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CASE NO. A15 (I:G)
FULL TRIBUNAL
AWARD NO. ITL 63-A15(I:G)-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

Request by the Islamic Republic of Iran relating to the balance remaining in the Fund held by the Federal Reserve Bank of New York pursuant to the Algiers Accords

INTERLOCUTORY AWARD

Appearances:

For the Claimant : Mr. Mohammad K. Eshragh, Agent of the Government of the Islamic Republic of Iran,
Mr. Mohsen Mohebi, Counsel to the Agent,

Mr. Ali Manavi Rad,
Mr. Said Niazi,
Representatives of Bank Markazi,
Mr. Richard Falk,
Mr. Daniel P. Levitt,
Counsels

For the Respondent :

Mr. John Crook,
Agent of the Government of the United States of America,
Mr. Daniel Price,
Deputy Agent of the Government of the United States of America,
Ms. Sally Cummins
Mr. Todd Buchwald
Department of State,
Mr. James Oltman,
Mr. Don Bittker,
Federal Reserve Bank of New York,
Ms. Rochelle Stern,
Department of the Treasury

I. GENERAL BACKGROUND AND PROCEEDINGS

A. General Background

1. On 20 January 1981, pursuant to the Algiers Accords, the United States, inter alia, caused the Iranian assets on deposit with the Federal Reserve Bank of New York ("Federal Reserve Bank") and with overseas branches of United States banking institutions to be transferred to an escrow account at the Bank of England in the name of the Algerian Central Bank as Escrow Agent. Originally, out of these assets, the gold bullion was placed in a custody account denominated the "Bullion Account", the securities in one of two custody accounts denominated "Securities Custody Account No. 1", and the funds in an account denominated "Dollar Account No. 1". Having been informed by the Algerian Central Bank that the 52 detained United States nationals had safely departed from Iran, the Bank of England, upon instructions given by the Algerian Central Bank pursuant to Paragraph 2(A) of the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria ("the Undertakings"), transferred $3.667 billion from Dollar Account No. 1[1] to the Federal Reserve Bank to pay the unpaid principal of and interest through 31 December 1980 on syndicated loans made to or guaranteed by the Government of Iran and controlled entities of Iran,

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[1] In the Algiers Accords the term "Dollar Account No. 1" only refers to the account at the Bank of England, into which the funds out of the Iranian assets were transferred by the United States pursuant to Paragraphs 4 and 5 of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("the General Declaration"). Later, Dollar Account No. 1 became a term used by the Parties to describe the $3.667 billion transferred from the Bank of England to the Federal Reserve Bank, and it will be used hereinafter in this sense.

involving a syndicate of banking institutions having a United States bank as a member.

2. After the Federal Reserve Bank repaid the syndicated loans identified by the Parties during the negotiations of the Algiers Accords, including interest through 31 December 1980, over $4 million remained in Dollar Account No. 1 with the Federal Reserve Bank. Also, funds were returned to the Federal Reserve Bank by agent banks when they ascertained that non-United States syndicate members had already been paid directly by Iran before 19 January 1981.

3. The disposition of the funds remaining with the Federal Reserve Bank in Dollar Account No. 1 is at issue in this Part I:G of Case No. A15. An accounting submitted by the United States pursuant to a Tribunal Order showed a closing balance in this Account of $399,293,273.84, including accrued interest, as of 30 December 1983. At the Hearing, the representative of the Federal Reserve Bank stated that as of 31 March 1986 the balance of Dollar Account No. 1 was $485,412,927.86.

4. The Islamic Republic of Iran requests "an order requiring the United States immediately to return all funds in Dollar Account No. 1 not needed to pay 'unpaid principal of and interest through December 31, 1980' of syndicated bank debt in which United States banking institutions were participants". The United States "requests that the Tribunal dismiss this interpretive dispute for lack of jurisdiction. In the event that the Tribunal finds that it has jurisdiction to entertain Iran's request, the Tribunal should determine that the status quo with regard to the funds must be maintained and that the disposition of the funds can only be resolved through negotiations between the parties."

B. The Proceedings

5. Iran's Statement of Claim in Case No. A15 was filed on 25 October 1982. In Case No. A15, Iran asserts a number of violations by the United States of its obligations under the Algiers Accords to transfer Iranian assets and to terminate litigation in United States courts and prohibit further litigation. By Order of 15 February 1983, the Tribunal set different time limits within which the United States should file Statements of Defence to the various parts of Case No. A15 and consequently those parts are proceeding separately from each other. The Statement of Defence to Part I:G was filed by the United States on 13 October 1983. On 13 December 1983, certain interested United States banks submitted a Memorial that was accepted for filing in accordance with Article 15, Note 5, of the Tribunal Rules. On 20 January 1984, Iran filed its Reply. On 13 February 1984, pursuant to a Tribunal Order, the United States filed an Accounting regarding Dollar Account No. 1 as of 30 December 1983. Iran filed Comments on this Accounting on 23 April 1984.

6. Together with its Comments of 23 April 1984, Iran filed a Request for a Partial Award in which it asked the Tribunal to direct the United States "to immediately transfer the said balance to Iran under summary proceeding". The United States filed its Rejoinder on 1 May 1984. Iran repeated its Request for a Partial Award on 3 May 1984. Having heard the Agents of the two Governments on this question, the Tribunal, pursuant to a request by the Agent of the Government of the United States, decided on 7 May 1984 that no action on the request for a Partial Award would be taken prior to a Hearing on this Part of Case No. A15. On 3 December 1984, Iran filed a Reply to the United States' Rejoinder. The United States' Response to Iran's Reply was filed on 25 February 1985.

7. A Hearing was held on this Part I:G of Case No. A15 on 2 and 3 April 1986. Pursuant to the Tribunal's

scheduling Order, the Hearing was on the following issues: (i) whether the Tribunal has jurisdiction over Part I:G of Case No. A15; (ii) whether the United States is obligated to transfer to Iran any balance remaining in Dollar Account No. 1; (iii) Iran's Request for a Partial Award; and (iv) the further proceedings in this Case with regard to any remaining issues.

II. JURISDICTION

A. Contentions of the Parties

8. The Claimant alleges jurisdiction over this Part I:G of Case No. A15 on the basis of Paragraph 17 of the General Declaration which confers on the Tribunal jurisdiction over any dispute that arises between the Parties "as to the interpretation or performance of any provision of this Declaration". The Claimant argues that the Respondent, by not transferring the excess funds in Dollar Account No. 1 to Iran, has not properly performed General Principle A and Paragraph 2 of the General Declaration. The Claimant further argues that also at issue in this Case is the interpretation and performance of Paragraph 2(A) of the Undertakings (see below, paragraph 30), which is a provision encompassed in the jurisdictional grant of Paragraph 17 of the General Declaration due to the explicit incorporation-by-reference of the Undertakings in Paragraph 2 of the General Declaration. The Claimant invokes the Tribunal's Decision in Case No. A1 in support of its argument that the absence of an "operative provision" in the Declarations does not prevent the Tribunal from ascertaining jurisdiction to decide issues "within the structure of the agreements themselves". The Claimant also argues that if the Tribunal had jurisdiction to interpret Paragraph 2(B) of the Undertakings, as it did in Cases Nos. A16 and A17, then it should have jurisdiction to interpret Paragraph 2(A). Alternatively, the Claimant argues that the Tribunal has jurisdiction to resolve the disposition of the excess funds

as an "incidental [ ] matter not explicitly covered" by specific operative provisions of the Agreements "in order to assure effectiveness of the underlying arrangements."

9. The Respondent contends that, as shown by the Decisions in Cases Nos. A2 and A16, the Tribunal's jurisdiction is limited to disputes concerning obligations based on specific operative provisions of the Declarations. This jurisdictional grant does not extend to all legal issues that may arise out of or under the Accords. Neither General Principle A nor Paragraph 2 of the General Declaration are independent sources of specific obligations. As to the Undertakings, the Respondent argues that they are not incorporated-by-reference by Paragraph 2 of the General Declaration. Even if they were so incorporated, the Respondent argues that there is no provision in the Undertakings which requires the United States to transfer the excess funds to Iran or in any other way dispose of them. The Undertakings themselves only confer upon the Tribunal jurisdiction over certain bank disputes in accordance with Paragraph 2(B). The Respondent further contends that the dispute is not covered by an implied jurisdiction based on the structure of the Algiers Accords as a whole, but that, in fact, the Claimant seeks a decision on a matter entirely outside the powers granted to the Tribunal, since it requests an award not based on a specific provision of the Declarations. Lastly, the Respondent contends that Paragraph 4(a) of the Escrow Agreement specifically provides for negotiation of the present dispute. Such negotiation not being completed yet, the Tribunal must defer a decision pending direct negotiations between the Parties.

B. Reasons

10. In its Statement of Claim, in relation to the transfer of the balance of the funds presently in Dollar Account No. 1, the Claimant contends that the "US Government's failure and refusal to act constitutes a willful and

deliberate breach of General Principle A of the General Declaration". This contention was reiterated in different terms in other submissions and never abandoned by the Claimant.

11. On the other hand, the Respondent strongly denies this assertion. In its Statement of Defence, it states that "General Principle A is not . . . an independent source of specific obligations". In more recent submissions, it asserts that General Principle A contains only a "statement of purpose", which says nothing about the excess funds issue. Admitting that "[i]n its Reply, Iran relies first on its understanding of General Principle A", the Respondent takes issue with this understanding and submits that "[t]his is not what General Principle A states". In the Respondent's view, "General Principle A is no more than a preamble that explains a purpose of the General Declaration". Consequently, this General Principle is not a part of the "operative provisions" of the Declaration.

12. In the light of these contentions and admissions, the Tribunal finds that a dispute exists between the Parties as to the interpretation and performance of General Principle A. Undoubtedly, such a dispute is a dispute between the parties to the General Declaration "as to the interpretation or performance of any provision of this Declaration" within the meaning of Paragraph 17 of the General Declaration, and consequently is within the jurisdiction of the Tribunal pursuant to the very terms of Paragraph 17.

13. Having established that it has jurisdiction on this ground, the Tribunal does not need, at this stage, to consider the other grounds for jurisdiction invoked by the Claimant. The Tribunal would have to come back to these additional arguments only if it were to find that it is not in a position to deal with all of the submissions of the Parties by reference to the interpretation and performance of General Principle A. For the reasons set forth below, it will be seen that this is not the case.

III. MERITS

A. Relevance of General Principle A

1. Contentions of the Parties

14. As mentioned above, the Claimant contends that the failure of the Respondent to transfer the remaining funds in Dollar Account No. 1 to Iran constitutes a breach of General Principle A of the General Declaration. While the Claimant does not rely solely on General Principle A, it argues that this Principle sets out the broad purposes which require return to Iran of the balance in Dollar Account No. 1 that is in excess of the sole purpose for which the Account was created, i.e. payment of the principal of and interest through 31 December 1980 on syndicated loans.

15. The Respondent denies that any provision in the Algiers Accords requires it to transfer the excess funds in Dollar Account No. 1 to Iran. In particular, it contends that General Principle A confers no independent operative obligation on either Government. The Respondent contends that such obligations are only defined by operative paragraphs apart from the General Principles, and that the Claimant does not cite any operative paragraph of the General Declaration in support of its claim.

2. Reasons

16. In examining the meaning and legal relevance to be attached to General Principle A, the Tribunal notes that the General Declaration opens by a preamble stating how it was arrived at. At the end of this preamble, the Government of Algeria "declares that the following interdependent commitments have been made by the two governments." Two General Principles, the first of which is General Principle A, appear in the General Declaration immediately after this sentence. The inevitable inference is that they constitute

an integral part of the "commitments" made by the two Governments.

17. This inference is supported by the following sentence, introducing General Principles A and B:

> "The undertakings reflected in this Declaration are based on the following general principles:" (emphasis added).

This wording implies that these General Principles are not simply statements of purpose, as is usually the case in preambles of treaties. They are expressly described by the parties as the legal basis of their undertakings. Accordingly, it would be difficult to admit that they are deprived of any legal effects. This would be inconsistent with the ordinary meaning to be given to the terms of this provision, as prescribed by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, as well as with the principle of effectiveness (ut res magis valeat quam pereat), generally accepted as one of the main principles of treaty interpretation. Quite to the contrary, preceding in the General Declaration the commitments of the parties, the General Principles must be understood as embodying broad legal commitments, with the ways of their implementation being detailed in the following parts of the General Declaration.

18. Such an interpretation is fully consistent with the terms in which General Principle A is couched. These terms are the following:

> "Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4 - 9."

Taken in their ordinary meaning, the terms of General Principle A clearly embody commitments by the United States. They state that "the United States will restore the financial position of Iran . . ." and, further, that "the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction . . ." (emphasis added). In this context, it is worthwhile to underline that there is no dispute about the fact that the other paragraphs of the General Declaration do embody real commitments by the two Governments. These commitments indeed are more often than not introduced by the verb "will" as in General Principle A (see Paragraphs 2 to 6 and 8 to 14). The Tribunal is therefore unable to accept the contention of the Respondent that General Principle A is no more than a preamble and contains no operative provisions. It remains, however, to ascertain the precise import of the obligations deriving from the commitments embodied in this General Principle.

19. A closer scrutiny of the wording of General Principle A reveals that, in this part of the General Declaration, the United States accepted two different kinds of duties. In the first sentence, it obliged itself to restore, "in so far as possible", the financial position of Iran to that which existed prior to 14 November 1979. Even with the mitigation brought about by the words just quoted, this is a very sweeping statement. It must be observed, however, that the undertaking it contains is made only with very definite qualifications, expressed in the phrase opening the sentence: "Within the framework of and pursuant to the provisions of the two Declarations . . .." Therefore, the provisions of the two Declarations not only describe and detail the specific acts that the United States will have to undertake in order to implement the broad commitment defined in General Principle A, but they also limit the obligations deriving from this commitment.

20. The second sentence of General Principle A describes, also in general terms, one of the legal

consequences ascribed by the parties to the duty to restore the financial position of Iran: namely to ensure the mobility and free transfer of all Iranian assets within the United States jurisdiction. The specific actions to be taken are described in detail in Paragraphs 4 to 9 of the General Declaration. Nothing in this second sentence can, however, be construed as limiting the general commitment to restore the financial position of Iran to the more narrow obligation of ensuring the mobility of the Iranian assets. The bringing about of such a mobility rather appears as a first step in the restoration contemplated by General Principle A.

21. As described in the Algiers Accords, the restoration of the financial position of Iran to that which existed prior to 14 November 1979 is a complex process, comprising several successive steps and taking place in a broader legal framework which comprises a series of interrelated commitments by both parties. This process reflects a delicate balance of the rights and obligations of the two parties, all the more delicate that it will have to be maintained throughout the rather lengthy time for implementation of the two Declarations and at the different stages of their performance.

22. In spite of its very broad terms, General Principle A does not imply that all Iranian funds within the United States jurisdiction at the time of the conclusion of the Algiers Accords were to be returned to Iran immediately after the entry into force of the Accords and the safe departure of the 52 United States nationals since, pursuant to the two Declarations and therefore in accordance with the agreement of both parties, portions of such funds were to be used for other purposes. On the other hand, the obligation to restore is so comprehensive that it cannot be construed to mean that Iranian funds not used for the purposes defined in the two Declarations may be kept by the United States and not returned to Iran. Such an interpretation would clearly run contrary to the letter and spirit of General Principle

A, and neither of the Parties argued such an extreme position.

23. The first step of the process of restoration is described in general in the second sentence of General Principle A, as already noted, and detailed in Paragraphs 4 to 9 of the General Declaration. Pursuant to these paragraphs, the various kinds of Iranian assets within the United States jurisdiction were to be transferred according to various procedures and at various times to a Central Bank ("the Central Bank") "to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3" of the General Declaration.

24. At the end of this first stage, all Iranian funds, which had been within the jurisdiction of the United States before the execution of the Accords, were outside that jurisdiction and were held in escrow by the Bank of England (eventually selected by the Parties as the Central Bank), acting under instructions by the Government of Algeria and the Algerian Central Bank. This does not mean, however, that the financial position of Iran was then restored to that which existed prior to 14 November 1979, as required in General Principle A and, consequently, that this Principle has been fully implemented. Before the imposition by the United States of economic sanctions in response to the seizure of the American Embassy in Tehran and the detention of United States nationals, Iran had the free disposition of its assets in the United States, subject only to possible attachments in favour of United States or other corporations claiming damages against Iran or to possible set-off by banking institutions. Iran's financial position, therefore, will be restored only when it will have recovered the free disposition of the assets not attached or subject to set-off for the payment of commercial or financial debts. While any portion of those assets remains in escrow at a foreign Central Bank under instructions of another foreign Central Bank, as Escrow Agent, this will not be the case. Further steps, therefore, are needed for the complete performance of

General Principle A. They are, in fact, provided for by the General Declaration.

25. Pursuant to Paragraph 3 of the General Declaration, the second stage of the process was due to start only after the Government of Algeria had certified that the 52 United States nationals held in Iran had safely departed (otherwise all the assets would have been returned to the United States). After the certification by the Government of Algeria to the Algerian Central Bank of the safe departure of the 52 United States nationals, the latter was to instruct the Bank of England "to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to t[he General] Declaration". This second stage, however, only partly resulted in the return of Iranian assets to the free disposition of Iran.

26. Paragraph 3 of the General Declaration does not specify how the Iranian assets were to be transferred and to whom. Therefore, it is necessary to look elsewhere in order to find answers to these questions.

27. A first and partial answer is given in Paragraph 7 of the General Declaration. According to a complex procedure, some of the funds received pursuant to Paragraph 6 of the same Declaration were transferred into a special interest-bearing Security Account, until the balance in that Account reached a level of $1 billion, and the other funds of same origin were transferred to Iran. All funds in the Security Account shall be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Declaration. After the payment of all arbitral awards against Iran, a third and final step in the restoration of the financial position of Iran will take place, with any amount remaining in the Security Account to be transferred to Iran. Meanwhile, Iran will have to make new deposits should the balance in the Security Account fall under $500 million, in order to maintain such a minimum balance. Such a provision implies

that, in any event, a substantial amount will remain in the Security Account at the end of the activity of the Tribunal (and subsequently will be transferred to Iran).

28. Furthermore, Paragraph 9 of the General Declaration provides for the transfer to Iran of all Iranian properties located in the United States and abroad which are not within the scope of other paragraphs. Conversely, no further provisions can be found in the General Declaration about transferring the assets described in Paragraphs 4, 5, and 8, although such assets constituted the most important part of the Iranian assets within the jurisdiction of the United States on 19 January 1981. Paragraph 2 of the General Declaration, however, provides that "[c]ertain procedures for implementing the obligations set forth in this Declaration . . . are separately set forth in certain Undertakings" of the two Governments "with respect to the Declaration of the Democratic and Popular Republic of Algeria". In fact, a document designated the Undertakings was executed the same day as the Declarations and forms, together with some further documents, an integral part of the Algiers Accords.

29. In their Paragraph 1, the Undertakings provide that:

> "Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph."

It is thus clear that the object and purpose of the Undertakings is to implement Paragraph 3 of the General Declaration in spelling out the transfers which the Bank of England, upon instruction of the Algerian Central Bank, as Escrow Agent, was to have to carry out as a second step of the process that started with the transfer of the Iranian assets to the Bank of England. In cannot be doubted that the Tribunal has the power -- and, indeed, the duty --

to look to the Undertakings for the purpose of interpreting General Principle A and of ascertaining whether the obligations deriving from this Principle have been properly performed or not. It is a general principle of treaty interpretation, recalled in Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties, that the terms of a treaty must be construed in their context, which contains, inter alia, any agreement which was made between all the parties in connection with the conclusion of the treaty. Manifestly, the Undertakings fall within this definition in relation to the General Declaration, by their very title as well as by their content.

30. Paragraph 2 of the Undertakings opens with a statement explaining the reason for the various transfers for which it provides, namely Iran's "intention to pay all its debts and those of its controlled institutions". Accordingly, the funds mentioned in Paragraph 1 of the Undertakings were to be divided into three parts, corresponding to the three subparagraphs of Paragraph 2:

(a) $3.667 billion to be transferred to the Federal Reserve Bank of New York "to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities" (Dollar Account No. 1).

(b) $1.418 billion to be placed in "Dollar Account No. 2" with the Bank of England "for the purpose of paying the unpaid principal of and interest owing, if any, on the loans and credits" just described "after application of the $3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, [etc.]", as

well as "for the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions".

(c) All assets in excess of these two amounts to be transferred immediately to Bank Markazi.

31. As in the case of the Security Account established in accordance with Paragraph 7 of the General Declaration, Paragraph 2(B) of the Undertakings provides for a third and final step for the funds retained in Dollar Account No. 2. After all disputes concerning the debts to be paid from Dollar Account No. 2 have been resolved either by agreement or by arbitral award and appropriate payment has been made, "the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi."

32. By contrast, the Undertakings are completely silent on the disposition of the funds which might remain in excess in Dollar Account No. 1 with the Federal Reserve Bank after payment of all syndicated loans and credits, should the total amount due prove less than $3.667 billion. There is no indication whether the balance must be transferred or not, nor, if it has to be transferred, when and to whom.

33. The absence of any explicit provision in the Declarations and the Undertakings on this important issue is at the center of the dispute referred to the Tribunal in this Case, since the Claimant contends that the United States has breached General Principle A by failing to transfer the balance of the excess funds to Iran, whereas the Respondent maintains that General Principle A "says nothing about the excess fund issue" and that this issue has received no solution in the Declarations or in the other documents relating to them. According to the Respondent, a new agreement, to be negotiated between the Parties, is the only way to solve the problem. It is therefore apposite to turn now to the contentions of the Parties with regard to their respective rights and obligations in connection with the excess funds in Dollar Account No. 1.

B. Disposition of the Excess Funds in Dollar Account No. 1

1. Contentions of the Parties

34. The Claimant contends that, interpreted in accordance with the Vienna Convention on the Law of Treaties, the terms and the object and purpose of the General Declaration and of the Undertakings require return to Iran of the excess funds in Dollar Account No. 1 remaining after payment of syndicated loans including interest through 31 December 1980. In addition to General Principal A, the Claimant relies principally on Paragraph 2 of the General Declaration establishing funds to discharge particular categories of bank claims and on the specific implementing provisions in Paragraph 2 of the Undertakings, which were incorporated in the General Declaration by explicit reference. The Claimant asserts that this is clear from the structure of the Undertakings and from the common understanding of the Parties on 19 January 1981, according to which Iran was entitled immediately to so much of the $7.955 billion mentioned in the preamble of the Undertakings as was not required to discharge the specific bank claims described in Paragraphs 2(A) and (B) of the Undertakings. No portion of the funds which proved to be surplus to the stated purpose was to be retained by the United States or to be applied differently. Paragraph 7(a)(i) of the Technical Arrangement between the Algerian Central Bank as Escrow Agent and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York as fiscal agent of the United States ("the Technical Arrangement"), which provides that the $3.677 billion be transferred to the Federal Reserve Bank "subject to the Fed's sole direction", does not affect this, the Claimant contends, since Iran is not a party to the Technical Arrangement and therefore is not bound by it.

35. The Claimant further contends that its right to seek the return of any surplus derives from its ownership of such funds and does not depend on any express provision in

the Algiers Accords. In the Claimant's view, the Respondent owes it fiduciary duties since it must be regarded as a trustee for Iran with respect to the funds in Dollar Account No. 1. The Claimant contends that its fiduciary relationship imposes on the Respondent the obligation to refrain from acting against Iran's interests, to refrain from applying the funds for a purpose contrary to the one specified, and to return any residue to Iran as the depositor of the funds.

36. The Claimant also argues that retaining the funds until a negotiated agreement on their disposition would be contrary to the specific purpose for which Dollar Account No. 1 was created. Were the Respondent's position upheld in this respect, this would amount to an unjust enrichment of the United States, the remedy for which is restitution.

37. The Respondent argues that no provision in the General Declaration or the Undertakings requires it to transfer the excess funds to Iran. Where the Parties intended that funds be transferred to Iran, they included specific provisions to that effect in the Accords, whereas they failed to agree on any disposition of the excess funds in Dollar Account No. 1. The Respondent acknowledges Iran's interest in the funds. It contends, however, that, in order to preserve the balance existing in their relations following the financial arrangements contained in the Algiers Accords, the disposition of the funds would have to be left to negotiations between the Parties, and the Respondent denies any obligation to transfer the residue to Iran at any time prior to such mutual agreement. According to the Respondent, Paragraph 4(a) of the Escrow Agreement provides for an exclusive mechanism for the resolution of any dispute concerning the disposition of the funds at issue.

38. The Respondent denies also that it holds the funds at issue in a banking or fiduciary relationship governed by private law. Rather, it contends that the relations of the

two Governments under the Algiers Accords are governed by principles of public international law only.

39. Lastly, with regard to the Claimant's argument of unjust enrichment, the Respondent answers that there has been no enrichment of the United States, and consequently no unjust enrichment.

2. Reasons

40. Both Parties recognize that no specific provision exists in any of the related agreements usually referred to as the Algiers Accords for the transfer of the balance of the funds in excess in Dollar Account No. 1 with the Federal Reserve Bank. It was already underlined that this contrasts sharply with what is provided for with respect to the other accounts established from the escrow funds, Dollar Account No. 2 and the Security Account.

41. Whatever the reasons for this different treatment (some of which can be understood from the negotiating history described below at paragraphs 47 to 50), the silence of the Accords on such an issue does not mean that the disposition of excess funds in Dollar Account No. 1 should be considered as having been left in a legal vacuum, as is suggested by the Respondent, which contends that only a new agreement, arrived at through fresh negotiations, could bring about a legal solution. Before accepting such a conclusion, the Tribunal must determine whether the general provisions of the Accords taken together and interpreted in the context of their framework provide legal guidance. For the reasons set forth in the following paragraphs, the Tribunal finds that the legal principles to be followed by the Parties in relation to said funds can be ascertained in this way.

42. At the Hearing, the United States representative repeatedly explained that the Accords established a complex and delicate equilibrium between the interests of the two States as well as between their rights and duties, and that this equilibrium must be fully taken into account and preserved in the interpretation and implementation of the Accords. The Tribunal shares this view completely.

43. One of the most important aspects of this equilibrium is that, pursuant to the General Declaration, those of the Iranian assets which were transferred in escrow to the Bank of England and not immediately transferred to Iran after the release of the 52 United States nationals were transferred to three dedicated funds, to serve specific purposes. The origin of the assets so transferred, the nature of the accounts in which they were to be held, and the exact kind of payments to be made from those accounts were defined with great precision and detail in each instance.

44. In the case of Dollar Account No. 1 ($3.667 billion), the funds were transferred to the Federal Reserve Bank, as fiscal agent of the United States, "subject to the Fed's sole direction". Thereupon, it was the duty of the Federal Reserve Bank, acting on instructions of the United States Treasury Department, to immediately pay out the syndicated loans and credits in conformity with the provisions of Paragraph 2(A) of the Undertakings. In the case of Dollar Account No. 2 ($1.418 billion), the payments were to be made by the Bank of England, only upon the instructions of the Escrow Agent, the Algerian Central Bank. The Escrow Agent itself was to act upon certification of agreements executed by Bank Markazi and the appropriate United States banking institutions (or upon determinations by an international arbitration panel or this Tribunal, as the case may be) pursuant to the terms of Paragraph 2(B) of the Undertakings.

45. The third account, the Security Account, was furnished through the transfer of a part of the Iranian assets described in Paragraph 6 of the General Declaration, (see supra, paragraph 27). According to Paragraph 7 of the General Declaration "[a]ll 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". Pursuant to two Technical Agreements of 17 August 1981 entered into with De Nederlandsche Bank N.V and with N.V. Settlement Bank of the Netherlands respectively, the $1 billion were deposited with the N.V. Settlement Bank in the name of the Escrow Agent.

46. These three accounts are the only ones established by the Algiers Accords with a view to secure payment of claims against, or of debts of, Iran. They are separate dedicated accounts, as recalled above, with specific and distinct purposes. The Algiers Accords do not provide that the funds existing in one account could be used for purposes other than those for which that account was established, or could be transferred from one account to another, with one exception. It has already been explained in paragraph 30 above that Dollar Account No. 2, established to pay non-syndicated loans and credits and disputed amounts owing on Iranian deposits, could also be used to pay syndicated loans owing, if any, "after application of the $3.667 billion" in Dollar Account No. 1, should the latter prove to be insufficient to pay all the syndicated loans.

47. The provision recalled in the preceding paragraph establishes a link between the two funds dedicated to the payment of bank debts, but this link is reduced to a minimum and, at any rate, is much more limited than had been proposed during the negotiation of the Accords. In the course of the negotiation, the United States prepared a document entitled "Implementing Technical Clarifications and Directions" ("the Clarifications"), to be signed by the same parties as the Escrow Agreement, namely the Government of the United States, the Federal Reserve Bank of New York,

Bank Markazi, and the Banque Centrale d'Algérie. The purpose of the Clarifications was to clarify "the instructions contained in Paragraph 4 of the Escrow Agreement". It must be recalled that the paragraph just mentioned instructed the Algerian Central Bank to give to the Bank of England the instructions "specifically contemplated" by the provisions of the General Declaration and the Undertakings immediately after the safe departure of the 52 United States nationals from Iran.

48. The Clarifications provided, inter alia, model payment instructions. In case the $3.667 billion proved to be insufficient, the Escrow Agent would issue one such instruction to the Bank of England to transfer to the Federal Reserve Bank the amount of such shortfall, debiting Dollar Account No. 2.

In addition, a model telex for Bank Markazi to send to the Federal Reserve Bank, attached to the Clarifications, contained a provision relating to Dollar Account No. 1 and reading as follows:

> "Any portion of the US released amount not applied to pay such indebtness because of prior payment or otherwise shall be credited to US Dollar Account No. 2 . . ."

The transfer provision (commonly referred to by the Parties as the "pourover" provision) had the effect that if payment of the syndicated debt, due to prior payment or otherwise, required less than the $3.667 billion, any residue was to be transferred to Dollar Account No. 2. In the opposite hypothesis, i.e. if the $3.667 billion proved to be insufficient, any additional amounts required would have to be transferred from Dollar Account No. 2 to Dollar Account No. 1. In both cases, the question presently in dispute between the Parties would have been solved, since the provision relating to the disposition of the amounts in excess in Dollar Account No. 2 would have applied to any amount in excess in either account or both.

49. Eventually the Clarifications were rejected by Iran, were not signed by Bank Markazi, and thus did not become part of the Algiers Accords. According to the statements of the two Parties, the "pourover" provision was not the reason for this failure. As a matter of fact, a telex identical to the model appended to the draft Clarifications was sent by Bank Markazi to the Federal Reserve Bank on 20 January 1981. The United States refused to consider this telex as having any effect due to the rejection of the Clarifications, and the telex, containing the pourover instruction, was eventually repealed by Bank Markazi ten months later. For its part, the United States Treasury Department sent to the Federal Reserve Bank, on 20 January 1981, deposit and payment instructions which contemplated a pourover of any excess funds in Dollar Account No. 1 to Dollar Account No. 2, but this was reversed ten days later by a new instruction which required retention of any such excess. Furthermore, both Parties admitted at the Hearing that the "pourover" mechanism never entered into force.

50. In the light of the history of the negotiations and of the subsequent conduct of the Parties in the implementation of the Algiers Accords, as well as of their contentions and admissions in the proceedings before the Tribunal, it is clear that, although no formal opposition was articulated against the "pourover" provision, such a provision was not agreed upon and that, after some hesitations, both Parties clearly recognized this fact.

51. The Tribunal, which is bound by the terms of the Algiers Accords, can only draw the conclusions which derive from the absence of any "pourover" provision in the Algiers Accords. It has, therefore, to look at the other provisions of the Algiers Accords with a view to determine whether they provide a solution to the issue before it. This leads it first to find that the equilibrium intended by the two Governments in executing the Algiers Accords, in their actual wording, imposes as a first requisite that the

dedication of the various accounts established pursuant to the Algiers Accords be strictly respected. This finding implies that the funds existing in one of these accounts must not be used for any purpose other than the one for which that account was established, or transferred to another account, with the only qualification being that mentioned in paragraph 46 above and expressly stipulated in Paragraph 2(B) of the Undertakings.

52. It appears, therefore, that funds in excess in Dollar Account No. 1 cannot legally be used for any of the purposes defined by the parties to the Accords. In such a case it seems difficult to understand why and on what basis they could be held indefinitely in this Account. Both Parties agreed during the Hearing that indefinite retention of the excess could not have been contemplated. As a matter of fact, it would be absurd.

53. Pursuant to General Principle A of the General Declaration, the United States committed itself to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." It is evident that the financial position of Iran would not be restored "in so far as possible" if the Iranian assets previously transferred in escrow pursuant to the General Declaration were not returned to Iran when they cease to be usable for the purpose of guaranteeing the payment of, and of paying, the debts that Iran promised to pay in Paragraph 2(A) of the Undertakings. The United States will not have fully fulfilled its obligations as long as it has not caused the return of those assets.

54. It is true that, according to General Principle A, the obligation of the United States quoted in the preceding paragraph was accepted only "[w]ithin the framework of and pursuant to the provisions of the two Declarations." For the reasons spelled out above (see supra, paragraph 29) the whole set of the Algiers Accords must be taken into account in order to ascertain the framework of the two Declarations

and the extent of the obligations deriving from their provisions. Even if this context is considered, however, it remains that the Algiers Accords do not contain any specific provision for the transfer of the non-used funds in Dollar Account No. 1, as already repeatedly noted.

55. The Tribunal already has stated that the silence of the Accords on this issue cannot be considered as having left the disposition of the funds in excess in Dollar Account No. 1 in a legal vacuum. The legal situation, in this Case, is quite dissimilar to the issue in Case No. A1, where the Tribunal found that the Accords failed to state explicitly what should be done with the interest accrued on the amounts in the Security Account. See Decision No. DEC 12-A1-FT p. 3 (3 August 1982), reprinted in 1 Iran-U.S. C.T.R. 189, 191. In the situation dealt with in Case No. A1, no general provision of the Accords applied to the disposition of the interest accrued by the Security Account. No legal principle could be found in the Accords in order to resolve the issue whether this interest was to be retained in the Security Account to secure the payment of all arbitral awards against Iran, or whether it was to be returned to Iran, taking into consideration Iran's duty to make new deposits when the balance in the Account falls below $500 million. To the contrary, the absence of any specific rule to govern the disposition of the funds in excess in Dollar Account No. 1 cannot have the effect of nullifying the broad commitment assumed by the United States in General Principle A. It leaves without a clear answer, however, a few problems relating to the procedure and timing of the return to Iran of these funds.

56. As far as the question of procedure is concerned, the problems are rather simple. It has already been observed that Dollar Account No. 1 is subject to the sole direction of the Federal Reserve Bank, acting as fiscal

agent of the United States. Therefore, instructions from the United States Treasury Department will suffice to cause the required transfer. According to Paragraph 2(B) of the Undertakings, the balance of the funds in excess in Dollar Account No. 2 "shall be paid to Bank Markazi". On the other hand, the funds remaining in the Security Account after payment of all the arbitral awards against Iran "shall be transferred to Iran" pursuant to the terms of Paragraph 7 of the General Declaration. Absent a specific provision for the excess funds in Dollar Account No. 1, the Iranian Government can be asked to indicate the banking institution to which the transfer should be made.

57. The question of timing raises more difficult issues. In the case of Dollar Account No. 2, as already mentioned, the transfer to Bank Markazi of the balance of the funds remaining will take place only after all disputes are resolved and appropriate payments have been made. In other words, the return of the remaining funds to Iran will be delayed until the time of the completion of all the operations for which the Account was established. The same solution applies for the Security Account pursuant to Paragraph 7 of the General Declaration.

58. It has been argued that the same solution should be applied by analogy to Dollar Account No. 1. The flaw in this argument is that, in the absence of any agreement between the Parties on this point, the opposite interpretation could as well be defended on the basis of the celebrated dictum "expressio unius est exclusio alterius". In this context an important difference between Dollar Account No. 1 and the two other accounts established by the Algiers Accords must not be underestimated. The funds held in Dollar Account No. 1 are "subject to the Fed's sole direction"; in other words, since the Federal Reserve Bank acts as fiscal agent of the United States, they are subject only to the decisions of one of the parties to the Algiers Accords. On the contrary, the funds in the two other accounts are held in escrow, with the Algerian Central Bank

as Escrow Agent acting pursuant to settlement agreements between banks or to awards, which will be notified to it by the parties to these agreements or by the President of the Tribunal or of any other arbitral tribunal established pursuant to Paragraph 2(B) of the Undertakings. Such a difference in the management of the accounts does not permit easily an application by analogy to Dollar Account No. 1 of provisions relating to the disposition of funds in Dollar Account No. 2 or the Security Account.

59. As we have seen, the Parties draw opposite conclusions from the absence of a specific provision in the Accords. According to the Claimant, the United States should be directed to return to Iran the funds in excess immediately. The Respondent does not dispute that the funds not used for other purposes should be returned to Iran some time. It argues, however, that this can be done only after all claims against Iran are satisfied, and only through negotiations leading to a supplementary agreement. It insists that both Parties have accepted this procedure as the only way of resolving differences about the funds in excess.

60. In support of this opinion, the Respondent invokes a sentence added at the very last moment of the negotiation to Paragraph 4(a) of the Escrow Agreement in order to alleviate possible difficulties resulting from the rejection by Iran of the Technical Clarifications. The sentence reads as follows:

> "The contracting parties resolve to work in good faith to resolve any difficulty that could arise in the course of implementing this Agreement."

According to the Respondent, this sentence means that all difficulties arising from the implementation of the Escrow Agreement must be resolved through negotiations between the Parties. This applies also to the present dispute and, as it has been recalled in the section relating to jurisdiction, the Respondent goes so far as to contend that the

provision just quoted excludes this dispute from the jurisdiction of the Tribunal.

61. The Tribunal notes first that the wording of the said provision does not expressly exclude the Tribunal's jurisdiction in cases where that provision applies. Nothing in this sentence can be construed as superseding the provisions of Paragraph 17 of the General Declaration and of Article II, paragraph 3, of the Claims Settlement Declaration. Furthermore, the sentence does not even use the words "negotiation" or "dispute". It does not seem to be much more than a strong reiteration of the general principle embodied in Article 26 of the Vienna Convention on the Law of Treaties, according to which treaties in force must be performed by the parties in good faith.

62. Furthermore, the provision presently discussed was inserted into the Escrow Agreement, whereas Dollar Account No. 1 was established pursuant to the Undertakings. The provision deals with the difficulties "that could arise in the course of implementing this Agreement" (emphasis added), meaning clearly the Escrow Agreement. It is true that the immediately preceding sentence states that the General Declaration and the Undertakings "are made part of this Agreement", but this does not change the legal situation presently at stake. The Escrow Agreement was devised in order to bind to the Algiers Accords the banks involved in the process of implementing the General Declaration and the Undertakings, namely the Federal Reserve Bank of New York, Bank Markazi of Iran, and the Algerian Central Bank. This result was obtained through the incorporation-by-reference clause just mentioned. It does not follow from this clause that the device agreed upon for the resolution of difficulties arising from the implementation of the Escrow Agreement could apply to the Undertakings in which the former was not incorporated. Conversely, the fact that the provision presently discussed is not applicable in the instant Case does not mean that the Parties do not have to work in good faith to resolve any difficulty which may arise

in implementing the agreements which bind them. As it was already stressed, such an obligation is a general principle of international law, codified in the Vienna Convention, and applicable to every treaty.

63. Taking this into account, the Tribunal can understand that the Parties interpreted their rights and duties pursuant to the Algiers Accords differently, as is apparent from their respective -- and contradictory -- contentions before the Tribunal. The Tribunal notes, however, several facts which undoubtedly have a bearing on the question of the time at which the funds in excess in Dollar Account No. 1 should be returned to Iran.

64. The first of those facts is that no transfer was made from or to Dollar Account No. 1 since May 1982, except for investments made with the existing funds for the purpose of earning interest on the funds. According to the Respondent, a few disputed items still remain to be resolved, but they involve an amount which is only a relatively small percentage of the funds presently held in the Account. No progress seems to have been made for several years. The Respondent gave no indication of the time within which these issues will possibly be resolved.

65. Furthermore, both Parties agree that the funds presently available in Dollar Account No. 2 are more than sufficient for paying all indebtedness held by United States banking institutions still owing and to be paid from this Account pursuant to Paragraph 2(B) of the Undertakings. The issue of the so-called "January interest", the payment of interest from 1 to 19 January 1981 on the syndicated loans and credits, now appears to be practically resolved, as the Parties indicated at the Hearing that they have agreed that this interest will be paid from Dollar Account No. 2.

66. This being so, it is well established that a sizeable percentage of the funds presently available in Dollar Account No. 1 will not, in any case, be needed for

the purpose for which this Account was established. Therefore, in so far as Iran performs its own obligations in conformity with the Algiers Accords, no legal foundation can be found for keeping in this Account funds that are not needed, when the United States, ultimately responsible for this Account, undertook in General Principle A "to restore the financial position of Iran, in so far as possible."

67. The United States, understandably, requests that a reconciliation of accounts leading to a release and discharge be accepted by the Parties before any decision is taken about the disposition of the remaining balance of Dollar Account No. 1. This demand should not give rise to serious difficulties, since counsel for the Iranian Government stated during the Hearing that he was authorized to declare that the Government of Iran was ready to give a complete release regarding the administration of Dollar Account No. 1 by the United States and the Federal Reserve Bank of New York. As the Tribunal understood it, this release would mean a waiver of any challenge to such administration.

68. Taking the foregoing into account, the Tribunal finds that the implementation of General Principle A of the General Declaration requires, at this stage, that the two Parties should immediately enter into negotiation, and negotiate in good faith with a view to determine, by mutual agreement, which claims are presently pending against Dollar Account No. 1 and what amount should consequently be kept in this Account in order to pay such claims. In the same agreement, the Parties should determine what amount of the funds presently held in Dollar Account No. 1 is not needed to pay the remaining claims pending against this Account, and such amount should be transferred to Iran immediately upon conclusion of such agreement. In the same agreement, a reconciliation of accounts leading to a release and discharge of the United States in the administration of Dollar Account No. 1 should be agreed upon by the Parties. Should the Parties be unable to arrive at such an agreement within

a reasonable time after the issuance of this Award, they might apply to this Tribunal, individually or jointly, in order to resolve the remaining difficulties.

69. The settlement of the claims presently pending against Dollar Account No. 1 should be pursued with due diligence. After they are resolved and appropriate payments have been made, the remaining balance of funds should be immediately transferred to Iran.

IV. AWARD

70. In view of the foregoing,

THE TRIBUNAL DETERMINES AS FOLLOWS:

(a) The Tribunal has jurisdiction over the dispute between the Parties relating to the interpretation and performance of General Principle A of the General Declaration.

(b) The implementation of General Principle A of the General Declaration requires, at this stage, that the two Parties shall immediately enter into negotiation and negotiate in good faith with a view to arrive at an agreement on:

(i) the determination of the claims which are still presently pending against Dollar Account No. 1 and of the amount which should consequently be kept in this Account in order to pay such claims;

(ii) the amount of the funds presently held in Dollar Account No. 1 which is not needed to pay the remaining claims pending against this Account; and

(iii) the terms of a reconciliation of accounts leading to a release and discharge of the United States in the administration of Dollar Account No. 1.

(c) The amount determined pursuant to sub-paragraph (b)(ii) above shall be transferred to Iran immediately upon conclusion of such an agreement.

(d) Should the Parties be unable to arrive at such an agreement in the four (4) months following the issuance of this Award, they may apply to this Tribunal, individually or jointly, in order to resolve the remaining difficulties.

(e) The settlement of the claims presently pending against Dollar Account No. 1 shall be pursued with due diligence. After they are resolved and appropriate payment has been made, the remaining balance of funds shall be immediately transferred to Iran.

Dated, The Hague,
20 August 1986

Karl-Heinz Böckstiegel
President

In the name of God

Robert R. Briner

Michel Virally

Hamid Bahrami-Ahmadi
Concurring Opinion

In the name of God

Howard M. Holtzmann
Dissenting Opinion

Mohsen Mostafavi
Concurring Opinion

George H. Aldrich
Dissenting Opinion

In the name of God

Parviz Ansari Moin
Concurring Opinion

Charles N. Brower
Dissenting Opinion