IUSCT (IRAN-US CLAIMS TRIBUNAL)

IUSCT Case Nos. A15(IV) and A24

THE ISLAMIC REPUBLIC OF IRAN V. THE UNITED STATES OF AMERICA

DISSENTING AND PARTLY CONCURRING OPINION OF BENGT BROMS

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28 December 1998

Tribunal:
Bengt Broms (Member)

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Dissenting and Partly Concurring Opinion of Bengt Broms

[1]. I am not able to concur with the majority as regards several central issues in the two Cases. The majority's position makes the reasoning inconsistent and weak. From the legal point of view, these findings are consequently untenable.

[2]. The first of my concerns relates to the findings with respect to Claim A of Case No. A15. In my opinion, the majority should have been satisfied with the conclusions reached concerning the differences between the terms "suspension" and "termination". The Award states that

> [t]he conceptual difference between these two terms is readily recognizable. Generally, "termination" implies that the activity being terminated is brought to an end. "Suspension" on the other hand, implies a temporary cessation of activity. The United States could satisfy its obligations under the Algiers Declarations only by doing what those declarations said, namely, by 'terminating' all litigation against Iran in United States courts involving claims that arguably fell within the Tribunal's jurisdiction. [27]

[3]. Because I fully subscribe to the above-mentioned citation, I cannot accept the findings in the subsequent paragraphs 95-100, essentially signalling that suspension may, under certain conditions, be regarded as sufficient to fulfil the obligation to terminate litigation.

[4]. Second, while it is clear that the Respondent's obligation to terminate claims is made dependent on whether or not the Tribunal assumes jurisdiction over the case, I disagree with the majority's treatment of the timing of the Respondent's termination obligation vis-a-vis litigation. The majority correctly states that in the absence of a clear provision in the Algiers Declaration in this respect, the conclusion is required that the United States was obliged to terminate such litigation within a reasonable period of time. The majority has, nevertheless, found that such a reasonable time is a six- month period, based on the analogous implementation of the time limits mentioned in Article I of the Claims Settlement Declaration and paragraph 6 of the General Declaration. A careful reading of those provisions reveals that those time limits do not relate to the present issue and that the application of an analogy is therefore inappropriate. Neither can I accept the view of the majority that the United States should be granted a six-month period due to administrative difficulties. Such a finding is particularly presumptuous as the Award in a previous paragraph--with regard to the general obligation to terminate litigation--specifically refers to the well-known rule, expressed by Article 27 of the Vienna Convention on the Law of the Treaties ("Vienna Convention"), that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[5]. Bearing in mind that Article I of the Claims Settlement Declaration provided a time limit of six to nine months, during which the Parties should promote settlement of the outstanding claims, it

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[27] See, paragraph 94.

would be contrary to the object and purpose of this provision, within the meaning of Article 31 of the Vienna Convention, if litigation would have been allowed to take place concurrently during a six-month period. In fact, it would render Article I without any significance at all. The majority has not based its findings with respect to this obligation on well-established rules of treaty interpretation as evidenced by the Vienna Convention. For the above-mentioned reasons, I find the Claimant's argument convincing that in the absence of express provisions, the obligation to terminate litigation arose within a few weeks after the conclusion of the Algiers Declaration. Consequently, I am of the opinion that the Respondent's liability for the Claimant's litigation costs ensued after the Algiers Declarations had been in force for one month.

[6]. The other central finding of the majority with which I disagree is its treatment of Claim B. At a very late stage of the deliberations, the majority has taken the Halliburton award [28] one of the pilot cases on the forum selection clauses--as a starting point for the findings of the Tribunal. For several reasons, I believe that that award is not very helpful in solving Claim B. The majority has quoted at length an excerpt from the Halliburton award, stating inter alia, that "[i]t is not generally the task of this Tribunal, or of any other arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts." [29] What the majority overlooks is that the award in Halliburton was not a request by either of the Parties to the Algiers Declarations to interpret Article II, paragraph 1, of the Claims Settlement Declaration. It was rather a claim by a private party for compensation. What makes the Tribunal's statement in Halliburton even more curious is that it involves a fundamental paradox. The Tribunal is faced with the issue of enforceability of a forum selection clause in every case wherein such a clause is invoked, and it has not avoided considering such clauses. If the Tribunal has proceeded with a case where enforceability is an issue, it undoubtedly will also have determined that the forum selection clause is ineffective to bar proceedings at the Tribunal. My conclusion is that the Halliburton award did not attempt to pronounce on the general question of whether the Tribunal, in abstract terms, has jurisdiction to determine the enforceability of forum selection clauses. In that context, it would not even have been proper for the Tribunal to elaborate upon such an issue.

[7]. Although an argument could be made that the Halliburton award in 1982 did not close the doors of any non-Iranian court to a United States claimant whose claim was considered barred in this Tribunal by the wording of Article II, paragraph 1, of the Claims Settlement Declaration, that award could not be relied upon as a basis for initiating subsequent proceedings in the United States. A holding to the contrary would render the forum exclusion clause in Article II, paragraph 1, of the Claims Settlement Declaration meaningless. It is my firm opinion that the Parties have used specific terms to exclude from the Tribunal's jurisdiction "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts." Such claims that the Tribunal consequently has found to be outside its jurisdiction cannot later be revived in United States courts because of the explicit commitment made by the Respondent to exclude such claims from the jurisdiction of this Tribunal in favour of competent Iranian courts. To the extent this has occurred in United States courts, the Respondent has not acted in conformity with its obligations under the Algiers Declarations.

[8]. Furthermore, I cannot agree with the findings of the majority with respect to the part of the Award

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[28] See, Halliburton Company et al. and Doreen/IMCO et al., Interlocutory Award No. ITL 2-51-FT (5 Nov. 1982), reprinted in 1 Iran-U.S C.T.R 242.

[29] Id., at 245. The Tribunal also did not cite any authority for that conclusion

dealing with Case No. A24. It is my view that the Respondent's obligation to terminate litigation operates independently from the issue of whether or not the later proceedings in the Foremost/ OPIC lawsuit gave appropriate preclusive effect to the Foremost award by this Tribunal. Therefore, the Tribunal should have concluded that--from the point of view of the Respondent's international obligation to terminate domestic litigation--it is impertinent to determine whether the domestic lawsuit, as amended, and the subsequent Summary Judgement in June 1997, respect the res judicata effect of the Tribunal's award in Foremost. Instead of venturing into a futile examination of res judicata, the majority should have followed and applied the reasoning of the Award with respect to the obligation to terminate claims, where the Tribunal stated that

> [s]ettlement and termination of a claim through binding arbitration means resolution of that claim on the merits. Otherwise there would have been no point in the Parties' referring claims to this Tribunal. This conclusion implies that the United States obligation to terminate a claim arises only once the claim has been decided on the merits by the Tribunal. [30]

[9]. The majority seems to neglect the fact that the Respondent allowed the Foremost/OPIC lawsuit to continue to be pending with the United States District Court even in 1988, almost two years after the award in Foremost, and in a format identical to the claim that had already been decided by the Tribunal. In fact, the Complaint before the District Court was not amended until April 1988, so that the cause of action fell outside the jurisdiction of the Tribunal.

[10]. The only legally defendable solution would have been for the majority to hold that the Foremost/ OPIC lawsuit should have been finally terminated well before the proceedings in the United States courts were resumed in 1988. By allowing the Foremost/OPIC lawsuit to be pending with the District Court during the time the case was pending before this Tribunal and also long after 11 April 1986, the date the Tribunal issued its award in Foremost, the United States violated its obligation under the Algiers Declaration to terminate claims that have been resolved on the merits by the Tribunal. [31] To the extent Iran was reasonably compelled in the prudent defence of its interests to make appearances or file documents in the Foremost/OPIC lawsuit, it should therefore have been compensated for those losses by the Respondent to the extent that those expenses are not sought under Claim D.

[11]. The only parts of the present Award I believe were correctly decided were Claims D, E, and F of Case No. A15. I also concur in the findings with respect to Claims G and H, except as regards the timing of the respective obligations. [32]

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[30] See, paragraph 82 of the Award.

[31] Moreover, it appears to me that even section 4 of Executive Order 12294 (see paragraph 28 of the award), which is a United States regulation, supports the termination of the claim.

[32] With respect to the timing of the obligations, see my findings, supra.