IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** DISSENTING OPINION of _____

- Date _____

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دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. A11
FULL TRIBUNAL
AWARD NO. 597-A11-FT

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
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THE ISLAMIC REPUBLIC OF IRAN
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

CONCURRING AND DISSENTING OPINION OF BENGT BROMS

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1. The majority has adopted a narrow textual interpretation of the United States obligations under Point IV that, in my opinion, ignores the interpretation of Point IV in its context and in view of its object and purpose, which was to facilitate Iran's attempts to recover the assets of the former Shah and his relatives in the United States In particular, I believe that the United States should have assisted Iran in its attempts to recover such assets. Neither do I support the Tribunal's interpretation of the term "estate" and the consequent finding that the freezing and reporting obligation as regards the assets of the former Shah never arose. Furthermore, I disagree with the majority as to the treatment of the freeze and reporting obligations in general.

2. I concur in the findings of the Tribunal with respect to the conclusion in paragraph 228, relating to the discussion on "served as a defendant", and with the findings in respect of the properties of Farah Diba, Ashraf and Fatemeh Pahlavi (including co-defendants).

I. INTERPRETATION OF POINT IV IN ITS CONTEXT AND IN LIGHT OF ITS OBJECT AND PURPOSE

3. The majority has been blinded by a rigid textual approach to treaty interpretation in this Case and the majority has showed little understanding for the latter part of Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention")[1], which requires that the terms of the treaty must be viewed in their context and that the interpretation also shall take into account the "object and purpose" of the treaty. In my opinion, Article 31 was undoubtedly meant to be applied as an integrated whole.[2] The strict approach of the majority is epitomized by paragraph 187 of the Award stating that "[t]he object and purpose of Point IV is to grant Iran, through the procedures laid down in Paragraphs 12-15 of the General Declaration, a certain degree of United States assistance [...] to recover Pahlavi assets [...]" I find this narrow textual approach striking in this Case, as the Tribunal has interpreted Article 31 of the Vienna Convention in a much more balanced manner in several of its previous cases. Among them are International Schools Services, Inc. (ISS) and National Iranian Copper Industries Company, in which the Tribunal stated that:

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[1] See Article 31 of the Vienna Convention on the Law of Treaties, signed 23 May 1969, in force 27 Jan. 1980, reprinted in 8 ILM 679.

[2] Cf., Oppenheim's International Law, Vol. 1 at 1272.

> It is to be noted that the Vienna Convention does not envisage that the words of a treaty be regarded in isolation; on the contrary it places 'the ordinary meaning' of those words first within the framework of 'their context' and then within the still wider framework of the 'object and purpose' of the treaty.[3]

4. There is no dispute among the Parties that the Algiers Accords were concluded having the Majlis resolution of 2 November 1980 as the basis for the discussions on how to end the hostage crisis. One of the Majlis demands, the return to Iran of the former Shah's assets, is reflected in the preamble to the General Declaration as well as in the heading of Point IV, which reads "Return of the Assets of the Family of the Former Shah.[4]" It is obvious that preambles and headings form a part of the "context" referred to in Article 31 of the Vienna Convention. Accordingly, the "context" should have been given its proper weight in interpreting the obligations under Point IV.

5. The majority considers the degree of assistance by the United States to be a very limited one. Consequently, the majority accepts the fact that the Claimant was not successful in any of its numerous attempts to recover the assets of the family of the former Shah in the United States. What I also regard as a significant shortcoming is the stand of the majority in deciding the problem whether the United States fulfilled its duty to assist Iran when the technical difficulties

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[3] Award No. ITL 37-111-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 338 at 341. See also The Islamic Republic of Iran and The United States of America, Interlocutory Award No. ITL 63-A15(I:G)-FT (20 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 40, at 46-7 and The Islamic Republic of Iran and The United States of America, Award No. 590-A15(IV)/A24-FT (28 Dec. 1998), paras. 93-5.

appeared in serving the individual respondents and also in regard to the recognition of Iranian decrees and judgments according to Paragraph 14 of Point IV.

6. Furthermore, the majority has failed to consider whether the Respondent, at a minimum, was obliged to act in good faith to assist the Claimant in its efforts. For example, in Case No. A21 the Tribunal has held that:

> the act of entering into a treaty in good faith carries with it the obligation to fulfil the object and purpose of that treaty - in other words, to take steps to ensure its effectiveness. In this respect, the Algiers Declarations impose upon the United States a duty to implement the Algiers Declarations in good faith [...][5]

In light of this, I cannot accept the view of the majority, stating inter alia, that the Justice Department of the United States has fulfilled its duty to assist Iran merely by sending its Suggestion of Interest in one case litigated by Iran in the United States courts. I find it unacceptable that the Award fails to mention that the United States was under an obligation not to block the attempts by Iran but instead to act in good faith by facilitating Iran's litigation attempts.

7. Bearing in mind the special weight the object and purpose of Point IV carry in this Case, my conclusion as to the appropriate interpretation of Point IV is that it obliges the United States to facilitate the return of the assets in question in the United States by allowing Iran access to United

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[4] See also the Tribunal's Award in Case No. B1, Award 382-B1-FT, 31 Aug. 1988, reprinted in 19 Iran-U.S. C.T.R. 273 at 288.

[5] The Islamic Republic of Iran and The United States of America, Decision No. DEC 62-A21-FT (4 May 1987), reprinted in 14 Iran-U.S. C.T.R 234 at 330.

States courts and by giving Iran litigation assistance in such cases.

II. THE APPLICATION OF POINT IV TO THE ESTATE OF THE FORMER SHAH

8. I do not agree with the conclusions of the majority in rejecting the Claimant's argument with respect to the definition of "estate". As a starting point, one should realize that Iran is a civil law State and the concept of estate as explained by Iran follows the generally acceptable interpretation of this term in civil law countries. Therefore, one cannot require that Iran should have understood the term "estate" the way the Tribunal now accepts it. Moreover, the legal technicalities related to the term "estate" in the United States cannot have been known to the Iranian negotiators by the time the Algiers Accords were under negotiation.

9. The majority has chosen to give the term "estate" in the context of Point IV a very specific definition, which was advocated by the Respondent. According to the Award an "estate" is a "formally constituted decedent's estate acting under a representative". It is a general rule of treaty interpretation that a special meaning of a word must be proven.[6] In my opinion, the majority has failed to state the reasons for its interpretation of "estate". Therefore, I cannot agree with

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[6] Cf., e.g., Legal Status of Eastern Greenland Case (1933) P.C.I.J., ser. A/B, No. 53 at 49: "The geographical meaning of the word 'Greenland' i.e. the name which is habitually used in maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is attributed to it, it lies on that Party to establish its contention." See also (Second) Admissions Case, I.C.J. Rep. (1950) at 8: "When the court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking some other meaning."

the Award's treatment of the claim related to the property of the former Shah himself. I regard it incorrect to use the term "formally constituted decedent's estate" in the Tribunal's reasoning as both Parties agree that an estate itself is never a legal entity under United States and New York law.[7] If an estate is not a legal entity it must mean the property and assets left behind by the late Shah. McKinney's Consolidated Laws of New York Annotated confirms this definition, stating that "[d]epending upon the context, "estate" may mean: (a) The interest which a person has in property; (b) the aggregate of property which a person owns."[8] In addition, the use of the word "estate" in New York legal practice confirms that "estate" simply means the "aggregate of property".[9]

10. Thus, there is nothing to support the Tribunal's conclusion in paragraph 211, that the Parties would have intended the word "estate" to have such a special meaning, i.e., "a decedent's estate acting through a personal representative".

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[7] That a decedent's estate is a legal fiction is in my opinion further confirmed by New York Jurisprudence, 2nd ed., vol. 38 (1984) § 53:

> [I]t is the theory of law that all valuable property must belong to someone and that devolution of the assets of a decedent to those entitled thereto takes place immediately on death without any intervening hiatus of ownership[…] Since the law abhors a vacuum, it is the prevalent conception that the rights of those succeeding to property upon a death attach immediately, with no intervening hiatus of ownership.

[8] McKinney's Consolidated Laws of New York Annotated, Estates, Powers and Trusts Law, Chapter 17-B of the Consolidated Laws, § 1-2.6.

[9] West's McKinney's forms, Estates and Surrogate Practice Esp, Ch. 9. Administration of Estates, B. Intestate administration, § 9:25, "Where letters are sought for the administration of the estate of a person alleged to be deceased […]" (Emphasis added.)

The Respondent has not demonstrated that "estate" would carry the special meaning the Award now suggests and the Respondent's definition should therefore be rejected. It is a completely different matter that the action in court is automatically stayed until a representative for the estate is appointed. Such a procedural step is in no way related to the definition of "estate". The appointment of a representative should have been a simple formality, but the outcome in this case was different. The estate would automatically have been a defendant, had a representative been substituted as a party.[10] The only procedural step for that substitution to take place was to appoint a representative, but the New York courts declined to issue such an order, since no assets had been located. The majority's view as now formulated, leads to a regrettable circular reasoning.

11. The second sentence of paragraph 12 of Point IV, "As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect," does not imply that the Parties wanted to give "estate" a special meaning, e.g., a "decedent's estate acting through a personal representative". Since the estate was not a legal entity at the time when the Algiers Accords were signed, it was necessary to refer to the estate in that sentence, so that it would be covered by the freeze order. As the United States and New York law do not require that an estate must be "constituted" to exist, the conclusion in paragraph 214 must be incorrect.

III. THE FREEZE AND REPORTING OBLIGATIONS

12. In my view, there is nothing in Point IV that would require a representative of the former Shah's estate to be appointed and served for the United States freeze obligation to

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[10] NY Civil Practice Law and Rules, s 1015.

be triggered. Because a lawsuit was already pending against the former Shah when the Algiers Declarations were concluded, the properties of the former Shah should have been frozen promptly after the signing of the Algiers Declarations by the executive. In this context, it is particularly important to note that U.S. Treasury Regulation 31 C.F.R. Section 535.217 was amended on 13 May 1981. Since then a proof of service against the estate was required in order to freeze its assets.[11] The original Regulation which was in force by the time of the Algiers Declarations, did not contain this passage.

13. Judging from the steps the Claimant later took in instigating litigation in the United States, the Claimant apparently had accepted that it had to furnish proof of service in respect of the assets that were not under litigation when the Algiers Declarations entered into force, before the assets could be frozen.

14. In respect of the reporting obligation, I would like to point out that, when issuing Executive Order 12284, the United States did not make the reporting of assets dependent on service. As regards the reporting obligation vis-à-vis the former Shah's property, I consequently believe that this obligation entered into force promptly after the signing of the Algiers Declarations, as the former Shah was already properly served at that time. It was the inaction by the United States courts, which failed to appoint a representative for the estate, that caused the lawsuit not to proceed.

15. As regards the reporting obligation vis-à-vis the properties of the close relatives, I see no reason not to accept the Claimant's argument that the Respondent should have instigated

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[11] The amended sentence reads "This provision shall apply only to such estate or persons as to which Iran has furnished proof of service..." (Emph. added).

the reporting obligations immediately after the entering into force of the Algiers Declarations. Looking at the plain meaning of the text in paragraph 13, one finds no support for the finding that the reporting obligation of the United States would enter into force only if the Shah's former relatives have been served. To the contrary, the wording implies that such reports would have to be produced speedily by the United States, i.e., within 30 days from the certification that the 52 United States nationals held hostages in Teheran had safely left the country, as the reports were crucial to the Claimant in order for it to prepare and instigate lawsuits. In case the United States officials could not fully ascertain who the former Shah's relatives were, they needed only to consult the representatives of the Claimant.

IV. FORUM NON CONVENIENS

16. Furthermore, I believe that in Point IV the United States committed itself to provide a United States forum so that Iran's attempts to recover assets of the former Shah and his close relatives could proceed to the merits of the cases Iran chose to instigate.[12] Anything short of that would not be in concordance with a good faith interpretation of the undertakings by the United States.[13] By this I do not mean that the United States guaranteed that Iran's claims would prevail in the United States courts, only that the United States courts

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[12] This has not even been refuted by the United States itself which says that "the purpose of Point IV [...] was to maintain access to U.S. courts on the part of Iran to recover assets that Iran could demonstrate were illegally taken from the Iranian Treasury."

[13] In the words of B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, at 107: "good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances."

would consider them on their merits. A good faith implementation of this international obligation should not entail that a case will be rejected applying forum non conveniens. Even if this happens, it would be reasonable to assume that Iran could take the claim to another court. The fact that the Parties had expressly mentioned the act of state doctrine and the sovereign immunity in paragraph 14 of the General Declaration did not mean that Iran's claims would not necessarily be adjudicated on the merits. Those defenses were only listed as examples of situations where the Claimant in its litigation attempts could rightly expect assistance from the Respondent.

17. In my opinion, the dismissal on grounds of the forum non conveniens doctrine constituted a violation of Point IV in as much as the cases were not referred to another United States court. In order for the forum non conveniens doctrine to become applicable it is required that the court must first have obtained jurisdiction over the parties. A necessary corollary of this is that it cannot be disputed that New York Supreme Court did not have jurisdiction over the former Shah. Also, at the time the Shah underwent hospital treatment in New York, that city was the only domicile of the Shah, because Mexico, where he had resided, informed the United States authorities that it will not grant an entry visa for the former Shah.

18. There was a clear obligation to provide Iran access to United States courts. This access could not be blocked by the interpretation of the United States courts of the forum non conveniens doctrine. The way in which the doctrine was applied resulted in a de facto dismissal of the cases Iran tried to litigate, because the cases were not directed to a perhaps more convenient forum, although that is the raison d'être of the doctrine of forum non conveniens. This meant that the New York courts gave the doctrine a new interpretation, compared

to the existing case law at that time.[14] It was probably clear to the Parties that cases would not be dismissed on grounds of this doctrine, since the normal outcome of the forum non conveniens application is that the case continues in another court. Applying this line of reasoning, one notices that there was no need to mention the doctrine in Paragraph 14 of Point IV.

V. ENFORCEMENT OF IRANIAN DECREES AND JUDGMENTS

19. With regard to the enforcement of Iranian decrees and judgments, I believe that the outcome was incorrect, if one compares it to the Respondent's obligations under Point IV. A good faith interpretation of Point IV necessarily implies that the Claimant can count on the assistance of the United States Government in enforcing these decrees and judgments. Had the United States Government informed its courts properly about the commitments under Point IV, the courts should have viewed the Iranian claims more favorably. The litigation against Shams Pahlavi (paragraphs 59ff.) bears evidence of the fact that the Claimant did not get the assistance it was entitled to under Point IV.

The Hague, 7 April 2000

Bengt Broms

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[14] See, e.g., New York Jurisprudence, Second Ed. Vol. 28 (1997), Courts and Judges, para. 673 and 683.