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نسخہ برابر اصل

CASE NO. B1 (CLAIM 4)

FULL TRIBUNAL

AWARD NO. 382-B1-FT

601

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاری ایران - ایالات متحدہ
ثبت شد - FILED	
Date	31 AUG 1988
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PARTIAL AWARD

Appearances

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Table of Contents

	<u>Paragraph</u>
I. THE PROCEEDINGS.....	2
II. FACTS AND CONTENTIONS.....	10
III. REASONS.....	40
A. Jurisdiction.....	40
B. The Merits.....	42
1. The Request for Return of the Items..	43
2. The Request for Compensation.....	65
a. Liability.....	65
b. Compensation.....	75
IV. AWARD.....	77

1. Claim 4, one of several by Iran against the United States in Case No. B1, concerns Iran's request for the return of military equipment originally sold to Iran pursuant to contracts forming part of the United States "Foreign Military Sales" ("FMS") program (see Islamic Republic of Iran and United States of America, Interlocutory Award No. ITL 60-B1-FT (4 April 1986) ("Interlocutory Award")) and which the United States now allegedly holds. In the part of Claim 4 covered by this Partial Award, Iran requests the Tribunal to order the United States to allow the shipment to Iran of those items which the Parties agree are currently in the possession of the United States, and, should this request not be granted, to order the United States to pay compensation in the total amount of U.S. \$143,290,948, plus interest, for the alleged replacement value of the property at issue. The United States denies any obligation to transfer the items to Iran. It agrees that Iran should receive compensation, but only for the current value of the items. The United States further requests that such compensation should be credited to Iran in the FMS Trust Fund (hereinafter referred to as "Iran's FMS Trust Fund") and not be refunded directly to Iran, because this Claim constitutes only one aspect of Case No. B1, and because the United States' Counterclaim in this Case is still pending. The United States denies that Iran is entitled to any damages and it also opposes the claim for interest.

I. THE PROCEEDINGS

2. The Tribunal has given an outline of the general procedural history of Case No. B1 in the Interlocutory Award. See paras. 1 et seq. With respect to the items at issue in Claim 4, on 31 March 1982, the United States filed a "Notice of Intent of the United States to Sell Non-

Exportable Military Property Purchased by Iran Under the FMS Program and Located Within the United States." In letters dated 17 April and 4 May 1982, Iran objected to this proposal. Although the United States reiterated its intention to sell the property on 27 May 1982 and on 15 April 1983, it never actually did so, apparently because of Iran's objections.

3. As a result of a number of meetings and the exchange of documents following the Pre-Hearing Conference held in this Case on 7 and 8 November 1983, the Parties, on 5 March 1986, submitted a "Final Joint Report" with Exhibits I through V containing "reconciled figures and remaining discrepancies" with respect to the items at issue in Claim 4.

4. On 12 December 1986, Iran requested the Tribunal to issue a Partial Award with regard only to the items listed in Exhibits III and V to the Joint Report, which are those items agreed by the Parties to be in the possession of the United States. The United States filed its comments on 2 February 1987.

5. With respect to the portion of Claim 4 referred to in Iran's request for a Partial Award, the Tribunal on 18 February 1987 invited the Parties to file copies of all additional written evidence on which they would seek to rely and to submit Hearing Memorials. On 4 March 1987, the Tribunal scheduled a Hearing to take place on 4 and 5 November 1987.

6. Both Parties filed Hearing Memorials on 14 September 1987. Among the evidence submitted by Iran was one set of microfilms allegedly containing prices of defense articles published by the United States in 1986 which was deposited with the Registry for inspection. A copy of this set

produced under the supervision of the Registry was given to the United States on 6 October 1987.

7. On 5 October 1987, the United States, alleging that Iran's Hearing Memorial contained new arguments and factual material, requested the Tribunal to postpone the Hearing and, should the request not be granted, reserved the right to request an opportunity to file a post-hearing submission responding to these new matters.

8. In an Order filed on 9 October 1987, the Tribunal maintained the Hearing schedule and invited the United States to respond in writing to Iran's Hearing Memorial by 21 October 1987 or orally at the Hearing. On 29 October 1987, Iran filed an objection to the United States' Request.

9. A Hearing on this portion of Claim 4 of this Case was held, as scheduled, on 4 and 5 November 1987 in the Peace Palace, The Hague.

II. FACTS AND CONTENTIONS

10. The Parties agree that Exhibits III and V to the Joint Report identify Iranian military property currently in the possession of the United States. Exhibits III and V distinguish between two main categories of such items at issue here.

11. The first category, listed in Exhibit III, concerns "Repair and Return Items," a large quantity of diverse military goods sent by Iran to the United States for repair, calibration, or modification under FMS contracts which provide for such services and which, as noted in the Interlocutory Award, are based on the standard form "Letter of

Offer and Acceptance" (LOA) issued by the relevant United States military agency. See paras. 13 et seq. Charges pursuant to each LOA were to be paid out of the amounts deposited by Iran in its FMS Trust Fund.

12. The second category consists of the "Five Major Items" and related parts listed in Exhibit V. The Five Major Items comprise a submarine ("INS Kousseh"), a F-14 fighter aircraft, an AH-1J helicopter, a Bell 214A helicopter and a Hawk Air Defense System. The submarine had been purchased and renovated under the FMS program but Iran had decided it no longer wished to keep it. Accordingly, under a Memorandum of Understanding ("MOU") dated 16 May 1979 the United States had "temporary custody in a caretaker status" of the submarine with "full authority to retain, sell, or otherwise dispose of" the submarine. Apparently it has never found a purchaser. The other four major items had also been sold previously to Iran under the FMS program, but were in the United States for purposes of testing and development under separate LOAs, and still remained there when relations between the Parties were actually severed in 1979.

13. The United States alleges that, when Iran stopped its scheduled quarterly payments to the Trust Fund in late 1978, it suspended deliveries to Iran under the FMS program. In July of 1979, the United States purchased certain destroyers from Iran which Iran no longer desired. The proceeds of this sale were credited to Iran's FMS Trust Fund, thereby making it solvent. The United States then indicated that, as a result of this solvency, it was willing to resume the delivery of "non-sensitive" defense articles to Iran, although shipments of "sensitive items" were to remain suspended. Apparently no arms transfer, even of "non-sensitive" items, actually occurred, however, prior to the seizure of the American Embassy on 4 November 1979, in

response to which President Carter's Executive Order 12170, issued on 14 November 1979, blocked the transfer of all Iranian property located in the United States.

14. After the adherence, on 19 January 1981, of Iran and the United States to the Algiers Accords, the United States, on 26 March 1981, requested the Government of the Democratic and Popular Republic of Algeria to inform Iran that the United States was unable to license the export of Iranian military equipment located in the United States. The items at issue in this Claim have remained, therefore, in the possession of the United States.

15. Iran, the undisputed owner of the equipment, contends that the United States is obliged to return the items to Iran pursuant both to the United States' contractual obligations contained in the MOU and the relevant FMS service contracts, as well as its obligations under the Algiers Accords, specifically the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"). It emphasizes that its Claim concerns the obligation of the United States to return the items and not whether the United States performed its service obligations according to the individual LOAs.

16. Iran alleges that, with respect to the Repair and Return Items, the United States failed to perform its contractual obligations under the LOAs to return the property of Iran within a specified time. Iran contends that the LOAs required that the Repair and Return Items, which were allegedly all sent to the United States in 1978, be returned within a period of 12 days minimum and 84 days maximum. Accordingly, all the items should have been repaired and returned by the end of 1978 or in early 1979 at the latest -- well before 4 November 1979. Iran proposes August 1979

as a "conservative average" of the dates on which these items should have been sent back to Iran. It suggests that the United States' refusal to return the Five Major Items, after the discharge of the contracts placing those items at the disposal of the United States, also constitutes a breach of a contractual obligation to return those items; these items, too, it asserts, should have been returned to Iran in or around August 1979. With respect to all the above items, Iran adds that the United States also violated its obligations as a bailee and asserts that the United States refusal to return the equipment constitutes a direct or indirect expropriation.

17. Iran also relies on Paragraph 9 of the General Declaration as an independent basis for its claim for restitution of the items. Paragraph 9 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.

Iran asserts that the purpose of the General Declaration as a whole was to ensure the transfer of all Iranian funds and property held by the United States and that the "properties" referred to in Paragraph 9 included military properties. It contends, in particular, that there was no mention in the negotiations of any possible restrictions pertaining to military items, but that, on the contrary, Paragraph 9 imposes an obligation upon the United States to transfer the military items and that the United States' refusal to do so constitutes a breach of this obligation.

18. Iran requests, as secondary relief only, should its claim for return of the military equipment not be granted, that the Tribunal order the United States to pay the replacement value of the Repair and Return Items and the Five Major Items, which, according to the calculation Iran submitted to the Tribunal, totals U.S.\$143,290,948, plus interest.

19. Finally, Iran seeks a "declaratory award" acknowledging that it is entitled to damages because the United States violated the Algiers Accords, breached the relevant contracts, and wrongfully expropriated the items by refusing to return them to Iran. It requests that the amount of such damages be determined as part of its Claim 6 in this Case No. B1.

20. The United States denies any obligation under the Algiers Accords, the LOAs, or international law to return military equipment to Iran. It maintains that the proviso "subject to the provisions of U.S. law applicable prior to November 14, 1979," inserted, allegedly at United States insistence, in Paragraph 9 of the General Declaration, expresses the intention -- clearly outlined during the Algiers Accords negotiations -- that Iranian property would be exportable to Iran only to the extent that such export was consistent with United States export control laws in effect prior to 14 November 1979. The United States contends that the clear purpose of Paragraph 9 was to ensure that United States export control laws continued to apply to any export of Iranian military property. The United States has submitted affidavits by Mr. Warren Christopher, Head of the United States Delegation to the discussions leading to the Algiers Accords, and by Mr. Roberts Owen, Legal Adviser to Mr. Christopher, testifying that such purpose was repeatedly explained to the Algerian intermediaries. The United

States asserts that its position in this regard was further confirmed on 17 February 1981 by Mr. Christopher in a Hearing before the Senate Committee on Foreign Relations and by a message submitted by President Carter to the United States Congress on 19 January 1981.

21. The United States asserts that the provisions of the Arms Export Control Act ("the Act") and the Regulations issued pursuant to the Act, which were in effect prior to 14 November 1979, were incorporated specifically or by reference in the LOAs and in the allegedly required export licenses, and precluded the export to Iran of military items both at the time of the Algiers Accords and "under present circumstances."¹ In support of its assertion, the United States enumerates several provisions of the Act, including Section 38 which authorizes the President of the United States to control the import and export of defense articles "[i]n furtherance of world peace and the security and foreign policy of the United States." The United States asserts that, in view of Iran's hostility toward the United States, and the neutrality of the United States in the war between Iran and Iraq, which commenced on 22 September 1980, any licensing of arms exports to Iran would conflict with the objectives of Section 38. According to the United States, the President has repeatedly determined that the export of military items to Iran would not be consistent with such objectives.

¹The United States takes the view that this assessment is not affected by the fact that "certain military items" were delivered by the United States to Iran during 1985-86, because these transfers were authorized as part of a covert intelligence operation "under separate statutory authorities."

22. The United States also contends that Section 42(e)(2) (A) of the Arms Export Control Act provides that the United States could, without prior notice, revoke or suspend the required export licences after the items were sent to the United States "whenever the Secretary [of State] deems such action to be advisable." Thus, export licences did not create an "absolute right to delivery" of defense articles.

23. The United States further maintains that Section 4 of the Act, which was reflected in LOA General Condition B.8, limits the purposes for which defense articles and defense services may be sold to internal security, legitimate self-defense or certain other peaceful activities. It alleges that Iran is acting in the Iraq-Iran War beyond legitimate self-defense within the meaning of the Act. Therefore, the United States contends that this Section would also preclude the export of FMS military equipment to Iran.

24. Moreover, the United States notes that Section 3(a) of the Act, which was reflected in LOA General Condition B.9, authorizes FMS sales only to countries which agree to maintain security and control over military items sold to them. The United States asserts that, beginning in 1979, Iran has not carried out its obligations in this regard and is consequently "no longer eligible for purchases or deliveries of defense articles and services." In addition, the United States maintains that Iran failed to comply with specific obligations imposed by the 1974 Agreement between the Parties for the Safeguarding of Classified Information and refused requests to affirm its obligations under the 1974 Agreement or under LOA General Condition B.9. Under these circumstances, the United States asserts that exports of military equipment would be inconsistent with the Act.

25. The United States contends that Paragraph 9 is dispositive of the Parties' rights and obligations with respect to the transfer of Iranian military property in the United States. Nevertheless, in response to Iran's assertion that, independent of the Algiers Accords, the LOAs require the United States to return the items to Iran, the United States asserts that Iran had no absolute entitlement to export of defense articles under the LOAs. According to the United States, when Iran entered into the LOAs, it agreed to the application of United States law, and specifically to the application of the Act. Under LOA General Condition B.5, Iran allegedly assumed both the responsibility for obtaining appropriate export licenses required by U.S. law as well as the risk that such licenses could be revoked or suspended under U.S. law. The United States rejects any notion that international law would abrogate these specific contractual commitments. The United States maintains as well that its retention of the submarine was agreed to specifically by Iran in the MOU of 16 May 1979.

26. Furthermore, the United States contends that it was relieved from specifically performing any delivery obligations imposed by the LOAs because Iran breached its obligations under the LOAs, first, by failing to comply with LOA General Condition B.9 concerning the security of military items and classified information obtained from the United States, second, by failing to make payments to the FMS Trust Fund in 1978, and, third, by failing to respect the limits imposed by LOA General Condition B.8 on the use of items sold under the LOAs to internal security, legitimate self-defense, or certain other peaceful activities.

27. The United States also alleges that the return of the items would be inconsistent with its policy of neutrality in the war between Iran and Iraq and would not conform to

Security Council Resolution 598 of 20 July 1987 which was adopted under Chapter VII of the United Nations Charter. This Resolution not only requested Iran and Iraq to observe an immediate cease-fire, to discontinue all military actions, and to withdraw all forces to the internationally recognized boundaries, but also called upon other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation of the conflict.

28. The United States further argued during the proceedings that, in response to the attack on its Embassy in Tehran in 1979, the refusal to deliver arms to Iran was a justified countermeasure, and that, thereafter, the right of self-defense justified this conduct, as the weapons could be used against the United States ships in the Persian Gulf. The United States also contends that it would be "unreasonable" for it to return military items to Iran at a time when neutral commercial vessels are subject to attack in the Persian Gulf. Finally, the United States contends that the Tribunal is not in a position to review the judgment of a sovereign State concerning an arms transfer.

29. The United States denies both that there has been any expropriation of a property interest of Iran and that the Tribunal would have jurisdiction over such a claim in this Case. It contends that the Tribunal's jurisdiction over official claims of the United States and Iran against each other only extends to cases arising out of contractual arrangements between the two Parties. It further contends that the refusal to issue an export licence does not constitute a taking, but is the valid exercise of a sovereign regulatory right.

30. The United States, nevertheless, agrees that Iran should be compensated for the value of its properties in order to avoid any unjust enrichment of the United States. Alleging that Iran grossly overstates the value of the property at issue, the United States contends that Iran should be compensated, not for the replacement value, but only for the current value of the items. If replacement value were accepted as the standard of compensation, the Claimant would be put in a better position than if the Contracts had been performed.

31. The United States further argues that Iran may not claim compensation for any decline in the value of its property from November 1979 through January 1981 because in this period the United States was justified in taking reasonable and proportionate countermeasures by blocking the transfer of Iranian property in response to the attack on the United States Embassy. The United States also asserts that Iran must also bear any losses associated with the decline in value of its property after the signing of the Algiers Accords, as Iran was responsible for the conditions causing its military property in the United States to be non-exportable at that time and thereafter. The United States further submits that Iran's refusal during these proceedings to permit the United States to sell the equipment in order to mitigate damages prevents Iran from claiming the recovery of any decline in value subsequent to such refusal. Finally, the United States contends that it needs more time to verify Iran's evidence on valuation of the Repair and Return Items, which was submitted at a late stage of the proceedings, and also contests various aspects of Iran's assertions relating to the valuation of the Five Major Items.

32. The United States declares that it is willing to identify and purchase any of the items it can use itself, "subject to the availability of funds, at cost to Iran less any charges necessary to place the items in operating condition." According to the United States, this would solve the issue of the transfer of highly sensitive items. The United States proposes to offer the items it would not procure itself for sale to "eligible third country purchasers." The United States argues that this proposal would equitably dispose of the property with due respect paid to Iran's interest in receiving a fair measure of value.

33. In response to the United States' defense, Iran denies that the proviso inserted in Paragraph 9 of the General Declaration justifies the refusal of the United States to return the items. Iran asserts that such an interpretation contravenes the object and purpose of the Algiers Accords, which was to ensure that the United States Presidential Order of 14 November 1979, blocking Iranian assets, would be annulled so that Iran could regain and utilize its assets in every possible way. In support of this contention, Iran quotes the message submitted by President Carter to the United States Congress on 19 January 1981 which, without differentiating between military and non-military items, states:

I will sign, upon release of the hostages, an Executive Order directing any person subject to the jurisdiction of the United States who is in possession or control of property owned by Iran, to transfer the property as directed by the Government of Iran acting through its authorized agent.

34. Furthermore, Iran has submitted the affidavit of Mr. Behzad Nabavi, Head of the Delegation to the discussions leading to the Algiers Accords, testifying that the Iranian understanding was that Paragraph 9 and the proviso "would ensure the attainment of the objective of free transfer to Iran of all Iranian properties" by nullifying all the restrictions imposed since 14 November 1979. He categorically denies that Iran was "told through the Algerian authorities that the phrase in question would cause the continuation of the application of American Arms Export Control Act" or even that a mention was made "of any differences existing or to be applicable between the military and non-military properties."

35. With respect to the United States interpretation of the proviso, Iran specifically refers to Article 19(c) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which prohibits the formulation of reservations incompatible with the object and purpose of the treaty.

36. Moreover, Iran rejects the contention that any domestic law of the United States applicable prior to 14 November 1979, particularly the Act, actually prohibits the transfer of the items at issue to Iran. The Act, according to Iran, simply grants the United States President the discretion not to authorize exports of defense articles, and, since the United States Government had already committed itself in the Algiers Accords to "arrange for the transfer" of the Iranian properties, including the military items, it was no longer allowed to use its discretion not to transfer those items. Iran emphasizes that it owns the properties at issue and that their title had passed to Iran well before 14 November 1979 and asserts that they were exportable to Iran prior to that date. It was legally possible to arrange for their transfer to Iran at that time and this is still the case under existing United States law.

37. Iran maintains, further, that the United States, when selling defense items and services, is not required to issue an export licence to itself and misinterprets the word "export licence" in General Condition B.5 of the LOAs. It contends that the items in question should have been shipped directly to Iran without requiring an export licence. Iran asserts that the repair items sent to the United States under a service contract required only an import licence so that the United States could not, in any event, prevent the return of the items even if the United States had the right of revocation. Iran also argues that the contention that the United States is entitled to deny an export licence is inconsistent with contract law, the LOA provisions and the "principle of good faith," and that the United States' refusal to return the items constitutes a breach of contract entitling Iran to compensation.

38. Iran denies that the United States' invocation of its alleged position of neutrality in the Iraq-Iran war has any validity because the United States' refusal to return the Iranian property dates back to 1978, over a year before the Iraq-Iran war started and the Algiers Accords were executed. Furthermore, Iran argues that the laws of war with respect to the rights and duties of neutrals do not exempt a State from honoring contractual obligations it had accepted prior to a war, nor authorize it to disregard the international law principle pacta sunt servanda, or to seize "a belligerent government's defence articles entrusted to it under contractual arrangements, obviously, to the detriment of one of the belligerent States, and in favour of the other." Iran also notes that many States including the United States, have sold arms to Iran and Iraq during the war, and emphasizes that Security Council Resolution 598 does not contain an arms embargo. Moreover, in Iran's view, the

United States is, in fact, not neutral, but on the side of Iraq. In any event, Iran contends that the Algiers Declarations obliged the United States to transfer all Iranian property located in the United States to Iran and that the Declarations were concluded well after the United States had declared its neutral position in the Iraq-Iran War.

39. Finally, Iran rejects the suggestion that any money awarded to it should be credited to its FMS Trust Fund. It contends that the Tribunal has no jurisdiction over the Counterclaim filed by the Respondent in Case No. B1, asserting that counterclaims in this type of case are inadmissible under Article II, paragraph 2, of the Claims Settlement Declaration.

III. REASONS

A. Jurisdiction

40. The Tribunal is satisfied that it has jurisdiction over this Claim, which involves the two Parties to the Algiers Accords, since it arises out of contractual arrangements between them for the purchase and sale of goods and services, in accordance with Article II, paragraph 2, of the Claims Settlement Declaration, and also presents a dispute as to the proper interpretation or performance of the provisions of the General Declaration in accordance with Article II, paragraph 3, of the Claims Settlement Declaration. The Tribunal's jurisdiction extends to Iran's request for return of the military equipment as well as to the subsidiary claim for compensation. Although the United States casts some doubt upon the jurisdiction of the Tribunal to order such a return, at least as far as such a decision would amount to reviewing the judgment of a sovereign State concerning an

arms transfer, it does not formally object to the Tribunal's jurisdiction over this part of the Claim. At any rate, the Tribunal does not find any provision in the Algiers Accords which would prevent it from taking cognizance of such a request. As to its authority to review sovereign acts of a State, the Tribunal has to rely upon the principles and rules of public international law. This issue will be dealt with more completely below. See infra para. 62.

41. In view of its decision on the merits, the Tribunal need not decide the question of its jurisdiction over an official claim concerning the expropriation of a property interest. See supra para. 29.

B. The Merits

42. The primary remedy sought by Iran is an Award "requiring the United States to let Claimant take delivery" of the items at issue "and allow it to carry them to Iran." This Claim will, therefore, be dealt with first. For the reasons set forth below, the Tribunal has arrived at the conclusion that the Claim for return of the items cannot be sustained. Accordingly, in a second section, the Award deals with Iran's subsidiary claim for compensation.

1. The Request for Return of the Items

43. Iran advances two lines of argument in support of its contention that the United States is obliged to return to Iran the items in dispute in this proceeding. The first argument is based on the pertinent contractual arrangements described above, and the second argument focuses on Para-

graph 9 of the General Declaration, which obligates the United States to arrange for the transfer to Iran of all Iranian properties located in the United States and abroad, including military equipment.

44. The Tribunal notes that, should the United States be bound to return the items by Paragraph 9 of the General Declaration, such obligation would necessarily prevail over any contrary rights and obligations having their source in prior contracts existing between the Parties to the General Declaration, since the General Declaration creates no exemption from its obligations for prior inconsistent agreements between the Parties. This conclusion is true whether the law applicable to those earlier FMS contracts is international law, as Iran argues, or the law of the United States, as the United States contends. Even if any of those contracts could be regarded as equivalent to a treaty, the General Declaration, as the more recent treaty, would prevail to the extent that it clearly alters rights and obligations set forth in the earlier treaty. It is, therefore, necessary to deal first with the argument based on Paragraph 9 of the General Declaration.

45. The Tribunal notes that two key issues are involved in the argument based on Paragraph 9: the first concerns the proper interpretation to be given to the proviso inserted in Paragraph 9, and the second addresses the question whether the United States law applicable prior to 14 November 1979 legitimizes the refusal by the United States Government to export military articles to Iran.

46. The Tribunal finds that Paragraph 9 obliges the United States to "arrange for the transfer to Iran" of all Iranian properties which are not included in the preceding paragraphs of the General Declaration. The Parties agree

that the Iranian properties referred to in Paragraph 9 include military properties. The wording of the proviso, "subject to the provisions of U.S. law," however, clearly means that the United States was not obliged to arrange for the transfer of the properties at issue, to the extent that such a transfer was prohibited by United States law. This sentence, therefore, expressly and specifically defines the scope of the international obligation by reference to domestic law.

47. The Tribunal finds that this interpretation accords with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," in the words of Article 31, paragraph 1, of the Vienna Convention. It is true that one aspect of the "object and purpose" of the General Declaration was "to ensure the mobility and free transfer of all Iranian assets" within the jurisdiction of the United States, as stated in General Principle A. Nothing, however, prevented the Parties from accepting specific exceptions to this "free transfer," or making it conditional for some of the assets at issue, as was done, in fact, in other parts of the General Declaration, notably in Paragraph 7, and in Paragraphs 2 and 3 of the Undertakings of the two Governments with respect to the General Declaration.

48. The Tribunal notes, in this context, that the proviso inserted in Paragraph 9 is part of the text agreed upon by both Parties to the General Declaration, and is not, as argued by Iran, a reservation within the meaning of Article 19(c) of the Vienna Convention as defined in Article 2(1)(d) of that Convention. See supra para. 35. According to Article 2(1)(d), a reservation is "a unilateral statement . . . made by a State" after the adoption of the text of the

treaty. A sentence included in the text of the General Declaration obviously is not a reservation in this sense. Article 19(c) of the Convention, therefore, is irrelevant.

49. The Tribunal notes, however, that the reference to United States law in the proviso at issue is limited to the law "applicable prior to November 14, 1979." This clause, accordingly, has two effects. It expressly authorizes the United States to invoke its domestic law in order not to have to arrange for the transfer to Iran of Iranian properties, in so far as this law was applicable prior to 14 November 1979 and prohibits such a transfer. On the other hand, it prevents the United States from so acting in relation to law not applicable prior to this date. If the intent of the negotiators had been, as Iran contends, solely to prevent the United States from invoking the Presidential Order of 14 November 1979 or any other orders or provisions subsequent to 14 November 1979, the omission of such proviso or, at the very least, a different wording of the proviso would have been more appropriate.

50. The Tribunal finds, therefore, that the proviso does not leave room for ambiguity. The above interpretation is confirmed by the preparatory work concerning the General Declaration and the circumstances of its conclusion, which, as stated in Article 32 of the Vienna Convention, are supplementary means of interpretation. The affidavits submitted by the Parties relating to the negotiations of the Algiers Accords are contradictory, and are, therefore, by themselves inconclusive. See supra paras. 20 and 34. The Tribunal finds, however, that the written exchanges between the Parties which preceded the drafting of the text are conclusive in this regard. The pertinent exchanges are described below.

51. Iran's conditions for finding a solution to the crisis existing between the two countries were formulated by the Majlis, the Islamic Consultative Assembly, on 2 November 1980, in a Resolution stating Iran's position concerning the release of the hostages. This Resolution constituted the basis of the Iranian position throughout the negotiations and is referred to in the Preamble of the General Declaration. The second of the conditions listed in the Resolution refers to the questions at issue in this Case. The Majlis requested

unfreezing all Iranian assets in and outside the United States. These assets should be put at the disposal of the Iranian government, in order that we may utilize them in every possible way. The (U.S.) presidential order of November 14, 1979, that blocks our assets should be declared null and void by presidential order All legal procedures must be taken to avoid the presidential order concerning the confiscation of Iranian properties by the United States courts. Guaranteeing the security and free transfer of these properties must be made.²

²This quotation is from "D.S. Publication 554" concerning "U.S.-Iran Negotiations 1980-81" submitted by Iran in Doc. No. 558, Exhibit N. The Iranian Arbitrators wish it to be noted that, in their view, it is not a correct translation reflecting the meaning of the original Persian text of the Resolution, which, however, does not bear on the present decision. They suggest that the following is a more accurate translation:

"To release all our assets, and to make these assets, and all properties and assets of Iran, in the United States or with institutions belonging to the United States Government or to U.S. nationals in all other countries, available in such a way that the Government of the Islamic Republic of Iran be able to avail itself of them by whatever means it chooses; and to declare null and void the United States President's Executive Order of 14 November 1979 . . . to take all necessary legal and administrative measures, through the United

(Footnote Continued)

52. In an initial response, dated 11 November 1980, the United States accepted, in principle, this Resolution as the basis for ending the crisis and declared itself to be prepared, inter alia, to deliver a copy of "a signed Presidential Order unblocking all of the capital and assets of Iran within the jurisdiction of the United States . . . in order to allow the parties to move expeditiously toward a resumption of normal financial relations as they existed before Nov. 14, 1979." In response to a message from Iran, delivered through the Algerian intermediaries, requesting answers to nine questions, a second American communication, dated 3 December 1980, stated that a guiding principle of its answers relating to Condition 2 of the Resolution "is that the United States shall restore the financial position of Iran insofar as possible to that which existed prior to November 1979." It also indicated that "[t]he United States specifically commits itself to insure the mobility and free transfer of the Iranian assets." An Iranian response to these proposals, dated 21 December 1980, listed the Iranian assets, valued at U.S.\$9.069 billion, the return of which was requested. Among those was the "Trust fund of the Ministry of Defense of the Islamic Republic of Iran," allegedly credited with U.S.\$800 million. In addition, the United States Government was required to undertake to return all "other assets and funds of Iran at the disposal of, or under attachment by the American Government, American nationals or institutions," for which a guarantee equal to U.S.\$4 billion in cash was to be deposited.

(Footnote Continued)

States President, in order to annul and overturn the attachment orders issued by the United States courts and public prosecutor's offices, and to ensure the safety and free mobility and transfer of these assets, vis-à-vis any and all measures by natural and juridical persons who are nationals of the United States or of any other country, within the United States."

53. The Tribunal notes that the various proposals and responses just cited, as well as the General Declaration itself, focus in detail on the financial assets and financial position of Iran. The Tribunal finds it significant, however, that, at a time when the Iraq-Iran War was raging, a time therefore when Iran presumably had a specific interest in obtaining its defense articles, neither the Majlis Resolution, nor any of the exchanges that followed, expressly deal with military property, even though the financial assets of the FMS Trust Fund are mentioned. The Tribunal notes that this omission is all the more striking in view of the fact that the defense articles constituted the most valuable part of the Iranian property referred to in Paragraph 9 of the General Declaration.

54. The Tribunal finds that this omission to discuss and to provide in any detail for the return of military equipment combined with (1) the weight of evidence supporting the United States' contention that it insisted on the inclusion of the proviso, (2) the widely-known principal feature of United States law in the field of arms export -- of which the Iranian negotiators could not have been ignorant -- that authorizes the President and the Secretary of State to control the import and export of defense articles, and (3) the fact that Iran never requested clarification of this issue nor suggested a provision excluding the exercise by the President of his power under the Act to control exports of defense articles, all confirm that the clear meaning of the proviso is that it continues the application of United States export control laws in effect prior to 14 November 1979.

55. As noted in paragraph 45 supra, the second issue that must be addressed is whether the provisions of United States law applicable prior to 14 November 1979 actually prohibit

the export to Iran of the military articles in question. For the reasons set forth below, the Tribunal finds that they do so and that the United States therefore did not violate Paragraph 9 by prohibiting the export of the items to Iran.

56. Much of the pleadings by the Parties on this issue focused on the export licenses required for the shipment of defense articles, the responsibility for obtaining the appropriate licenses, and the right of the United States, pursuant to United States law applicable prior to 14 November 1979, to refuse to grant new licenses or to cancel licenses already issued. Both Parties invoke specific provisions of the LOAs in support of their respective allegations concerning the necessary export licenses. However, as already emphasized, Paragraph 9 of the General Declaration does not refer to the contracts previously existing between the Parties as an exception to the United States commitment to transfer properties. Moreover, it should also be noted that, under the Act, export licenses are not required when arms exports are "made by or for an agency of the United States Government." Under Paragraph 9, it was the United States Government that undertook to "arrange . . . for the transfer." Therefore, under the Act, no export licenses were required for this transfer. For these reasons, the provisions of the Act relating to licensing are irrelevant to the question of whether the export of arms to Iran in 1981 would have comported with "United States law applicable prior to 14 November 1979."

57. The Tribunal notes, however, that Section 38 of the Act, provides that "[i]n furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services." Such a provision

clearly empowers the President to preclude the export of military items if he determines that such exports would not be consistent with "world peace and the security and foreign policy of the United States." Section 38 applies to all exports of defense articles, and not solely sales, and thus extends to any transfer of items to a foreign country, even if the latter is the owner of the items. There is also no doubt and no dispute that the items at issue in Claim 4 are "defense articles" within the meaning of the Act.

58. The Tribunal finds, therefore, that while provisions of United States law applicable prior to 14 November 1979 did not per se preclude the export to Iran of military items at the time of the signing of the Algiers Accords, those provisions did entrust the President of the United States with the power to determine that such exports are inconsistent with "world peace and the security and foreign policy of the United States." Once such a determination is made under the Act, the export of defense articles is precluded. The United States has in fact pointed out that President Reagan repeatedly made such a determination.³

59. Although Iran agrees that the Act grants the President of the United States discretion not to authorize the export of defense articles, it argues that export authorization was, in fact, given with the execution of the corresponding LOAs and that the United States' undertaking under the General Declaration to arrange for the transfer of the Iranian property prevents it from later using its discretion to refuse the transfer of the items at issue.

³According to the United States, President Carter had already made the same determination, but the remarks by President Carter quoted in support of this contention only
(Footnote Continued)

60. The Tribunal is not persuaded by this argument. Under the Act, the President's discretion to deny export of defense articles to a specific country is nowhere circumscribed by the fact that an export license may previously have been issued. Moreover, the Iranian contention that the United States' commitments under Paragraph 9 should be read to preclude the President from exercising this discretion ignores the fact that the right to use such discretion was a remarkable and well-known aspect of the United States law applicable prior to 14 November 1979. In the absence of any specific phrase in the Declaration excluding this right, the "subject to" proviso effectively preserved the discretion granted to the President by Section 38 of the Act.

61. Iran also contends that such a determination was not justifiable and that to the extent that it was based on the ground of alleged United States neutrality in the Iraq-Iran War (which Iran denies), it was not sustainable in light of the fact that the United States recently transferred certain defense articles to Iran.

62. The Tribunal finds that the President's exercise of the discretion conferred upon him by Section 38 of the Act, to make a determination in highly sensitive political matters such as, as stated in that Section, "world peace and the security and foreign policy of the United States," is the exercise of a sovereign right which is not subject to review by an international Tribunal. Therefore, because the United States has not renounced this sovereign right in a treaty or in any other way that binds it internationally, and in the absence of any rule of customary international law which

(Footnote Continued)

state that "we have not been and we will not become involved in the conflict between Iran and Iraq."

would limit its freedom of decision, it cannot be deprived of this sovereign discretion. Under these circumstances, the Tribunal does not consider the determination made by the President of the United States to withhold export of the military articles at issue in this Case to be unlawful. Accordingly, as a result of this determination, the Tribunal finds that "the provisions of the United States law applicable prior to 14 November 1979" effectively prevented the export of the military items to Iran, and that the United States, therefore, acted within its rights under Paragraph 9 and not in violation of it by refusing to export those items.

63. This finding disposes of the arguments advanced by Iran with reference to specific performance of the contracts binding the two Parties prior to 14 November 1979. For the reasons already set forth, the rights and obligations created by Paragraph 9 necessarily would prevail over any prior inconsistent contractual provisions. See supra para. 44.

64. While the United States has asserted that some actions by Iran "go beyond legitimate self defense within the meaning of the Act and the LOAs, and responsible U.S. authorities have so characterized the situation" and has referred to recent resolutions of the United Nations Security Council, particularly Resolution 598 of 20 July 1987, the Tribunal need not consider these arguments which, at any rate, refer to events subsequent to the Algiers Accords, in view of its conclusion with respect to the return of the items. Similarly, the Tribunal need not consider in the present Award the additional argument by the United States that its refusal to export is justified by the alleged failure of Iran to maintain security and control over

military items previously transferred to it by the United States.⁴

2. The Request for Compensation

a. Liability

65. It does not necessarily follow from the Tribunal's findings above that the General Declaration does not require compensation of Iran when the application of the proviso in Paragraph 9 of the General Declaration has the effect of preventing the transfer to Iran of the Iranian military properties referred to in that Paragraph.

66. The Tribunal has found that, as a result of the determination made by the President of the United States, the provisions of U.S. law applicable prior to 14 November 1979 effectively prevented the export of military equipment to Iran. See supra para. 58. This finding, however, does not imply that the United States would be relieved from all obligations, under Paragraph 9, in relation to the Iranian-owned military equipment at issue in this part of Claim 4. Such an interpretation would not conform with the scope of Paragraph 9 and would be inconsistent with the object and purpose of the General Declaration. The provisions of U.S. law invoked by the United States do not prohibit -- and it has not been contended that they prohibit -- the transfer to

⁴This contention is the subject-matter of the United States' Counterclaim pending in Case No. B1 which will be dealt with separately.

Iran of the monetary equivalent of Iranian-owned military properties held by the United States. Therefore, the proviso inserted in Paragraph 9 could not be construed to excuse the United States from arranging for the transfer of these properties in form of a monetary equivalent, that is, to substitute compensation for the value of these properties in place of their export when it was only such export that is prevented by application of the U.S. law referred to in this proviso. Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.

67. A contrary interpretation of Paragraph 9 would be inconsistent with the object and purpose of the General Declaration, notably as expressed in General Principle A of the Declaration, according to which "[w]ithin the framework of and pursuant to the provisions of the two Declarations . . . the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." This sentence emphasizes the importance attached by the two Governments (and especially by Iran, as the preparatory work demonstrates) to the restoration of the financial position of Iran, as it existed prior to 14 November 1979. See supra para. 52. Failure to transfer the monetary equivalent of Iranian-owned properties not themselves exportable certainly conflicts with such a purpose.

68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to Article 31

(3)(b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defense articles would not be approved, the United States expressly stated that "Iran will be reimbursed for the cost of equipment in so far as possible." Furthermore, in its Hearing Memorial, it unconditionally confirmed:

The United States does not, however, dispute Iran's right to the value of its properties.

The Tribunal also notes that at the Hearing the United States explained that it was willing to pay compensation in order to avoid being "unjustly enriched."

69. The acknowledgement by the United States of "Iran's right to the value of its properties" was reinforced by the several proposals it made during the present proceedings, on 31 March 1982, 27 May 1982, and 15 April 1983, to dispose of all the Iranian military items in the possession of the Department of Defense and to credit Iran's FMS Trust Fund with the proceeds, as previously proposed on 26 March 1981. See supra para. 2. Although these proposals included conditions that the Tribunal does not find justified under Paragraph 9, and although no compensation was actually paid, such proposals cannot be construed other than as a clear recognition of a duty to pay compensation for the items which were not transferred to Iran pursuant to that Paragraph. See infra para. 72.

70. Furthermore, the interpretation set forth in paragraph 66 above is consistent with general rules of international law, which do not authorize a State, in normal circumstances, to take or retain foreign property without compensation. At the date of issuance of this Partial Award, the determination made in 1981 by the President of the United States

that defence articles were not exportable to Iran has not been reversed and continues to prevent the return to Iran of the items it owns. Iran, therefore, has been completely deprived of its property by the conduct of the United States, even if the United States never expressed its intention to appropriate this property and never attempted to dispose of it without Iran's authorization. See supra paras. 2 and 69. Such deprivation, undoubtedly, entails for Iran prejudicial consequences similar to those which would have been the result of an expropriation. Under international law the State responsible for such deprivation is liable to compensate for the full value of the deprived property at the date the deprivation became effective. See Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2, pp. 10-11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225-26. Moreover, this is consonant with general principles of contract law pursuant to which the United States, as a bailee of the Iranian-owned items at issue in this part of Claim 4, had the obligation to substitute compensation for the value of the items in place of their return once it exercised the discretion reserved to it by the General Declaration not to authorize their export to Iran.

71. The conclusion of the Algiers Accords in January 1981 coincided with a change of administration in the United States. It was reasonable for the new administration to take about two months to decide how to exercise the discretion given to it by United States law with respect to the export of defense articles to Iran. Such a decision evidently was made shortly before 26 March 1981, when Algeria was officially asked to convey to Iran both the position that it would not permit export of the items and its willingness to compensate Iran for the value of its equipment.

Valuation of the items, therefore, must be calculated as of 26 March 1981.

72. With respect to the United States proposal to sell the items and to deposit the proceeds to Iran's credit in the FMS Trust Fund, the Tribunal observes that if the United States had not exercised its discretion to withhold return of those Iranian-owned items in the United States, they would have been returned directly to Iran. Moreover, these items had been acquired by Iran at earlier times and their value, consequently, could in no way be properly considered an asset of the Trust Fund. Therefore, the payment should be made directly to Iran and not to Iran's credit in the FMS Trust Fund. The Tribunal notes that the United States' proposal of 26 March 1981 was made with reference to a previous agreement in February 1979 under which certain other military properties of Iran were sold by the United States and the proceeds credited to Iran's FMS Trust Fund in order to replenish it. That 1979 agreement, however, was not related to the United States' obligations with respect to the Iranian-owned property specified in Paragraph 9. For the reasons set forth above, in relation to the issues dealt with in this Award, the Trust Fund has no place in the implementation of Paragraph 9. Furthermore, the proposal to determine the amount of the compensation to be paid to Iran through actual sale of the items by the United States itself and deducting certain costs from those proceeds did not necessarily permit the establishment of the full value of the goods in conformity with the findings of the Tribunal and was therefore subject to legitimate objections by Iran. See infra para. 73. Iran was thus under no obligation to accept such a proposal. In these circumstances, its refusal cannot have the effect of shifting to Iran the risk for any diminution of the value of the items after 26 March 1981.

73. On the basis of these findings, the Tribunal holds that the United States is obligated, pursuant to Paragraph 9 of the General Declaration, to compensate Iran for the full value of the items at issue in the present proceedings. The value of these items shall be calculated as of the time the determination of non-exportability was made and conveyed to Iran, that is as of 26 March 1981. The amount due is to be paid to Iran directly and not to be credited to its FMS Trust Fund.

74. Finally, as the Tribunal has found that the United States did not act unlawfully in refusing to permit the export of the items, there is no legal basis for Iran's request for damages. This part of the Claim is therefore dismissed.

b. Compensation

75. As just stated, the Tribunal finds that Iran is entitled to be compensated for the full value of the goods as of 26 March 1981. The Tribunal has taken note of the views of the Parties with regard to the assessment of the value of the items at issue and the amount of compensation due to Iran. However, considering in particular that Iran has presented its case under the premise that it is entitled to the replacement value of the items, and that the United States has made its argument under the assumption that it is liable only for the present value of the items, the Tribunal has arrived at the conclusion that it is not in a position to make an informed decision on this issue on the basis of the pleadings and evidence before it. Therefore, it invites the Parties to file further submissions on the issue of the value of the items as of 26 March 1981 and of the amount of interest thereon. These submissions should take the

findings of this Partial Award fully into account. Consequently, the Respondent's request to submit unilaterally a post-hearing submission is moot.

76. The filing of further submissions will be determined by a separate Order. The Tribunal intends to issue its Partial Award on compensation on this part of Claim 4 on the basis of the documents so submitted.

IV. AWARD

77. In view of the foregoing,

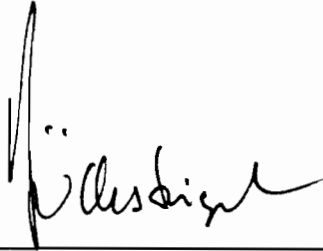
THE TRIBUNAL DETERMINES AS FOLLOWS:

- a) The request by the Claimant, THE ISLAMIC REPUBLIC OF IRAN, for return of the items listed in Exhibits III and V to the Joint Report is dismissed.
- b) The Respondent, THE UNITED STATES OF AMERICA, is liable to compensate the Claimant, THE ISLAMIC REPUBLIC OF IRAN, for the full value of these items as of 26 March 1981.
- c) The Tribunal defers the determination of the amount of compensation and of interest until such time as the Parties have been

given opportunity to submit further pleadings and evidence, as determined in paragraphs 75 and 76 of this Partial Award, pursuant to the schedule which will be determined by separate Order.

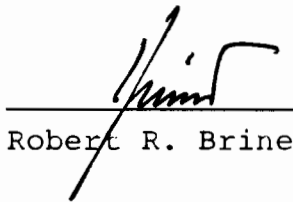
- d) All other claims relating to this part of Claim 4 are dismissed.

Dated, The Hague,
31 August 1988



Karl-Heinz Böckstiegel
President

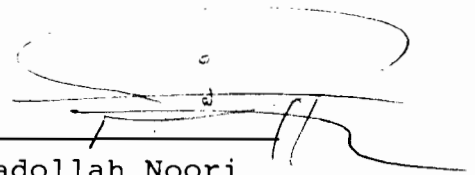
In the Name of God



Robert R. Briner

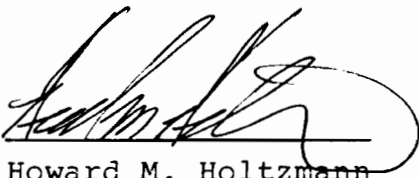


Michel Virally



Assadollah Noori
Concurring Opinion

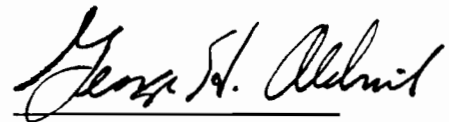
In the name of God



Howard M. Holtzmann
Separate Opinion,
Concurring in Part,
Dissenting in Part

In the Name of God

Hamid Bahrami-Ahmadi
Concurring Opinion
(signature on separate
page)



George H. Aldrich



Parviz Ansari Moin
Concurring Opinion



Charles N. Brower
Concurring and
Dissenting Opinion

given opportunity to submit further pleadings and evidence, as determined in paragraphs 75 and 76 of this Partial Award, pursuant to the schedule which will be determined by separate Order.

- d) All other claims relating to this part of Claim 4 are dismissed.

Dated, The Hague,
31 August 1988

Karl-Heinz Böckstiegel
President

In the Name of God

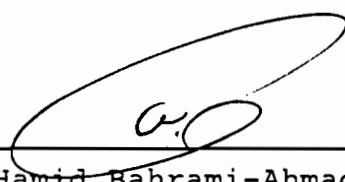
Robert R. Briner

Michel Virally

Assadollah Noori
Concurring Opinion

In the name of God

Howard M. Holtzmann
Separate Opinion,
Concurring in Part,
Dissenting in Part
In the Name of God


Hamid Bahrami-Ahmadi
Concurring opinion

George H. Aldrich

Parviz Ansari Moin
Concurring Opinion

Charles N. Brower
Concurring and
Dissenting Opinion