

CASES NOS. A15 (II: A), A26 (IV) AND B43

FULL TRIBUNAL

DECISION NO. DEC 137-A15 (II:A)/A26 (IV)/B43-FT

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL دیوان داوری دعوی ایران ایالات متحده	
CASE NO:	A15(II:A) پرونده شماره:
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SEPARATE OPINION OF JUDGE HAMID REZA NIKBAKHT FINI

DECISION ON REQUEST FOR CORRECTION AND ADDITIONAL AWARD

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## ***I. Introduction***

1. The Respondent in this Case has requested the Tribunal, pursuant to Article 36(1) of the Tribunal Rules, to correct a number of findings in the Partial Award number 604- A15 (II:A), A26 (IV) and B43-FT, issued on 10 March 2020 (the Partial Award). Further, the Respondent has requested the Tribunal to issue an additional award, pursuant to Article 37(1) of the Tribunal Rules, regarding a defense which is contended to have been omitted from the Partial Award.

2. Whereas I join the present Decision in dismissing the request of the Respondent for an additional award, unfortunately, I cannot join the majority in its finding with respect to a number of corrections allowed in this Decision. As explained below, the corrections are not permitted under Article 36(1) of the Tribunal Rules. The Tribunal has no jurisdiction to revise its decisions. The present decision could only be described as an attempt in equity, for which the Tribunal has no authority on its own. The Tribunal Rules do not provide for a revision or correction based on equity, nor the Parties have authorized the Tribunal to act *ex aequo et bono* under Article 33 of the Tribunal Rules. I believe the Members of the Tribunal carry a duty to observe and promote the Tribunal Rules of Procedure as strictly as the Rules would require; they cannot interpret the Rules so liberally to deviate from the object and purpose of the Parties to the Claim Settlement Declaration.

## ***II. Tribunal Rules of Procedure***

3. Both the constituent treaty of the Tribunal (Claims Settlement Declaration) and the Tribunal Rules of Procedure emphasize the final nature of its awards and decisions. Article IV of the Claims Settlement Declaration provides that “all decisions and awards of the Tribunal shall be final and binding.” Article 32 of the Tribunal Rules echoes this provision and states that “the Awards shall be ... final and binding on the parties.” As such, the Parties to the Algiers Declarations have not stipulated any possibility of revision or post-award action, except in the limited and restrictive instances in form of Article 36 of the Tribunal Rules.

4. Article 36(1) of the Tribunal Rules provides for the correction of certain specific errors:

Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

5. As it is obvious from the text, the “errors” are defined very restrictively. An error is capable of correction only if it concerns “computation”, “clerical”, or “typographical” mistakes. Outside these limited instances, the Tribunal has no jurisdiction to modify the award. The types of the errors mentioned in Article 36(1) are all formalistic with no relation to the merits of a case.

6. It is to be noted that the Tribunal Rules are based on the 1976 UNCITRAL Arbitration Rules. Article 36 of the Tribunal Rules adopted, verbatim, Article 36 of the 1976 UNCITRAL Rules. However, UNCITRAL in its 2010 revised Rules, added the phrase “any error *or omission* of a similar nature” to the text (now Article 38 of the UNCITRAL Arbitration Rules).<sup>1</sup> The Tribunal has so far not seen it fit to make a similar revision to its Rules. No need to emphasize that we are bound by the rules of procedure and the practice of this Tribunal and no other authority, particularly due to the special nature of this Tribunal.

7. It is clear that the drafters of the Tribunal Rules were very careful not to interfere with anything that relates to the merits of the awards and decisions of the Tribunal, which would inevitably lead to the revision of such awards or decisions. As the Tribunal held in Case B61:

The Tribunal Rules provide a narrow exception to the basic rule of finality of awards in Articles 35, 36, and 37. Following the issuance of an award, the Tribunal may ... correct "any errors in computation, any clerical or typographical errors, or any errors of similar nature" (Article 36), or "make an additional award as to claims presented in the arbitral proceedings but omitted from the award" (Article 37).<sup>2</sup>

During the process of modification of the UNCITRAL Arbitration Rules neither the Tribunal nor the State Parties concluded that ... any exceptions to the fundamental rule of finality of awards were required other than the narrow exceptions provided in Articles 35, 36, and 37 of the Tribunal Rules.<sup>3</sup>

8. The authorities on the UNCITRAL Arbitration Rules 1976 and the Tribunal’s practice, too, have interpreted Article 36 as a tool to make corrections of minor nature. As it is commented:

When the Iran–US Claims Tribunal granted requests for correction, for example, it was in large measure to correct for faulty mathematical calculations and typographical errors.

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<sup>1</sup> As explained by the UNCITRAL Working Group, this addition broadened the scope of correction in this Article: UN Doc A/CN.9/WG.II/WP.145/Add.1. (6 December 2006), para 41.

<sup>2</sup> Case B61, Decision No 134-A3/A8/A9/A14/B61-FT (1 July 2010), para. 50.

<sup>3</sup> *Ibid*, para, 58.

Other correctable errors of a similar nature may consist of a misspelled party's name, inaccurate dates, or mistranslations ... an arbitrator's failure to sign the award or to state in the award the date or place of the award, omissions which might invalidate the award.<sup>4</sup>

### ***III. The Corrections by the Majority***

9. Despite the clear mandate of Article 36(1) of the Tribunal Rules, the majority's decision on certain occasions largely deals with the content of the Partial Award or the intent behind the holdings of the Partial Award. In essence, what the majority in these instances contemplates is that the Tribunal intended to rule otherwise, but mistakenly ruled the way it is now reflected in the Partial Award. The position is a far cry from "computation", "clerical" or "typographical" errors. It is nothing less than a correction of the Partial Award, perhaps based on a sense of equity. It is an acknowledgment that the Tribunal went beyond the relief sought, or in two perhaps similar instances rendered contradictory rulings, and now attempts to correct its mistakes. Assuming that these are true, I do not see that the Tribunal possesses jurisdiction for such a correction.

10. An example of a permissible error in this Case is Claim G-105, as the error occurred only in computation stage when the interest due on the awarded amount was calculated. No decision-making element is involved; it is a purely technical computation exercise. The Tribunal's ruling is clear that the interest should run from 30 September 1983,<sup>5</sup> but the computation erroneously runs from September 1981.<sup>6</sup> No need to say that I agree with this correction.

11. In other instances, as examined below, the requested corrections are in need of amending the content of the Partial Award. They do not involve any typographical, clerical or computation error.

#### ***III.1. Claim G-32***

12. In this part, the Tribunal has awarded \$852,709.75 to Iran as damages for legal fees incurred.<sup>7</sup> The Respondent complains that Iran had asked for damages until 22 April 2015, but the Tribunal has included amounts attributed to fees incurred until June 2015. According to the

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<sup>4</sup> D. Carron & L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary (Oxford Commentaries on International Law) 2nd Edition, 2013, 26.3. (e-Textbook)*.

<sup>5</sup> Para. 2597 of the Partial Award.

<sup>6</sup> Para. 22 of the present Decision.

<sup>7</sup> Para. 2463 of the Partial Award.

Respondent, the Tribunal erred in awarding Iran damages for costs concerning the time after 22 April 2015.

13. The Tribunal in the Partial Award has held:

The Tribunal concludes, therefore, that the legal fees and expenses charged to Iran by its United States attorneys between July 2006 and June 2015 were also caused by the United States' failure to arrange for the transfer of the Chogha Mish Artifacts to Iran.<sup>8</sup>

The Tribunal has reviewed in detail all the invoices for legal fees and expenses that were submitted by Iran ... The Tribunal finds that the legal fees and expenses properly allocated to the work done on the Chogha Mish Artifacts constitute 50 percent of the total legal fees and expenses charged to Iran between July 2006 and June 2015. Half of those legal fees and expenses equals USD 852,709.75. Accordingly, the Tribunal awards this amount to Iran.<sup>9</sup>

The Tribunal has awarded Iran a total of USD 852,709.75 on this Claim. This amount represents the legal fees and expenses charged by Iran's United States attorneys between July 2006 and June 2015 for work performed in the *Rubin* Litigation relating to the Chogha Mish Artifacts.<sup>10</sup>

14. These are clear rulings and conclusions of the Tribunal, rendered after reviewing "in detail all the invoices for legal fees and expenses that were submitted by Iran." Whether this is in error or not is another question. The question is, does the Tribunal have jurisdiction to correct it? I do not see any computation error in this ruling.

15. There are three arguments against changing the clear ruling of the Tribunal in G-32. First, if there is a mistake on the part of the Tribunal, it could only be termed as an *ultra petita* ruling. It is a mistake concerning the merits of the dispute. The Tribunal went a little further than what the claimant was seeking for and ruled a small amount of \$4,334.90 in excess. This was the result of a judgment in merits and not a computation error.

16. As it was stated, there is no ground or jurisdiction in the Tribunal Rules to correct errors of this type. While the present Decision does not explain any reason for applying the correction, the only ground for correction by the majority that one can imagine is equity, which should be out of question. Because equity in fact aims at revising an earlier ruling which does not seem fair on one party. The only explanation by the majority is that:

"The Tribunal recognizes that, in determining in the Partial Award the damages Iran incurred between November 2014 and 22 April 2015 ... the Tribunal erroneously included the time entries and five expense entries ... from after 22 April 2015 and totaling USD 8,669.79.

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<sup>8</sup> Para. 2458 of the Partial Award.

<sup>9</sup> Paras. 2462-2463 of the Partial Award.

<sup>10</sup> Para. 2598 of the Partial Award.

Hence, an error in computation has arisen as a result of this mistake that must be corrected pursuant to Article 36 of the Tribunal Rules.”<sup>11</sup>

17. While this characterization does not entirely reflect the Tribunal’s findings quoted above, still it is obvious, even from this passage, that the “error” has occurred in the process of decision making and not computation.<sup>12</sup> As stated, any mistake associated with the process of decision making in the merits of the dispute, is incapable of correction under Article 36(1).

18. Second, the Tribunal should have first considered whether in fact extra amounts have been awarded to Iran. It is not established that Iran has received any extra amount in excess of what it has spent or sought. Iran has explained that it has indeed received less than it was entitled to under the Tribunal’s own approach. The majority does not examine this point and dismisses it on legalistic grounds.<sup>13</sup>

19. Third, Iran in its correspondence with the Tribunal over this subject, has maintained that it has not claimed any amount for the period after 22 April 2015. The United States on the other hand points to certain invoices which allegedly concern charges one week after 22 April 2015. The only way for the Tribunal to resolve this dispute between the Parties is to re-open the proceedings and to consider the allegations and the defences. This is of course impossible under Tribunal Rules. Thus, the situation cannot be reduced to a simple computation error.

20. The Tribunal cannot blow hot and cold. If it goes with the textual interpretation of Article 36, there is no jurisdiction to correct any kind of error in going beyond the relief sought. If, on the other hand, it opts for equity, then there is no equity in awarding less than a party is entitled to.

### ***III.2. Claim Supp. (2)-55 and Claim G-11/Supp. (2)-67***

21. This request for correction involves contradiction in the Tribunal’s approach between different claims in this Case. As the Decision explains:

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<sup>11</sup> Para. 31 of the present Decision.

<sup>12</sup> “The Tribunal concludes, therefore, that the legal fees and expenses charged to Iran by its United States attorneys between July 2006 and June 2015 were also caused by the United States’ failure to arrange for the transfer of the Chogha Mish Artifacts to Iran” (para. 2458 of the Partial Award). It is clear from this quotation that the Tribunal has awarded damages until June 2015. Whether it is a mistake or not is not the issue here; the point is that it is a holding in merits and not a computation error in the application of that holding.

<sup>13</sup> Para. 34 of the present Decision. Indeed, the present Decision in its Paragraph 32 ignores Iran’s assumed plea on a legalistic ground, to the effect that the request for correction was not raised within 30 days prescribed in Article 36(1). Iran has not made an express request for correction; so, dismissal of something not requested is not warranted. Iran only draws the Tribunal’s attention to the fact that it has not received any amount in excess.

The Tribunal's calculations of the fair market values of the items at issue in (i) Claim Supp. (2)-55 and Claims G-11 and Supp. (2)-67 and (ii) Claims G-105, G-172, G-174, and 1996-E/F are all based on the cost approach. The way the Tribunal implemented the cost approach, however, diverges between the two sets of claims: for Claim Supp. (2)-55 and Claims G-11 and Supp. (2)-67, the Partial Award calculated the adjustments for depreciation based on the original prices of the items; by contrast, for Claims G-105, G-172, G-174, and 1996-E/F, it calculated those adjustments based on the higher indexed values of the items, which it determined by increasing the original prices on the basis of the appropriate Producer Price Indices ("PPIs"). The Tribunal acknowledges that it did not intend in the Partial Award to implement the cost approach differently in those two sets of claims. There are otherwise no justifiable reasons for the Partial Award's inconsistent implementation of the same method (the cost approach) for the same purpose (determining the fair market value of tangible properties). This inconsistent implementation of the cost approach is the result of an error in calculation that must be corrected pursuant to Article 36 of the Tribunal Rules. The Tribunal holds that the correct implementation of the cost approach is that which the Partial Award adopted for Claims G-105, G-172, G-174, and 1996-E/F. Accordingly, adjustments for depreciation should be calculated based on the indexed values of the items, which, in turn, are determined by increasing the original prices of the items on the basis of the appropriate PPIs. Hence, the fair market values of the items at issue in (i) Claim Supp. (2)-55 and (ii) Claims G-11 and Supp. (2)-67, as recalculated correctly implementing the cost approach, are, respectively: (i) USD 12,388.76 and (ii) USD 14,052.42.<sup>14</sup>

22. It is hard to imagine how a different approach in awarding damages in different claims may amount to computation error. As it is obvious from the text quoted above, the text is referring to the Tribunal's "intention", meaning that the Tribunal had another intention but the expression of its intention in the Partial Award resulted in a contradiction ("Tribunal acknowledges that it did not intend in the Partial Award to implement the cost approach differently in those two sets of claims"). Yet, this inconsistency in intention, applied to two different claims, is termed as "an error in calculation." The analogy is incomprehensible. With no stretch of imagination one can call such an inconsistency "an error in calculation."<sup>15</sup> It seems that the majority had to call it so in order to squeeze (presumably an equitable result) into Article 36 parameters. To go against the express text of the Rules cannot be justified by resort to terminology. It goes without saying that any kind of error, formalistic or in merits, is without real intention. However, under the Tribunal Rules errors of the merit cannot be corrected. Paragraphs 42-44 of the present Decision indeed re-write the Partial Award, and there is no sign of correcting computation errors.

23. What has happened here is that a depreciation principle is applied differently to different claims, though similar in nature. This inconsistency may by no means be interpreted as computation error. It is simply re-interpretation of an intention on the part of the Tribunal.

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<sup>14</sup> Paras. 42-44 of the present Decision.

<sup>15</sup> Article 36(1) of course refers to *computation error*.

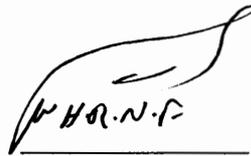
**IV. Conclusion**

24. The Tribunal Rules allow corrections to its awards and decisions in very limited instances. Perhaps a reasonable yardstick for the application of Article 36(1) of the Tribunal Rules is whether the issue involves a decision of the Tribunal on the one hand, or editorial and computation actions pursuant to such decision, on the other. In other words, the issue should not involve any judgment or judicial determination; rather it should be of a kind that is capable of correction by “clerks” (clerical errors), proofreaders (typographical errors), and accounting personnel or programs (computation errors).

25. The corrections suggested by the majority for claims discussed above are of the first category, *i.e.*, are substantial issues in need of further determination by the members of the Tribunal. They are by definition incapable of being considered under Article 36(1) of the Tribunal Rules.

26. I concur with the conclusions of the Decision in other parts, not discussed here.

Dated, The Hague,  
27 November 2020

A handwritten signature in black ink, appearing to read 'H.R. N. F.', written over a horizontal line.

H.R. Nikbakht Fini