IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 823
CHAMBER THREE
AWARD NO. 595-823-3

BANK MARKAZI IRAN,
Claimant,

and

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent.

CONCURRING OPINION OF
RICHARD M. MOSK

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1. I concur in the Award of the Chamber. I agree with the Tribunal's conclusion on the merits, except as to the Tribunal's failure to award costs to the prevailing party. The Award establishes that the Federal Reserve Bank of New York (hereinafter "New York Fed") acted honorably and appropriately despite difficult international and domestic conditions. In my view, jurisdictional issues should be resolved, and a decision on the merits should only be rendered if there is a determination that there is jurisdiction. There is, however, some Tribunal practice whereby the Tribunal avoids deciding a difficult jurisdictional issue when the claim can be dismissed on the merits. Therefore, I accede to the Tribunal's avoidance of the jurisdictional issue in this case. Nevertheless, I set forth my views on the jurisdictional issue not determined by the Tribunal because that issue concerns significant legal questions. My conclusions on the jurisdictional issue are based on the specific record of this case. I also discuss my disagreement with the Tribunal's unjustified and inexplicable failure to award costs to the prevailing party that had to defend a meritless claim.

I. INTRODUCTION

2. Bank Markazi Iran (hereinafter "Bank Markazi"), the Central Bank of Iran, established an investment account at the New York Fed in 1961. Pursuant to the arrangement, the New York Fed invested Bank Markazi funds in three- to six-month United States Treasury Bills and in repurchase agreements with one-day maturities. As agreed, there was a minimum uninvested balance, the earnings from which, in effect, served as compensation to the New York Fed for its investment services.

3. In response to Iran taking American hostages, President Carter issued Executive Order No. 12170 on November 14, 1979, blocking Iranian assets in United States banks. 44 Fed. Reg. 65,279 (1979). The New York Fed notified Bank Markazi that the New York Fed would comply with the Executive Order, but nevertheless continued to invest Bank Markazi's money as it had been doing. Under the terms of the Algiers Declarations of January 19, 1981, the New York Fed returned to Bank Markazi its funds along with approximately 12.54% in returns generated by investments during the freeze period. Bank Markazi ultimately asserted that had it been able to withdraw its monies during the period of the freeze, Bank Markazi could have earned a higher interest rate elsewhere.

4. The Tribunal correctly notes that the New York Fed continued to invest Bank Markazi's funds pursuant to standing instructions. At no time did Bank Markazi ever seek to change its investments or withdraw its funds, nor did it object to the investments. The only effect the United States freeze order had on Bank Markazi's account with the New York Fed was to preclude a few payments to Bank Markazi creditors. There is no indication this harmed Bank Markazi, which was able to obtain 12.54% on these monies that otherwise would have been paid creditors.

5. Article II(1) of 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 (hereinafter "Claims Settlement Declaration") provides for, *inter alia*, Tribunal jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." Article II(2) of the Claims Settlement Declaration provides for 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 VII(4) of the Claims Settlement Declaration defines the United States as "the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof."

6. There is no dispute that Bank Markazi is "an agency, instrumentality or entity controlled by the Government of Iran" and therefore under Article VII(3) of the Claims Settlement Declaration is deemed to be the Government of Iran entitled to bring a claim in this Tribunal against the United States "arising out of contractual arrangements ... for the purchase and sale of goods and services." Assuming that the arrangement in question is deemed to be for the purchase of services, the jurisdictional issue is whether or not the New York Fed is the United States by reason of being "an agency, instrumentality, or entity controlled by the Government of the United States."

7. In Tribunal *Case No. A2*, the Full Tribunal held that it has no jurisdiction over claims by a government against the nationals of the other country, unless by way of a proper counterclaim or as provided for in the Undertakings, which instrument is associated with the Algiers Declarations. *The Islamic Republic of Iran* and *The United States of America, Case No. A/2*, Decision No. DEC 1-A2-FT (26 Jan. 1982), *reprinted in* 1 Iran-U.S. C.T.R. 101. Bank Markazi originally filed the claim in the instant Case with other claims on the basis of Paragraph 2(B) of the Undertakings. Paragraph 2(B) gives the Tribunal jurisdiction over disputes between Iran and United States banks concerning Iranian indebtedness to, or deposits in, United States banks. The Full Tribunal held in Tribunal *Case No. A17* that it did not have jurisdiction over claims against United States banks unless they concerned Dollar Account No. 2 (the account containing the frozen Iranian funds to repay amounts owed to those banks) referred to in the Algiers Declarations. *Case No. A17, The United States of America* and *The Islamic Republic of Iran*, Decision No. DEC 37-A17-FT (18 June 1985), *reprinted in* 8 Iran-U.S. C.T.R. 189, 203 (hereinafter "*Case No. A17*"). Claimant has admitted that its claim does not concern Dollar Account No. 2. Thus, there can be no jurisdiction under the Undertakings.

8. After the decision in *Case No. A17*, Bank Markazi added an allegation to its claim in the instant Case that the New York Fed is an "agency, instrumentality or entity controlled by the Government of the United States" (quoting Article VII(4) of the Claims Settlement Declaration) and that therefore the Tribunal has jurisdiction under Article II(2) of the Claims

Settlement Declaration, which provision covers "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."

II. JURISDICTION

1. The *Dadras* Factors for Control

9. The Tribunal's jurisprudence on the issue of "control" under the Claims Settlement Declaration has been summarized in *Dadras International* and *The Islamic Republic of Iran, et al.*, Award No. 578-214-3, para. 30 (25 Feb. 1997), *reprinted in* _ Iran-U.S. C.T.R. _, _ (hereinafter "*Dadras*"). While noting that the issue of control is a question of fact to be decided on a case-by-case basis, the Tribunal stated in *Dadras* that the relevant factors for determining whether there is "control" of an entity by the government for jurisdictional purposes include: (1) expropriation of the entity, its stock or assets by the government; (2) government ownership of stock of the entity, either entirely or a controlling amount; (3) government supervision or control of the entity's operations; or (4) administration or management of the entity by persons appointed by a public authority. *Id.* These factors can be considered either independently or in combination. In evaluating whether an entity is controlled for jurisdictional purposes, the Tribunal is not bound by municipal law, but such law can provide assistance to the Tribunal in its inquiry. *American Housing International Inc.* and *Housing Cooperative Society of Officers of State General Gendarmerie, et al.*, Award No. 117-199-3 (19 Mar. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 235, 237-39 (hereinafter "*American Housing*").

10. Under the *Dadras* factors, the New York Fed is not a controlled entity for purposes of the Claims Settlement Declaration. There is no evidence, nor has their been any assertion, that the New York Fed is a controlled entity by virtue of an expropriation. There is no evidence that the New York Fed is a controlled entity because of government ownership. No share of the New York Fed is or ever has been owned by the Government of the United States.

11. The New York Fed is not a controlled entity by virtue of supervision or control of its operations by the Government of the United States. The New York Fed, as other Federal Reserve Banks and commercial banks that are members of the Federal Reserve System, is regulated by the Federal Reserve Board of Governors (hereinafter "Board of Governors"), an

independent regulatory agency of the United States Government. A mere connection with the government is not enough to establish control for purposes of the Claims Settlement Declaration. *See Dadras*, para. 30 (the Tribunal requires more than mere governmental involvement with, or interest in, a company); *American Housing*, 5 Iran-U.S. C.T.R. at 239 (a society of governmental employees not a controlled entity; government involvement in a project does not constitute control); *Schering Corporation* and *The Islamic Republic of Iran*, Award No. 122-38-3 (16 Apr. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 361, 370 (regulatory framework governing Workers' Councils not sufficient to establish control by Iran). Mere government regulation does not constitute the necessary degree of control. If it did, the distinction in the Claims Settlement Declaration between a "national" – not subject to jurisdiction except for counterclaims – and an "agency, instrumentality or entity controlled by the Government" would be meaningless, because nationals are subject to government regulation. The necessary "supervision" referred to by the Tribunal is distinct from regulation and suggests ongoing governmental control over the entity's day-to-day operations. *See Rexnord Inc.* and *The Islamic Republic of Iran, et al.*, Award No. 21-132-3 (10 Jan. 1983), *reprinted in* 2 Iran-U.S. C.T.R. 6, 10 (hereinafter "*Rexnord Inc.*").

12. Under United States law, the Board of Governors exercises only "general supervision" of the operations of the Federal Reserve Banks. 12 U.S.C. § 248(j). This form of supervision is equivalent to regulation. Under the applicable statute, actual "supervision and control" of each of the Federal Reserve Banks are exercised by a nine-member board of directors, six of whom are elected by private banks that are members of the Federal Reserve System and within the district of the particular Federal Reserve Bank. *Id.* at §§ 301-304. Only three members of each of these boards of directors are appointed by the Federal Reserve Board of Governors. *Id.* at § 305. The Tribunal has held that government control of an entity only commenced when the government gained the right to appoint a majority of the directors. *CBS Incorporated* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 486-197-2 (28 June 1990), *reprinted in* 25 Iran-U.S. C.T.R. 131, 140-41 (hereinafter "*CBS Incorporated*"). As a two-thirds majority of the New York Fed's directors is elected by member banks, the New York Fed is not controlled by the Government of the United States by virtue of the composition of its Board of Directors. *See Foremost Tehran, Inc., et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 220-37/231-1 (11 Apr. 1986), *reprinted in* 10 Iran-U.S. C.T.R. 228, 242; *CBS Incorporated*, 25 Iran-U.S. C.T.R. at 140-41.

13. The Tribunal has found that management or day-to-day control of a firm by government officers or government appointees may support a finding of control for jurisdictional purposes. *See, e.g., RayGo Wagner Equipment Company* and *Star Line Iran Company*, Award No. 20-17-3 (15 Dec. 1982), *reprinted in* 1 Iran-U.S. C.T.R. 411, 413 (entity controlled when not run by its own management, but rather by government appointees); *Rexnord Inc.*, 2 Iran-U.S. C.T.R. at 10 (government appointment of managers in charge of day-to-day operations sufficient for finding of control). No United States Government official is involved in the day-to-day management of the New York Fed. Federal Reserve employees are not United States Government employees. The President and officers of the New York Fed are selected by the Board of Directors and report to it. All of the Directors are private citizens and none is a government officer. Although the Board of Governors must approve the appointment of the President and first Vice-President of the New York Fed, such approval does not constitute, and is not equivalent to, appointment.

14. Bank Markazi argues that the New York Fed is a controlled entity by virtue of special government regulation of the type of transaction at issue in this Case pursuant to 12 U.S.C. § 348a. Under this provision, the New York Fed must inform and seek approval from the Board of Governors for negotiations with foreign banks that intend to open an account with the New York Fed. In practice, this requirement simply requires the submission of a one-page summary of the proposed account to the Board of Governors, and there is no evidence in the record that there has ever been a rejection of any request for such approval. This supervision is equivalent to that exercised over many highly regulated, private industries, including, for example, defense, power generation, and securities trading. *See, e.g., U.S. v. General Dynamics Corp.*, 644 F. Supp. 1497, 1503-04 (C.D. Cal. 1987) (defense industry highly regulated through "webs of laws, regulations and directives"); 16 U.S.C. § 824 (regulation of electric utilities companies "necessary in the public interest"); 15 U.S.C. § 78b (necessity of regulating securities markets, including requiring appropriate reports). Such supervision does not by itself establish that entities within such a regulated industry are under governmental control. Once a relationship is established between a Federal Reserve Bank and a foreign bank with the permission of the Board of Governors (as it was with Bank Markazi in 1961), there is no special or ongoing government supervision of the kind that has been held to constitute control for Tribunal jurisdictional purposes.

15. Under all of the *Dadras* factors, and based on the specific record in this case, the New York Fed is not an entity controlled by the United States under the Claims Settlement Declaration.

2. Nature of the Transaction as Evidence of Control

16. In some cases the Tribunal has used as evidence of control the nature of the activity in which the entity is engaged, if such activity is analogous to a government function. In *Hyatt International Corporation, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Interlocutory Award No. ITL 54-134-1 (17 Sept. 1985), *reprinted in* 9 Iran-U.S. C.T.R. 72 (hereinafter "*Hyatt International Corporation*"), the Tribunal found the Foundation for the Oppressed to be controlled by the Government of Iran for a number of reasons, even though it was allegedly a nongovernmental organization. Ayatollah Khomeini appointed the Foundation's President and the members of its Central Council. The Tribunal deemed these events to be equivalent to governmental appointment of the chief manager and board of directors of a company – appointments that are sufficient for a finding of control. In addition, the Tribunal noted that the Foundation (1) was established by the decree of Imam Khomeini and Iran's Revolutionary Council; (2) exercised the functions of expropriating and managing property for public purposes; and (3) was subject to government supervision by the Iran Majlis and the office of the Prime Minister of Iran. *Id.* at 88-92.

17. Unlike the Foundation for the Oppressed, the New York Fed was not created by government decree, but merely authorized by legislation. The creation of a Federal Reserve Bank requires the filing of an organization certificate with the United States Comptroller of the Currency, just as private commercial banks file for charters. Although the Federal Reserve Banks exercise some public functions, the transaction at issue here was of an essentially private character – a contract between two banks for investment services. These services are not carried out as part of any United States governmental policy or function. Rather, they are a profit-making arrangement, identical with arrangements made by and for many private concerns.

18. The characterization of certain banking transactions as commercial is supported by the Tribunal's decision in *International Technical Products Corporation, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Final Award No. 196-302-3 (28 Oct. 1985), *reprinted in* 9 Iran-U.S. C.T.R. 206, 238-39. In that case, the Tribunal, on

jurisdictional grounds, rejected a claim against Bank Tejarat, a bank wholly owned by the Government of Iran, concerning the foreclosure on a building in Tehran, because the bank was acting in a private commercial capacity. This case establishes that the acts of a government-owned bank undertaken in a private commercial capacity are not attributable to the government. If that rationale were applied here, clearly the acts in question are of a private commercial capacity and therefore would not be attributable to the United States. However, the private commercial capacity test can also be used as a factor to show that the bank is not a controlled entity. As the New York Fed engages in private commercial transactions that are not attributable to the United States Government, that is another factor demonstrating that the New York Fed is not a controlled entity.

3. Agency or Instrumentality

19. Bank Markazi contends that the New York Fed's activities as fiscal agent for the United States in negotiating, signing and implementing the Algiers Declarations establishes that the New York Fed is a government agent. The actions taken by the New York Fed with respect to the Algiers Declarations were exercised pursuant to a particular fiscal agency agreement, but such an agreement does not establish either governmental control for all purposes or the agency relationship referred to Article VII(4) of the Claims Settlement Declaration. The role of fiscal agent of the United States is not limited to the Federal Reserve Banks, but can be and is exercised by commercial banks. *See, e.g.*, 12 U.S.C. § 266. Indeed, other private banks participated along with the New York Fed in the preparation of the Escrow Agreement and Technical Agreements executed in conjunction with the Algiers Declarations. The Tribunal has already held that it does not have jurisdiction over private United States banking institutions, notwithstanding that some of them participated in the negotiations and implementation of the Algiers Declarations. *See Case No. A17*, 8 Iran-U.S. C.T.R. at 197-98, 202. Therefore, mere service by the New York Fed as a fiscal agent for the United States for a particular transaction does not make the New York Fed a government agency under the Claims Settlement Declaration.

20. It is arguable that an agency or instrumentality of the United States Government may be subject to Tribunal jurisdiction even though not controlled by the United States Government if the word "controlled" in Article VII(4) of the Claims Settlement Declaration is read to modify only the word "entity." It is difficult to imagine an agency or instrumentality that is not controlled by the government, unless it can be an agency or

instrumentality for some purposes and not for others. The Tribunal has not yet distinguished between an instrumentality and a controlled entity. *See Hyatt International Corporation*, 9 Iran-U.S. C.T.R. at 92, 94 (Foundation for the Oppressed a "controlled instrumentality"). Nevertheless, because Bank Markazi argues that United States law establishes that the Federal Reserve Banks are agencies and instrumentalities of the United States Government and therefore subject to jurisdiction under the Claims Settlement Declaration, I discuss the status of the New York Fed under United States law.

21. The New York Fed is not an executive agency of the United States as defined by 5 U.S.C. § 105 because it is not in the executive branch. The New York Fed is not part of the legislative or judicial branches of Government of the United States. It does not receive United States Government funds. Federal Reserve Bank employees are not United States civil servants and are not subject to civil service regulations. 12 U.S.C. § 341 (employees dismissable at pleasure); *Little v. Federal Reserve Bank of Cleveland*, 601 F. Supp. 1372 (N.D. Ohio 1985) (Federal Reserve Bank employees not covered by civil service procedural requirements).

22. Under United States law, the question of whether a Federal Reserve Bank is an "agency" or "instrumentality" of the United States in a particular case depends on the statute under which the analysis is being made and the particular functions of the Bank being considered. For some purposes, Federal Reserve Banks are considered to be United States (*i.e.* federal) instrumentalities, and not for others. United States courts have found that the Federal Reserve Banks are not federal agencies for purposes of the Federal Tort Claims Act, 28 U.S.C. § 2671, in part because the banks are independent and privately owned and controlled, receive no appropriations from Congress, are empowered to sue and be sued in their own names, and, most importantly, because there is no government supervision over "day-to-day operation" of the banks. *Lewis v. United States*, 680 F.2d 1239, 1240-42 (9th Cir. 1982); *see also United States v. Orleans*, 425 U.S. 807, 814 (1976) (community action agency not federal agency or instrumentality because no day-to-day supervision even though heavily funded by government and created under federal regulations).

23. For other purposes, such as immunity from local assessments, the Federal Reserve Banks are deemed to be federal instrumentalities and thereby exempt from assessments because they perform "important governmental functions." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement District No. 1*, 657 F.2d 183, 185 (8th Cir. 1981). These

governmental functions include issuing currency, general fiscal duties of the United States, and regulation of the financial structure of national banks. *Id.* United States law specifically exempts Federal Reserve Banks from state and local taxation. 12 U.S.C. § 531. Such legislation would be unnecessary if Federal Reserve Banks were federal agencies or instrumentalities, because such entities are automatically immune from state and local taxes by virtue of the United States Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Although 12 U.S.C. § 531 also exempts Federal Reserve Banks from federal taxes, it likely does so because under 12 U.S.C. § 289 those banks must pay to the United States Government a percentage of their net profits.

24. In some United States cases, Federal Reserve Banks have been found to be instrumentalities of the United States Government when a sufficient nexus existed between the activity in question and the government. *See, e.g., Brinks Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 116, 119 (D.D.C. 1979) ("[t]here is ample judicial authority for treating the Banks as government entities with regard to their governmental functions."). In other cases, Federal Reserve Banks have been considered as private entities. *Lewis v. United States*, 680 F.2d at 1242. There is no connection between the investment services at issue and the government such that the New York Fed should be considered as an instrumentality of the United States Government under United States law. It should be noted that the Tribunal has applied this governmental function test only in connection with the issue of control and only when other factors also point to a finding of control. *Hyatt International Corporation*, 9 Iran-U.S. C.T.R. at 91-92 (evaluating whether Foundation for Oppressed engaged in governmental functions, in addition to other indicia of control).

25. Interestingly, one of the Tribunal's tests for control – whether or not the government exercises day-to-day management and control – has also been the test for whether an entity is a government instrumentality under United States law. In the United States, courts have found that because the government has not exercised day-to-day control over Federal Reserve Banks, these banks are not instrumentalities of the United States. *Lewis v. United States*, 680 F.2d at 1242; *see also Arney v. United States*, No. 77-3503-NA-CV, slip op. (M.D. Tenn. Dec. 4, 1979). Thus, it appears that under United States law, the New York Fed would not be held to be an agency or instrumentality of the United States in connection with the transaction involved in the instant Case.

26. The term "instrumentality" in United States law is sufficiently broad that it can and has been applied to privately-owned, federally-chartered banks. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (national banks are "federal instrumentalitites"). But it does not follow that an entity sometimes referred to in United States law as "instrumentality" is an "instrumentality" under the Claims Settlement Declaration. In *Case No. A17*, the Tribunal held that it had no jurisdiction over federally-chartered banks; thus, they could not be instrumentalities under the Claims Settlement Declaration, even though they are so labeled for some purposes under United States law. If, as here, an entity is not a United States instrumentality under United States law, it would seem unlikely that it could be deemed a United States instrumentality under the Claims Settlement Declaration.

27. For the above reasons, the New York Fed is not an agency or instrumentality of the United States under the Claims Settlement Declaration.

III. COSTS

28. The New York Fed is entitled to an award of costs, just as other prevailing parties before this Tribunal have been awarded costs. *See Abrahim Rahman Golshani* and *The Government of the Islamic Republic of Iran*, Final Award No. 546-812-3, para. 123 (2 Mar. 1993), *reprinted in* _ Iran-U.S. C.T.R. _, _ (award by Chamber Three for U.S.$50,000 in costs to the Government of the Islamic Republic of Iran); Separate Opinion of Howard M. Holtzmann on Awarding Costs of Arbitration in *Sylvania Technical Systems, Inc.* and *The Government of the Islamic Republic of Iran*, Award No. 180-64-1 (27 June 1985), *reprinted in* 8 Iran-U.S. C.T.R. 329; *see also* Concurring Opinion of Richard M. Mosk in *William L. Pereira Associates, Iran* and *The Islamic Republic of Iran*, Award No. 116-1-3 (19 Mar. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 230, 231. The Tribunal has not typically awarded costs to the successful party in so-called official claims (those brought under Articles II(2) and II(3) of the Claims Settlement Declaration) – that is, claims between the Governments. The instant claim, however, has never been so categorized, and the Tribunal does not find it to be so in its Award. Had the case been dismissed for lack of jurisdiction, the New York Fed would have been awarded costs. *See The Ministry of National Defence of the Islamic Republic of Iran* and *The Government of the United States of America*, Award No. 247-B59.B69-1 (15 Aug. 1986), *reprinted in* 12 Iran-U.S. C.T.R. 33, 36 (awarding U.S.$25,000 in costs to Bowen-Mclaughlin-York Company, a private party named in an official claim). To fail to award

costs is, in effect, to act as though there was a holding that there was Tribunal jurisdiction over the New York Fed, even though no such holding was made.

29. Even if the New York Fed were held to be a controlled entity, costs should still be awarded. It is true that the Tribunal has not awarded costs in "official claims." The rationale for not awarding costs in "official claims" is that the two Governments jointly undertook to share the costs of the Tribunal in the Algiers Declarations and derive the benefits therefrom. *See Atomic Energy Organization of Iran* and *The United States of America*, Award No. 246-B7-1 (15 Aug. 1986), *reprinted in* 12 Iran-U.S. C.T.R. 25, 28. Therefore, to award costs in "official claims" would be tantamount to making assessments on the parties, disturbing the equality of Government expenditures on the Tribunal. This rationale does not apply to a party that may or may not be a controlled entity for jurisdictional purposes. Even if an entity is controlled by the government, that does not mean that it is funded by the government. All of the shares of the New York Fed are owned by private parties. The New York Fed receives no government funds. It is clearly not an agency or instrumentality of the United States. As its monies are private, it has no obligation to, nor derives any benefit from, the Tribunal. It should be treated no differently than any private party, whether controlled or not, even though under the Claims Settlement Declaration it might hypothetically be deemed to be the "Government."

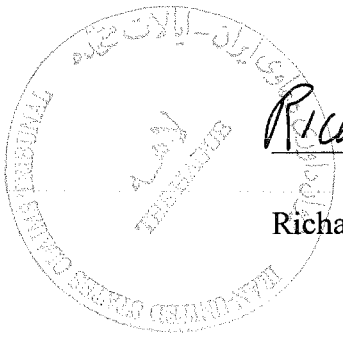
30. If one were to weigh the equities, it should be noted that the New York Fed has been forced to respond to a claim that the Tribunal has decided had no merit. The process was all the more expensive because the Claimant revised its claim throughout the long proceeding, thereby multiplying the costs of the New York Fed. Accordingly, as a matter of both law and equity, an award of costs is justified. The Tribunal avoided its responsibility to award costs and even to explain such a decision.

IV. CONCLUSION

31. Based on the record before the Tribunal, the New York Fed is not an "agency, instrumentality or entity controlled by the United States" under the Claims Settlement Declaration. Therefore the Tribunal lacks jurisdiction over this claim, and the claim should be dismissed on this ground, as well as on the grounds set forth in the Tribunal Award.

32. The Tribunal should have awarded costs to the New York Fed as the prevailing Party.

33. Notwithstanding anything said herein, I concur in the Award of the Tribunal.



Dated, The Hague

16 November 1999

Richard M. Mosk