of which United States banks were members, and to retain $1.418 billion in the escrow account primarily, but not only, for the purpose of paying nonsyndicated bank loans made by United States banking institutions. These provisions also authorized the Central Bank to transfer immediately to, or upon the order of, Bank Markazi all assets in the escrow account in excess of the above mentioned amounts.

The object of the Escrow Agreement was to implement those provisions of the Declaration which concerned the establishment of escrow arrangements for transferred property tied to the release of United States nationals who were detained in Iran. To this end, paragraph 2 of the Escrow Agreement provided that:

> ....the Government of the United States will cause... Iranian deposits and securities in domestic branches and offices of United States banks...to be transferred to the FED, as fiscal agent of the United States, and then by the FED to the Bank of England for credit to the account on its books opened in the name of the Banque Centrale d'Algérie as Escrow Agent under this Agreement (the Iranian...deposits, securities and funds mentioned in this paragraph 2 are referred to collectively as "Iran property").

Furthermore, paragraph 3 of the Escrow Agreement provided that:

> ....the deposits and funds will be held in one or more

> dollar accounts opened at the Bank of England in the name of Banque Centrale d'Algérie as Escrow Agent under this Agreement. These deposits and funds will bear interest at rates prevailing in money markets outside the United States....

A provision in paragraph 4 of the Escrow Agreement is also relevant to the instant matter. This paragraph, which in sub-paragraphs (a) and (b) contained provisions that made the release of the United States nationals in Iran a prerequisite for the transfer of funds, embodied in subparagraph (d) the following provision:

> (d) The funds and deposits held by the Bank of England under this Agreement will earn interest at rates prevailing in money markets outside the United States after their transfer to the account of the Banque Centrale d'Algérie, as Escrow Agent, with the Bank of England, and such interest will be included as part of the Iranian property for the purpose of subparagraphs (a) and (b) of this paragraph 4.

The Technical Arrangement with the Bank of England sets forth the details concerning various accounts in which Iranian assets were to be held in escrow. It provided for a total of six separate accounts, including a dollar account, "Dollar Account No. 2", to hold the portion of Iran's funds primarily for payment of nonsyndicated bank loans in accordance with the Undertakings, and two accounts,"Securities Custody Account No. 2" and "Dollar Account No. 3", to temporarily hold the securities and funds comprising the Security Account pending the transfer of these funds and securities to a permanent depositary.

Agreements with Banks in the Netherlands

Regarding the Security Account

The Technical Arrangement presupposed that the Bank of England was to hold the Security Account only for a limited period of time, by the end of which, it was anticipated, agreement would have been reached with another suitable bank and the account

would be transferred. In fact, the funds intended for the Security Account were never transferred to the Bank of England.

In June, 1981, the Federal Reserve Bank of New York and Bank Markazi Iran commenced discussions with De Nederlandsche Bank N.V., the Central Bank of the Netherlands, in order to establish and maintain the Security Account in that bank. On 17 August 1981 the Federal Reserve Bank of New York as fiscal agent of the United States, Bank Markazi Iran and Banque Centrale d'Algérie, as Escrow Agent, signed agreements with De Nederlandsche Bank N.V. and its subsidiary, N.V. Settlement Bank ("the Depositary Bank"), providing for the establishment and maintenance of the Security Account in the Depositary Bank. Pursuant to these Agreements, on 18 August 1981 the Federal Reserve Bank of New York transferred to the Depositary Bank more than $2 billion, $1 billion of which is now deposited in a security account, "Account B"; the remaining sum was transferred to Iran.

The agreements with the Netherlands banks provided, inter alia, that the Depositary Bank would pay interest on the funds equal to that received by it; that its monthly fee for managing the account would be $150,000; and that the Depositary and its parent bank would be indemnified for any liability, loss, cost or expense arising in connection with the operation of the Security Account.

The agreements with the Netherlands banks record disagreement between Bank Markazi Iran and the Federal Reserve Bank of New York on four issues and provide that they will be referred to this Tribunal for decision. In a letter of 22 October 1981 the United States requested the Tribunal to determine these issues.

Each of the two Governments have submitted simultaneously Memorials and Countermemorials and presented oral arguments at a hearing on 8 - 9 March 1982. In the course of this exchange of arguments, the Governments have submitted to the Tribunal the

following issues: (1) the disposition of interest earned on the Security Account; (2) the standard to be applied by the Tribunal in recording settlements as awards on agreed terms; (3) payment of the bank fees associated with the Security Account; and (4) responsibility for indemnification of the Depositary of the Security Account.

ISSUE I. THE DISPOSITION OF INTEREST EARNED ON THE SECURITY ACCOUNT.

Decision reserved.

ISSUE II. STANDARD TO BE APPLIED BY THE TRIBUNAL IN RECORDING A SETTLEMENT AS AN AWARD ON AGREED TERMS.

Background

This issue relates to the jurisdictional and procedural framework for the Tribunal provided for by the Claims Settlement Declaration. It is therefore appropriate initially to describe the relevant elements of this framework.

The Claims Settlement Declaration contains in Articles II and VII a number of detailed and complex provisions which specify the extent of the Tribunal's jurisdiction.

As to the procedural rules to be applied by the Tribunal, Article III of the Claims Settlement Declaration provides that the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Governments or by the Tribunal.

Article 34 of the UNCITRAL Rules, which has been maintained unchanged in the Tribunal Rules, is of particular interest in relation to the present issue. Paragraph 1 of this Article provides:

> 1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

Contentions of the Two Governments

The original disagreement between the Federal Reserve Bank of New York and Bank Markazi Iran on this issue was a question of whether the Security Account might be used in direct payment of private settlements. However, the Tribunal understands from the positions taken by the two Governments during the proceedings that this question is no longer an issue in the case. Thus, the only outstanding question is under what conditions the Tribunal may make an award on agreed terms embodying such settlement of claim. Iran contends that the Tribunal in such a case should make an award on agreed terms, if the claim is, prima facie, within the jurisdiction of the Tribunal.

The United States on the other hand holds the view that the Tribunal may make such an award only after it has reviewed the settlement and found that the claim is within the Tribunal's jurisdiction and that the settlement represents a reasonable determination of the claim.

Iran makes the following contentions: Neither the text of Article 34 nor the legal history of that provision supports the view that the Tribunal must make a final jurisdictional determination of the kind it would make if a party had

questioned its jurisdiction over the particular claim. The drafters of the UNCITRAL Rules did not even discuss the possibility that an arbitral tribunal would refuse to record an agreement as an award on agreed terms on the ground that jurisdiction is lacking. As for the contention by the United States that the Tribunal has to consider the reasonableness of a settlement before the settlement is embodied in an award on agreed terms, Iran points out that Article 34 of the UNCITRAL Rules does not oblige the Tribunal to make an award on agreed terms, since it gives to the Tribunal a discretionary power to refuse to do so. However, the history of the UNCITRAL Rules demonstrates clearly that it was intended that arbitral tribunals would exercise their right to refuse to make awards on agreed terms only under limited circumstances. The records of the UNCITRAL proceedings and the commentaries to the Rules reflect only one consideration which might cause arbitral tribunals to decline to record a settlement as an award -- a finding that a settlement is unlawful or against public policy. Not once during the preparatory work concerning Article 34 of the UNCITRAL Rules did any delegate suggest that, before a tribunal could record a settlement in the form of an award on agreed terms, it should consider whether the settlement represents a reasonable determination of the claim. Article 34 was designed to facilitate and promote negotiated settlements, and the commentaries to that article reflect the recognition that it would often be impossible for arbitrators to pass upon the reasonableness of a settlement. The reasonableness is an issue for the parties to determine, not for the arbitrators. Considerations underlying settlements often include factors other than elements of law; such factors are peculiarly inappropriate for review. Since Article 34 has not been modified by the two Governments or by the Tribunal, it is for the United States to show that the broad interpretation of this article for which they argue is correct. However, both the legal history of the UNCITRAL Rules and international precedents are inconsistent with the notion that arbitrators should review settlements for reasonableness.

The arguments of the United States are as follows: Article 34 gives the Tribunal discretion to refuse a request by parties for an award on agreed terms. The history of the rule shows that efforts to limit such discretion were rejected. Neither the express terms of Article 34 nor its legal history provides specific guidance as to the standards to be applied in deciding whether to record a settlement as an award on agreed terms. Such a decision by the Tribunal involves more complex considerations than apply to a private two-party arbitration and is subject to certain fundamental limitations arising from the terms of the Claims Settlement Declaration, which establishes the overall framework for the operations of the Tribunal. Thus, the Tribunal is not limited by Article 34, in view of the Tribunal's overall responsibility to decide claims pursuant to the Claims Settlement Declaration. In this arbitration, it is not the arbitrating parties requesting the Tribunal to make an award on agreed terms who have established the jurisdictional limitations on the Tribunal; these limitations have been established by the two Governments in the Claims Settlement Declaration. Therefore, the Tribunal must determine that the claim which has been settled is within its jurisdiction. The Tribunal must also review the settlement and satisfy itself that it represents a reasonable determination of the claim. The critical element of the Security Account -- the security it affords -- would otherwise be destroyed. In the case of an adjudicated claim, access to the Security Account is determined by a procedure which guarantees consistency and fairness. The Security Account cannot provide security for the payment of claims if access to the funds is controlled by Iran. Thus, the Security Account retains the character it was intended to have only if the Tribunal exercises effective control over the process by which settlements are recorded as awards. However, this control does not mean that the Tribunal has to satisfy itself that the agreement between the parties corresponds to the resolution that the Tribunal would have arrived at had it adjudicated the claim on the merits. The Tribunal has only to determine that the parties' resolution makes sense; that it can be adequately explained in the general context of the Claims

Settlement Declaration and in view of the particular circumstances of the claim.

Conclusions concerning the Settlement Issue

The Tribunal has been requested to define under what conditions it may record a settlement between a United States claimant and Iran as an award on agreed terms in accordance with Article 34 of the UNCITRAL Rules. However, as both Governments have contended, this question entails two sub-issues, the first one regarding the extent to which the Tribunal must establish that it has jurisdiction over the claim settled, and the second concerning the question of whether the Tribunal must review the reasonableness of the settlement.

With regard to the first sub-issue, it is an undisputed fact that the extent of the Tribunal's jurisdiction has been determined by Iran and the United States in the Algiers Declarations, which contain detailed provisions on the jurisdiction of the Tribunal, and that, consequently, the Tribunal has no jurisdiction over any matter not conferred on it by these Declarations. Therefore, if requested to make an award on agreed terms, the Tribunal will make such examination concerning its jurisdiction as it deems necessary. However, the Tribunal holds that it would be neither appropriate nor feasible to establish, in abstracto, without reference to the situation in any particular case, a general rule concerning the extent of the examination as to jurisdiction that may be needed, given the large variety of situations in which matters of jurisdiction may arise and the detailed nature and complexity of the provisions on jurisdiction in the Algiers Declarations.

As for the second question, it should first be emphasised that both Governments agree that the Tribunal has to apply Article 34 when making awards on agreed terms. This article provides, in paragraph 1, that a tribunal may record a settlement in the form

of an award on agreed terms only upon a request by both parties and if it accepts to do so.

The legal history of the UNCITRAL Rules demonstrates that Article 34 confers upon a tribunal the power to refuse to record a settlement as an award on agreed terms. (See Preliminary Draft Set of Arbitration Rules, U.N. Doc. A/CN.9/97, Article 28, at 52.) This power is not limited or defined. In drafting the Rules, UNCITRAL repeatedly declined to accept proposals to limit the grounds for refusal to a situation in which the arbitrators found that the settlement violated law or public policy. (See Official Records of the General Assembly, 30th Sess., Supp. No. 17, U.N. Doc. A/10017, Annex I, para. 194; Summary Record of the 167th Meeting of the Eighth Sess. of UNCITRAL, U.N. Doc. A/CN.9/SR.167 at 202-204; Revised Draft Set of Arbitration Rules....Alternative Draft Provisions, U.N. Doc. A/CN.9/113, Article 29, at 24.) However, it is at the same time clear that the power to refuse to record a settlement cannot be exercised in an arbitrary manner.

Although the Tribunal, when deciding on a request under Article 34, should not attempt to review the reasonableness of the settlement in the place of the arbitrating parties, the Tribunal can refuse to record a settlement in the form of an award, provided that it does not act arbitrarily, for example, if the settlement does not appear to be appropriate in view of the framework provided by the Algiers Declarations.

ISSUE III. PAYMENT OF BANK FEES ASSOCIATED WITH THE SECURITY ACCOUNT.

Decision reserved.

ISSUE IV. RESPONSIBILITY FOR INDEMNIFICATION OF THE DEPOSITARY OF THE SECURITY ACCOUNT.

Decision reserved.

The Hague,
Signed, 14 May 1982

Gunnar Lagergren
(President)

In the name of God,

Pierre Bellet

Nils Mangård

Mahmoud M. Kashani

In the name of God,

Howard M. Holtzmann

Shafi Shafeiei

George H. Aldrich

In the name of God,

Richard M. Mosk
CONCURRING

Mostafa Jahangir Sani