IRAN-UNITED STATES CLAIMS TRIBUNAL

In the Name of God

[redacted]

CASE NOS. B2, B13, B18, B20
CHAMBER TWO
AWARD NOS. 265-B2-2, 266-B13-2
267-B18-2, 268-B20-2

IRANIAN CUSTOMS ADMINISTRATION,
Claimant,

and

UNITED STATES OF AMERICA,
Respondent.

DISSENTING OPINION OF HAMID BAHRAMI-AHMADI WITH RESPECT TO THE DISMISSAL OF IRANIAN CUSTOMS CLAIMS, AWARD NOS. 265-B2-2, 266-B13-2, 267-B18-2 AND 268-B20-2

The Iranian Customs Administration has filed Statements of Claim under Nos. B2, B13, B18 and B20 with the Tribunal, whereby it claims for customs fees and duties on goods imported for the United States' pavilions at international trade fairs held in Tehran between 1976 and 1978. The Claimant has based its demand upon letters of guarantee issued by the United States Embassy in Tehran, whereby that Embassy assumed financial responsibility for payment of the customs fees.

In view of analogous awards issued by Chambers One and Three of the Tribunal, Chamber Two separated the jurisdictional issue from the merits; and by similar awards issued under Nos. 265-B2-2, 266-B13-2, 267-B18-2 and 268-B20-2, it has made a determination, in reliance upon precedent laid down by the other Chambers, that

> "... even if such guarantees could be characterized as contractual arrangements between the two Governments, they were not for the purchase and sale of goods and services. They constitute an assumption of administrative responsibility by the Embassy to facilitate the importation of goods for exhibition at the various Tool and Trade Fairs. They purportedly guarantee not only payment of requisite customs duties but also compliance generally with Iranian customs regulations. The Tribunal has previously determined that such arrangements do not constitute contracts 'for the purchase and sale of goods and services' in the ordinary meaning of those words."
>
> (paragraph 8 of Award No. 265-B2-2, dated 13 November, 1986)

In paragraph 9 of the same Award, the majority holds that

> "The Tribunal is satisfied that there is no other possible jurisdictional basis in the Claims Settlement Declaration for this claim."

For the reasons set forth hereinbelow, I dissent to these conclusions from the Claims Settlement Declaration. I am of the opinion that this Tribunal has jurisdiction over the financial claims of Iran and the United States apart from those instances where excluded by the Declaration, because:

1. The Government of the Islamic Republic of Iran agreed to the Tribunal's jurisdiction in reliance on the special Single Article Act ratified by the Majlis. Furthermore, in

connection with the Tribunal's jurisdiction, Article II, paragraph 1 of the Claims Settlement Declaration makes express reference to "the Majlis position"; and the exceptions to the Tribunal's jurisdiction are those described in the said Single Article Act, ratified by the Majlis. In that Act, the financial disputes between Iran and the United States are broadly placed within the Tribunal's jurisdiction. Therefore, there is a sufficient jurisdictional basis for adjudication of the Iranian Customs claims against the United States Government, which rest upon letters of guarantee issued by the United States Embassy; and the Tribunal cannot invoke the contra-positive of Article II, paragraph 2 of the Claims Settlement Declaration, which also grants the Tribunal jurisdiction over disputes relating to "the purchase and sale of goods and services," in order to make a finding against its jurisdiction. In actuality, pursuant to Articles 31 and 32 of the Vienna Convention, a consideration of the preliminary documents on whose basis an international treaty has been drawn up, provides the best guidance to an interpretation thereof. In this respect, the Tribunal cannot disregard the Majlis Act, which constitutes a precondition to referral of the dispute to arbitration and is referred to in the Declaration itself.

2. Clearly, as an international forum the Tribunal should on principle adhere to the doctrine of restrictive interpretation of a treaty in connection with its jurisdiction. However, as the Tribunal stated in its Award in Case No. A/1, issued on 30 July 1982, in citation of McNair, Law of Treaties (1961):

> "...this rule of 'restrictive interpretation' has been criticized as leading to restrictions on the obligations of one sovereign State to the detriment of any benefits in a treaty provided to another sovereign State."

Naturally, the sole purpose of restrictive interpretation is to respect the sovereignty of the two Governments, and not to reject jurisdiction in cases where this would obviously lead to an injustice. This is particularly so in this case, where a basis for jurisdiction exists in the Declaration and in documents relating thereto, and where a finding of the Tribunal's nonjurisdiction would cause injury to one of the two Governments party to the agreement.

Moreover, just as the Tribunal stated in its Award in Case No. A/15 (I:G, paragraph 41), the United States' request for a finding of nonjurisdiction in these cases confronts the Tribunal with a "legal vacuum." Here too, the United States has requested that the Tribunal find against its jurisdiction, thereby depriving the Claimant (Iranian Customs Administration) of any opportunity to seek redress. This is because, in circumstances where the Respondent has persistently refused to pay its debt, there does not appear to be any other forum before which the Iranian Customs Administration might bring claim.

3. In order to broaden its overall jurisdiction, in nine cases the Tribunal has narrowly interpreted exceptions to its jurisdiction, instead of respecting the principle of restrictive interpretation. For example, the contract on which the claim in Gibbs & Hill (ITL 1-6-FT) is based expressly provided that

> "All the disputes that may arise between the parties hereto over this Contract or the interpretation of its contents... shall be settled through competent courts according to Iranian law."

Nonetheless, the Tribunal held that

> "The TAVANIR Contract does not contain any provision which unambiguously restricts jurisdiction to the courts of Iran."

Similarly, in Ford Aerospace (ITL 6-159-FT), wherein the contract on which the claim was founded provided that

> "All disputes and differences between the two parties arising out of interpretation of the Contract or execution of the Works which can not be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian laws, via referring to the competent Iranian courts,"

the Tribunal passed over this expressly-stated condition for jurisdiction, on the argument that certain important aspects of the contract, including obligations to be performed outside Iran and the payment obligation, had not been provided for under this condition; and it thereby decided in favor of jurisdiction.

As we are well-aware, in cases where the Tribunal makes a finding of its lack of jurisdiction, the American claimants can always vindicate their rights before the competent municipal fora. However, in the event that the Tribunal's jurisdiction is denied in this case, the Claimant, which is an Iranian Government organization, must in effect abandon its claim. Furthermore, the creation of this legal vacuum by the Tribunal, which was established at the expense of the two Governments for the purpose of settling their financial disputes, results in an illogical interpretation of an international treaty, something which, according to the principles of interpretation of international treaties, this Tribunal should avoid.

4. A logical and sound interpretation of the Claims Settlement Declaration clearly points to the Tribunal's jurisdiction over all financial disputes betwen Iran and the United States, because Article II, paragraph 1 thereof sets forth the instances of the Tribunal's jurisdiction within the framework of the Single Article Act ratified by the Majlis; and of the financial disputes between the two Governments, it has excluded from this Tribunal's jurisdiction only those disputes described

in paragraph 11 of the General Declaration and "claims arising out of the actions of the United States in response to the conduct described in such paragraph..." (ie. paragraph 11 of the General Declaration). In this way, one of Iran's financial claims against the United States relating to this sort of injury has been excluded from the Tribunal's jurisdiction; but the claim of the Iranian Customs Administration arises out of letters of guarantee issued by the United States Embassy prior to the Revolution, whereby the United States Government transferred to itself the responsibility of the owners of the goods to pay customs duties thereon. It must also be noted that on principle, such a legal relationship does not arise out of Iranian customs regulations , because those regulations provide that the owner of the goods is responsible for payment of customs fees. The United States Government voluntarily assumed the liability of the owner of the goods on this premise; and in this respect, the letter of guarantee by the United States Embassy is in every way comparable to a letter of guarantee issued by a bank at the request of the importers of the goods. Such letters of guarantee are directly payable, irrespective of the source of the obligation.

5. In dismissing the claims of the Iranian Customs Administration, the majority refers in particular to Article II, paragraph 2 of the Claims Settlement Declaration, and it holds that those claims are outside the Tribunal's jurisdiction because they do not arise out of the purchase and sale of goods and services. I do not believe, either, that the claim relating to the United States Embassy's letters of guarantee arises out of the direct purchase and sale of goods and services between the two Governments. However, as has been discussed above, Article II, paragraph 1 of the Claims Settlement Declaration constitutes the principal basis for the Tribunal's jurisdiction over the financial disputes between the two Governments. In paragraph 2, the drafters of the Declarations made special mention of a specific and common instance of the

financial relations between Iran and the United States, of which there are prominent examples. Moreover, the use of the word "also" in the said paragraph means that, aside from the financial claims arising out of the purchase and sale of goods and services as provided under Article II, paragraph 2, all other financial claims are within the Tribunal's jurisdiction as well; otherwise, the use of the term "also" would constitute a serious redundancy in the text of the Declaration.

6. Moreover, use of the term "also" in paragraph 2 supports the logical interpretation that all financial claims between the two Governments are within the Tribunal's jurisdiction. In actuality, if the drafters of Article II, paragraph 1 of the Declaration had intended otherwise, they would not have excluded one of the specific financial disputes between Iran and the United States as provided for therein, because an exception must also be of the same category as that from which it is excepted. And since the terms of an international treaty must be interpreted in a logical manner, the Tribunal cannot now regard the language of paragraphs 1 and 2 of Article II of the Claims Settlement Declaration as an instance of carelessness in phraseology, and deny its jurisdiction, to the injury of one of the two Governments which are parties to the accord. As the International Court of Justice held in its 1952 decision in Ambatielos,

> "The Court cannot accept an interpretation which would have a result obviously contrary to the language of the Declaration and to the continuous will of both Parties to submit all differences to arbitration of one kind or another..."

In the present cases as well, in my opinion, the Tribunal should not have accepted an interpretation which is contrary to the express language of the Declarations and to

the intention of both Governments to refer all their financial disputes (apart from those that they have expressly excluded) to the jurisdiction of this arbitral Tribunal; nor should it have dismissed the instant financial claims through a restrictive interpretation of the Declarations.

The Hague,
26 Deymah 1365/16 January 1987

Hamid Bahrami-Ahmadi