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CLAIMS TRIBUNAL

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** CONCURRING OPINION of _____

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CASE NO. 111
FULL TRIBUNAL
AWARD NO. ITL 37-111-FT

INTERNATIONAL SCHOOLS SERVICES, INC.,
Claimant,

and

NATIONAL IRANIAN COPPER INDUSTRIES COMPANY,
Respondent.

Dissenting opinion of President Lagergren

The question for decision by the Full Tribunal is whether the claim by International Schools Services, Inc. ("ISS") is a claim by a national of the United States of America within the meaning of Article VII of the Claims Settlement Declaration of 19 January 1981 (the "Claims Settlement Declaration").

The relevant provision in Article VII is clause (b) of paragraph 1, which defines "nationals" as follows:

> "1. A 'national' of Iran or of the United States, as the case may be, means ... (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or

> entity equivalent to fifty per cent or more of its capital stock."

The evidence submitted in this case shows that ISS is a non-profit corporation for charitable and educational purposes incorporated under the laws of the District of Columbia. It has not issued any capital stock. Article 9 of the Articles of Incorporation provides that the corporation shall have a Board of Directors consisting of six members. The number of Directors may be increased or decreased pursuant to the by-laws of the corporation but shall never be less than three. According to the relevant provisions of the District of Columbia Code §29-1003, relating to "Charitable, Educational, and Religious Associations", the directors of the corporation "shall have the control and management of the affairs and funds of the Society".

Article 4 of the Articles of Incorporation provides that no part of the net earnings of the corporation shall inure to the benefit of any individual or member, except as reasonable compensation for services actually rendered to the corporation. Furthermore, Article 13 provides that in the event of termination and dissolution of the corporation none of its assets shall be made available in any way to any individual or corporation, except to a corporation or other organisation which itself is educational or recognised as being of a similar public nature under the laws of the District of Columbia and the United States of America.

There is no dispute that all the members of the Board of Directors are and have always been citizens of the United States.

In my view, it is clear that a non-profit, non-stock corporation like ISS does not naturally fall within the wording of Article VII of the Claims Settlement Declaration. This Article requires, as far as this case is concerned,

that citizens of the United States hold "an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock" and it is undisputed that ISS has not issued any capital stock and it does not seem to be contended that any such citizens have a proprietary or beneficial interest in the corporation that can be equivalent to ownership or holding of capital stock.

The majority's basic argument seems to be that the test to be applied for the notion of "interest" under Article VII, paragraph 1, of the Claims Settlement Declaration essentially is a test of control or management and that ISS therefore fulfils the requirements laid down in that paragraph since ISS's Board of Directors, which controls the corporation, consists of United States citizens.

In my opinion, the test to be applied under Article VII, paragraph 1, of the Claims Settlement Declaration is whether the "interest" in question which is held by United States citizens is sufficiently similar in character to the "interest" held by an owner of capital stock. An interest "equivalent" to fifty per cent of capital stock is, for instance, most likely to be found in partnership. Article VI of the Convention of 16 March 1923, forming the basis for the German-Mexican Claims Commission provides expressly as follows:

> "The Commission shall deal with all claims against Mexico arising out of losses or damages suffered by citizens of Germany and by German corporations, German companies, German partnerships or German juridical persons; or arising out of losses or damages caused to citizens of Germany by reason of losses or damages to corporations, partnerships or other associated interests, provided that, in each such case (a) the interest of the claimant is more than 50% of the total capital of the corporation or partnership of which it forms a part ..."

The "interest" of the Directors of ISS is however different

from the interest that shareholders have in a stock corporation. Unlike shareholders, ISS's Directors cannot sell or transfer their "interest" in ISS. Their position as Directors cannot be inherited. And in the event of termination or dissolution of the corporation, ISS's Directors do not receive any of ISS's assets or other benefits.

Furthermore, a mere reading of Article VII, paragraph 1, clearly shows that the possible factual control of a corporation through ownership of less than fifty per cent of its capital stock does not meet the requirements of that paragraph. Thus, "control" can hardly be the decisive criteria.

In this context it is of interest to note a decision of the Foreign Claims Settlement Commission of the United States ("FCSC"), where the Commission had to interpret a provision in the relevant Act which defined "a national of the United States" in a manner which is similar to Article VII, paragraph 1, of the Claims Settlement Declaration. The relevant part of that Act reads as follows:

> (b) a corporation or other legal entity which is organized under the laws of the United States or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States owned, directly or indirectly, 50 percentum or more of the outstanding capital stock or other beneficial interest of such corporation or entity. The term does not include aliens.

In the Commission's Final Report on the German Democratic Republic Claims Program, 1981 FCSC Ann. Rep. 42, 47-8, under which program the claim was decided, the Commission stated:

> Determining the "nationality" of a corporation posed little difficulty for the Commission. The phrase "other legal entity" caused some difficulty in interpretation. In addition to corporations, some claims were filed by estates, trusts, partnerships, and

> churches. In each case the Commission was required to make a determination with respect to the nationality of the proper party claimant.
>
> In the Claim of Board of Foreign Parishes, Claim No. G-2876, Decision No. G-2315 [of 10 September 1980] ... the Commission made an award to the Board of Foreign Parishes of the Episcopal Church based on the loss of property in Dresden. The evidence showed that the Church was a non-profit corporation organized under the laws of the State of New York. Although one could not point to "beneficial ownership" of the organization, the Commission found that the church was sufficiently "American" in character to allow the Commission to grant an award.

Thus, the FCSC could not point to any citizens of the United States as having any beneficial ownership in the organization in question. However, the Commission found that the church was sufficiently "American" in character.

While the Tribunal is certainly not bound by decisions of the FCSC, it is also important to bear in mind that the Tribunal, as distinct from the FCSC, has to interpret a provision in an international arrangement to which the general rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties are applicable. These rules emphasize in particular the ordinary meaning to be given to the terms of a treaty. Thus, the Tribunal is to a larger extent than the FCSC bound to follow the wording of the provision strictly, and as previously has been pointed out, a non-profit corporation without capital stock like ISS does not naturally fall within the wording of Article VII of the Claims Settlement Declaration. The test applied by the FCSC, whether the entity in question is sufficiently "American", might be acceptable on the national level, but it cannot be a substitute for the specific and detailed requirements of Article VII, paragraph 1, of the Claims Settlement Declaration.

It is also a recognized principle of treaty interpretation

that provisions which establish the scope of the jurisdiction of an international court or arbitral tribunal should be given a restrictive interpretation. Thus not only the Permanent Court of International Justice held that "every Special Agreement, like every clause conferring jurisdiction upon the court, must be interpreted strictly"[1], the reason for this being that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation, or to arbitration or to any other kind of pacific settlement".[2] The principle is also confirmed by the practice of arbitral tribunals[3] including decisions of this Tribunal[4].

Furthermore, in view of the detailed and specific wording of Article VII, paragraph 1, there is no room for uncertain analogies or guesses as to the purpose of this provision. There might be a gap in the treaty as far as non-profit, non-stock corporations are concerned, or the parties may not have considered these when drafting the agreement. In any event, the intention of the parties in that respect not being known, the technical language used in Article VII, paragraph 1, cannot be amended by recourse to what the purpose of the parties might have been when such purpose is not clearly demonstrated. As Professor Yasseen has written: "C'est au texte que de prime abord il est inévitable de

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[1] P.C.I.J., The Free Zones of Upper Savoy and Gex case, Series A/B, No. 46 (1932), pp. 138-139.

[2] P.C.I.J., The Eastern Carelia case, Series B, No. 5 (1923), p.27.

[3] Cf., e.g., The Kronprins Gustaf Adolf case, R.I.A.A., Vol. II (1949), p. 1254.

[4] In case No. A-2 the Tribunal stated that the parties to the Algiers Declarations "knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement" (emphasis added).

recourir pour interpréter le traité. Ce texte est censé contenir l'intention commune des parties."[5]

Furthermore, it would be easy to find entities being sufficiently "American" in character, but which clearly do not belong to the privileged corporations or entities described in Article VII, paragraph 1, of the Claims Settlement Declaration, such as, for instance, the City of New York, the Government of the United States or a corporation, in which that Government owns 100 per cent of the capital stock, although these entities might qualify under other provisions of the Claims Settlement Declaration (cf. Article II, paragraph 2).

The Claimant also points to the Award on Agreed Terms in Case No. 122, International Schools Services, Inc. and The Islamic Republic of Iran and National Petrochemical Co., Award No. 4-122-3 of 25 May 1982, in which the Tribunal held that claims by ISS fall within its jurisdiction, and to the contrary position taken by the Respondent in this case.

In Case No. 122 the arbitrating Parties concluded a Memorandum of Understanding whereby they settled the dispute between them. The Memorandum of Understanding contained the following statement:

> ISS is incorporated as a not-for-profit corporation under the laws of the District of Columbia, United States of America, for charitable and educational purposes, and is completely owned and controlled by citizens of the United States of America (emphasis added).

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[5] M.K.Yasseen, L'Interprétation des traités d'après la Convention de Vienne sur le droit des traités, 151 Recueil des Cours (Hague Academy of International Law) 1, 25 (III-1976)

Moreover, the same Memorandum of Understanding stated that the settlement was reached as "the result of negotiations with respect to claims of nationals of the United States against the Islamic Republic of Iran". The Award on Agreed Terms was issued on the basis of the Memorandum of Understanding.

As to the Award in Case No. 122 it has to be borne in mind that according to the standard adopted by the Tribunal in its decision in Case No. A-1, the issuance of an Award on Agreed Terms requires only that the Tribunal "make such examination concerning its jurisdiction as it deems necessary", which may result in less detailed inquiry than in a contested case.

However, the Vienna Convention on the Law of Treaties also provides that when interpreting a treaty there shall be taken into account

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

It remains therefore to answer the question whether the settlement agreement in the above-mentioned case represents a subsequent agreement or practice that, in accordance with the Vienna Convention, shall be taken into account when interpreting a treaty.

However, the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the

treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case. It is even more doubtful whether a single settlement agreement can be said to constitute a subsequent practice in the application of the treaty which establishes the agreement between the States parties regarding its interpretation.

There are also certain circumstances which in my view further reduce the importance of the Memorandum of Understanding in this respect. Firstly, the text of the Memorandum makes it clear that it was based on the erroneous or at least misleading assumption that ISS was completely owned by United States citizens. As pointed out previously, a not-for-profit corporation without capital stock cannot be said to be owned by its Directors. Secondly, this settlement was concluded very early before the parties had gained much experience regarding the problems involved in the application of the Claims Settlement Declaration.

For these reasons I hold that the claim by International Schools Services, Inc. is not a claim by a national of the United States within the meaning of Article VII of the Claims Settlement Declaration.

Dated, The Hague,
6 April 1984

Gunnar Lagergren