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AIMS TRIBUNAL

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دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 10973 Date of filing: 23 Feb 88

** AWARD - Type of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

- Date _____
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** SEPARATE OPINION of Mr Khalilian

- Date 23 Feb 88
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

CASE NO. 10973
CHAMBER TWO
AWARD NO. 346-10973-2

LORD CORPORATION
a claim of less than U.S. $250,000
presented by
THE UNITED STATES OF AMERICA,
Claimant,

and

IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY,
Respondent.

SEPARATE OPINION OF SEYED KHALIL KHALILIAN

I dissent to that portion of the present Award where it names the "Lord Corporation" as the Claimant, and wherein it justifies this characterization by downplaying the role of the United States Government, as being merely that of the presenter of the claim.

I. Background: The Practice of the United States Government

As an exception to the rule of ratione personae of international courts, according to which States alone are entitled to recourse before such courts, the Claims Settlement Declaration also gave private individuals and corporations the right to bring their claims directly before the Iran-United States Claims Tribunal

themselves. Nonetheless, the aforementioned principle was maintained intact with respect to those claims wherein the amount sought was less than $250,000 dollars. Article III, paragraph 3 provides that:

> "Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the tribunal either by claimants themselves or, in the case of claims of less than 250,000 U.S. Dollars by the Government of such national." (1)

Pursuant to this Article, in January 1982 the United States Government brought a large number of claims, among them the instant Case, on behalf of its nationals. In these claims, not only were the Statements of Claim signed by the Agent of the U.S. Government, but all of the subsequent communications and memorials up to the time of issuance of the award were prepared and submitted to the Tribunal by the U.S. Government. In the initial stages the U.S. Government, acting as claimant, chose for its memorials and communications a caption beginning with the phrase: "The Government of the United States of America," followed by the words "on behalf and for the benefit of ...", to which it added the name of its national. Here, it is important to point out that Mr. Rovine, who was then the Agent of the Government of the United States, explicitly stated that his nation's purpose in taking this step was to exercise diplomatic protection, in the traditional sense of that term, or in other words, to apply the concept of "espousal of private claims":

> "Mr. Rovine urged that there was no reason why Case No. 86 (2), which had long been filed with the Tribunal, should not be served on

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(1) In this Article, the word "presented" is used to refer indifferently to the bringing of claims, whether large or small, and whether by private persons or by the two Governments. Pursuant to this Article, private persons were permitted to bring their claims directly. If the United States regards them as claimants, then it should consider itself the claimant in the small claims, insofar as the Declaration is concerned. In each instance, the legal nature of "presented" is the same.

(2) The Statement of Claim in Case No. 86, known as the "Umbrella Case," was filed on 18 November 1981 under the following caption: "The Government of the United States of America, On Behalf and for the Benefit of Certain of Its Nationals." Therein, the U.S. Government stated that:

(continued on following page)

> the Respondent in the usual way. He explained that this claim was based on espousal by the United States of the claims of its nationals, as that concept was understood in traditional public international law. Accordingly, it was a claim by one Government against the other, and no instructions were being sought or received from individual claimants..." (emphasis added). Minutes of the 64th Meeting of the Full Tribunal, paragraph 10, dated 5 November 1982.

It is to be noted that even in the agreement on the basis of which the Award in the instant Case was issued, the Parties have retained the original caption of the Statement of Claim (i.e. the United States Government as the Claimant). Nonetheless, the Tribunal has disregarded this important point and even gone much further than the U.S. Government itself in this respect.

II. Interpretation of Article III, paragraph 3 of the Claims Settlement Declaration

One of the avenues for the interpretation of international instruments is, to refer to the statements and practice of the States parties thereto, or of their official representatives. The Tribunal has expressly recognized the principle that "subsequent practice" is taken into account in treaty interpretation:

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty." United States and Iran, Case No. A-16 (5 Iran-U.S. C.T.R. 71)

This is also the very principle set forth, albeit in other language, in Article 31.3 (b) of the Vienna Convention on the Law of Treaties. See also: Case Concerning the Interpretation of the Air Transport Services Agreement (Italy v. U.S.), Advisory Opinion 17 July 1965, R.I.A.A. XVI, at 9-100; Interpretive Decision 28 June 1964

(continued from preceding page)

> "This statement of claim is presented to the Iran- United States Claims Tribunal by the Government of the United States of America against Iran pursuant to the Declaration..., in particular, Article II, paragraph 1 and Article III, paragraph 3 thereof, in continuance of the exercise of diplomatic protection of its nationals, acting as parens patriae, trustee, guardian and representative, and on their behalf." (emphasis added) Case No. 86, Statement of Claim, at 1.

in Air Transport Services Agreement Arbitration (U.S. v. France), 38 I.L.R., at 246-247.

We saw above that the U.S. Government, through its own Agent to the Tribunal, expressly invoked its understanding of Article III, paragraph 3 of the Declaration in holding that by bringing the claims of private persons before the Tribunal it was acting within the framework of public international law, and for the purpose of extending diplomatic protection to its injured nationals. Iran, the other Party to the Algiers Declaration, has also always maintained that the Declaration had established an inter-state tribunal for the purpose of adjudicating the disputes of the two nations in connection with their injured nationals, and that the particular role of each of the two States before this Tribunal was, to exercise diplomatic protection. This position has been consistently enunciated, on numerous occasions, in the Iranian Government's memorials and communications; in addition, it argued and elaborated on this legal position in its memorial filed in Case No. A-18. Is is to be noted, however, that The Full Tribunal very inadequately and imperfectly summarized its statements and arguments in Decision No. 32-A-18-FT (5 Iran-U.S. C.T.R. 255-256).

In diplomatic protection, private claims are elevated from the individual to the national level, and are brought before inter-state courts, such as this Tribunal, as international claims. In other words, at this stage private claims are espoused by the government of which the original owners of those claims are nationals; i.e. that state thereafter treats them as its own claims and assumes direction and control over the means of recovering on the claims or of vindicating the rights of the individuals concerned:

> "When ... a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken." (Case of William A. Parker, R.I.A.A. vol. IV, at 37).

See also: Verzijl, International Law in Historical Perspective, vol.V, at 444-447; the American Umpire's opinion in Fabiani Case, R.I.A.A. vol. X, at 107.

In the Mavrommatis case, brought before the Permanent Court of International Justice, the Court did not sustain the argument of the British Government, which held that the claim was not one between two states, but rather a private claim brought against it by a Greek individual. The Court ruled that such a claim was transformed into an international dispute, and that the government which brought it was acting in vindication of its rights. The Court held that such a government was the "claimant" in the case:

> "Once a state has take up a case on behalf of its subjects before an international tribunal, in the eyes of the latter the state is the sole claimant." (emphasis added) PCIJ, series A, no. 2, at 12.

In addition to the above, see: E. J. de Arechaga, "International Responsibility", in Manual of Public International Law, Sorensen ed. 1968, at 573-574; Borchard, The Diplomatic Protection of Citizens Abroad, at 357.

In the process of diplomatic protection, even the monies recovered belong to the sponsoring Government; thus, we see at this Tribunal that monies awarded are deposited to the account of the United States Government. In this connection, see also the Supreme Court Decision in the La Abra Case cited in Francis Deak, American International Law Cases, Oceana 1975, at 73.

In the instant Case, not only has the United States Government conceded, both by deed and in speech through its official Agent to the Tribunal, that it is exercising diplomatic protection and has brought claim on behalf of its national for this purpose, but reference to other sources confirms as well that this is the legal nature of its acts. By way of example, if one refers to the Memorial of the United States Justice Department, which was filed with U.S. District and Appeals Courts under the title of "Statement of Interest," he will see the way in which it sets forth that Government's aim and objective in entering into the Algiers Declaration:

> "The Agreement with Iran is only the latest in a historical practice of claims settlements which confirms the President's constitutional authority to settle international claims to bind American claimants."

It then goes on to add that:

> "Typically, rather than renounce claims of American nationals, the Executive has utilized two primary methods to settle such claims and has often done so through Executive Agreements. First, the Executive Branch has espoused single or multiple claims arising out of specific events or covering a specific period of time, often accepting lump sum payments in full settlement of American claims. Second, the United States has agreed to settle claims through the establishment of arbitration mechanisms, and has made that arbitration binding, exclusive and non-reviewable." (emphasis added) International Legal Materials, 1981, vol. 20, at 368-369.

It is to be noted that one of the principles of treaty interpretation is, reference to the purpose for which the treaty was concluded -- and according to the United States Justice Department, that Government's purpose in entering into the Declarations was, to engage in the process of diplomatic protection. See also: Rousseau, Droit International Public, Tome I, at 272.

III. Agency or Diplomatic Protection

In view of the foregoing, the meaning of the words "presented" and "on behalf of," which the United States Government has employed when bringing the small claims, becomes entirely clear (1).

An act such as that taken by the United States Government in bringing the small claims cannot be characterized as "agency," because it lacks the features of this concept, which relates to the civil law or the law of contracts. The relationship between the Lord Corporation and the United States Government in the present Case is categorically not that of "principal" to "agent." One of the prominent features of agency is that the principal determines his agent's powers, and does not permit him to exceed them, whereas in connection with the claims of its nationals

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(1) In its subsequent communications to the Tribunal, the United States reversed the order of its name and that of its national, to read: "LORD CORPORATION a claim of less than U.S.$ 250,000 presented by THE UNITED STATES OF AMERICA." However, this does not change things in the least; such a switch of places cannot possibly alter the meaning of the word "presented" as set forth in Article III, paragraph 3.

against Iran, we have seen that the United States took decisions unilaterally and within the framework of the nation's broad interests and policies in the Persian Gulf region:

> "[T]he surest way of resolving any of the financial problems between the United States and Iran consistent with the interests of U.S. claimants and the broader interests of the United States in the Persian Gulf area, a region of strategic importance to the United States..." (quoting Alexander Haig, the then United States Secretary of State, international Legal Materials, 1981, at 365).

In the other statement quoted above, the United States Justice Department also explicitly holds that the provisions to which the United States and Iran have agreed are binding upon "American claimants." Therefore, the United States Government's relationship with these individuals in presenting their claims within the framework of Article III, paragraph 3 of the Declaration cannot be regarded as an agency relationship as conceived under the "law of contracts."

One of the legal consequences of the Declaration was that it nullified all of the claims, attachments and court proceedings before the United States courts. See: Potelicki, "The United States-Iran Hostage Agreement: A Study in President Power," Cornell International Law Journal, vol.15, 1982, at 161. Simultaneously, one of the social effects of this measure by the United States Government was, that it generated a wave of dissatisfaction among American claimants, a striking instance of which can be seen in the claim of Dames & Moore. See: Chinkin, "The Foreign Affairs Powers of the U.S. President and the Iranian Hostage Agreement: Dames & Moore v. Regan," ICLQ, 1983, at 600 et seq.; Dames & Moore v. Regan, Geo. Wash. J. L. & Econ., vol. 16, 1982, at 401 et seq.

This dissatisfaction, and the involuntary solution which the Chief Executive of the United States imposed upon the American claimants in order to settle the claims, is totally incompatible with the notion of "agency" in the law of contracts. In this connection, refer to the article by Trooboff, "Implementation of the Iranian Settlement Agreements - Status, Issues, and Lessons: View from the Private Sector's Perspective," Private Investors Abroad, 1981, at 126 et seq. Compare also with the situation in diplomatic protection, wherein the owner of the claim loses all control over the outcome of the claim and proceedings once the claim is espoused by the

protecting government: Lillich, The Protection of Foreign Investment, Syracus University Press, 1965, at 192; Rousseau, Droit International Public, Tome V, at 189. In affirming this point, the United States Supreme Court ruled as follows in Dames & Moore:

> "But it is also undisputed that the 'United States has sometimes disposed of the claims of citizens without their consent. Or even without consultation with them. Usually without exclusive regard for their interests as distinguished from those of the nation as a whole.' Henkin. Supra. at 263. Accord. The Restatement (second) of the Foreign Relations Law of the United States Section 213 (1965) (president 'may waive or settle a claim against a foreign state... even without the consent of the [injured] national'). It is clear that the practice of settling claims continues today." Supreme Court of the United States, No. 80-2078 - opinion (July 2, 1981).

IV. Unilateral Breach of the Provisions of Article III, paragraph 3 of the Declaration

In view of the foregoing, it is clear to what extent the Award at issue, and also certain previous decisions and awards of the Tribunal which have in some way ruled on the legal nature of the action of the two Governments in presenting the claims of their respective nationals, fail to conform to the facts and the law. First of all, the two Governments have stated their aim and purpose in entering into the Declaration in unequivocal language which admits of no interpretation, in such a way that there is no ambiguity whatsoever, such as might leave room for an interpretation contrary to the positions adopted by the two Governments. It would appear that this change in the United States' position took place after it was confronted with the arguments raised by the Iranian Government in dealing with the issue of the Tribunal's jurisdiction in connection with dual nationals, whereupon the United States Government denied that it was exercising diplomatic protection even in the small claims. Although this change of position should be deemed to constitute a unilateral breach of Article III, paragraph 3 on its part, the Tribunal has also unfortunately supported this approach in certain of its orders and awards, without advancing a sound legal argument. See: Esphahanian and Bank Tejarat, Award No. 31-157-2, reprinted in 2 Iran-U.S. C.T.R. 165; and Iran and The United States, DEC 32-A-18-FT, Id., vol. 5, at 261-262.

Based on the above, once the two Governments parties to the Algiers Declarations had set forth the position that this Tribunal had been established within the framework of diplomatic protection, on the basis of which it would adjudicate the claims of their respective nationals, on principle any subsequent change of position on this issue on the part of either of the two Parties should have been notified to the other Party, in the form of a proposal to amend the agreement. Instead, however, the Claimant State unilaterally altered the captions of the "Lord Corporation" claim and scores of other small claims, without adhering to its undertakings or, it would appear, abiding by the rules governing the law of treaties, in naming its nationals in place of itself as the claimants in those claims brought within the framework of diplomatic protection. Regrettably, the Tribunal has also couched its awards in these Cases in terms which correspond to this incorrect change in position by the United States Government, without advancing any convincing legal arguments whatsoever.

Based on these facts, and on their analysis in the light of clear and solid legal points which precisely describe the United States' position, I am compelled to file the present Opinion in dissenting to this, the first award which I have signed following my appointment as arbitrator.

Dated, The Hague,
23 Febuary 1988

Seyed Khalil Khalilian