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Case No. 202

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IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
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In the Name of God

CASE NO. 202

CHAMBER TWO

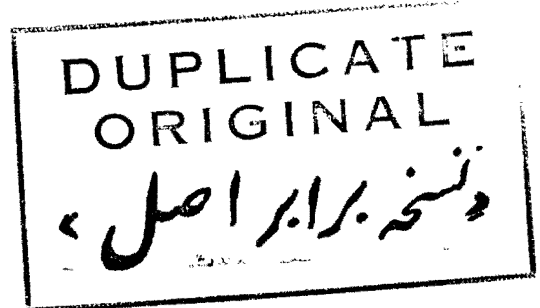
DECISION NO. DEC 83-202-2

THE FIRST NATIONAL BANK OF BOSTON,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
IRANIANS' BANK,
INDUSTRIAL CREDIT BANK,
BANK IRANSHAHR,
FOREIGN TRADE BANK OF IRAN,
BANK PARS,
AKAM BUILDING INDUSTRIES CO. LTD.,
BEHSHAHR INDUSTRIAL CO., LTD.,
HAMMADAN GLASS COMPANY,
KHUZESTAN WATER AND POWER AUTHORITY,
MINISTRY OF ENERGY,
MINISTRY OF ECONOMIC AFFAIRS AND FINANCE,
INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN,
NATIONAL PETROCHEMICAL CO. OF IRAN,
BANK SAKHTEMAN,
KASHAN VELVET AND RAYON MILLS LTD.,
INTERNATIONAL BANK OF IRAN AND JAPAN,
MAZANDARAN TEXTILE COMPANY,
IRAN NATIONAL AIRLINES CORPORATION,
BANK MARKAZI IRAN,



Respondents.

SEPARATE OPINION OF SEYED KHALIL KHALILIAN

To the best of my recollection, the set-off has mainly been invoked before this Tribunal in connection with

claims for taxes and social insurance. In their submissions, Iranian respondents have argued in support of the set-off, while the claimants have responded to, and raised defences against, that position. If we wish to get at the essence of all the arguments and contentions of the two sides, we come to the conclusion - to put it in simple terms -- that in availing themselves of the set-off, which constitutes a part of the arsenal for their defence, the respondents have, in mounting a defense -- and not as a counterclaim -- brought before this Tribunal the matter of the countervailing debts owed them by the claimants. The claimants, however, considering "set-off" to be another term for "counterclaim," have dealt with this legal argument with a kind of "verbal gymnastics." As a result, they have held that the set-off must satisfy all of those conditions which a counterclaim has to meet.

At any rate, what is important for us is to take note of the substance of the parties' arguments and to reconsider the various legal concepts involved. Thus, before all else we must recall the distinction between the following two legal concepts: the set-off and the counterclaim. The pleadings of the American claimants, and the conclusions drawn by the Tribunal majority in certain awards, have been based on a fallacy in that they have regarded these two terms as embracing a single concept, whereas from a strictly legal point of view the issue should not have seemed to be so difficult as to have brought about such a gap between the views of the Tribunal's members, who are divided into a majority and minority on this matter. Now, we shall first very briefly and quickly recount the fundamental distinction made between these two concepts in certain legal systems -- systems which, in view of the law governing the contractual relations between the parties to the claims involved, certainly have a bearing upon the decisions of this

Tribunal. Following that, we shall make an appraisal of the majority's decision.

I.

Distinction between the concepts of "Set-off" and "Counterclaim"

"Set-off. Remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction extrinsic to plaintiff's cause of action. (1) Edmonds v. Stratton, MO. APP., 457 S.W. 2d 228, 232," Black's Law Dictionary.

"Set-off. A defense or an independent demand made by the defendant to counterbalance that of plaintiff, in whole or in part. Mack v. Hugger Bros. Constr. S. 153 Tenn 260, 283 SW 448, 46 ALR 389." Ballentine's Law Dictionary.

"A counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, 20 AM J2d Council section 2." Ibid.

"When two persons are indebted to one another, their mutual debts are to be set off in the manner provided for in the following Articles." Civil Code of Iran, Article 294.

"In this connection, it will be immaterial whether the two debts arise from the same or different causes, because a difference of cause does not lead to a different effect. Therefore, [even] if one of those two debts arises from a sale and the other from a loan or lease, the two debts are set off against one another." Emami, Hogug-e Madani, vol. I, p. 345.

"La compensation s'opère de plein droit par la seule force de la loi, même a l'insu des debiteurs; les deux dettes s'éteignent reciproquement, à l'instant où elles se trouvent exister à la fois, jusqu' à concourence de leurs quotités respectives." Article 1290, French Civil Code.

(1) In this and the following passages, the emphasis has been added.

"No counterclaim is required if the defendant wants to set off a liquidated debt against the plaintiff's claim. Such a set-off, called compensation legale, is considered a defense on the merits (Dalloz, Repertoire de procedure civile et commerciale, Demande reconventionnelle, at No. 14.)" P. Herzog, Civil procedure in France, Martinus Nijhof, 1967, p. 277.

"Set-off. Generally, in set-off, it is not necessary that the defendant's claim arise from the contract or transaction sued on or be connected with the subject matter thereof." 80 C.J.S., Section 35.

"The distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint..." Ibid, Section 36.

The distinction between the two concepts of "counterclaim" and "set-off" can be clearly understood from the legal texts cited above. That is to say, the counterclaim is an independent claim which is brought vis-à-vis the original claim. In other words, the original claim provides the motive or justification for bringing the counterclaim, and the latter must therefore be related to it. As for the set-off, it is brought as a distinct claim as well, but it indicates the existence of a debt which in itself, by the operation of law, sets off and extinguishes all or part of the claimant's claims in advance. Thus, the legal set-off constitutes a substantive rule and principle and, as we saw in the above-cited texts, it is one of the respondent's grounds of defence.

II.

The Set-off according to the Tribunal Rules and in
Tribunal Awards

The term "counterclaim" has been employed in the Algiers Declaration, but the word "set-off" does not appear in that instrument. Both of these terms are used in Article 19, paragraph 3 of the Tribunal Rules, and in Note 2 thereto. It would appear that omitting the word "set-off", even from the Tribunal Rules, would not prejudice the respondents' right to mount a defence by every legitimate means permitted under the law. The juxtaposition of these two terms should not be misconstrued to mean that the set-off and counterclaim may be regarded as synonymous, and that exactly those conditions which relate to the counterclaim are to be applied to the set-off; in the same way, the conditions governing the set-off are not applicable to the counterclaim, either.

Now, there are two incompatible presumptions in the awards and decisions of the Iran-United States Claims Tribunal in this connection. One is founded upon a correct understanding of these two legal concepts, while the other is based upon the fallacy embodied in the submissions by the American claimants who, by disregarding the legal nature of the set-off and counterclaim, and by dealing with the matter with a sort of verbal gymnastics, have stated that the set-off, being another term for counterclaim, must also arise, like the latter, out of the same transaction or contract that underlies the original claim.

A submission by one of the claimants invokes a suggestion made by Mr. Holtzmann in the ninth meeting of UNCITRAL Committee No. 2, where he stated that according to the

provisions of United States law, the counterclaim and set-off must both arise from the same contract (as that which underlies the original claim). Combustion Engineering Inc. and Iran, Case No. 308, Doc. 345, p.42. At the same time, following a clarification by the chairman of that meeting he stated that he was not insisting on his proposal; and at any rate it would not appear to be correct to regard the set-off and counterclaim as being synonymous or as governed by identical conditions either, even under United States law. Of course, that statement did somehow hold true in that country prior to the eighteenth century ², but it is extremely difficult for a jurist to assert today that in the United States, these two legal concepts continue to stand for the same thing, and that the conditions for applying them are the same.

Unfortunately, these two concepts were confused with one another, apparently for the first time before this Tribunal, after the filing of the General Brief of the Government of the Islamic Republic of Iran regarding the Tribunal's jurisdiction over tax claims, in an award rendered by Chamber One of the Tribunal, composed of Mssrs. Böckstiegel, Holtzmann and Mostafavi. In its submission, the Iranian Government expounded on the set-off in very clear and simple terms, and as constituting an alternative to bringing a counterclaim; it also endeavored to describe the basis of this independent legal concept to the Tribunal in detail. See: General Brief of the Islamic Republic of Iran in Support of Claims Based on Unpaid Taxes, Part I, Section 1-2, published in the Iranian Assets Litigation Reporter, 10 May 1985. The conclusion reached by Chamber One, however, was erroneous

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"Where the defendant's claim did not arise out of the transaction sued on, there was no set-off at common law until the early eighteenth century." F. James, Jr. & G.C. Hazard, Civil Procedure, p. 483.

and astonishing, for it very explicitly stated that:

"The Tribunal determines that as far as its jurisdiction is concerned claims for set-off are generally governed by the same standards as counterclaims."
Computer Sciences Corporation and The Government of the Islamic Republic of Iran, et al, Award No. 221-65-1, reprinted in 10 Iran-U.S. C.T.R., p. 309.

What this award signifies is that the set-off is governed by the same conditions as the counterclaim, which must arise from the same cause of action as the original claim. This finding on the part of Chamber One, which arises out of the majority's feigned ignorance in the face of simple legal concepts, is not only totally without foundation, but also highly astonishing (see the legal texts cited in Part I of the present Opinion, supra).

What is yet more astonishing, is that this same baseless finding has been invoked as precedent in certain Tribunal decisions as well. Although the instant Decision does not expressly do so, it is unclear why the majority deemed the finding of Chamber One in Computer Sciences to be so valuable and significant that it was unwilling to pass up a reference, even in a footnote, to Decision No. DEC 66-338-2, which itself invokes the award rendered in Computer Sciences.

From the terms employed in Article 19, paragraph 3 of the Tribunal Rules and in the Note thereto, there is clearly a distinction made between the two concepts of "counterclaim" and "set-off." As for the point that permission to bring those two kinds of claim depends upon the provisions of the Declaration, this is natural, for the Declaration constitutes the statutory source of this Tribunal's rules of procedure. See Article 1(2) of the Tribunal Rules, which provides that wherever there is a conflict between the Tribunal Rules and the Declaration, the provisions of

the latter shall apply. Therefore, a set-off, which is a means of defence and a part of the arsenal thereof³ must, like the "counterclaim," be brought within the framework of the Declaration. This is not an exceptional and unconventional rule, and such a condition that there must be no conflict with the Declaration should not give a judge a pretext for mixing together different legal concepts and -- as we have seen -- for baselessly concocting analogies and similarities between them in order, on the basis of such an erroneous conclusion, to strike off a whole series of major claims of the Iranian Government (concerning taxes and social insurance) as being invalid.

In the Case at issue here as well, Bank Markazi relied upon the set-off as one of its legal theories for reducing or cancelling out the claim of the Claimant, the First National Bank of Boston. Bank Markazi devoted 17 pages to its arguments in this connection, and then took up the theory of the counterclaim. Doc. No. 58, pp. 4-21. Therefore, first of all, since the original claims have been withdrawn in the present Case, it would have been enough for the Tribunal to have stated merely that set-off no longer applied, since the original claims had been withdrawn. Cf. paragraph 8 of the Decision. Secondly, the insistence upon invoking one of the decisions by Chamber Two, as done in the footnote to the instant Decision, constitutes an insistence upon reviving a flimsy finding

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In addition to what has been set forth in Part I of this Opinion, note should be taken of the following statement:

"Set-off. The right to plead a compensating debt against a creditor and thereby to have his claim extinguished or diminished to that extent. It is limited to money claims and is a ground of defence, not a substantive claim." The Oxford Companion to Law, 1960. (Emphasis added)

by Chamber One, a finding which has no value whatsoever as precedent. See: paragraphs 52-53 of the Dissenting and Concurring Opinion of Seyed Khalil Khalilian in Lockheed Corporation and Iran, Award No. 367-829-2. Thirdly, Chamber One's findings are inconsistent with other findings by this same Tribunal with respect to set-off, a fact which underscores the point that the finding invoked in the award in Computer Sciences is without merit.

It is true that this Tribunal has, in certain instances, held that the concept of the set-off is independent of that of the counterclaim. For example, in Owens-Corning Fiberglass Corp. and The Government of Iran, et al, the Tribunal stated that:

"...the question of the amount of any taxes which might be owing on unpaid royalties would necessarily arise as an offset against any recovery of those royalties, even if no affirmative recovery of such amounts could be allowed as a counterclaim." (emphasis added) ITL 18-113-2, reprinted in 2 Iran-U.S. C.T.R., p. 322 at 324.

See also: Futura Trading Incorporated and Khuzestan Water and Power Authority, Award No. 187-325-3, reprinted in 9 Iran-U.S. C.T.R., p. 58; and Ammann & Whitney and Ministry of Housing and Urban Development, Award No. 248-198-1, reprinted in 12 Iran-U.S. C.T.R., p. 105.

Dated, The Hague

23 September 1988/ 1 Mehr 1367


Seyed Khalil Khalilian