IRAN-UNITED STATES CLAIMS TRIBUNAL

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** CONCURRING OPINION of _____

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** DISSENTING OPINION of MR AGHAHOSSEINI

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exalted Name

CASE NO. 823
CHAMBER THREE
AWARD NO. 595-823-3

BANK MARKAZI IRAN,
Claimant,

and

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent.

DISSENTING OPINION OF
MOHSEN AGHAHOSSEINI

The Award in the Case at hand is a nullity, and hence of no legal consequences, for two reasons mainly. *First*, in coming to dismiss the claim, the Award adopts a course of action which violates this Tribunal's limited mandate. *Second*, and that violation apart, neither the justification offered for, nor the very outcome of, the adopted course enjoys the support of a true majority. For the reason last mentioned, the Award may indeed be more aptly termed as *inexistent*.

In there, two of the Chamber's three members have examined and offered their conclusion on the merits of the submitted dispute, while expressly refusing to determine

whether or not the claim falls within the narrow and clearly defined jurisdiction of this Tribunal. By doing so they have clearly exceeded the Tribunal's powers, for when Iran and the United States specifically identified, in the Algerian Declarations, the limited types of claims which could be addressed by this Tribunal, they necessarily required the Tribunal not to involve itself with the merits of a claim unless it first ascertained that the claim qualified as one of the identified types. To interfere with and to determine the merits of a claim which may or may not qualify as such -- and this is what the two members have done -- is to transgress the Tribunal's mandate.

What, according to them, mainly justifies this action is the asserted "difficulties involved" in the determination of the central jurisdictional issue of the Respondent's true legal status. That this assertion is factually suspect and, even if it were not, it could not provide a legitimate excuse for simply detouring the threshold issue of jurisdiction, will be demonstrated later. Suffice it to note, for the moment, that of the two members who make that assertion, and rely on it not to concern themselves with the Tribunal's jurisdiction, one has separately proceeded to exhaustively review and to pronounce himself on that very subject, encountering, evidently, none of the contended "difficulties".[1]

And not only that. For he has there concluded, factually, that the Respondent is not a government-controlled, but a private, entity. That finding on facts, coupled with the clear and undisputed terms of the applicable law to be noted shortly, call for the only and inevitable conclusion that the submitted complaint falls outside the jurisdiction of this Tribunal; that this Tribunal could not have legitimately addressed and, *a priori*, determined its merits.

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[1] Concurring Opinion of Judge Richard M. Mosk, filed on 16 November 1999.

The results of all these, too, are quite clear. Any finding by this Tribunal -- as with that of any other multi-member judicial forum -- requires the support of all or at least a majority of its members. Such has not been the case here. Of the Chamber's three members, two have suggested in the Award that since the issue of jurisdiction is difficult to resolve, the merits of the presented claim may be addressed irrespective. And yet of the same two, one has not only treated the issue without the slightest hint of any difficulty, but concluded that the dispute is outside the Tribunal's jurisdiction. It is his true belief, therefore, *that* the excuse offered in the Award for bypassing the issue of jurisdiction is unwarranted, and *that* the Tribunal, lacking jurisdiction, should not have gone further than that stage.

Now that being the case, the rejection of the claim on the merits, supported in reality by one member only, lacks any binding effect. The Claimant, the Central Bank of Iran, is thus free to pursue its claim elsewhere, if it so wishes.

This Dissenting Opinion seeks to elaborate on the points referred to above, and to address a few additional items of relevance. But before that, one point of some affinity with the said points may be conveniently noted here.

It has been suggested by some colleagues in this Tribunal that a member may at times legitimately compromise his view on a given issue in order to form a majority. And when he does so, we are told, it is the view to which he joins, and not his own conviction, that represents his position.[2] Whether this is a legally permissible practice -- and that is by no means certain -- need not be examined here, for even if one were to regard it as such, it cannot possibly rectify the lack of a majority in the instant Case. This is because the practice is at any rate conceivable only where the difference of opinion is a matter of

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[2] See, *e.g.*, Separate Opinion of Members Aldrich, Holtzmann and Mosk, *Case A/1 (issues I, III and IV)*, Decision No. DEC 12-A1-FT (3 Aug. 1982), *reprinted in* 1 Iran-U.S. CTR 200; Concurring Opinion of Richard M. Mosk in *Ultra Systems Incorporated* and *The Islamic Republic of Iran, et al*, Partial Award No. 27-84-3 (4 Mar. 1983), *reprinted in* 2 Iran-U.S. CTR 114.

degrees, and not of principle,[3] especially where the compromise on the latter requires, as in here, not only the abandoning of one's conviction, but the adoption of a diametrically opposite stance.

A typical instance in which such a compromise is said to have been lawfully exercised is where a party's right to receive compensation is upheld by a majority of members, but an agreement on its exact amount requires concession on the part of one or more of them. A closer examination reveals, however, that instances of this nature often do not involve any "compromise" in its real sense, but the simple application of the "majority rule", under which only that much of the proposed amount supported by the majority is granted, and anything in excess of that is disregarded, not because the excess is "compromised" by its proponent, but because it remains unsupported by others.

Where, on the other hand, the difference relates to a material issue in a case and is diametrical, any reversal of position by a member in favour of another's goes not only against the former's judicial mandate but against the very rationale of a multi-member forum; a forum so structured to resolve the submitted disputes on the basis of the unanimous or majority views of its members as individually formed and expressed, and not as expediently reversed.

In the Case at hand, the member who has concluded that the panel on which he sits has no jurisdiction over a given claim believes, or must believe, that the panel is not entitled to enter into the merits of the complaint. To suggest that in order to form a majority he may nevertheless conclude that the panel is entitled to address the merits is to contend, for instance, that a judge who in a criminal prosecution is satisfied of the accused's innocence may still choose to vote for the accused's guilt in order to form a majority. It is a contention which must fail on its face.

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[3] The judgment of the International Court of Justice in the Case Concerning the *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, p. 53, has sometimes been cited in support of the suggestion that even "contradiction" between the adopted and the true positions of an arbitrator would not vitiate the award. This is misplaced, for the Court in that Case specifically concluded that what was said by the president of the arbitral panel in his separate "Declaration" was in perfect harmony with the Award and that "[h]is position therefore could not be regarded as standing in contradiction with the position adopted by the Award." (*Ibid*, at 64). It is true of course that the Court additionally observed, *obiter*, that "even if there had been any contradiction ... [this] could not prevail over the position ... taken when voting for the Award." (*Ibid*) But then what was meant by this was made abundantly clear in the Court's next observation: "As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been *inclined to prefer* another solution." (*Ibid*, at 64-5. Emphasis added)

1. THE AWARD'S TREATMENT OF THE ISSUE OF JURISDICTION

1.1. The Need To Ascertain Jurisdiction

The Iran-United State Claims Tribunal (The "Tribunal") is a judicial forum with a limited jurisdiction clearly defined in the Tribunal's constituent instruments, the Algerian Declarations. As was stated by a full panel of the Tribunal back in 1982:

> It can easily be seen that the parties set up very carefully a list of the claims and counter claims which could be submitted to the arbitral tribunal. As a matter of fact, they knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.[4]

In order to be entitled to address the merits of a case, the Tribunal must therefore first ascertain that what is before it is included in the claims or counterclaims "set up very carefully" by Iran and the United States, the Parties to the Algerian Declarations.[5] And it must do so *ex officio*, that is to say, irrespective of whether or not the Tribunal's jurisdiction is objected to:

> The Islamic Republic of Iran has not raised any objections to the Tribunal's jurisdiction over the claims. However, the Tribunal holds that it has to determine *ex officio* whether it has jurisdiction in this case.[6]

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[4] *Iran* and *The United States* (*Case No. A/2*), 1 Iran-U.S. CTR 101 at 103. See, also, *Iran* and *The United States* (*Case No. A/19*), 16 Iran-U.S. CTR 288 at 289, where it is stated that: "The Tribunal must first determine whether the issue raised by Iran is one which it has jurisdiction to decide".

[5] This, indeed, is a requirement not only with respect to awards on litigated disputes, but with regard likewise to awards recording mutually agreed settlements where, according to the Tribunal's consistent precedent, jurisdiction must first be established at least on a *prima facie* basis. See, *e.g.*, *Iran* and *The United States*, *Case No. A/1* (issue II), 1 Iran-U.S. CTR 144 at 152.

[6] *The United States* and *Iran* (*Case No. B/24*), 5 Iran-U.S. CTR 97 at 99. See also *Component Builders Inc., et al.* v. *Iran, et al.*, 5 Iran-U.S. CTR 216 at 224 ("The Tribunal notes that it has to decide on its jurisdiction *ex officio*") and *Housing and Urban Services International, Inc.* v. *The Government of the Islamic Republic of Iran*, 9 Iran-U.S. CTR 313 at 333 ("Although the Parties have not addressed this question, the Tribunal must always be satisfied that it has jurisdiction, and therefore examines this issue.")

If the Tribunal fails to do so -- if it pronounces itself on the merits of a dispute over which its jurisdiction is not ascertained -- it violates the terms of its mandate. This, indeed, would be the case not only where the dispute does in fact fall outside the Tribunal's jurisdiction, but also where it is covered by its jurisdiction.

The mandate is breached in the former because there the Tribunal interferes with what the Parties to the Algerian Declarations have clearly excluded from the scope of its competence: an unmistakable act of *ultra vires*. The mandate is likewise breached in the latter because there the Tribunal ignores the requirement in the Algerian Declarations, as correctly interpreted in the above-cited rulings, that only the merits of those disputes which are determined to be within its jurisdiction -- and not of the disputes which may or may not be of such character -- should be dealt with by the Tribunal.

It remains to be said that the requirement, under the Algerian Declarations, that this Tribunal should first establish its jurisdiction is not an arbitrary requirement, but the dictate of some serious legal considerations. If an international judicial forum with limited jurisdiction,[7] such as the present Tribunal, bypasses the threshold issue of jurisdiction, it runs the risk of trespassing on the right of another forum which may happen to be the proper one, and which may not necessarily take the same view of the merits. The detrimental effects, on the parties, of an improper forum seeking to offer its

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[7] On the importance of the issue of jurisdiction in the international field, as against the domestic field, see Sir Gerald Fitzmaurice, *The Law and Practice of the International Court of Justice*, 1986, Volume Two, at 435-7: "Whereas in the domestic field ... jurisdictional issues are relatively unimportant ... the exact opposite is the case in the international field. ... Two points of difference can be singled out as being of special importance, and as going far to account for the prominence of jurisdictional issues in the international field.

(a) First, the obligation of the citizen in the domestic field to answer in court depends not on his own volition but upon the law of the land ... In the international field, the obligation of any State to appear before an international tribunal, and consequently the jurisdiction of the tribunal and its competence to hear a particular case, depends directly or indirectly upon the agreement of the parties ...

(b) Secondly, whereas in the domestic field jurisdictional issues present themselves directly or indirectly mainly as *conflicts* of jurisdiction, i.e. as questions of *forum*, this is not at all the case in the international field."

conclusions on the rights and wrongs of their dispute are too manifest to require elaboration.

It is true of course that no such detrimental effects would be suffered by the parties if the forum detouring its jurisdiction happens to be the proper one. But then there is here the equally grave problem of keeping the parties in the dark, not knowing whether their dispute has been settled by a competent forum.

1.2. The Central Issue of Control

The present claim is brought by BANK MARKAZI IRAN ("the Claimant" or "Bank Markazi") against THE FEDERAL RESERVE BANK of NEW YORK ("the Respondent" or "the NYFED") for the alleged breach by the latter of certain contractual arrangements between the two. The basis of jurisdiction, as further clarified by the Claimant in its later pleadings and accepted by the Tribunal, is Article II (2) of the Claims Settlement Declaration, dealing with what has come to be known as "official claims":

> The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

The terms "Iran" and the "United States" are defined in paragraphs 3 and 4 of Article VII of the same Declaration:

> 3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.
>
> 4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

Such being the pertinent provisions, the jurisdictional issues before the Tribunal were, exclusively: (a) whether the Claimant qualified for the term "Iran" as defined in Article VII (3) of the Claims Settlement Declaration (personal jurisdiction); (b) whether the Respondent qualified for the term the "United States" as defined in Article VII (4) of the said Declaration (personal jurisdiction); and (c) whether the claim arose out of contractual arrangements between them for the purchase and sale of goods and services (subject-matter jurisdiction).

Of these, the subject-matter jurisdiction presented no difficulty; both Parties being of the view, supported by the evidence before the Tribunal, that the claim did in fact arise out of contractual arrangements between them for certain identified banking services. No difficulty, either, with regard to the Claimant's status; both Parties again agreeing, in conformity with a whole string of consistent earlier decisions of this Tribunal[8], that the Claimant, the Central Bank of Iran, is an entity controlled by the Government of Iran, and thus covered by the definition of "Iran" in Article VII (3) of the Claims Settlement Declaration. The Tribunal was thus left, concerning its jurisdiction, with the single task of determining whether the Respondent, too, was a controlled entity, and hence within the definition of the "United States", in which case alone the Tribunal would have jurisdiction over the submitted claim.[9]

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[8] See, for instance, *General Electric Company* v. *The Government of the Islamic Republic of Iran*, 26 Iran-U.S. CTR 148 at 153: "Bank Markazi is the central bank of Iran and is wholly owned by the Government of Iran. This Tribunal has repeatedly upheld its jurisdiction over Bank Markazi."

[9] Though in the present Case the proof of the public status of the Respondent was a requirement under Article II (2) of the Claims Settlement Declaration dealing with the "official claims", it should be noted that as far as the respondents before the Tribunal are concerned this is a requirement in all other cases as well, whatever the nature of the claim or the status of the claimant.

1.3. The Parties' Pleadings

On this, the Parties were of opposite views: the Claimant arguing that the Respondent is a controlled entity, and the Respondent denying that it is.

Realizing the determinant effect of the answer to this disputed point on the outcome of the Case, the Parties devoted the greater part of their written pleadings to the said point alone. The evidence dealing with the creation, functions, and the status of the Respondent, as well as the pertinent provisions of the Algerian Declarations and the precedent of this Tribunal, were submitted and exhaustively discussed by them in submission after submission. Written testimonies of expert witnesses, addressing the issue not only under Tribunal law but also under United States law, were provided to the Tribunal.

The same is true of the oral presentations, at which the Parties' counsel and expert witnesses addressed the minute details of every aspect of the issue. In short, the question of whether the NYFED is a private or a controlled entity was one of the two by far more important, and more extensively debated, issues in the present proceedings, the other being the merits of the claim.

The issue having been exhaustively pleaded, both factually and legally, all the Tribunal had to do was to examine the submitted facts pertinent to the status of the NYFED in the light of a number of well-defined tests provided by the Tribunal[10] for the determination of the issue of control under the Algerian Declarations.

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[10] Of which *Dadras International* v. *The Islamic Republic of Iran, et al.*, (Award No. 578-214-3, 25 Feb. 1997, para. 22 *et seq.*) is but one example.

2. THE AWARD BYPASSES THE ISSUE OF JURISDICTION

The Award, as noted before, refuses to make that determination. What it does, instead, is to offer an "evaluation of this jurisdictional issue" in just four paragraphs[11], concluding, contrary to the dictates of law and logic, that the issue of control, and hence the issue of the Tribunal's jurisdiction, need not be resolved at all. This must now be examined.

2.1. The Asserted Difficulties

The Award begins its "evaluation" by suggesting that the issue of control, being of some complexity, is difficult to resolve. That complexity is shown, according to the Award, by the facts: (a) that "[t]he arguments by both Parties on this issue have been extensive"; (b) that "[e]ven the law in the United States as to the status of the Federal Reserve banks is arguably not consistent"; and (c) that "[t]he structure of the United States banking system is intricate". Furthermore, says the Award, the fact "[t]hat the Tribunal received expert evidence on the subject also suggests that the resolution of the issue requires an in-depth analysis of the United States banking institutions". None of these is factually correct or legally relevant.

First, the fact that the issue has been extensively pleaded by the Parties is no ground for the conclusion that the issue is complex, much less that its resolution is difficult. It has, on the contrary, greatly assisted the Tribunal in making a ready determination. This is because as far as the relevant facts are concerned -- the facts pertinent to the state, characteristics, and attributes of the NYFED -- the Parties have had no point of

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[11] Paras. 34 to 37.

disagreement. Nor could they have any, these being all fully recorded and admitted in the NYFED's constituent instruments and official publications.

Thus it was admitted on all hands that the NYFED is an entity whose board of directors include three members appointed by an agency of the government of the United States; an entity whose chairman and vice-chairman of the board of directors are appointed, and the appointments of its president and vice-president must be approved, by the same agency; an entity whose earnings belong not to itself, but to the State's treasury; an entity whose activities may be terminated, and which may be liquidated, not by its share-holders, but by the said agency; an entity whose assets, when liquidated, do not go to its shareholders, but to the State's treasury; an entity in which the approval of its budget, the suspension or removal of its directors, the determination of the salaries of its high-ranking officers, and the auditing of its books, are all done not by itself, but by that government agency; and finally, an entity which is by law exempt from paying federal or state taxes.

With these points firmly established as the Parties' common grounds, the question left for the Tribunal's determination was simply whether the NYFED could still argue not to be a controlled entity under any of the tests of control set by the Tribunal, according to only one of which the mere appointment to an entity of a manager, or a supervisor, or an inspector is repeatedly held to be sufficient for a finding of control by the government of Iran.[12]

Second, there is no inconsistency in United States law on the status of the Federal Reserve banks. In a number of cases in the United States, the courts have been called upon to decide whether Federal Reserve banks are agencies, instrumentalities, or controlled entities of the United States Government in the different contexts of different

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[12] See, for instance, *Dadras International*, above, note 10, paras. 30-31.

statutes. In relation to all but one such statutes, the courts have consistently held that the said banks are indeed of such a status. Here is one example in which the banks are held to be federal instrumentalities for the purposes of immunity from state taxation:

> Federal Reserve banks are instrumentalities of the federal government for purposes of doctrine that federal agencies or instrumentalities are immune from special assessments by state and local governments.[13]

The exception relates to a statute – the Federal Tort Claims Act[14] -- under which the sovereign immunity of the United States is limitedly waived, creating liability on the part of the United States for injuries "caused by the negligent or wrongful act or omission of an employee of any federal agency acting within the scope of his office or employment". Here, it has been held in a case or two that in the specific context of this Act -- for its specific purposes -- a Federal Reserve bank is not to be regarded as a federal instrumentality.[15]

What justifies this different conclusion, say the judgments, is the special context in which the term "instrumentality" is used in the Act, requiring the application of a special test of control.[16] While the "[t]est for determining whether an entity is a federal instrumentality for purposes of protection from state ... taxation ... is very broad",[17] the critical factor

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13 *Federal Reserve Bank of St. Louis* v. *Metrocentre Improvement District*, 657 F. 2d 183 (1981).

14 28 U.S.C. § 1346 (b).

15 See, for instance, *Lewis* v. *United States*, 680 F. 2d 1239 (1982).

16 *Ibid*, at 1242. See also the *St. Louis Case*, above, note 13: "Test for what is 'a government instrumentality' for purposes of doctrine that federal agencies or instrumentalities are immune from special assessments by state and local governments is different from test for determining whether entity is an agency or instrumentality for purposes of the Federal Tort Claims Act."

17 *Lewis*, above, note 15.

under the Federal Tort Claims Act is the "existence of federal government control over 'detailed physical performance' and 'day to day operations' of an entity".[18]

There is, therefore, no inconsistency here. The terms "instrumentality", "agency", or "controlled entity", used in the different contexts of different pieces of legislation enacted for different purposes, have been held, quite consistently, to require different interpretations, and hence different tests. This is nothing but the proper application of a rule of interpretation reflected, in relation to treaties, in Article 31 (1) of the Vienna Convention on the Law of Treaties (1961) under which:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Third, and assuming, for the sake of argument only, that the United States' law on the status of the Federal Reserve banks were inconsistent, this could have nothing to do with the task of the Tribunal in the present Case, which was to determine the status of the NYFED not under United States law, but under its own law; not in the context of this or that statute in the United States, but in the specific context of the Algerian Declarations. If the Parties also chose to deal in their pleadings with the tests of control under certain United States statutes, this was to provide the Tribunal with additional information, and not to invite the Tribunal to lose sight of the tests of control under the Algerian Declarations, clearly defined and firmly established by the Tribunal in a host of decisions.

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[18] *Ibid*, at 1239. The context in which the concept of "control" is used in the taxation statutes is different from that of the Act, according to the above-cited decisions, because the policy considerations pursued by them are different. In the former, the policy is to extend immunity from state taxation, which is traditionally viewed as an obstacle to an entity's ability to perform its federal functions. Hence, the necessity for a more liberal test of control. In the latter, on the other hand, a holding of control would mean that the employees of the entity are in fact civil servants, requiring the United States' Treasury, rather than the employees' insurance companies, to pay for any damages resulting from the employees' negligent acts. Hence, the necessity for a less liberal test. See *Lewis*, above, note 15 at 1242-3.

Sadly, however, there is not a word in the Award's treatment of the issue on either the text of the Algerian Declarations -- the context in which the term "control" is used there -- or on the well-established law of this Tribunal on the subject. Had the issue been correctly addressed -- had the Tribunal's clear law on the subject been applied to the undisputed facts pertinent to the NYFED's status -- the Award would have found it difficult to speak of the "complexity" of the issue.

Fourth, and assuming, again for the sake of argument, that the issue were indeed complex, the question would remain as to how the asserted complexity of an issue may provide a valid excuse for leaving it undecided, particularly where the determination of the subject constitutes, as it does here, a condition precedent to the resolution of other disputed points in the Case. Jurisdictional issues of real complexity have been routinely decided by this Tribunal before, albeit against Iran, of which the Tribunal's finding of jurisdiction over Iran's Foundation for the Oppressed is but one example.[19] In none of these instances has the Tribunal declined to perform its duty because of the complexity of the matter before it; and rightly so, for the Tribunal's task is not limited to pronouncing itself on matters which are free from complexity.

2.2. The Parties' Supposedly Different Approaches

The Award states, next, that:

> "Furthermore, the Parties seem to have approached the matter from different perspectives. On the one hand, it seems difficult to overlook some kind of institutional attachment of the New York Fed to the FRS and the existence of some measure of control over the New York Fed by the FRS Board of Governors. On the other hand, it would be equally hard to overlook the private law nature of the relationship between the Parties. Faced with such contradictory facts and arguments, as well as with the particular difficulties involved in the resolution of this issue, the Tribunal

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[19] 9 Iran- U.S. CTR 172.

> believes that a final determination of this matter should only be undertaken if the merits of the claim so required."[20]

The Award's assertion that there are "particular difficulties involved in the resolution of this issue" has already been dealt with. It is based on the Award's misinterpretation of the pertinent United States' law and, more importantly, on its refusal to address the status of the NYFED in the context of the Algerian Declarations, rather than in relation to different United States' statutes. Regrettably, it is that very refusal which manifests itself here again. It is that very refusal which leads the Award to speak of the Parties' having "approached the matter from different perspectives", and to contrast the NYFED's "institutional attachment" to the Government of the United States, on the one hand, and "the private law nature of the relationship" between the NYFED and Bank Markazi, on the other.

But is there any justification for such observation and, in particular, for the asserted contrast? Not, certainly, under the Algerian Declarations, or under any of a host of Tribunal awards dealing with the issue of control in identical or similar instances. In every one of these awards, once an entity is shown to be institutionally controlled by the State concerned -- whether through the ownership of its stock or through the appointment of its managers, supervisors or inspectors by a public authority[21] -- the Tribunal has, based on the explicit text of the Algerian Declarations, affirmed its personal jurisdiction over that entity. In none of these have the parties been concerned with, nor has the Tribunal found it relevant to address, the nature of the relationships involved.

In fact, the introduction in this single Case of the concept of private, as against public, law nature of the relationship between the NYFED and Bank Markazi is the product of

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20 The Award, para. 35. The FRS (the Federal Reserve System) is, as admitted by both Parties, an agency of the Government of the United States.

21 See, for example, *Dadras International*, above, note 10 at paras. 30-31.

the NYFED's imagination only, faithfully adopted by the Award in total disregard of the fact that it has no place under the Algerian Declarations, and is therefore wholly irrelevant to the Tribunal's task of addressing the issue of control under the said instruments. The concept belongs to the subject of State Responsibility under general international law and, as the NYFED repeatedly admits in its submissions,[22] it is used as a factor in determining whether or not a given action is attributable to the government concerned.

This has, of course, nothing to do with the commitment by Iran and the United States under the Algerian Declarations to meet the obligations of any entity which, by virtue of control, comes within the definition of Iran or that of the United States, respectively. It has, indeed, been on the basis of that very commitment that the Government of Iran has been ordered, in case after case, to pay the debts of its controlled entities arising from purely private commercial relationships with the United States' entities or nationals. In none of them has the Tribunal sought to satisfy itself of the attributability of the action to the Government of Iran.[23]

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[22] Of which the following passage is an example:
"Suppose ... that New York Fed ... possessed the status of an 'agency, instrumentality or entity controlled by the Government of the United States.' Suppose further that Bank Markazi stated a coherent legal claim supported by facts. It would remain true nevertheless that the Tribunal would not have jurisdiction over the claims pressed in this case against New York Fed. The reason is that the New York Fed's actions cannot be attributed to the Government of the United States, but instead were taken in the context of a wholly private agreement between the New York Fed and Bank Markazi."

[23] In support of its attempt to introduce the notion of 'attributability' into the Algerian Declarations, the NYFED invokes a single case: *International Technical Products Corp.* v. *Iran, et al.*, 9 Iran-U.S. CTR. 206. It is a case, however, which not only says nothing of the sort but, on the contrary, comes to the exactly opposite conclusion. There, the Tribunal found that Bank Tejarat, being a controlled entity, came within the Tribunal's jurisdiction and, on the merits, was required to cancel all the guarantees it had issued in relation to the contracts in dispute. It goes without saying that, had there been any monetary judgement against the Bank, Iran would have been required to pay it out of its Security Account.
The Claimant had additionally contended, however, that the taking of a certain building by the Bank amounted to the expropriation of the building by the Government of Iran under international law. As to this, the Tribunal rightly rejected the Claimant's contention, stating that even if the Bank had come to possess the building "in an illegal manner, this would not automatically establish responsibility of the Government under international law" because "the evidence does not suggest that Bank Tejarat when taking possession of the building acted on instructions of the Government or otherwise performed governmental functions". (*Ibid.* at 239.)
In the present Case, the NYFED is sued for breaching the terms of a contract and, as such, exclusively governed by the first of the above two findings, under which the Tribunal's jurisdiction over a "private law relationship" is clearly affirmed.

In short, the unambiguous text of the Algerian Declarations, as well as Tribunal precedents set during the past nearly two decades, demonstrate firmly that there is here one consideration only: the institutional attachment. And that being the case, the very finding in the Award that "it seems difficult to overlook some kind of institutional attachment of the New York Fed to the FRS and the existence of some measure of control over the New York Fed by the FRS Board of Governors" ought to have put an end to the matter.

The Award's attempt, therefore, to contrast the institutional control of the NYFED, on the one hand, and the assertedly private law nature of the underlying transactions between the Parties, on the other hand, is a flat violation of Tribunal law on the subject of control, under which law there is no room for the latter consideration. And it is not a violation without significant consequences. It is, on the contrary, the violation of a law which, throughout the life of the Tribunal, has been applied to make Iran liable, in a host of cases, for the obligations of entities only institutionally controlled by Iran. That law ought not to have been violated by the Award, if only because what is good for the goose must be good for the gander.

It may be the case that in referring to the private law nature of its relationship with Bank Markazi, the NYFED has been influenced by the phrase *official claims* in Article II (2) of the Claims Settlement Declarations, on the basis of which the present claim has been pursued.[24] If so, the NYFED is guilty of an obvious misreading of the text of the Article, so obvious that the Award, at any rate, ought not to have readily fallen for it.
That text is abundantly clear on the subject:

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[24] The following passage, quoted from one of the NYFED's written pleadings, supports this view: "In order to establish the Tribunal's jurisdiction over an 'official claim' the conduct which forms the basis for the claim must be properly attributable to the government. Conduct which is fundamentally private even if undertaken by a government entity cannot give rise to an official claim."

> The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

It will be seen that what constitutes the Tribunal's subject matter jurisdiction under this Article is any contractual arrangement -- of whatever nature -- for the purchase and sale of goods and services, provided only that the parties to such an arrangement are Iran and the United States, that is to say, the Governments of Iran and the United States or their agencies, instrumentalities, or controlled entities. If the claims are there described as *official*, this is because of the statuses of the parties, and not because of the nature of the transactions giving rise to such claims; there is simply no reference in the Article to *official* as against *private* contractual arrangement.

This, indeed, is precisely how the Article has been consistently interpreted by the Tribunal in tens of cases involving *official claims*, docketed as "B Cases". In every one of them, the Tribunal has simply looked at the statuses of the parties and, satisfied that they are governments or controlled entities, has determined the claim to be *official*. In every one of them, that determination has left the Tribunal with the only additional issue of whether the underlying transaction has been for the purchase and sale of goods and services, irrespective of the nature of that transaction. A typical example of these is the Tribunal decision in *Case No. B9*, a claim by *Iran Air* against the United States.[25]

> [T]he Tribunal is satisfied, that the Claimant is an 'agency, instrumentality, or controlled entity' of the Government of the Islamic Republic of Iran and therefore comes within the definition of 'Iran' ...
>
> ... The Respondent is the Government of the United States of America ... and clearly comes within the definition of 'United States' ... .
>
> ... The Claim is therefore an 'official claim' between 'Iran' and the 'United States' pursuant to Article II, paragraph 2 of the Claims Settlement Declaration. The Tribunal's jurisdiction over such claims is limited to those which arise out of 'contractual arrangements ... for the

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[25] 17 Iran-U.S. CTR 214.

> purchase and sale of goods and services.' The Tribunal is satisfied ... that the transportation of goods by Iran Air for the account of the United States constitutes 'contractual arrangements' ...[26]

Further examples need not be quoted here.[27] They reveal a consistent pattern of defining *official claims* in terms of the public nature of the parties to the underlying contractual arrangements, without any reference to the nature of those contractual arrangements, or the attributability of such arrangements to the governments concerned. The Award ought not to have arbitrarily deviated from this solid and sound interpretation of the Article, simply because this time the status of the NYFED was at issue.

2.3. The Alleged Specific Circumstances

As noted earlier, an asserted, but in fact nonexistent, difficulty in the determination of the NYFED's status is invoked by the Award in support of the suggestion that "a final determination of this matter should be undertaken if the merits of the claim so required". The Award then states:

> In light of both the relatively straightforward nature of the merits, and of the decision relating thereto, and in the interests of judicial (here Tribunal) economy, the Tribunal believes that, under these specific circumstances, this jurisdictional issue need not be resolved.[28]

These, too, are highly flawed. *First*, the Award's reference to "the interest of judicial ... economy" makes no sense in the light of the Award's own conclusion, in its nutshell

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[26] *Ibid*, at 215-216. As indicated in that Award (footnote 5), the invoices in dispute were originally addressed against a number of U.S. agencies. But "[t]he United States has responded to all of the claims, considering that this is more consistent with the Algerian Declarations". The contractual arrangements, therefore, were originally made between Iran Air and various United States' agencies and not the United States' Government.

[27] But see *Case No. B/2*, 13 Iran-U.S. CTR 155; *Case No. B/7*, 12 Iran-U.S. CTR 25; *Case No. B/8*, 17 Iran-U.S. CTR 187; *Case No. B/12*, 17 Iran-U.S. CTR 228; *Case No. B/13*, 13 Iran-U.S. CTR 158; *Case No. B/18*, 13 Iran-U.S. CTR 161; *Case No. B/20*, 13 Iran-U.S. CTR 164; *Case No. B/40*, 17 Iran-U.S. CTR 183; *Case No. B/51*, 17 Iran-U.S. CTR 200; *Case No. B/55*, 23 Iran-U.S. CTR 320.

[28] The Award, para. 35.

treatment of the issue, that the NYFED's institutional attachment to, and control by, the United States cannot be overlooked. Such a conclusion, as suggested earlier, was all that was needed for the determination of the Tribunal's jurisdiction in the present Case. *Secondly*, the contention that the merits of the dispute and the decision relating thereto have been of a "relatively straightforward nature" is belied by the Award's own treatment of the issue in some 22 of its 48 pages, the rest being devoted, for the most part, to the "Procedural History" of the Case.

Thirdly, and more importantly, since the very right of this forum to address the merits of a dispute depends, as already seen, on the forum's prior determination that it has the authority to do so, it may not, clearly enough, begin by examining the merits and making a decision thereon in order to see whether, depending on the complexity of the merits and "the decision relating thereto", the issue of its authority, challenged by one Party, should be revealed. How, then, does the Award propose to do that – to put the cart before the horse, as it were? It relies on two legal authorities.

2.4. The Award's Legal Justifications

First, citing a number of Cases before the Tribunal, the Award contends that "[i]n several instances, the Tribunal has dismissed a claim on the merits without deciding the jurisdictional issue."[29] A glance at these Awards will reveal at once, however, not only that they do not support the Award's proposed course of action here, but that they all firmly militate against it.

In every single one of the cited Awards, the Tribunal has first dealt with, and expressed itself on, all the issues material to its jurisdiction. In every single one of them, the Tribunal has first addressed the statuses of the parties -- including the issue of their control -- and ascertained its jurisdiction over them, before reaching the merits. It has

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29 The Award, para. 36.

done so even where the status of a given party has not been in dispute. They therefore directly reject the suggestion that the issue of the status of a party -- especially where that is in dispute and more especially where, as in the present Case, it forms a most important contentious issue -- may be bypassed.

If they have, on rare occasions, declined to determine certain tangential jurisdictional issues, it has been because of the mootness of those issues in the circumstances, or because no evidence in support of the claims was offered. The former was the case with three of the five Awards cited in the Award.

Thus, in *Ultrasystems Inc.* v. *Iran, et al*,[30] the Tribunal first examined the statuses of the parties and found that it had jurisdiction over them and over the submitted dispute. Turning to the merits, it found that the contract at issue had been terminated by the parties' mutual agreement on a certain date, and that the respondent was only liable to pay compensation for costs resulting directly from the termination.

Various items of the claim were then examined to see whether or not they were incurred in connection with the contract's termination. On one of these items -- the medical expenses for personal injuries assertedly sustained by an employee of the claimant -- the respondent had raised the defence of "popular movements".[31] The Tribunal found it unnecessary to address this jurisdictional defence since, in any event, personal injuries had nothing to do with the contract's termination.[32] In other words, a prior finding on the

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30 2 Iran- U.S. CTR 100.

31 Under Article 11 of the General Declaration, the United States undertakes, *inter alia*, to "bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to ... injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran."

32 *Ibid*, at 110.

merits -- with respect to which jurisdiction had been first established -- had led to the irrelevancy of the jurisdictional objection.

Similarly, in *International Schools Services, Inc.* v. *National Iranian Copper Industries Company*,[33] the Tribunal found, again having ascertained its jurisdiction over the parties and over the dispute, that the respondent was liable for paying compensation to the claimant for losses incurred prior to, but not after, the termination of the contract at issue. Since certain asserted losses had been incurred after the termination of the contract, the issue of whether or not they were covered by the "popular movements" exclusion was found to be immaterial.[34] Once again a rejection on the merits, with regard to which jurisdiction had been properly established, had made it unnecessary for the Tribunal to address a further jurisdictional objection.

The same is true of the decision in *Grune and Stratton, Inc.* v. *The Islamic Republic of Iran*,[35] in which the Tribunal, again having established its jurisdiction over the parties and the claim, dismissed the claimant's contention that it had sold and delivered books to two Iranian entities. Because of that holding on the merits, there was no need for the Tribunal to reach the issue of whether it had jurisdiction to examine the legality of Iran's exchange control restrictions.[36]

The remaining two Cases cited by the Award have nothing to do with the present Case either. In both, the Tribunal once again first examined and satisfied itself of its personal and subject-matter jurisdiction over the parties and the claims. It considered it unnecessary, however, to reach a tangential jurisdictional point with respect to certain

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33 9 Iran- U.S. CTR 187.

34 *Ibid*, at 195-196.

35 18 Iran- U.S. CTR 224.

36 *Ibid*, at 227-228.

counterclaims simply because the counterclaimants had failed to produce the minimum evidence required to move their counterclaims forward.

Thus, in *American Bell International Inc.* v. *The Islamic Republic of Iran, et al.*,[37] the respondent had offered no evidence in support of its counterclaim for allegedly unpaid taxes and security premiums, requesting the Tribunal instead to order the claimant to produce its relevant payment documentation. The Tribunal rejected this request and, with no evidence of whatever sort before it, found no reason to express itself on the pertinent jurisdictional issue.[38]

Likewise, in *Avco Corporation* v. *Iran Aircraft Industries, et al*,[39] the respondent had conceded that certain purchase orders, on which the counterclaims were based, did not arise out of the contracts upon which the claimant had based its claim, and the Tribunal stated that in the absence of any indication and evidence, it was "unable to determine whether [the purchase orders] formed part of the same transaction or occurrence",[40] as required by the terms of the Claims Settlement Declaration.[41] The Tribunal noted, however, that the respondent had similarly failed to adduce any "evidence" of whatever nature in support of its counterclaims, and decided that, because of the said failure, it did not need to reach the issue of jurisdiction. As with *American Bell*, there was simply no case to answer.

Such being the Tribunal's decisions in the Cases invoked, it remains for the Award to explain how they can provide any justification for the Award's extraordinary suggestion that the central and fiercely disputed issue of jurisdiction in the present Case may be left

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37 12 Iran- U.S. CTR 170.

38 *Ibid*, at 227-228.

39 19 Iran- U.S. CTR 200.

40 *Ibid*, at 222-223.

41 Under Article II (1) of which a counterclaim would fall within the Tribunal's jurisdiction only if it arises "out of the same contract, transaction or occurrence that constitutes the subject matter of [the] claim".

undecided. This is a Tribunal whose mandate is limited, *inter alia*, to hearing complaints against *Iran* and the *United States*, as those terms are defined in the Algerian Declarations. How can it propose, then, not to decide the threshold issue of whether or not the Respondent in the present Case comes within the definition of the *United States*, relying, as it does, on a few cases in every single one of which the statuses of the parties have been first and foremost dealt with?

The Award's *second*, and last, legal justification for bypassing the issue of jurisdiction is a passage in Judge Morelli's Dissenting Opinion in the *Barcelona Traction Case*:

> If a certain order is not imposed by any logical necessity, it is for the court to determine the order that may most suitably be followed. In this connection, the Court may be guided by various criteria and these, as I have said, might even be criteria of economy. Thus the Court might find it desirable to start by considering a question of law that is so presented that it is easy to settle, before entering upon the consideration of a complicated question of fact, if it appears that a possible decision of the question of law might obviate the necessity for considering the question of fact. Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), Preliminary Objections, 1964 I.C.J. 97 (24 Jul.).[42]

Apart from the facts that this is a Dissenting Opinion, and that Judge Morelli's observations relate exclusively to the issue of *preliminary objections* under the old and now replaced ICJ Rules, and thus have nothing to do with the issue before the Tribunal, it will be observed that this quoted passage says the very opposite of what the Award tries to advocate. This must be briefly explained.

Under Article 62 of the 1946 Rules of the Court,[43] a party who wished to file a *preliminary objection* was required to do so *before the expiry of the time-limit fixed for the delivery of its first pleading*. If it did so, the Court was required to suspend the proceedings on the merits, deal instead with the submission, and either *give its decision on the objection or join it to the merits*.

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42 The Award, para. 37.

43 Later modified in the 1972 and 1978 Rules of the Court.

What Judge Morelli says in his Dissenting Opinion is that the expression *preliminary objection* may be understood in two senses: the first referring to an objection which is not necessarily of a preliminary character, but is called preliminary because it is submitted under Article 62 at a preliminary stage, and the second referring to the preliminary nature of the objection in its relation with the other questions that have to be decided in the case. In short, one denoting the means by which the objection is submitted, and the other denoting the nature of the objection.

Although it is true, he says, that Article 62 is on the face of it concerned not so much with the character of the objection but with the means by which it may be presented, it is quite obvious that a *question can constitute the subject of a preliminary objection ... only if a decision on that question is logically necessary before proceeding with the consideration of other questions. The necessity for such a character*, he suggests, *is only impliedly prescribed by Article 62.*

Having made these introductory observations, Judge Morelli comes to his conclusions. The first, cited in the Award, is that if a certain order of priority is not imposed by any logical necessity, it is for the Court to determine the order that may most suitably be followed, whatever the wishes of the parties. The second, ignored by the Award, is that when the order between the different issues is imposed by any logical necessity, that order must be observed by the Court, irrespective of any other consideration. And, interestingly, he himself hastens to give a prime example of where an order is imposed by logical necessity:

> It is quite obvious that the question whether a decision on the merits is or is not possible must necessarily be settled before the merits are considered.[44]

Now it is of course that *quite obvious* point which the Award proposes to defy. It proposes to consider the merits of the present Case before settling the question *whether a*

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[44] *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, I.C.J. Reports 1964, p. 6, at 99. As an example of the case in which no order of priority is dictated by logical necessity, he exclusively refers to where the different questions raised are all related to the merits.

decision on the merits is or is not possible. This, says Judge Morelli, *cannot be done*; and yet he is cited by the Award in support of the proposition that it *can be done*.

Speaking of the ICJ Rules, a further word should be said on the strict approach there adopted with regard to the *timing* at which the issue of jurisdiction must be determined. As noted before, once an objection to the jurisdiction is filed, *the proceedings on the merits shall be suspended* until such time as the objection is decided upon. In the words of a former President of the Court, *The Court must satisfy that it possesses jurisdiction, not only before deciding the case, but before hearing its merits.*[45]

Our own Tribunal Rules prescribe a more flexible approach. As indicated in Article 21 (4), there is no strict requirement to suspend the proceedings on the merits before deciding the issue of jurisdiction, though this is recommended:

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.[46]

But if this Tribunal is not strictly prohibited -- unlike the International Court -- from *hearing* the merits of a case before ascertaining its jurisdiction, it is certainly not allowed -- here in line with the International Court -- to *decide* the merits before its jurisdiction is established. And this for the same legal and logical considerations which forbid the International Court to do so, both being fora of limited jurisdiction only.

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[45] E. Jimense de Arechaga, 'The Amendments to the Rules of Procedure of the International Court of Justice', 67 American Journal of International Law, p. 12 (1973). Indeed, even where a party does not appear before the Court or fails to defend its case, the Court must, under Article 53 of its Statute, still satisfy itself, before deciding on the merits, that it has jurisdiction to do so.

[46] In fact, the Tribunal has at times suspended the proceedings on the merits, especially when there has been a request to that effect. Thus, this very Chamber has stated, in respect of Article 21 (4) of the Tribunal Rules, that: "The intention of this provision is to relieve both the Tribunal and the Parties from the burden of further pleadings and expenses involved in pursuing the claim, since, if the Tribunal determines that it lacks jurisdiction, it will not be required to rule on the merits of the claim. The Tribunal therefore concludes that it is appropriate to decide the issue as preliminary matter ..." Doc. No. 23 in *Case No. 11429*, Chamber Three.

3. CONCLUDING REMARKS

Ordinarily, the ideal outcome of a proceeding for a defendant would be the rejection of the claim on the merits. For the Defendant NYFED, however, this would have posed a problem because, under the terms of the Algerian Declarations, such an outcome could be attained only on the basis of a prior finding that the NYFED is an entity controlled by the Government of the United States; a holding which the NYFED, for reasons it knows best, was anxious to avoid.

Recognizing the indispensability of a prior affirmation of control to any pronouncement on the merits, and balancing its interests, the NYFED made its choice. It argued *that* "the NYFED is not a government agency", *that* as a result, "the claim falls outside the Tribunal's jurisdiction, and *that* "the Tribunal's lack of jurisdiction over [the] claim precludes a consideration of its merits".

But then what the NYFED evidently could not have imagined, or wished for, was the Award's preparedness to attempt to fully meet the NYFED's interests, however incompatible: its readiness to examine in minute detail the evidence on the merits and to reject the claim on that basis, while refusing at the same time to hold that the NYFED is a controlled entity.

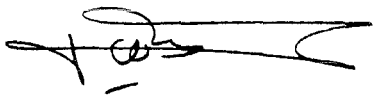
In trying to reconcile the irreconcilables, however, the Award fails, not only because it falls short of offering any sound factual or legal justification, but also because in what it offers it is directly contradicted by one of its two supporting signatories in his Concurring Opinion.

And finally a word in response to a possible, if not probable, inquiry as to my own positions on the substance of the disputed issues of jurisdiction and merits. With regard to the former, the decision by two colleagues that the Tribunal need not deal with the issue

of jurisdiction makes it injudicious of me to pronounce myself on what has not been properly deliberated upon. With respect to the latter, the suggestion throughout the present Dissent that this Tribunal may address the merits of a dispute only after the affirmation of its jurisdiction makes it impermissible for me to take up the merits of a dispute on which the Tribunal's jurisdiction is left unresolved.

Dated, The Hague

13 June 2000



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