IRAN-UNITED STATES CLAIM

[redacted]

دیوان داوری دعاوی ایران - ایالات متحد

IN SAFE

242

Case No. 68 Date of filing: 21 OCT 86

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** CONCURRING OPINION of _____

- Date _____

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** DISSENTING OPINION of Hamid Bahrami

- Date 21 OCT 86

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوا[redacted]ت متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

In the Name of God

242

CASE NO. 68
CHAMBER TWO
AWARD NO. 244-68-2

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 21 OCT 1986 تاریخ
۱۳۶۵/۷/۲۹
No. 68 شماره

HOWARD NEEDLES TAMMAN & BERGENDOFF,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, MINISTRY OF ROADS AND TRANSPORTATION, AND BANK TEJARAT (successor to International Bank of Iran and Japan),

Respondents.

DISSENTING OPINION OF HAMID BAHRAMI

As I stated in the deliberative sesssions, I am unable to concur with my colleagues with respect to a number of important legal issues raised in the present case, for the reasons set forth below. Because I do not believe that the majority's justifications are convincing from the legal point of view, I am disseminating the present Opinion in order to bring its contents to the attention of the other Chambers, which might in future rely upon the instant Award as a precedent:

I. JURISDICTIONAL ISSUES

A. Because the issue of whether the Tribunal has jurisdiction over indirect claims brought against the Iranian Government by Iranian companies constitutes the general subject of the Request for Interpretation in Case No. A/22, I shall not state my opinion in this connection for the time being. I will note, however, that in the present case the Claimant has brought an indirect claim which belongs to HNTB-Iran (a limited liability company). On the basis of the legal and logical rule of lis alibi pendens (since in the instant case the issue is already before the Full Tribunal), Chamber Two should have deferred adjudication of the present claim pending a decision by the Full Tribunal, for it is certain that the Award rendered in the present case will cause irreparable injury to the Respondent, if the Full Tribunal interprets the Claims Settlement Declaration as providing that indirect claims brought on behalf of Iranian companies do not lie within the Tribunal's jurisdictional ambit. On principle, therefore, Chamber Two should postpone issuance of an award until after the Full Tribunal has issued its interpretive ruling, in order not to cause the Respondent such an injury. It goes without saying that Case No. A/22 is a request for interpretation lying within the particular jurisdiction of the Full Tribunal, and that the Chambers must adhere to the Full Tribunal's decision in this connection once it has been reached. In such matters, even the municipal courts hold proceedings in abeyance, in order not to occasion irreparable injury to either party. A fortiori, therefore, the Tribunal's several Chambers should also refrain from taking a decision on, and thereby prejudging, such an issue.

In this particular claim, the Claimant is not even the legal owner of shares in the Iranian company. Rather, it alleges that it is the owner of the shares of the American partners in the Iranian company because it underwrote them. In accepting the Claimant's position, the majority has disregarded the express provisions of Article 103 of the Iranian Commercial Code ratified in 1311 AS /1933/, which states that shares in

limited liability companies can be transferred only by means of a formal instrument and upon agreement of a numerical majority of the shareholders. The majority holds that

> "The evidence also indicates that HNTB partners have continued to hold these shares, as departing shareholders have transferred their shares to new or remaining HNTB shareholders." (page 17 of the English version of the Award)

However, the fact is, firstly, that a limited liability company does not have share certificates, whereby the so-called "shares" mentioned above might continue to be held in anyone's possession. Rather, the shareholders in a limited liability company hold a proprietary interest in that company, and this interest cannot be transferred. And secondly, in view of Article 103 of the Iranian Commercial Code, what instrument, other than a formal transfer instrument of its proprietary interest, could HNTB possibly submit which the Tribunal might invoke as substantiating evidence?

The Tribunal has invoked United States municipal law, specifically the Uniform Partnership Act, in order to justify its decision. Certainly, the relationship between partners in a US-registered partnership is subject to United States law, and HNTB can always invoke United States law in order to recover on its entitlements vis-à-vis its own partners, who had apparently made capital investments in Iran with monies belonging to HNTB and as its nominees. However, for the same reason that HNTB's relationship with its partners is subject to United States law, the relationship between HNTB-Iran's partners and the said Iranian company is subject to Iranian law alone; and proprietary interests in an Iranian limited liability company may be transferred only in conformity to the Iranian Commercial Code.[1] Therefore, the proprietary interests in HNTB have

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(1) See: Cheshire, Private International Law (10th Ed.), pp. 555 ff. The Tribunal has also applied Iranian law in instances where Iranian law prevailed on the basis of conflict of laws rules. See: American Housing and Housing Cooperative Society, Award No. 117-199-3.

not yet been legally transferred to HNTB-America, and only those partners who legally owned shares thereof could have brought claim. The practical result of this discussion is, that the Award issued in this case will not preclude the possibility that the true shareholders might bring vexatious actions against the Iranian Respondent; moreover, the United States shareholders who have not yet transferred their shares to the Claimant company in the manner prescribed by Iranian law might very well have claims against the Claimant company. Furthermore, even if none of these eventualities materializes, as an international forum this Tribunal is not empowered to interpret its jurisdiction broadly.

B. Finding of lack of jurisdiction over the tax and social security counterclaims[1]

I have repeatedly stated,[2] and reiterated in deliberative sessions as well, that the Tribunal's policy of dismissing Iran's tax and social security claims results in a blatant inequity. At any event, in dismissing the tax and social security claims, the majority has disregarded several important legal points and manifestly caused the Claimant to be unjustly enriched. The majority has adopted this policy owing to several legal misapprehensions that certain Chambers have entertained from the very outset, after which the Tribunal treated

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(1) As I stated in my Dissenting Opinion in Harza International, accepting indirect claims does not entail the issuance of an award for the proportion of the company's shares owned by United States nationals. Instead, the company's other liabilities must first be deducted from the amount due, after which an award would be issued with respect to the remainder thereof. In the instant case, apparently only the company's tax and social security obligations have not been taken into account, which is why these are taken up in the text of this Opinion.

(2) See: My Dissenting Opinion in General Dynamics Telephone Systems Center and The Government of the Islamic Republic of Iran (Award No. 192-285-2, issued on 27 November 1985), paragraph 4.

these legal considerations as precedential matters. Moreover, because it eased the work of the Tribunal Chambers (which are by and large unacquainted with Iranian law on taxes and social security) to dismiss these claims on grounds of lack of jurisdiction, all of the Chambers have disregarded the clear evidence submitted in Iran's General Briefs on taxes and social security. Instead, they have pegged these counterclaims at a fixed rate of 5.5% (for withholding taxes treated in Article 76 of the Iranian Law on Direct Taxes) with respect to tax claims, thereby skirting this fundamental legal issue. Before presenting my reasons for dissenting to the dismissal of the claims for taxes and social security premiums in this particular case, I shall briefly review the existing precedent on the issue; and I shall conclude that even in applying the said precedents, the majority should not have dismissed Iran's counterclaims for taxes and social security in this specific case. Moreover, in my opinion the issue of the Tribunal's jurisdiction over claims for taxes and social security constitutes an important and fundamental legal issue. Thus, even if the Respondent has imperfectly set forth and documented its claim in certain of its submissions, the Tribunal should nonetheless enforce the law sua sponte, in observance of the principle of judicial notice.

1. Precedent on this issue

In Pomeroy and Iran (Award No. 50-40-3, dated 3 June 1983), Chamber Three merely set forth and argued the position that even if tax and social security claims were related to performance of the contract, they nonetheless did not arise out of the contract that was the subject matter of the claim, but were instead founded upon the law and were thus outside the Tribunal's jurisdiction. Subsequently, on 27 July 1983, in Intrend International and The Iranian Air Force (Award No. 59-220-2), Chamber Two posed a series of legal questions; although some of those relate to that particular case, others involve broad jurisdictional issues as well. Chamber Two held, inter alia, (first) that pursuant to Article II, paragraph 1

of the Claims Settlement Declaration, a counterclaim must arise out of the same contract or legal relationship that constitutes the subject matter of the claim; and (second) that the taxes must have been imposed prior to 19 January 1981. In addition (third), the counterclaim must be asserted by the same respondent against whom the original claim has been brought; and it asks (finally) whether or not, if jurisdiction is assumed, the Tribunal should consider such counterclaim in view of the practice of national courts in refusing to enforce foreign revenue laws. Thereafter, in T.C.S.B. and Iran (Award No. 114-140-2, dated 16 March 1984), Chamber Two ruled that the Tribunal should consider only the 5.5% withholding tax as arising out of the contract, and should treat all other tax claims, in the absence of other convincing evidence, as arising out of the operation of law, whereby the should be dismissed. In his Concurring Opinion of 17 March 1984 in William L. Periera and Iran (Award No. 116-1-3), Judge Mosk refers to authorities on international law, according to whom the municipal courts refuse to enforce foreign revenue laws. Next, in referring to awards by national courts, he concludes that just as those courts are not equipped to deal with and examine foreign revenue laws and must therefore not intervene in the enforcement of such laws, so too is this Tribunal faced with the same problem and thus ought to refrain from enforcing Iran's revenue laws. Naturally, Judge Mosk did not conclude as well that this Tribunal is a

municipal court, or that it will not enforce Iran's revenue laws since this would be inconsistent with public order, because according to the Declarations, this Tribunal is manifestly an international court established by the two Governments; and pursuant to Article V of the Claims Settlement Declaration, it must enforce Iranian law in those instances where that law prevails. In the same Opinion, Judge Mosk relies upon Cheshire's views in adding, by way of justifying the Tribunal's application of the 5%5 rate, that the fact that the Tribunal will not enforce revenue laws does not mean that such laws "are to be totally ignored".

I believe that ignoring such tax laws where a tax liability is definite and receivable would cause the claimant to become unjustly enriched. furthermore, if there is a conflict between avoiding unjustly enriching the Claimant to the detriment of the Respondent (which happens to be one of the two Governments that established this Tribunal), and the practical problems relating to assessing the taxes pursuant to Iranian law, the Tribunal can resolve the problem by referring the issue to an expert opinion. Apart from the foregoing, if by their own admission the Chambers of this Tribunal were confronted with an important legal issue in connection with the tax counterclaims, then the proper fulfillment of their legal duty would in my opinion have dictated that they refer its examination to the Full Tribunal, in implemen-

tation of paragraph 6(a) of Presidential Order No. 1, dated 19 October 1981. Unfortunately, the hasty issuance of awards prevented adoption of such an approach, until Iran eventually filed its Briefs on taxes and social security, in response to the numerous problems posed by the Chamber wherein it answered all the Jurisdictional objections in a convincing manner. Lastly, in Computer Sciences Corporation (Award No. 221-65-1, dated 16 April 1986), Chamber One dismissed such counterclaims primarily in reliance on the principle that public law and tax law cannot be extraterritorially enforce. It is this Award that has been among the majority's important grounds for dismissing the tax and social security claims in the instant case.

2. A look at the legal bases of the majority's argument
in connection with this claim

(a) The majority has argued that since the Government of Iran is not a party to the instant case, the tax claims cannot be brought as counterclaims. This argument does not seem very convincing, because the Government of the Islamic Republic of Iran has been made party to all of the claims brought before this Tribunal; moreover, this point should not be confused by the fact that certain organizations and agencies belonging to or under the control of the Government have been named among the respondent.

(b) The majority has argued that the Tribunal lacks jurisdiction over the tax and social security claims, because they do not arise out of the same contract and cause of action /as the original claim/ and instead can be asserted solely on the basis of law. In reality, this sort of argument constitutes a disregarding of actual facts. Of course, if the Respondent has brought a counterclaim which does not arise out of tax claims relating to performance of the contract or transaction which constitutes the subject matter of the claim, it will in that event not come under the rubric of a "counterclaim." Iran's counterclaims in the instant case, however, are not of this kind. Rather, they involve issues similar to others over which this Tribunal itself has already recognized that it has jurisdiction. For in Owen Corning Fiberglass and Iran (Award No. 18-113-2, dated 14 May 1983), this Tribunal ruled that:

> "...it can doubtless be argued that, in a case where a prolonged or complex business transaction results in several contracts, a counterclaim should be within our jurisdiction, even if it arises from a different one of these contracts than the one on which the claim was based, because both arise from the same transaction."

Thus the Tribunal could never be confronted with the argument that we should rely solely upon the terms and provisions of the contract on which the claim is based, in setting out to determine the amount of taxes or social security due. For once the Tribunal has correctly ruled that a claim arising out of one transaction may be taken into account and set off against a claim asserted on the basis of a different transaction, wherein a series of legal relationships are involved which are based upon diverse and yet interrelated transactions-- and once the Tribunal has made a determination that the tax and social security claims have arisen solely in connection with a particular contract, and that the Claimant has moreover undertaken to discharge this obligation in accordance with the contract which constitutes the subject matter of the case-- how, then, can the Tribunal regard such a claim (where it has been proved by the respondent through submission of sufficient evidence) as extraneous to the transaction on which the

claim is based? In my opinion, in setting out to prove its counterclaims for taxes and social security, the Respondent should have to establish only the point that the Claimant has implicitly or explicitly undertaken to pay those obligations, and that the said claims have arisen solely out of the legal relationship which constitutes the subject matter of the case. It will also be worth noting that it is not only tax liabilities that might also have a basis in law; many of the claimant's other liabilities in performing on a contract, such as the various kinds of fair equivalent, share this characteristic. The fact that a claim has a basis in law while also relating to the performance of a specific contract does not, on the basis of any precedent among international judicial decisions or awards by the municipal courts (the sole exception being, perhaps, prior decisions by this very Tribunal), deprive the relief sought of its character as a counterclaim. This Tribunal cannot rely solely upon its own previous awards (which also lack supporting reasons) in dealing with legal issues, because the two Governments have bound this Tribunal, pursuant to Article V of the Claims Settlement Declaration, to render its awards on the basis of law.

(c) The majority makes a further glaring error by holding that the Tribunal cannot enforce Iran's revenue laws since such laws cannot be extraterritorially enforced. In my opinion, this nondeterminative rule of conflict of laws cannot be applied by this Tribunal, because pursuant to the Declarations it is an international tribunal rather than a municipal court, whereby it is incumbent upon it to enforce the laws of the High Contracting Parties out of respect for those States' sovereign authority. In other words, it cannot possibly be maintained that in agreeing to the establishment of this Tribunal, the Government of Iran thereby intended to consent to nonenforceability of its own tax laws before this Tribunal, or to evasion of taxes and social security contributions on the part of the claimants. Although tax counterclaims, in the special sense of that term, have but seldom been asserted before international fora, yet

the fact the [concerned] arbitral tribunal took the Kuwaiti Government's tax claims into account in the Aminoil claim (1982) clearly establishes the principle that the rule of domestic enforcement of revenue laws merely constitutes a remnant of an age when national courts were reluctant to enforce the applicable law, and cannot be justified before international arbitral tribunals.

This rule has gradually lost force within the area of private international law as well; and even though the municipal courts by and large refrain from enforcing the revenue laws of foreign states, owing to the technical problems involved and to their conacquaintance with other nations' complex tax laws, they nonetheless never permit this rule to enable persons to become unjustly enriched or to help tax evaders to avoid paying their taxes. For example, the courts of Great Britain recognize, and permit transfer of, taxes imposes upon a taxpayer on the basis of foreign law. They also treat as fraudulent, and refuse to enforce, contracts which would circumvent the enforcement of foreign revenue laws. In addition, whenever a foreign government's claim for taxes has reached the stage where an enforcement order has been issued pursuant to law, and has given rise to a pre-emptive right or right of lien, such rights are both recognized and enfored.[1] I shall here point out only that pursuant to the revenue laws and the other laws and regulations pertaining to Iran's commercial claims, the Ministry of Finance enjoys an absolute and preemptive right over all of the taxpayer's properties and claims for the purpose of collecting on its assessed taxes, and can issue orders attaching those properties.[2] Therefore, where the

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[1]See: Cheshire, Private International Law (10th Ed.), P. 134.

[2]For example, pursuant to Article 283 of the Direct Taxation Law, the tax authority has the right to attach all of the taxpayer's movable and immovable property and interest therein.

taxpayer refuses to pay his assessed tax obligations, all of his assets, inter alia his rights relating to claims asserted before the Tribunal, would in practice be subject to an attachment order. In this event, the tax claim brought before the Tribunal would no longer constitute a claim, since it would be changed into a petition seeking enforcement of the Ministry of Finance's pre-emptive right or right of lien. In such an event, we are not, on principle, confronted with the issue of enforcement of Iran's revenue laws. Rather, the Tribunal is faced with the issue of recognition of the legal right of one party to recover on a claim which has arisen and been confirmed in accordance with the prevailing law, which even a foreign municipal court would necessarily recognize and enforce.

In view of the foregoing, it is my opinion that wherever the Tribunal determines that the claimant has undertaken to pay his tax and social security obligations arising out of the transaction constituting the subject matter of the claim-- and where the respondent (the Government of the Islamic Republic of Iran) also brings a counterclaim for taxes and social security premiums in connection with that same claim and for the amount assessed prior to 19 January 1981 pursuant to Iranian revenue laws-- such counterclaims have arisen out of the very same legal relationship on the basis of which the claimant brought claim against the Iranian Government. Furthermore, once those levies have been assessed, the Government of Iran (ie. the Ministry of Finance, or the Social Security Orgnization) enjoys a pre-emptive right and right of lien over all of the claimant's property, inter alia his remedy sought as asserted before the Tribunal; and the Tribunal must therefore necessarily recognize this right.

3. Special features of the instant claim: A brief review of facts relating to taxes and social security therein

In the claim at issue, the majority has invoked prior Tribunal awards (some of which were not even relevant to the

issue at hand) in dismissing the counterclaims for taxes and social security, even though those counterclaims arose out of the express provisions of the contract constituting the subject matter of the claim and although the amounts due in taxes and social security premiums were even expressly included in the contract price; and it has in this way clearly caused the Claimant to become unjustly enriched to the prejudice of the Iranian Government. Even if the Tribunal sought, by a highly restrictive interpretation of Article II, paragraph 1 of the Claims Settlement Declaration, to limit the bringing of counterclaims to those claims arising out of the contract, it should still have taken cognizance of Iran's tax and social security counterclaims, because Article 13 of the Contract expressly indicates that the counterclaims arise out of the contract. In this connection, Article 13 of the Contract provides that:

> "The Consulting Engineer will be responsible for the payment of all kinds of taxes, custom duties and charges, income tax, social securities premium and other relevant government dues, applied to him or to his employees, as well as customs duties and charges related to articles, commodities, and equipment required by him, and the fee specified has been determined by taking into account all the above governmental rights prevailing at the date of the conclusion of the Contract." (emphasis added) (*)

The final sentence of this Article clearly demonstrates that the Government increased the Consulting Engineer's fees by the amount of the said duties and charges knowingly and with his agreement, in order to persuade the Consulting Engineer to pay his tax and social security obligations. That is to say, every payment included an additional amount covering his tax and social security contributions. The Respondent's counterclaim in this case has arisen solely out of the contract that constitutes the subject matter of the instant claim. It might even be said as well, that this counterclaim does not

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/*/ /Cited directly from the English version of the Contract/

actually constitute a claim for payment of taxes and social security premiums, such that the majority might dismiss this counterclaim by invoking certain earlier Tribunal awards. In reality, the Respondent's claim is based on the fact that the claimant agreed, pursuant to the Contract, to satisfy the obligations relating to income taxes, social security premiums and other charges, in return for his receipt of fees which included those obligations; and now that the Claimant has brought claim for the unpaid balance owing from the account of the Iranian Government only as a net amount -- ie. after deducting for taxes and social security premium. It is therefore manifest that in dismissing the Respondent's counterclaims, the Tribunal has abetted the claimant in becoming unjustly enriched to the prejudice of the Respondent. Moreover, as is clear from the aforementioned Article 13 of the contract, taxes and social security contributions have been expressly included as against a part of the contract price; in actuality, payment of taxes and social security premiums constitutes a "consideration" or "cause" of the contract. If those taxes or social security premiums are not paid, Iran has no obligation vis-à-vis the claimant, since such an obligation would be without "cause". Under the system of written law, an obligation without cause is not binding.[1] In the common law system too, such an obligation is without legal effect and can even be treated as a kind of fraud.

II. The award for payment of part of the alleged but non-invoiced fees

The third jurisdictional issue is the majority's award on non invoiced fees. Aside from whatever justification might be adduced on the merits in favor of awarding for payment of non-invoiced

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[1] Pursuant to Article 1131 of the French Civil code, "L'obligation sans cause ou sur une fausse acuse ou sur une cause illicite ne peut avoir aucun effet".

fees, it would appear that the conclusion reached by the majority in paragraph 115 of the Award has led to the issuance of an award on a matter lying outside the Tribunal's jurisdiction. In accordance with the express terms of Article II, paragraph 1 of the Claims Settlement Declaration, claims asserted before this Tribunal must, I believe, have been outstanding as of 19 January 1981. The several Chambers have now interpreted the term "outstanding," with respect to the claim in question, in such a way that the weakest definition of this term is, that the word "outstanding" at least is equivalent to the word "existing." (Interlocutory Award No. 11-39-2, dated 30 December 1982.) In Harza Engineering and the Government of Iran (Award No. 19-98-2, dated 30 December 1982), the Tribunal explicitly ruled that

> "A mere right to payment from a bank account is not a 'claim' within the meaning of the Claims Settlement Declaration..."

Therefore, a mere right to demand fees from the Respondent prior to 19 January 1981 is not to be regarded as constituting an outstanding claim within the meaning of the Declaration, either. On principle, the two Governments had some intent in employing the term "outstanding" in the Declaration; and this intent was, at the very least, that a demand must have already been made on the right, in order for it to be considered "outstanding." Although the principle is obvious that any employer has to receive an invoice and demand for payment from the consulting engineer before he will pay him his fees, the majority has disregarded the fact that according to Article 12, paragraph 2 of the Contract, the Employer's obligation to pay the fees was contingent upon submission of a monthly invoice. From this fact, the conclusion is to be drawn that the Tribunal lacks jurisdiction to award any payment of fees that were not at least invoiced prior to 19 January 1981.

III THE RATE OF CONVERSION

Although the majority observes in paragraph 138 of the Award that one-half of the invoiced amounts was to be paid in Rials in accordance with the terms of Enclosure No.4 of the Contract, it has ruled that the applicable rate of conversion for the claims relating to the invoices is, the rate prevailing at the time that payments fell due between 1978 and April 1980. Then, because it could not apply this basis with respect to those high supervision fees which had not, on principle, been invoiced at all, in paragraph 139 of the said Award the majority has arbitrarily adopted the average rate for the month after the Claimant filed its Statement of Claim with the Tribunal. I believe that this approach by the majority is incorrect for the following reasons:

(a) Instead of applying its own judgment in settlement of disputes, the majority should apply only the prevailing law by way of implementing Article V of the Claims Settlement Declaration. The rule routinely applied by the courts of various states, inter alia Iran, Germany, Great Britain, and the United States,[1] which has thereby become a customary rule of international law, involves the principle of issuance of an award on the basis of the "currency of contract." This simple rule is founded upon the principle of the sovereign will of the transacting parties, and upon the acceptance by the parties to the contract of any gains or losses resulting from currency conversions. In light of this principle, in contractually based claims the courts always render their award in the currency of the contract, and at the rate prevailing on the date the award was issued. The sole exception is the practice

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(1) See, for example: Milangos v. George Frank (1976), A.C. 443; Schoch Meir G.m.b.H. v. Heinin (1975), Q.B.416; Sirie v. Godferey (1921), 196 App. Div. 529.

of certain courts, inter alia those of Germany, which converted the currency of contract in the face of the catastrophic depreciation thereof, following the two World Wars when Germany's currency became virtually worthless. The Tribunal is aware that the Iranian Rial has not been officially devaluated between the pre-Revolutionary period and the present, and that it has undergone the usual fluctuations in keeping with regulations of the International Monetary Fund and on the basis of a group of internationally convertible currencies. Therefore, in my opinion the Tribunal cannot alter and tamper with the Parties' contractual obligations on the pretext of making equitable adjustments.

(b) Based on the foregoing, where the claimant's claim is based on a certain amount in local or foreign currency, he has both the right and the duty to assert his claim on the basis of that same currency, and the Tribunal must render its award in that currency as well. It might be said that in signing the Declarations and funding the Security Account in Dollars, Iran has in fact agreed to conversion of its Rial obligations into Dollars. However, it must be noted that even if, in arguendo, this reasoning be accepted, the obligation is to be converted as at the date of issuance of the award. This action on the part of Iran was never meant to signify that its Rial obligations were to be converted into Dollars as of the time of the contract or as of the date when the payments became due.

(c) The argument is also incorrect that had the Claimant received the monies owed it in Rials at the time the payment was due, it could have converted that amount into Dollars on the same date. For the Contract and the surrounding circumstances offer no indication, either implicitly or explicitly, of such an intention; rather, an argument can be made to the contrary, because if such a possibility had existed, there would have been no need for the Parties to enter into a contract providing for an amount to be paid half in Rials, and half in Dollars. Therefore, this manner of payment is a strong

indication that claimant intended to make use of Iranian currency.

The evidence presented above, and other evidence, leaves no doubt that the Tribunal should take into account that rate of exchange obtaining on the date of issuance of Award, since it was on that date the conversion of the obligation materialized. And if there remained any doubt as to this point, the conclusion that must logically be drawn is, that Iran's obligation would not involve any currency other than that provided for under the contract, until the date the Award was issued.[1]

At any event,

> "The true and the real reason should be that it is not the function of legal proceedings to interfere with substantive rights. It is their function to enforce rights. The idea that default or breach creates entitlement to a currency which previously was not the money of account, whether actual or potential, lacks both justification and attraction".[2]

Therefore, because the present Award by the majority does not conform to law in those respects treated in this Opinion, I dissent to the said Award.

The Hague, 21 October 1986

Hamid Bahrami-Ahmadi

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[1] This conclusion is based on the principle known as Esteshab in Islamic law.

[2] See: Mann, The legal Aspect of Money (4th Ed.), pp.347-8