رای انتشار نیست
NOT FOR PUBLICATION

A1-49

IRAN-UNITED STATES CLAIMS TRIBUNAL

Case A/1

Request for decision regarding four issues of dispute arising in connection with the establishment and operation of the Security Account provided for in the Algiers Declarations.

On 14 May 1982 the Tribunal rendered a decision regarding Issue II (Standard to be applied by the Tribunal in recording a Settlement as an Award on Agreed Terms) but reserved its decision on the remaining three issues.

The Tribunal now renders the following decision on Issues I, III and IV.

ISSUE I. THE DISPOSITION OF INTEREST EARNED ON THE SECURITY ACCOUNT.

The Contentions of the Two Governments

The Tribunal has been requested to interpret the agreements between the two Governments with respect to the disposition of interest earned by the funds in the Security Account. Iran asserts that those agreements require all interest to be transferred to Iran as the interest accrues. The United States asserts that those agreements require all interest to be retained in the Security Account available, like the principal, to secure and pay awards against Iran by the Tribunal.

Iran contends that all interest should be remitted to Iran as it accrues because the funds in the Security Account are "Iranian property", any residue of which, after all claims are resolved, is to be remitted to Iran. It argues that the Account has a $1 billion ceiling that would be exceeded, at least prior to the payment of awards, if interest were credited to the Account.

Iran contends that it never agreed to allow more than $1 billion of its property to remain in the Account, and that any interpretation of the Algiers Declarations which would result in the Account's exceeding the sum would impermissibly place an obligation on Iran to which it, as a sovereign State, had not explicitly consented. Iran asserts that the burden of proving any such consent is on the United States. Iran further argues that, in negotiations in August, 1981 concerning the disposition of interest, United States negotiators put forth a settlement proposal which would have allowed the interest to be credited to Iran, and that such earlier position undercuts the present one.

The United States contends that the $1 billion amount is a ceiling on initial funding only, not on any amounts which might ultimately be contained in the Account due to the accrual of interest. It notes, further, that interest on an escrow account can be paid only at the direction of the account holder, that in this case the account holder is the Escrow Agent and that the Escrow Agent is not authorized by the agreements to direct payment of interest to Iran. The United States also contends that normal banking usage would be to credit interest to the Account, and that following such usage in this case would be most consistent with the object and purpose of the agreements. The United States views it as misleading to characterize the funds in the Account as "Iranian property", since Iran's property right in those funds is only a residual one, i.e., the right to the funds, if any, which remain after all awards to United States claimants have been satisfied. It notes, finally, that the question of ownership must be placed in the context of the United States possession of the funds prior to the creation of the Account, due to attachments lawfully obtained by United States claimants on Iran's assets.

Conclusions Concerning the Interest Issue

The Tribunal notes at the outset that it has jurisdiction to determine this issue pursuant to paragraph 17 of the Declaration

and Article VI of the Claims Settlement Declaration as a dispute or question concerning the interpretation or performance of any provision of the Declaration and the interpretation or application of the Claims Settlement Declaration. In so doing, the Tribunal looks first to the text of paragraph 7 of the Declaration. With respect thereto, the Tribunal is not convinced by the views of either Government that paragraph 7 establishes without doubt how the interest is to be disposed of. In order, therefore, to avoid a denial of justice it is necessary to find a solution either (a) in the common intention of the Parties; or (b) in banking usages; or (c) in the object and purpose of the agreements, within the meaning of the Vienna Convention on the Law of Treaties of 1969.

With respect to point (a), and Iran's reference to settlement negotiations held in August, 1981, a court cannot take account of that which one party proposes to another in a confidential manner in an effort to achieve a resolution of their disputes. There is, in all other respects, no clear and persuasive evidence of what might have been the intention of the Parties as to the interest on the Account when they entered into the agreements. While the United States has submitted certain unilateral statements made after the signing of the agreements of its intent that interest remain in the Account, there are counter-statements by Iran. The High Contracting Parties were quite precise in detailing their common views on the other highly technical points involved in transferring the assets. Their silence here leads the Tribunal to conclude that there was no common intention on the point at issue. Moreover, the absence of an agreed-upon mechanism for crediting the interest, and the prohibition on the Escrow Agent from acting outside of its written instructions governing the operation of the Account, indicate that the Parties either knew or should have known that the question of interest payment could only be settled through further negotiations.

With respect to point (b), it is not entirely clear that standard banking usages apply to so unique a situation. Where, as here,

a court is asked to determine the rights of the parties to funds in an escrow account, and the parties which created it have failed in their contract to express their intent, it is for the arbitrators to determine the scope of the contractual lien on the funds contained in that account. The difficulty of having recourse to banking usage as guidance in deciding whether the escrow lien extends to interest on the principal amounts, is that in most commercial situations this question would not arise, because the parties would have written their agreement more clearly.

It is therefore necessary with respect to point (c), to find a solution within the structure of the agreements themselves. The relevant governing principles established by the Parties are a recognition of Iran's rights in its assets, along with agreement to resolve disputes by binding arbitration, and the creation of a Security Account consisting of Iranian funds in order to satisfy awards against Iran. In this context, in the Declarations, the interests of Iran, the "owner" of the funds, were set 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. The balance was a careful one, and was premised on maintaining equilibrium between the Parties.

In determining to whom the interest on the Account should be remitted as it accrues, the Tribunal should ensure that neither Party is favoured. Rather, it is necessary to maintain the present equilibrium by, in essence, freezing the situation as it has been brought about in the absence of any conferral of power on the Escrow Agent by the Parties. The Tribunal therefore concludes that the interest must, as it has been, be credited as it accrues to a separate interest-bearing account in the N. V. Settlement Bank unless and until the two Governments agree to a different result. In the absence of such agreement, the funds in this separate account, including interest earned by them, would be finally remitted to Iran at the same time as any balance in the Security Account.

However, in order to avoid any prejudice to Iran, and in harmony with the equilibrium already established in the agreements, the Tribunal decides that Iran shall have access to the funds in the separate account in order to help satisfy its replenishment obligation, if the need arises. Since use of those funds for this purpose would facilitate the payment of awards to United States claimants, the funds in the separate account can be used by Iran for replenishment of the Security Account without the need for concurrence by the United States.

It is important to point out that this result does not accord undue regard to the sovereignty of either State. As a response therefore to Iran's argument that no financial commitment on its part can be assumed without explicit textual support, the Tribunal notes first that this rule of "restrictive interpretation" has been criticized as leading to restrictions on the obligations of one sovereign State to the detriment of any benefits in a treaty provided to another sovereign State. McNair, The Law of Treaties 765 (1961). Second, no genuine restrictions are imposed on Iran's "ownership" rights be retaining the interest in a separate account, which can be a source for replenishment, where the interest itself will accrue interest, and the final balance of which can ultimately be remitted to Iran.

The Parties shall meet in order to determine any technical arrangements which may be necessary in order to carry out our decision, though they of course remain free to agree to such other arrangements as they find mutually acceptable.

ISSUE III. PAYMENT OF BANK FEES ASSOCIATED WITH THE SECURITY ACCOUNT.

Background

A number of provisions in the various agreements are relevant to this issue. The Escrow Agreement provides:

> This Agreement is made to implement the relevant provisions of the Declaration of the Government of Algeria of January 19, 1981 (the "Declaration"). These provisions concern the establishment of escrow arrangements for Iranian property tied to the release of United States nationals being held in Iran....
>
> 5. On the date of the signing of this Agreement by the four parties hereto, the Banque Centrale d'Algérie and the FED [Federal Reserve Bank of New York] will enter into a Technical Arrangement with the Bank of England to implement the provisions of this Agreement.
> Pursuant to that Technical Arrangement between the FED, the Bank of England and the Banque Centrale d'Algérie, the FED shall reimburse the Bank of England for losses and expenses as provided in paragraph 10 thereof. The FED will not charge the Banque Centrale d'Algérie for any expenses or disbursements related to the implementation of this Agreement.

Paragraph 10 of the Technical Arrangement concluded to implement the Escrow Agreement sets forth the United States undertaking to pay any loss and expense of the Depositary Bank. That proposal provides:

> The FED shall indemnify and hold the Bank harmless against and shall reimburse the Bank for any loss or expense that they may incur by reason of their acts or omissions under or in connection with this Arrangement....

Furthermore, the agreement with the Depositary Bank in which the Security Account was eventually established states that a monthly fee of $150,000 shall be paid to the Depositary Bank "...in consideration of the service rendered and in order to cover costs, charges and expenses in respect of the maintenance and operations of the Accounts...." Technical Agreement with N. V. Settlement Bank, paragraph 3(e). The Depositary Bank is not permitted by the Technical Agreement to keep for itself any

earnings on the funds in the Security Account. Technical Agreement with N. V. Settlement Bank, paragraph 3(a). Accordingly, its compensation for services is the monthly fee.

Thus, the parties have agreed on the fees to be charged for maintaining and operating that Account. There is, however, no express provision in the agreements as to the allocation of these fees between Bank Markazi Iran and the Federal Reserve Bank of New York.

The Technical Agreement also provides that $75,000, or the portion of the fees to be paid by the Federal Reserve Bank of New York "according to the decision of the Tribunal", shall be paid monthly by the Federal Reserve Bank of New York on demand. Furthermore the Agreement provides that the remaining half of the fees, or the portion to be paid by Bank Markazi Iran according to the decision of the Tribunal, shall, at the request of the Depositary, be paid monthly by deducting this amount from the interest earned on Account B prior to its being credited to Account C (the Account in which the interest earned on Account B currently accumulates). Technical Agreement with N. V. Settlement Bank, paragraph 3(d)(i).

Lastly, paragraph 3(d)(ii) of the same agreement provides:

> Any adjustment in amounts so paid that may be required by the Tribunal's decision shall be made as follows:
>
> Any amounts owing from Bank Markazi to Federal, or vice-versa, in this regard shall be paid by transferring the amount so owed to an account to be opened on the books of the Escrow Agent for that purpose ("the Adjustment Account"). The Escrow Agent shall then transfer funds to the appropriate party in such a way as to effect the necessary adjustments. Bank Markazi and Federal each hereby irrevocably guarantees to the Escrow Agent the payment into the Adjustment Account of such funds as may be necessary to make the adjustments required by the Tribunal's decision. Funds that may be due from Bank Markazi under this clause shall, on instructions to be issued by the Escrow Agent, be deducted by the Depositary from interest earned on Account B and transferred to the Escrow Agent for credit to the Adjustment Account. Funds that may be due

from Federal under this clause shall be transferred from Federal to the Escrow Agent for credit to the Adjustment Account.

Contentions of the Two Governments

The Tribunal has been requested to determine the allocation of the fees which are required to be paid for services to the Depositary Bank and the method of payment.

Iran asserts that the United States alone should pay the full amount of operational costs and expenses of the Security Account. Iran argues that since the United States agreed to pay the costs of the Escrow Account in the Bank of England, the United States should also pay the costs of the account in the Depositary Bank. The Escrow Agreement and the Technical Agreement are, according to Iran, the basic agreements regarding all banking and financial relations between the two Governments and are inseparable parts of the Algiers Declarations. Thus, the change of location of the Security Account from the Bank of England to the Depositary Bank in the Netherlands does not change the obligation of the Federal Reserve Bank of New York to pay the losses and expenses of the bank with which the Account is deposited.

Iran also argues that it derives no benefits from the existence of the Security Account since it was created solely for paying awards to United States claimants. On the contrary, according to Iran, the existence of the Security Account is a substantial impediment to Iran, which is deprived of a considerable sum of its money, and thus, there is no reason why Iran, in addition, should have to bear the costs of maintaining this Account. Hence, Iran contends that in the absence of any express undertaking by Bank Markazi Iran to pay the fees, the United States should bear the costs of maintaining the Security Account.

The United States, on the other hand, contends that Iran should bear responsibility for payment of a substantial portion, or, at a minimum, one-half of the fees of the Depositary Bank.

The United States further argues that the burden of expenses in connection with the management of the funds would have fallen on Iran regardless of where the funds were being kept, and that Iran derives a benefit from the management of the funds in the Security Account and from the Security Account itself in that it provides an efficient mechanism for liquidating Iran's debts. Finally, the United States contends that just as the Parties have agreed to share equally expenses incurred by the Tribunal in its operations, Iran should be required to share the expenses of the Security Account.

Conclusions Concerning the Costs Issue

For the reasons stated below the Tribunal holds that Bank Markazi Iran and Federal Reserve Bank of New York shall each pay one-half of the fees of the Depositary Bank.

The provisions in the Escrow Agreement and the Technical Arrangement with the Bank of England for the contingency that the Security Account might have to be temporarily lodged in an account in that bank, and the related undertakings of the United States to pay the costs of this and other accounts, cannot be interpreted as obligating the United States to bear the operational costs also of the Security Account when it was eventually created ab initio in the N. V. Settlement Bank. Because Iran was not a party to the Technical Arrangement with the Bank of England, the United States had to make a commitment to the Bank of

England in this respect. In any event, the funds in the Security Account have never been held in the Bank of England, and the United States has consequently never paid any monthly fees to the Bank of England for the Security Account. Therefore, no obligation of the United States to pay the full amount of the costs can be inferred from its separate undertaking, made in quite different circumstances, to the Bank of England.

The agreements between the two Governments establish an integrated mechanism for resolving claims. This mechanism includes both the establishment of the Tribunal and the creation of the Security Account to secure the payment of awards which the Tribunal may make in favour of American claimants. The Claims Settlement Declaration provides that the expenses of operating the Tribunal shall be borne equally by the two Governments. Article VI, paragraph 3. It is therefore consistent with the general framework of this mechanism that the bank fees associated with operating the Security Account, which is a related part of the same claims settlement process, should likewise be borne equally by the two Governments.

In addition, it should be noted that the Technical Agreement with the Depositary Bank provides that Bank Markazi Iran and Federal Reserve Bank of New York shall equally reimburse the Escrow Agent for any reasonable costs incurred by it in making certain valuations of "bank securities" deposited in the Security Account. Paragraph 1(b)(iv)(B)(2). This carries out the object of equal sharing of costs related to the claim settlement process which is expressed in the Claims Settlement Declaration. It is appropriate that the other costs provided for in the same Technical Agreement, i.e. the monthly fees, should also be borne equally.

It is not true, as contended by Iran, that only the United States benefits from the existence of the Security Account. The Security Account also serves Iran's interests to the extent its

funds are used to satisfy Iran's obligations. Moreover, the income generated by the services of the Depositary Bank, for which services the fees are being paid, will accrue to the benefit of Iran, whether used to pay awards or ultimately returned to Iran. To argue about the benefits and detriments of the Security Account, however, leads to no conclusion since it is merely one aspect of an overall agreement of the two Governments. The Declaration states in its first paragraph that the two Governments entered into "interdependent commitments" in order to settle the crisis between them. The Security Account is only one element of these commitments which, taken together, constitute a package that both Governments must have considered to be in their mutual best interest.

ISSUE IV. RESPONSIBILITY FOR INDEMNIFICATION OF THE DEPOSITARY OF THE SECURITY ACCOUNT.

Contentions of the Two Governments

Iran contends that the United States alone must indemnify the Depositary Bank and its parent Central Bank for any losses or damages arising out of the Security Account. The United States argues that the responsibility for indemnification must be joint and several. Furthermore, the United States contends that, in the instance where either or both Parties is deemed to be at fault for any ensuing liability to the banks, there should be a right of contribution in accordance with the relative fault of the Parties, up to the entire amount of indemnification; otherwise, each Party would be exposed to liability caused by the acts of the other. Again, the agreements contain no express provisions on the matter.

The Governments' positions are based on essentially the same arguments advanced in connection with the issue of payment of bank fees associated with the Security Account.

In addition, Iran argues that the United States position would result in the necessity of determining the relative fault of the two Governments -- a process inconsistent with the agreements between them.

Conclusions Concerning the Issue of Responsibility for Indemnification

For the reasons stated below, the Tribunal holds that Iran and the United States are jointly and severally bound to indemnify the Nederlandsche Bank and the N. V. Settlement Bank in connection with the indemnification provisions of the Technical Agreements. The Tribunal does not, at this time, reach the issue of what standards to apply to any dispute between Iran and the United States as to their liability to each other for contribution in the event indemnification is required.

For the same reasons set forth with respect to equal responsibility for the costs of the Security Account, both Iran and the United States must have equal responsibility for indemnifying the Depositary Bank and its parent central bank. Furthermore, for the protection of those banks, this responsibility must be borne by the Parties jointly and severally, allowing the banks to seek recourse against either or both of them.

It is premature at this point to establish the basis for determining liability of one of the two Governments for contribution to the other in the event of indemnification. The Tribunal can determine each Government's liability for contribution to the other, if any, based on the facts and law applicable to the particular case, if and when indemnification is sought or made, and the issue of responsibility is before the Tribunal.

The Hague,
Signed, 30 July 1982
Rendered, 3 August 1982

Gunnar Lagergren
(President)
(dissenting as to Issue I)

In the name of God,

Pierre Bellet

Nils Mangård

Mahmoud M. Kashani

In the name of God,

Howard M. Holtzmann
(separate concurring opinion as to Issue I)

Shafi Shafeiei

George H. Aldrich
(separate concurring opinion as to Issue I)

In the name of God,

Richard M. Mosk
(separate concurring opinion as to Issue I)

Mostafa Jahangir Sani

Having been informed of the time when the decision would be signed at the Headquarters of the Tribunal, Mr. Kashani, Mr. Shafeiei and Mr. Jahangir Sani failed to be present.

The Hague, 30 July 1982
Gunnar Lagergren