IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

Case No. A28
Full Tribunal

THE UNITED STATES OF AMERICA and
THE FEDERAL RESERVE BANK OF NEW YORK,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN and
BANK MARKAZI IRAN,
Respondents.

SEPARATE OPINION OF
CHARLES N. BROWER

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1. I have been called upon to deal with the aftermath of Decision No. DEC 130-A28-FT as the only Member of the Tribunal who did not participate in it.[1] My perspective thus being unaffected by previous involvement, perhaps it is not amiss for me to make certain observations on the Tribunal's Order of 17 September 2001.

2. Several things should be recalled about Decision No. DEC 130-A28-FT. First, it found:

> that the text of Paragraph 7 is clear and unambiguous and leaves no room for alternative interpretations. The textual interpretation leaves no doubt whatsoever: Iran is obligated to "make new deposits [into the Security Account] sufficient to maintain a minimum balance of U.S.$500 million in the Account . . . [w]henever the Central Bank [of Algeria] shall . . . notify Iran that the balance in the Security Account has fallen below U.S.$500 million" and to maintain the Account at that level "until the President of the [Tribunal] has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied."[2]

3. Second, the Tribunal was expressly conscious of the fact that notwithstanding the clarity and lack of ambiguity of this replenishment obligation, "on 5 November 1992, the balance in the Security Account fell below the required level of U.S. $500 million" (para. 87)

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[1] Decision No. DEC 130-A28-FT was issued 19 December 2000. My reappointment as a regular Member took effect 1 January 2001. I replaced Judge Duncan, who had participated in that Decision.

[2] Para. 54 (brackets in the original).

and Iran's "refusal to [replenish] since November 1992 has been absolute" (para. 85). Hence, Iran was already into its ninth year of "non-compliance with this obligation" (para. 95B).

4. Third, the Tribunal expressly, and repeatedly, was not disposed to "assume that Iran will remain in non-compliance in the future," *i.e.*, following issuance of Decision No. DEC 130-A28-FT, stating that it "cannot" do so, that it "cannot anticipate continued non-compliance by Iran" inasmuch as it "expects both Parties to comply with their obligations under the Algiers Declarations" and therefore "expects that Iran will comply with this obligation" of replenishment (paras. 93, 94 and 95B).

5. Fourth, it was on the basis of this combination of reluctance to assume that Iran would persist in its non-compliance and expectation of compliance that the Tribunal rested with its declaration of non-compliance, expressly "assum[ing] that this holding represents, by itself, a partial satisfaction to the United States" (para. 88), and declined to issue, as the United States had urged, "a request or order to Iran to comply with its obligation under Paragraph 7 as determined by the Tribunal" (para. 92).

6. Fifth, some Members of the Tribunal at least were of the view that such a request or order "would not have added any additional weight to this Decision" or would have been, in effect, superfluous.[3]

7. Against this background, it is at least not surprising that, some eight months following Decision No. DEC 130-A28-FT, the Tribunal's "expectation" of replenishment not having been fulfilled, the United States has thought it appropriate to reiterate its request that the Tribunal order replenishment. Failure to do so, it could have been anticipated, might be argued to constitute a waiver of its right to replenishment. Equally, however, perhaps it should not be surprising, let alone dismaying, upon reflection, that this Tribunal, having refused to issue the requested order in the face of eight years and six weeks of non-compliance with a clear and unambiguous obligation, has not been prepared to consider a renewed request for such relief in this Case at this time and in the present circumstances.

9. In any event, certain significant facts remain.

10. The Tribunal finding in Decision No. DEC 130-A28-FT that since 5 November 1992 Iran has not been complying with its clear and unambiguous obligation under international law to replenish not only stands, but is reaffirmed by the Tribunal's Order

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[3] *See* Concurring Opinion of George H. Aldrich in *The United States of America, et al.* and *The Islamic Republic of Iran, et al.*, Decision No. DEC 130-A28-FT, para. 2 (19 Dec. 2000), *reprinted in* _ Iran-U.S. C.T.R. _; *see also* Concurring Opinion of Richard M. Mosk in *The United States of America, et al.* and *The Islamic Republic of Iran, et al.*, Decision No. DEC 130-A28-FT, para. 3 (19 Dec. 2000), *reprinted in* _ Iran-U.S. C.T.R. _.

of 17 September 2001, which expressly "recalls" that Decision. Iran continues to bear all the consequences under international law of its persistent and, following Decision No. DEC 130-A28-FT, undeniably knowing non-compliance. Having acted as it has, the United States has made clear that it does not acquiesce in Iran's continued non-compliance. Under present circumstances, there is nothing more for it to do to preserve its right to replenishment. Finally, as the foregoing reflects, other action by the Tribunal in the future is by no means precluded. I remain confident that the Tribunal will continue, as circumstances require, to act within its powers to secure compliance with the Algiers Accords.

Dated, The Hague

21 September 2001

Charles N. Brower