

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان دآوری دعاوی ایران - ایالات متحدہ

In the Name of God

CASE NO. A15 (I:G)

FULL TRIBUNAL

AWARD NO. ITL 63-A15 (I:G) -FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	4 SEP 1986 ۱۳۶۵ / ۹ / ۱۲
No.	A-15

CONCURRING OPINION OF HAMID BAHRAMI

Although I concurred in the Award issued in the present case in order to obtain a majority, I believe, on the basis of the considerations set forth below, that the Tribunal's decision does not conform to the arguments enunciated in the Award, and that instead of interpreting the provisions of the Declarations and settling the dispute, it has assumed the role of mediator in inviting the Parties to engage in negotiations. In my opinion, the Algiers Declarations, which constitute the basis on which this international arbitral Tribunal was established, do not confer any such authority upon the Tribunal. Rather, having determined that it has jurisdiction, the

Tribunal must issue a final and peremptory decision on the basis of the rules of international law.

1. Pursuant to Article II of the Claims Settlement Declaration, this Tribunal was established for the purpose of deciding those claims and other matters which are within its jurisdiction. Moreover, Article 17 of the General Declaration, upon which the finding in favor of the Tribunal's jurisdiction in the present interpretive decision is based, provides that the two Governments shall refer their disputes over interpretation of the Declaration to binding arbitration by this Tribunal. The said Article also gives the Tribunal the competence to award damages arising out of any breach of obligations. However, it does not confer upon this Tribunal the power to issue advisory opinions or to invite the Parties to engage in negotiations.

2. On the basis of Article V of the Claims Settlement Declaration, this Tribunal shall make its awards solely on the basis of law; and the applicable law in any interpretation of an international treaty is, the standards of international law as set forth in the Vienna Convention. An examination of the provisions of the Vienna Convention nowhere yields the inference that, in interpreting the Declaration, and after having determined the duty of one of the Parties thereto, this Tribunal may refrain from issuing a decision and [merely] require the Parties to engage in negotiations.

3. Article 33, paragraph 2 of the Tribunal Rules provides that

"The arbitral tribunal shall decide ex aequo et bono only if the arbitrating parties have expressly and in writing authorized it to do so."

Issuance of the interpretive decision as done in this claim (in the sense that the Tribunal (firstly) determined that it had jurisdiction, and (secondly) rejected the Respondent's opinion that this dispute should be resolved through negotiations; and yet granted the Parties a four-month period within which to negotiate over the fixing of the amount that should remain in Dollar Account No. 1) in actuality constitutes a kind of mediation between the Parties to the claim, one given without their consent and which is unjustifiable.

4. Up to section 68, the Award fully conforms to the specific decisions taken in the deliberative sessions, and it is for this reason that I have concurred in the said Award, in order to secure a majority. In the course of the deliberations, there were two basic issues, which were decided following sufficient examination. These two issues were: first, whether or not the Tribunal had jurisdiction over the said dispute over interpretation; and second, whether or not the United States Government is obliged under the Declarations to return the remaining balance in Dollar Account No. 1 promptly. By a majority vote, the Tribunal ruled, first, that the dispute brought did relate to the interpretation of the Declarations and was for this reason within the Tribunal's jurisdiction; and second, that so long as Iran is continuing to carry out its obligations under the Algiers Declarations, there is no reason for the United States to refuse to return the remaining balance in Dollar Account No. 1. Naturally, the Award should conform to the decisions arrived at by majority vote, and the Tribunal should require the United States Government to transfer the remaining balance in Dollar Account No. 1 to Iran immediately. In my opinion, the contents of the Award from section 86 onwards do not conform to the decisions made by a majority vote of the Tribunal. In actuality, in preparing the final draft Award the Tribunal attempted to act as

mediators between the Parties, by adding paragraph 68 instead of incorporating the majority's decisions, and by requiring the Parties to enter into negotiations. Given that the Tribunal has itself noted that between May 1982 and the present time there has been no withdrawal of funds from Dollar Account No. 1 for the purpose of repaying the syndicated debts, I cannot possibly understand what issues the two Governments are supposed to negotiate during the four months following issuance of the Award. (The disposition of the other matters set forth in the text of the Award as issues to be negotiated is also clear, as shall be explained in the present Opinion, infra, and there is no need to negotiate them.) Therefore, I do not consider the Award rendered in this case to be justifiable where it fails to reflect the legal arguments elaborated therein.

5. I do not believe section 68 to be compatible with the other provisions of the Award, because in this section the Tribunal invites the Parties to enter into negotiations immediately, whereas in section 61 of the same Award, the Tribunal expressly rejects the opinion of the United States, which asserted that paragraph 4(a) of the Escrow Agreement can be construed as meaning that the two Governments had intended that any disputes relating to Dollar Account No. 1 should be settled through negotiations. It further states that the Agreement must be performed in good faith on the basis of the Vienna Convention on Treaties, but the said paragraph does not support any inference that negotiations shall be held to this end. In section 66 of the present Award, the Tribunal finds that in so far as Iran performs its own obligations in carrying out the Declarations, there is no justification whatever for retaining the remaining balance in Dollar Account No. 1. In the light of these arguments, the Tribunal should have issued an Award

requiring return of the remaining balance in Dollar Account No. 1, rather than concluding from these premises, as it did, that the Parties should enter into immediate negotiations for the purpose of resolving their disputes relating to the determination of the amount which should be kept in Dollar Account No. 1.

6. As the Tribunal itself observes, no new claim has been made to the Federal Reserve Bank on the syndicated debts since May 1982, and Bank Markazi Iran has not been informed of any possible future demand. Therefore, it can be ascertained that no bank has any other claim against the said account. Local rules of law, and conventional banking practice, require that banks at least send their customers invoices within an appropriate period of time; and pursuant to the law of some states, such claims must be pursued within a short period of time or else they will fall under the provisions of the statute of limitations. Moreover, the Tribunal should assume that if a bank has refrained for six years from bringing its claim, intentionally and in order to keep the monies in Dollar Account No. 1 blocked, then it is barred by laches and by injury to the other party, from recovering its hypothetical entitlement.

Therefore, [the request that the Parties enter into] negotiations for the purpose of determining what claims have not yet been paid out of Dollar Account No. 1 constitutes the granting of a grace period to the Government of the United States, something which that Government has not even requested. In addition, if any new claim is submitted to the Federal Reserve Bank of New York during the negotiations, it will have lapsed anyway, since it will be estopped by laches. In my opinion, the negotiations which the two Governments are required by the Tribunal to conduct solely involves their taking of a decision on a judicial issue, for the sake of which the

two Governments have already established this Tribunal, because the remaining balance in Dollar Account No. 1 currently equals the amount stated by the representative for the Fed at the Hearing; and there has not yet been any other claim on the said account. Furthermore, supposing in arguendo that another claim were brought, the United States would have to notify the Tribunal, and the latter would determine the remaining balance [in the account].

7. The other issue to be negotiated is, an agreement by the two Governments concerning release of the United States with respect to its administration of Dollar Account No. 1.

In this connection, just as is set forth in paragraph 67 of the Award, the Iranian Government has already stated that it is ready to waive any and all claims against the United States in relation to its administration of Dollar Account No. 1. Therefore, I have no idea just what new agreement the two Governments are supposed to sign in this connection following the four months' negotiations. In actuality, this matter is now in the nature of a resolved issue, because the United States Government had previously requested such an arrangement and the Iranian Government agreed thereto, so that there is on principle no dispute for the two Parties to negotiate. In my opinion, the Tribunal could have acted on the basis of the agreement by the two Parties in this respect. The fact is that the Tribunal has itself concluded, in the final sentence of paragraph 67, that "As the Tribunal understood it, this release would mean a waiver of any challenge to such administration." Therefore, in my opinion, negotiations on this issue would be moot as well.

8. Since the negotiations ordered by the Tribunal in this way might possibly fail to lead to agreement on the part of the Parties, it has been provided in paragraph 70(d) that

"Should the Parties be unable to arrive at such an agreement in the four (4) months following the issuance of this Award, they may apply to this Tribunal individually or jointly, in order to resolve the remaining difficulties."

As has already been noted above, one part of the award ordering negotiations, is [that the Parties] determine what claims might possibly be brought with respect to Dollar Account No. 1. If any such claims existed, they would have been notified to the Federal Reserve Bank of New York between 1982 and the present. Furthermore, the Parties apparently have no basis on which to agree about possible future claims, in order for them to assign at will some figure for securing those claims. The negotiations over the second part of the agreement, namely to waive any claims against the Federal Reserve, would constitute a redundant effort to do that which has already been done; on principle, the Tribunal seeks to oblige the two Governments to set forth in writing those very legal contractual terms and provisions over which they have already previously agreed.

9. Based on the foregoing, those issues which are supposed to be included in the agenda of the two Governments' negotiations in accordance with the Tribunal's decision do not in reality need to be negotiated. Nor, indeed, did the United States Government intend by negotiations, that these were the issues to be resolved. Rather, as is noted in paragraph 59 of the Award, the United States Government seeks to resolve those problems which may have arisen or which, according to that Government, might arise, in connection with the other accounts

and with issues involved in implementation of the Declarations. The Tribunal has noted this point in the Award, stating in paragraph 59 that

"... The Respondent does not dispute that the funds not used for other purposes should be returned to Iran some time. It argues, however, that this can be done only after all claims against Iran are satisfied, and only through negotiations leading to a supplementary agreement..."

However, this position taken by the United States has been implicitly rejected by the Tribunal in the present Award; and in particular the Tribunal states in paragraph 51 of the Award, that

"... This leads it first to find that the equilibrium intended by the two Governments in executing the Algiers Accords, in their actual wording, imposes as a first requisite that the dedication of the various accounts established pursuant to the Algiers Accords be strictly respected. This finding implies that the funds existing in one of these accounts must not be used for any purpose other than the one for which that account was established, or transferred to another account, with the only qualification being that mentioned in paragraph 46 above and expressly stipulated in Paragraph 2 (B) of the Undertakings."

Therefore, since the United States' purpose in negotiating is, as noted in paragraph 59 of the Award, to resolve issues which are not capable of amendment within the limits of the Algiers Declarations; and since the matters stipulated in the Tribunal's order of negotiations do not need to be negotiated either, it is my opinion that the Tribunal should state in the present Award only that in interpreting the Algiers Declaration and the instruments attached thereto, the Tribunal has concluded that the United States Government is obliged to return to Iran immediately the remaining balance in Dollar Account No. 1 on which no claim has been filed.

10. Since the Tribunal has expressly declared under Section 66 of the Award that the United States Government has undertaken, pursuant to General Principle (A), to restore the financial position of Iran to that which existed prior to November 1979; since under Section 64 of the present Award the Tribunal has found that there has been no transfer from Dollar Account No.1 since May 1982 for the purpose stipulated under the Declarations; and since the Tribunal has expressly held in Section 51 of the Award that the equilibrium intended by the two Governments in executing the Accords requires that the monies in the various accounts be allocated solely to those purposes provided for them under the Declarations and the Undertakings-- and since by this decision the Tribunal has rejected the position of the United States, to the effect that the balance in the various accounts should remain for all practical purposes blocked pending settlement of all America's claims against Iran-- I thus conclude that the Tribunal has not rejected Iran's position that the United states has violated the Declarations. It would appear that the Tribunal has called its decision an "Interlocutory Award" for the purpose of communicating this presumption. Thus, in principle, refusal to transfer the balance remaining in Dollar Account No.1 after the four-month period provided for under the present procedure may constitute a violation of the Declarations by the United States Government. Although this can be regarded as an inescapable conclusion of the present Award, I believe it would have been more appropriate, had the tribunal spelled it out.

11. While the text of the Award makes provision for a time period for the purpose of concluding an agreement in settlement of the dispute through negotiations between the two Parties, its provisions for solving the hypothetical situation where the Parties fail to reach agreement are vague. That is, the Tribunal has provided that in

the event of a failure to come to an agreement, the two Governments may either jointly or individually apply to the Tribunal, in order to resolve any remaining difficulties. As we know, if the Tribunal wishes to follow its ordinary procedure calling for exchanges of memorials and the holding of hearing conferences, it will nullify the basic objective of its Award, namely, that the money be returned to Iran immediately, and it will also cause the vindication of Iran's legal rights to be unreasonably delayed. Moreover, it will also give the United States' refusal to comply with its obligations under the Declarations the semblance of validity and the color of legality-- unless the Tribunal really intends to effect a solution to the problem foreseen by it once the four-month period has ended, by immediately ordering that the remaining balance in Dollar Account NO. 1 be transferred to Bank Markazi Iran.


In light of the foregoing, I concur with all of the terms of the Award up to paragraph 68 thereof; however, I believe that the Award's conclusions are inconsistent with the arguments set forth in the Award, as well as with the decisions taken by a majority vote. Therefore, since the Tribunal has determined that the United States Government is obliged to return the remaining balance in Dollar Account No. 1 to Iran, the said Government must immediately carry out its obligation, pursuant to Paragraph 17 of the General Declaration.

In conclusion, I feel compelled to note that although I believe the Award in Part I-G (in particular, the sections prior to paragraph 68 thereof) to represent a shift from the Tribunal's past position and to indicate its inclination toward the interests of justice,

nonetheless I would have hoped that the Tribunal would more decisively demonstrate its fittingness to take up the task entrusted to it. We must always have in mind the fact that a noble, revolutionary Government has, under the most critical circumstances, expressed its willingness to settle its disputes by legal means, on the basis of international law, by having agreed to establish this Tribunal. The manner in which we deal with the issues confronting us can either encourage others to place their reliance on international courts, or discourage them from doing so. Past events always light the way for those who follow.

The Hague,

Dated 13 Shahrivar 1365/ 4 September 1986

A handwritten signature in dark ink, consisting of a large, sweeping loop followed by a smaller, more intricate flourish.

Hamid Bahrami-Ahmad