Decision No. 87

Alan D. Berg (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A. K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F. K. Apaloo, R. A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received April 28, 1989, by Alan D. Berg, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on January 17, 1990.

The relevant facts:

2. The Applicant filed an application before the Tribunal on which the Tribunal gave judgment in Decision No. 73 on November 7, 1988. The Tribunal noted:

> While the Applicant has made a request for costs he has not submitted to the Tribunal an itemized statement of costs at the conclusion of the proceedings.

The Tribunal then decided to award the Applicant costs in the amount of $1,000. In this proceeding to revise the earlier judgment, the Applicant alleges that the costs incurred by him amounted to $7,121.

The Applicant's main contentions:

3. The appropriate time for the Applicant to submit a bill of costs was when the President requested it, not necessarily before the judgment was given in Decision No. 73.

4. The Applicant's attorneys had advised him that the standard practice in American and European jurisprudence was to submit the bill of costs following the decision in the case. Moreover, the practice of the ICSID arbitral tribunal is that it requests submission of a statement of fees and costs when the case has been completed.

5. There is nothing in the Rules of the Tribunal or in its practice to provide guidance on the time at which a bill of costs should be submitted. Therefore, it is only fair and just that the Applicant should now be given an opportunity to present and have considered evidence of the actual legal fees and expenses incurred.

6. The Tribunal should have been aware that attorneys in Washington commonly charge $150 per hour. At that rate the amount awarded covers only 6 hours 40 minutes of attorney time. Clearly the efforts involved in the case reflected many times that.

7. Since the issue raised by the Applicant is one of procedure, and since the question of costs is not expressly provided for in the Rules of the Tribunal, it is well within the power of the Tribunal to permit under Rule 25 the presentation of evidence of costs subsequent to its decision by interpreting its Rules otherwise only prospectively so as not to treat the Applicant unfairly, because it was not through his fault that the present situation had arisen.

8. The Applicant claims an additional sum of $6,121 to cover attorney's fees and costs.

The Respondent's main contentions:

9. The Tribunal has previously decided to award $1,000 in costs to the Applicant. Further review of the issue is, therefore, barred under Article XI of the Statute which provides that judgments shall be final and without appeal, and under the doctrine of res judicata.

10. Review of a judgment by the Tribunal is possible only under Article XIII, where a previously unknown fact has been discovered after the judgment. The Applicant's claim for increased fees and costs does not constitute a newly discovered fact. What the Applicant is seeking is to "repair an omission" or to "correct an error" in the manner in which his case was presented to the Tribunal. This he may not do.

11. Ignorance of the Tribunal's Rules or procedures does not insulate the Applicant from the consequences of his action. Consequently, the mistaken assumption of counsel that the Tribunal would request a bill of costs does not provide a basis for review of the judgment. If counsel had been uncertain, he should have moved the Tribunal to order how to proceed.

12. The Applicant believes that, had a full accounting of costs been submitted, he would have been awarded all costs incurred. This is a mistaken conception, since the Tribunal's practice is to award costs only exceptionally and the Tribunal has never awarded the full amount claimed. There is no reason to believe that the Tribunal's award would be changed for lack of information.

13. Rule 25 of the Tribunal's Rules of Procedure is not relevant. The principle of finality flows from Article XI of the Statute. The Rules do not pertain to modification of the Tribunal's Statute.

Considerations:

14. In Decision No. 73, dated November 7, 1988, the Tribunal ruled in favor of the Applicant on the merits of his claim. As regards costs, the Tribunal observed, among other things, in paragraph 45:

> While the Applicant has made a request for costs he had not submitted to the Tribunal an itemized statement of costs at the conclusion of the proceedings. In these circumstances the Tribunal decides to award the Applicant costs in the amount of $1,000.

These words have been interpreted by the Applicant as an invitation to submit reasons – detailed in paragraphs 4 to 9 above – why the Tribunal should award him an additional sum of $6,121 to cover attorney's fees and costs.

15. The Applicant has misunderstood the nature of the Tribunal's observation. The Applicant made a request for costs and the Tribunal did not make an interim decision on his request, postponing a final decision and inviting him to submit further particulars to enable it to make a final decision. On the contrary the Tribunal did make a final decision – awarding him costs in the amount of $1,000 which was intended to include attorney's fees. This decision makes the award res judicata, as is confirmed by Article XI (1) of the Tribunal's Statute, which declares its judgments "final and without appeal". Thus, clearly the Tribunal cannot reopen Decision No. 73 by way of appeal. As was stated in Van Gent (No. 2) Decision No. 13 [1983], para. 21:

> No party to a dispute before the Tribunal may bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

16. The Tribunal may however revise a judgment; revision is governed by Article XIII (1) which reads:

> A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal which at the time

> judgment was delivered was unknown both to the Tribunal and that party, request the Tribunal ... to revise the judgment.

As the Tribunal observed in Skandera, Decision No. 9 [1982], para. 7:

> This Article, as well as Article XI (1) providing for finality of the judgments of the Tribunal, compel the conclusion that the powers of revision of a judgment are strictly limited and may be exercised only upon compliance with the conditions set forth in Article XIII.

One of the conditions is that the facts in support of revision applied for were, at the time judgment was delivered, unknown to both the Tribunal and the Applicant. Here there is no question of the facts set out in support of the application being at the time of judgment unknown to the Applicant; most of them were then known to him or his attorney and should have properly been brought to the notice of the Tribunal before delivery of judgment. In any event it cannot be said that they were then completely unknown to the Tribunal.

17. Besides, the extra amount ($6,121) sought by the Applicant and reasons advanced by him are not facts which by their nature might have had a decisive influence on the judgment of the Tribunal.

18. In the circumstances the application is dismissed.

Decision:

For the above reasons, the Tribunal unanimously decides that the application be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, May 25, 1990