IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

NOT FOR Publication

برای انتشار نیست

CASE A/1

SEPARATE OPINION OF MEMBERS ALDRICH, HOLTZMANN AND MOSK ON THE ISSUE OF THE DISPOSITION OF INTEREST EARNED ON THE SECURITY ACCOUNT.

We concur in the majority decision of the Tribunal on the disposition of interest accruing on the Security Account because it is a fair, if conservative, interpretation of the text of paragraph 7 of the General Declaration. This interpretation leaves the burdens and benefits of the agreements where it was arguably foreseeable that they would lie in the absence of further agreements between the two Governments. While we consider that crediting the interest directly to the Security Account rather than placing it in a separate account would have been more consistent with the language, object and purpose of the Algiers Declarations and more in keeping with banking practice, we nevertheless join the majority in order to enable this question to be resolved in an acceptable manner.*

Article V of the Claims Settlement Declaration provides:

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

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* Such a majority is required by Article 31, paragraph 1 of the Tribunal Rules. See Sanders, Commentary on UNCITRAL Arbitration Rules, II [1977] Yearbook - Commercial Arbitration 172, 208.

Although not in customary treaty form, the Algiers Declarations and related agreements are "treaties" within the meaning of Article 2 of the Vienna Convention on the Law of Treaties of 1969. Rules for interpretation of treaties are, of course, a matter of international law and have been codified in the Vienna Convention. On this question there is no dispute, as both Governments have agreed that the Vienna Convention provides guidance to the Tribunal in interpreting the Algiers Declarations. Transcript of Hearing of March 8, 1982 at pp. 13 and 88-90.

Article 31, paragraph 1 of the Vienna Convention sets forth the following general rule of interpretation:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The language of the Algiers Declarations can certainly be interpreted to provide that the interest earned on funds in the Security Account is to be credited, as it accrues, to that account. Paragraph 7 of the General Declaration provides that the Security Account is to be "interest-bearing" and that "[a]ll funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement." (Emphasis added)

The criteria often utilized to interpret treaty language also support our preferred interpretation.

The object and purpose of paragraph 7 of the General Declaration establishing an interest-bearing Security Account clearly was to provide security for the payment of any awards which might be rendered by the Tribunal against Iran. Crediting to the Security Account interest earned on the funds comprising it is, in our view, more consistent with that object and purpose than is any other result, particularly in view of the

fact that, with the passage of time, more of the amount in the Security Account will be attributable to interest payable on valid, unpaid claims, thereby having the effect of reducing the number of claims that can be satisfied out of the initial $1 billion amount in the Security Account. While recognizing that the security afforded American claimants does not consist solely of the funds in the Account, but also includes the obligation assumed by Iran to replenish the Security Account whenever it falls below $500 million, we believe that our preferred interpretation is more consistent with the reasons for creating the Security Account.

Moreover, we place greater emphasis than do the other members of the majority upon the significance of banking usages and practices as a necessary aid in interpreting the Declaration with respect to disposition of the interest earned on the funds in the Security Account.

Under both the Vienna Convention and Article V of the Claims Settlement Declaration, it is appropriate to refer to principles of commercial law and the relevant banking usages and practices. The application of such law and usages is specifically referred to in Article V. Such application is also required in order to understand the "ordinary meaning to be given to the terms of the treaty in their context" as is provided in Article 31 of the Vienna Convention.* Established to secure payment of claims which arise out of transactions that were largely commercial in nature, the Security Account is in the form of an escrow account-- a legal mechanism developed and used mainly in connection with commercial transactions. Each Government demonstrated its recognition of the importance of banking practice by submitting extensive evidence of commercial banking law and

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* See also Ambatielos Case (Greece v. U.K.) Anglo-Greco Commission of Arbitration, 12 R. Int'l Arb. Awards 82, 108 (1956) ("Naturally [the treaties'] wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact.")

practice. The negotiators for Iran and the United States, among whom were included experienced international bankers from both sides, knew or should have known of this banking practice and must be held to have contracted in light of it.

Both Governments submitted evidence in the form of sworn affidavits by experts. The testimony of experts is almost universally held by international tribunals to be of evidentiary value. See generally D. Sandifer, Evidence Before International Tribunals 325-348 (Rev. ed. 1975). It is equally clear that such testimony may be offered in the form of affidavits. Id. at 257.

The banking experts whose testimony is before the Tribunal all agreed that, under banking law and practice, only the Central Bank of Algeria, as Escrow Agent, can give instructions to the depositary bank concerning the payment of interest earned on the funds in the Security Account, and that the Escrow Agent can do so only pursuant to mutual agreement of Iran and the United States.

There is also remarkable agreement among the banking experts on the question of what the banking usage is in a situation in which neither the documents establishing the escrow account nor other agreements of the parties give explicit instructions concerning the disposition of interest earned on the escrow account.* Two experts on behalf of Iran and four experts on behalf of the United States testified in their affidavits that, under banking usage, the interest would, in such a situation, be credited to the account in which the

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* Iran's unexpressed expectations cannot be enforced absent an objective manifestation in the Declarations of such expectation. See Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and Other Treaty Points, 1957 Brit. Y.B. Int'l L. 203, 206.

principal is held. One of the experts for Iran and one for the United States added that, as an alternative, the interest might be placed in a separate account.

In view of the preponderance of the expert testimony and in the context of the object and purpose of the General Declaration, we believe that the better decision would have been to credit the interest directly to the Security Account.* We recognize, however, that there is also expert evidence which supports placing the interest in a separate account, and, in view of that evidence, we are able to join in the majority decision adopting that alternative. We are especially able to do so because the practical result of that decision will be that, unless the two Governments agree otherwise, the interest will be kept available for use by Iran as a source of funds for replenishment, if needed, until such time as all awards of the Tribunal have been satisfied. Only then will any remaining amount of interest be paid to Iran, along with any balance remaining in the Security Account.

George H. Aldrich Howard M. Holtzmann Richard M. Mosk

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* Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) (the United States Supreme Court stated that "the usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." (Emphasis added)).