2000

DECISION AND AWARDS

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

v.

THE ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI IRAN, *Respondents*

(Case No. A28)

Full Tribunal: Skubiszewski, *President*;[1] Broms,[2] Arangio-Ruiz, Noori,[3] Aldrich,[4] Ameli,[5] Duncan,[6] Aghahosseini[7] and Mosk,[8] *Members*[9]

Signed 19 *December* 2000[10]

DECISION NO. DEC 130-A28-FT

The following is the text as issued by the Tribunal:

DECISION

APPEARANCES

For the Claimants: Mr. Allen S. Weiner,
Agent of the United States of America,

[1] A Statement by the President, signed on 21 December 2000 and filed on 21 December 2000, appears at p. 42, below.]

[2] Mr. Broms' signature is accompanied by the words "Concurring and Dissenting Opinion." The Opinion, signed on 19 December 2000 and filed on 19 December 2000, appears at p. 33, below.]

[3] Mr. Noori's signature is accompanied by a statement, which appears at p. 32, below.]

[4] Mr. Aldrich's signature is accompanied by the words "Concurring Opinion." The Opinion, signed on 19 December 2000 and filed on 19 December 2000, appears at p. 36, below.]

[5] Mr. Ameli's signature is accompanied by the words "Concurring in part; Dissenting in part (Separate Opinion)." The Opinion is unavailable at the time of printing.]

[6] Mr. Duncan's signature is accompanied by the words "Concurring Opinion." The Opinion, signed on 19 December 2000 and filed on 19 December 2000, appears at p. 40, below.]

[7] Mr. Aghahosseini's signature is accompanied by the words "Concurring Opinion." The Opinion, signed on 19 December 2000 and filed on 19 December 2000, appears at p. 40, below.]

[8] Mr. Mosk's signature is accompanied by the words "Concurring Opinion." The Opinion, signed on 19 December 2000 and filed on 19 December 2000, incorporating the correction signed on 4 January 2001 and filed on 4 January 2001, appears at p. 36, below.]

[9] Mr. Brower's reappointment as a regular Member of the Tribunal took effect on 1 January 2001. Mr. Brower's Separate Opinion, signed on 21 September 2001 and filed on 21 September 2001, appears at p. 283, below. The Tribunal's order of 17 September 2001 appears at p. 283, below.]

[10] Filed 19 December 2000.]

Ms. Jessica R. Holmes,
Deputy Agent of the United States of America,
Mr. Michael J. Matheson,
Deputy Legal Adviser,
United States Department of State,
Mr. Ronald J. Bettauer,
Assistant Legal Adviser,
United States Department of State,
Mr. Thomas Baxter,
General Counsel,
Federal Reserve Bank of New York,
Ms. Kathleen M. Milton,
Attorney Adviser,
United States Department of State,
Ms. Kathleen A. Wilson,
Attorney Adviser,
United States Department of State,
Mr. Mark A. Clodfelter,
Attorney Adviser,
United States Department of State,
Ms. Michelle Meertens,
Attorney, Federal Reserve Bank of New York,
Mr. Dirk Meerburg,
Counsel,
Mr. William T. Lake,
Witness,
Mr. James Oltman,
Witness.

For the Respondents:

Mr. M. H. Zahedin-Labbaf,
Agent of the Government of the Islamic Republic of Iran,
Dr. Ali Akbar Riyazi,
Legal Adviser to the Agent,
Mr. Ian Brownlie, Q. C.
Legal Adviser to the Agent,
Mr. Zainolabedin Marousi,
Legal Assistant to the Agent,
Mr. Jafar Tamaddoni,
Adviser to the Agent,
Mr. Behazin Bijani,
Adviser to the Agent,
Mr. Behzad Nabavi,
Witness,
Mr. Ali Manavi-Rad,
Witness.

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I. INTRODUCTION

1. On 29 September 1993, the Claimants, the United States of America and the Federal Reserve Bank of New York ("Federal Reserve Bank"), submitted a claim against the Respondents, the Islamic Republic of Iran ("Iran") and Bank Markazi Iran ("Bank Markazi"). At issue in this Case are the Respondents' obligations under the Algiers Declarations[11] and the implementing Technical Agreement[12] concerning the replenishment of the Security Account established pursuant to Paragraph 7 of the General Declaration ("Security Account") "for the sole purpose of securing the payment of, and paying, claims against Iran" in accordance with the Claims Settlement Declaration. Paragraph 7 of the General Declaration is quoted in full *infra*, at para. 5.

2. The Claimants allege that the Respondents have breached those obligations by failing to maintain a balance of at least U.S. $500 million in the Security Account. According to their final pleadings, the Claimants request that the Tribunal order the Respondents to replenish the Security Account to U.S. $500 million and to maintain it at that level until all awards against Iran have been satisfied. In addition, the Claimants request that, at any time that the Respondents have not replenished the Security Account to U.S. $500 million, the Tribunal allow the Claimants to satisfy any awards rendered against them in favor of Iran by paying such awards into the Security Account until the required minimum balance is reached.

3. The Respondents deny any liability for this claim. They contend that, because the current balance in the Security Account is, in their view, sufficient

[11] Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), both dated 19 January 1981.

[12] Technical Agreement with N.V. Settlement Bank of the Netherlands, 17 August 1981, *reprinted in* 1 IRAN-U.S. C.T.R. 38 ("Technical Agreement"). *See infra*, para. 9.

to satisfy any future Tribunal awards against Iran, the Respondents are not obligated to replenish the Security Account to U.S. $500 million.

4. A Hearing in this Case was held on 17-19 November 1999 in the Peace Palace, The Hague.

II. FACTUAL BACKGROUND

5. Paragraph 7 of the General Declaration ("Paragraph 7"), the provision at the heart of this claim, states:

> As funds are received by the Central Bank pursuant to Paragraph 6 [of the General Declaration], the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S. $1 billion. After the U.S. $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S. $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S. $500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

6. On 17 August 1981, the Central Bank of Algeria as Escrow Agent, Bank Markazi, the Federal Reserve Bank as Fiscal Agent of the United States, and N.V. Settlement Bank of the Netherlands ("N.V. Settlement Bank")[13] entered into the Technical Agreement to implement, *inter alia*, "the relevant parts of the [Algiers] Declarations." Technical Agreement, Introductory Paragraph.

7. The details of the operation of the Security Account are contained in the Technical Agreement. Under the terms of the Technical Agreement, the Security Account consists of three separate accounts, denominated A, B, and C. Account A was to be used to receive, in accordance with Paragraph 7, Iranian funds previously held in United States banking institutions. One-half of these funds were then to be transferred into Account B until it reached U.S. $1 billion; the remainder was to be returned to Iran. *See* Article 1(b)(ii) of the Technical Agreement. *See also* Paragraph 7.

[13] The N.V. Settlement Bank of the Netherlands is the "Central Bank" referred to in Paragraph 7.

8. Account C holds the interest earned on the funds in Account B. The Tribunal has determined that Iran shall have access to the funds in Account C for the purpose of satisfying its obligation to replenish the Security Account. *See Islamic Republic of Iran* and *United States of America*, Decision No. DEC 12-A1-FT, at 5 (3 Aug. 1982), *reprinted in* 1 IRAN-U.S. C.T.R. 189, 192 ("Case No. A1").

9. The provisions of the Technical Agreement that may be relevant to the present claim are:

(a) Article 1(d), which provides:

> (i) Whenever the balance in Account B has fallen below US $500 million, the Depositary[14] shall notify the other parties to this Agreement of this fact.
>
> (ii) As soon as such notification is received by Bank Markazi, it shall promptly make new deposits sufficient to maintain a minimum balance of US $500 million in Account B.

(b) Article 18(b), which provides:

> Any dispute arising under this Agreement, which cannot be amicably resolved, may be submitted by any of the parties to the court of competent jurisdiction in Amsterdam, to a court of competent jurisdiction in any other country in which the defendant party has a permanent business establishment in its own name or to the Tribunal, except that any case in which the Depositary is a defendant shall be submitted exclusively to the court of competent jurisdiction in Amsterdam. Notwithstanding the foregoing, neither the Escrow Agent nor the Depositary shall be bound by a decision of the Tribunal which adversely affects its rights or privileges under this Agreement. In connection with the resolution of disputes arising out of this Agreement or other enforcement of this Agreement, solely in actions brought by a party hereto and solely before the courts or the Tribunal referred to above, the parties hereby waive any immunity they may have or have the power to assert in any proceeding, and the parties agree to accept the jurisdiction of the Netherlands court or, except for the Depositary, the jurisdiction of the Tribunal.

10. Upon signature of the Algiers Declarations on 19 January 1981, the United States transferred to escrow accounts agreed to by Iran approximately U.S. $8 billion of Iran's assets held by the Federal Reserve Bank and by overseas branches of United States banks. In addition, the United States lifted the judicial attachments on Iranian assets that were still held in United States branches of United States banks; thereafter, immediately upon the conclusion of the Technical Agreement on 17 August 1981, the United States transferred those assets, totaling U.S. $2.038 billion, to the N.V. Settlement Bank, the depositary

[14] The N.V. Settlement Bank of the Netherlands. *See* Article 1(a)(i) of the Technical Agreement.

of the Security Account. The N.V. Settlement Bank transferred U.S. $1 billion out of that amount to the Security Account and then transferred the remainder to Iran.

11. Throughout the history of the Tribunal, the Security Account balance has frequently fallen below U.S. $500 million following the payment of awards. The Respondents had replenished the Security Account for many years. On 5 November 1992, following the payment of certain sizable awards, the Security Account balance fell to U.S. $253,628,936.74. The balance in the Security Account has been below U.S. $500 million since that date.

12. On 5 November 1992, the N.V. Settlement Bank informed by telex the other parties to the Technical Agreement, including Bank Markazi, that the balance in the Security Account had fallen below U.S. $500 million. On 19 January 1993, the Agent of the United States sent the Agent of Iran a letter, urging that Iran and Bank Markazi take "immediate steps . . . to rectify the situation and achieve compliance with the relevant obligations."

13. On 22 February 1996, Iran and the United States agreed that part of a settlement reached between them concerning monies to be paid to Iran be deposited by the United States into the Security Account (*see* Partial Award on Agreed Terms No. 568-A13/A15 (I and IV:C)/A26 (I, II, and III)-FT, para. 9 (22 Feb. 1996)). The balance in the Security Account nevertheless has remained under U.S. $500 million.

III. THE PARTIES' CONTENTIONS

14. The Claimants contend that the clear terms of Paragraph 7 obligate Iran to maintain a minimum balance of U.S. $500 million in the Security Account so long as claims against Iran remain pending at the Tribunal. They assert that it is only after the President of the Tribunal certifies to the Central Bank of Algeria that all Tribunal awards against Iran have been satisfied that the Respondents' obligations to replenish cease. The Claimants contend that, under the terms of Article 1(d) of the Technical Agreement, Bank Markazi is independently obligated to replenish the Security Account.

15. The Claimants contend that in the Declarations the Parties struck a careful balance of their respective rights and obligations. The United States accepted the Security Account mechanism, along with Iran's replenishment obligation, in place of all the restraints on Iranian property that were in effect on 19 January 1981, but only upon the terms of the agreement concluded at that time. Thus, the Claimants conclude, in order to maintain that balance, Iran must be required promptly to replenish the Security Account.

16. Accordingly, the Claimants request that the Tribunal hold that the Respondents have been in breach of their replenishment obligations since

5 November 1992 and, as their principal relief, request that the Tribunal order the Respondents to replenish the Security Account to U.S. $500 million and to maintain it at that level until all awards against Iran have been satisfied.

17. The Respondents contend that they have no obligation to replenish the Security Account because the balance therein is sufficient to satisfy any potential Tribunal awards against Iran. In support of their contention, the Respondents provide an estimation of the value of the two private claims against Iran that they state were still pending before the Tribunal at the date of the Hearing, plus interest; the Respondents argue that there is no realistic way that the payment of these claims would require more funds than are currently available in the Security Account, since, the Respondents allege, the total relief sought in these claims does not exceed U.S. $62 million (excluding interest). In this connection, and in response to the Claimants' reference at the Hearing to the United States counterclaim against Iran in Case No. B1,[15] the Respondents contend that counterclaims are not "claims" within the meaning of the third sentence of Paragraph 7; thus, the United States counterclaim in Case No. B1 should not be considered in determining both the sufficiency of the current balance in the Security Account and the timing of the President of the Tribunal's certification to the Central Bank of Algeria that "all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement." Paragraph 7, last sentence. The Respondents also argue that the Claimants bear the burden of proving, *prima facie*, that the current balance in the Security Account would be insufficient to pay future awards.

18. The Claimants argue that the face value of currently pending claims is irrelevant to the Respondents' obligations to replenish the Security Account to U.S. $500 million and that therefore the Respondents must do so immediately, having been in violation of their obligations since November 1992. Furthermore, the Claimants contend that any analysis of the pending claims is inappropriate and unnecessary because, even if the amount remaining in the Security Account might ultimately be sufficient to pay future awards, the replenishment requirements were designed to avoid the unfair and burdensome prejudgment of claims. The Claimants contend that, in any event, the actual amount of pending claims, including the United States' counterclaim against Iran in Case No. B1,[16] exceeds U.S. $500 million.

19. The Respondents point to the language of Paragraph 7 that the "sole purpose" of the funds in the Security Account is "securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement." Paragraph 7, third sentence. The Respondents argue that the inclusion

[15] *Islamic Republic of Iran* and *United States of America*, Case No. B1 (Counterclaim).
[16] *See supra*, note 15.

in Paragraph 7 of language as to the "sole purpose" of the Security Account means that Iran's obligation to replenish the Security Account must be interpreted in light of that purpose. The Respondents point out that the general rules of treaty interpretation as set forth in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 ("Vienna Convention")[17] provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Because, according to the Respondents, the object and purpose of the Security Account obligation is to pay awards against Iran; because all such awards, whether rendered before or after November 1992, have been fully and immediately paid out of the Security Account; and because the funds that are currently available in the Security Account are sufficient to achieve that purpose, the Respondents maintain that Iran has met its obligations under Paragraph 7.

20. The Claimants respond that Iran's Paragraph 7 obligation consists not only of paying awards against Iran, but also of providing security for United States claimants, including the United States, and ensuring continued cooperation by Iran in the adjudication of claims against Iran before the Tribunal until the last award is paid. In any event, the Claimants argue that the stated purpose of Paragraph 7 provides no basis for understanding the terms of that provision in any sense but their ordinary meaning. Even the object and purpose of a treaty, the Claimants contend, cannot be invoked to change the ordinary meaning of a treaty provision.

21. The Respondents argue that, because the last clause of Paragraph 7 states that "any amount remaining" in the Security Account after the Tribunal President's certification shall be transferred to Iran (*see supra*, para. 5), the Algiers Declarations authorize Iran to maintain some lesser amount than U.S. $500 million in the Security Account so long as the payment of potential Tribunal awards is secured. If the Parties had intended that the Security Account be maintained at U.S. $500 million, the Respondents contend, they would have used the words "at which point the U.S. $500 million shall be transferred to Iran." The Respondents argue that, if the Parties had contemplated a minimum balance of U.S. $500 million in the Security Account, they could also have used the phrase "*the* amount remaining."

22. In response, the Claimants argue that Paragraph 7 refers to "any amount remaining" rather than to "U.S. $500 million" for at least two reasons. First, Iran may maintain a balance greater than U.S. $500 million in the Security Account. Second, the payment of the final award would, if the balance is precisely U.S. $500 million, cause the balance of the Security Account to

[17] 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).