IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

CASE NO. A33
FULL TRIBUNAL
DECISION NO. 132-A33-FT

THE UNITED STATES OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF ASSADOLLAH NOORI

I. INTRODUCTION

1. As will be observed, the main question to be decided in this Case (*Case No. A33*) was whether or not the ruling of a previously delivered Decision in *Case No. A28*,[1] between Iran and the United States on the issue of Iran's obligation to replenish the Security Account established under Paragraph 7 of the General Declaration,[2] could be considered to have such a final and *res judicata* effect as would prevent relitigation of the same matter between the same Parties.[3] In *Case No. A28*, having noted that "Iran has been in non-compliance with [its] obligation since late 1992"[4] and that it "expects that Iran will comply with its obligation,"[5] the Tribunal denied "the requests by the United States for an order to Iran for replenishment."[6]

2. In my view, the Tribunal has erred in accepting jurisdiction over Case No. A33 for the simple reason that it takes up a *res judicata* matter - one already decided and terminated by the final and binding Decision in *Case No. A28*.[7] As will be shown

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[1] *The United States of America, et al.* and *Islamic Republic of Iran, et al.*, Decision No. 130-A28-FT (19 Dec. 2000), *reprinted in* – Iran-U.S. C.T.R. - .

[2] See, note 2 of the present Decision, No. 132–A33-FT.

[3] Both *A28* and *A33* involved the same parties (Iran and the United States), the same subject matter (Iran's obligation under Paragraph 7 of the General Declaration), the same cause of action (Iran's non-compliance with that obligation), and the United States' request for ordering Iran to replenish the Security Account. For an eloquent analysis of the Rule in the Iranian legal system, see, Professor Dr. Nasser Katouzian, *L'Autorité de la Chose Jugée en Matière Civile*, Dadgar Publications, Tehran, 5th ed. (1997), pp. 175 *et seq.*

[4] While agreeing with the A28 Decision insofar as it denied the United States' relief sought with respect to the replenishment of the Security Account and the additional relief, I vehemently dissented, in view of the circumstances of the Case, from the Decision to the extent that it declared that Iran was in non-compliance with respect to its obligation under Paragraph 7 of the General Declaration. (See, the note under my signature to the A28 Decision, note 1, *supra*, at -.

[5] To understand this expectation better, see the discussions under Section II.2, *infra*.

[6] Note 1, *supra*, paragraph 95 (B). See, also, paragraph 7 of the present Decision.

[7] According to Article IV of the Claims Settlement Declaration and Article 32 of the Tribunal Rules, the awards and decisions of the Tribunal are final, binding and enforceable.

here in this Opinion, the majority tried to circumvent this well settled rule by committing a host of palpable factual and legal errors and taking upon itself the hardship of contradicting and misinterpreting the rules of law and precedents of international tribunals, though it has, in the end, returned to the already decided Case and adjudicated matter, as the basis for its present Decision. Had the majority applied the elementary rules of law and equity in an objective manner, the outcome would no doubt have been different and would have resulted in the outright dismissal of the United States' application under the guise of *Case No. A33*.

II. REASONS FOR THE OPINION

3. In seizing jurisdiction over *Case No. A33*, the majority reasons that as long as Iran does not replenish the Security Account and does not maintain it at the required level, Iran continues to be in non-compliance with its obligation under Paragraph 7 of the General Declaration and that the United States is entitled to assert a new claim based on Iran's non-compliance, because the United States' right to assert this new claim was not extinguished by the Tribunal's Decision in *Case No. A28*, which, in the majority's view, only addressed Iran's non-compliance from late 1992 until December 2000. It is in support of this finding that the majority entangles itself in a web woven with the threads of misinterpretation and misapplication of certain rules and precedents alien to Cases Nos. *A28* and *A33*.[8] The same jurisdictional argument forms the basis of the majority's reasoning under the title "Merits" in the *A33* Decision, stating that denial of the United Sates' request for an order maintaining replenishment was based solely on the Tribunal's expectation of Iran's compliance with its replenishment obligation,[9] which is, in the main, the same reason forming the basis for accepting jurisdiction to entertain the *A33* claim.

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[8] See, paragraphs 31-37 of the Decision.

[9] Id., paragraph 39.

II.1. A33 IS BARRED BY THE RES JUDICATA RULE

II.1.a. *RES JUDICATA* IS A RULE OF LAW OR A GENERAL PRINCIPLE

4. Although the majority fails to approach the *res judicata* rule appropriately, concentrating more on what would be qualified as "dispositif" from a final and binding point of view, there has been no dispute that the rule is accepted and applied by all tribunals, arbitral tribunals included, as a legally binding customary rule or general principle of international law[10] in situations wherein a matter has been judicially determined by a previous decision between the same parties. Therefore, the majority should be taken to know well [11] that granting the United States' request by deciding *Case No. A33* on its own merits could only be possible through outright contravention of this principle that is one of the most fundamental rules of

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[10] See, e.g., A. Reinsch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes," 3 *The Law and Practice of International Courts and Tribunals: A Practitioners' Journal* (2004), 38, at 44-46; W.S. Dodge, "National Courts and International Arbitration: Exhaustion of Remedies and *Res Judicata* Under Chapter Eleven of NAFTA," 23 *Hastings International & Comparative Law Review* (2000), 357, at 368; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), at 336; Sir H. Lauterpacht, *The Development of International Law by the International Courts* (1958) at 19, 325-326; *Request for Interpretation of the Judgment of 1 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Preliminary Objection, paragraph 12, *I.C.J. Reports* 1999, 31, 39 (23 March 1999); *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), *I.C.J. Reports* 1960, 192 (18 November 1960); *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, *I.C.J. Reports* 1954, 47 at 53; *Trail Smelter Case* (United States v. Canada), 3 *R.I.A.A.* 1905, at 1950 (1941); *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory of Chorzów*, 1927 *P.C.I.J.* (*Series A*) No. 11, at 27 (Dissenting Opinion of Judge Anzilotti); and *Pious Fund Arbitration* (Mexico v. United States), *Hague Ct. Report* (Scott) 1, 5 (Permanent Court of Arbitration 1902) and 2 *American Journal of International Law* (1908) 893.

[11] The majority is taken to know the preventive impact and primacy of the *res judicata* principle because Judge Virally had, on an earlier occasion, referred to it in an award of the Tribunal, stating that "the principles of *res judicata* or estoppel would bar Amoco in most, if not all, legal systems, from successfully prosecuting a claim, the merits of which have been finally determined by this Tribunal." (*Amoco International Finance Corporation* and *The Government of the Islamic Republic of Iran, et al.*, paragraph 18 (14 July 1987) *reprinted in* 15 Iran-U.S. C.T.R. 189, at 196.

adjudication, *i.e.* the prohibition on deciding a matter twice.[12] The rule is so deeply rooted in all legal systems that no derogation from it is conceivable: *res judicata pro veritate habetur*. A matter judged should simply be accepted and followed not only by the tribunal rendering it, but also by all other fora.[13]

II.1.b. A33 DECISION CONTRAVENES THE RULE

5. It is readily recognizable from the text of the Decision that *Case No. A33* could not stand on its own. There would have simply been no Case without bringing in the elements from *Case No. A28*, a final and closed Case. The only way to deal with *Case No. A33* was to open *Case No. A28* and revisit its merits. That is what the majority has plainly done here. However, in order to disguise this, the majority resorts to two arguments, both totally immaterial and incorrect.

6. By the first argument, the majority tries to dismiss Iran's position, which it refers to as "Iran's theory", to the effect that the *dispositif* of the Decision in *Case No. A28* is limited to the final sentence of paragraph 95 (B) thereof.[14] The majority then takes the position that the *dispositif* of that Decision comprises the entirety of paragraph 95 and not just the last sentence of subparagraph B.[15] It goes on to state that all holdings of paragraph 95 of the A28 Decision enjoy *res judicata* effect and are final and binding, and that the reasons provided by the Tribunal in the Decision, too, have binding force between the Parties.[16]

7. Though the views of Iran on this subject are somewhat distorted, still one is at a loss as to the ingenuity of the arguments in the abovementioned four paragraphs. To start with, to the extent related to the *res judicata* rule, the entirety of *Case No. A28*

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[12] Considering the latter of these two Cases as being the continuation of the former, the Claimant demanded compensation for legal costs involved in *Case No. A28*, and the Tribunal treated the request as a part of the relief sought in *Case No. A33*.

[13] The process of setting aside an award, or usual recourses open for the revision or correction of it, are, of course, separate matters, which are not at issue here.

[14] The Decision in this Case, paragraph 26.

[15] *Id.*, paragraph 27.

[16] *Id.*, paragraphs 28-29.

and its subject matter should enjoy the positive and negative effects of *res judicata*. Therefore, the majority's arguments are superfluous and convoluted, because, while the majority is correct to conclude, if such has been its intention, that the final and binding character of awards and decisions entail their automatic *res judicata* effect, there was no need, for that purpose, to haphazardly catalogue a number of concepts, namely *dispositif, res judicata*, and the final and binding force of awards and decisions. Secondly, it is simply irrelevant and immaterial for that matter whether the *dispositif* of the A28 Decision comprises the entirety of paragraph 95 or only a portion thereof. The issue is not the demarcation of the borders of a *dispositif* or the determination of its exact number of words. The issue is whether or not one may re-open and revisit a matter already decided by a previous award or decision. To this the majority proffers virtually no answer, except for bringing up the issue of "expectation" expressed in the A28 Decision, to which I will return later in Section II.2. It suffices, however, to point out here, in this connection, the irony of according, on the one hand, final, binding and *res judicata* effects to the entire contents of paragraph 95 while on the other hand divesting the same of all those effects by resorting to the word "expectation" therein expressed, upsetting the whole A28 Decision by allowing reconsideration of the issues already decided by it.

8. The second argument put forward by the majority to circumvent the *res judicata* hurdle and to disguise its act of revisiting the A28 Decision is the "continuous non-compliance" argument. The majority believes that "as long as Iran does not replenish the Security Account ... Iran continues to be in non-compliance with its Paragraph 7 obligation." From this, the majority concludes that the subject matter of this Case, *i.e.* the renewed request for replenishment may be entertained again despite the fact that it has once before been considered and ruled upon by a previous Decision.[17]

9. This argument is simply incorrect. To begin with, although the "continuous non-compliance" argument is introduced under the rubric of jurisdiction, it vanishes altogether when the majority deals with the merits of the Case. At the latter stage, the majority returns to the Decision in Case No. A28, and bases its finding on the

[17] Id., paragraphs 31, and 35-36.

"expectation" expressed in that Decision. If the "continued non-compliance" argument could form the basis for a new claim, as is argued by the majority, then Iran's so-called non-compliance with its obligation under paragraph 7 of the General Declaration since December 2000 could have been a sufficient cause for finding Iran to be in non-compliance, as was the case in Case No. A28, whether or not there existed a previous expectation on the Tribunal's part. It is no wonder why the majority did not take this approach. The doctrine of continuous breach cannot be, and has never been, used to defeat the *res judicata* effect of a previous decision rendered on the same matter between the same persons.[18]

10. In fact, as will be discussed again under Section II below, the same claim of continued non-compliance formed the subject matter of another request for replenishment of the Security Account by the United States filed over 8 months after the Decision in *Case No. A28*. The Tribunal did not consider that renewed request as a new claim covering Iran's continued non-compliance for that period. Rather, recalling its Decision in that Case, the Tribunal dismissed the application by its Order of 17 September 2001, ruling that it is not prepared to change the relief granted.[19] Thus, the majority had no other choice but to clutch at the straw of "expectation" by qualifying the A28 Decision as an open and conditional one.[20]

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[18] Having ruled, in its previous Decision in *Case No. A28*, that Iran was not in compliance with its obligation, and having dismissed the relief sought by the United States (to order Iran to replenish the account), both findings stand in tandem with equal force, no matter whether Iran's continued non-compliance would have been for a period of one day or years before or after the Decision. Thus, the positive and negative effects of *res judicata* of the Decision will apply to both alike. Actually, the majority states in paragraph 28 of the Decision that those holdings "form part of the *dispositif* of the Decision in *Case No. A28*, enjoy res-judicata effect, and, therefore, are final and binding on the parties."

[19] See, also, Paragraph 16 of the present Decision. By recalling its Decision in Case No. A28, the Tribunal refers, implicitly, to the *res judicata* effect of that Decision.

[20] The majority's distinction, based on continued non-compliance, between the periods falling before and after the A28 Decision, and treating them as different causes of action, entails another illogical conclusion: that the Decision related solely to Iran's pre-Decision obligation and that a new claim by the United States should have been expected for the post-Decision period, even if the relief sought by the United States would have been granted in the first place.

II.1.c. AUTHORITIES RELIED UPON ARE NOT SUPPORTIVE

11. As alluded to above (paragraph 3), the majority relies only on certain interpretations of the International Law Commission's Articles on State Responsibility ("ILC Draft Articles") and a few international decisions presented to it by one of the parties to the present Case (*Case No. A33*) to support its position based on the "continuous non-compliance" theory as a new ground for seizing jurisdiction. To start with, the definition given in the ILC Draft Articles (paragraph 32 of the present decision) can have little bearing on the question of jurisdiction over a dispute or whether a new cause of action may be derived from an issue already decided. Paragraph 2 of Article 14 of the ILC Draft Articles, and in fact other paragraphs of that Article, intend only to define "an act" of breach under international law whether or not that act has a continuing character.

12. The *Rainbow Warrior* declaratory award delivered by the France-New Zealand Arbitration Tribunal was dealing with France's failure to confine two of its agents on the island of Hao for three years as required by an agreement between France and New Zealand. Therefore, the tribunal was dealing for the first time with the alleged breach of the agreement, and no earlier decision was involved with respect to the France's non-compliance with that agreement. In view of this, the analogy is simply misplaced, and the additional explanation in footnote 14 of the Decision stating that the Arbitral Tribunal could not order the return of the two agents to the island only undermines further the majority's reliance on that award. The passage quoted by the majority simply explains that France's continued breach of the agreement by keeping the agents in France, rather than on the island, ceased to have a continuing character as soon as the violated rule ceased to be in force.[21]

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[21] Furthermore, in line with its settled approach in the present Decision, the majority refers to a part of the *obiter dictum* out of context, leaving out the remaining part. After explaining their understanding of Article 24 and paragraph 1 of Article 25 of the ILC Draft Articles and stating that the ILC distinguished "instantaneous breach" from "the breach having a continuing character," the arbitrators pronounced on the possible "practical consequences" of that classification by stating that the seriousness of the breach and its prolongation in time may have bearing on the establishment of the reparation. There is nothing, even in the form of an adverse inference or hint, to remotely imply that they considered the possibility of reopening a decision rendered with respect to a continued breach before the decision as a consequence of the continuation of that breach after the decision. *Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of*

13. The same applies to the considerable weight accorded by the majority to the award in the *Asylum Case* before the International Court of Justice[22] and the subsequent case of *Haya de la Torre* before the same forum (paragraph 34 of the present Decision). The quoted passage from *Haya de la Torre* is taken out of context and has little relation to the Case at hand. There are stark differences between those two Cases and Cases Nos. *A28* and *A33*. First, in the two Cases before the ICJ there was no dispute as to the jurisdiction of the Court. Both Parties were in agreement as to this aspect of the proceedings. In particular, in the second Case (*Haya de la Torre*), the Court did not deal with the question of jurisdiction and simply stated that:

> 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.[23]

14. Second, the Court in *Haya de la Torre* was extremely careful not to enter into any issue already examined in the *Asylum Case*. The issue of *res judicata* was strictly adhered to by the Court. While the fact of a continuous breach was at issue in the *Haya de la Torre* Case, the Court makes it clear, contrary to what the majority attempts to imply, that the reason for assumption of jurisdiction was because the subject matter and the relief sought in those two Cases were totally different:

> [T]he Government of Peru had not [in the *Asylum Case*] demanded the surrender of the refugee. This question was not submitted to the Court and consequently was not decided by it. It is not therefore possible to deduce from the Judgment of November 20th any conclusion as to the existence or non-existence of an obligation to surrender the refugee ... the question of the surrender of the refugee ... was raised by Peru in its Note to Columbia of November 28th 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender.[24]

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two Agreements, Concluded on 9 July 1986 between the two States and which Related to the Problem Arising from the Rainbow Warrior Affair (30 April 1990), 20 *U.N. R.I.A.A.*, 217, at 264.

[22] *Asylum Case* (Colombia v. Peru), *ICJ Reports* 1950, 265.

[23] *Haya de la Torre Case* (Colombia v. Peru) *ICJ Reports* 1951, 70, at 78.

[24] *Id.*, at 79 and 80. The respect for issues already judged is also observed in the question related to intervention of a third party, with respect to which the Court stated that "the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November

15. It is in this context that the quoted part of the decision of the World Court should be understood. Therefore, in the *Haya de la Torre Case* the Court was confronted with a genuinely new case, involving new subject matter and new relief sought. In the *Asylum Case*, the relief sought was a judgment to declare that the granting of asylum by the Columbian Ambassador at Lima was in violation of the 1928 Havana Convention,[25] while in *Haya de la Torre*, the relief sought was 1) "to determine the manner in which effect shall be given to the Judgment of November 20th, 1950", and 2) whether or not Columbia was bound to deliver the refugee to the Government of Peru.[26]

16. Third, in the *Haya de la Torre Case* the Court did not go beyond its earlier decision in the *Asylum Case*. Simply repeating its decision in that Case, the Court declined to provide any guidance as to how the earlier judgement should have been performed and expressly dismissed the request for an order to Colombia to surrender the refugee,[27] which was the principal remedy sought.[28]

17. The situation in the present Case, *i.e. A33*, is totally different. The above analysis of the *Haya de la Torre Case* shows that had the Court been faced with a situation similar to that which was present in Cases *A28* and *A33*, the Court would have, as clearly indicated, refrained from even admitting the *Haya de la Torre Case* based on the *res judicata* rule. There is no difference between our Cases here (*Cases No. A28* and *A33*). They share the identity of the parties, the subject matter of the

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20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950. Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute...." (*Id.*, at 77)

[25] Note 22, *supra*, at 271.

[26] Note 23, *supra*, at 72-73.

[27] *Id.*, at 79 and 82.

[28] It must be noted that under the Havana Convention the grant of domestic asylum was a provisional measure and could not continue forever. In any event, Columbia had the duty to terminate it somehow. (*Id.* at 80.)

claim, and the relief sought, with respect to which the A28 Decision has already been rendered by the Tribunal.

18. In my view, the Tribunal could not only rely on the *Haya de la Torre Case* in support of denying the United States' renewed application in *Case No. A33*, but it could also seek support for that from other international decisions and the precedents of this Tribunal, to some of which we will briefly refer in the following paragraphs.

19. In *Pious Fund Arbitration*, decided by the United States-Mexican Claims Commission in 1875 (Sir Edward Thornton, umpire), the Commission found that bishops in Upper California were entitled to annual interest payment from a fund called "The Pious Fund of the Californias." After effecting payment of accrued interest in accordance with the award, Mexico refused to continue making further annual payments. In a proceeding initiated by the United States before the Permanent Court of Arbitration in The Hague, the arbitral tribunal held, in its 1902 award, that the earlier award of the Commission of 1875 enjoyed *res judicata* effect between the parties on the matter and could not be questioned again.[29] The tribunal did not consider the continued act of non-compliance by Mexico after the 1875 award of the Commission a matter different from that which had been decided earlier such that it might form a new cause of action for the United States' new claim.

20. For the sake of brevity, only two other international precedents will be referred to here which show that continued action of the respondent State or passage of time after the initial decision has not been found to form a new cause of action for accepting jurisdiction over a renewed claim or for ignoring the *res judicata* effect of that initial decision.

21. In *John F. Machado*, damages for the seizure by Spanish authorities in Cuba of the claimant's house, cattle, and horses formed the subject matter of a claim (numbered 3). In 1873, the claim was dismissed by the Commission for want of prosecution. But the Commission reserved "to itself the right to reinstate the said case

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[29] *Pious Fund Arbitration*, note 10, *supra*, at 900. *See*, also, August Reinisch, referred to in the same footnote. The latter states that "The decision demonstrates a positive and a negative effect of *res judicata*. Because the umpire decision of 1875 was final and binding (positive effect), it could not be re-litigated in 1902 (negative effect). In the words of the tribunal 'all the parts of the judgment [...] serve to [...] determine the points upon which there is *res judicata* and which thereafter cannot be put in question.'"

on motion by the advocate for the United States" if sufficient cause could be shown in support thereof. In 1879 Machado filed another case, numbered 129, seeking restoration of his house and claiming rent and damages for its detention up to that date. The umpire first posed a question for resolution, asking himself whether claim No. 129 could be considered a new claim or the same as claim No. 3. In resolving the issue, the umpire stated that the question could not be answered by finding "whether the items included in both cases were the same." Rather "the test is whether both claims are founded on the same injury." Then, noting that the injury on which claim No. 129 was based was the seizure of the claimant's house, which was "one of the foundations for claim No. 3," he ruled that claim No. 129, "being part of an old claim, cannot be presented as a new claim under a new number."[30]

22. Similarly, in *José G. Delgado,* decided by the United States-Spanish Claims Commission, the first umpire was asked to decide "the amount of rents, issues, profits, and income of the real estate," which was seized and detained by Spanish authorities in Cuba since 1869, from the time of seizure until the date of decision, and for certain personal property. On 18 December 1875, the umpire denied the claim put to him by the Commission for lack of sufficient evidence. Later, in 1876, the United States moved to introduce further evidence in support of Mr. Delgado's claim. The umpire overruled the motion and it was so ordered.[31]

23. Over two years later, in April 1878, the United States moved again for a rehearing of the case and for leave to produce new documents. The new umpire first treated the question of whether the claim, now numbered 125, was a new claim or the same as the previous claim (No. 12). After noting the United States' argument that "the claimant in the former case only asked for the rents, issues, profits, and income of the land," and that in this case "he demands the value of the land," the umpire ruled that the claims arise from the same seizure of the same property, and "[e]ven if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do as other claimants in

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[30] *Machado Case* (United States v. Spain, John Basset Moore III *History and Digest of the International Arbitration to which the United States has been a Party* (1898) at 2193-2194.

[31] *Delgado Case* (United States v. Spain), *id.*, at 2196-2197.

other cases where it has been done, and he can not have relief by a new claim before a new umpire."[32]

24. To the extent related to our discussion here, the above decision demonstrates that the umpire considered the *res judicata* effect of the previous award applicable not only to the relief sought, but also to that which could have been sought based on the same cause of action, namely the seizure and continued detention of the lands. Here, we did not have to go that far. The cause of action and the relief sought based on that cause were identical in *A28* and *A33*. The United States' demand in *Case No. A28* was for replenishment of the Security Account by Iran and maintaining it at the requested level until the time that the Tribunal ceases its function. The same demand was made in *Case No. A33*. Moreover, the decisions in both *Delgado* and *Machado* resemble, in some respects, the findings of the *Asylum* Case, *Haya de la Torre*, and the 1902 award in *Pious Fund Arbitration*, because the continuation of acts forming the bases of earlier claims were not found to constitute a good excuse to set aside the *res judicata* effects of the earlier awards, whatever they might have been.

25. Further, had any of the above tribunals entertained jurisdiction over new claims they would have entered an impermissible domain of issuing as *exequatur* with respect to the earlier awards, a move also declined by this Tribunal in a number of its decisions.[33] The Tribunal's practice in its recent decision in *Case No. A27* is a good example.[34] In that Case, after the United States' refusal to comply with the Tribunal's ruling by paying the judgment debt,[35] Iran requested the Tribunal "to order the United

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[32] *Id.*, at 2197-2199.

[33] In *Bendone-Derossi International* and *The Government of the Islamic Republic of Iran*, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. C.T.R. 130, the Tribunal ruled that it "does not consider it a reasonable interpretation of the Algiers Declarations that it should act as a court issuing *exequatur*...." (*Id.*, at 133.)

[34] *The Islamic Republic of Iran* and *The United States of America* Award No. 586-A27-FT (5 June 1998), *reprinted in* 34 Iran-U.S. C.T.R. 39. This Case related to the refusal of a United States claimant (Avco) to accept the final and binding effect of an earlier Tribunal award and to pay the judgment debt of that award to the Iranian party involved. (*Avco Corporation* and *Iranian Aircraft Industries, et al.*, Partial Award No. 377-261-3 (18 July 1988), *reprinted in* 19 Iran-U.S. C.T.R. 200.)

[35] In *Case A27* (*supra*, paragraphs 71, *et seq.*, at 59 *et seq.*), the Tribunal found that the United States had "violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the Jurisdiction of the

States to comply with the Award No. 586-A/27-FT."[36] The Tribunal did not treat the request as a new cause of action for a new claim or as a ground allowing it to revisit its earlier decision based on the continued non-compliance of the United States after Award No. 586. Rather, it dismissed the application by an order invoking the final and binding nature of Award No. 586-A27-FT and its limited authority under Articles 35-37 of the Tribunal Rules.[37] In support of its order, the Tribunal also referred to an earlier decision in *Case No. 389*.[38]

II.2. MAJORITY'S DECISION ON THE MERITS

26. As stated earlier, in the present Decision, the Tribunal relies on its "expectation" expressed in the A28 Decision for dual purposes; namely as a ground for supporting its seizing of jurisdiction over *Case No. A33*, and for revisiting the *res judicata* merits of *Case No. 28* under the guise of deciding *Case No. A33*. Fortunately, however, the majority does not go much beyond the dispositif of the A28 Decision, in a way following in the footsteps of the International Court of Justice in *Haya de la Torre*, discussed, *supra*, at paragraph 16.

27. The foundation of the majority's finding leading to the pronouncement under paragraph A of the *dispositif* could be readily seen in paragraph 39 of the same Decision. There, the majority expresses the view that when the Tribunal in *Case No.*

United States," and ordered the United States to pay over 5 million dollars plus interest to Iran.

[36] Iran's letter of 24 July 1998, Document No. 40.

[37] Tribunal's Order of 5 August 1998, Document No. 41.

[38] *Westinghouse Electric Corporation* and *The Islamic Republic of Iran Air Force*, Decision No. DEC. 127-389-2 (23 April 1997), *reprinted in* 33 Iran-U.S. C.T.R. 204 (wherein the Tribunal denied Iran's request for an order to Westinghouse to abide by an earlier award of the Tribunal -- Award No. 579-389-2 -- which had, *inter alia*, directed Westinghouse to send certain Iranian properties to a warehouse in the United States. In denying the request the Tribunal pointed out that it had no such power to grant Iran's request and emphasized that Award No. 579 was final and binding, contemplating compliance by all parties. (*Id.*, at 205.) Therefore, the Tribunal did not consider the continued non-compliance with the award by Westinghouse to be a sufficient cause for entertaining Iran's renewed request and revisiting Westinghouse's obligations pursuant to Award No. 579.

A28 denied the United States' request for a replenishment order, the denial was based on the "expectation" expressed in paragraph 95 (B) of the A28 Decision. From this, the majority proceeds to pronounce that "once that expectation did not materialize, the basis for the denial disappeared; therefore, the Tribunal will now consider the United States' petition for a replenishment order."[39] The majority adds in the same paragraph that: "doing so does not conflict with the Tribunal's Decision in Case No. 28."

28. The first thing revealed by this statement is the fact that the majority is not concerned with its main task, *i.e.* dealing with *Case No. A33 sub judice*, but is revisiting *Case No. A28*, a fact that it has been ineptly trying to hide throughout the Decision. The consequences of such an approach are obviously grave, as I have shown in the previous Sections and will demonstrate further here.

29. However, before all else, one has to put the "expectation" expressed in the A28 Decision in its proper context. To understand that, one should not detach it from that context by treating it in the abstract.[40] Rather, one should recall a number of factors involved, including, *inter alia*, the facts that 1) Iran, for over 22 years, has fully satisfied the awards of the Tribunal, 2) all claims by United States nationals, for securing whose claims the Account was established, were totally settled and paid, 3) the Security Account was still solvent and, at the time of the Decision in *Case No. A28*, had a balance of about U.S. $133,000,000 with interest accruing to it regularly (increasing the present balance to U.S. $143,335,673.58), and that 4) Iran made a pledge during that proceeding, which was repeated in this Case, committing itself to provide necessary funds for the Security Account should any additional fund be needed, though no Case with a potential impact on the balance of the account was

[39] Compare with the decisions in *Delgado* and *Machado*, where the umpires relied on the final and binding and *res judicata* effects of previous decisions, notwithstanding language employed by the commission which implied the possible reconsideration of the earlier claims. (Notes 30 and 31 *supra*.)

[40] It was against this backdrop and under the circumstances involved that I agreed, on the one hand, with the Tribunal's denial of the United States' requests, and dissented, on the other, even from the declaratory nature of the A28 Decision, considering it wrong to declare Iran not in compliance with its obligations under Paragraph 7 of the General Declaration.

pending against Iran as defined by Article VII (3) of the Claims Settlement Declaration.[41]

30. Therefore, the Tribunal considered it fair to limit itself to a declaratory judgment on non-compliance, to deny the United States' demand for replenishment, and to say that it "expects" that Iran will comply with its obligation, the gist of which was satisfying future awards, if any, against it by using the balance in the Account or, in a very unlikely situation, by adding money to it if necessary.[42] This explains further why the Tribunal did not set any time limit for Iran to meet its expectation.[43]

31. Nowhere in the A28 Decision, or for that matter in the separate opinions of other members, is there any indication that by using the word "expectation" the Tribunal intended anything similar to what it is now inventing in paragraph 39 of the Decision. Actually, bearing in mind the fact that during the proceedings in *Case No. A33* the situation improved rather than deteriorated in comparison to that which existed during the proceedings in *Case No. A28* by the fact that the last remaining claim of a United States national was terminated and the balance of the Security Account increased to U.S. $143,335,673.58, notwithstanding the withdrawal of the judgment debt of the award in that last claim, it comes as a surprise to see the majority clinging, this time, to that "expectation" in order to revisit the issues already decided by the A28 Decision.

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[41] See, paragraph 89 of the Decision in *Case A28*, *op. cit.* note 1, at -, and paragraphs 5 and 25 of the present Decision. It was also in view of these circumstances that Iran argued that a purely formal and literal interpretation of Paragraph 7 of the General Declaration would defeat the whole object and purpose of that Paragraph. (See, also, paragraph 23 of the present Decision.)

[42] This understanding of the Tribunal, forming the basis for denying the United States' request for an order against Iran, is spread throughout the A28 Decision. In paragraph 93 of that Decision the Tribunal stated that it "sees no need," in view of the circumstances, "to include such a specific order." Moreover, in paragraphs 89 and 90, the Tribunal expressly appreciated and understood "the reason why Iran presently considers replenishment of the Security Account unnecessary as a practical matter to secure and pay the awards in the claims remaining against it."

[43] The right, and for that matter the expectation of performance of an obligation, must be exercised *bona fide*, observing the universally accepted principle of good faith. "The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State." B. Cheng, note 10, *supra*, at 131-132.

32. Although, it is difficult to enter into the subjective domain of each member's intention at the time of the A28 Decision, nothing was expressed at the time to give the slightest hint that by that "expectation," possible future reconsideration of the relief denied by the A28 Decision was intended.[44]

33. Out of nine members of the Tribunal, the signatures of 7 members were accompanied with annotations of separate opinions, while two decided to remain silent and content with the Decision as it was.[45] In none of those 7 opinions does one find any indication to the effect that the word "expectation" was used to signify a conditional determination, a link between that word and the denial of the United States' request, or a ground for future reopening of the issue(s) decided.

34. Irrespective of the merit of his interpretation, Judge Aldrich, the only American member who was present in both panels delivering the A28 and A33 Decisions, considered the Tribunal's task and duty completed:

> In my view, in the present Decision, the Tribunal performs that duty effectively by explaining clearly Iran's obligation to replenish the Security Account, by determining that Iran has been in breach of that obligation since late 1992, and by stating that it expects Iran to comply with that obligation. *It would not have added any additional weight to this Decision to have phrased the remedy as one that "requests" or "orders" compliance.*[46]

35. Actually, he not only considered the door slammed in the face of any future recourse, stating in the same place that "[w]hile the Tribunal has broad powers to fashion remedies, it does not have the power of the domestic courts to enforce them," but also explained what he considered to be the reason behind the Tribunal's expectation and its declaratory judgement, which conforms with that which is explained in paragraphs 29 and 30, *supra*.

> When the other Party has incurred a loss that can be quantified and compensated by monetary damages, an award of such damages is clearly appropriate. In the

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[44] Breaching the confidentiality rule of deliberations is unnecessary because one may easily conclude the opposite from that which will be explained in the following paragraphs.

[45] It is notable that the A28 Decision was a congruent judgment, with six members fully concurring and three others concurring in part. Indeed, on the denial of the United States' request one could say that there was unanimity.

[46] Note 1, *supra*, Concurring Opinion of George H. Aldrich (19 December 2000), paragraph 2. Italics supplied.

> present Case, *the United States has incurred no losses that can be so quantified and compensated*, but the breach -- the failure of compliance -- continues. In these circumstances, the Tribunal has a duty to make clear the nature of the breach and the duty of the Party in breach to comply with its treaty obligation, regardless of any inconvenience such compliance might entail.[47]

36. Judge Mosk, another American colleague, also filed a Concurring Opinion, to which the late Judge Duncan, another American member, joined. They, too, considered the A28 Decision the end of the matter. Judge Mosk opens his Opinion by saying that "[t]he Tribunal's statement that it expects Iran to comply with its obligations hereafter should be sufficient," though he later adds his personal interpretation that such a "manifestation of expectation should be viewed as the equivalent of an order."[48]

37. Going through other Opinions filed by other Tribunal members leads us to the same conclusion. No such link or condition may be discerned from the views expressed by any of those members. Obviously, the views of those members who did not express anything under their signature or filed no Opinion may not be treated differently. Had they believed in any such link and possible future reconsideration of the issue, they would have expressed it.[49]

38. In fact, the idea of such a link or condition does not emanate from the A28 Decision but was proffered by the United States months later in its motions to revise the Decision from a declaratory to a new replenishment order against Iran. On 30 August 2001, eight months after the issuance of the A28 Decision, the United States filed a request with the Tribunal asking it to order Iran to replenish the Security Account. There, the United States introduced the argument that the Tribunal's decision not to grant the United States' request for a replenishment order in *A28* was

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[47] *Id.*, paragraph 1. Italics supplied.

[48] *Id.*, Concurring Opinion of Richard M. Mosk (19 December 2000), paragraph 3. Even this added personal interpretation connotes his understanding of the conclusive nature of the A28 Decision

[49] The United States, too, only two weeks after the issuance of the Decision in A28, emphasized the unambiguity of the remedy granted without any reference to the conditionality of the Decision, so much so that it challenged Judge Broms for, in the United States' view, casting doubt over the remedy granted to the United States.

linked to the Tribunal's expectation that Iran would comply with that Decision. As a result, the United States requested the Tribunal to issue such an order.[50]

39. Not agreeing with that interpretative argument, the Tribunal, in its Order of 17 September 2001, unanimously dismissed the United States' motion in the following words:

> The Tribunal recalls its Decision [in Case No. A28]. The Tribunal is not prepared to consider the Request by the United States to change the relief it granted in that Decision. For that reason the Request by the United States is hereby dismissed.

Yet again, no reference to any such link or condition can be discerned from this Order, as there was none. For the same reason, the Tribunal paid no heed to the United States' representation to that effect.

40. Two of the American members of the Tribunal appended their comments to the Order. Referring to and incorporating his Concurring Opinion in *Case No. A28*, Judge Most stated in a short sentence that "in view of Iran's continued violation of its obligations," he believed that "the Tribunal should have given greater consideration to the Request in question."[51]

41. To conclude on this, the so-called link or condition was a self-serving interpretation introduced by the Claimant some eight months after the issuance of the Decision in *Case No. A28* when it filed its request for an order of replenishment. Even then, the Tribunal made no reference to it while dismissing the request on 17

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[50] The United States' attempt to make such a link is understandable from a legal tactical approach. Since the Tribunal does not possess the power to reconsider its awards and decisions, it had to create such a link between the denial of its request in the A28 Decision and the "expectation" expressed there to attempt to achieve what was not available to it.

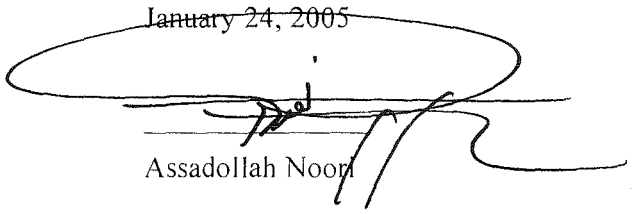
[51] Comment of Richard M. Mosk with respect to Order (17 September 2001). Judge Brower, who had just rejoined the Tribunal to replace Judge Duncan (and was not involved in the A28 proceedings), understandably referred to the expectation contained in the A28 Decision because it was raised by the United States in the motion denied by the Tribunal. However, referring to the Concurring Opinions of Judges Aldrich and Mosk, he noted that "some Members of the Tribunal at least were of the view that such a request for order 'would not have added any additional weight to this Decision' or would have been, in effect, superfluous." He then concluded that there remained "nothing more for it [the United States] to do to preserve its right of replenishment." (Separate Opinion of Charles N. Brower, dated 21 September 2001, with respect to the same Order.)

September 2001, which is further evidence supporting the conclusion that the "expectation" had no such significance. Now, all of a sudden, the majority has come up with the idea that the A28 Decision was based on that fictitious notion. A notion that, as explained above, had no place in the Tribunal's finding in *Case No. A28.*

42. As explained earlier here, the majority states that it has not gone beyond the ruling of the A28 Decision on the merits, but has upheld it, reiterating in a number of places that its decision in *Case No. A33* "does not conflict with the Tribunal's Decision in Case A28" and confirming that which was "determined by the Tribunal in its Decision in Case No. A28."[52] It has been because of this positive approach that I have agreed in part with the Decision, which required, if properly followed, the dismissal of the United States' claim in its entirety, but, unfortunately, the majority opted for a contrary course by committing fatal flaws, as discussed hereinabove.

Dated, The Hague

January 24, 2005



Assadollah Noori

[52] Paragraphs 39 and 45 (A) of the present Decision.