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...NS TRIBUNAL

...وان داوری دعاوی ایران - ایالات متحده

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** CONCURRING OPINION of _____

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** DISSENTING OPINION of Mr Parvis ANSARY

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In The Name of God

Case No. A16

Full Tribunal

Award No.108-A-16/582/591-FT

The United States of America

and

The Islamic Republic of Iran

Dissenting Opinion of Parviz Ansari

The issue as well as the background and the nature of the case in general terms have been cited in the introductory parts to the award dated January 25, 1984. The legal point at issue is whether or not the Tribunal has jurisdiction over the claims of Iranian banks arising out of standby letters of credit against the United States nationals, including the United States banks, and the Government of the United States of America.

Iran took the position that under paragraph 2(B) of the

"Undertakings"[1] this Tribunal is vested with such jurisdiction.

Paragraph 2(B) provides that:

> "(B) To retain $1.418 billion in the Escrow Account for the purpose of paying the unpaid principal of and interest owing, if any, on the loans and credits referred to in paragraph (A) after application of the US$ 3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid, and for the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing. In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be

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[1] Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, ("Undertakings")

> owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this paragraph (B) shall be paid to Bank Markazi".

The United States contends that :

> "[t]he Tribunal has jurisdiction over Iranian bank standby letters of credit claims only to the extent they may properly be asserted as counterclaims to claims of United States nationals pending before the Tribunal and over which the Tribunal has jurisdiction.
>
> In support of this contention the United States argues that the standby letter of credit claims are direct claims by Iranian governmental entities against United States nationals and that the Full Tribunal already has decided in its decision, rendered on 21 December 1981, in Case A-2, that such claims can only be within its jurisdiction as counterclaims."[2]

I. Despite the fact that the majority carefully reiterates the United States argument in support of its own decision, significant misgivings could be shown in the presentation of such arguments. To be more specific, the following has been stated as one of the arguments of the United States:

> "The expression "disputed amounts of deposit, assets, and interest, if any, owing on Iranian deposits" was intended to be limited to disputes over this $130 million or over the deposits and

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[2] Summary of U.S.contentions as presented in the majority decision, pp. 8 and 9.

assets in overseas branches of United States banks on which the disputed interest had been calculated". (Emphasis added) (Award 108-A16, p. 10 - para. 3)

On the other hand, the majority as well as pleadings of the United States have failed to consider and provide any explanation in response to one of the arguments of Iran to the effect that should the Tribunal try to interpret the provisions of the "Undertakings" within the framework of U.S. approach, then the phrase "disputed amounts of deposits, assets..." shall become redundant.

Iran has further argued that the subsequent practice of the parties during their settlement negotiations shall be given due consideration with respect to the interpretation of the "Undertakings". In support of this argument Iran has furnished the Tribunal with settlement agreements reached in pursuance of the "Undertakings" and as a result of which Iran was paid fresh money directly by the U.S. banks.[3] The said agreements by their very terms could not become operative without the approval of the United States Treasury and the Federal Reserve Bank of New York (The "Fed") acting as the fiscal agent of the United States. Such subsequent practice of the parties is decisive[4] and provides additional

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[3] Submission of certain documents by the Government of the Islamic Republic of Iran in relation to Case A16 Oct. 17, 1983

[4] See Article 31 of the Vienna Convention on the Law of (Footnote Continued)

evidence in support of Iran's argument. Unfortunately, the majority has again failed to take into account in its holding the subsequent practice of the Parties. I shall note that such misgivings and production of fresh arguments on behalf of the United States by the majority is prejudicial and shall invalidate the majority's decision.

II. The majority in order to reach its decision in A16 heavily relies on its decision in A2 with a sweeping argument that "... in so far as the standby letter of credit claims by Iranian banks against United States nationals are based on the Claims Settlement Declaration the Tribunal has no jurisdiction over such claims". (page 14 of the majority decision).

Iran has not argued that the jurisdiction of the Tribunal is based on Claims Settlement Declaration. The majority is attributing a wrong position to Iran, and to the extent that the decision is based on such position it is not justifiable.

The United States in its memorial of 8 December 1981, in Case A2 (F.N. pp.5 and 6) has taken the following position:

(Footnote Continued)
Treaties that provides that in the interpretation of a Treaty "[t]here shall be taken into account, together with the context: (a)... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding interpretation..."

> Paragraph 2(B) of the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981. (The "Undertakings") does permit one instrumentality of the Government of Iran to bring certain disputes with American nationals before the Tribunal. But this is strictly limited to certain disputes: (1) submitted by the Bank Markazi, (2) involving a "U.S. banking institution" and (3) concerning amounts owed due to the banking relationship between the U.S. banking institution and the Government of Iran. The existence of this provision shows that in the one case where Tribunal jurisdiction over direct actions by a government against a national of the other party was contemplated, the parties found it necessary to provide for it expressly."

This clearly reveals the fact that the United States has already recognized a jurisdiction for this Tribunal based on paragraph 2(B) of the "Undertakings", and accordingly prevents the majority to base its decision in "A16" on a new contention by the United States which contradicts its position taken in A2, as quoted above. In fact the U.S. is now barred from taking this new position because of the "Estoppel Doctorine". Iran has in fact consistently taken the position that the "Undertakings" confers a special jurisdiction to this Tribunal. The majority's erroneous position could be further elaborated by the fact that the "Undertakings" provides for specific jurisdiction to settle all banking claims between Iran and the U.S. banking institutions.

The arbitral process provided for under paragraph 2(B) is totally different from the arbitral clause envisaged under

the Settlement Declaration. The "Undertakings" provides that:

> "In the event that within 30 days any U.S. banking institution and Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal". (Emphasis added)

Thus, it is obvious that the High Contracting Parties have agreed to the establishment of another ad-hoc arbitral body solely for the purpose of settlement of banking disputes. Iran-U.S. Claims Tribunal is, therefore, by virtue of the "Undertakings" the substitute for the ad-hoc arbitral body contemplated by the High Contracting Parties.

It thus follows that the jurisdiction of the Tribunal in banking disputes is not based upon the Settlement Declaration, and the majority is obviously wrong in relying on its previous restrictive reading of its jurisdiction in Case A2.

This interpretation falls within the scope of General Principle (B) of the "Declaration" which provides that:

> "It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration..."

I, therefore, conclude that the position of Iran has been to base its banking claims on the ad-hoc jurisdiction conferred to this Tribunal and the banking claims submitted by Iran clearly falls under the plain language of the "Undertakings" and the abstention from this jurisdiction entrusted to the Tribunal is not justifiable.

III. The majority then enters into another fallacious argument which is a futile exercise of restrictive reading of the very clear language of the "Undertakings". The essence of this argument is that the balance in account No.2 in the Bank of England belongs to Iran and it is inappropriate for the Tribunal to let Iran use its own money to satisfy its claims. In view of the majority this Tribunal has only jurisdiction to render awards which could be satisfied out of some kind of a security account. The majority is accustomed to rendering self-executing awards which automatically is payable out of Iranian funds in security account. This procedure has given a false impression to the majority as if an arbitral Tribunal lacks jurisdiction whenever no deposit is put at the disposal of such Tribunal. This interpretation is clearly wrong and without any judicial precedent. Iran has neither contemplated nor requested that the Tribunal orders for the satisfaction of its banking claims payments out of its own money. Iran's position is rather to request the Tribunal to render a judicial decision. It is obvious that the High Contracting Parties have agreed that the awards will be

enforced in "the courts of any nation in accordance with its laws." The majority's ruling as to denial of its jurisdiction whenever no payment mechanism is provided is not only without precedent in law but is also contrary to the practice of the Tribunal. In certain instances this Tribunal however, has rendered awards in favour of the Islamic Republic of Iran against the United States and its nationals. Consequently, this fact alone or in the language of the majority "lack of mechanism" does not affect the jurisdiction of a Tribunal established by the High Contracting Parties.

In consequence, the majority is clearly wrong in limiting the jurisdiction of this Tribunal through resorting to lack of enforcement mechanism. In reading the opinion of the majority I have come to the conclusion that this is the cornerstone of its ruling and its basic argument to avoid the plain, unequivocal, jurisdictional basis of the "Undertakings." The majority facing with this dilemma has initiated a position on behalf of the United States to the effect that the expression "disputed amounts of deposits, assets and interest, if any, owing on Iranian deposits" was intended to be limited to disputes over the $130 million "...or over the deposits and assets in overseas branches of United States banks on which the disputed interest had been calculated." I wonder how the majority has attributed this

intention to the parties. Although the United States has stated that this phrase was intended to cover the amount of "$130 million" but even the United States has not taken the position that by "disputed ... deposits, assets ..." it is meant the interest "over the deposits and assets in overseas branches of the United States banks." Furthermore if I assume, arguendo that this argument as put forward by the majority was correct, it would destroy the majority's invented theory of "lack of mechanism" which seems to have played an important role in the majority's holding.

IV. The majority in an effort to justify the denial of its jurisdiction has also ruled that Iran's standby letters of credit cannot be considered as assets even if they have been called in accordance with their own terms. This position is wrong both in accordance with Iranian law as well as U.S. law and practice in this connection.

Under Iranian Government Transaction Regulations,[5] which were brought to the judicial notice of this Tribunal during the hearing, standby letters of credit are accepted only "in lieu of cash". The contractors were required either to deposit cash money in an account or to provide unconditional standby letters of credit as a collateral when receiving

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[5] Iranian Government Transaction Regulations adopted in compliance with Article 71-79 of Iranian Public Accounting Law ratified in 1967.

advanced payments or upon signing of the contract for good performance of their obligations. Such standby letters of credit are to be distinguished from letters of guarantee or performance bonds. Although a performance bond is related to the underlying transaction but the express provision of the standby letters of credit would not allow any doubt as to its independent nature. Such standby letters of credit are to be considered as assets because by their own terms are payable upon a simple demand. Therefore, there is no difference between a standby letter of credit and a certificate of deposit from a legal point of view. In the same way as the bank is obligated to pay a certificate of deposit when a demand is made in accordance with its terms the bank is also bound to make prompt payment on the standby letters of credit upon a conforming demand. The whole purpose of a standby letter of credit is to enable the beneficiary to collect the claim whenever he so desires. This purpose may only be achieved if one is to consider such arrangements as an acknowledgement on the part of the issuing bank that certain amount of money is available to be utilized by the beneficiary upon his request. Therefore, such standby letters of credit from the point of view of the beneficiary is in lieu of cash deposit. I understand that there may be dispute between the account parties as to the right of the beneficiary to call a standby letter of credit. Such disputes, however, should be resolved between the account parties through the recourse of the affected party to the competent court. The banks are not in a position to

avoid compliance with their obligations under the pretext of a potential dispute between the account parties.

I have also noticed that U.S. banking practice considers the standby letters of credit commitments as a contingent liability. Although the banking practice should not affect the legal nature of the commitments of the banks, I have also noticed once a standby letter of credit is called, it will be transferred to the category of cash liability and treated as the actual liability of the bank. Even if the majority was to follow the banking practice in the U.S. it should have at least considered those standby letters of credit that were called by the beneficiaries and were considered in the U.S. banking practice as assets of the beneficiaries. Even if "assets" were interpreted restrictively to include standby letters of credit which were called, since such assets were not in fact transferred to the beneficiaries, the Tribunal majority should have deemed themselves competent to resolve the dispute. The majority upon understanding of this obvious fact has indulged into another remote interpretation of the legal concept of "disputed assets". They have come up with the argument that due to restrictions provided by courts in the United States or U.S. Treasury regulations, the standby letters of credit would lose their characteristic as "asset". It is very obvious that the subject matter of this Tribunal's jurisdiction is "disputed assets". It is also clear that neither the courts in the United States nor the

U.S. government have ever attempted to remove the asset nature of the standby letters of credit by introducing such measures. The measures have only turned these assets into "disputed assets" by blocking their transfer to the beneficiary.

V. It is surprising to note that the majority in order to stick to the position of the United States has established such manifestly wrongful precedent. I could understand that the "Undertakings" is not clearly drafted. The rule is then that such a text should be interpreted in a manner not prejudicial to the interest of the other party who happens not be the drafter of the text, and in view of the subsequent practice of the parties themselves. The majority in taking its position not only has exceeded the judicial function of the interpretation in accordance with the plain language of the text but also has ignored the subsequent practice of the parties prejudicial to Iran's position. The Tribunal is aware of the fact that the Declarations including the "Undertakings" have been drafted and proposed by the United States. It is, therefore, inconceivable to interpret these instruments in accordance with subsequent desires of the United States. I understand that the denial of the jurisdiction of this Tribunal regarding the standby letters of credit disputes shall amount to virtual annulment of hundreds of millions of dollars of the unconditional commitments of the U.S. banking institutions. Bank Markazi Iran with a reasonable understanding that such claims will be

resolved by this Tribunal has not made any other attempt to secure its rights through other available judicial process. The majority in A16 decision holds that due to lack of mechanism for payment to Iran the High Contracting Parties in fact did not intend to comply with the literal meaning of the "Undertakings" and thereby denied the Tribunal's jurisdiction. Such denial of jurisdiction is now prejudicial to the interest of Iran, and the Tribunal that is established by the two governments may not interpret the documents of its own mandate (its terms of reference) contrary to the legitimate interest of one of the two governments.

Even if ambiguities in the drafting of the document are noticed a recourse should have been made to the subsequent practice of the parties. I understand that the parties to the settlement agreements are the U.S. banking institutions and Bank Markazi Iran. But the settlement agreements by their very terms and conditions[6] cannot be implemented without the approval of the United States Treasury and the Federal Reserve Bank of New York acting as the fiscal agent of the United States government. Therefore, the position of the majority to the effect that one of the parties to the settlement agreements, namely U.S. banks, is not party to

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[6] Submission of certain documents by the Government of the Islamic Republic of Iran in relation to Case A16, Oct. 17, 1983. Document No.2: Annex A and Annex B. Document No.1: Exhibit 1 to Memorandum of Settlement.

the "Undertakings" is without any legal merit and in flagrant disregard of the realities of subsequent practice.[7] Needless to say that the majority is also wrong in holding that:

> "The evidence before the Tribunal indicates that the parties to these settlements referred to the Undertakings in a general way and did thereby not intend to express that all the claims settled were covered by paragraph 2B..." (Page 20 of the Award)

The parties to the settlement agreements should have drafted the agreement strictly in accordance with the scope provided by the "Undertakings". Otherwise, neither Bank Markazi nor the U.S. banking institutions and the "Fed" had any other legal authority to enter into such settlements. Furthermore, any deviation from the scope of paragraph 2(B) would have resulted in non-compliance of the Central Bank of Algeria, the Bank of England and the "Fed" with the terms of the settlements.

It is, therefore, quite clear that the majority has wrongly denied its jurisdiction in a prejudicial manner and contrary to the plain language of the "Undertakings". It is also clear that the majority by resorting to the solution of the counterclaim has further confused the Tribunal process.

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[7] The majority also challenges the authority of Bank Markazi in representing Iranian banking institutions. In fact the "Undertakings" requires Bank Markazi to act on behalf of Iranian banks.

VI. In light of the foregoing, I dissent from the Majority's decision and I believe that the Tribunal has jurisdiction over claims by the Iranian banks against the United States nationals, including the United States banks, and the Government of the United States of America based on standby letters of credit.

Parviz Ansari