

B1-604

U.S. CLAIMS TRIBUNAL

دیوان دآوری دعادی ایران - ایالات متحدہ

604

ORIGINAL DOCUMENTS IN SAFE

Case No. B1 ⁶⁹

Date of filing: 31. Aug 88
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** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
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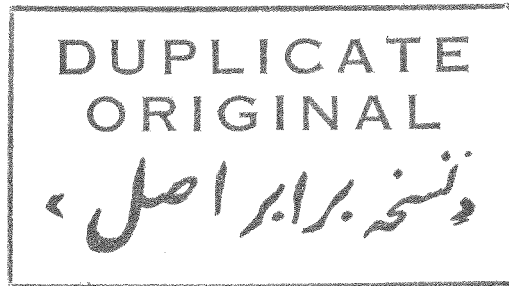
** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of Mr Holtzman
- Date 31. Aug 88
10 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
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** OTHER; Nature of document: _____

- Date _____
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604

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

ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

UNITED STATES OF AMERICA,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	31 AUG 1988
۱۳۶۷ / ۶ / ۹	تاریخ

SEPARATE OPINION OF JUDGE HOLTZMANN,
CONCURRING IN PART, DISSENTING IN PART

I

1. This Claim, as argued by both Iran and the United States, has thus far focused primarily on whether the United States is obligated to return certain Iranian-owned military equipment present in the United States under contractual arrangements providing for its repair or for training purposes. The Partial Award filed today correctly holds that when the United States exercised its discretion not to return the military equipment to Iran it acted legally and in accordance with rights it had expressly retained in the General Declaration.¹ I join fully in that holding.

¹See Paragraph 9 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter cited as "General Declaration").

2. I write separately, however, to explain why I dissent on two points. First, while I agree that the United States should pay Iran the value of the equipment at issue -- which the United States has said from the outset that it is willing to do -- I do not agree with the 26 March 1981 valuation date established in the Partial Award. Second, I believe it is unnecessary and unwise for the Tribunal to determine at this stage of the proceedings that the value of the equipment should be paid directly to Iran rather than being deposited in its Foreign Military Sales Trust Fund (hereinafter "FMS Trust Fund").

3. Finally, while I concur in the remainder of the Partial Award, I disagree with some of the Award's reasoning. In particular, I do not agree with the Majority's needless stretching and twisting of the terms of the General Declaration in an effort to find an implied treaty obligation that requires the United States to do what it has always been prepared to do without any such compulsion.

II

4. While the United States lawfully refuses to permit export to Iran of the military equipment at issue in this Claim, it has repeatedly made clear that it "does not, however, dispute Iran's right to the value of its property."² Nevertheless, there is disagreement concerning the proper valuation date for the items. In the Partial Award the Tribunal determines that "[t]he value of these items shall be calculated as of the time the determination of non-exportability was made and conveyed to Iran, that is as of 26 March 1981." Partial Award, para. 73. A review of ~~the sequence of events and their logical consequences~~ compels my dissent from the holding that the items should be valued as of 26 March 1981. Rather, Iran's conduct in

²United States Hearing Memorial, p. 32 (14 Sept. 1987).

objecting to the United States' proposals in March of 1981 to sell the items leads to the proper conclusion that they should be valued in their present condition, not as they were more than seven years ago.

5. The relevant events are undisputed. Promptly after entering into the Algiers Accords the United States considered whether it would exercise its discretion under the Arms Export Control Act to refuse export of Iranian-owned military equipment located in the United States -- a right which the Partial Award holds that the United States expressly retained in the General Declaration. On 26 March 1981, the Director of Iranian Affairs at the United States Department of State, Mr. Ralph Lindstrom, met with the Chargé d'Affairs of the Embassy of Algiers, who was acting on Iran's behalf. At the meeting, the United States took the position that "exports of such equipment will not be approved, but Iran will be reimbursed for the cost of the equipment insofar as possible." Mr. Lindstrom explained that the decision of the United States "is consistent with the Algiers agreements [and] that U.S. law prohibits military exports without U.S. Government approval, which must be based on a judgment that such exports will be in furtherance of U.S. foreign policy. We are presently unable to make that judgment with respect to Iran."

6. Mr. Lindstrom indicated that in order to reimburse Iran for the value of the equipment that could not be exported, the United States proposed to sell the equipment in the hands of the Defense Department. The Memorandum describing the meeting reports that Mr. Lindstrom stated that "in most cases, we expect to receive full reimbursement of what Iran paid for the property. In some cases, however, special features ordered by Iran [or] deterioration may decrease the value of the property to other purchasers. He stressed that in any event we will do our best. Our record of performance

in disposing of property under previously cancelled orders demonstrates that we will treat Iran fairly."

7. As to the application of proceeds of sales by the Defense Department to Iran's FMS Trust Fund, Mr. Lindstrom said that "[t]he Defense Department, under a previous agreement with Iran, has been disposing of the large volume of items ordered under contracts which Iran had cancelled prior to November, 1979, and is depositing the proceeds to Iran's credit in the FMS Trust Fund. We plan to continue this procedure with respect to Iranian-titled property in the custody of the Department of Defense"

8. The United States then offered to "wait a reasonable time to allow the Government of Algiers to ascertain whether there is an objection to this procedure on the part of the Government of Iran. If we do not hear an objection before April 30 [1981] we will assume that Iran accepts the application of the earlier agreement and will commence seeking alternative purchasers for the Iranian property held by the Department of Defense."

9. Iran promptly requested Algiers to inform the United States that Iran protested the United States' "refusal to deliver to Iran the parts and equipment belonging to it." Iran took the position that the General Declaration required "full restitution of all Iranian property and assets" -- a position that the Tribunal now specifically holds was incorrect.

10. On 26 March 1981, Iran had two options. It could either permit the United States to sell the military equipment at issue in this Claim, or it could refuse such permission, thereby keeping title to the equipment in the hope of eventually receiving permission to export it. Iran choose the second option. In fact, Iran has consistently

maintained that this equipment should not be sold. Thus, when the United States twice during the course of this litigation informed the Tribunal that it intended to sell the equipment for Iran, Iran objected to any such sale. Each time the United States honored Iran's objections because of Iran's ownership of the items.

11. The Tribunal's decision to value the equipment as of 26 March 1981 is flawed because it ignores the fact that the United States held the equipment after that date only at Iran's insistence. By refusing permission for the sale and retaining title to the equipment, Iran knowingly created a situation in which it was likely that the value of the property would decrease. Indeed, if the Tribunal had reached the conclusion that Iran has advocated in these proceedings and had determined that the equipment should be returned, Iran would have received the property in its present state, not in the state that existed on 26 March 1981. Because Iran, not the United States, decided that the equipment should be held, Iran, not the United States, should bear the risk of its decline in value.

12. In sum, the United States on 26 March 1981 proposed to sell the items to obtain their value for Iran. The United States did not do so only because Iran -- the owner of the items -- asked that they not be sold. Iran thereby assumed the risk of any diminution thereafter in the value of the property. Accordingly, Iran must bear the consequences of its action. Now that the Tribunal confirms in the Partial Award that the military items need not be returned, the fair solution is to determine their value in their present condition.

III

13. In addition to determining the value of Iran's unreturned military items, the Tribunal must decide at some point in these proceedings whether that value should be paid directly to Iran or deposited in its account in the FMS Trust Fund. The Partial Award filed today decides that the payment should be made directly to Iran. In my view, making that decision at this stage of the proceedings is premature and unwise.

14. On the issue of the monetary valuation of the equipment, the Tribunal determines that "it is not in a position to make an informed decision on this issue on the basis of the pleadings and the evidence before it." Partial Award, para. 75. That is equally true with respect to how the payment should be made. The briefing by both Governments on this point is scanty. Thus, for example, we do not even have before us a document setting forth the provisions that govern the Trust Fund. Moreover, the Tribunal has neither documentary evidence nor oral testimony fully describing how the Trust Fund operates or the practices and understandings of the two Governments concerning it. It appears that in an earlier transaction the proceeds of the sale by the United States of certain Iranian-owned equipment were deposited in Iran's FMS Trust Fund. Yet the Tribunal has no explanation whether that deposit was based on a specific agreement between the two Governments in the particular circumstances of that transaction or reflected a broader understanding by them concerning their overall financial arrangements involving military equipment.

15. Obviously, the Tribunal has no need to decide how payment to Iran should be made before it has determined how much is to be paid. In view of that, and taking into account the slim record on this subject, I respectfully suggest that there is no need for the Tribunal to rush to a

final decision on this point. Instead, it would be more prudent to invite the two Governments to submit evidence and argument on the Trust Fund issue at the same time that they submit their evidence on valuation, possible set-off of the counterclaims, interest, and responsibility for storage fees and other costs in relation to the property. In that way, the Tribunal could decide the method of payment on the basis of a complete record without delaying the final disposition of this Claim.

IV

16. Payment by the United States to Iran of the value of the military equipment at issue in this Claim is not a contested issue because, as noted, the United States has repeatedly stated that it does not "dispute Iran's right to the value of its property."³ While there are disputes, discussed above, concerning the valuation date and the mechanism of payment, the fundamental willingness of the United States to make payment has never wavered. There is therefore no reason for the Tribunal to search -- and stretch -- the General Declaration in an effort to find some treaty provision on which to rest the United States' payment obligation. Neither the text of the General Declaration, nor its history, nor the conduct of the Parties support such a strained construction.

17. If the Tribunal considers that it must articulate a legal basis for the United States' payment obligation notwithstanding the United States' admission, the proper basis is found in the relevant contracts. As the Partial Award correctly observes, under the contractual arrangements by which the United States came into possession of Iran's property, the United States served as a bailee for the

³United States Hearing Memorial, p. 32 (14 Sept. 1987).

Iranian property. See Partial Award, para. 70. In the circumstances of this Case, the United States' duty as a bailee includes an obligation for it to pay the value of any property which it fails to return.⁴ It is that straightforward contract obligation on which I would rest the liability of the United States.

18. Instead, the Partial Award engages in a discussion of Paragraph 9 of the General Declaration that is both unnecessary and unconvincing. It recognizes, as it must, that Paragraph 9 expressly permits the United States to refuse to export Iran's military equipment and contains no requirement that the United States make any payment in the event it exercises this right. Nevertheless, the Majority finds that "such an obligation is implicit in that Paragraph." Partial Award, para. 66.

19. The Partial Award reaches this implication, first, from reading Paragraph 9 in conjunction with General Principle A in the General Declaration. General Principle A states that the United States will "restore the financial position of Iran, in so far as possible to that which existed prior to 4 November 1979." Yet, as General Principle A makes clear, such restoration of Iran's financial position is required only "within the framework and pursuant to the provisions" of the Algiers Accords. It is undisputed that the relevant "framework" in this context is the provision of Paragraph 9 permitting the United States to exercise discretion to prohibit export of military equipment pursuant to its laws in effect on 4 November 1979. A treaty obligation to pay

⁴See, e.g., D. Burke, Personal Property 152, 162 (1983); G. Paton, Bailment in the Common Law 379-89, 404-18 (1952); see also 6 A. Corbin, Corbin on Contracts § 1368 (restitution where defendant's duty discharged); U.C.C. § 2-614 (substituted performance), U.C.C. § 2-615 (excuse by failure of presupposed conditions).

compensation for failure to return the items cannot arise from a refusal to return the items when, as the Majority correctly holds, no treaty requires their return.

20. Moreover, it is anomalous for the Partial Award to explain at length that in negotiating the General Declaration the two Governments did not consider the military equipment at issue in this Claim to be an element of Iran's "financial position" to be restored pursuant to General Principle A,⁵ and then to invoke the same General Principle in an effort to support an implication that Paragraph 9 obligates the United States to make payment in order to restore that same financial position.

21. The Majority advances a second reason in an effort to support its position that an obligation for the United States to pay for the unreturned military equipment is "implicit" in Paragraph 9. The Majority reasons that the United States' expressions of its willingness to pay the value of the goods constitute evidence of "subsequent practice" that "according to Article 31(3)(b) of the Vienna Convention [on the Law of Treaties], is also to be taken into account in the interpretation of a treaty." Partial Award, para. 68. Here, again, the Majority strains too hard.

22. Subsequent conduct by a State Party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such

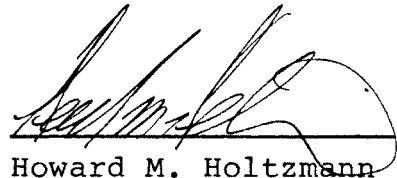
⁵See the particularly strong wording emphasizing this in paragraph 33 of the Partial Award.

conduct would be equally consistent with a recognition of a contractual obligation to make payment.⁶ In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty.

23. Further, in its search for a basis for the obligation of the United States to pay for the equipment at issue, the Partial Award draws an analogy between the United States' refusal to export and an expropriation. See Partial Award, para. 70. I suggest that the general principles of international law to which the Majority refers were developed to meet quite different circumstances and do not necessarily apply in a case such as this, where one State has sent military equipment into another State's territory knowing that the law of the receiving State permits it to refuse permission for export if it considers that export would be inconsistent with its foreign policy. I, therefore, also find the Award's dicta concerning general principles of international law to be unwarranted.

Dated, The Hague

31 August 1988



Howard M. Holtzmann

⁶When asked at the Hearing why the United States was willing to pay Iran the value of its unreturned properties, the Legal Adviser of the Department of State stated that the United States did not wish to be "unjustly enriched." That position is entirely consistent with the duty of a bailee that recognizes that it should pay the value of goods if it does not return them.