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IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 823
CHAMBER THREE
AWARD NO.595-823-3

BANK MARKAZI IRAN,
Claimant

and

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent.

AWARD

Appearances:

For the Claimant:

Mr. M.H. Zahedin-Labbaf,
Agent of the Government of the Islamic Republic of Iran;
Mr. S. Mohammadi,
Legal Adviser to the Agent of the Government of the Islamic Republic of Iran;
Prof. B. Ristau,
Counsel for Claimant;
Mr. A. Hejazi,
Financial Adviser to Claimant;
Mr. A. Farrashi,
Mr. M. Rashidi,
Mr. A. Tayyabifard,
Representatives of Bank Markazi;
Dr. A. Manavi-Rad,
Mr. John Allday,
Witnesses.

For the Respondent:

Mr. Thomas C. Baxter, Jr.,
General Counsel for Respondent;
Ms. Karen Gifford,
Counsel for Respondent;
Mr. Richard Charlton,
Mr. James H. Freis, Jr.,
Attorneys for Respondent;
Mr. David H. Willey,
Prof. Rosa Lastra,
Mr. Derek Ross,
Mr. Heinz Riehl,
Witnesses.

Also present:

Mr. Allen S. Weiner,
Agent of the Government of the United States of America;
Ms. Jessica R. Holmes,
Deputy-Agent of the Government of the United States of America.

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INTRODUCTION

1. Claimant in this Case is BANK MARKAZI, IRAN ("Bank Markazi" or "Claimant"), the Central Bank of the Islamic Republic of Iran. Respondent in this Case is the FEDERAL RESERVE BANK OF NEW YORK ("the New York Fed" or "Respondent"). In the Statement of Claim, Bank Markazi claims a principal amount and an amount of unpaid interest allegedly owing on certain principal sums. As the Case has evolved, Bank Markazi claims that the New York Fed breached obligations it had with respect to funds provided to the New York Fed to invest. The New York Fed is alleged to have breached these obligations during the period of 14 November 1979 to 20 January 1981, when Iranian assets were frozen in accordance with an Executive Order issued by the United States President (see paragraph 52 below).

2. Because of the unusual procedural history of this Case, no Statement of Defense was then filed, with the result that the next document to be filed dealing with the substance of the claim was Bank Markazi's Memorial, filed on 29 January 1997. Thus, the first time that the New York Fed responded to the claim was in its own Memorial of 25 August 1997. In this submission, Respondent alleges that the basis of the claim has been transformed in Claimant's Memorial and argues that Claimant should not be allowed to proceed on this new basis. The New York Fed also contends that the claim should be dismissed because it had been so changed that it would be unfair to permit it as an amendment or otherwise. The New York Fed further contests that it is a proper subject of Tribunal jurisdiction in

this Case and denies liability on the merits. A full exposition of the procedural history and principal contentions of the Parties is given so as to better define the issues and the development of the Case. Although every contention of the Parties may not be referred to specifically, the Tribunal has considered all of the arguments in reaching its conclusions.

PROCEDURAL HISTORY

3. Claimant filed its Statement of Claim on 19 January 1982, and claimed a principal amount of US$2,853.26 as well as an amount of interest on various principal amounts of US$41,846,095.92. The Statement of Claim was identical in form to many others filed that same date against United States banking institutions.

4. On 5 August 1983, the Tribunal ordered a stay of proceedings pending the decision of the Full Tribunal in Case No. A17. In that case, the U.S. requested the Tribunal to determine the extent to which it had jurisdiction over certain Iranian bank claims against entities alleged to be United States banking institutions, including the claim in Case No. 823. The Full Tribunal held that "any claim by an Iranian bank against a United States bank, or other private entity, that does not seek payment from Dollar Account No. 2 clearly is not within the jurisdiction of the Tribunal except to the extent it can be

asserted as a counterclaim against a pending claim by the United States bank or other private entity."[1]

5. Pursuant to this Decision, the Tribunal (Chamber Three) issued an Order on 10 February 1986 setting out its understanding of the Decision and stating that unless it was informed by Claimant by 7 April 1986 that Case No. 823 involved an amount payable out of Dollar Account No. 2, it would terminate all proceedings in this Case. On 8 April 1986, the Tribunal received a letter from the Agent of the Islamic Republic of Iran stating that although the claim did not involve an amount payable out of Dollar Account No. 2, "the Respondents in this case are the Federal Reserve Bank of New York and the Government of the United States which are not considered to be 'U.S. Banking Institutions' or 'U.S. national'. Therefore, [the] Tribunal's decision in case A-17 is not applicable here. Claimant is of the opinion that the Tribunal does have Jurisdiction to decide this case." This was the last filing in this Case until 1994.

6. On 14 December 1994, the Tribunal issued an Order noting "that no submissions have been received from the Parties since 8 April 1986," and requesting the Parties "to submit their comments on jurisdictional issues and future proceedings in this Case ...."

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[1] United States and Iran, Decision No. DEC 37-A17-FT (13 May 1985), *reprinted in* 8 Iran-U.S. C.T.R. 189, 202 ("Case No. A17"). Dollar Account No.2 was the account set up under the Algiers Declarations for the purpose of paying principal and interest owed on Iranian bank loans and other debts to United States banking institutions.

7. In response to this Order, Respondent submitted its Comments on 14 March 1995, and Claimant submitted its Comments on 14 July 1995. The Parties disagreed over whether the United States was a Party. The Tribunal issued an Order on 28 September 1995, stating that "the Government of the United States is not a Party to this Case and [the Tribunal] orders that it be struck from the caption of this Case."

8. Having been requested by Respondent to allow further submissions on jurisdictional issues, the Tribunal granted such request, and, on 24 November 1995, both Parties submitted comments on various jurisdictional and procedural issues. Following these filings and an Order of 21 May 1996 in which the Tribunal joined the jurisdictional issues in the Case to the merits and requested the Parties to answer certain questions, Claimant filed its Memorial and supporting material on 29 January 1997, and Respondent filed its Memorial and supporting material on 25 August 1997.

9. The final written pleadings to be submitted were the Parties' respective Rebuttal Memorials -- that of Claimant, submitted on 9 April 1998, and that of Respondent, submitted on 12 August 1998. Bank Markazi submitted additional documents on 27 August 1998, which the Tribunal accepted by its Order of 25 September 1998, without making any determination as to their admissibility or relevance. In response to these documents, the New York Fed filed a submission and supporting evidence on 23 November 1998, as well as further material on 27 November 1998. The Tribunal similarly reserved its decision on admissibility of these

filings by the New York Fed. The Hearing was held on 30 November and on 1 and 2 December 1998.

PRELIMINARY ISSUES

I. The Change of Claim Issue

A) Respondent's contentions

10. The New York Fed asserts that Bank Markazi has so changed its original claim that, in effect, it has presented an entirely new claim without obtaining the required approval of the Tribunal for such an amendment and that to allow such an amendment would prejudice the New York Fed. The New York Fed contends that, as originally formulated, the claim was based on obligations allegedly arising from the General Declaration, and not on an alleged breach of contract. The New York Fed argues that it has been prejudiced by having responded for fifteen years to a claim based on obligations allegedly arising under the General Declaration -- which claim did not require an examination of the contractual relationship between the Parties -- and then, since Claimant's Memorial of January 1997, having to defend itself against a different claim, namely one based on an alleged breach of contract. At the Hearing, Respondent's counsel described a claim as "a core set of facts that if proved gives the claimant a right to recover," and argued that the core set of facts under the two theories had changed sufficiently after the filing of Claimant's Memorial that the claim itself had changed into, in effect, an entirely new claim.

11. The New York Fed also argues that the claim was instituted against the New York Fed as a U.S. banking institution pursuant to Paragraph 6 of the General Declaration, and not as an agency, instrumentality or entity controlled by the Government of the United States, under Article VII(4) of the Claims Settlement Declaration ("CSD"); that is, not as an official claim pursuant to Article II(2) of the CSD. Thus, according to the New York Fed, the basis of jurisdiction over the New York Fed asserted by Bank Markazi would have changed completely.

B) Claimant's contentions

12. In response to the above contentions, Claimant asserts that its claim has remained unchanged since the Statement of Claim, and is still for "the interest on the funds maintained at the NYFed from 14 November 1979 to January 1981." In Claimant's words,

> There are two jurisdictional bases for this claim. One is Article 2 of the declaration and the other Article 2(b) of the undertaking. These two have been a part of the statement of claim. With issuance of Award A17 one of the two bases of jurisdiction, that is, Article 2(b) of the undertakings document, has lost its relevance. But Article 2 still stands. The theory of the claim from the outset related to the breach of contract. Therefore, there has been no change in the theory of the claim.

Claimant furthermore asserts a distinction between the claim and the legal theory upon which the claim is based and argues that Respondent has confused the two concepts.

Referring to Article 20 of the Tribunal Rules[2], which provision deals with amendments of claims or defenses, Claimant contends that because this Article only mentions an amendment of the claim or defense and not of the legal theory, "the legal theory of the claim cannot be deemed as a new claim merely because it has not been raised in the Statement of Claim." Claimant also points out that Article III, paragraph 4 of the CSD states that "no claim may be filed with the Tribunal more than one year after the entry into force of the Algiers Accords."[3] The implication of this argument is that by dealing only with the claim, these provisions of the CSD and of the Tribunal Rules do not prohibit amendment of the legal theory, as this does not form part of the "claim" in the strict sense.

13. Bank Markazi also argues that, consistent with the Tribunal practice of liberal interpretation of Article 20 of the Rules and the allegedly clear distinction between the claim and the legal theory, the Tribunal has in the past accepted a change in legal theory. Claimant further contends that the New York Fed has not been harmed by the

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[2] This reads:

> During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal.

[3] Emphasis Claimant's. All emphasis, unless otherwise stated, in the original.

change in question, as it has had ample opportunity to respond to the legal theory employed by Bank Markazi.

C) The Tribunal's findings as to whether or not the claim has changed

14. Article 18 of the Tribunal Rules provides that a Statement of Claim must include, inter alia, the names of the parties, a reference to the underlying basis of the claim (debt, contract, etc.), the general nature of the claim, as well as a statement of facts supporting the claim and the points at issue. Although these points do not specify exactly what a claim under the applicable rules is, they do provide helpful guidelines. In this Case, the capacity in which a party is sued and a precise exposition of the basis of the claim would be essential elements of the claim. Thus, the Tribunal cannot accept the distinction drawn by Claimant between a change in the claim and a change in the legal theory. Any change which affects these two elements cannot be overlooked as a mere change of theory, as it relates to one of the essential aspects of the Case, for which clarity is vital to Respondent in the preparation of its defense.

15. In several of its aspects, the claim has indeed changed since its first formulation in the Statement of Claim. The original claim was based on obligations arising under the General Declaration, and was brought by way of the mechanism set out in Paragraph 2(B) of the Undertakings. The relationship between the General Declaration and the Undertakings is set out in Paragraph 2 of the General Declaration, which states that "[c]ertain

procedures for implementing the obligations set forth in this Declaration and in the [Claims Settlement] Declaration ...are separately set forth in certain Undertakings ...." Recognising this relationship, the Statement of Claim invokes the procedure described in the Undertakings as the mechanism by which the claim is brought and bases the interest-only claims on, among others, the ground that "the General Declaration requires that all Iranian deposits and securities in U.S. banking institutions to be transferred to the Central Bank (as therein defined) are to be so transferred 'together with interest thereon'." The claim as finally formulated is instead based squarely on an alleged breach of contract and is brought under Article II of the CSD. This change occurred after the Full Tribunal decision in Case No. A17, in which the Tribunal held that it did not have jurisdiction over claims against United States banking institutions except in certain specified circumstances that Claimant itself conceded did not arise in this Case. Only at that stage did Claimant proceed on the basis that this was an official claim against the New York Fed as an agency, instrumentality or entity controlled by the United States and thus within the Tribunal's jurisdiction.

16. The argument that the Statement of Claim refers to a contractual basis for the claim is not tenable, as no details whatsoever of the terms of the contract are provided in the Statement of Claim and no mention is made therein of any act or omission by Respondent that could constitute a breach of contract. Moreover, as to the jurisdictional basis of the claim, although considerable detail is provided in the Statement of Claim as to why the

Undertakings are invoked, nothing is said about Article II of the CSD, other than the rather obvious point that it is the provision "whereby the Tribunal was established." Further, whereas the initial claim appears to have been brought against the New York Fed in its capacity as a "U.S. banking institution," with no mention of its governmental connection, it has been made clear since the filing of the letter of 8 April 1986 that the claim now relies on the assertion that Respondent is an agency, instrumentality or entity controlled by the U.S. Government. The New York Fed's argument that, had the initial claim indeed been an official one, Bank Markazi would have included the United States as a Respondent from the outset, has some merit.

17. As regards the object of the claim itself, the Tribunal cannot accept Bank Markazi's assertion at the Hearing that Respondent confused the concepts of "interest" and "return on investment." In fact, to the extent the issue is relevant, it is Claimant that has confused the two concepts by using both of them at various stages of the proceedings. The term "interest" was thus used in the Statement of Claim and continued to be used throughout Claimant's written pleadings, including in its Rebuttal Memorial of April 1998: "As explained in the Statement of Claim and in the subsequent pleadings, Bank Markazi's claim is for the interest on the funds maintained at the NYFed from 14 November 1979 to January 1981 ('the freeze period')." On the other hand, however, there have also been references to "return on investment" as the object of the claim. Thus, from Claimant's Memorial in January 1997, the claim has been construed as being for the damages suffered by Bank Markazi by reason of it not having been

allowed to invest its funds elsewhere. This change became necessary once the General Declaration was abandoned in favor of an alleged breach of contract as the basis of the claim. With the claim that Bank Markazi's funds could have been fruitfully invested in Eurodollars, it became inevitable that the term "return on investment" would be used instead of "interest." Using both of these concepts, sometimes simultaneously, has also not made the claim, against which Respondent had to defend itself, any clearer.

18. With regard to the changes introduced by Bank Markazi in its claim, the Tribunal notes that the New York Fed rightly contends that it has had to endure more than seventeen years of proceedings before this Tribunal, including an eight year period of inaction (when it could reasonably have believed that the claim had been dismissed), as well as numerous changes in the claim. Nevertheless, the New York Fed has had a reasonable opportunity to respond to all of the allegations. Furthermore, the lengthy delays and slow progress in the Case cannot be attributed to the Claimant entirely. To some extent the Tribunal's inaction following Claimant's 1986 submission that the Case did not involve an amount payable out of Dollar Account 2 has contributed to this. Thus it would not seem appropriate to dismiss the claim on the ground of the change in the claim. Accordingly, to the extent the claim has changed, the Tribunal believes that, under the particular circumstances of this Case and in the interest of fairness, this change should be permitted in accordance with Article 20 of the Tribunal Rules.

II. The Status of the New York Fed and the Jurisdictional Issue of Control

A) Claimant's contentions

19. Following the above-mentioned Full Tribunal decision in Case No. A17, Claimant has contended that Respondent, the New York Fed, is an agency, instrumentality or entity controlled by the Government of the United States, a requirement for an official claim under the CSD. By way of the above-mentioned letter of 8 April 1986, the Agent of the Government of Iran informed the Tribunal that Claimant considered the Respondents in this Case to be the New York Fed and the U.S. Government. Furthermore, Iran's Agent argued that the New York Fed and the U.S. Government were not considered to be "U.S. Banking Institutions" or "U.S. nationals," and that the decision in Case No. A17, stating that the Tribunal did not have jurisdiction over claims by Iran against U.S. banking institutions unless the claim is for an amount payable out of Dollar Account 2, was thus inapplicable. According to Claimant, the Tribunal would have jurisdiction over this Case under the CSD if the claim could be considered an official one "arising out of contractual arrangements ... for the purchase and sale of goods and services," CSD, Article II(2), against the New York Fed as an agency, instrumentality or entity controlled by the U.S. Government (CSD, Article VII(4)).

20. In order to show that the New York Fed forms part of the definition of the United States for purposes of jurisdiction, Bank Markazi argues that the New York Fed is part of the Federal Reserve System of the United States

("FRS"), which system constitutes, in its view, the central bank of the United States and is responsible for the policy and administration of the United States' monetary affairs. Claimant contends that, because of this, the New York Fed's operations, like those of the other Federal Reserve Banks ("FR Banks"), are subject to the control of the FRS Board of Governors, a United States agency or instrumentality, and that the New York Fed implements the economic policies of the Board of Governors. This control over the FR Banks is exercised, according to Claimant, via a number of bodies that form part of the FRS Board of Governors and have a direct and close relationship with the FR Banks. Claimant also asserts that, apart from its other functions, each FR Bank carries out the local functions of the FRS on the instructions of the Board of Governors.

21. Claimant argues that the FR Banks implement the financial, economic and political policies of the FRS and the U.S. Government, and that they exist for a public purpose and not for profit as is the case with private, commercial banks. The New York Fed, according to Claimant, has an even closer connection to the U.S. Government than the other eleven FR Banks because of the functions it performs at the international level for foreign central banks and international organizations. Claimant contends that the relationship between itself and the New York Fed was typical of the kind of activity carried out by the New York Fed on behalf of the FRS.

22. Bank Markazi expands on its discussion of the prominent role played by the New York Fed, as compared to the other FR Banks, in "international banking" and refers

to "its exclusive dealings with foreign central banks." Specifically, Claimant contends, relying for support on material published at the New York Fed's website, that the New York Fed "serves as the sole fiscal agent of the United States for foreign central banks and official international financial organizations." Claimant emphasizes the supervisory role of the Board of Governors, and, referring to the conditions with regard to which the New York Fed was to perform services for Bank Markazi, argues that these services were to be performed on behalf of the FRS. The Board of Governor's role in supervising all relationships between FR Banks and foreign banks was reiterated at the Hearing.

23. Claimant points out that the FRS refers to itself in an official publication as "the central bank of the United States." This is the basis of an argument that the New York Fed is an organ of the U.S. by virtue of its integral place within the FRS, itself governed by a governmental agency of the United States, namely the FRS Board of Governors. Claimant proceeds to list the duties of the FRS as including: conducting the United States' monetary policy; regulating banking institutions; maintaining the stability of the financial system; and providing financial services to the U.S. Government, the public, financial institutions and to foreign official institutions.

24. Claimant contends that the FRS, although enjoying a certain measure of independence as a central bank, still has to work within the overall economic and financial policies established by the United States Government. The members of the Board of Governors are appointed by the

President with the approval of the Senate, and this body, namely the FRS Board of Governors, according to Claimant, "supervises and regulates the operations of the Federal Reserve Banks and the activities of various banking institutions." Claimant contends that the Reserve Banks, in turn, were created for a public purpose and "are the operating arms of the central banking system, and they combine both public and private elements in their makeup and organization. As part of the Federal Reserve System, the Banks are subject to oversight by Congress." Claimant also points out that the Board of Governors appoints three of the nine Directors of each FR Bank and nominates one of these as chairman and another as deputy chairman of each particular FR Bank.

25. In order to counter the assertion that the New York Fed is privately-owned like any other private banking institution, Claimant argues that although FRS member banks do hold stock in Respondent, ownership of this stock is not associated with the control and financial interest traditionally associated with the holding of stock in a for-profit organization, and is merely a legal requirement. Claimant states that although not directly owning the stock of the New York Fed, the U.S. Government has a reversionary interest in all the net assets of the New York Fed; that the New York Fed, with the other FR Banks, must finance the operations of the Board of Governors; and that the net profits of the New York Fed must be paid over to the U.S. Treasury.

26. Finally, Claimant contends that the New York Fed entered into its account relationship with Bank Markazi on

behalf of the FRS. As support for this contention, Claimant relies on a document sent to it by the New York Fed in 1979. That document is entitled "Investments and Account Operations" and is styled a "handbook" by Respondent (hereinafter "1979 handbook"). In particular, Claimant refers to language in the 1979 handbook to the effect that the New York Fed maintains accounts for its clients "on behalf of the Federal Reserve System."

B) Respondent's contentions

27. With regard to the accounts which formed the basis of the relationship between Bank Markazi and the New York Fed, the New York Fed states the following:

> These accounts were held by the New York Fed in its corporate capacity, pursuant to depositary agreements that it entered into with Bank Markazi, in the same way that it enters into such agreements with many central banks and commercial banks. When it entered into these agreements with Bank Markazi, the New York Fed was not acting as fiscal agent of the United States. It was simply acting as a bank accepting deposits.
>
> The New York Fed is not owned or controlled by the United States Government. It is owned by the commercial banks in its district that are members of the Federal Reserve System. Unless it is acting as fiscal agent of the United States pursuant to a fiscal agency agreement with the United States Secretary of the Treasury, the New York Fed is not acting at the direction of the United States Government. Iran's claims in Case 823 involve a dispute between a bank and its depositor over the amount of interest, if any, owed on an account. Thus, the New York Fed in respect to the subject matter of Case 823, is indisputably a private United States banking institution and is, therefore, covered by the Full Tribunal decision in Case A/17.

28. Respondent further states that Bank Markazi confuses the FR Banks with the Board of Governors of the FRS and with the FRS as a whole. Acknowledging that the FRS Board of Governors is an agency of the U.S. government, Respondent argues that the New York Fed is organized as a separate corporate entity within the FRS. According to Respondent, the New York Fed is controlled by its board of directors, two-thirds of the members of which are elected by its shareholders, and not by the U.S. Government, which has no day-to-day involvement in the manner in which the New York Fed is run. Respondent contends that none of its directors represents, or is controlled by, the Board of Governors of the FRS or the U.S. Government, and whereas the Board of Governors has "general supervisory power over the operations of the Federal Reserve Banks, it supervises the New York Fed in essentially the same way as other United States Government agencies supervise other private financial entities."

29. Respondent argues that although it on occasion acts as fiscal agent of the U.S. Government, these activities are performed only on the basis of special agreements entered into with the Secretary of the Treasury and are limited to the matters specifically set forth in those fiscal agency agreements. Respondent points out that such agreements are also concluded between the U.S. Government and private commercial banks. Its activities as fiscal agent, Respondent contends, are distinct from the New York Fed's corporate activities, an example of which is its purely private relationship with Bank Markazi. When it operates an account for a foreign central bank, Respondent adds, the New York Fed does so on its own authority, although the

Board of Governors does have to approve the establishment of the account. Respondent further argues that the New York Fed performs many of the same services as private banks (over which the Tribunal has no jurisdiction) except that its clientele is composed primarily of other banks. Respondent argues that the New York Fed offers these services in competition with other private banks and is required by law to charge a fee for doing so. Respondent claims that Bank Markazi acknowledged the similarities between the FR Banks and private banks by simultaneously filing identical Statements of Claim on the same basis against more than a hundred private banks, as well as against the New York Fed.

30. Respondent contends that the functions identified by Bank Markazi as evidence of government control over the New York Fed are not unique to the New York Fed, "but are shared with national and state banks." Respondent points out that it does not serve as the sole fiscal agent of the United States in relation to foreign central banks and international financial organizations. According to Respondent, any U.S. bank may open and maintain an account for a foreign central bank and any such bank can perform the same services as the New York Fed for foreign central banks and international organizations.

31. Respondent points to a number of attributes that it contends indicate its private nature. For example, while Bank Markazi is wholly owned by the Government of Iran, all of the New York Fed's stock is owned by private commercial banks in its district and not by the United States Government. Furthermore, annual dividends are paid on

these shares. None of the New York Fed's employees, including its directors, is a government employee. New York Fed employees receive different benefits and contribute to different pension schemes than do government employees. Respondent further states that it does not receive any money from the government and that all its expenses are financed by its own investments and services. United States legislation also distinguishes the FR Banks from the U.S. Government and its agencies, according to Respondent, when, for example, it specifically mentions both the government and the FR Banks as not being "employers" under the United States National Labor Relations Act (29 USCA §§ 151 et seq.). The implication is, according to Respondent, that there would have been no need to mention the FR Banks separately had they been considered to be government agencies. Respondent adds that the Federal Reserve Act itself confirms the non-governmental nature of the FR Banks by explicitly exempting them from Federal, State and local taxation. This would have been unnecessary, argues Respondent, had the FR Banks been considered to be government agencies, as a well-established principle of U.S. law is that the federal government and its agencies are exempt from State and local taxation.

32. Respondent states there is not one "central bank" of the United States of which the New York Fed is a part. Claimant's comparison between itself as a central bank and the New York Fed is flawed, according to Respondent, in that the New York Fed is part of a decentralized system (the Federal Reserve System) in which the "critical governmental part is the Board of Governors ... which has

rulemaking and oversight authority for the entire Federal Reserve System." National banks are also part of this system and, as such, are also subject to federal oversight. As an example of its institutional independence, Respondent points to its role in helping to resolve the hostage crisis. The New York Fed notes that other private parties, including other banks, also participated in the negotiations leading to the hostages' release. Furthermore, it participated in those negotiations pursuant to a fiscal agency agreement with the U.S. Government, which agreement would have been unnecessary had the agent (in casu the New York Fed) not been separate from the principal (the U.S. Government). An officer of the New York Fed signed the Declarations separately despite the fact that an officer representing the U.S. State Department had also signed the Declarations, showing, according to the Respondent, that the New York Fed is a separate legal entity.

33. The New York Fed responds to Claimant's argument that FR Banks are not chartered like private banks, but established by the Board of Governors, by stating that the New York Fed was in fact chartered in 1913, and that FR Banks are established following a similar procedure to the one used in the establishment of private national banks.

C) The Tribunal's evaluation of this jurisdictional issue

34. The arguments by both Parties on this issue have been extensive. These arguments show that the issue of the status of Respondent, i.e., whether or not it is an agency,

instrumentality or entity controlled by the Government of the United States, is a complex one. Even the law in the United States as to the status of Federal Reserve banks is arguably not consistent. The structure of the United States banking system is intricate. That the Tribunal received expert evidence on the subject also suggests that a resolution of the issue requires an in-depth analysis of United States banking institutions.

35. Furthermore, the Parties seem to have approached the matter from different perspectives. On the one hand, it seems difficult to overlook some kind of institutional attachment of the New York Fed to the FRS and the existence of some measure of control over the New York Fed by the FRS Board of Governors. On the other hand, it would be equally hard to overlook the private law nature of the relationship between the Parties. Faced with such contradictory facts and arguments, as well as with the particular difficulties involved in the resolution of this issue, the Tribunal believes that a final determination of this matter should only be undertaken if the merits of the claim so required. In light of both the relatively straightforward nature of the merits, and of the decision relating thereto, and in the interests of judicial (here Tribunal) economy, the Tribunal believes that, under these specific circumstances, this jurisdictional issue need not be resolved.

36. In several instances, the Tribunal has dismissed a claim on the merits without deciding the jurisdictional issue. See International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1 (10 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 187,

195 (finding it unnecessary to reach the issue of whether losses resulted from popular movements in view of findings that contract had been terminated before losses occurred); Avco Corporation and Iran Aircraft Industries, et al., Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-U.S. C.T.R. 200, 223, and American Bell International Inc. and The Islamic Republic of Iran, et al., Award No. 255-48-3 (19 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 170, 227-28 (dismissing counterclaim for lack of proof without reaching the issue of whether it had jurisdiction); Ultrasystems Incorporated and The Islamic Republic of Iran, et al., Partial Award No. 27-84-3 (4 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 100, 110 (failing to reach Iranian contention that damages were caused by popular movements and hence outside of Tribunal jurisdiction); Grune and Stratton, Inc. and The Islamic Republic of Iran, Award No. 359-10059-1 (15 Apr. 1988), reprinted in 18 Iran-U.S. C.T.R. 224, 227-28 (no need to reach the issue of jurisdiction over a claim).

37. In this regard, the Tribunal finds some merit in considerations developed by Judge Morelli in his Dissenting Opinion in the Barcelona Traction case with regard to the principle of economy in the activities of judicial organs. Discussing the order in which the Court considers various issues before it, he makes the following comment which, although not directly on point, provides some guidance in this Case:

> If a certain order is not imposed by any logical necessity, it is for the Court to determine the order that may most suitably be followed. In this connection, the Court may be guided by various

> criteria and these, as I have said, might even be criteria of economy. Thus the Court might find it desirable to start by considering a question of law that is so presented that it is easy to settle, before entering upon the consideration of a complicated question of fact, if it appears that a possible decision of the question of law might obviate the necessity for considering the question of fact. Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), Preliminary Objections, 1964 I.C.J. 97 (24 Jul.).

The Tribunal believes that what may be true of the relationship between a question of law and a question of fact, may also be true of the relationship between two questions, both of which consist of matters of law and matters of fact at the same time, and one of which is jurisdictional. As the decision on the merits below disposes of the matter, the Tribunal need not decide the jurisdictional question.

THE MERITS

I. The Contractual Relationship between the Parties: The Terms of the Contract

A) Claimant's contentions

38. Claimant argues that, despite the existence of a contractual relationship between the Parties since 1961, the terms of the agreement by which the New York Fed was to invest Claimant's funds were set out most recently in a letter of 27 September 1979. By this letter, Respondent indicated various services that were available to its clients, including those selected by Claimant- namely the

sale and purchase of government securities and investment in repurchase agreements. Claimant alleges that under this letter that defines the relationship, the New York Fed was to act upon Claimant's instructions regarding the purchase and sale of government securities and the investment in repurchase agreements. Claimant states that the relationship between the Parties continued on this basis until mid-November 1979. Claimant emphasises that "as required by the contract and by the ordinary banking practices, NYFed had to comply with Bank Markazi's instructions"; and Claimant has continued to refer to the letter of 27 September 1979 as the basis of the Parties' relationship.

39. Bank Markazi argues that its relationship with Respondent was also governed by the 1979 handbook discussed in paragraph 26, above. Claimant refers to this document as the "1979 contract," and argues that the "requirements" or "conditions" contained in the document "governed the transactions between the two sides."

40. Bank Markazi argues that the so-called automatic investment program begun in 1974 was in fact instructions for specific investments with specific maturities, which did not give rise to any "permanent" or "general" instructions. Regarding the use of the term "standing instructions," Mr. Manavi-Rad, witness for Claimant at the Hearing, stated that "[t]his phrase standing instruction, the wording, is a wording and a phrase that were never used in the correspondence and communications of Bank Markazi. This was in relation to the internal communications of the New York Fed." The idea of standing instructions,

according to Bank Markazi, has no bearing on the relationship between the Parties.

B) Respondent's contentions

41. Respondent contends that it is undisputed that under the agreement entered into between the Parties in 1961, investments would "be executed only upon Bank Markazi's instructions .... Thus, in order to earn a return on its assets, Bank Markazi was required to issue instructions to the New York Fed and to specify the investments it wished the New York Fed to execute on its behalf." Respondent notes that Claimant itself selected the investments it wished to make, and that the New York Fed was then bound to act on Claimant's instructions in relation to those investments.

42. Respondent claims that the relationship between itself and Bank Markazi continued on this basis until 1974, and that during that year, however, the Parties modified their agreement. The New York Fed relies on a letter of 4 August 1974 from Bank Markazi to the New York Fed, in which a representative of Bank Markazi stated that "we should be grateful if you would operate an investment programme for us on an automatic basis, exchanging matured bills for new issues of three- and six-month Treasury bills as requested in our cable of June 23, 1974." The "cable" referred to contained a request in the following terms: "We hereby authorize you to operate an investment program for us on automatic basis exchanging maturing bills for new issues of three and six-month Treasury Bills." As a result of these requests, contends the New York Fed, it drew up for its

internal use, "Standing Instructions," dated 20 January 1975, which incorporated the various communications between the Parties into a single document upon which it would henceforth act on Claimant's behalf. Respondent alleges that these standing instructions were not revoked and continued to be valid and effective throughout the period at issue in this Case.

43. Respondent points out that by the terms of the 27 September 1979 letter upon which Claimant relies, Claimant was required to "signify [Claimant's] acceptance thereof by having [its] duly authorized officer or officers sign in the appropriate place at the foot of the enclosed copy of this letter and return the signed copy to [the New York Fed]." The New York Fed argued that as the letter had never been signed and returned by Bank Markazi, it never came into effect and thus never governed the relationship between the Parties.

44. Respondent contends that the 1979 handbook was not part of the contract between the Parties and hence also did not govern their relationship.

C) The Tribunal's findings on the terms of the contract

i) The agreement of 1961 (first stage)

45. The record indicates that the Parties entered into a formal contractual relationship for the first time in 1961, whereby Claimant established an investment account with Respondent. By the terms of this agreement, the New York

Fed offered to buy and sell, upon the instructions of Bank Markazi and on its behalf, United States Government Treasury Bills and other securities. Bank Markazi would have to give the New York Fed new instructions to invest its funds each time an investment matured. The agreement contains nothing that could be construed as a guarantee that a certain return would result from the investments. Nor is there any promise by the New York Fed to pay interest.

46. Claimant has said very little concerning the initial agreement between the Parties and seems to regard it as irrelevant to the resolution of this Case. Indeed Claimant seems to imply as much in its Rebuttal Memorial, when it claims that in light of the alleged deprivation of its contractual rights by Respondent in 1979, the "continuation of work on the basis of the previous [i.e., pre-1979] instruction had lost its relevance."

ii) The agreement of 1974 (the second stage)

47. In 1974, the relationship between the Parties underwent a slight, yet significant, change. It is the Tribunal's view that, despite Claimant's arguments to the contrary, the Parties did agree on an automatic investment program. Although the New York Fed used the term "standing instructions" for its own, internal use, and may not have communicated it to Claimant, this does not alter the fact that there was an understanding between the Parties, whatever it was called, that certain specified investments would be made by Respondent, on behalf of Claimant, on an automatic basis (see paragraph 42 above). Furthermore, had

Bank Markazi indeed believed that no standing instructions for automatic investments existed, one would expect to find some trace in the record either of a disagreement with the ongoing investments carried out by Respondent or a substantial number of individual investment instructions issued to the New York Fed by Bank Markazi. As no such evidence is in the record, the Tribunal concludes that Claimant had authorized the automatic investment program.

48. The existence of an agreement for an automatic investment program up to at least April 1978 is confirmed by other elements in the record. A telex of 4 April 1978 from one of the New York Fed's officers to Bank Markazi, apparently in response to an inquiry by Bank Markazi concerning the "effective date of your [i.e., Bank Markazi's] automatic investment program instructions to us," summarizes the communications that passed between Claimant and Respondent in relation to the setting up of the automatic investment program. Claimant did not contest any of the facts set forth in that telex. Thus, up to at least April 1978, such an investment program appears to have been validly in effect, and there is nothing in the record to suggest that it was not still in operation at the time the United States ordered the freeze of Iranian assets-- i.e., on 14 November 1979 (see paragraph 52 below).

iii) The agreement in 1979

49. The Tribunal is satisfied that as regards the 27 September 1979 letter of terms and conditions sent to Bank

Markazi by Respondent, there is no evidence in the record that the letter was ever signed and returned to Respondent by Claimant. Thus the 1979 letter never came into effect as part of the contract.

50. That the prior contract (in casu the 1961 agreement as modified in 1974) would continue to govern the relationship until an executed copy of the 27 September 1979 letter was received by Respondent, is clear from an accompanying, introductory note, which note states in its final paragraph: "Transactions which are entered into by us for your account prior to our receipt of this new standard letter of terms and conditions [the 27 September 1979 letter] executed by you will continue to be governed by the terms and conditions now in effect between us." The 27 September 1979 correspondence does not purport to alter significantly the relationship between the Parties. The above-mentioned accompanying note of the same date explains that the attached letter of terms and conditions does not in fact bring about substantial changes in those terms and conditions. The new letter largely provides additional information about investment possibilities and other minor changes in New York Fed banking policy. Under such circumstances, it is clear that the automatic investment program, the continued validity of which has been noted above, and which was embodied in the standing instructions, was still in effect.

51. The purpose of the 1979 handbook referred to above, as stated therein, was merely to consolidate information available elsewhere from a variety of sources, and to assist investors in making the most effective use of their

accounts with the New York Fed. Whereas Claimant argues that the 1979 handbook contained terms and conditions that were binding on Respondent, that document does not, in fact, purport to be a contract or to form part of the contract between the Parties. The 1979 handbook in fact refers to the document that does govern that relationship when it says, "This Bank's letter of terms and conditions governing the operations of correspondents' accounts specifies that the Bank be informed of all substantial transactions in U.S. markets effected through private institutions." The distinction between such letter of terms and conditions (which would become binding if duly signed and returned), on the one hand, and the 1979 handbook, on the other, is clear. Finally, Claimant nowhere clearly states what "term" of the 1979 handbook was breached by Respondent. In light of the above, the Tribunal finds that the 1979 handbook did not form part of the contract between the Parties.

II. Performance Under, and Alleged Breach of, the Contract

A) The Freeze order

52. As noted above, on 14 November 1979, the President of the United States issued Executive Order No. 12170, entitled "Blocking Iranian Government Property," which Order Claimant includes as an exhibit to its Rebuttal Memorial. In relevant part, this Order reads:

> I ... find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to

> deal with that threat. I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States....

This Order, along with regulations promulgated in furtherance of it, remained in force until 20 January 1981, which period will henceforth be referred to as the "freeze" or "freeze period" and the Order as the "freeze order."

B) Claimant's contentions

53. Claimant does not allege that Respondent failed to fulfill any of its contractual obligations in the period prior to the freeze. Its claim has always related solely to the freeze period. Even with regard to the period after 1974, Claimant, while disputing the nature of the investment program then in operation, does not allege that its funds were not in fact invested as Respondent asserts they were. The New York Fed provided a statement of Bank Markazi's account as of 16 November 1979 which Bank Markazi accepts as accurate.

54. As originally formulated, the claim was that either no, or insufficient, interest was paid on various principal amounts held by Respondent for the account of Claimant. As later developed by Claimant, the claim is for a return on investments, namely, a return higher than that actually received. Claimant stated, "We have already made it clear that the claim is about the return on investment .... We are talking about the return on investment during the

freeze period. This is the claim .... In fact, our claim is for the return that we were deprived of."

55. In its view, Bank Markazi was deprived of this return on investments because as of mid-November 1979 it lost the ability to withdraw its funds from the United States and invest them elsewhere. From that date, Claimant argues,

> Bank Markazi lost control of its funds with NYFed and was not able to exercise its ownership rights on them .... Bank Markazi had no way to remove the funds from the possession of NYFed or the United States so as to be able to use the funds at its discretion.

Claimant continues in its Memorial:

> NYFed, by failing to carry out Bank Markazi's instructions, and in fact by cutting off the relationship between the funds and its owners deprived Bank Markazi of the right of better use of its funds. Thus it is responsible to indemnify the losses suffered by Bank Markazi in this respect.

56. Bank Markazi stresses the priority of its control of its funds over the obligations of the New York Fed under the Executive Order. It also argues that this contractual control specifically means the ability to remove the funds from the New York Fed and from the United States in order to utilize other investment opportunities. Thus, the New York Fed's alleged breach of contract would consist in its not having honored its purported contractual promise to act in accordance with Bank Markazi's instructions. As understood by Claimant, the terms "safety" and "liquidity," used by Respondent to characterize the investments in question, meant the ability to liquidate the funds at will

and remove them from the United States, any domestic law to the contrary notwithstanding. Claimant understands these two terms as, in effect, guarantees arising from the contract with the New York Fed.

57. In response to the New York Fed's assertion that it acted pursuant to the standing instructions throughout the period of the freeze (see paragraph 66 below), Claimant makes various arguments, including, as pointed out above, that alleged compliance with these instructions prior to the freeze was irrelevant. Claimant states that:

> ever since November 1979 [the date of the freeze order] Bank Markazi was deprived of all its contractual rights for the management of the funds and had lost any control over them. Accordingly, under such circumstances the question of the method of the investment services or continuation of work on the basis of the previous instruction had lost its relevance.

Claimant adds that "[t]his argument [compliance with instructions] does not have any effect on the substance of the damages sought by Bank Markazi in this case. Because the damages sought derives [sic] from the NYFed's failure to pay a reasonable interest during the freeze period...."

58. Bank Markazi argues that the New York Fed failed to comply with certain instructions to effect payments to Claimant's creditors from its account. The New York Fed made it clear to Claimant by way of a telex of 14 November 1979, that "[i]n view of President Carter's Executive Order of today ... we are not permitted to effect payments requested value November 15. We are considering such

requests cancelled." Bank Markazi responded in a telex to the New York Fed on 27 November 1979, stating:

> This is to inform you that due to non-execution of our legetimate [sic] payment instructions since Nov. 14, 1979 by your bank, we have suffered extensive financial losses. We hereby present our formal objection to this unlawful act by your bank and reserve our full right to take all necessary steps in order to compensate these losses.

Bank Markazi has subsequently relied on this telex as evidence of the New York Fed's non-compliance with its instructions and as support for the proposition that "it is clear that CBI [Bank Markazi] was denied access to its funds during the freeze period."

59. Bank Markazi makes another argument that deals specifically with the size of the return it received from the New York Fed, and with the attributes of its investments. Whereas Respondent argues that, in order to receive a higher return, Bank Markazi would have had to sacrifice some of the safety and liquidity of its investment, Claimant argues that because, in its view, it was deprived of the benefits of safety and liquidity of its funds during the freeze period, the New York Fed now owes it the higher return it could have received from an investment without those attributes in the first place.

60. Bank Markazi further contended at the Hearing that the difference between the return on United States Treasury Bills and the return on Eurodollar deposits, in which Claimant asserts it would have invested its funds had it been able to move its funds out of the United States during

the freeze period, represents a "premium" that Respondent owes Claimant. Claimant explained at the Hearing that:

> the lower credit, maturity and liquidity risks associated with U.S. T-bills had virtually disappeared as a result of the freeze. Once the freeze was in place, then those three elements for which we were paying a premium were no longer there. What CBI [Bank Markazi] is asking for is no more than those premiums, the premiums for liquidity, for insurance and other factors that they are referring to that they didn't give us.

Bank Markazi argues that the New York Fed withheld this "premium" from the return on Claimant's investments transferred by Respondent to the Bank of England after the freeze period.

61. In the Statement of Claim, Bank Markazi included, as stated in paragraph 3 above, a claim for a small principal amount and a substantial claim for unpaid interest allegedly owing on various principal sums. The principal claim has not been pursued subsequently, while the claim for interest that was pursued was U.S.$41,846,095.92. The interest claimed was calculated on the basis of the London inter-bank offered rate (LIBOR) being applied to the funds held in the name of Bank Markazi at the New York Fed during the freeze period, less the actual returns paid to Bank Markazi.

62. In Claimant's Memorial, however, the basis upon which the claim was to be calculated was changed to the Eurodollar rate applicable at the time. This resulted in the amount claimed being changed to U.S.$17,280,305.83. In its Rebuttal Memorial, Claimant again suggested that the

correct method of calculating damages would be to use the Eurodollar rate, less the actual returns paid to Bank Markazi, and the claim thus remained U.S.$17,280, 305.83.

63. This was Claimant's position until 27 August 1998 when Claimant filed with the Tribunal a document titled "Affidavit of Mr. Manavi-Rad and Report of Ernst & Young." This document consists of an affidavit by a witness who testified at the Hearing, and a financial report setting out damages allegedly suffered by Claimant based on Eurodollar rates.[4] The accompanying letter from the Iranian Agent does not seek to amend the claim, but explains that the report has been submitted merely to correct errors in Bank Markazi's calculation of damages, concerning which the expert would testify at the Hearing. The report contains three alternative calculations of damages: U.S.$32,769,432.21, representing the actual claim based on higher returns on Eurodollar deposits, U.S.$47,606,836.62 based on the assumption that the funds had been converted to Sterling and invested in U.K. Treasury Bills, and a "notional claim" of U.S.$242,458,390.68 based on the latter scenario, but including potential foreign exchange gains had the final Sterling amount been converted back into U.S. dollars.

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[4] The Tribunal received these documents without making any finding as to their admissibility, and invited Respondent to submit its own argument or evidence in response to them. Respondent accepted this invitation and made various submissions on 23 November 1998, as well as on 27 November 1998. In view of the fact that Respondent had a full opportunity to respond to these documents, both before and at the Hearing, and in view of the fact that the documents clearly relate to the quantum of damages, the Tribunal finds these documents admissible.

64. At the Hearing, at which experts of both Parties testified concerning the issue of the calculation of damages, it was emphasized by Claimant that the final amount of the claim was the lowest of the three amounts contained in the report of the expert which "corrected" the calculation of damages: U.S.$32,769,432.21. This figure is arrived at by assuming that Bank Markazi had its funds invested in Eurodollars during the freeze period. It represents, in Claimant's view, what it was deprived of due to the fact that it could not move its funds out of the U.S. during the freeze period and make more profitable use of those funds.

C) Respondent's contentions

65. Respondent argues that it continued to perform under the contract between the Parties after the proclamation of the freeze in November 1979, but that the Executive Order made compliance with payment instructions from Bank Markazi's account impossible.

66. Respondent states that Bank Markazi selected the investments it wished to make, and that "throughout the Freeze Period, the New York Fed continued to invest Bank Markazi's funds in accordance with standing instructions established by Bank Markazi." Respondent states that throughout the freeze period, "the Federal Reserve Bank kept Bank Markazi's balances fully invested in Treasury bills and repurchase agreements." Respondent contends that Bank Markazi's attorneys were in contact with the New York Fed, and that despite a "substantial degree of

communication, at no point during the asset freeze did Bank Markazi complain about its investment result or seek to modify its standing instructions." The implication was that Bank Markazi was satisfied with the manner in which its funds were being managed throughout the freeze period. Respondent notes that in the negotiation of the Algiers Declarations, Bank Markazi contested amounts to be paid by other United States banks but not those to be paid by the New York Fed.

67. As evidence that Bank Markazi accepted the amount of funds to be transferred by the New York Fed at the end of the freeze period, and, by implication, accepted the manner in which its funds had been dealt with, Respondent points to Appendix A to the Escrow Agreement, and states: "If Bank Markazi seriously contested the amount of funds being transferred from the New York Fed, it would certainly have refused to agree to the amounts listed in Exhibit A."[5]

68. Respondent argues that the only purported wrong Claimant can point to is the New York Fed's compliance with the Executive Order freezing Iran's assets. According to Respondent, this cannot give rise to any liability on its part, as it was merely complying with domestic law. Referring to the proclamation of the Executive Order by the U.S. President, Respondent argues in its Rebuttal Memorial that "When a private law claim, such as breach of contract,

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[5] Appendix A to the Escrow Agreement between the Parties, under the heading "Securities, Gold Bullion, and Funds to be transferred by the Federal Reserve Bank of New York," lists as the amount of funds to be so transferred at the agreed time, "Approximately $ 1.38 billion."

is brought against an entity with a legal identity distinct from the State, actions taken by the State may excuse contractual performance."

69. Respondent denies it charged Bank Markazi a "premium" for the safety and liquidity of its investments. In explaining the difference in return on an investment in U.S. securities (what Bank Markazi received) and on Eurodollar deposits (which difference Bank Markazi is claiming), the New York Fed submitted evidence that this difference is market-driven, and is not "an administered or regulatory-driven risk premium" determined by Respondent. Respondent argues that Claimant received a commercially reasonable rate of return on investments that it selected, totalling 12.54%, and that was the same as the return received by other investors who selected the same investments during the relevant period. In Respondent's view, Bank Markazi has suffered no damages.

70. Respondent also argues that because it did in fact invest Bank Markazi's funds in U.S. Treasury Bills and repurchase agreements as requested, Eurodollar deposits cannot be used as the basis of any damages calculation. Respondent argues that had it indeed failed to make the agreed upon investments on behalf of Bank Markazi, it would then owe Claimant the return that those investments would have generated, and not the return on Eurodollar deposits.

D) The Tribunal's findings on Respondent's performance under, and alleged breach of, the contract

i) Pre-November 1979 period

71. There is no contention on the part of Claimant that Respondent failed to fulfill its obligations under the contract prior to November 1979. It is apparent from the fact that Bank Markazi continued the relationship over a long period that it was satisfied with Respondent's performance. As late as October 1979, there is evidence of Bank Markazi requesting reinvestment of its funds in U.S. Treasury Bills and no evidence of a failure by the New York Fed to carry out such instructions.

72. The record shows that the automatic investment instructions of 1974 were in effect and that the New York Fed adhered to them. There is no evidence that Claimant's instructions regarding its ongoing investments were ignored. Not even the dispute over the existence of these standing instructions caused Claimant to argue that Respondent failed to re-invest its funds appropriately during this period.

ii) 14 November 1979 - 20 January 1981: the freeze period

73. There is no dispute that Respondent continued investing Claimant's funds during the period of the freeze in accordance with the standing instructions that remained in effect. Bank Markazi's claim is based on the alternative argument that it was deprived of control over the funds from mid-November 1979.

74. The record shows that throughout the period of the freeze, Claimant was kept fully informed about the state of its investments and that it followed developments in this regard closely. The record also shows that Claimant never complained about the actual management of its investments during this period, and never requested Respondent to change its investments, a request with which Respondent might well have been able to comply. Besides complying with the Executive Order freezing Iranian assets, Respondent did not in any way preclude Claimant from designating the investment of its funds. There is nothing to indicate that Claimant could not have requested Respondent to invest its funds in higher-yielding securities. Moreover, it has not been proved that during the freeze Claimant ever specifically requested that the funds invested be liquidated and returned to it. Considering that Claimant contested amounts transferred to it from other banks, the fact that Claimant signed the Escrow Agreement, including the Appendix with a description of its funds as "approximately $1.38 billion," is a strong indication that Bank Markazi agreed with the manner in which its account had been dealt with and agreed with the amount to be transferred. Claimant also does not contest the fact that part of this sum, approximately U.S.$180 million, constituted the return on its investment at the New York Fed during the period of the freeze.

75. Claimant's argument that the New York Fed breached its contractual obligations by not allowing Claimant to remove its funds and invest them elsewhere during the freeze period cannot be sustained. It is accepted that President Carter issued Executive Order No. 12170 on 14 November 1979

blocking all Iranian assets in the jurisdiction of the United States. That the New York Fed, whether or not a government entity, had the obligation to abide by the domestic law of the United States, of which this Executive Order and its associated regulations formed part, cannot be doubted. The Tribunal has held that "acts of public authority by the state may operate as force majeure and excuse the state enterprise from liability." Blount Brothers Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 215-52-1 (28 February 1986), reprinted in 10 Iran-U.S. C.T.R. 56, 75.

76. A finding that the New York Fed is a state enterprise is clearly not necessary for this principle to have application here. Although the Tribunal does not decide whether Respondent is a controlled entity (see paragraphs 35-37 above), the record shows that, at the least, the New York Fed has its own legal personality distinct from the state, and can thus invoke the United States' act, in this instance Executive Order No. 12170, as justification for not acceding to Claimant's "request" to remove its funds even if the New York Fed were considered a state entity.

77. As mentioned in paragraph 45 above, the contract between the Parties at no stage contained any guarantee of a specified return. By entering into an agreement with the New York Fed whereby it would invest Claimant's funds in U.S. Treasury Bills and repurchase agreements, Claimant was agreeing to receive whatever could be earned from such investments on the open market. The return received by Bank Markazi was purely the result of these operations, without any interference by the New York Fed. There is no

indication in the record that the New York Fed withheld a "premium" or charge from the proceeds of Bank Markazi's investments for any alleged guarantee concerning those investments. Its remuneration was derived from an agreed-upon uninvested balance of funds kept with the New York Fed.

78. The contract between the Parties contains no guarantee either of the safety or liquidity of Claimant's funds, as those terms appear to have been understood by Claimant itself. When Respondent asserts that Bank Markazi's investments were safe and liquid, these terms are used merely as attributes ascribed to the investments in question by the market. The fact that the New York Fed had indicated that certain investments possessed certain attributes cannot be taken to mean that Respondent provided any guarantees concerning the investments.

79. Respondent did not fail to fulfil its contractual obligations to Claimant during the freeze period. Moreover, Claimant's own calculation of its damages further demonstrates that it has no valid claim. Focusing only on the claim as it has emerged, the rationale of the quantum of damages is that the New York Fed would have withheld a premium in return for which it was supposed to have guaranteed both the safety and liquidity of Bank Markazi's funds, both "guarantees" understood as having very specific meanings. Claimant asserts that this charge amounted to the difference between the return it actually received and the return it would have received had it invested its funds in Eurodollars during the relevant period. It argues that the movement of funds into Eurodollars would have been a

"natural" move and should not be viewed as a form of speculation. Bank Markazi submits, furthermore, that the return on such Eurodollar deposits would have been consistent with the "rules applicable" in the money market at the time, and that the New York Fed breached its obligations by not allowing Claimant to invest its funds in accordance with these rules.

80. The claim for damages is speculative. There is no way to know what Bank Markazi would have done with the funds had it requested and received them. Thus there is no indication that the Parties knew or could have known how the funds would have been invested, whether in Eurodollars or something else, or at all, in order to calculate any difference in returns for damages purposes. The New York Fed's failure to honor a few instructions to transfer funds to Bank Markazi's creditors because of the freeze order has not been the basis of any specific claim for damages. There is no indication that Bank Markazi suffered any losses because of these non-payments. Furthermore, Claimant referred to these payment instructions, and to Respondent's subsequent inaction in relation to them, as evidence that Respondent had severed the connection between Claimant and its funds and that in this way, Claimant had suffered damages. However, these instructions relate only to payments out of Bank Markazi's account -- which payments were not permitted under the Executive Order -- and not to the manner in which the funds were invested. There is no evidence that Bank Markazi issued any instructions to the New York Fed during the freeze period related to the manner in which the funds were invested. In conclusion, it is

apparent that Claimant has not shown that it suffered any damages caused by Respondent.

AWARD

81. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

i. The claim against the Federal Reserve Bank of New York is hereby dismissed;

ii. Each Party will bear its own costs of arbitration.

Dated, The Hague
16 November 1999

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the Name of God

Richard M. Mosk
Concurring Opinion

Mohsen Aghahosseini
Dissenting. See
Dissenting Opinion.