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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

[redacted]

CASE NO. B-24

CHAMBER ONE

AWARD NO. 106-B-24-1

THE UNITED STATES OF AMERICA,

Claimant

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

OPINION OF HOWARD M. HOLTZMANN CONCURRING IN PART AND DISSENTING IN PART

This is one of the first cases decided by the Tribunal which requires analysis of the provisions of the Claims Settlement Declaration giving the Tribunal jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." Article II, paragraph 2. The case calls for a determination of what constitutes "services" in that context.

The Tribunal holds that a claim for an unpaid fine assessed by the United States against the government-owned Iran National Airlines Corporation ("Iran Air") for unlawfully carrying to the United States an alien passenger

who did not have a visa is not a claim arising out of the purchase and sale of "services," and thus is not within the jurisdiction of the Tribunal under Article II, paragraph 2. I concur in that decision.

On the other hand, the majority of the Tribunal holds that a claim based on Iran Air's failure to fulfill its contractual obligation to reimburse the United States for the salaries and expenses of United States immigration officers while they were engaged in activities for the benefit of the airline, is also not a claim arising out of the purchase and sale of "services." I think that was wrong and I dissent.

I write separately in this case because discussion of the facts involved in the two separate parts of the claim may help to illuminate the meaning of the term "services" as used in Article II, paragraph 2 of the Claims Settlement Declaration.

I.

As part of the establishment and development of passenger air service by Iran Air to the United States, two agreements were entered into. The first, entered into between the Government of the United States of America and The Government of Iran, is an "Air Transport Services Agreement" covering the establishment of air service between the two countries. The second, entered into between Iran Air and the United States of America, through its Commissioner of Immigration and Naturalization, is a contractual

arrangement known as the "Immediate and Continuous Transit Agreement." Under the latter Agreement, Iran Air contracted to pay for the salaries, expenses and overtime wages of U.S. immigration officers needed to facilitate Iran Air transporting through the United States alien passengers who were in transit to other countries and did not have visas for entry into the United States.

II.

The Air Transport Services Agreement is without doubt an agreement between the two Governments. Pursuant to Article 5, paragraph (b) of that Agreement, Iran undertook to ensure compliance with the "laws and regulations of [the United States] as to the admission to or departure from its territory of passengers ... such as regulations relating to ... immigration." This Article incorporates into the Agreement the provisions of the United States Immigration and Nationality Act, one section of which prohibits the transportation to the United States of any alien who does not have a valid visa, and imposes a fine of $1000 for each intentional or negligent violation. See 8 U.S.C. §1323.

The United States has claimed in this case for payment by Iran Air of what the Statement of Claim characterizes as an "administrative fine" for illegally transporting to the United States an alien who had no valid visa. Such claim, for payment of a fine assessed for allegedly unlawful conduct, is not a claim for payment for "services," and

accordingly is not within the jurisdiction of the Tribunal under Article II, paragraph 2 of the Claims Settlement Agreement. I therefore concur with the Tribunal's Award dismissing the claim arising out of the Air Transport Services Agreement.

III.

In sharp contrast with the foregoing claim is the claim of the United States made under the Immediate and Continuous Transit Agreement for non-payment by Iran Air of charges for services for which it contracted in that Agreement.

The business basis of the Immediate and Continuous Air Transit Agreement is clear from its text. The United States agreed to waive visa requirements for Iran Air's alien passengers in transit through the United States; in return, Iran Air agreed to "reimburse the United States for salaries and expenses of immigration officers of the United States during such times as they are actually employed maintaining custody of such alien passengers," (Agreement, paragraph 4) and to pay "all extra compensation for overtime services performed by immigration officers," (Agreement, paragraph 6) (emphasis added).

In addition, the parties to the Agreement recognized that the United States would be entitled to reimbursement for additional expenses it would incur if Iran Air breached

its contractual obligations to carry alien passengers "in immediate and continuous transit through the United States without expense thereto" within established time limits, (Agreement, paragraph 7). Iran Air therefore agreed that in each such instance it would pay $500 "as liquidated damages and not as a penalty." Id.[1]

The majority's Award incorrectly holds that this business arrangement "cannot possibly be characterised as an arrangement for the sale and purchase of goods and services." It goes on to state that the Agreement "must be regarded as akin to an ordinary set of administrative or police regulations." That analysis is unpersuasive for two reasons. First, it will be recalled that the Agreement itself specifies, inter alia, that it covers "services performed by immigration officers." Second, police functions are typically performed without charge in the United States.

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[1] Rather than requiring that salaries, overtime and other expenses be calculated in each such instance, paragraph 7 provides the simpler mechanism of requiring payment of the fixed sum of $500 as "liquidated damages." Such damages are not "a penalty," when as here, the amount fixed represents a reasonable attempt to approximate contractual damages that are difficult or inefficient to calculate exactly. Liquidated damages for breach of contract are thus clearly different from the "administrative fine" for violation of law discussed above in connection with the Air Transport Services Agreement.

The majority's Award also incorrectly concludes that the activities of the immigration officers were not performed to facilitate Iran Air's income-producing business, but were "measures ... taken by the United States in order to protect its own interest ... rather than as a service to the airline." That conclusion is plainly contradicted by the wording of the Immediate and Continuous Transit Agreement. Thus, the introductory paragraph of that Agreement makes clear that Iran Air entered into the Agreement, and thus agreed to pay for the services of immigration officers, "in consideration of additional passengers which it expects to receive by reason of the fact that under the immigration laws and regulating certain documentary requirements as to aliens proceeding to the United States ... may be waived." On the other hand, the provisions of the Agreement quoted above make it clear that the United States was willing to provide the services necessitated by the waiver of the documentary requirements, but only if Iran Air, not the United States, bore the cost of providing them. Thus, it will be recalled, paragraph 7 of the Agreement refers to Iran Air's duty "under this agreement" to carry aliens "through the United States without expense thereto." (Emphasis added.)

Accordingly, I would hold that the claim of the United States under the Immediate and Continuous Transit Agreement is a claim arising out of contractual arrangements between

the two Governments for the purchase and sale of services, and therefore within the jurisdiction of the Tribunal pursuant to Article II, paragraph 2 of the Claims Settlement Declaration.

Dated, The Hague
9 February 1984

Howard M. Holtzmann