IRAN-UNITED STATES CLAIMS

A20 – 67

۲۰. الف -۶۷

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران

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IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
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CASE NO. A20
FULL TRIBUNAL
DECISION NO. DEC. 45 -A20-FT

DUPLICATE ORIGINAL
«نسخه برابر اصل»

ISLAMIC REPUBLIC OF IRAN
and
UNITED STATES OF AMERICA

Request for the decision of the Full Tribunal as to "the criteria for the proper application" of Article VII of the Claims Settlement Declaration concerning the evidence required to establish the nationality of corporate Claimants.

DECISION

Appearances:

For the Islamic Republic of Iran:

Mr. Mohammad K. Eshragh,
Agent of the Islamic Republic of Iran,
Professor François Rigaux,
Professor Charles Lipton,
Professor Léopold Simar,

Professor Jafar Niaki,
Legal Adviser to the
Agent,
Professor Sayed Hossein
Safaei, Legal Adviser
to the Agent,
Mr. Hassan Golami,
Assistant to the Agent.

For the United States
of America:

Mr. John R. Crook,
Agent of the United
States of America,
Mr. Daniel M. Price,
Deputy Agent,
Mr. Ashby McCown,
Representative of the
United States Department
of the Treasury.

I. THE PROCEEDINGS

1. On 14 June 1983 the Islamic Republic of Iran filed a Request for the Full Tribunal's Decision on "the question concerning the application of the provisions of the Declaration relative to the U.S. juridical persons' standing to sue". Relying on the grant of jurisdiction in Article VI, paragraph 4, of the Claims Settlement Declaration ("the Declaration"), as well as on Presidential Order No. 1 of 19 October 1981, Iran requested the Full Tribunal "to decide the criteria for the proper application" of the provisions of Article VII of the Declaration relating to corporate nationality. Iran contends that the individual Chambers of the Tribunal have permitted publicly-held corporate Claimants to establish their United States nationality by means of evidence which cannot suffice for the purpose.

2. On 27 September 1983 the United States of America submitted its Reply, in which it argued that Iran "does not raise a question concerning the interpretation or application of the Declaration pursuant to Article VI(4) thereof. Nor is this Claim properly raised under Presidential Order No. 1". The United States contends that Iran's request raises an evidentiary issue outside the scope of the Tribunal's interpretative jurisdiction, but that in any event the evidence which the Chambers have so far required provides an adequate basis for determining corporate nationality.

3. On 9 January 1984 Iran filed its Answer, maintaining that the "scope of application" of Article VII of the Declaration remained to be determined, and that this constituted an interpretative dispute, or, at the least, a dispute as to application, within the meaning of Article VI, paragraph 4, of the Declaration. Iran maintained that "Article VII does not apply to corporations, such as Flexi-Van Leasing Inc., which have not produced sufficient evidence to prove that no less than 50% of their shares are

owned by natural persons of US nationality during the period provided in Article VII".

4. In an Order filed on 18 January 1984, the President of the Tribunal announced the Tribunal's decision that the question whether Iran's Request raised an interpretative dispute under Article VI, paragraph 4, of the Declaration would be joined to the merits of the dispute.

5. In its Memorial filed on 16 October 1984 Iran maintained its position that its Request was properly submitted under Article VI, paragraph 4. Iran proceeded to analyse the requirements laid down by Article VII, paragraph 1, which defines a "national" of Iran or the United States for the purposes of the Declaration, with particular reference to the nationality of corporations. The Memorial went on to criticize the 15 December 1982 Order of Chamber One in Case No. 36, Flexi-Van Leasing Inc. and Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455 ("the Flexi-Van Order"), objecting, inter alia, that it imposed a test for establishing the required percentage of ownership of a corporation by U.S. nationals which was based upon voting stock and not on capital stock as required by Article VII, paragraph 1. The Memorial continued with a discussion of the kinds of evidence which in Iran's opinion have to be submitted in order to prove the facts necessary to establish jurisdiction and of the various rules of evidence applicable.

6. In its Reply of 1 April 1985 the United States reiterated its position that the Tribunal had no jurisdiction to consider this matter. It examined the existing practices of the Tribunal with regard to the establishment of corporate nationality, which it regarded as sound and consistent with the requirements of the Declaration. The United States went on to argue that many of the forms of evidence proposed by Iran were consistent with the approach taken by the Tribunal in the Flexi-Van Order and in the 18 January 1983 Order of Chamber One in Case No. 94, General Motors Corporation et

al. and Islamic Republic of Iran et al., reprinted in 3 Iran-U.S. C.T.R. 1 ("the General Motors Order").

7. A Hearing was held on 7 January 1986. During this Hearing the representatives of Iran stated that they no longer relied upon Presidential Order No. 1 as a basis for reference of this question to the Full Tribunal.

II. REASONS FOR DECISION

8. It would seem that the request of Iran arises out of its dissatisfaction with the content of the Flexi-Van Order and, to a certain extent, its confirmation in the General Motors Order.

9. Iran presents this Case as a question concerning the interpretation or application of the Declaration, raised pursuant to Article VI, paragraph 4. It is obvious, and both Parties are in full agreement, that neither Article VI, paragraph 4, nor the Tribunal Rules provide for any kind of review by the Full Tribunal of Orders or Awards made by the Chambers. To the contrary, Article IV, paragraph 1, which applies equally to actions by the Full Tribunal and the Chambers, states that "[a]ll decisions and Awards of the Tribunal shall be final and binding". The only exceptions to this rule of finality are those contained in Articles 35 and 36 of the Tribunal Rules, dealing with interpretation and correction, which clearly do not apply here.

10. Insofar as Iran's case might be interpreted as a request that the Full Tribunal lay down a uniform rule of evidence applicable to the establishment of corporate nationality, the Tribunal holds that the request does not pose a question concerning the interpretation or application of the Declaration. The questions raised by Iran relate to burden of proof, to the evidence required to establish to the satisfaction of the Tribunal the existence of the facts

on which its jurisdiction is based, and to the weighing of such evidence by the Tribunal. These issues are obviously not questions concerning the interpretation or application of the Declaration, but, rather, relate to the application of the Tribunal Rules governing burden of proof and evidence. Article 24, paragraph 1, of the Tribunal Rules provides that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defense." Article 25, paragraph 6, states that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." These provisions are taken without change from the UNCITRAL Arbitration Rules, which Article III, paragraph 2, of the Declaration requires the Tribunal to follow in conducting its business, except to the extent modified by the States Parties or the Tribunal to ensure that the Declaration can be carried out effectively. Neither the Tribunal nor the States Parties have considered it necessary to modify any of these provisions. To the contrary, the Rules reflect generally accepted principles of international arbitration practice and contribute to the effective resolution of cases before the Tribunal.

11. Insofar as Iran's Request seeks an interpretation of the term "capital stock" in Article VII, paragraph 1, of the Declaration, it raises a question cognizable under the grant of jurisdiction in Article VI, paragraph 4. The States Parties agree and the Tribunal holds that "capital stock" includes both voting and non-voting stock. Thus, the holdings of shareholders in the total equity of a corporation have to be taken into consideration. Depending on the circumstances of each individual case, the Chamber will have to decide whether it is sufficient to rely solely on evidence of the ownership of voting stock as in Flexi-Van, or if further evidence is needed. For example, a Chamber might wish to examine evidence of holdings of non-voting stock in cases where it constituted so large a part of the total capitalization of a Claimant corporation that the

nationality of the owners of such non-voting stock should be taken into account.

12. The practice of the Chambers shows that they have adopted no general rule as to the evidence required for a corporation to prove its nationality, but have approached the question flexibly and pragmatically. Thus, Chamber One of the Tribunal regularly orders publicly-held corporate Claimants to submit the material described in the Flexi-Van and General Motors Orders as a starting point for its examination of corporate nationality. See, e.g., Orders of 26 March 1984 in Case No. 810, Fluor Corporation and Islamic Republic of Iran; 27 March 1984 in Case No. 386, General Electric Company and Bank Markazi et al; and 15 May 1984 in Case No. 394, Merrill Lynch & Co. Ltd. and Islamic Republic of Iran. Compliance with such an Order is normally found by the Chamber to provide satisfactory evidence on the issue. Where appropriate, however, Chamber One has accepted different types of evidence from such Claimants. See, e.g., Starrett Housing Corporation and Islamic Republic of Iran, Award No. ITL 32-24-1, p. 32 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 100.

13. Chambers Two and Three have not adopted the practice of requiring publicly-held corporate Claimants to file evidence in accordance with the Flexi-Van and General Motors Orders. Even without such orders, however, many such Claimants have submitted such evidence, and the Tribunal has accepted it as the basis for determining jurisdiction. The type of evidence that has been found to be acceptable, however, has varied from case to case. See, e.g., American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3, p. 7 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 100.

14. At the Hearing on 7 January 1986 both States Parties agreed that Claimants have the burden of proof regarding their nationality as defined in Article VII, paragraph 1(b),

of the Declaration, and that the requirements laid down in the Flexi-Van and General Motors Orders can constitute a useful basis for the examination of the corporate nationality of a Claimant. The States Parties furthermore agree that the use of presumptions can constitute a perfectly legitimate method of evaluating the evidence in cases before the Tribunal. In this context it should be noted that the Tribunal Rules clearly state that evidence may also be presented in the form of signed written statements. See Tribunal Rules, Article 25, paragraph 5. The States Parties seem to differ, however, as to whether statistical sampling based on surveys of shareholders is appropriate or necessary to prove nationality. Like any other legitimate source of evidence, this method cannot be generally excluded, nor can it be universally prescribed. Other methods are available, and, as noted above, the Chambers have been able to satisfy themselves on the question of corporate nationality on the basis of other forms of evidence.

15. In this Case, as in the unanimous decision on the settlement issue in Case No. A1, "it would be neither appropriate nor feasible to establish, in abstracto, without reference to the situation in any particular case, a general rule concerning the extent of the examination as to jurisdiction that may be needed, given the large variety of situations in which matters of jurisdiction may arise and the detailed nature and complexity of the provisions on jurisdiction in the Algiers Declarations". Case No. A1 (Issue II), Decision No. DEC 8-A1-FT, p. 12 (17 May 1982), reprinted in 1 Iran-U.S. C.T.R. 144, 152.

Dated, The Hague
26 June 1986

Karl-Heinz Böckstiegel
President

In the name of God,

Robert Briner

Michel Virally

Hamid Bahrami-Ahmadi
See separate opinion

In the name of God,

Howard M. Holtzmann

Mohsen Mostafavi
See separate opinion

George H. Aldrich

In the name of God,

Parviz Ansari Moin
See separate opinion

Charles N. Brower
Concurring opinion