CASES NOS: A15 (IV) AND A24
FULL TRIBUNAL
AWARD NO. 602-A15(IV)/A24-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant

and

THE UNITED STATES OF AMERICA,
Respondent

SEPARATE OPINION OF JUDGE GABRIELLE KIRK McDONALD

CONCURRING IN PART, DISSENTING IN PART

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1. I join the Concurring and Dissenting Opinion of Judge Charles N. Brower, and the Separate Opinion, Concurring in Part, Dissenting in Part, of Judge O. Thomas Johnson, and while I agree that the United States breached its obligation to terminate legal proceedings under General Principle B, I would find that suspension of the claims pursuant to Executive Order 12294 by the United States was the functional equivalent of termination of those legal proceedings and underlying claims, as required by General Principle B of the Algiers Declarations; the breach was due to the failure of the courts in the United States to suspend all legal proceedings by 19 July 1981, and not because of a flaw in the suspension mechanism itself.

2. The Tribunal is seized of jurisdiction in this case pursuant to Article II, paragraph 3 of the Claims Settlement Declaration which provides that the Tribunal has jurisdiction over "any dispute as to the interpretation or performance of any provision of that Declaration." This case has been pending for thirty-two years, dozens of filings have been made, two evidentiary hearings have been conducted, and a Partial Award has been rendered. Yet, Iran and the United States continue to be at loggerheads over the meaning of General Principle B. From the very beginning of this case, Iran has contended that General Principle B requires the United States to "terminate" the legal proceedings, and not merely to "suspend" them.[1] The United States, on the other hand, has asserted that its "suspension," as set forth in Executive Order 12294, was the most appropriate method because that method prevented claims that did not fit within the Tribunal's jurisdiction from being nullified, and the United States did not agree to such nullification in the Algiers Declarations.[2]

3. After the first phase of this proceeding, the Tribunal in Partial Award No. 590 interpreted the U.S. obligation to terminate claims and agreed with the U.S. position, finding that it was obligated to terminate only those claims that were found by the Tribunal to fall within its jurisdiction, and only after that determination was made.[3] The process that the Tribunal used in Partial Award No. 590 is a prototype for the resolution of issues requiring an interpretation of the Algiers Declarations. There, the Tribunal had resort to the preparatory work of the Declarations pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties to ascertain the object and purpose of the Declarations. The Majority fails to follow this analytical process even though the Partial Award directed the Tribunal in the second phase of the proceedings to "analyze the matter further" and "test the method chosen by the United States – suspension of the claims pursuant to Executive Order 12294 – against the object and purpose of those Declarations."[4] Instead, the Award is limited to a determination of the United States non-compliance with the obligation, rather than also considering the nature of the obligation itself. That is, the Majority finds that if Iran was reasonably compelled in the prudent defense of its interests to make appearances or file

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[1] *Islamic Republic of Iran* and *United States of America*, Partial Award No. 590-A15(IV)/A24-FT, para. 50 (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 123.

[2] *Id. at* para. 59; Transcript of 13 September 1995 Hearing in A15(IV), at 258.

[3] *Islamic Republic of Iran* and *United States of America*, Partial Award No. 590-A15(IV)/A24-FT, paras. 82, 89 (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 132, 135.

[4] *Id. at* para. 95.

documents in proceedings pending in U.S. courts, the United States has not complied with its obligations under the Declarations.[5] This language, which is also found in Partial Award No. 590, relates to causation and to Iran's entitlement to specific relief, however, and is not a statement of the meaning of the United States obligation.[6]

4. While the Majority finds that the United States breached its obligations under General Principle B by failing to terminate certain identified legal proceedings, the Majority never determined the object and purpose of termination of the legal proceedings under the Declarations and has not even defined the meaning of termination. Thus, after thirty-two years, the Parties are left with a decision by the Majority of the Tribunal that the United States is liable to compensate Iran in the amount of $842,548.14 for breaching General Principle B, but the Tribunal has not provided them with a clue as to whether by adopting Executive Order 12294, and calling for the suspension of the claims, the United States breached its obligations under the Algiers Declarations. And the Majority has not defined the meaning of the termination obligation – does the termination obligation require that the proceeding be "brought to an end?" Or did the United States meet its obligations by providing for suspension pursuant to Executive Order 12294?[7] The Parties deserve more from the Tribunal in interpretive disputes such as this; they rightfully look to the Tribunal to put flesh on the bones of the Declarations, as needed; they look to the Tribunal to give attention to the intentions of the Parties; and they have the right to expect that the Tribunal will approach their disputes as it did after the first phase of the proceedings in Partial Award No. 590, by using a careful interpretive analysis.

5. In my view, suspension of the claims pursuant to Executive Order 12294, rather than bringing the claims to an end, was the only legitimate way the United States could discharge its obligation to terminate legal proceedings. This is so for two reasons. The first is that suspension was the only way the interests of *both* Iran and the United States could be given

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[5] Award at para. 269.

[6] At the hearing, the United States did not dispute that Iran incurred legal expenses, but rather argued that mere expenses were "not the same as demonstrable losses from U.S. breach." Transcript of 27 September 2012 Hearing in A15(IV), at 9. Additionally, "with respect to causation . . . whatever losses may have been suffered [by Iran] were proximately caused not by U.S. breach but by decisions that were made by Iran or its counsel, decisions to set up an excessive and unnecessary system of monitoring which happened in a situation where objectively there was no reasonable risk." *Id.* at 76.

[7] In the Partial Award, the Tribunal notes that termination implies that the activity being terminated is "brought to an end." "'Suspension,' on the other hand, implies a temporary cessation of activity." *Islamic Republic of Iran* and *United States of America*, Partial Award No. 590-A15(IV)/A24-FT, para. 94 (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 136.

effect. Additionally, in order to be consistent with Partial Award No. 590's holdings regarding the termination of claims, the legal proceedings could only be terminated in a way that did not prematurely extinguish the underlying claims. That is, the underlying claims could not be terminated, with prejudice, along with the related legal proceeding until the Tribunal decided the claims on the merits; suspension, rather than a physical termination, could have accomplished this.

6. The negotiating history of the Algiers Declarations reveals the object and purpose of the termination obligation, and demonstrates that only suspension could give effect to the interests of the Parties. Had the Majority used the interpretive process directed by Partial Award 590, this would have been apparent. Iran's interest was to ensure that certain claims filed against it by U.S. nationals in courts in the United States would not be decided by these courts, where Iran believed it could not receive fair and impartial treatment.[8] While the United States agreed to terminate legal proceedings and the underlying claims, it insisted that it would only terminate in a way that would not nullify claims that did not fit within the jurisdiction of the Tribunal, and insisted that it would not pay any ransom for the release of the hostages.[9] Thus, Executive Order 12294, by requiring suspension of those claims that

[8] One of Iran's chief negotiators, Mr. Behzad Nabavi, addressed these concerns at the first stage of these proceedings. Nabavi testified that there were two reasons why Iran insisted on termination of the litigation in the United States. First, he stated that judges would be affected by the atmosphere in the U.S. that he described as being "hostile" and "very much against Iran." Transcript of 13 September 1995 Hearing in A15(IV), at 80-81. Second, Nabavi stated that Iranian officials had difficulty getting visas to enter the United States, and in their absence, default judgments would be entered. *Id.* at 81-82.

[9] Partial Award No. 590 pays particular attention to this crucial aspect of the negotiating history of the Algiers Declarations. *Islamic Republic of Iran* and *United States of America*, Partial Award No. 590-A15(IV)/A24-FT, para. 23 (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 114 (discussing the Majlis conditions of 2 Nov. 1980 and the United States' first and second written responses of 11 Nov. and 3 Dec. 1980, and Iran's written response of 21 Dec. 1980); para. 24 (discussing the United States condition, communicated by the Deputy Secretary of State Warren Christopher on 10 Nov. 1980 that claims could be removed from U.S. courts only with the establishment of an arbitral tribunal to ensure their settlement, and the U.S. communication of 11 Nov. 1980 indicating its readiness to commit the United States to a claims settlement procedure to cancel orders, attachments, and claims); para. 25 (discussing the U.S. response of 3 Dec. 1980 indicating, *inter alia*, its understanding that in exchange for the safe return of U.S. hostages, the Parties would establish a claims settlement forum); para. 26 (discussing Iran's response of 21 Dec. 1980, agreeing to settle bona fide debts to U.S. persons or institutions and for the establishment of an arbitral process). The 3 December 1981 U.S. communiqué to Iran stated that the third Majlis condition would be met through a symmetric termination procedure by which (1) litigation in the United States would be stopped, and (2) those claims would be brought before an international arbitral body. *See id.* Furthermore, as noted by White House Counsel Lloyd Cutler during his testimony before the Tribunal:

> Iran's argument really violates a fundamental principle of the President's instructions and positions we took from the beginning of the negotiations with Iran. Had we in fact agreed to nullify the claims of US persons who had already filed actions in the United States courts, that would have violated our most fundamental position in the negotiations, a non-negotiable position, that the United States would not pay ransom for the release of the hostages. And

were within the Tribunal's jurisdiction, was the functional equivalent of termination, and protected both interests. Termination, with prejudice, of the legal proceedings would extinguish the underlying claims before the Tribunal decided whether they fell within its jurisdiction because they would be "brought to an end."

7. Thus, I join the Concurring and Dissenting Opinion of Judge Charles N. Brower, and the Separate Opinion, Concurring in Part, Dissenting in Part, of Judge O. Thomas Johnson, and like them, I concur with the Award to the extent it finds that the United States breached its obligation under General Principle B of the Algiers Declarations by failing to terminate the identified legal proceedings brought by U.S. nationals against Iran in courts of the United States, for the United States failed, in fact, to suspend all outstanding legal proceedings pending in courts of the United States involving claims against Iran by 19 July 1981. In light of the interpretive nature of this dispute, I would have also considered the issue of whether the United States suspension mechanism and Executive Order 12294 were the functional equivalent of termination of those legal proceedings and underlying claims, as required by General Principle B of the Algiers Declarations.

Dated, The Hague
2 July 2014

Gabrielle Kirk McDonald

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cancellation of just claims, valuable claims, already filed in courts, without providing an equivalent alternative remedy, would constitute a ransom – either a ransom exacted from these claimants or from the United States itself – if the claimants successfully pursued an action for just compensation for the taking of their property against the US government.

The United States government never agreed and never would have agreed to any such arrangement. At our meetings with Iran's designated intermediaries, the Algerians, we emphatically rejected any Iranian proposal that could be viewed as a payment of any type of ransom, and that's very clear from the negotiating history.

Transcript of 13 September 1995 Hearing in A15(IV), at 258-59.