IRAN-UNITED STATES CLAIMS TRIBUNAL

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100-82

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ORIGINAL DOCUMENTS IN SAFE

Case No. 100 Date of filing: 16 July 84

** AWARD - Type of Award _____
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** CONCURRING OPINION of _____

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** DISSENTING OPINION of Mr. Mosk

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CASE NO. 100

CHAMBER THREE

AWARD NO. 142-100-3



HOOD CORPORATION,

Claimant,

-and-

THE ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI IRAN AND BANK MELLAT,

Respondents,

DISSENTING OPINION OF RICHARD M. MOSK

I dissent from the Award in this case.

I. LIABILITY OF BANK MELLAT

By not making timely application to Bank Markazi for repatriation of Claimant's money as it was obligated to do, by not complying with its agreement to roll over the funds into interest-bearing time deposits and by placing Claimant's money in a non-interest-bearing account, Bank Mellat effectively took over control of Claimant's money.

The Islamic Republic of Iran itself has argued that "'[w]here a bank knowingly accepts a deposit for a specific purpose, it cannot thereafter divert it for its own benefit or otherwise act to defeat the purpose for which the deposit was made' . . . 'If it does so it is liable to the depositor.' " Reply of the Islamic Republic of Iran in Case A-15 (IG), 20 January 1984 at p. 24 (citations omitted). Accordingly, Bank Mellat should be held responsible for the breach of its banking obligations to Claimant.

The Tribunal's conclusion that Claimant was not damaged by Bank Mellat's failure to make a timely application for the transfer of Claimant's funds can only be based on the assumption that despite the alleged discretion of Bank Markazi to approve such transfers of money, it would not have done so, no matter what factors existed with respect to Hood's application in late 1979. In short, the Tribunal's decision appears to rest on the premise that even if Bank Mellat had fulfilled its obligation to make a timely application, Iran's exchange restrictions would have been applied to Hood in what would appear to be an arbitrary and discriminatory manner.

## II. VALIDITY OF EXCHANGE RESTRICTIONS

### A. Exchange Controls as a Taking

I recognize that it is generally assumed that states may enact certain exchange controls. Nevertheless, as the noted authority, F. A. Mann, has written, "[e]xchange

control legislation is so grave an encroachment upon private rights and liabilities and may cause such serious prejudice, that good faith requires the restricting State to formulate and operate the law with due regard for the legitimate interests of aliens . . . In short, 'the right to accord or refuse permission [to repatriate money] is in all circumstances interpreted not as one of absolute discretion but of controllable discretion, one which must be used reasonably and not capriciously, one which must be exercised in good faith.'" F.A. Mann, The Legal Aspect of Money 480-82 (4th ed. 1982) (citation omitted).

Similarly, it has been said that "[e]xchange controls which are confiscatory in character are frequently refused recognition in courts of other countries because they are either invalid in the eyes of international law when they affect aliens, or offensive to the public policy of the forum when they affect nationals." 2 D.P. O'Connell, International Law 1016 (2d ed. 1970). See also M. Shuster, The Public International Law of Money, 73-91 (1973); Hjerner, The General Approach to Foreign Confiscations, reprinted in International and Comparative Law Center, Selected Readings on Protection by Law of Private Foreign Investments 523, 571 (1964); Hug, The Law of International Payments, II Recueil Des Cours 622-29 (1951). Indeed, this Tribunal has recognized that exchange controls cannot be unrestricted. See Schering Corporation v. The Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984).

In this case, Claimant has pointed out that prior to 1979 it had no difficulty in repatriating money. There is no indication that Claimant had any warning that it would not be able to repatriate its funds. The International Monetary Fund's 1979 Annual Report on Exchange Arrangements and Exchange Restrictions at page 213 reported that in 1978 in Iran, "[f]oreign nationals are permitted to maintain accounts freely, in rials as well as in foreign currencies, with authorized banks; rial accounts may be used both for payments in Iran and for conversion into foreign currencies through the noncommercial market."

Bank Markazi, through circulars in late 1978 and 1979, imposed new foreign exchange restrictions.[1] The 1979 circular superseded the prior one. It is not clear whether the classifications in the 1979 circular cover the transactions involved in the instant case. It is also unclear as to the nature or even existence of any mechanism for the repatriation of the funds arising out of the transactions in this case. The Respondents provided no guidelines with respect to such approvals. Indeed, Claimant was never given any reason why it has not received approval to repatriate its funds.

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[1]Bank Markazi Circular No. 11600, 14 Nov. 1978 and Bank Markazi Circular No. Na 5/2090, 5 May 1979, reprinted in 130 Cong. Rec. S. 1679, S. 1685-86 (Daily ed. Feb. 29, 1984). The exchange controls are generally described in the 1979 International Monetary Fund Annual Report at page 213 and in the 1980 report at page 203. See also Monetary and Banking Law of Iran, enacted 9 July 1972, as amended, reprinted in G. Vafai, VIII Commercial Laws of the Middle East-Iran, Book 6, p. 29 (1982).

There are suggestions that Respondents' position was not totally motivated by appropriate factors.[2] Respondents' oral assertions at the Hearing that the restrictions are "temporary" are unsupported by any evidence. Indeed, it has been over five years since Respondents precluded the repatriation of Claimant's funds, and Claimant has not yet been able to obtain them. Claimant, as a United States national, cannot utilize the rials in Iran. Although a claim cannot be made before this Tribunal on the basis of Iran's actions after 19 January 1981, those actions constitute evidence of the motives and intent of Respondents prior to that date.

The Tribunal's discussion of why Respondents' actions do not constitute a compensable taking is unclear. It appears that a ground relied upon by the Tribunal was that Claimant's request was such that Claimant did not qualify for repatriation of its funds under the provisions concerning exchange restrictions in the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force, 16 June 1957, T.I.A.S. No. 3835, 8 U.S.T. 900 ("Treaty of Amity"). The non-applicability of such

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[2] In November of 1979 the Iranian Finance Minister of Iran announced that all foreign debts were repudiated. B. Rubin, Paved with Good Intentions 372 (1980). See also Law for the Protection and Development of Iranian Industry, reprinted in G. Vafai, supra, at Book 3, p. 13; 130 U.S. Cong. Rec. S.1679, S.1680, S.1683, n. 33 (daily ed. Feb. 27, 1984).

provisions should not necessarily preclude a claim for compensation based on a taking under the Treaty of Amity or otherwise.

The facts appear to demonstrate that as of January 19, 1981, Claimant had no opportunity to obtain its funds and would not have obtained its funds whatever it did. Those funds were not even bearing interest as they should have been under the terms of the deposit. Thus, I believe the actions of Respondents can and should be considered to be a taking requiring compensation to Claimant. Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa Consulting Engineers of Iran, et al., Award No. 141-7-2 (29 June 1984); Treaty of Amity, Article IV(2). See also Art. 10, Par. 3(b), Harvard Draft Convention on the Responsibility of States for Injuries to the Economic Interests of Aliens, reprinted in 55 Am. J. Int'l. L. 548, 553 (1961).

B. Treaty of Amity

I have stated before that a requirement for the application for the repatriation of money can be unnecessary in view of the situation and policies in Iran. See Schering Corporation v. The Islamic Republic of Iran, Award No. 123-38-3 (Dissenting Opinion of Richard M. Mosk, 18 April

1984). I believe that Iran's exchange restrictions violate the Treaty of Amity. Id.[3]

C. International Monetary Fund Agreement

Both Iran and the United States are bound as original parties to the Articles of the Agreement of the International Monetary Fund, signed 22 July 1944, entered into force 27 December 1945, 2 U.N.T.S. 39, as amended ("Fund Agreement"). Claimant can invoke the terms of the Fund Agreement. Schering Corporation v. The Islamic Republic of Iran, Award No. 122-38-3 (Dissenting Opinion of Richard M. Mosk, 17 April 1984). See Note, Foreign Exchange Controls: A Survey of the Legal Protection Available to the American Investor, 49 Notre Dame Law. 589,599 (1974).

The Tribunal notes that if the transaction in question involved a capital transfer, rather than a current transaction, the Fund Agreement is not applicable. Fund Agreement Art. VI, Section 3. The Tribunal assumes, without any authority or significant discussion, that the transaction involved is not a "current transaction", which is defined as including payments "due in connection with

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[3] How the Tribunal could even suggest that there is a question as to the validity and relevance of the Treaty of Amity in light of the decision of the International Court of Justice (United States Dipolomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3,28 (Judgment of 24 May 1980)) and other principles of international law is mystifying.

foreign trade, other current business, including services ...." Fund Agreement Art. XIX(i)(1). No matter how the transaction was structured, in reality the entire first payment was for goods, services and advances and not for the stock. The money in question had resulted in a transfer of resources to Iran in the form of monies, goods and services and did not involve a claim to a future return. Thus the transaction giving rise to the funds has the characteristics of a current transaction. See Evans, Current and Capital Transactions: How the Fund Defines Them, 5 Fin. & Dev. 30, 34 (1968). It does not appear that the transaction was for the "purpose of transforming capital." Fund Agreement Art. XIX(i). Rather it was for "payments due in connection with foreign trade, other current business, including services." Fund Agreement, Art. XIX(i)(1). Thus, it is at least arguable that the first payment arises out of a current transaction. I would agree with the Tribunal that the distinction between current and capital transactions, in the absence of guidance from the International Monetary Fund, is difficult to make. The terms are not necessarily used in their strict economic sense.

If the payment did arise out of a current transaction, Iran's restrictions appear to violate the Fund Agreement. See Schering Corporation v. The Islamic Republic of Iran, Award No. 122-38-3 (Dissenting Opinon of Richard M. Mosk, 18 April 1984).

D. Conclusion With Respect To Exchange Controls

Respondents Bank Markazi and the Government of Iran, by making no provision for the repatriation of Claimant's money, by not indicating any time limitation on the exchange controls, by not applying any articulated grounds for its decision with respect to the restrictions on the exchange of Claimant's money and by, in effect, exercising dominion and control over Claimant's money are in violation of the principles of international law. It may be that the harshness of the result of this case is mitigated by the possibility that Claimant retains a claim for actions or inactions of Respondents after January 19, 1981, even though such claims could not be asserted before this Tribunal.

III. THE LETTER OF GUARANTEE

The Tribunal holds that the Claimant could not make a claim until after January 19, 1981 on the letter of guarantee securing the second payment and that therefore the Tribunal had no jurisdiction over such a claim.

Before January 19, 1981, however, Claimant had made a claim based on the letter of guarantee. Whatever the merits of that claim, the Tribunal has jurisdiction to hear it because the claim was outstanding on the date of the Algiers Declarations. Claims Settlement Declaration, Article II, paragraph 1.

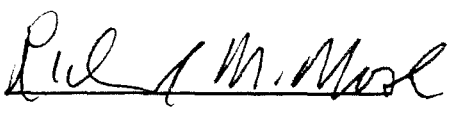
Claimant had a right to assert that the actions of Respondents constituted an anticipatory breach of the letter of guarantee and rendered worthless the receivable and that guarantee as security.

The Tribunal finds that by the time of the Claims Settlement Declaration, Respondents had, in effect, made clear that they would not allow the repatriation of Claimant's funds. As of January 19, 1981, the exchange restrictions and the method of their application constituted a violation of Iran's obligations and had caused Claimant damage by rendering both its account receivable and its rights under letter of the guarantee worthless. Such conduct could be considered actionable by that time. Cf. 4 Corbin on Contracts §§ 961 ff. (1951). But cf. Smith v. United States, 302 U.S. 329, 356 (1937).

## IV. CONCLUSION

For the foregoing reasons, I respectfully dissent from the Award.

Dated, The Hague
13 July 1984



Richard M. Mosk