A15 - 803

۱۵ الف - ۸۰۳

IRAN-UN ... AL

دیوان داوری دعاوی ایران - ایالات متحده

...NAL DOCUMENTS IN SAFE

803

Case No. A15 Date of filing: 20 Aug 86

** AWARD - Type of Award ______
- Date of Award ______
______ pages in English ______ pages in Farsi

** DECISION - Date of Decision ______
______ pages in English ______ pages in Farsi

** CONCURRING OPINION of ______
- Date ______
______ pages in English ______ pages in Farsi

** SEPARATE OPINION of ______
- Date ______
______ pages in English ______ pages in Farsi

** DISSENTING OPINION of Three American Arbitrators
- Date 20 Aug 86
23 pages in English ______ pages in Farsi

** OTHER; Nature of document: ______
______
- Date ______
______ pages in English ______ pages in Farsi

R/12

CASE NO. A15 (I:G) 803
FULL TRIBUNAL
AWARD NO. ITL 63-A15(I:G)-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

DISSENTING OPINION OF
JUDGES HOLTZMANN, ALDRICH, AND BROWER

The Tribunal rests the Interlocutory Award entirely on the statement in General Principle A of the General Declaration[1] that the United States intended to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." That statement, however, has nothing to do with the present dispute between the States Parties to the Algiers Accords over the proper disposition of the balance remaining in the fund created by

[1]Declaration of the Government of the Democratic and Popular Republic of Algeria, reprinted in 1 Iran-U.S. C.T.R. 3.

the Undertakings[2] to pay off syndicated bank loans. The Tribunal concludes otherwise because it fails to recognize the basic character of the exchange embodied in the Accords.

The statement in General Principle A on which the Tribunal relies reflects only the first stage of a reciprocal, two-stage deal. Keeping its half of the bargain, the United States did "restore the financial position of Iran, in so far as possible," on 19 January 1981, by lifting the freeze on Iranian assets imposed by President Carter in response to the taking of American hostages so as to permit the transfer, principally, of over $7.955 billion of cash, gold bullion, and securities, including the funds here at issue, for Iran's benefit on that date.[3] This first stage, the result of intergovernmental negotiations, is set forth in the General

---

[2]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, reprinted in 1 Iran-U.S. C.T.R. 13.

[3]The $7.955 billion in assets was transferred from the Federal Reserve Bank of New York and "overseas banking offices of U.S. banks" as provided in Paragraphs 4 and 5, respectively, of the General Declaration. The transfer provisions governing all other Iranian property within the jurisdiction of the United States are also contained in the General Declaration. Paragraphs 6 and 7 obligated the United States within a specified time to "bring about the transfer . . . of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon," $1 billion of which Iran agreed be used to establish the Security Account out of which certain of the Tribunal's awards are paid. Paragraphs 8 and 9, respectively, required the United States more immediately to bring about the transfer of all other "Iranian financial assets (meaning funds or securities)" and to arrange for the transfer of all other "Iranian properties" which were "located in the United States and abroad."

Declaration and the Claims Settlement Declaration.[4] Upon its completion, Iran was left where it was before 14 November 1979 -- with billions of dollars at its disposal but substantial loans outstanding.

In return for the restoration of its November 1979 financial position, Iran issued instructions for the disbursement of certain of the transferred assets to ensure payment of various of its international financial obligations. This second stage, largely a product of discussions in the "Bankers' Channel,"[5] was recorded in the separate Undertakings. It radically altered Iran's "financial position" from what it had been as of 14 November 1979 by arranging for the payment of substantial indebtedness existing at that time. As Warren Christopher, the American negotiator of the Accords, has written:

> In the case of the bank settlement, . . . we were able to accommodate Iranian sensibilities without sacrificing substance. They wanted back all of their frozen overseas bank deposits, an outcome that would have left the bank creditors of Iran unprotected. Through an escrow arrangement, however, all of Iran's overseas deposits were momentarily given up by the banks; but the major part of the funds was immediately returned to the banks by the escrow agent to pay off the loans.

Christopher, Introduction, in American Hostages in Iran 21 (W. Christopher ed. 1985) (emphasis added). It is this second set of arrangements -- those concerned with repayment of Iran's bank debts -- that has spawned the present dispute.

---

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 9.

[5] See Hoffman, The Bankers' Channel, in American Hostages in Iran 235-80 (W. Christopher ed. 1985).

As a result of its failure to recognize the discrete elements of the States Parties' agreement, the Tribunal incorrectly or inadequately answers each of the questions posed by this Case. First, the Tribunal finds jurisdiction under General Principle A only by ignoring the true jurisdictional issue raised by Iran's reliance on that provision -- whether it sets forth a relevant and substantive requirement by itself susceptible of interpretation and performance. Next, upon reaching the merits, the Tribunal misreads General Principle A to set forth a substantive, independently enforceable mandate, when in fact the States Parties meant it to provide no more than interpretive guidance. As well, even were one to read General Principle A as substantive, the Tribunal errs in applying it to the present dispute, whose origins, like the scope of General Principle A itself, make clear the irrelevance of that provision. Finally, the Tribunal propounds a solution which, assuming jurisdiction, is at odds with such guidance as can be gleaned from relevant provisions of the Accords. In short, we find the Interlocutory Award incompatible with the language, structure, and purposes of the Algiers Accords.

I.

The Tribunal casts its jurisdictional holding in innocuous terms. Iran contends that General Principle A, a paragraph of the General Declaration which the Full Tribunal has jurisdiction to interpret pursuant to Paragraph 17 of that Declaration, requires the immediate return of that portion of the residue of the $3.667 billion Fund which would not be necessary to satisfy remaining claims against the Fund. The United States responds that General Principle A has no independent operative force and has in any event no relevance to the disposition of the funds remaining in the $3.667 billion Fund. We agree with the Tribunal that these differences give rise to an interpretive dispute concerning the effect of General Principle A over which the Tribunal has jurisdiction by virtue of Paragraph 17 of the General Declaration. See Interlocutory Award, para. 12.

The conclusion that jurisdiction attaches to the dispute under these circumstances, however, merely confirms the obvious obligation of this Tribunal, like all others, to react when a party invokes its jurisdiction. In finding jurisdiction here, the Tribunal does no more than exercise its Kompetenz-Kompetenz. The real jurisdictional question, meanwhile, proves identical to the initial question on the merits: whether General Principle A of the General Declaration constitutes a relevant and substantive obligation. If it does not, then it cannot itself be the source of required "performance." On that score, whether under the heading of jurisdiction or the merits, we take issue with the Tribunal's fundamental misinterpretation of the import of General Principle A.

II.

A.

Immediately after a preamble reciting the intention of the States Parties to resolve "the crisis in their relations arising out of the detention of the 52 United States nationals in Iran," the General Declaration provides:

> GENERAL PRINCIPLES
>
> The undertakings reflected in this Declaration are based on the following general principles:
>
> A. 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.
>
> B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Contrary to the Tribunal's conclusion, close examination of this section discloses what its title suggests: It does not set forth primary, enforceable obligations of the States Parties to the Algiers Accords. Instead, the General Principles of the General Declaration simply state the conceptual background against which the substantive provisions of the Declaration are to be viewed and, if necessary, interpreted.

In the first place, textual evidence makes plain that General Principles A and B are of a different character than the concrete obligations set forth elsewhere in the General and Claims Settlement Declarations. The introductory sentence, for example, draws an express distinction between the "undertakings" of the General Declaration and the "general principles" of this section, suggesting that the former do not include the latter. The semantic relations of the introductory sentence, moreover, reveal that the "undertakings" reflected in the General Declaration have an immediate significance that the "general principles" on which they "are based" lack. The ordinary meaning of the terms employed indicates as much: While "undertakings" give rise to concrete obligations, "general principles" provide interpretive guidance or reflect underlying suppositions. The organizational structure of the General Declaration as a whole also suggests a difference: the general principles appear in an unnumbered section consisting of a single unnumbered paragraph, while the four "Points" which follow, setting forth undeniably concrete obligations, are separately numbered and in turn consist of individually numbered paragraphs. Thus, while it is clear that the general principles are "an integral part of the 'commitments' made by the two Governments," Interlocutory Award, para. 16, it is equally clear that they are a different species of commitment than the obligations set forth in the remainder of the Declaration.[6]

In fact, the objects, purposes, and context of General Principles A and B demonstrate that they reflect commitments on the part of the United States which were prerequisite to the deal embodied in the Algiers Accords, but which are not in themselves primary, enforceable obligations. Besides the overwhelming American objective to free the hostages, the

---

[6]In equating General Principles A and B with the specific undertakings which follow, the Tribunal relies in part on "the principle of effectiveness (<u>ut res magis valeat quam pereat</u>), generally accepted as one of the main principles of treaty interpretation." Interlocutory Award, para. 17. We question whether the principle of effectiveness, as such, retains the status the Tribunal ascribes to it, as the rules of interpretation of the Vienna Convention do not include it. <u>See</u> Vienna Convention on the Law of Treaties, <u>opened for signature</u> 23 May 1969, U.N. Doc. A/Conf. 39/27 (<u>entered into force</u> 27 January 1980) ("Vienna Convention"), <u>reprinted in</u> 8 <u>Int'l Legal Materials</u> 679 (1969).

Accords reflect a bargain whereby the United States obtained satisfaction of monetary claims against Iran and its instrumentalities, while Iran obtained access to those of its previously frozen assets not dedicated to the three accounts which would secure and pay American claims -- the $3.667 billion and $1.418 billion Funds established pursuant to Paragraph 2 of the Undertakings, and the $1 billion Security Account established pursuant to Paragraph 7 of the General Declaration. To effect this bargain, the Accords provided for precisely defined transfers of Iranian assets held in American banks -- first, to the Central Bank designated by the States Parties, and then from the Central Bank to, in part, the dedicated accounts and, in part, Iran.[7]

At the time the States Parties were negotiating the Algiers Accords, the Iranian assets for whose transfer the Accords would provide were subject to the freeze imposed by President Carter on 14 November 1979 in response to the seizure of the American Embassy in Tehran and detention of American nationals there. See Case No. A1 (Issues I, III & IV), 1 Iran-U.S. C.T.R. 189, 191 (1982); Dames & Moore v. Regan, 453 U.S. 654, 662-63 (1981). Many of these assets were subject also to attachments obtained pursuant to litigation arising generally from the fracture in normal commercial and financial relations brought on by the Islamic Revolution. See Case No. A1, supra. Thus, the bargain envisioned by the Accords could not have been effected unless the United States acted to loose the Iranian assets from the legal encumbrances attaching to them.

---

[7] See note 3, supra. In addition, the Accords provided that the United States would bring about the transfer to Iran of certain Iranian properties. See id.

Against this backdrop, General Principle A, which dealt with the freeze, and General Principle B, which dealt with pending and potential litigation, appear as necessary preconditions to the primary obligations undertaken by the United States and Iran in the body of the General Declaration. Specifically, in General Principle A, the United States confirmed that restrictions placed upon the transfer of Iranian assets in response to the hostage-taking would not stand in the way of fulfillment by the United States of its primary obligations under the Accords. That General Principle A required the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," the date on which President Carter imposed the freeze, demonstrates that the States Parties expressly intended the provision to undo its effects.[8]

The narrowly circumscribed significance of the language obligating the United States to "restore" Iran's financial position is reinforced by the "very definite qualifications"

---

[8]Similarly, in General Principle B, the United States recognized that it would have to take whatever steps were necessary with regard to domestic litigation to allow the asset transfer and dispute settlement provisions of the Declarations to go into effect. Compare, e.g., General Declaration, General Principle B ("Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."), with Claims Settlement Declaration, Article I ("Any [claims of nationals of the United States against Iran and claims of nationals of Iran against the United States] not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement.").

expressed by additional text in General Principle A itself. Interlocutory Award, para. 19. Its first sentence states plainly that the United States made a commitment to restore Iran's financial position as of 14 November 1979 only "[w]ithin the framework of and pursuant to the provisions of the two Declarations." The Tribunal has already recognized that this language, which appears also in General Principle B, permits the Tribunal to implement the General Principles only by reference to "the specific provisions of the two Declarations." Case No. A2, 1 Iran-U.S. C.T.R. 101, 103 (1982). In Case No. A2, Iran argued that the statement in General Principle B that the States Parties intended to terminate "all litigation as between the government of each party and the nationals of the other" conferred jurisdiction on the Tribunal to decide original claims by Iran against United States nationals. The Tribunal flatly rejected that argument, pointing out that the objectives expressed in General Principle B, like those in General Principle A, were to be implemented "within the framework of and pursuant to the provisions of the two Declarations." Because none of "the specific provisions of the two Declarations" authorized the disputed class of claims, the Tribunal concluded that it had no jurisdiction over them, notwithstanding the superficially broad language of General Principle B. Thus, by reading "very sweeping" obligations into General Principle A which arise independently of concrete obligations stated elsewhere in the Declarations, Interlocutory Award, para. 19, the Tribunal ignores the teaching of Case No. A2.[9]

---

[9]Although the Tribunal does not discuss Case No. A2, it appears to accept the lesson of that Case when it states that because the General Principles "preced[e] in the General Declaration the commitments of the parties, [they] must be understood as embodying broad legal commitments, with the ways of their implementation being detailed in the following parts of the General Declaration." Interlocutory (Footnote Continued)

Were any further guidance from the language of General Principle A necessary, its second sentence identifies both the content of the obligation to restore and the framework and provisions which define its scope: "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" of the General Declaration.[10] In other words, the obligation to restore, or to lift the freeze, was not an end in itself, but operated to permit transfers specified elsewhere to take place. That being so, the United States fulfilled its obligation under General Principle A when it lifted the freeze so as to permit the transfers contemplated by Paragraphs 4 through 9 to occur.[11] Use of the phrase "in so far as possible" in the first sentence of General Principle A as part of the "context" defined in the second sentence

(Footnote Continued)
Award, para. 17. In spite of this assurance, however, the Tribunal proceeds to read into General Principle A an obligation independent of the commitments "detailed in the following parts of the General Declaration."

[10]Notwithstanding the obvious reference in the first sentence of General Principle A to the freeze imposed on 14 November 1979, and the explanatory connective "[i]n this context" at the beginning of the second sentence, the Tribunal does not explain why it concludes that "[n]othing in this second sentence can . . . 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," and that "[t]he bringing about of such a mobility rather appears as a first step in the restoration contemplated by General Principle A." Interlocutory Award, para. 20. In any event, even taken in isolation, the first sentence of General Principle A imposes an obligation only, as noted, "[w]ithin the framework of and pursuant to the provisions of the two Declarations." The import of General Principle A, therefore, still must depend on specific provisions found elsewhere.

[11]The final transfers were those of funds from domestic deposits in United States banks, pursuant to Paragraphs 6 and 7 of the General Declaration, which were completed by August 1981. <u>See</u> note 3, <u>supra</u>.

underscores that the limits of the "possible" have been definitively determined as of 19 January 1981 in Paragraphs 4 through 9 and hence do not remain open for future consideration independently of these Paragraphs.

In sum, the drafters of General Principle A could scarcely have been more precise in explaining the objective of the provision, nor clearer that the "general principles" do not themselves constitute substantive "undertakings," which are to be found instead under Points I through IV.

B.

In any event, whether independently enforceable or not, General Principle A has nothing to say about the disposition of unfrozen "Iranian assets" once they have been dedicated to the repayment of Iran's debts. As the preceding discussion explains, its evident purpose was instead simply to remove the obstacle posed by the freeze to the transfer of Iranian assets outlined in Paragraphs 4 through 9 of the General Declaration. Thus, even were one to read substantive content into General Principle A, it would still provide the Tribunal no assistance in its present task.

The Algiers Accords created three funds from the unfrozen and transferred Iranian assets, each dedicated to the payment of a defined class of claims against Iran. Paragraph 7 of the General Declaration created a Security Account of $1 billion "for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement." Paragraph 2(A) of the Undertakings provided for the transfer of $3.667 billion to the Federal Reserve Bank of New York in order "to pay the unpaid principal of and interest through December 31, 1980" on loans to Iran or its instrumentalities by banking syndicates of which a United States banking institution was a member, as well as on loans by such syndicates which Iran or its instrumentalities had guaranteed. Paragraph 2(B) of the Undertakings provided that the Central Bank designated by the States Parties would retain $1.418 billion for the purpose, as relevant here, of paying the unpaid principal of and interest owing on, first, the indebtedness described in Paragraph 2(A) if the $3.667 billion fund was not sufficient to do so, and second, "all other indebtedness held by United States banking institutions of, or guaranteed by," Iran or its instrumentalities.[12]

The present dispute arises because there is no provision in Paragraph 2(A) which expressly provides for the disposition of any remaining balance in the Fund it established. In contrast, Paragraph 7 of the General Declaration requires Iran to maintain the Security Account at a level of at least $500 million, and provides that the residue will be returned to Iran only when the President of this Tribunal has certified "that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement." Similarly, Paragraph 2(B) of the Undertakings provides that the residue of the $1.418 billion Fund will be paid to Bank Markazi only "[a]fter all disputes are resolved . . . and appropriate payment has been made" in accordance with the procedures there set forth.

Given the structure of the Accords and the sequence of the States Parties' obligations under them, General Principle A could not logically apply to the $3.667 billion Fund, or to either of the other dedicated funds created by the Accords. The obligation to lift the freeze and to

[12]The $1.418 billion Fund also had "the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions." See Case No. A16, 5 Iran-U.S. C.T.R. 57, 63-64 (1984).

permit free transfer of Iran's assets was to be implemented at once. It would, if applicable to the $3.667 billion Fund, have required unrestricted transfer to Iran of this Fund before it could have been used for the purpose for which it was created. Moreover, the monies transferred to that Fund from the Bank of England were no longer "Iranian assets" within the meaning of General Principle A. The assets now constituting the balance of the $3.667 billion Fund were first unfrozen, pursuant to General Principle A, and transferred to escrow, pursuant to Points II and III of the General Declaration, and then dedicated to the repayment of certain indebtedness, pursuant to Paragraph 2 of the Undertakings. While the first step restored Iran's financial position to that which existed on 14 November 1979, the second step significantly altered that position. And the Parties could not have intended a provision addressing the initial step of restoration to govern disposition of remaining monies upon completion of the second step of debt repayment.[13]

In sum, General Principle A is confined by its own terms to the restoration of Iran's financial position to that which existed prior to the imposition by the United States of economic sanctions on 14 November 1979, in response to the seizure of the hostages, and was evidently designed to ensure only that the United States lifted those sanctions. No economic sanctions apply to the monies remaining in the $3.667 billion Fund, however, and the United States does not retain the Fund because of any such sanctions. To construe General Principle A to govern the

---

[13]The Tribunal confirms that the Undertakings have nothing to do with restoration of Iran's pre-14 November 1979 financial position when it declares that it is "clear that the object and purpose of the Undertakings [was] to implement Paragraph 3 of the General Declaration," Interlocutory Award, para. 29, rather than any of Paragraphs 4 through 9 or General Principle A.

disposition of the balance of the Fund, as does the Tribunal, requires a distortion of the plain meaning of the terms of the Accords and a fanciful disregard of their context.

III.

We now turn to consideration of the mechanisms that the Tribunal chooses to resolve this Case. The Tribunal concludes that "in so far as Iran performs its own obligations in conformity with the Algiers Accords, no legal foundation can be found for keeping in [the $3.667 billion Fund] funds that are not needed" to satisfy all presently pending claims against the Fund. Interlocutory Award, para. 66. Accordingly, 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 [the $3.667 billion Fund] and what amount should consequently be kept in this [Fund] in order to pay such claims. In the same agreement, the Parties should determine what amount of the funds presently held in [the $3.667 billion Fund] is not needed to pay the remaining claims pending against this [Fund], 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 [the $3.667 billion Fund] should be agreed upon by the Parties.

Id., para. 68.

We agree with the Tribunal that the United States has not violated the Algiers Accords by retaining until now the balance remaining in the $3.667 billion Fund. As the relief ordered demonstrates, the Tribunal correctly recognizes that the Interlocutory Award is based on interpretation of obligations that will ripen in the future rather than on correction of performance to date. We also agree that the Accords do not permit the United States indefinitely to retain possession of any excess in the Fund, whether as additional security or for any other purpose. Nevertheless, assuming a proper source of jurisdiction,[14] the Tribunal's resolution of this dispute cannot be squared with the bargain embodied in the Accords.

As the Tribunal notes, the absence of a specific provision governing the disposition of the residue of the $3.667 billion Fund does not necessarily leave those funds in "a legal vacuum." Interlocutory Award, para. 41 (emphasis in original). Thus, again assuming jurisdiction, the Tribunal is correct to seek "legal guidance" in the "provisions of the Accords taken together and interpreted in the context of their framework." Id. In other words, as Article 31 of the Vienna Convention instructs, the Tribunal should attempt to solve the interpretive problem before it by resorting to the customary guides of language, structure, and purpose. Accurately assessed, however, those guides point the Tribunal to a fundamentally different result than that it adopts.

The most salient factor in this regard is the negotiating history which gave rise to the present dispute. There is no mystery as to the reasons for the absence in the

---

[14]For reasons which need not be elaborated here, Judge Aldrich believes that the Tribunal has jurisdiction to resolve the present dispute pursuant to a combination of General Principle B and Paragraph 2 of the General Declaration. Judges Holtzmann and Brower believe that there is no source of jurisdiction which would permit the Tribunal to intervene in the present controversy, because they believe that if such controversy arises out of any part of the Algiers Accords, it arises out of the Undertakings, to which the Tribunal's interpretive jurisdiction does not extend. See Concurring Opinion of Charles N. Brower, in Which Howard M. Holtzmann Joins, in Case No. A17, Decision No. DEC 37-A17-FT (18 June 1985).

Accords of a provision expressly governing the disposition of any balance in the $3.667 billion Fund, as the Parties have explained its provenance. In essence, the negotiators of the Algiers Accords had designed the two funds established for the payment of bank debts to function, by means of reciprocal "pourover" provisions, in a mutually supportive manner. If payment of the syndicated debt required more than $3.667 billion, the additional amounts needed were to be transferred, upon order of the Escrow Agent, to the New York Federal Reserve Bank of New York from the $1.418 billion Fund. Conversely, if payment of the syndicated debt required less than $3.667 billion, the residue was to be transferred to the $1.418 billion Fund. Had the Accords been executed in this form, the present dispute would not have arisen, as the residue of the $3.667 billion Fund would be poured over into the $1.418 billion Fund, and any excess in that Fund would be returned to Iran pursuant to the return provisions of Paragraph 2(B) of the Undertakings. In the event, however, the Accords did not take this form. The first of these two transfer provisions remained in the final text, but the second was contained in a model telex instruction attached to draft "Implementing Technical Clarifications and Directions," a document which, in the end, Iran rejected and therefore was not concluded.

One of Iran's representatives at the Hearing in this Case was Mr. Ali Manavi-Rad, Director of the International Department of Bank Markazi. Mr. Manavi-Rad, who participated in the discussions in Tehran leading to the decision to reject the Technical Clarifications, stated unequivocally that Iran did not do so because of objections to the provision for pouring over any residue in the $3.667 billion Fund. It is clear that the United States, which was prepared to the end to execute the Technical Clarifications, also had no objection. Thus, the evidence before the Tribunal indicates that this pourover provision remained acceptable to both Parties at the time the Accords were concluded. Indeed, the Parties' conduct immediately after conclusion of the Accords suggests that both still assumed that the absent pourover provision remained. Bank Markazi gave the pourover instruction in a telex it sent to the Federal Reserve Bank on 20 January 1981, and the Treasury Department payment instructions to the Federal Reserve Bank of 20 January 1981 also provided for a pourover of any excess funds in the $3.667 billion Fund to the $1.418 billion Fund. Ten days later, however, presumably in belated recognition of the final version of the Accords, the Treasury Department instructed the Federal Reserve Bank to retain any excess in the $3.667 billion Fund. Likewise, on 23 November 1981 Bank Markazi sent a telex "overrul[ing]" the payment instructions contained in its earlier telex, including the pourover provision, which the United States had in any event declined to follow in light of the failure of the Parties to execute the Technical Clarifications. Thus, the absence of an agreed text containing the provision for pourover out of the $3.667 billion Fund was the incidental result of last-minute negotiating problems that arose over other provisions of the draft "Implementing Technical Clarifications and Directions," not from any desire by either Party to avoid this pourover obligation.

Clearly, then, the States Parties saw the two funds established to pay bank claims as organically linked. Specifically, at the time the Accords were concluded and for a short time thereafter, both States Parties assumed that no part of either Fund would be returned to Iran until all claims against both had been settled. Thus, were the Tribunal to respect the Parties' common assumption at the time they concluded the Accords, it would hold that, absent mutual agreement otherwise, the United States has no obligation to transfer the residue of the $3.667 billion Fund until all bank claims have been resolved and the balance of the $1.418 billion Fund returned to Iran. To so hold would not require the Tribunal to reinstate the rejected pourover provision; it would require simply that the Tribunal give effect to the Parties' common assumption as to the separate matter of the date of return of any balance in the $3.667 billion Fund.

Indeed, even as executed, the Accords suggest that the Parties intended just such a result. In defining the purpose of the $1.148 billion Fund, Paragraph 2(B) of the Undertakings refers to both Funds. It provides for the Central Bank

> [t]o retain U.S. $1.418 billion in the Escrow Account for the purpose of paying the unpaid principal of and interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the U.S. $3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid, and for the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions.

After further provisions defining the procedures for resolution of those claims through negotiation or arbitration, Paragraph 2(B) concludes by stating:

> After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

Presumably composed at a time when both Parties expected the final version of the Accords to provide for reciprocal pourover, the reference in this final sentence to "the funds referred to in this Paragraph (B)" should be read to encompass both the $1.148 billion and the $3.667 billion, as both are mentioned in the first sentence of Paragraph 2(B). That the Parties saw no need to amend this language upon rejection by Iran of the Technical Clarifications is evidence that, notwithstanding the disappearance of the pourover provision, neither Party had an objection to the previously contemplated result as to the timing of a return. Thus, even in the absence of the pourover provision itself, the Undertakings may fairly be read to provide for the return of the residue of both Funds pursuant to the provisions of Paragraph 2(B). At the very least, this final sentence unambiguously demonstrates the organic linkage of the two funds, pointing a way to a resolution of the present dispute that comports with the structure and purpose of the Accords.

The Tribunal's error in severing the link between the two bank Funds, however, is not the only way in which it ignores the broad guidance provided by the Accords. Even were one to read the final sentence in Paragraph 2(B) of the Undertakings to govern only the return of the residue of the $1.418 billion Fund, it would remain clear that that residue is to be returned to Iran "[a]fter all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made." Similarly, Paragraph 7 of the General Declaration provides that the balance of the Security Account, in which Iran must "maintain a minimum balance of U.S. $500 million," will not be returned to Iran until the President of this Tribunal has certified "that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement." Thus, to the extent that other provisions in the Accords supply legal guidance, they teach that the drafters did not intend to authorize the <u>partial</u> return of any dedicated fund. An obvious purpose of these provisions is to prompt Iran to cooperate in resolving expeditiously all relevant disputes. By determining that the United States may not retain possession of funds that will not be needed to satisfy remaining claims against the $3.667 billion Fund, the Tribunal ignores this element of the balance created by the Accords.

The Tribunal rejects the guidance provided by the other dedicated accounts by relying on "the celebrated dictum 'expressio unius est exclusio alterius.'" Interlocutory Award, para. 58. The application of that principle is clearly inappropriate here, however. The "expressio unius" principle is a rule of construction which purports to identify an intention on the part of the drafters of a given text deliberately to exclude an absent provision when counterparts to that provision appear in analogous places. We need no such rule of construction to explain the absence of a provision expressly governing disposition of the residue in the $3.667 billion Fund, because we need not hypothesize. As the Parties have explained, the gap which gives rise to the present dispute was the unintended consequence of last-minute objections to unrelated provisions in the draft Technical Clarifications.

The Tribunal also attempts to distinguish the $3.667 billion Fund on the ground that its funds are held by the Federal Reserve Bank of New York "subject to the Fed's sole direction,"[15] while the funds in the $1.418 billion Fund and the Security Account are held in escrow. That distinction has only to do, however, with control over disbursement of those funds for their dedicated purpose; it does not bear on the timing of the return of the balance once that purpose has been fulfilled. Iran has never alleged undue delay on the part of the Federal Reserve Bank in paying syndicated bank claims, nor is there any evidence of it.

The Tribunal might have found the key to this Case in its resolution of a similar dilemma in Case No. A1 (Issues I, III & IV), 1 Iran-U.S. C.T.R. 189, 190-92 (1982), in

---

[15] Technical Arrangement Between Banque Centrale d'Algerie and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York, para. 7(a)(i), reprinted in 1 Iran-U.S. C.T.R. 20, 21.

which it held that accrued interest on monies in the Security Account should initially be retained in a separate account and then returned to Iran in accord with the provisions of the General Declaration governing return of the Security Account residue -- that is, when all claims against that Account have been satisfied. In Case No. A1, as here, frozen Iranian assets were used to create a fund for the purpose of paying certain of Iran's debts; there, as here, a dispute arose between Iran and the United States because the Accords failed explicitly to state any instruction concerning disposition of the money. Unable to find a common intention on the point on the part of the Parties, and unwilling to rely solely on banking usages in the unique circumstances of the Security Account, the Tribunal in Case No. A1 found a solution "within the structure of the Agreements themselves." The Tribunal observed that the Accords had carefully balanced Iran's interests in the funds "against those of the United States and its national claimants, who had the benefit of the freeze orders and, in some cases, of judicial attachments of Iranian assets." It recognized that in order not to favor either Party, it was "necessary to maintain the present equilibrium by, in essence, freezing the situation as it has been brought about . . . by the parties." Accordingly, the Tribunal ordered that the funds be maintained in a separate account "unless and until" the Parties agreed on a different disposition. The Tribunal ruled that, absent agreement, the funds should be returned to Iran in accordance with the return provisions governing the Security Account. It ruled as well that Iran could use the funds to fulfill its obligation to replenish the Security Account, a use which would inure to the benefit of both Parties.

Indeed, the course adopted in Case No. A1 recommends itself even more strongly in the present Case, because here, unlike in Case No. A1, the Parties have satisfactorily explained the origin of the gap giving rise to the dispute.

Thus, here as in Case No. A1, the Tribunal should in the first instance leave the Fund where the Parties left it unless and until they agree on an appropriate disposition. Likewise, here as in Case No. A1, the Tribunal should draw guidance from the most relevant of the other return provisions in the Accords to determine when, absent agreement, the monies in question should eventually be returned. This guidance leads us to conclude that unless the Parties agree otherwise, the residue should be returned when all claims against the $3.667 billion Fund and the $1.418 billion Fund have been resolved. In this way, as in Case No. A1, the Tribunal would maintain the balance established by the Accords.

IV.

The Tribunal's failure to bring into view the complete framework of the Algiers Accords leads it to rely on a careful, elaborate, but ultimately misplaced textual exegesis of General Principle A for jurisdictional and substantive solutions to a dispute wholly unrelated to that provision. Misunderstanding the basic character of the exchange embodied in the Accords, the Tribunal adopts the one solution to the dispute that the Parties clearly could not have intended and thereby unsettles the equilibrium achieved in the bargain they struck. The resulting Interlocutory Award appears to us more an effort to implement the Tribunal's own sense of fairness than a reasoned interpretation of the treaty texts.

We dissent.

Dated, The Hague
20 August 1986

Howard M. Holtzmann   George H. Aldrich   Charles N. Brower