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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE A17
FULL TRIBUNAL
DECISION NO. DEC 37-A17-FT

THE UNITED STATES OF AMERICA,

and

THE ISLAMIC REPUBLIC OF IRAN.

CONCURRING OPINION OF CHARLES N. BROWER, IN WHICH HOWARD M. HOLTZMANN JOINS

Introduction

We concur with the Decision of the Full Tribunal. We have arrived at this result, however, only after careful consideration of whether or not this Tribunal has jurisdiction[1] to interpret the Undertakings in this case.[2]

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1 Although no jurisdictional objections have been raised by the Parties in the present case, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore." Northern Cameroons (Preliminary Objections) (Cam. v. U.K.), 1963 I.C.J. Reports 15, 29 (Judgment of 2 Dec.). See Gross, "Limitations Upon the Judicial Function," 58 Am. J. Int'l L. 415 (1964).

2 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, reprinted at 1 Iran-U.S. C.T.R. 13 ("Undertakings").

Given the frequency with which the Parties have invoked the Tribunal's interpretative jurisdiction, we think it useful to elaborate the process which has led us to conclude that while such jurisdiction does not ordinarily extend to the Undertakings, the States Parties have conferred such jurisdiction upon the Tribunal in this case.[3]

I.

The Algiers Accords Must be Interpreted in Accordance with Their "Ordinary Meaning"

Of necessity one first must establish the rules of interpretation to be applied.

The rules for interpretation of treaties are widely accepted to be codified in the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, U.N. Doc. A/Conf. 39/27 (entered into force 27 January 1980), reprinted at 8 Int'l Legal Mat'ls 679 (1969).[4] This Tribunal has frequently resorted to the Convention in

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[3] A broader importance of the jurisdictional issue here presented is evidenced by the fact that "[o]f the 4,834 treaties registered with the League of Nations between 1920 and 1946 and the 12,500 registered with the United Nations between 1946 and the present, some 4,000 include a special compromissory clause providing for the pacific settlement of disputes relating to the interpretation and application of the treaty itself." Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties," 150 Recueil des Cours 195, 259 (1976). Professor Sohn goes on to note that "[m]ost commonly, the [compromissory] clause will relate to all disputes concerning 'the interpretation or application of the treaty'." Id. at 271.

[4] de Aréchaga, "International Law in the Past Third of a Century" 159 Recueil des Cours 1, 42 (1978) ("Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law").

interpreting the Algiers Accords[5] and the States Parties have declared the Convention to provide the applicable law of interpretation.[6] Article 31 requires that "ordinary meaning [should] be given to the terms of the treaty in their context and in the light of its object and purpose." This article presents almost invariably the only principle of interpretation that need be applied.

The Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed.[7] This rule of strict construction, sometimes called restrictive interpretation, also extended to writings alleged to constitute a State's consent to the jurisdiction of an

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5 See, e.g., The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT at 14-15 (6 Apr. 1984).

The Declaration of the Government of the Democratic and Popular Republic of Algeria, reprinted at 1 Iran-U.S. C.T.R. 3 ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, reprinted at 1 Iran-U.S. C.T.R 9 ("Claims Settlement Agreement") are sometimes referred to collectively as the Algiers Accords.

6 See, e.g., The Islamic Republic of Iran and the United States of America, Decision No. 32-A18-FT at 14-15 (6 Apr. 1984). See also Transcript of 8 Mar. 1982 Hearing in Case A1 at 88 (filed 11 Mar. 1982).

7 See, e.g., Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J., ser. A/B, No. 46, at 167 (Judgment of 7 June) ("[I]n case of doubt a limitation of sovereignty must be construed restrictively").

international tribunal.[8] This "principle" was in any event never universally favored.[9] Indeed a learned publicist concluded such a principle could apply, if at all, "only when all other considerations . . . have failed to produce a result." Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 26 Brit. Y.B. Int'l L. 48, 67 (1949).[10]

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8 See, e.g., Montefiore Claim (Italy v. Fr.) (Franco-Italian Conciliation Comm'n 7 Dec. 1955), reprinted at 22 Int'l L. Rep. 840, 842-43 ("A clause of a compromis cannot be interpreted liberally (extensivement), particularly in the international sphere, as regards the competence of an arbitrator or arbitrators"); I.C.C. Case No. 2138 (1974) ("Attendu que les clauses compromissoires sont d'interprétation stricte"), quoted in 102 Journal du Droit International 934 (1975).

9 See, e.g., Case Concerning Article 181 of the Treaty of Neuilly (Preliminary Question) (Greece v. Bulgaria) (Öster Undén, sole arb., Award of 4 Nov. 1931), reprinted at 28 Am. J. Int'l L. 760, 773 (1934) ("If . . . the reasons in favor of the competence of the Arbitrator are more plausible than those which can be shown to the contrary, the former must be adopted"). See also S.S. Wimbledon (U.K., Fr., Italy & Japan v. Ger.), 1923 P.C.I.J., ser. A, No. 1, at 24-25 (Judgment of 17 Aug.).

10 Even in construing arbitral agreements between a State and a private party, where the Vienna Convention is not applicable and where it might especially be argued that a State should be presumed not to intend to cede its sovereignty, an approach devoid of interpretative bias has been urged:

> [L]ike any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law. (Emphasis in original.)

Amco Asia Corporation v. Indonesia (Jurisdiction), (B. Goldman, I. Foighel and E. Rubin, arbs., Award of 25 Sept. 1983), reprinted at 22 Int'l Legal Mat'ls 351, 359 (1983). See also Lalive, "The First 'World Bank' Arbitration (Holiday Inns v. Morocco) -- Some Legal Problems," 51 Brit. Y.B. Int'l L. 123, 151-55 (1982).

We therefore approach the jurisdictional question in this case without interpretative bias, casting a net neither determinedly wide nor arbitrarily narrow. Rather we simply seek to ascertain whether the Algiers Accords in their "ordinary meaning" bestow upon this Tribunal jurisdiction over the instant case.[11]

II.

The Interpretative Jurisdiction Granted by the Algiers Accords Does Not Extend to the Undertakings

The Algiers Accords do not contain any express grant of general authority to this Tribunal to interpret or apply the Undertakings. In fact, they implicitly exclude such jurisdiction.

The jurisdiction of the Tribunal to interpret and apply is set forth in three separate provisions of the two Accords. Article VI(4) of the Claims Settlement Agreement provides,

> Any question concerning the interpretation or application of this Agreement shall be decided by

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[11] This approach has been applied by the majority of this Tribunal. See, e.g., The United States of America and The Islamic Republic of Iran, Decision No. 12-A1-FT at 5 (3 Aug. 1982), reprinted at 1 Iran-U.S. C.T.R. 189, 190, 192; and Dissenting Opinion of President Lagergren ("I am in further accord with the majority view . . . that the so-called rule of 'restrictive interpretation' should not be applied so as to restrict the obligations of one sovereign State to the detriment of the treaty benefits provided to another sovereign State"), reprinted at 1 Iran-U.S. C.T.R. 197, 198; and Separate Opinion of Members Aldrich, Holtzmann and Mosk, reprinted at 1 Iran-U.S. C.T.R. 200-01. On the rare occasion when the Tribunal has referred to "strict interpretation" it has been clear from the context that it in fact only decided the "ordinary meaning" of the words to be interpreted. See, e.g., Iranian Customs Administration and The United States of America, Award No. 105-B16-1 at 3-4 (24 Jan. 1984); see also Alexander Lyons Lianosoff and The Islamic Republic of Iran, Award No. 104-183-1 at 4-5 (20 Jan. 1983).

> the Tribunal upon the request of either Iran or the United States. (Emphasis added.)

Article II(3) of the same Agreement provides,

> The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the [General Declaration], over any dispute as to the interpretation or performance of any provision of that Declaration. (Emphasis added.)

Paragraph 17 of the General Declaration provides in pertinent part,

> If any other dispute [than one over the assets of the former Shah and his close relatives, resolution of which is provided for in paragraph 16] arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws. (Emphasis added.)

The specificity with which these jurisdictional grants refer only to the two instruments containing them is striking. Even though the Undertakings, as well as the subsidiary Escrow Agreement and Technical Arrangement,[12] were concluded simultaneously with the Accords and implement them, not one of them is referred to anywhere in the Claims Settlement Agreement. The General Declaration does refer

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[12] Escrow Agreement, reprinted at 1 Iran-U.S. C.T.R. 16; Technical Arrangement Between Banque Centrale d'Algérie and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York, reprinted at 1 Iran-U.S. C.T.R. 20.

once to the Undertakings, in paragraph 2,[13] but the structure of the Accords makes clear that related instruments mentioned in the Declaration were not thereby incorporated by reference in the phrase "this Declaration" in paragraph 17 thereof. If documents thus referred to were so incorporated there would have been no need for Article VI(4) of the Claims Settlement Agreement, quoted above, inasmuch as that Agreement is mentioned in a number of paragraphs of the General Declaration.[14] Likewise, there would have been no need for the second sentence of paragraph 17 of the Declaration, also quoted above, to refer to the Claims Settlement Agreement.

Inasmuch as interpretative jurisdiction was specifically provided in respect of the Claims Settlement Agreement notwithstanding that it was "attached" to the General Declaration (see references in paragraphs 6, 8 and 9), a fortiori, absent an individually expressed grant, such

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[13] Paragraph 2 of the General Declaration states inter alia that "[c]ertain procedures for implementing the obligations set forth in [the General Declaration and the Claims Settlement Agreement] are separately set forth in certain Undertakings."

[14] The Claims Settlement Agreement is mentioned in paragraphs 2, 6, 7, 8, 9, 16 and 17 of the General Declaration.

It is unlikely that Article VI(4) of the Claims Settlement Agreement was necessary because of the difference in phrasing of the adjudicatory powers granted, i.e., "interpretation or application," the phrase used in Article VI(4) of the Claims Settlement Agreement (the Tribunal's basic "charter"), and "interpretation or performance," the language appearing in paragraph 17 of the General Declaration (which contains substantive obligations of the States Parties). The distinction in phrasing is understandable in light of the nature of the documents containing them, but for present interpretative purposes the distinction is one without a difference.

jurisdiction is not available as regards the "separately set forth" Undertakings (paragraph 2 of the General Declaration) (emphasis added).[15] This conclusion is particularly justified given the provision in Paragraph 2(B) of the Undertakings for the resolution of all disputes that the States Parties envisioned arising under the Undertakings. See Part III, infra.

The States Parties themselves have evinced reservations regarding the scope of our jurisdiction to interpret and apply. When four separate disputes arose between them relating to the Security Account (see The United States of America and the Islamic Republic of Iran, Decision No. 8-A1-FT (17 May 1982) and Decision No. 12-A1-FT (3 August 1982), reprinted at 1 Iran-U.S. C.T.R. 144 and 1 Iran-U.S. C.T.R. 189), even though that Account was established by paragraph 7 of the General Declaration the States Parties signed two special compromis. Those disputes embraced also discrete differences over provisions of the Technical Arrangement, as well as the subsequently concluded Technical

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15 Compare the much more broadly worded clause addressed in Affaire de L'Interprétation d'une Disposition de la Convention de Commerce entre la France et la Suisse et du Procés-Verbal signé á Berne le 20 Octobre 1906 (Fr. v. Switz.) (Borel, Plichon & Reay arbs., Award of 3 Aug. 1912), reprinted at 11 R. Int'l Arb. Awards 411:

> Article 24. Si une contestation venait à surgir entre les parties contractantes au sujet de l'interprétation de la présente Convention ou de ses annexes, ainsi qu'au sujet de l'application des droits fixés dans les traités à tarifs conclus par les parties contractantes avec des puissances tierces, et même s'il s'agit de la question préjudiciale de savoir si la contestation se rapporte à l'interprétation de la Convention, cette contestation sera tranchée, sur la demande de l'une ou de l'autre partie, par voie d'arbitrage, dans les conditions prévues à l'annexe E.

Agreement with De Nederlandsche Bank N.V., reprinted at 1 Iran-U.S. C.T.R. 29.[16]

Moreover, in the instant case one is not compelled to examine Paragraph 2(B) of the Undertakings as a result of interpreting or applying either the General Declaration or the Claims Settlement Agreement in the instant case, because neither contains a relevant specific obligation. It is true that General Principles A and B of the General Declaration provide that the United States "will restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979" and that it "is the purpose of both parties . . . to terminate all litigation as between the government of each party and the nationals of the other." As stated in Case A2, however, these are general principles the meaning of which can be discerned only by reference to "the specific provisions of the two Declarations." The United States of America and The Islamic Republic of Iran, Decision No. 1-A2-FT at 4 (26 January 1982). In the instant case, the Tribunal in reality is asked to interpret Paragraph 2(B) and not merely to use that

16 In the event, the matter was not submitted jointly to the Tribunal on the basis of these compromis but rather solely by the United States of America relying on the agreed compromis. See Letter of Arthur W. Rovine, Agent of the United States to the Iran-United States Claims Tribunal, filed in Case A1, 19 Oct. 1981. The Tribunal appears to have based its Decisions in Case A1, at least in part, on the Tribunal's interpretation and application jurisdiction. See The United States of America and The Islamic Republic of Iran, Decision No. 12-A1-FT at 2-3 (3 Aug. 1982), reprinted at 1 Iran-U.S. C.T.R. 189, 190.

paragraph as an aid to the interpretation of a specific part of either of the Algiers Accords.[17]

III.

The Tribunal Does Not Have Jurisdiction over this Case Under Paragraph 2(B) of the Undertakings

The relevant portion of Paragraph 2(B) of the Undertakings provides,

> [I]n the event that within 30 days [after 19 January 1981] 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.

Bank Markazi has filed with the Tribunal over 100 claims allegedly under this provision, not one of which is before this Tribunal in the instant case.[18] Neither Bank Markazi nor "any U.S. banking institution" is a party to this proceeding; Case A17 involves only the States Parties

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[17] In the Mavrommatis Palestine Concessions Case, 1924 P.C.I.J., ser. A, No. 2 (Judgment of 30 Aug.) ("the legal and factual situation [of which] are tortuous to an extreme," Kearney, "Sources of Law and the International Court of Justice" in 2 The Future of the International Court of Justice 610, 624 (L. Gross ed. 1976)), the Permanent Court of International Justice looked to a related document to aid interpretation but only because it was clear that the drafters had intended a clause of the document being interpreted to be defined by a portion of the related document. In Mavrommatis the reference in the related document clearly provided the meaning of a clause in the document being interpreted. In the instant case, the obligations in Paragraph 2(B) are independent and were assumed by the parties in agreeing to the Undertakings.

[18] Bank Markazi has filed with the Tribunal 148 claims allegedly under Paragraph 2(B). It appeared at the Hearing that 111 of those claims are still pending.

and does not place before the Tribunal a single contentious case within the jurisdictional ambit of Paragraph 2(B).

No jurisdiction of this Tribunal to "interpret or apply" the Undertakings outside the context of a specific dispute between Bank Markazi and a U.S. banking institution is expressed in Paragraph 2(B) and no basis exists for inferring one. When this Tribunal is called upon to substitute as an alternate forum for resolution of disputes as described in Paragraph 2(B) it presumably is intended to exercise only those powers bestowed on the "arbitration panel" in whose stead it serves. There is no reason to believe that utilization of this Tribunal as a substitute was intended automatically to import all of its powers under the Algiers Accords. Indeed, the contrary conclusion is suggested by the analysis detailed in Part II, supra.

IV.

The Parties Have Conferred Jurisdiction in this Case on the Tribunal

We are conscious that the States Parties retain, and in the past have exercised, the power to refine our jurisdiction, either broadly or in respect of an individual dispute. It is appropriate to derive a grant of jurisdiction from the conduct of both States Parties in their bringing and pursuing this case without jurisdictional objection. As the Permanent Court of International Justice stated in the Rights of Minorities case:

> There seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of a suit.

Rights of Minorities in Upper Silesia (Minority Schools) (Ger. v. Pol.), 1928 P.C.I.J., ser. A, No. 15, at 24 (Judgment of 26 Apr.).[19] As this is true for parties appearing before the International Court of Justice, established in collaboration with other States, it is so a fortiori in respect of States Parties before a forum they alone have created.

On this basis we conclude that the Tribunal has jurisdiction in this case.[20]

The Hague
13 May 1985

Charles N. Brower

Howard M. Holtzmann, Joining in the Opinion

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19 See also Haya de la Torre (Colom. v. Peru), 1951 I.C.J. 71, 78 (Judgment of 13 June) ("The Parties have in the present case consented to the jurisdiction of the Court. All the questions submitted to it have been argued by them on the merits, and no objection has been made to a decision on the merits. This conduct of the Parties is sufficient to confer jurisdiction on the Court."); 1 S. Rosenne, The Law and Practice of the International Court 357 (1965) ("[J]urisdiction may be conferred by the tacit consent of the parties, deduced from their conduct in pleading to the merits of a claim . . . without raising the question of jurisdiction."). This basis for jurisdiction, known as forum prorogatum, is discussed in detail by Rosenne. Id. at 319-22, 344-63.

20 In so concluding we draw comfort, too, from the fact that the primary holding in the Decision of the Full Tribunal parallels The United States of America and The Islamic Republic of Iran and Bank Mellat and The United States of America, Award No. 108-A16/582/591-FT (25 Jan. 1984), where there could be no question as to jurisdiction because that Award was, at least in part, based on a specific contentious case relinquished to the Full Tribunal in accordance with Presidential Order No. 1 (19 October 1981).