

ORIGINAL DOCUMENTS IN SAFECase No. 388Date of filing 4 Feb 1983AWARD. Date of Award _____

_____ pages in English.

_____ pages in Farsi.

DECISION. Date of Decision _____

_____ pages in English.

_____ pages in Farsi.

ORDER. Date of Order _____

_____ pages in English.

_____ pages in Farsi.

CONCURRING OPINION of _____

Date _____

_____ pages in English.

_____ pages in Farsi.

DISSENTING OPINION of _____

Date _____

_____ pages in English.

_____ pages in Farsi.

☒ OTHER; Nature of document: Interim Award ITM 13-388-FTDate 4 Feb 198312 pages in English.12 pages in Farsi.388-55
311-01

IRAN UNITED STATES
CLAIMS TRIBUNAL

ثبت شد - FILED

No. 388-311 شماره

Date 4 FEB 1983 تاریخ

۱۳۶۱ / ۱۱ / ۱۵

388-56
311-86

IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE
ORIGINAL

نسخه برابر اصل

INTERIM AWARD

Case No. 388

Award No.: ITM 13-388-FT

Question as to whether the Tribunal has exclusive jurisdiction over any counterclaim arising out of the same contract, transaction or occurrence that constitutes the subject matter of a claim before the Tribunal. Motion by the Claimant to compel dismissal of proceedings before a Court in Iran.

Parties

E-Systems, Inc.,

Claimant,

and

The Government of the Islamic Republic
of Iran,

Bank Melli Iran,

Respondents.

Appearances:

Mr. Harold Hoffman,

Mr. James Bolding,

for the Claimant,

Mr. M. K. Eshragh, Deputy Agent of the
Islamic Republic of Iran,

Mr. M. Kazazi, Legal Adviser to the Deputy
Agent of the Islamic Republic of Iran,

for the Government of the Islamic
Republic of Iran.

Also present: Mr. Arthur W. Rovine, Agent of the United States of America,
Ms. Jamison M. Selby, Deputy Agent of the United States of America,
Mr. M. Reboin, and
Mr. J. Reynolds, Attorney-Advisers.

On 18 January 1982 E-Systems filed with the Tribunal claims against the Islamic Republic of Iran and Bank Melli. These claims were alleged to arise out of a contract entered into by E-Systems and the Government of Iran on 23 December 1976.

In general, this contract provided that the Islamic Republic of Iran would deliver to E-Systems at its plant in Greenville, Texas, two Boeing 707 aeroplanes, together with certain equipment to be installed in these planes. The contract further provided that E-Systems would modify the aircraft, purchase other materials and equipment, and install all such equipment in the aircraft. The contract required that E-Systems issue, in favour of the "Imperial Ministry of War", certain bank guarantees to secure the proper performance of the contract by E-Systems and any down-payments or advances made on the contract by the Government of Iran.

The contract further provided that certain equipment to be installed in the aircraft by E-Systems was to be furnished by the Government of Iran through suppliers in the United States. The Government of Iran was to pay such suppliers prior to the delivery of the equipment to E-Systems for installation in the aircraft.

E-Systems contends that the Government of Iran breached the contract primarily in two ways. First, the Government of Iran did not pay the suppliers in the United States as provided in the contract. E-Systems alleges that in particular one supplier had not been paid since the fall of 1978 for equipment that it had prepared for delivery to E-Systems at the request of the Government of Iran. Due to this non-payment, the supplier, it is contended, withheld delivery of the equipment, which was scheduled for delivery to E-Systems in January 1979. E-Systems contends that the equipment to be furnished by this supplier was essential to performance under the contract. Second, E-Systems contends that the Government of Iran did not pay an invoice in the amount of \$77,533 for work performed during the month of December 1978, despite the fact that the contract provided that payment was to be made to E-Systems within four weeks.

E-Systems further contends that as a consequence of these alleged defaults by the Government of Iran, E-Systems gave notice of termination of the contract on 4 December 1979, but out of necessity continued to perform the services involved in caring for the property.

Based on these alleged defaults by the Government of Iran, E-Systems seeks to recover damages from the Government of Iran in excess of \$9 million and declaratory relief that the bank guarantees and letters of credit, which were an integral part of the contract between the Parties, be cancelled and returned to E-Systems without liability.

On or before 1 June 1982 the Iranian Ministry of Defence, the successor to the Imperial Ministry of War, filed a claim against E-Systems with the Public Court of Tehran. In that case the Ministry of Defence seeks an award obligating E-Systems to return the two Boeing 707 aircraft belonging to the armed forces of Iran together with a complete range of

equipment as described in the above-mentioned contract between the Government of Iran and E-Systems as well as damages sustained by the Government of Iran as a result of E-Systems' alleged failure to perform the obligations under the contract in a timely manner. In particular, the Ministry of Defence contends that E-Systems, without any legal justification, refused to discharge its contractual obligations and thereby caused irreparable damage to the Islamic Republic of Iran. The Ministry of Defence also contends that E-Systems unilaterally cancelled the contract on 4 December 1979 without any justification and informed the Government of Iran that the two aircraft were attached in lieu of E-Systems' claims.

On 13 September 1982 E-Systems filed with the Tribunal a "Motion to compel dismissal or stay of proceedings in Iranian court". In this motion E-Systems contends that the claim before the Court in Tehran by the Ministry of Defence arises out of the same contract, transactions and occurrences as the claim previously submitted to the Tribunal by E-Systems. E-Systems argues that for this reason the claim by the Ministry of Defence must be brought before the Tribunal as a counterclaim. E-Systems further argues that the filing of the claim by the Ministry of Defence in a forum other than the Tribunal is a violation of the overall intent and spirit of the Algiers Declarations.

More specifically, E-Systems argues that the claim brought before the domestic Court in Tehran constitutes a violation of the following provisions of the Algiers Declarations:

- (a) General Principle B of the Declaration, which states that a purpose of both Parties is to settle all claims between the Parties through binding arbitration before the Tribunal;

- (b) Article II, paragraph 2, of the Claims Settlement Declaration, which states that the Tribunal shall decide any counterclaim arising out of the same contract as the subject matter of the main claim; and
- (c) Article VII, paragraph 2, of the Claims Settlement Declaration, which excludes claims filed with the Tribunal from the jurisdiction of the courts of either of the two countries.

As E-Systems eventually has formulated its requests, E-Systems seeks an order by the Tribunal requiring the Islamic Republic of Iran to immediately cause to be dismissed the claim filed with the Iranian Court. E-Systems also requires the Tribunal to issue an order that there be no re-filing of the claim in Iran or any other forum so long as the Tribunal has pending before it a claim for relief by E-Systems regarding the subject matter as referred to in the instant case.

Alternatively, if the Tribunal does not deem it appropriate to cause the Islamic Republic of Iran to dismiss further proceedings, E-Systems seeks a declaration by the Tribunal that the Islamic Republic of Iran is in breach of the Algiers Declarations and that, consequently, E-Systems is no longer bound by the provisions of Article VII, paragraph 2, of the Claims Settlement Declaration.

As an interim relief, E-Systems has requested the Tribunal to order the Islamic Republic of Iran to immediately stay any and all proceedings in connection with the claim filed in Iran.

The instant case has been assigned to Chamber One of the Tribunal. Chamber One did not grant the interim relief sought by E-Systems but decided in an order dated 22 September 1982 to relinquish jurisdiction to the Full

Tribunal in the instant case for the purpose of deciding the issues raised in E-Systems' "Motion to compel dismissal or stay of proceedings in Iranian court".

Following orders by the Tribunal, the Parties have submitted Memorials addressing the issues raised in E-Systems' "Motion to compel dismissal or stay of proceedings in Iranian court". Furthermore, a Hearing on these issues was held on 10 January 1983.

Upon invitation of the Tribunal in accordance with Note 5 to Article 15 of the Provisionally Adopted Tribunal Rules the Government of the United States has submitted oral and written statements with a view to assisting the Tribunal in carrying out its task.

The Government of Iran argues, firstly, that the Tribunal has no jurisdiction over E-Systems' claims, since the contract out of which these claims arise contain a provision which specifically provides that any dispute under the contract shall be within the sole jurisdiction of the competent Iranian courts. Secondly, the Government of Iran denies that it follows from the text of the Algiers Declarations or from general principles of international law that the Tribunal's jurisdiction over Iran's counterclaims is exclusive.

As to the question whether the Tribunal has jurisdiction over E-Systems' claims it should first be noted that this question is still before Chamber One, since the decision by that Chamber on 22 September 1982 to relinquish jurisdiction to the Full Tribunal does not mean that the Chamber has referred to the Full Tribunal also questions regarding the Tribunal's jurisdiction over E-Systems' claims against the Government of Iran and Bank Melli.

However, the particular provision in the contract which the Government of Iran has invoked reads as follows:

9. Settlement of Differences

All disputes and differences between the two parties arising out of interpretation of the Contract items or the execution of the works which can not be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian Laws, via referring to the competent Iranian Courts.

In view of the determination by the Tribunal in its interim awards Nos. ITL 6-159-FT and ITL 7-254-FT, filed on 5 November 1982, that the Tribunal has jurisdiction over a claim based on a contract containing a forum selection clause similar to the above-mentioned clause, Chamber One has decided to proceed with its consideration of the case. To this end, Chamber One issued on 15 December 1982 an Order requesting the Government of Iran to file with the Tribunal a Statement of Defence by 14 February 1983.

Further, assuming that the Tribunal has jurisdiction over E-Systems' claims, it is obvious that the claim initiated before the Iranian Court had been admissible as a counterclaim before the Tribunal, since the documents presented in the instant case clearly demonstrate that the Iranian claim arises out of the same contract that constitutes the subject matter of E-Systems' claims.

However, Article II, paragraph 1, of the Claims Settlement Declaration defines the extent of the Tribunal's jurisdiction, and it does not follow from the ordinary meaning to be given to this paragraph that the Tribunal has exclusive jurisdiction over counterclaims that fall within the scope of its competence. The question is therefore whether it follows from other provisions of the Algiers Declarations or from Article II, paragraph 1, in its context

that the two Governments have agreed to confer on the Tribunal exclusive competence to deal with counterclaims falling within the scope of its jurisdiction.

In this respect E-Systems refers to General Principle B of the Declaration and to Article VII, paragraph 2, of the Claims Settlement Declaration.

General Principle B of the Declaration reads:

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

As the Tribunal has found in its decision in case No. A-2, the general rule laid down in the first sentence of this principle has to be interpreted in the context of other provisions of the Algiers Declarations. Thus, claims by the Government of Iran against United States nationals do not fall within the jurisdiction of the Tribunal despite the wording in this sentence. When interpreting General Principle B in the instant case, it has to be taken into account that the express agreement in the second sentence to prohibit all further litigation applies only to proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises.

The provision in Article VII, paragraph 2, of the Claims Settlement Declaration that claims referred to the Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court, is in accordance with its wording applicable only to claims that are already before the Tribunal. Consequently, it follows from this provision that once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other court, but it cannot be deduced from this provision that the Tribunal's jurisdiction over any counterclaim is of an exclusive nature.

Consequently, the wording of the Algiers Declarations does not support the argument that the Tribunal's jurisdiction over Iran's counterclaims is exclusive. No other evidence has been submitted to demonstrate that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims.

In support of the argument that litigation before other fora on the merits of claims before the Tribunal would be inconsistent with the "final and binding" character of the Tribunal's decisions E-Systems has referred to Article IV, paragraph 1, of the Claims Settlement Declaration, which provides that "(a)ll decisions and awards of the Tribunal shall be final and binding". Furthermore, E-Systems has also referred to paragraph 3 of the same Article which provides that "(a)ny award which the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation...."

However, none of these provisions indicate necessarily that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims.

E-Systems and the United States Government have further referred to a number of authorities and cases to demonstrate that under both international and domestic law an arbitration award takes precedence over decisions by national courts and that an agreement between the parties to refer a dispute to arbitration requires the parties not to submit the same dispute to domestic courts.

A precondition for the application of these theories to claims such as the claim raised by the Ministry of Defence before the Iranian court is that the parties have agreed to confer on the Tribunal exclusive jurisdiction over such claims. Since it does not follow from the text of the Algiers Declarations that the two Governments have made such an agreement concerning counterclaims, these theories are not applicable in regard to Iran's claim in the instant case.

Consequently, the Tribunal concludes that the Algiers Declarations leave the Government of Iran free to initiate claims before Iranian courts even where the claims had been admissible as counterclaims before the Tribunal.

But it does not follow from what has been said that the requests should be entirely dismissed.

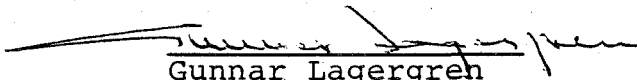
This Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective. Not only should it be said that the award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the

Iranian Court be stayed until proceedings in this Tribunal have been completed.

For these reasons,

the Tribunal requests the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until the proceedings in this case before the Tribunal have been completed.

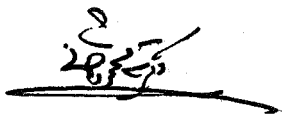
The Hague,
4 February 1983


Gunnar Lagergren
(President)


In the name of God,



Pierre Bellet

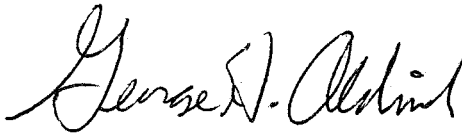

Nils Mangård


Mahmoud M. Kashani
(Concurring opinion)

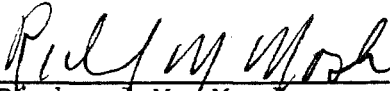
In the name of God,

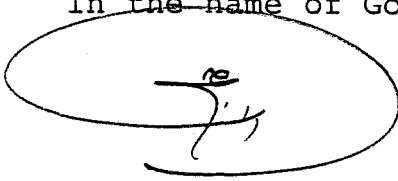

Howard M. Holtzmann
(Concurring Opinion)


Shafie Shafaei
(Concurring Opinion)


George H. Aldrich

In the name of God,


Richard M. Mosk
(Concurring Opinion)


Mostafa Jahangir Sani
(Concurring Opinion)