# THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION

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*Edited by*

P. Hamilton, H.C. Requena
L. van Scheltinga, B. Shifman

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# The Iran-United States Claims Tribunal

*Koorosh H. Ameli**

Despite controversies over the precedential value of its jurisprudence, perhaps the most valuable contribution of the Iran-United States Claims Tribunal to international law has been its operation as a means of pacific settlement of disputes. Pursuant to the Algiers Declarations of January 19, 1981, the Tribunal was agreed upon by the Governments of Iran and the United States at a time when relations between the two Governments had deteriorated to crisis level and Iraq had invaded Iranian territory with the blessing of some foreign powers. The resolution of that crisis; the return of Iranian assets and properties, including those taken by the former Shah of Iran and his close relatives; and the mutual benefit of having a forum in which the legitimate claims of both sides could be fairly heard and decided; were among the primary considerations in the conclusion of the Algiers Declarations and the establishment of the Tribunal. One may question whether the Tribunal has lived up to these expectations, but the result of its operations, at least in monetary terms, since its establishment on July 1, 1981, would lead to the view that both sides have to some extent benefitted from its operation – something which would arguably not have been otherwise achievable.

According to its Communiqué dated April 22, 1998, the Tribunal had by March 31, 1998 finalized 3,919 cases. By the same date, it had rendered 795 awards, partial awards, interlocutory awards, interim awards, decisions, and awards on agreed terms. Pursuant to these awards, Iran and Iranian parties have paid $2.140 billion plus interest to United States parties out of the Security Account which Iran had established under paragraph 7 of the General Declaration. It is worth noting that of this amount only $495 million plus the interest to be calculated by the Escrow Agent was awarded pursuant

* Judge, Iran-United States Claims Tribunal; Member, PCA Expert Group and Steering Committee; Member, International Law Association Committee on International Commercial Arbitration; Fellow, Chartered Institute of Arbitrators; LL.M., Harvard Law School 1977; LL.M. (abp), National University of Iran Law School 1975; LL.B., *idem.*, 1973.

to contentious awards, the remaining $1.645 billion was paid pursuant to awards on agreed terms, which carry no interest. On the other hand, pursuant to its awards, the Tribunal has directed the United States and United States parties to pay Iranian parties $1.010 billion.[1]

The contentious awards' figure of $495 million plus interest thereon, however calculated by the Escrow Agent, cannot amount to more than a total of $1 billion, which compares favorably with the amount awarded to Iranian parties. Thus, at least in monetary terms, the outcome of the Tribunal's operation appears to have resulted in some balance between the two sides, despite controversy over a number of Tribunal awards. Iranian parties must also have received some value in the form of property, goods, services and the like for the $495 million plus interest, that is $1 billion, awarded against them in contentious cases, however questionable those awards may have been. It should be noted that the sums awarded to Iranian parties obviously do not include any amount for the major Iranian claims that have yet to be decided. While a number of Tribunal awards remain highly controversial,[2] the peaceful resolution of international disputes between two States is in itself of considerable importance. Moreover, by virtue of the Declarations, Iran has also obtained access to an international tribunal for resolution of its major claims against the United States, and at the same time avoided being drawn into litigation before United States courts by private U.S. claimants in the pursuit of their claims.

There has been considerable emphasis by international law commentators on the decisions of the Tribunal concerning certain controversial private

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1. The amounts for certain Iranian claims before the Tribunal, that were settled along with the *Airbus* dispute, a case then pending before the International Court of Justice. *Islamic Republic of Iran* and *United States of America*, Partial Award on Agreed Terms, Award No. 568-A13/A15 (I and IV:C)/A26 (I,II, and III)-FT (22 February 1996), reprinted in ___ Iran-U.S. C.T.R. ___ and in 11 Mealey's International Arbitration Report (February 1996, no. 2) Sec. G.
2. R. Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution* (Martinus Nijhoff 1988) p. 197 et seq., a study funded by the Max Planck Institute; S.J. Toope, *Mixed International Arbitration*, Ph.D. thesis Cambridge University (Grotius Publications, Cambridge 1990) pp. 263-383; as example of one case see the controversy over the validity of an "award" in *Phillips Petroleum*, 21 Iran-U.S. C.T.R. p. 307 et seq.

American claims against Iran.[3] There has been almost no discussion of the Tribunal's decisions concerning intergovernmental claims, particularly those involving treaty violations, most of which were brought against the United States.[4] To highlight the Tribunal's jurisprudence and its contributions to international law, I include two of these cases and two private cases for the case summaries that I have been asked to provide in limited space.[5] The two intergovernmental claims concern the return of Iranian properties and excess funds, and of the two private claims, one is a construction case, *Westinghouse*, and the other is a dual nationality case, *Karubian*, which involves expropriation or other measures affecting property rights and the operation of the Tribunal's important caveat in dual nationality cases.

1. The Full Tribunal Award in Case No. *A15 (II:A and II:B)*[6] involved the international responsibility of the United States for violations of its treaty obligations under the Algiers Declarations, which were intended to settle prior disputes between Iran and the United States. In Claim II:A of this Case, Iran argued that the United States had breached its obligations under the General Declaration, General Principle A, "to ensure the mobility and free transfer of all Iranian assets within its jurisdiction"[7] and, pursuant to

3. See, e.g., R.B. Lillich and D.B. Magraw, eds., *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (ASIL, Transnational Publishers 1998).
4. *Idem.*
5. As this paper was written, the Tribunal rendered an award which represented a major contribution to international law, namely that the validity and enforceability of international arbitral awards are not subject to review by municipal courts but by the international tribunal itself. The award further stated that the grounds for invalidity and unenforceability of awards under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is not applicable to international arbitral awards, and that failure to comply with the award would give rise to international responsibility of the State party to the arbitration agreement, even if enforcement of the award is refused by a municipal court. *The Islamic Republic of Iran* and *The United States of America*, Award No. 586-A27-FT (5 June 1998), paras. 64 and 69-71, reprinted in ___ Iran-U.S. C.T.R. ___.
6. *The Islamic Republic of Iran* and *The United States of America*, Partial Award No. 529-A15-FT (6 May 1992), reprinted in 28 Iran-U.S. C.T.R. p. 112.
7. The full text of General Principle A reads:

"Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United

paragraph 9 of the Declaration, to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs."[8]

Iran contended that (i) the United States had violated these obligations by issuing and maintaining Treasury Regulations subsequent to the Algiers Declarations that failed to direct the holders to transfer Iranian properties where statutory liens had not been discharged, necessary obligations, charges and fees had not been paid, the properties could be considered contested by virtue of the holder's belief of the existence of a defense, counterclaim, set-off, or similar reason, or where Iran's ownership of such properties was still at issue; (ii) that the United States had violated these obligations by issuing and maintaining Treasury Regulations that permitted the licensing of the sale of certain Iranian properties, some of which were indeed sold; and (iii) that the United States had also violated these obligations by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties subject to U.S. export control laws and failed to offer compensation for such properties.

Simultaneous with the signing of the Algiers Declarations by the two Governments, the President of the United States issued Executive Orders Nos. 12279, 12280 and 12281 with immediate effect, directing the transfer of the Iranian Government assets. Executive Order No. 12281, while directing and compelling all persons subject to United States jurisdiction in

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States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9."

8. Paragraph 9 of the General Declaration provides:

"Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs."

possession or control of such properties to transfer them as directed by the Government of Iran, provided that:

> "All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to [Iranian properties]."[9]

More than a month later, on February 26, 1981, the U.S. Treasury Department issued a number of Regulations purportedly for the implementation of the three Executive Orders. Section 535.333 of the Regulations defined "Iranian properties" whose transfer was directed to include "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts." It stated that Iranian properties "may be contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason." It also provided that properties are "not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged." As a result of these provisions, any holder of Iranian property who reasonably believed that Iran owed him money for storage, repair, breach of contract, expropriation, or other reason was not compelled by the Treasury Regulations to return the property to Iran.

Treasury Regulations Section 535.540, issued on July 22, 1982, permitted the sale of Iranian tangible properties under a license if the holder's efforts to obtain payment from Iran were unsuccessful and agreed to give Iran and this Tribunal a 30-day notice of the sale where the holder had a pending claim before the Tribunal.

Iran argued that the United States by not requiring the holders of Iranian tangible properties to transfer them to Iran, by allowing the holders to sell the properties, and by maintaining the liens, taxes and other charges on the properties as grounds for refusing to return or transfer the properties,

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9. *A15(II:A & II:B)*, para. 12.

breached its obligations under the Algiers Declarations, particularly General Principle A and paragraph 9 of the General Declaration.

The Tribunal held that the United States, in the Declarations, committed itself to direct the transfer of Iranian properties that were subject to liens, no matter when those liens arose. Although the United States argued that under General Principle A of the Declaration, its commitment was limited to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979", and that on that basis it had no obligation for properties as to which a lien had arisen prior to November 14, 1979, the Tribunal found that Executive Order No. 12281 clearly prohibited the exercise of *all* liens on Iranian properties, no matter when the liens arose. Noting that both parties considered this Executive Order to be in compliance with the Declaration, the Tribunal found that this Executive Order formed part of the practice of the treaty for purposes of its interpretation, as provided in Article 31(3) of the Vienna Convention on the Law of Treaties.

The Tribunal also observed that the main purpose of General Principle B of the Declaration[10] was to remove and bar disputes with and claims against Iran from the courts of the United States and bring them before the Tribunal and that this purpose would best be served by preventing the exercise of liens, because otherwise the only way for Iran to contest the liens would be, through litigation in U.S. courts. The lien holders had been given access to the Tribunal and could recover any amounts due them from Iran.[11] The Tribunal held:

> "If the necessary interests of persons subject to United States jurisdiction holding Iranian properties on which liens existed were to be protected, that had to be done overtly in the Algiers Declarations themselves, not by unilaterally redefining Iranian properties by subsequent regulation as non-Iranian properties."[12]

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10. Under General Principle B "the United States agree[d] to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."
11. *A15(II:A & II:B)*, para. 49.
12. *Idem.*, para. 50.

The Tribunal found fundamentally flawed the United States argument that the "U.S. law clause" in paragraph 9 of the General Declaration authorized such redefinition in the Treasury Regulations to protect the rights of lien holders, holding that "the U.S. law clause cannot reasonably be interpreted as covering rights and privileges accorded by that law to the holders of Iranian properties, as opposed to the restrictions and requirements imposed by that law upon the movement of those properties." Further, the U.S. interpretation was found to be contradicted by the terms of Executive Order No. 12281 sections 1-101 and 1-102(c). The Tribunal also noted the lack of any evidence that during the negotiations of the Declarations the United States received Iran's consent that the "U.S. law clause" had any purpose other than the preservation of strategic export controls on military properties.[13] The Tribunal concluded that the redefinition of "Iranian properties" in the Treasury Regulations constituted a violation of the United States' obligations in exempting from the transfer directive Iranian properties on which any existing liens had not been discharged by Iran. The Tribunal also found questionable the legality of the Treasury Regulations under customary international law of immunity "in so far as they require Iran to submit to the jurisdiction of U.S. courts in the event Iran challenges a lien asserted by a U.S. person in possession of any Iranian properties covered by said customary international law [of] immunity."[14]

The Tribunal also held that the conclusions made with respect to liens also applied for the same reasons to Iranian properties where the holder contested Iran's right to possession by asserting a defense, a counterclaim or a set-off.[15]

As to the licensing of the sale of Iranian properties under the Treasury Regulations, the Tribunal held that under both the U.S. Foreign Sovereign Immunities Act and customary international law, a foreign state is immune from execution of a private lien through sale and that the Treasury Regulations breached those rules in so far as they subjected Iran to the jurisdiction of the United States. The Tribunal also found that

13. *Idem.*, para. 51.
14. *Idem.*, para. 52.
15. *Idem.*, para. 54.

> "The principle that a State's property is immune, albeit with certain exceptions, from execution in another State must *a fortiori* apply to an execution which . . . is principally determined and effected by a private foreign citizen. The various theories of state immunity, whether they be more or less restrictive, would lead here to the same result."[16]

As to the refusal to grant export licenses for Iranian properties under Treasury Regulations Section 535.215, the Tribunal noted that under an earlier decision (Award No. 382-B1-FT, para. 46 (19 Iran-U.S. C.T.R. pp. 273, 278)) it was held that "the United States did not violate its obligations under the Algiers Declarations by issuing and maintaining Treasury Regulations that permit it to refuse to license exports of Iranian properties subject to U.S. export control laws applicable prior to 14 November 1979,"[17] [and that is so for properties for important military and security uses.] nor was the refusal to license for export properties for important military and security uses a violation of the agreement between the two countries.[18] The Tribunal also found that prior to November 14, 1979 Iran was not listed among the countries for deliveries to which the United States prohibited the issuance of export licenses.[19] It held that from the lawfulness of the U.S. measures "it does not necessarily follow that the General Declaration does not require compensation of Iran when the application of the United States law clause in paragraph 9 of the Declaration prevents the transfer of military properties."[20]

Although the United States argued that unlike the case in *B1* many of the properties at issue in this Case were in the possession of private U.S. corporations and nationals, rather than the United States Government, the Tribunal held that:

> "The General Declaration imposes upon the United States an implicit obligation to compensate Iran for losses it incurs as a result of the refusal by the United States to license exports of Iranian properties subject to U.S. export control laws applicable

16. *Idem.*, para. 57.
17. *Idem.*, para. 59.
18. *Idem.*, para. 60.
19. *Idem.*
20. *Idem.*, para. 61.

> prior to 14 November 1979. Such an obligation derives from paragraph 9 and General Principle A which requires that the United States restore Iran's financial position to that which existed prior to 14 November 1979."[21]

The Tribunal further elaborated that:

> "While it is correct that the Partial Award in Case No. B1 (Claim 4) dealt with military items, the above finding of an obligation to compensate is not limited to such properties, but rather applies to Iranian properties in general."[22]

It was also held that "[i]f the United States [by refusing to authorize export of properties to Iran] caused losses to Iran, there was in the Algiers Declarations an implied obligation for the United States to compensate Iran for the full value of such losses, since Iran's financial position would otherwise not be restored fully."[23] The Tribunal further held that in this connection, the period from the time the relevant contracts were entered into up to November 14, 1979 must be considered in determining Iran's financial situation. Although the risk that the necessary export licenses would not be granted by the United States was higher in 1979 (particularly just before November 14, 1979) than it was at the time the relevant contracts were entered into, the reason why Iran's properties were not returned was due to decisions that the United States Government took as a result of the change in its relations with Iran after the Islamic Revolution and the seizure of the American Embassy in 1979.[24]

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21. *Idem.*, para. 65.
22. *Idem.*
23. *Idem.*
24. *Idem.* In these holdings the Tribunal was mindful that with the full force of the Treaty of Amity, which also governed the U.S. law clause prior to November 14, 1979 (*id.*, paras. 17 and 18) the risk of export licenses being refused prior to November 14, 1979, if any, was marginal, given the Treaty's strong most favored nation clauses (Articles VIII & IX of the Treaty) and reviewability of measures taken under Article XX(1) of the Treaty by the International Court of Justice, for they are not limited to the unilateral decisions of the United States, as held in *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA*) (*Merits*), I.C.J. Reports (1986) pp. 11, 115-117 and 140-142, involving an F.C.N. treaty with language identical to that of the Treaty of Amity with Iran. As to non-responsibility of Iran for such United States measures, see, *Queens Office Tower*

The questions as to the nature and extent of the losses and any reasonable attempt to mitigate them were left to the next stage of the proceedings, which is now in the course of written pleadings.

In Claim II:B of this Case, Iran argued that the United States breached its obligation under General Principle A of the General Declaration to restore Iran's financial position to that which existed prior to the blocking of its properties on November 14, 1979. Iran argued that the United States' failure to consolidate and care for Iran's properties from November 14, 1979 to January 19, 1981 caused excessive and unnecessary storage charges, as well as damage to and deterioration of such properties. Iran sought compensation for these charges, reduction in value, and deprivation of the use of properties during that period. Iran's argument was based on the premise that General Principle A contained an independent obligation for the United States and that a textual analysis of that provision and its negotiating history supported its interpretation.[25]

The United States argued that General Principle A cannot be regarded as a separate and independent basis for Iran's claim and further that General Principle A is qualified by the proviso "within the framework of and pursuant to the provisions of the two Declarations", and that none of operative provisions of the two Declarations obligate the United States to compensate Iran for any losses it incurred during the blocking period of November 14, 1979 and January 19, 1981.[26] Finally, the United States argued that claims arising from the U.S. action in response to the seizure of its Embassy were excluded from the Tribunal's jurisdiction under paragraph 11 of the General Declaration.[27]

As to the latter argument of the United States, Iran argued that the U.S. actions were not consistent with international law or even actually in response to the U.S. Embassy incident, that the U.S. actions were not proportionate to the act complained of, and that paragraph 11 of the General Declaration does not apply to governmental claims or disputes regarding the

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*Associates* and *Iran Air*, Award No. 36-200-1 (11 April 1983), reprinted in 2 Iran-U.S. C.T.R. pp. 241, 253-254.

25. *Idem.*, para. 19.
26. *Idem.*, para. 22.
27. *Idem.*

performance of the Declarations, as that provision only covers claims of nationals of either Government.[28]

As to Claim II:B of this Case, the Tribunal found no provision in the General Declaration to address compensation for the damages, mainly storage charges, that Iran incurred due to the blocking of its properties by the United States and that the structure of the Declarations suggests that this was not inadvertent.

Having found the structure of the Declaration as "entirely forward-looking", the Tribunal ultimately held that paragraph 9 of the General Declaration which deals with Iran's tangible properties, makes no reference to any duty on the part of the United States to compensate Iran for storage charges or depreciation in value during the blocking period.

Referring to paragraph 11 of the General Declaration which excluded from the Tribunal's jurisdiction the claims of nationals of either State arising out of actions of the United States in response to the U.S. Embassy incident, the Tribunal also held that "[t]he existence of such an exclusion suggests that if the Declarations were intended to create any liability of the United States to Iran for such actions, that would have been done expressly."[29]

2. The Full Tribunal Awards in Case No. *A15 (I:G)*[30] involved the international responsibility of the United States under the Algiers Declarations for the return of excess funds with the Federal Reserve Bank in a Dollar Account No. 1, initially established with $3.667 billion of Iranian funds for the payment of syndicated bank loans made to or guaranteed by the Government of Iran, which involved U.S. banks or banking institutions. After payment of the principal and interest through December 31, 1980 on these syndicated bank loans, there remained $399,293,273.84 in the Dollar Account No. 1 with the Federal Reserve Bank, which with accrued interest to the date of Hearing, April 2, 1986, amounted to $485,412,927.86.[31]

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28. *Idem.*, para. 24.
29. *Idem.*, para. 69.
30. *The Islamic Republic of Iran* and *The United States of America*, Interlocutory Award No. ITL 63-A15-FT (20 August 1986), reprinted in 12 Iran-U.S. C.T.R. p. 40.
31. *Idem.*, para. 3.

Iran sought the immediate return of all the excess funds in Dollar Account No. 1, unneeded for the payment of any claims against the Account.[32] The United States merely argued that the Tribunal did not have jurisdiction, that even if it decided to have jurisdiction, the Tribunal should maintain the *status quo* with respect to the funds, and that the disposition of the funds can only be resolved by the parties themselves.[33]

Iran argued that the United States by not transferring the excess funds in Dollar Account No. 1 had breached its obligations under General Principle A and paragraph 2 of the General Declaration as well as paragraph 2(A) of the Undertakings.[34] The United States argued that the Tribunal's jurisdiction is only based on specific operative provisions of the Declarations, which are lacking in this Case. The United States asserted that neither General Principle A nor paragraph 2 of the General Declaration are independent sources of specific obligations and that even the Undertakings do not require the United States to transfer the excess funds in Dollar Account No. 1 to Iran. The United States insisted that the dispute should be settled by the parties alone.

The Tribunal held that it has jurisdiction, since there existed a clear dispute between them, evident in the Parties' submissions, on the interpretation and performance of General Principle A and that such a dispute is within its jurisdiction under the clear terms of paragraph 17 of the General Declaration.[35]

On the merits, the Tribunal having found that General Principles A and B of the General Declarations "constitute an integral part of the 'commitments' made by the two Governments",[36] held:

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32. *Idem.*, para. 4.
33. *Idem.*
34. "Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria," were an agreement signed by Iran and the United States on 19 January 1981, simultaneous with the Algiers Declarations, describing the details of various payments and transfers of Iran's financial assets.
35. Interlocutory Award, para. 11.
36. *Idem.*, para. 16.

> "These General Principles are not simply statements of purpose, as is usually the case in preambles of treaties. They are expressly described by the parties as the legal basis of their undertakings. Accordingly, it would be difficult to admit that they are deprived of any legal effects. This would be inconsistent with the ordinary meaning to be given to the terms of this provision, as prescribed by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, as well as with the principle of effectiveness (*ut res magis valeat quam pereat*), generally accepted as one of the main principles of treaty interpretation."[37]

It was further held that "the terms of General Principle A clearly embody commitments by the United States" and that the Tribunal "is therefore unable to accept the contention of the Respondent that General Principle A is no more than a preamble and contains no operative provisions."[38]

Noting that the restoration of the Iranian financial position was a lengthy and complex process, comprised of several successive stages and that General Principle A does not imply that all Iranian funds were to be returned to Iran immediately, the Tribunal held:

> "On the other hand, the obligation to restore is so comprehensive that it cannot be construed to mean that Iranian funds not used for the purposes defined in the two Declarations may be kept by the United States and not returned to Iran. Such an interpretation would clearly run contrary to the letter and spirit of General Principle A, and neither of the Parties argued such an extreme position."[39]

The Tribunal then continued that the initial transfer of Iranian funds to the Escrow Agent and retransfer of $3.667 billion to the Federal Reserve Bank for payment of the syndicated loans pursuant to the Undertakings was only the first phase of the implementation and that Iran's financial position would not have been considered as restored to that which existed prior to November 14, 1979, as was required by General Principle A, observing that

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37. *Idem.*, para. 17.
38. *Idem.*, para. 18.
39. *Idem.*, para. 22.

> "Iran's financial position . . . will be restored only when it will have recovered the free disposition of the assets not attached or subject to set-off for the payment of commercial or financial debts. . . . Further steps, therefore, are needed for the complete performance of General Principle A."[40]

Then the Tribunal reviewed various provisions of the General Declaration as well as the Undertakings concerning the procedures to be followed in the transfer of Iranian assets. In referring to the Undertakings, the Tribunal noted that:

> "It cannot be doubted that the Tribunal has the power – and, indeed, the duty – to look to the Undertakings for the purpose of interpreting General Principle A and of ascertaining whether the obligations deriving from this Principle have been properly performed or not. It is a general principle of treaty interpretation, recalled in Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties, that the terms of a treaty must be construed in their context, which contains, *inter alia*, any agreement which was made between all the parties in connection with the conclusion of the treaty. Manifestly, the Undertakings fall within this definition in relation to the General Declaration, by their very title as well as by their content."[41]

However, the Tribunal noted that while the Undertakings clearly provide for the balance of the funds remaining in Dollar Account No. 2 to be paid to Bank Markazi following the final resolution of all such disputes through agreement or arbitral award, there is a complete silence on the disposition of excess funds remaining in Dollar Account No. 1. The Tribunal noted that "[t]here is no indication whether the balance must be transferred or not, nor, if it has to be transferred, when and to whom."[42]

This absence of "explicit provision" concerning the funds at issue was the core of the dispute, which the United States argued required a new agreement by the two Governments, while Iran argued that under General Principle A

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40. *Idem.*, para. 24.
41. *Idem.*, para. 29.
42. *Idem.*, para. 31.

of the Declaration the United States had the obligation to return the assets and has breached that obligation by refusing to do so.

The Tribunal in dealing with this central issue first held that "the silence of the Accords on such an issue does not mean that the disposition of excess funds in Dollar Account No. 1 should be considered as having been left in a legal *vacuum*, as is suggested by the Respondent," but that it "must determine whether the general provisions of the Accords taken together and interpreted in the context of their framework provide legal guidance" on the resolution of the issue.[43] The Tribunal held that the Parties' intent in general was to establish three separate accounts (Dollar Account No. 1, Dollar Account No. 2, and Security Account), each dedicated to serve a specific purpose, and that beyond these three accounts, the Algiers Declarations do not provide for the funds remaining in any of them to be used for any purpose other than that envisaged in the Declarations.[44] Therefore, it was held that:

> "In such a case it seems difficult to understand why and on what basis [the excess funds in Dollar Account No. 1] could be held indefinitely in this Account. Both Parties agreed during the Hearing that indefinite retention of the excess could not have been contemplated. As a matter of fact, it would be absurd."[45]

More importantly, the Tribunal held that:

> "The absence of any specific rule to govern the disposition of the funds in excess in Dollar Account No. 1 cannot have the effect of nullifying the broad commitment assumed by the United States in General Principle A [in restoring Iran's financial position]. It leaves without a clear answer, however, a few problems relating to the procedure and timing of the return to Iran of these funds."[46]

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43. *Idem.*, para. 41.
44. *Idem.*, para. 46.
45. *Idem.*, para. 52.
46. *Idem.*, para. 55.

The Tribunal having noted that while the question of procedure is rather simple, as the Federal Reserve Bank handles the account under instruction of the United States Treasury Department which could direct the required transfer to Iran, the question of timing is more complicated. While the return of the funds in Dollar Account No. 2 and the Security Account are delayed until completion of all the operations for which each account was established, there is no similar provision for Dollar Account No. 1. The United States argued that the same solution should be applied by analogy to Dollar Account No. 1 and thus that it should retain the excess funds until all claims against Iran are satisfied. The Tribunal observed that "the flaw in this argument is that, in the absence of any agreement between the Parties on this point, the opposite interpretation could as well be defended on the basis of the celebrated *dictum* "*expressio unius est exclusio alterius*."[47]

The Tribunal also dismissed the United States' contention that the provision in paragraph 4(a) of the Escrow Agreement that "[t]he contracting parties resolve to work in good faith to resolve any difficulty that could arise in the course of implementing this Agreement" excludes the present dispute from the Tribunal's jurisdiction, because such a provision was no more than the obligation of good faith performance of every treaty referred to in Article 26 of the Vienna Convention of the Law of Treaties and that at most it pertains to the Escrow Agreement, not the Undertakings.

Coming back to the timing of the return of the excess funds in Account No. 1 to Iran, the Tribunal noted the United States' admission that only "a few disputed items still remain to be solved, but they involved an amount which is only a relatively small percentage of the funds presently held in the Account,"[48] while it was well established that a sizeable percentage of the funds would not, in any case, be needed for the purpose for which this Account was established. The Tribunal held:

> "Therefore, in so far as Iran performs its own obligations in conformity with the Algiers Accords, no legal foundation can be found for keeping in this Account funds that are not needed, when the United States, ultimately responsible for this Account,

47. *Idem.*, para. 58.
48. *Idem.*, para. 64.

undertook in General Principle A 'to restore the financial position of Iran, in so far as possible'."[49]

However, noting that no transfer had been made from Dollar Account No. 1 since May 1982, that is, more than four years before the date of the Award, the Tribunal recognized the urgency of expediting negotiation of the few remaining disputed items and directed the parties to immediately enter into negotiations to determine which claims are presently pending against Dollar Account No. 1 and what amount should consequently be kept in the Account for the payment of such claims, so that the remainder be returned to Iran immediately, that the negotiation should be concluded in good faith and pursued with due diligence, and that within four months from the date of the Award they should jointly or individually report to the Tribunal in order to resolve the remaining difficulties.[50] The Tribunal also held that immediately after settlement of claims pending against Dollar Account No. 1, the remaining balance of the funds shall be transferred to Iran.[51]

As demonstrated by the subsequent Partial Award in this Case,[52] the negotiations were not successful as the United States pursuant to a later public notice in the Federal Register had received $56.7 million in claims against the Account, which together with a contingent amount for errors in interest rate calculations amounted to a total of $63 million, while Iran believed none of the claims related to the Account. In the end, Iran agreed that the amount of $63,000,000 provisionally be maintained in Dollar Account No. 1 for the purpose of resolving the remaining claims, so that the remainder would be immediately transferred to Iran. The United States attempted to delay the transfer of the remaining funds, then amounting to approximately $515 million, by requesting that the funds, after provision for outstanding claims, be transferred to a suitable trust account to be disposed of on the specific further order of the Tribunal. The Tribunal also dismissed this request as unnecessary, particularly since the condition of the release and

49. *Idem.*, para. 66.
50. *Idem.*, paras. 68-69.
51. *Idem.*, para. 70(e).
52. *The Islamic Republic of Iran* and *The United States of America*, Award No. 306-A15 (I:G)-FT (4 May 1987), reprinted in 14 Iran-U.S. C.T.R. p. 311.

discharge of the United States and the Federal Reserve Bank was satisfied by the same Award.[53]

The Tribunal held that $63,000,000 should be provisionally kept in Account No. 1, directing the United States to transfer immediately to Iran all amounts in excess of this sum. The Tribunal again directed the parties to pursue negotiation of the claims pending against Dollar Account No. 1 with due diligence and that any balance remaining of this $63 million after payment of the claims should also be immediately transferred to Iran and that at any time Iran believed that the United States did not pursue the settlement of the pending claims, it might apply to the Tribunal to determine what further action may be required. Of this $63 million the parties finally agreed that $54 million was unneeded for the settlement of the claims, and it was thus returned to Iran. In accordance with the Award, the United States transferred to Iran $454 million, and pursuant to resolution of the pending claims against Dollar Account No. 1, it transferred to Iran the final balance of $54 million in three stages, the last in February 1992.[54]

3. Probably the last major construction case before the Tribunal, of the type usually found in major international commercial arbitrations, is *Westinghouse*,[55] which involved many contracts, claims, counterclaims, and even counter-counterclaims. The case concerned a series of contracts entered into by Westinghouse and the Iranian Air Force within a period of seven years, from 1971 to 1978, for the design, manufacture and development of an Integrated Electronics Depot (IED) for the repair and maintenance of the Air Force's weapon and electronics systems. The Depot was designed so that it could be modified easily to accommodate new weapon and electronics systems as they were required by the Air Force. It was organized into several work areas or "shops" equipped to handle, for example, radio, radar, or

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53. *Idem.*, para. 23. Moreover, as to the United States concern that its compliance with the Tribunal decisions in this Case may be regarded by some as having links with the political situation in Lebanon at the time, the Tribunal acknowledged that there can be no doubt that this Case and, in particular, the implementation of the Interlocutory Award, have no relation to the situation in Lebanon or any other political matter, as both parties have declared. *Idem.*, para. 13.
54. Tribunal Communiqué No. 98/2 (22 April 1998), n. 2.
55. *Westinghouse Electric Corporation* and *The Islamic Republic of Iran Air Force*, Award No. 579-389-2 (26 March 1997), reprinted in ___ Iran-U.S. C.T.R. ___ and in 12 Mealey's International Arbitration Report (April 1997, no. 4) Sec C.

electro-mechanical equipment. Each contract called for the provision by Westinghouse of specified services or equipment, or both, needed for the establishment, modification, or expansion of one or more of the specialized shops in the Depot.

Westinghouse initially brought claims based on four of its several contracts with the Air Force for the IED project. The Air Force brought eighteen counterclaims, of which only three were based on the same contracts from which the claims arose. The remaining counterclaims were based on other Depot contracts not invoked by Westinghouse. Westinghouse objected to the jurisdiction of the Tribunal over the latter counterclaims. Under Article II, paragraph 1 of the Claims Settlement Declaration, the Tribunal has jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the] claim." Three of the counterclaim contracts not relied upon by Westinghouse before the Tribunal were the subject of legal proceedings brought by either party against the other in their national courts and orders of interim protection were obtained from the Tribunal for stay of both proceedings until the Tribunal had determined its jurisdiction. Having heard the parties, the Tribunal held[56] that as in *American Bell*,[57] while the various contracts covered different goods and services and were entered into at different times, all of the contracts were linked to the Depot project, to which both parties were, in practice, committed as a whole; the Respondent had no reasonable opportunity to obtain the desired services from a competitor of the Claimant, and when the parties wound up the initial contract, some remaining works from the initial contract (as amended) were transferred to the relevant counterclaim contracts, which originally only implemented a second general expansion of the Depot's capabilities. In this sense, the Tribunal found that the Depot project as a whole consisted of a single transaction and therefore held that it had jurisdiction over the counterclaims based on the three counterclaim contracts at issue in the Interlocutory Award, that all other jurisdictional issues were joined to the merits, and therefore these counter-

56. *Westinghouse Electronic Corporation* and *The Islamic Republic of Iran Air Force*, Interlocutory Award No. ITL 67-389-2 (12 February 1987), reprinted in 14 Iran-U.S. C.T.R. p. 104.
57. *American Bell International, Inc. v. The Government of the Islamic Republic of Iran, et al.*, Award No. ITL 41-48-3 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. p. 74; see also *Owens-Corning Fiberglass Corp. v. The Government of Iran, et al.*, ITL 18-113-2 (13 May 1983), p. 5, reprinted in 2 Iran-U.S. C.T.R. pp. 322, 324.

claims were excluded from the jurisdictions of the courts of Iran, of the United States, or of any other court, under Article VII, paragraph 2, of the Claims Settlement Declaration.

As this decision of the Tribunal also in effect admitted at least eight other counterclaims of the Air Force, Westinghouse did not pursue its earlier jurisdictional objection, but raised nine counter-counterclaims based on the contract with regard to which the Air Force had brought counterclaims.[58] The Tribunal dismissed the Air Force's remaining three counterclaims for lack of jurisdiction, as the counterclaims did not meet the Tribunal's tests set forth in its earlier interlocutory award.[59] The Tribunal also dismissed the portion of Westinghouse's counter-counterclaims that went beyond recoupment, that is, the amount needed to off-set, the Air Force's counterclaims. Although Article 20 of the Tribunal Rules allows amendment of claim by a party in the absence of prejudice to the other party, "the Tribunal conclud[ed] that to allow an amendment in this instance would be inconsistent with the deadline [of 19 January 1982] for filing of claims with the Tribunal contained in Article III, paragraph 4, of the Claims Settlement Declaration."[60]

Both parties accused each other of breaching the contracts at issue and considered the alleged breach as their main cause of action. The Tribunal, however, held that all of the contracts not terminated before December 1979 were subsequently terminated through frustration by *force majeure* with one notable exception in which Westinghouse was held to have been in breach.[61] In so finding and having considered the facts surrounding the termination of the contracts as a whole, the Tribunal held that in view of the strikes, riots, and other civil strife in the course of the Islamic Revolution which by December 1978 created classic *force majeure* conditions at least in Iran's major cities, "Westinghouse's suspension of work and the withdrawal of its personnel from Iran in December 1978 were excused."[62]

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58. *Westinghouse*, Final Award, para. 51.
59. *Idem.*, paras. 423-432 and 434.
60. *Idem.*, para. 320; as to recoupment see, paras. 320-322.
61. *Idem.*, para. 61.
62. *Idem.*, para. 54. All relevant contracts included provisions allowing Westinghouse to suspend work if *force majeure* conditions arose and the Tribunal found that the conditions in Iran at the time were within the meaning of those provisions. *Ibid.*, para. 55. The Tribunal cited several of its previous Awards in support of its finding including *Gould Marketing, Inc., et al.* and *Ministry of National Defence of Iran,*

The Tribunal then proceeded to find that subsequent to December 1978, after all efforts by both parties failed to restart the implementation of the contracts and with no immediate prospect of ending the impasse, particularly with the onset of the U.S. Embassy seizure on November 4, 1979:

> "by the end of December 1979 continued existence of *force majeure* conditions ripened into a termination of all IED contracts that had not previously been terminated."[63]

In so finding, the Tribunal took special note of the parties' conduct during the period of suspension of work, particularly their eagerness to resume of work, their continued contacts with each other until November 1979, and the fact that the Air Force did not use its right under the contracts to formally terminate them.[64]

As for the legal consequences of *force majeure* termination of the contracts, the Tribunal held that:

> "The first legal consequence of the frustration of the IED contracts is that as of 31 December 1979, Westinghouse and the Air Force were excused from further performance under those contracts. They were discharged from their duty to perform contractual obligations not yet due."[65]

Using the rule "the loss must lie where it falls" commonly applicable in such cases, the Tribunal held that:

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including *Gould Marketing, Inc., et al.* and *Ministry of National Defence of Iran*, Interlocutory Award No. ITL 24-49-2 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. pp. 147, 152-153; *International Technical Products Corporation, et al.* and *Islamic Republic of Iran, et al.*, Award No. 186-302-3 (19 August 1985), reprinted in 9 Iran-U.S. C.T.R. pp. 10, 23; *General Dynamics Telephone Systems Center, Inc., et al.* and *Islamic Republic of Iran, et al.*, Award No. 192-285-2 (4 October 1985), reprinted in 9 Iran-U.S. C.T.R. pp. 153, 159-160.

63. *Westinghouse*, Final Award, para. 61.

64. *Idem.*, para. 59.

65. *Idem.*, para. 62, citing *International Schools Services, Inc.* and *National Iranian Copper Industries Co.*, Award No. 194-111-1 (10 October 1985) at p. 14, reprinted in 9 Iran-U.S. C.T.R. p. 187 at pp. 196-197; *William J. Levitt* and *Islamic Republic of Iran, et al.*, Award No. 520-210-3 (29 August 1991), paras. 74-75, reprinted in 27 Iran-U.S. C.T.R. pp. 145, 167-168.

> "it will determine the extent to which Westinghouse performed its obligations under each IED contract at issue until such performance was made impossible, and whether, based on such performance, Westinghouse is entitled to receive further payments or, on the contrary, must return to the Air Force part of the payments it received. In accordance with Tribunal practice in frustration cases, Westinghouse should not be reimbursed for any costs or fees incurred after the date the contracts came to an end, nor should it be compensated for lost profits."[66]

In dealing with the issues arising from each contract, the Tribunal made certain remarks which are of general interest.

For example, the Tribunal gave considerable weight to the "contemporaneous conduct" of both parties in the course of implementing the contracts, so much so that sometimes such conduct was held to supersede the clear contractual terms.

Some of the Air Force's counterclaims for breach of contract were dismissed because "the Air Force was not at the time treating Westinghouse as in breach of contract."[67]

With respect to another contract where there existed a clear requirement of written notice for formal termination and no such notice had ever been given, the Tribunal nevertheless held, based on contemporaneous communications and conduct, that the said contract "was terminated verbally by Air Force officials and Westinghouse acquiesced in this verbal termination."[68] The Tribunal made it clear that "by this conduct, the parties effectively waived the contractual requirement of a written notice of termination."[69] With respect to this contract, the Tribunal dismissed other breach of contract claims by Westinghouse because such claims "raised for the first time in this proceeding, are inconsistent with Westinghouse's conduct at the time the

66. *Westinghouse*, Final Award, para. 64.
67. *Idem.*, para. 91, which finding was with respect to Contract IWPC-007.
68. *Idem.*, para. 137, which finding was with respect to contract IWPC-009.
69. *Idem.*

alleged breach occurred, when it elected to regard the contract as terminated by the Air Force."[70]

In one instance, however, when a Westinghouse employee left his job in May 1978 for personal reasons without giving notice to either Westinghouse or the Air Force, and Westinghouse subsequently failed to fill his place with another qualified technician until the suspension of all contracts in December 1978 but denied liability based on a contractual *force majeure* clause exempting the contractor for losses "due to delay in performance resulting from any cause beyond [Westinghouse's] reasonable control or due to . . . inability to obtain labor from [Westinghouse's] usual sources", the Tribunal nevertheless held Westinghouse to be in breach of contract.[71] This was despite Westinghouse's insistence that the sudden departure of its technician from Iran and its "subsequent inability to recruit a technician to come to Iran constituted events falling squarely within the meaning of [the contractual] *force majeure* language."[72]

In dismissing Westinghouse's argument, the Tribunal held:

> "*Force majeure* is a cause of impossibility of contractual performance which is outside the control of a party or all parties to a contract and could not be avoided by exercise of due care. In the Tribunal's view, however, turnover of personnel – even unexpected turnover – was within the 'reasonable control' of Westinghouse, in the sense that turnover should have been anticipated and contingencies planned."[73]

With respect to a specific allegation by the Air Force that Westinghouse is responsible for the delays in performance of various contractual tasks, the Tribunal closely scrutinized the dispute. There was no dispute that delays had indeed occurred. However, there were allegations and counter allegations by both parties blaming each other for the delays. The Tribunal held that:

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70. *Idem.*, citing *Oil Field of Texas, Inc.* and *Islamic Republic of Iran, et al.* Award No. 258-43-1 (8 October 1986), para. 35, reprinted in 12 Iran-U.S. C.T.R. pp. 308, 317.
71. *Westinghouse*, Final Award, para. 239.
72. *Idem.*, para. 238.
73. *Idem.*, para. 239.

> "The evidence indicates that both parties adjusted to the delays by extending performance schedules or devising alternative ways to obtain the necessary prime equipment. Neither party treated the delays, either in Westinghouse's performance or in the Air Force's prime equipment deliveries, as breaches of contract justifying cessation of performance. Westinghouse continued to perform, although it did complain to the Air Force that continued delays in the provision of prime equipment would negatively affect the contract schedule. The Air Force, for its part, did not withhold any scheduled payments, though the contract entitled it to do so '[i]f Seller is more that 30 days delinquent in meeting any of the scheduled completion dates.'"[74]

Therefore, in the Tribunal's view, the Air Force was unable to show that Westinghouse *alone* was responsible for the delays and that both parties were responsible to some extent for the delays.[75]

In another context, namely the contract provisions limiting Westinghouse's liability for incidental or consequential damages as a result of its performance solely to making repairs or providing information so that the Air Force itself could carry out repairs, the Tribunal held that these provisions should generally be enforced unless a specific default "arose through an intentional wrong or gross negligence on the part of the one invoking the limitation."[76] Noting that it had not been argued nor had there been any evidence of any consequential damage having been suffered by the Air Force as a result of an intentional wrong or gross failure of Westinghouse, the Tribunal decided that those contractual provisions are valid and enforceable.[77] The Tribunal emphasized, however, that its finding was also based on the fact that

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74. *Idem.*, para. 262.
75. Of course, the Tribunal ultimately found that it does not have to determine the precise balance of responsibility for the delays because contractual provisions as well as lack of proof prevents the Air Force from recovery for such claims. *Idem.*, para. 263.
76. *Idem.*, para. 265, citing *Itel International Corporation* and *Social Security Organization of Iran, et al.*, Award No. 479-476-2 (23 May 1990), para. 53, reprinted in 24 Iran U.S. C.T.R. pp. 272, 288; *American Bell International, Inc.* and *Islamic Republic of Iran*, Interlocutory Award No. ITL 41-48-3 (11 June 1984) at pp. 29-30, reprinted in 6 Iran-U.S. C.T.R. pp. 74, 90.
77. *Westinghouse*, Final Award, para. 266.

"nothing in the contract, or elsewhere, suggests that this exclusion is unreasonable or unconscionable."[78]

As to yet another aspect of the Air Force's counterclaims, i.e., nonconformity of certain test equipment with the contractual requirements, Westinghouse had argued that a contractual provision that required the Air Force to give written notice of any defect within 60 days of the delivery of a piece of equipment would preclude the Air Force claims, as it failed in most cases to serve such notice on Westinghouse at the time.[79] The Air Force in response had argued that the 60-day notice should be assumed to have started to run from the date of delivery of the whole package, i.e. after providing the maintenance capability for an entire system and not from the date of delivery of individual components.

The Tribunal, not accepting in full either party's arguments, held that:

> "The evidence shows that the parties did not, in practice, exclude complaints raised outside the sixty-day period.
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> . . .
>
> Westinghouse was unable to show a single example of an Air Force complaint it refused to deal with because it had not been submitted within sixty days. On the other hand, to interpret Article VII, as the Air Force does, to mean that it required the Air Force to give notice of defects or nonconformities only after full maintenance capability, including all equipment, technical manuals, and training, had been delivered, cannot be justified under either the clear meaning of the text – 'the delivery of such items *or* the furnishing of such services' – or the evident purpose of the article. Indeed, the Air Force's interpretation would render Article VII a nullity, for 'full maintenance capability' implies no defects."[80]

The Tribunal ultimately held that:

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78. *Idem.*
79. *Idem.*, para. 269.
80. *Idem.*, para. 270. *Citation omitted.*

> "given the practice of the parties, counterclaims based on the furnishing of allegedly defective or incomplete test equipment are not barred if they were not raised by the Air Force within sixty days of the delivery of that equipment. However, failure by the Air Force, prior to the commencement of the present proceedings, to raise these claims, as well as claims for test equipment and services allegedly not delivered, undermines the credibility of the Air Force's claims and places a high burden of proof on the Air Force."[81]

Applying this criterion to one of the Air Force's counterclaims for the reimbursement of the price it had paid for a study (the so-called Phase II study) carried out and submitted by Westinghouse in April 1973, the Tribunal held:

> "there is no evidence that the Air Force, prior to these proceedings, ever complained that the Phase II study was defective or improperly done. Clearly, therefore, the Air Force must be deemed to have reviewed and accepted the study at the time. In view of this acceptance, the incorporation of the study into Phase III of the contract, and the passage of many years before this claim was raised, the Air Force now faces a high burden of proof on this claim. . . . The Tribunal finds that the Air Force has been unable to satisfy this burden."[82]

Another interesting aspect of the Case concerns the Air Force's counterclaims alleging overpricing by Westinghouse of spare parts delivered as part of the contracts at issue to the Air Force. The Air Force had alleged that Westinghouse overcharged it for the spare parts and failed to provide all the spare parts and related services. The Air Force's overpricing allegation was based on the difference between the prices charged by Westinghouse and

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81. *Idem.*, para. 271, citing, *inter alia*, *Austin Company* and *Machine Sazi Arak, et al.*, Award No. 257-295-2 (30 September 1986), paras. 31-32, reprinted in 12 Iran-U.S. C.T.R. pp. 288, 294-295; *Richard D. Harza, et al.* and *Islamic Republic of Iran, et al.*, Award No. 232-97-2 (2 May 1986), para. 99, reprinted in 11 Iran-U.S. C.T.R. pp. 76, 114; *Trustees of Columbia University in the City of New York* and *Islamic Republic of Iran*, Award No. 222-10517-1 (16 April 1986), para. 30, reprinted in 10 Iran-U.S. C.T.R. pp. 319, 325.

82. *Westinghouse*, Final Award, para. 276.

the prices shown in the contemporaneous United States Air Force microfiche.[83] Westinghouse denied overcharging and argued instead that in acting as the Air Force's purchasing agent, it was entitled to charge costs it incurred as a middleman resulting in higher prices than those the Air Force would have been charged had it chosen to purchase the same spares directly.[84]

In its determination of the issue, the Tribunal again turned to the contemporaneous conduct of the Parties and especially the Air Force. Referring to the Air Force's contemporaneous complaints on overcharging prior to the onset of *force majeure* and suspension of the contracts, the Tribunal then took special note of the fact that not withstanding these earlier complaints, the Air Force made in 1979 a payment of nearly half a million dollar on the outstanding invoices for the same controversial spare deliveries. Then, it was held that:

> "this contemporaneous conduct is inconsistent with the position the Air Force took in this proceeding. The Air Force's contemporaneous behavior seems to suggest, rather, that in 1979, after it had carried out its internal investigation of the spares pricing . . . , the Air Force concluded that Westinghouse's prices were, after all, acceptable."[85]

Based on this fact and the structure of the related contracts, the Tribunal dismissed the Air Force's counterclaim.

The Tribunal then addressed Westinghouse's counter-counterclaim. Initially Westinghouse had not raised any claim with respect to spare parts. The Air Force argued that Westinghouse's counter-counterclaims were inadmissible because they should have been raised in the statement of claim and that failure to do so effectively amounted to a waiver and that their subsequent filing with the Tribunal was an untimely claim inadmissible under Article III, paragraph 4, of the Claims Settlement Declaration.

The Tribunal as an initial matter rejected Westinghouse's alternative argument that its counter-counterclaims should be admitted as amendments to the

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83. *Idem.*, para. 315.
84. *Idem.*, para. 316.
85. *Idem.*, para. 317.

original claims which amendments are admissible under Article 20 of the Tribunal Rules. In so holding, the Tribunal held:

> "It is true that Article 20 of the Tribunal Rules allows amendments of claim by a party in the absence of prejudice to the other party. Nevertheless, the Tribunal concludes that to allow an amendment in this instance would be inconsistent with the deadline for filing of claims with the Tribunal contained in Article III, paragraph 4, of the Claims Settlement Declarations."[86]

Faced with a very complex and rather novel question, the Tribunal noted:

> "In making its determination, moreover, the Tribunal must take into account that Westinghouse chose not to assert before the Tribunal any claim based on any of the counterclaim contracts during the period prior to 19 January 1982, when it was free to do so. On the other hand, in the unusual circumstances of this Case, where the Air Force's counterclaims against Westinghouse under the counterclaims contracts are within the Tribunal's jurisdiction . . . , the Tribunal, in allocating between the parties the consequences of frustration, cannot ignore the extent of Westinghouse's performance under the counterclaims contracts. To do so would be unfair."[87]

Ultimately, the Tribunal's finding went as follows:

> "For all the above reasons, the Tribunal will consider Westinghouse's counter-counterclaims but will limit Westinghouse's potential recovery thereon. Thus, in allocating the parties' losses, the Tribunal will consider the extent of Westinghouse's performance under the counterclaims contracts, but only to a limited degree – that is, only to reduce or satisfy the Air Force's counterclaims on those contracts, without allowing Westinghouse

86. *Idem.*, para. 320.
87. *Idem.*, para. 321.

> Westinghouse to recover any amounts in excess of the Air Force's recovery on its counterclaims."[88]

The Tribunal ordered Westinghouse to return to the Air Force its prime equipment on loan with Westinghouse for use in the design and manufacture of test equipment as well as the test equipment and parts which Westinghouse had fully or partially completed manufacturing. In this way the Tribunal directed Westinghouse to deliver to the Air Force not only the equipment and parts to which the Air Force had full title but also where the Air Force had partial or only apparent title.[89]

Therefore, the highlights of Westinghouse are *first*, the contract provisions between the disputing parties, although enforceable in general, are not conclusive in deciding questions arising from the same contracts. The conduct of the parties in the course of implementation of the contracts might very well supersede the contractual terms. *Second*, the Tribunal was extremely reluctant to entertain claims not raised in due time but only after the other party raised claims and in response thereto. Therefore, the Tribunal's treatment of Westinghouse's counter-counterclaims, although slightly off the mark, was a clear sign of this reluctance and discomfort.[90]

4. One of the landmark decisions of the Tribunal which is likely to have a profound effect on the future adjudication of international claims, especially those involving dual nationals, is the unanimous Award in *Karubian*.[91] The Case involved the claim of an Iranian national at birth who later immigrated to and acquired United States nationality by naturalization. The Claimant sought compensation for alleged expropriation and other measures affecting his property rights in four parcels of land he had purchased in Iran after his

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88. *Idem.*, para. 322. The United States member of the panel disagreed with this finding, arguing in his separate opinion that Westinghouse should have been allowed full recovery even if such recovery would have exceeded the Air Force's recovery. See Separate Opinion of George H. Aldrich filed on March 26, 1997 in this Case.
89. *Westinghouse*, Final Award, paras. 365-368.
90. There were, of course, three other counterclaims by the Air Force, two of which were based on two missile contracts and one of which was based on the unpaid social security premiums and taxes, which the Tribunal found not to have arisen out of the same transaction and therefore not within its jurisdiction.
91. *Rouhollah Karubian* and *The Government of the Islamic Republic of Iran*, Award No. 569-419-2 (6 March 1996), reprinted in ___ Iran U.S. C.T.R. ___.

U.S. naturalization. The Claimant argued that several laws passed after the Islamic Revolution in Iran, together with other measures, amounted to an expropriation of his property rights and that he, as a United States national, was entitled to compensation for the losses he allegedly suffered.

Iran, on the other hand, argued that the Tribunal does not have jurisdiction over the claim of an Iranian national who has acquired U.S. nationality without observing Iranian law and renouncing his Iranian nationality, and thus he cannot bring a claim against Iran as a national of the United States before the Tribunal.[92] Iran further argued that even under the Tribunal's earlier decision in *A18*,[93] the Claimant lacks dominant and effective United States nationality. Iran also denied expropriating or taking other measures affecting property rights of the Claimants in such a way as to engage the international responsibility of Iran under international law. Finally, Iran argued that even if it decided otherwise, the Tribunal should still dismiss the claim by application of the important caveat, which the Full Tribunal added to its conclusion in *A18*, stating that "[i]n cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the Claimant, the other nationality may remain relevant to the merits of the claim."[94]

Under its long established practice, the Tribunal held that the Claimant, a dual Iran-United States national, was eligible to bring his claim before the Tribunal because of his dominant and effective United States nationality during the relevant period.

On the merits, the first issue involved a post-Revolutionary law, and whether that legislation constituted expropriation of the Claimant's property rights or a lesser degree of interference as "other measures affecting property rights," under Article II, paragraph 1 of the Claims Settlement Declaration and whether Iran bore any liability for damages resulting from such measures under international law. The law in question established an urban develop-

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92. *Idem.*, para. 2.
93. In the Full Tribunal's decision in Case No. A18, it was decided that the Tribunal has jurisdiction over claims against Iran of dual Iran-United States nationals whose dominant and effective nationality during the relevant period, i.e. between the date a claim allegedly arose and the date of the Algiers Declarations (19 January 1981), is that of the United States. See *Iran* and *the United States*, Case No. A18, Full Tribunal Decision (6 April 1984), 5 Iran-U.S. C.T.R. pp. 251, 265.
94. *Ibid.*, pp. 255-256.

ment program for the prevention of land speculation and for reversion of undeveloped lands which had fallen into private hands prior to the Revolution (in violation of even the then prevailing laws and regulations) to the public domain.

The Tribunal, having examined the provisions of the 1979 Act Concerning Abolition of Ownership of Urban Undeveloped (*Mawat*)[95] Lands and the Manner of Their Development, its Amendment and Implementing Regulations, the Urban Lands Act of 1982, which superseded the 1979 Act, as well as other laws concerning rural lands together with reports and official statements of governmental and non-governmental authorities, correctly held that neither the enactment of the post-Revolutionary legislation, nor the official statements and other reports, individually or collectively amounted to expropriation of the Claimant's property rights.[96] As to one of the properties in question, located at Chaboksar, which had admittedly reverted to the public domain in 1985 and officially been determined to be "mawat", the Tribunal correctly found that this action had been taken under the 1982 Urban Lands Act, which was outside its jurisdictional cut-off date of January 19, 1981, and that in any event the 1985 action had no retroactive effect to render invalid the Claimant's title deeds during the relevant period before January 19, 1981.[97] The Tribunal also did not find it necessary to decide on the validity of the title deeds under Iranian law prior to the Revolution and proceeded only on the assumption of their validity.[98]

In dismissing the expropriation claim, the Tribunal especially noted that the implementation of the 1979 Act, including its Amendment and Implementing Regulations, was contingent, as a prerequisite, upon a semi-judicial determination under the guidelines set in the Implementing Regulations of whether or not a specific land parcel was *mawat*.[99] Before such deter-

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95. The "mawat" land was found as "land which is undeveloped and has no prior record of development". *Karubian* Award, *op. cit.*, n.4.
96. In a subsequent Award by Chamber Three of the Tribunal, this finding was confirmed. See *Jahangir Mohtadi and Jila Mohtadi* and *The Government of the Islamic Republic of Iran*, Award No. 573-271-3 (2 December 1996), paras. 53-55.
97. *Karubian*, para. 126.
98. *Idem.*, para. 119.
99. *Karubian* Award, *op. cit.*, para. 106. This was confirmed by the statement of the Minister of Housing and Urban Development at the time, according to which first the status of specific parcels of land must be individually determined before any trans-

mination was made with respect to a specific parcel of land, the issue of its expropriation would not arise. The Tribunal held that:

> "The Tribunal is not satisfied that the very existence and binding force of the 1979 Act, its Amendment and its Regulations constituted, by themselves, a measure or measures which amounted to an expropriation of the Claimant's Chaboksar, Ahmad-Abad, Farahzad and Nashtarood properties."[100]

On the other hand, the Tribunal also held that while the subject properties were not expropriated, the uncertainty hanging over them until a determination of whether or not they were *mawat* temporarily rendered the exercise of some ownership rights difficult. It would have been only after such determination that the clouds over the ownership of such land could have been removed and ownership rights could have been exercised in full.

The Tribunal, moreover, proceeded to determine whether the measures complained of, individually or cumulatively, would constitute a lesser degree of interference than expropriation. In this regard, the Tribunal referred to one of its earlier Awards in which it was held:

> "The fact that Iran's interference did not rise to the level of an expropriation or of a deprivation of ownership rights does not, however, preclude the Tribunal from considering whether the interference established here was such as to constitute 'other measures affecting property rights' as contemplated by Article II, paragraph 1, of the [Claims Settlement Declaration]. Such measures, while not amounting to an expropriation or deprivation, may give rise to liability in so far as they give rise to damage to the Claimant's ownership interests."[101]

The Tribunal also cited *Foremost*, in which it was held that an interference "attributable to the Iranian Government or other state organs of Iran, while

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action on such land is permitted. *Idem.*, para. 108.

100. *Idem.*, para. 111.

101. *Eastman Kodak Company, et al.* and *Islamic Republic of Iran, et al.*, Partial Award No. 329-227/12384-3 (11 November 1987), reprinted in 17 Iran-U.S. C.T.R. p. 153.

not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question."[102]

On the question of facts, the Tribunal found that the statements made by various Iranian officials reported in newspapers concerning the situation of lands and the manner of implementation of the 1979 legislation, which remained uncontradicted during the proceedings, "to be of sufficient probative value to corroborate [the Claimant's] assertion that his property rights were affected by the Respondent's actions."[103] The Tribunal also referred to restrictions after the Islamic Revolution on carrying out transactions with respect to properties in Iran, such as the unenforceability of powers of attorneys prepared and sent from abroad.[104] However, the Tribunal further noted that parallel with these restrictive land laws and regulations, there existed during the 1980 various U.S. laws and regulations which also imposed restrictions on the Claimant's ability to exercise his rights, e.g., to sell his property in Iran.[105]

In sum, the Tribunal concluded that the totality of various measures taken by Iran after the Revolution, as reflected in various pieces of legislation and official or semi-official statements, adversely affected, for a certain period of time, the Claimant's property rights.[106] The Tribunal held that it was the right to dispose of properties which was mainly affected in the sense that the prevailing laws in the relevant period made all undeveloped and unutilized land in both urban and rural areas vulnerable to a determination that they were *mawat* and thus subject to immediate cancellation of their title deeds.

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102. *Foremost Tehran, Inc., et al.* and *Islamic Republic of Iran*, Award No. 220-37/231-1 (11 April 1986), reprinted in 10 Iran-U.S. C.T.R. p. 228.
103. *Karubian*, *op. cit.*, at 137. The Tribunal in relying on these newspaper reports, referred to the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* in which the International Court of Justice held that "although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge." *Ibid.*, para. 136 citing ICJ Judgment of June 27, 1986 on the merits, I.C.J. Reports (1986) p. 14 at p. 40, para. 63.
104. *Idem.*, paras. 138-139.
105. *Idem.*, para. 140.
106. In *Mohtadi*, too, Chamber Three came to the same finding, adding that beside the right of transfer, the Claimant's rights and ability to use and develop the property at issue were affected. *Mohtadi*, *op. cit.*, at paras. 68-69.

Therefore, "[u]nder the circumstances, the Claimant would have had difficulties in finding a buyer for his properties."[107] It appears that, in the Tribunal's view, the possibility of sale, although restricted, still existed for the Claimant. However, the Tribunal also found that these measures were not the only measures affecting the Claimant's right and that the United States measures, too, had affected those rights. Because the application of the *A18* caveat correctly barred the Claimant's claim against Iran, the Tribunal did not reach important issues of identifying the precise damages caused to the Claimant's rights, quantifying the damages and deciding whether they were caused by Iranian or United States measures, whether the Iranian measures were the proximate cause of the damages, and whether they engaged Iran's international responsibility.[108]

On the application of the A18 caveat, the Tribunal was faced with the important question of barring the Claimant's recovery on the merits of a claim involving Iranian real property owned by a dual national. The caveat, under Tribunal practice, normally finds its application in instances, where the right in question is restricted by law to Iranian nationals or where the conduct of the Claimant is of such a nature as to justify, in the Tribunal's view, the refusal of an award in his favor. In this Case, the issue of conduct was not as important as the restrictions of Iranian law on ownership of real estate, although conduct was still taken into account as a relevant factor.

In this context, the Claimant argued as an initial matter that he did not conceal his U.S. nationality from anyone in Iran and that his action in purchasing the real estate in Iran was not abusive or illegal. He further argued that even if under Article 989 of the Iranian Civil Code, the authorities would decide to sell his property or transfer it to exclusively Iranian

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107. *Karubian*, para. 143.

108. A few months later, concerning the same issue, Chamber Three, in its split decision in *Mohtadi*, calculated damages without requiring the Claimant to prove such damages with probative evidence. Instead, the majority took upon itself to do so by a simple method of first determining the value of the entire property, as in a case of expropriation, and then applying a flat 15% discount to reach the amount of damage to the Claimant's property rights for a limited period of approximately 19 months. Chamber Three nevertheless acknowledged that the right of ownership of real estate in most legal systems is limited in areas such as the control of natural resources, planning and development regulations and nuisance, while it conspicuously did not give effect to such limitations in the Case. *Mohtadi*, para. 103.

nationals, he would still be entitled to the proceeds of such sale. He also argued that he had been told by two former high ranking Iranian officials that there would be nothing wrong with his purchase of real estate in Iran as a part of the pre-Revolutionary Government's policy to encourage Iranians, including those who held another nationality, to return to Iran and become involved in Iran's development.

The Tribunal dealt with these allegations by first dismissing the Claimant's alleged representations attributed to the Iranian officials, as it was not clear in which capacity the officials made such statements and what type of investment they referred to or encouraged.[109]

The Tribunal then proceeded to examine the important issue of whether the right to acquire real property in Iran by contract, as opposed to inheritance, is a benefit reserved exclusively to Iranian nationals. Despite fierce arguments by the Claimant, asserted as a U.S. national, supported by memorials of the United States, that under Iranian law there was no restriction on the ownership of Iranian real estate by foreign nationals including those who also held Iranian nationality, the Tribunal (after extensive examination of Iranian law and its legislative history on ownership of real property by aliens) found that

> "under Iranian law, the right to acquire real property in Iran by contract, apart from certain limited exceptions, is a benefit reserved for Iranian nationals."[110]

The Tribunal continued that the Claimant's inconsistent conduct of purchasing the properties in Iran as an Iranian national and then claiming with respect to the same properties before the Tribunal as a U.S. national is a clear case for the application of the A18 caveat because if the Tribunal were to allow him to recover in this manner, "it would be permitting an abuse of right."[111]

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109. *Idem.*, para. 153.
110. *Idem.*, para. 161.
111. *Ibid.* In *Aryeh*, however, Professor Arangio-Ruiz in a split decision under similar facts misconstrued Iranian law and asserted that Iran had been unable to point to a comprehensive provision in Iranian law that contains an express prohibition on the ownership of real estate by foreign or dual nationals. *Moussa Aryeh* and *The Islamic Republic of Iran*, Award No. 583-266-3 (25 September 1997), para. 75. Instead of

This landmark decision, taken unanimously by The Tribunal, has been a long overdue positive development with respect to such claims. This was the Tribunal's eventual recognition that dual nationals should not be allowed under international law to use one nationality in acquiring property and invoke another nationality with respect to the same property after a claim has arisen, even if (as in the present Case) the second nationality be the dominant and effective one. The *Karubian* message is clear: duplicity is not to be tolerated in international law. The Tribunal's reluctance in earlier awards to apply this basic principle, perhaps occasioned by insufficient evidence or lack of argument, was eventually made right in the *Karubian* Award.

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*Republic of Iran*, Award No. 583-266-3 (25 September 1997), para. 75. Instead of dismissing it, he granted the claim against Iran without reference to any authority in international law and in clear contrast with the unanimous award of the Tribunal in *Karubian*.