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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. B1 (COUNTERCLAIM)
FULL TRIBUNAL
AWARD NO. ITL 83-B1-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

INTERLOCUTORY AWARD

Appearances:

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I. INTRODUCTION

1. On 31 March 1982, the United States of America ("Counter-Claimant" or "United States"), submitted a counterclaim in Case No. B1 ("Counterclaim"). In the Counterclaim, the United States asserts that the Islamic Republic of Iran ("Counter-Respondent" or "Iran") has violated its contractual obligations to maintain the security of classified componentry in defense articles and related classified information. The United States invokes provisions in certain contracts ("Letters of Offer and Acceptance" or "LOAs") dealing with F14 aircraft and the Phoenix missile system that were concluded at various times between 1974 and 1978 under the Foreign Military Sales Program ("FMS"). In that connection, it refers also to provisions of an agreement effected through an exchange of notes between the Ambassador of the United States in Iran and Iran's Minister for Foreign Affairs on 28 May and 6 June 1974, on the Safeguarding of Classified Information ("1974 Agreement"). The United States alleges that, as a consequence of Iran's failure to comply with the provisions of the LOAs, it has had to incur substantial expenses to modify its own equipment. The United States seeks compensation for these costs and for the costs of any other measure that may be required in the future as a consequence of Iran's violation of its obligations.

2. Iran raises four preliminary objections to the Counterclaim. First, it contends that the Algiers Declarations[1] do not provide the Tribunal with jurisdiction to entertain "official counterclaims," i.e., counterclaims submitted in

[1] Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), both dated 19 January 1981, reprinted in 1 Iran-U.S. C.T.R. 3.

response to "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." Accordingly, Iran argues that, instead of a counterclaim, the United States should have filed a claim against Iran before 19 January 1982, the deadline for the filing of official claims before the Tribunal. Second, Iran maintains that, even if the Tribunal has jurisdiction to hear official counterclaims, such counterclaims had to be outstanding on 19 January 1981, the date of the Algiers Declarations. Iran contends that the United States has not shown that its Counterclaim was outstanding on that date. Third, Iran asserts that, even if the Counterclaim was outstanding on 19 January 1981, it should be dismissed preliminarily because it does not arise out of the contracts that are the basis of Iran's claims in Case No. B1, but rather arises out of a separate agreement, namely the 1974 Agreement. Fourth, Iran submits that the Counterclaim does not constitute a cognizable claim, as it is not described with sufficient specificity and fails to meet the requirements of Article 18 of the Tribunal Rules of Procedure.[2]

II. PROCEDURAL HISTORY

3. On 18 November 1981, Iran submitted a Statement of Claim in this Case. This Statement of Claim was supplemented on 18 January 1982. On 31 March 1982, the United States submitted a Statement of Defense and Counterclaim. Iran submitted its Statement of Defense to the Counterclaim on 8 July 1982, to which the United States answered on 1 October 1982. On 12 April 1983, Iran submitted a further Reply.

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[2] Final Tribunal Rules of Procedure, adopted 3 May 1983 ("Tribunal Rules"). These were preceded by the Provisionally Adopted Tribunal Rules, adopted 10 March 1982 ("Provisional Tribunal Rules"). The text of Article 18 of the Tribunal Rules and that of Article 18 of the Provisional Tribunal Rules are identical.

4. On 7-8 November 1983, a pre-hearing conference was held in Case No. B1. Preliminary issues relating to the Counterclaim were discussed, but no decision thereon was taken.

5. On 19 June 1989, the Tribunal invited the United States to respond to Iran's written submissions of 12 April 1983; the United States submitted a Response on 14 September 1989.

6. On 21 September 1989, the Tribunal issued an Order informing the Parties that it intends "to decide whether it has jurisdiction over the Counterclaim in this Case on the basis of the documents presently before it" and inviting the Parties' comments on this intention. On 6 and 20 November 1989, Iran informed the Tribunal that it intended to file a written response to the United States' submission of 14 September 1989, and that it would, upon filing of that response, ask for a Hearing if deemed necessary. The United States replied on 20 November 1989, requesting the Tribunal to schedule a Hearing before deciding the question of jurisdiction.

7. On 24 November 1989, the Tribunal granted Iran's request to file a response to the United States' submission of 14 September 1989, which response was submitted on 18 February 1991.

8. On 1 December 1992, the Tribunal asked for the Parties' suggestions for further proceedings in this Case. The United States replied on 15 December 1992, seeking, inter alia, permission to reply to Iran's filing of 18 February 1991. Considering that the written pleadings in this Case were complete, Iran suggested on 17 December 1992 that the Tribunal "decide on its jurisdiction on the basis of briefs

and evidence before it without holding a Hearing." In a more elaborate response filed on 3 March 1993, Iran objected to the United States' request for an additional filing, but added that it should be granted a further opportunity to respond in writing should the United States' request be allowed.

9. On 16 May 2001, the Tribunal issued a "Communication to the Parties" inquiring "whether they would desire the Tribunal to arrange for early decision of the questions whether it has jurisdiction over the Counterclaim and, if there is jurisdiction, whether it is limited to an offset against any amount that might be awarded to Iran in this Case." On 17 July 2001, the United States responded by expressing its strong reluctance to have these issues decided preliminarily. On the same day, Iran indicated that it had "no objection to an arrangement for early decision by the Tribunal covering all outstanding issues concerning the Counterclaim" provided that such decision be rendered on the basis of the written pleadings already exchanged between the Parties. However, in a supplementary communication filed on 12 September 2001, Iran explained that it no longer opposed the holding of a hearing on the preliminary issues. In a further response filed on 22 October 2001, the United States reiterated its opposition to the preliminary treatment of jurisdictional issues.

10. On 27 November 2001, the Tribunal determined that it was appropriate to provide for early decision of the question whether it has jurisdiction over the Counterclaim. The Tribunal requested further submissions on the subject; it also asked the Parties to address the question whether any jurisdiction it may have over the Counterclaim is limited to a set-off against any amount to be awarded Iran in Case No. B1.

The United States and Iran submitted their Memorials on 29 July 2002 and 27 February 2003, respectively.

11. A Hearing in this Case was held on 22-24 September 2003 in the Peace Palace, The Hague.

III. FACTUAL BACKGROUND

12. Iran began taking part in the FMS Program in 1964. Starting in January 1974 and continuing until August 1978, the Parties concluded, inter alia, two LOAs for the sale of F-14 fighters,[3] three LOAs for the sale of AIM-54A (Phoenix) missiles,[4] and nine LOAs for the maintenance and operation of the F-14s and AIM-54A (Phoenix) missiles.[5] These LOAs provided that the sales were made under certain General Conditions, among which is General Condition B.9:[6]

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[3] Case designators IR-SAT (sale of 30 F-14s, concluded on 7 January 1974), IR-SBY (sale of 50 F-14s, concluded on 10 June 1974).

[4] Case designators IR-ABB (sale of 150 Phoenix missiles, concluded on 7 January 1974), IR-ABS (sale of 270 Phoenix missiles, concluded on 28 August 1975), IR-ABY (sale of 274 Phoenix missiles, concluded on 25 April 1977).

[5] Case designators IR-JCO (concluded on 22 September 1975), IR-GDC (concluded on 1 March 1976), IR-MAE (concluded on 7 July 1976), IR-JGB (concluded on 13 July 1976), IR-SCG (concluded on 22 November 1976), IR-JGN (concluded on 31 August 1977), IR-GFW & IR-MAJ (concluded on 27 February 1978), IR-GFD (concluded on 31 August 1978).

[6] In the 1977 version of Standard Form DD 1513 (employed in cases IR-GFD, IR-GFW, and IR-MAJ), the relevant provision is General Condition B.9. However, in the 1973 version of this form (employed in cases IR-ABB, IR-ABS, IR-ABY, IR-GDC, IR-JCO, IR-JGB, IR-JGN, IR-MAE, IR-SAT, IR-SBY, and IR-SCG), it is General Condition B.8., which provides:

> [THE PURCHASER] Shall not transfer title to, or possession of, the defense articles, components and associated support material furnished under this sales agreement to any person, or organization (excluding transportation agencies), or other government, unless the written consent of the USG has first been obtained. It shall not disclose, dispose of, or permit use of any plans, specifications, or information furnished in connection with this transaction, except to the extent authorized by the USG. To the extent that any items, plans, specifications, or information furnished in connection with this transaction may be classified by the USG for security purposes, the Purchaser shall maintain a similar classification and employ all measures necessary to preserve such security, equivalent to those

> [THE PURCHASER:] Shall not transfer title to, or possession of, the defense articles, components and associated support material, related training or other defense services (including any plans, specifications or information) furnished under this Offer and Acceptance to anyone not an officer, employee or agent of the Purchaser (excluding transportation agencies), and shall not use or permit their use for purposes other than those authorized by B.8 above, unless the written consent of the USG has first been obtained. To the extent that any items, plans, specifications, or information furnished in connection with this Offer and Acceptance may be classified by the USG for security purposes, the Purchaser shall maintain a similar classification and employ all measures necessary to preserve such security, equivalent to those employed by the USG, throughout the period during which the USG may maintain such classification. The USG will use its best efforts to notify the Purchaser if the classification is changed. The Purchaser will ensure, by all means available to it, respect for proprietary rights in any defense article and any plans, specifications, or information furnished, whether patented or not.

13. As noted earlier,[7] the United States and Iran exchanged diplomatic notes on 28 May and 6 June 1974, thus effecting the 1974 Agreement. Pursuant to the 1974 Agreement, Iran and the United States agreed to protect classified information exchanged between the two Governments, not to transfer such information to third parties without the other party's consent, and to use such information only for the purposes for which it was furnished. Additionally, the 1974 Agreement also provided that

> Each Government will permit security experts of the other Government to make periodic visits to its territory, when it is mutually convenient, to discuss with its security authorities its procedures and facilities for the protection of information furnished to it by the other Government, and will assist such experts in determining

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employed by the USG, throughout the period during which the USG may maintain such classification.

For the sake of simplicity and because the provisions are similar in relevant respects, this Award will refer to the relevant provision in each LOA as "General Condition B.9."

[7] See supra para. 1.

whether classified information provided by their Government to the other Government is being adequately protected."

IV. RELEVANT PROVISIONS

14. This Case raises questions relating to the interpretation or application of the following provisions:

Article II Claims Settlement Declaration

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether of not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

...

Article III Claims Settlement Declaration

1. ...

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that

this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal.

...

Article 18 Tribunal Rules[8]

1. A party initiating recourse to arbitration before the Tribunal (the 'claimant') shall do so by filing a Statement of Claim. Each Statement of Claim shall contain the following particulars:

(a) ...
(b) ...
(c) A reference to the debt, contract (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to Article II, paragraphs 1 and 2 of the Claims Settlement Declaration;
(d) The general nature of the claim and an indication of the amount involved, if any;
(e) A statement of the facts supporting the claim;
(f) The points at issue;
(g) The relief or remedy sought;

...

Article 19 Tribunal Rules[9]

...

3. In the Statement of Defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off, if such counterclaim or set-off is allowed under the Claims Settlement Declaration.

4. The provisions of Article 18, paragraph 1 shall apply to a counter-claim or claim relied on for purpose of a set-off.

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[8] As noted earlier (see supra note 2), the text of Article 18 of the Tribunal Rules and that of Article 18 of the Provisional Tribunal rules are identical.

[9] The text of Article 19 of the Tribunal Rules and that of Article 19 of the Provisional Tribunal Rules are identical.

Article 19 UNCITRAL Arbitration Rules[10]

...

3. In his statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

...

V. CONTENTIONS OF THE PARTIES

A. Does the Tribunal Have Jurisdiction over Official Counterclaims?

15. Both Parties agree that the source of the Tribunal's jurisdiction is to be found in the provisions of the Algiers Declarations, and in particular in the Claims Settlement Declaration. Moreover, both Parties agree that the Claims Settlement Declaration must be interpreted in accordance with the rules expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 ("Vienna Convention").[11] However, they differ in their application of these provisions. In Iran's view, the absence of an express mention of counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration means that the Tribunal lacks jurisdiction to entertain official counterclaims. The United States disputes this conclusion and asserts that the Tribunal has jurisdiction to entertain official counterclaims.

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[10] Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), U.N. GAOR, 31st Sess., Supp. (No. 17), U.N. Doc. A/31/17 (1976), reprinted in [1976] VII UNCITRAL Y.B. (part I) 22("UNCITRAL Rules").

[11] 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

1. The United States' Arguments

a. Ordinary Meaning, Context, Object and Purpose

i. Article II, paragraph 2, of the Claims Settlement Declaration

16. In its Response of 14 September 1989, the United States asserts that the language and purpose of Article II, paragraph 2, of the Claims Settlement Declaration indicate that the Tribunal has jurisdiction over official counterclaims. In the United States' view, the ordinary meaning of "official claims [...] arising out of contractual arrangements" includes counterclaims arising out of the same contractual arrangements, especially when read in light of the purpose of Article II, paragraph 2, of the Claims Settlement Declaration, which is to provide a forum for the Parties to settle all of their disputes relating to contractual arrangements for the sale and purchase of goods and services. The United States also argues that the Tribunal, in the context of Article VII, paragraph 2, of the Claims Settlement Declaration, has held that the term "claims" includes counterclaims.[12]

17. According to the United States, the fact that Article II, paragraph 2, of the Claims Settlement Declaration does not refer expressly to counterclaims - in contrast to Article II, paragraph 1, of the Claims Settlement Declaration - does not imply that the Parties did not grant the Tribunal jurisdiction to decide official counterclaims. The United States avers that the Parties to the Algiers Declarations had to expressly authorize counterclaims in Article II, paragraph

[12] The United States refers to the Tribunal's Award in Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107, 132.

1, of the Claims Settlement Declaration because, without an express provision for counterclaims, there would be no jurisdictional basis for any claim or counterclaim by Iran and the United States against private parties: the Tribunal's jurisdiction would be limited to "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." As such, it is necessary for Article II, paragraph 1, of the Claims Settlement Declaration explicitly to provide for counterclaims so as to allow the Tribunal to hear counterclaims and to delineate the specific conditions under which counterclaims may be brought. In contrast, Article II, paragraph 2, of the Claims Settlement Declaration concerns cases involving parties who are able to bring any relevant counterclaim as a direct claim even if the primary claim does not exist or is not presented to the Tribunal. Accordingly, it is not necessary for Article II, paragraph 2, of the Claims Settlement Declaration expressly to state that counterclaims brought thereunder are permissible.

ii. Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules

18. In its later written pleadings and at the Hearing, the United States additionally argues that the absence of an express reference to counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration is not conclusive, as there is another basis to hear official counterclaims. The United States avers that Article III, paragraph 2, of the Claims Settlement Declaration incorporates the UNCITRAL Rules, making the latter a source of Tribunal jurisdiction.[13] Article 19(3) of the UNCITRAL Rules, which allows for counterclaims arising out of the same contracts as the claim, thus provides

[13] In support of this assertion, the United States refers to Anaconda-Iran, Inc. and Islamic Republic of Iran, et al., Interlocutory Award No. ITL 65-167-3 (10 December 1986), reprinted in 13 Iran-U.S. C.T.R. 199, para. 102.

a jurisdictional basis for the Tribunal to entertain counterclaims, including in cases under Article II, paragraph 2, of the Claims Settlement Declaration. Further, the United States maintains that it is precisely because of the existence and incorporation of Article 19(3) of the UNCITRAL Rules that there was no need to mention the Tribunal's jurisdiction over counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration. Citing a previous award, the United States contends that the Tribunal has already held that silence in the terms of Article II of the Claims Settlement Declaration does not deny jurisdiction where language in Article 19(3) of the UNCITRAL Rules permits it.[14] The United States also asserts that, given the incorporation of Article 19(3) of the UNCITRAL Rules, if the Parties had wished to bar the Tribunal from entertaining official counterclaims, they would have done so explicitly in the Claims Settlement Declaration.

19. The United States maintains that there was a specific rationale for including language relating to counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration that did not apply to Article II, paragraph 2, of the Claims Settlement Declaration. Article II, paragraph 1, of the Claims Settlement Declaration provides the Tribunal with jurisdiction not only over claims arising out of contracts, but also over claims arising out of debts, expropriations or other measures affecting property rights. Article 19(3) of the UNCITRAL Rules provides only for

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[14] The United States refers to Computer Sciences Corporation and Islamic Republic of Iran, et al., Award No. 221-65-1 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 309. The question at issue there was whether the Tribunal had jurisdiction over set-off claims (Article II of the Claims Settlement Declaration does not mention set-off claims). The United States submits that the Tribunal concluded that it had jurisdiction over set-off claims based on the terms of Article 19(3) of the UNCITRAL Rules despite the acknowledged fact that the Claims Settlement Declaration does not expressly refer to set-off claims.

counterclaims arising out of the same contract as the claim. Thus, to ensure that permissible categories of counterclaims be coextensive with the permissible categories of affirmative claims brought under Article II, paragraph 1, of the Claims Settlement Declaration, the Parties had to specify that permissible counterclaims were those arising out of "the same contract, transaction or occurrence that constitutes the subject matter of that national's claim." By contrast, no express provision for counterclaims was required in Article II, paragraph 2, of the Claims Settlement Declaration: the language of Article 19(3) of the UNCITRAL Rules is consistent with that of Article II, paragraph 2, of the Claims Settlement Declaration in that they both relate only to claims arising out of contracts.

20. The United States notes that the Tribunal modified Article 19(3) of the UNCITRAL Rules; instead of authorizing counterclaims arising out of the same contract as the claim, Article 19(3) of the Tribunal Rules authorizes counterclaims if they are "allowed under the Claims Settlement Declaration." However, the United States submits that this modification does not affect the Tribunal's jurisdiction over official counterclaims. First, the modification does not explicitly or implicitly curtail the right to make official counterclaims: it simply provides that the counterclaim must be permitted under the Claims Settlement Declaration. In the United States' view, official counterclaims are permitted as a result of the incorporation of the UNCITRAL Rules by Article III, paragraph 2, of the Claims Settlement Declaration. Second, the circumstances surrounding the issuance of Administrative Directives at the end of 1981 confirm that the modification of Article 19(3) of the UNCITRAL Rules was not intended to narrow the counterclaim jurisdiction provided thereunder. The United States asserts that, at the end of 1981, with the deadline for

the filing of claims (i.e., 19 January 1982) fast approaching and the Tribunal Rules not yet adopted, it became necessary to issue a series of Administrative Directives to inform the claimants and respondents of what they had to do to file statements of claim and statements of defense. None of these Administrative Directives addressed the right to file official counterclaims. If the modification to Article 19(3) of the UNCITRAL Rules (then in draft form) had been intended to preclude jurisdiction over official counterclaims, the Tribunal would no doubt have said something to this effect in one of the Administrative Directives; that way, the two Governments would have been warned not to reserve their potential claims for filing as counterclaims. Third, the Minutes of the meetings where the modification to Article 19(3) of the UNCITRAL Rules was discussed and decided show that the modification agreed upon was not intended to eliminate the right to file official counterclaims, but rather sought to address issues relating to the scope of set-offs permitted to be filed in response to claims of nationals.[15] Fourth, the modification to Article 19(3) of the UNCITRAL Rules cannot be interpreted as having the effect of suppressing the right to file official counterclaims because that would require the impermissible assumption that the Tribunal acted ultra vires. According to the United States, the Tribunal cannot be deemed to have altered its subject matter jurisdiction by adopting Article 19(3) of the Tribunal Rules, as the only modifications to the UNCITRAL Rules permitted by Article III, paragraph 2, of the Claims Settlement Declaration are those designed "to ensure that this

[15] The United States also argues that a second purpose of the modification surfaced later when the Tribunal considered this issue in Computer Sciences Corporation and Islamic Republic of Iran, et al., supra, note 14, at 310. In the United States' view, the Tribunal indicated in that case that the purpose of the modification was to address the concern that the permissible scope of counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration did not match up with that under Article 19(3) of the UNCITRAL Rules, which refers only to counterclaims arising out of the same contract.

Agreement can be carried out." On 19 January 1981, the date of the Algiers Declarations, the Tribunal had jurisdiction over official counterclaims; that jurisdiction could not be eliminated in the Tribunal Rules.

b. Subsequent Practice of the Parties and Tribunal's Jurisprudence

21. The United States asserts that the subsequent practice of the Parties shows that they have interpreted the Claims Settlement Declaration as providing the Tribunal jurisdiction over official counterclaims.

22. The United States emphasizes the importance of subsequent practice in the exercise of treaty interpretation. It relies on Article 31(3)(b) of the Vienna Convention, which states that "there shall be taken into account together with the context [...] any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

23. The United States submits that the Parties engaged in two types of conduct relevant to the issue of the Tribunal's jurisdiction over official counterclaims. First, it maintains that the Parties' conduct during the development of the Tribunal Rules constitutes contemporaneous evidence of their understanding that the Tribunal could entertain official counterclaims. The United States argues that the Agents of Iran and the United States were both involved in the process leading to the adoption of the Tribunal Rules. Yet, throughout this process, neither Party ever suggested a need to eliminate any supposed inconsistency between Article 19(3) of the UNCITRAL Rules (which expressly permits counterclaims) and Article II, paragraph 2, of the Claims Settlement Declaration (which is silent on the issue).

24. Second, the United States observes that both Parties have filed official counterclaims in the past. Iran has filed counterclaims in Cases Nos. B23, B26, B31, B32, B33, B73, and "reserve[d] the right" to do so in Case No. B25. The United States remarks that some of these counterclaims were filed long after Iran had raised its objection concerning the jurisdiction of the Tribunal over official counterclaims, and that these were made without reservation as to the Tribunal's jurisdiction to hear official counterclaims. Further, Iran has not only filed counterclaims in cases falling under Article II, paragraph 2, of the Claims Settlement Declaration, it has specifically argued that the Tribunal has jurisdiction over counterclaims in such cases.[16] The United States recalls that it did not object to the counterclaims filed by Iran on the ground that the Tribunal did not have jurisdiction over official counterclaims. Nor did Iran object on this ground to the United States' counterclaim in Case No. B41 or in its initial response to the Counterclaim in the present Case[17]; this objection was raised only in Iran's Reply of 12 April 1983.

25. Thus, in the United States' view, the subsequent practice of the Parties conclusively demonstrates their understanding that official counterclaims were permitted under the Claims Settlement Declaration, and Iran's efforts to deny

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[16] The United States refers to submissions made by counterclaimants in Cases Nos. B31 and B33. See National Iranian Copper Industries Corporation (NICIC)'s Opinion concerning the validity of its Counterclaim notwithstanding the conclusion of National Bureau of Standard (NBS)'s claim in Case No. B/31 against NICIC (24 May 1985), p. 17; Statement of Counterclaim in Case No. B/33 (6 August 1984), at 1; Rebuttal Memorial of the Islamic Republic of Iran and the Air Force in Case No. B33 (12 June 1989), at 10.

[17] Statement of Defense to the United States Counterclaim (8 July 1982).

the existence of a pertinent subsequent practice are unconvincing.[18]

26. The United States also contends that the Tribunal's jurisprudence is consistent with the existence of a jurisdiction to entertain official counterclaims. The United States notes that the Tribunal has never dismissed an official counterclaim on the basis of a purported lack of jurisdiction despite its authority to examine its jurisdiction ex officio. Further, the United States asserts that, in its Order of 28 January 1988 in Case No. B31, the Tribunal expressly stated

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[18] As will be noted below (infra, para. 43), Iran argues:

i. The counterclaims filed by Iranian respondents in official cases were filed by Iranian entities separate from the Government of the Islamic Republic of Iran;

ii. In some cases where a counterclaim was filed, the jurisdiction of the Tribunal over the main claim was disputed;

iii. In some cases, the counterclaim was withdrawn by the Iranian respondent;

iv. The counterclaims had been filed in the "heat of the moment after the Algiers Declarations had been issued" and were introduced to preserve any possible right, "solely out of an abundance of caution";

v. The fact that the parties may have decided to waive a jurisdictional bar in specific cases cannot affect the issue in Case No. B1 where such jurisdiction is disputed.

To these arguments, the United States replies:

i. The counterclaims filed by Iranian entities are counterclaims filed by Iran according to Article VII, paragraph 3, of the Claims Settlement Declaration;

ii. The fact that jurisdiction over the main claim might have been disputed in some cases is irrelevant;

iii. The fact that some of these counterclaims were later withdrawn is irrelevant;

iv. It is not true that the counterclaims filed by Iranian entities were filed in the "heat of the moment after the Algiers Declarations", and it is irrelevant that these counterclaims were filed for purely tactical reasons;

v. It is neither credible nor supportable to suggest that the subsequent practice of the Parties merely represented a decision by the counter-respondent government to waive the alleged jurisdictional bar over official counterclaims: absent an amendment to the Claims Settlement Declaration, such a waiver would not be effective and could not be recognized by the Tribunal.

that it would retain its jurisdiction over the counterclaim despite the withdrawal of the claim.

c. International Practice

27. According to the United States, the Tribunal has indicated that, under customary international law, respondents enjoy a right of counterclaim.[19]

28. The United States also submits that the precedents of international tribunals with jurisdictional grants similar in scope to Article II, paragraph 2, of the Claims Settlement Declaration indicate that respondents normally have the right to counter-claim, whether or not the statute conferring jurisdiction explicitly refers to counterclaims. In that regard, the United States notes that neither the Statute of the Permanent Court of International Justice ("PCIJ") nor the Statute of the International Court of Justice ("ICJ") made reference to counterclaims but that these tribunals nonetheless ruled that they could hear counterclaims; the ICJ even adopted rules on the subject. The United States adds that the Greco-German, the Anglo-Austrian, the Anglo-Bulgarian, the Anglo-Hungarian, and the Franco-German Mixed Arbitral Tribunals allowed counterclaims, even though the Treaty of Versailles and other treaties creating these tribunals did not expressly provide for them. According to the United States, Article II, paragraph 2, of the Claims Settlement Declaration - unlike Article II, paragraph 1, of the Claims Settlement Declaration - is similar to the above statutes in that it concerns opposing parties able to bring claims against one another on an equal footing. The United

[19] The United States refers to Islamic Republic of Iran and United States of America, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101, 103; Westinghouse Electric Corporation and Islamic Republic of Iran, et al., Interlocutory Award No. ITL 67-389-2 (12 February 1987), reprinted in 14 Iran-U.S. C.T.R. 104, para. 1.

States submits that the possibility of bringing counterclaims in such cases serves the functions of efficiency and fairness without increasing the tribunal's jurisdiction, since if the primary claim did not exist or was not presented to the tribunal, the counterclaim could itself be heard as a direct claim. The United States concludes that "[i]t is not surprising, then, that the drafters of the Claims Settlement Declaration, like the drafters of the Statutes of the ICJ and the PCIJ, did not believe it necessary to expressly state that such counterclaims were permissible."

2. Iran's Arguments

a. Ordinary Meaning, Context, Object and Purpose

i. Article II, paragraph 2, of the Claims Settlement Declaration

29. Iran avers that the controlling provision on jurisdiction in official claims is Article II, paragraph 2, of the Claims Settlement Declaration. In Iran's view, the ordinary meaning of the terms employed therein, the context, and the object and purpose of this provision all point to the conclusion that the Tribunal does not have jurisdiction to hear official counterclaims.

30. Iran submits that the starting point of the analysis must be the text of Article II, paragraph 2, of the Claims Settlement Declaration.[20] The text of this provision does not refer to "counterclaims," but only to "claims." Iran asserts that the ordinary meaning of "claims" does not include "counterclaims" (even if a counterclaim can be considered a

[20] In this connection, Iran refers to Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (March 3) and Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994 I.C.J. 6 (Feb. 4).

type of claim in certain circumstances). In this connection, Iran refers to the Tribunal's decision in Case No. A2; there, in Iran's view, the Tribunal differentiated between the terms "claim" and "counterclaim" and ruled that it had no jurisdiction over claims of Iran against United States nationals because Article II, paragraph 1, of the Claims Settlement Declaration limits its jurisdiction to "counterclaims" of each State against the nationals of the other.[21]

31. Turning to the context of Article II, paragraph 2, of the Claims Settlement Declaration, Iran notes that Article II, paragraph 1, of the Claims Settlement Declaration refers expressly to both "claims" and "counterclaims." Therefore, Iran argues, the use of only the word "claims" in Article II, paragraph 2, of the Claims Settlement Declaration cannot have been accidental; it has to be assumed that the Parties intended to exclude counterclaims from the ambit of Article II, paragraph 2, of the Claims Settlement Declaration. Other provisions of the Claims Settlement Declaration reinforce this conclusion. For instance, the time limit to file a "claim" pursuant to Article III, paragraph 4, of the Claims Settlement Declaration clearly does not apply to counterclaims.

32. Iran challenges the United States' arguments regarding the purpose of Article II, paragraph 2, of the Claims Settlement Declaration. Iran emphasizes that, pursuant to its terms, Article II, paragraph 2, of the Claims Settlement Declaration envisages the United States and Iran settling their disputes by bringing claims against each other within the time-limit prescribed in Article III, paragraph 4, of the Claims Settlement Declaration. In Iran's view, precisely because each Government party had the ability to

[21] Islamic Republic of Iran and United States of America, supra, note 19.

bring claims against the other, it was not necessary to allow counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration. By contrast, because under Article II, paragraph 1, of the Claims Settlement Declaration neither Government could bring claims against nationals of the other State, a provision conferring the right to counterclaim was clearly required.

33. Thus, Iran concludes that Article II, paragraph 2, of the Claims Settlement Declaration does not grant the Tribunal jurisdiction over official counterclaims. Referring to the Tribunal's Decision in Case No. A2, Iran recalls that the Parties very carefully delineated the Tribunal's jurisdiction over claims and counterclaims in the Algiers Declarations and that the Tribunal cannot exercise wider jurisdiction than that which was specifically granted by mutual agreement in these Declarations.[22] If the Parties had intended to authorize official counterclaims, they would have included express language to that effect in Article II, paragraph 2, of the Claims Settlement Declaration. Iran insists that it would be ultra vires for the Tribunal to revise or add language to the agreement of the Parties.[23]

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[22] See id., at 103.

[23] In this connection, Iran refers to Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), International Court of Justice, Judgement of 17 December 2002, available at http://www.icj-cij.org; Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1991 I.C.J. 53 (Nov. 12); Islamic Republic of Iran and United States of America, Partial Award No. 597-A11-FT (7 April 2000); United States of America, et al. and Islamic Republic of Iran, et al., Award No. 108-A16/582/591-FT (27 December 1983), reprinted in 5 Iran-U.S. C.T.R. 57; Lillian Byrdine Grimm and Islamic Republic of Iran, Award No. 25-71-1 (18 February 1983), reprinted in 2 Iran-U.S. C.T.R. 78.

34. Iran submits that its conclusion is reinforced by the established principle that provisions conferring jurisdiction must be interpreted restrictively.[24]

ii. Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules

35. In response to the United States' argument, Iran argues that Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules cannot provide a basis for the Tribunal's jurisdiction over official counterclaims.

36. In Iran's view, an analysis of the text, the context, and the object and purpose of Article III, paragraph 2, of the Claims Settlement Declaration shows that this provision is concerned purely with procedural matters and cannot confer jurisdiction. Iran observes that, unlike Article II of the Claims Settlement Declaration, Article III of the Claims Settlement Declaration does not even mention the word "jurisdiction." Nor is there any language in that provision defining the scope or type of claims and counterclaims that might be submitted. Moreover, Article I of the Claims Settlement Declaration, which provides that "Iran and the United States will promote the settlement of the claims

[24] Iran notes that the Tribunal has recognized and applied this principle in Lillian Byrdine Grimm and Islamic Republic of Iran, supra note 23, at 80; Iranian Customs Administration and United States of America, Award No. 105-B16-1 (18 January 1984), reprinted in 5 Iran-U.S. C.T.R. 94, 95; United States of America and Islamic Republic of Iran, Award No. 106-B24-1 (18 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 97, 99. In response, the United States notes that the Tribunal has questioned whether the restrictive interpretation principle is valid at all (citing United States of America, et al. and Islamic Republic of Iran, et al., Decision No. DEC 130-A28-FT, at para. 67, n. 17 (19 Dec. 2000)). Even assuming such a principle is applicable, the United States notes further that the Tribunal has held that it is applicable only when the relevant terms of the treaty are ambiguous (see id. at para. 66), which - the United States argues - is not the case here when the Claims Settlement Declaration is properly interpreted in accordance with the provisions of the Vienna Convention.

described in Article II by the parties directly concerned," confirms that the intention of the Parties was that Article II of the Claims Settlement Declaration would govern the issue of the Tribunal's jurisdiction. Iran also avers that the United States has been unable to point to any precedent affirming that the Tribunal derives its jurisdiction from Article III, paragraph 2, of the Claims Settlement Declaration.[25]

37. In any case, Iran submits that the United States does not really rely on Article III, paragraph 2, of the Claims Settlement Declaration, but rather on Article 19(3) of the UNCITRAL Rules, which the United States contends was incorporated by reference into the Claims Settlement Declaration and confers on the Tribunal jurisdiction to hear official counterclaims. Iran raises a number of arguments against this position.

38. First, to consider Article 19(3) of the UNCITRAL Rules as a source of jurisdiction is contrary to the Tribunal's consistent holdings that its jurisdiction is defined only by the Claims Settlement Declaration.[26] In this

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[25] In Iran's view, contrary to the United States' contention, Anaconda-Iran, Inc. and Islamic Republic of Iran, et al., supra note 13, does not constitute such a precedent. Although the Tribunal stated there at para. 102 that "[a]s concerns the Tribunal's jurisdiction, procedure and more generally its constitution and its functioning, the Tribunal is governed exclusively by the rules derived from the Algiers Accords and, pursuant to Article III, paragraph 2, of the CSD, from the UNCITRAL Arbitration Rules as modified by these Accords or by the Tribunal," Iran argues that it would be a "giant leap of faith for the United States to attempt to draw from that innocuous passage the sweeping conclusion that the Tribunal has hereby held that its jurisdiction is governed by the Rules. It is the Tribunal's procedure and functioning which are governed by the Rules."

[26] Iran refers to Islamic Republic of Iran and United States of America, Decision No. DEC 8-A1-FT (17 May 1982), reprinted in 1 Iran-U.S. C.T.R. 144, at 152; United States of America, et al. and Islamic Republic of Iran, et al., Award No. 108-A16/582/591-FT, supra note 23, at 70; General Dynamics Telephone Systems Center, Inc., et al. and Islamic Republic of Iran, et al., Award No. 192-285-2 (4 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 153, at 156; Amoco International Finance Corporation and Islamic Republic of Iran, et al., Partial Award No. 310-56-3 (14 July 1987), reprinted in 15 Iran-U.S. C.T.R. 189, at 196; Blount Brothers Corporation

connection, the fact that the Tribunal can take certain actions pursuant to Articles 35 to 37 of the Tribunal Rules or pursuant to any inherent powers it might have is of no relevance: such powers would pertain to "purely ancillary matters" and could not be invoked as bases for jurisdiction over claims and counterclaims.

39. Second, Iran contends that Article III, paragraph 2, of the Claims Settlement Declaration does not incorporate the UNCITRAL Rules: it merely provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this agreement can be carried out." The Claims Settlement Declaration thus remains the governing instrument on jurisdictional matters. In any case, if incorporation there is, it is not incorporation of the UNCITRAL Rules, but of the UNCITRAL Rules as modified by the Tribunal. Accordingly, Article 19(3) of the UNCITRAL Rules is not even applicable to the case at hand, as it was modified by the Tribunal in accordance with Article III, paragraph 2, of the Claims Settlement Declaration. Article 19(3) of the Tribunal Rules, which does not differ from Article 19(3) of the Provisional Rules, provides that "the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, if such counter-claim or set-off is allowed under the Claims Settlement Declaration." This modification, in force at the time the United States filed its Counterclaim, is controlling and confirms that the issue of the Tribunal's jurisdiction over claims and counterclaims is decided by the Claims Settlement Declaration, not by the Rules. Since Article II, paragraph 2, of the Claims Settlement Declaration

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and Islamic Republic of Iran, et al., Award No. 215-52-1 (6 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 56, at 62.

does not provide for jurisdiction over official counterclaims, there is thus no jurisdiction over official counterclaims.

40. Hence, Article 19(3) of the UNCITRAL Rules cannot confer jurisdiction on the Tribunal to entertain official counterclaims. By the same token, Article 19(3) of the UNCITRAL Rules cannot constitute a "specific rationale" for the inclusion of a reference to counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration.

b. Subsequent Practice of the Parties and Tribunal's Jurisprudence

41. Iran asserts that Article 31(3)(b) of the Vienna Convention merely provides for "a subsidiary means of treaty interpretation"; the focus of interpretation must remain the plain and ordinary meaning of the terms employed in the Claims Settlement Declaration. The subsequent practice of the Parties cannot by itself provide the Tribunal with jurisdiction over official counterclaims when such jurisdiction does not exist in the Algiers Declarations.

42. In any case, Iran maintains that the alleged practice of Iran and the United States does not establish that the Parties agreed to interpret the Claims Settlement Declaration as granting the Tribunal jurisdiction over official counterclaims.

43. Iran submits that there has been no concordant, common, and consistent practice of the Parties pointing to an agreement to this effect. Iran recalls that, since 1983, it has maintained its objection to the jurisdiction of the Tribunal over the present Counterclaim. Moreover, in Iran's view, the United States has, in its pleadings in Case No. A2, taken the position that the Tribunal had no jurisdiction over

official counterclaims.[27] Iran asserts that it has never acknowledged expressly the Tribunal's jurisdiction over official counterclaims. Nor has it done so implicitly by filing counterclaims in official cases. In this connection, Iran contends that the cases the United States refers to "involved respondent entities separate from the Government of Iran and/or cases where a counterclaim may have been submitted, but the Tribunal's jurisdiction over the main claim was simultaneously disputed. In other examples, the Iranian respondent subsequently withdrew its counterclaim."[28] Iran also avers that those official counterclaims were filed in the "heat of the moment after the Algiers Declarations had been issued" and were introduced to preserve any possible right, "solely out of an abundance of caution." Further, Iran asserts that the fact that the parties may have decided to waive a jurisdictional bar in specific cases does not affect the issue in Case No. B1 where such jurisdiction is disputed.

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[27] Iran refers to the Memorial of the Government of the United States of America in Case No. A2 (8 Dec. 1981), at 10-11. In this connection, Iran asserts:

> If the parties' practice is anything to go by, it appears that a very different interpretation of Article II(2) has been given by the United States in its Memorial dated 8 December 1981 filed in Case A/2 from that which is asserted here. In particular, the United States notes in that pleading that Article II(2) "contains no provision with respect to counterclaims", and having stressed the precision with which the parties set out which claims and counterclaims were admissible in Article II(1) of the Claims Settlement Declaration goes on to say that "[h]ad the parties intended for broader jurisdiction, they could and would have done so. They did not. There is no ambiguity here; there are no murky issues of interpretation." This is an approach with which Iran fully agrees. The United States is thus barred from raising the opposite argument now.

In response, the United States replies that Iran's reference to the Memorial of the Government of the United States of America in Case No. A2 is misleading in that it combines without acknowledgement the United States' comments about Article II, paragraph 2, with a separate set of comments about Article II, paragraph 1. The United States adds that its comments in Case No. A2 concern the question regarding whether or not the Government could bring direct claims against nationals of the other Party and do not concern official claims.

[28] Hearing Memorial of the Islamic Republic of Iran (27 February 2003), para. 2.35.

44. Iran asserts that the Tribunal has not yet decided whether it has jurisdiction over official counterclaims. In this connection, the fact that the Tribunal has never dismissed a counterclaim in an official case for lack of jurisdiction does not amount to a ruling that the Tribunal has jurisdiction over such counterclaims. As for the Tribunal's Order of 28 January 1988 in Case No. B31 (relied upon by the United States), Iran submits that the Tribunal merely preserved its competence to decide the issue of jurisdiction over the counterclaim (compétence de la compétence) and did not actually accept jurisdiction over the counterclaim.

45. Finally, Iran argues that the Tribunal has recognized, on a number of occasions, that it has to decide its jurisdiction ex officio or proprio motu, even if no dispute between the parties as to the Tribunal's jurisdiction exists.[29] Iran also relies on precedents of the International Court of Justice to support its view that an international tribunal cannot regard a question of jurisdiction as a question inter partes.[30]

c. International Practice

46. Iran contends that the practice of other international tribunals cannot support the proposition that the Tribunal has jurisdiction over counterclaims in official cases. First, customary international law cannot be invoked as an independent basis of jurisdiction: the jurisdiction of a

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[29] In this connection, Iran relies, inter alia, on Parguin Private Joint Stock Co. and United States of America, Award No. 275-12783-3 (15 December 1986) reprinted in 13 Iran-U.S. C.T.R. 261, at 263 and T.C.S.B., Inc. and Iran, Award No. ITL 5-140-FT (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 261, at 266.

[30] Iran refers to the Individual Opinion of President McNair in Anglo-Iranian Oil Co. (United Kingdom v. Iran), 1952 I.C.J. 93 (22 July), at 116, and to Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3 (19 December), at 7-8.

tribunal in international law depends on the will of the parties as reflected in the arbitration agreement or any other constitutive document.[31]

47. Second, Iran submits that it is by no means true that international tribunals usually recognize a right to bring counterclaims. Iran refers to the inconsistent practice of other international arbitral tribunals[32] and concludes that a restrictive reading of Article II, paragraph 2, of the Claims Settlement Declaration is far from exceptional. Moreover, although both the PCIJ and the ICJ have admitted counterclaims despite the fact that their respective Statutes did not refer to counterclaims, Iran maintains that there are important distinctions between the Tribunal and these courts including, inter alia, the fact that, unlike the Claims Settlement Declaration, the Statutes governing these courts do not impose a time bar for bringing claims, and they permit a respondent State to bring a related counterclaim as a separate independent claim.[33] In any case, Iran asserts that the

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[31] In this connection, Iran refers to Computer Sciences Corporation and Islamic Republic of Iran, et al., supra note 14, at 281.

[32] Iran notes that the Mexican-Venezuelan Mixed Claims Commission, which was authorized to deal with "unsettled claims" of Mexican citizens against Venezuela, considered that it did not have jurisdiction over counterclaims. Iran also points to the international arbitral tribunals established in the aftermath of the First World War. The treaties establishing these tribunals did not refer to counterclaims; in their rules of procedure, some of the Tribunals considered that they had jurisdiction over counterclaims, while others considered that they did not, e.g., the German-Polish Mixed Arbitral Tribunal and the German-Belgian Mixed Arbitral Tribunal.

[33] At paragraph 41 of its Memorial on the Tribunal's Jurisdiction over the United States Counterclaim (18 February 1991), Iran also argues:

> The United States fails to note three important distinctions here. First, the jurisdiction of neither the P.C.I.J. nor the I.C.J. is limited to "claims" arising out of a certain type of contract as is Article II(2) of the Claims Settlement Declaration. Second, the judges of both the P.C.I.J. and I.C.J., who were free to make rules of procedure based on their grant of jurisdiction in the respective statutes, interpreted their statutes to allow them to provide in those rules for the possibility of counterclaims in certain limited circumstances. This Tribunal's Rules, on the other hand, were specifically modified to make the admissibility of counterclaims entirely dependent upon the terms of the Claims Settlement

practice of the ICJ shows that a respondent cannot use a counterclaim as a means of referring to an international tribunal claims that would otherwise be outside the tribunal's jurisdiction.[34]

B. Must Official Counterclaims Be Outstanding on the Date of the Algiers Declarations and, If So, Was the Counterclaim in This Case Outstanding on 19 January 1981?

1. Iran's Arguments

48. In its latest filing, Iran contends that, if the Tribunal holds that it has competence ratione materiae over official counterclaims, it should nonetheless refuse to hear the Counterclaim because it lacks competence ratione temporis. In Iran's view, the United States had to demonstrate that its Counterclaim was outstanding as of 19 January 1981. Iran asserts that this requirement is integral to the purpose of the Algiers Declarations and is reflected in a number of its provisions, in particular Article I and Article III, paragraph 4, of the Claims Settlement Declaration. Iran also submits that the United States has, in the proceedings of this Case, accepted the requirement that the Counterclaim had to be outstanding on 19 January 1981.[35]

Declaration. If the arbitrators here had felt free to deal with counterclaims there would have been no need to do this. Third, the rules of both the P.C.I.J. and the I.C.J. state that the counterclaims are only admissible providing they are (i) "directly connected with the subject-matter of the claim" and (ii) that they independently "come within the jurisdiction of the Court." (I.C.J. Rules of Court Article 80.) Thus, even in these supposedly analogous situations, the admissibility of counterclaims is dependent on the application of a specific limiting test and on the Court's grant of jurisdiction. [footnote omitted, emphasis in original]

[34] Iran refers to Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, 1997 I.C.J. 243 (Order of 17 December).

[35] Iran refers to statements made by the Agent of the United States during the 7 November 1983 Pre-Hearing conference in Case No. B1.

49. In Iran's view, the United States has failed to establish that the Counterclaim was outstanding on 19 January 1981; rather, the United States has limited itself to general assertions and a vague statement of belief to this effect.

2. The United States' Arguments

50. The United States replies that there is no requirement that the Counterclaim be outstanding at the time of the Algiers Declarations. The provisions invoked by Iran do not have any relevance to the question: Article III, paragraph 4, of the Claims Settlement Declaration provides a filing deadline for all claims (except interpretive disputes), while Article I of the same Declaration states that Iran and the United States shall promote the settlement of all claims described in Article II of the Claims Settlement Declaration. Nor is there any other provision in the Algiers Declarations, the Tribunal Rules, or the UNCITRAL Rules supporting Iran's contentions. In fact, the only provision that contains a requirement that a claim be outstanding is Article II, paragraph 1, of the Claims Settlement Declaration, which provides that claims and counterclaims filed under that provision had to be outstanding on the date of the Algiers Declarations. By contrast, Article II, paragraph 2, of the Claims Settlement Declaration contains no requirement that official claims be outstanding on 19 January 1981.

51. In any case, even if the Counterclaim had to be outstanding on 19 January 1981, the United States submits that this requirement is met, as the Statement of Counterclaim and the other United States' pleadings contain assertions that the Counterclaim was outstanding on the 19 January 1981. This was also confirmed during the pre-hearing conference of 7 November 1983, where the Agent of the United States stated that the

Counterclaim was outstanding as early as the later part of 1979.

C. Must Official Counterclaims Arise Out of the Same Contractual Arrangements as the Original Claim and, If So, Does the Counterclaim in This Case Arise Out of the Same Contracts as Iran's Claims in Case No. B1?

52. Both Parties agree that, if the Tribunal has jurisdiction over official counterclaims, then that jurisdiction is limited to counterclaims arising out of the contractual arrangements forming the subject matter of the main claim. However, they disagree as to whether the Counterclaim meets this requirement.

1. Iran's Arguments

53. Iran contends that the Counterclaim cannot be entertained because it does not arise out of the same contracts as the claims, but rather arises out of the 1974 Agreement, a separate international agreement.

54. Iran submits that, although the United States asserts that General Condition B.9 of the LOAs has been breached, it has failed to point to any concrete breach. The only concrete assertion made by the United States in support of its Counterclaim is that it has been unable to send experts to Iran to examine the latter's performance of its obligation not to disclose classified information. However, continues Iran, if such a right-to-visit exists, it stems from the 1974 Agreement, and not from the LOAs that form the subject matter of Iran's claims in Case No. B1.

55. Iran adds that the damages claimed by the United States in its Statement of Counterclaim, if damages there are,

flow from an alleged breach of the 1974 Agreement - which, as a separate agreement concluded by an exchange of diplomatic notes, is not a contractual arrangement for the sale and purchase of goods and services in accordance with Article II, paragraph 2, of the Claims Settlement Declaration - and not from a violation of a contractual obligation under the LOAs. In Iran's view, the remedial measures allegedly taken by the United States could only have been taken because of the United States' perceived inability to send its experts to Iran to verify Iran's compliance with its undertakings. Iran asserts that the United States has admitted in its pleadings that it has no knowledge of a breach of the LOAs by Iran.

56. Thus, Iran maintains that the Counterclaim does not arise out of the contracts that constitute the subject matter of its claims, but arises out of the 1974 Agreement and cannot, therefore, be entertained by the Tribunal. To the United States argument that the Counterclaim does not arise out of a breach of the 1974 Agreement but that that Agreement is relevant to the merits of the Counterclaim as it assists in defining General Condition B.9 of the LOAs,[36] Iran replies that the 1974 Agreement does not form part of the same contractual arrangements as the LOAs, that it was not incorporated by reference in General Condition B.9 of the LOAs, and that it cannot be considered as an implied term of General Condition B.9, as the agreed law applicable, as the binding law inter partes, or as a guide to the interpretation of General Condition B.9. In this connection, Iran points to the different nature and content of the 1974 Agreement and the LOAs as well as to the fact that these agreements do not expressly refer to each other. Iran also argues that the 1974 Agreement could not cover LOAs concluded before 6 June 1974 (the date on which that agreement entered into force), and

[36] See infra, para. 60.

that the 1977 version of the General Conditions of the LOAs neither refers to, nor incorporates, the 1974 Agreement.

2. The United States' Arguments

57. The United States asserts that the Counterclaim arises out of fourteen LOAs that Iran relies on for its claims in Case No. B1.[37] The United States recalls that it asserted in its Counterclaim that the basis of the Counterclaim is Iran's alleged failure to protect the security of classified equipment and information, as provided in General Condition B.9 of the LOAs in question.

58. The United States denies that the 1974 Agreement forms the basis of its Counterclaim. First, it contends that its allegations that the Counterclaim arises out of a breach of General Condition B.9 of the LOAs are sufficient for the Tribunal to find that the Counterclaim arises out of the same contracts as Iran's claims. The United States maintains that, in accordance with its established practice,[38] the Tribunal must proceed on the basis of the United States' formulation of its claim in the Counterclaim; in order to establish jurisdiction, the United States does not have to provide evidence supporting the allegation of breach.

59. Second, the United States maintains that its Counterclaim is not limited to an assertion that Iran has failed to permit inspections: the Counterclaim contains allegations relating to other breaches of General Condition

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[37] The fourteen LOAs have been identified supra notes 3, 4 and 5.

[38] The United States refers to Stephen G. Shifflette and Islamic Republic of Iran, Award No. 423-10645-1 (12 June 1989), reprinted in 22 Iran-U.S. C.T.R. 111, 115; Merrill Lynch & Co., Inc., et al. and Islamic Republic of Iran, et al., Award No. 519-394-1 (19 August 1991), reprinted in 27 Iran-U.S. C.T.R. 122, 137.

B.9 of the LOAs. The United States recalls that the Counterclaim states that Iran has breached

> three key elements of General Condition B.9. The first is the transfer provision, which requires written consent by the United States Government before Iran can transfer any of the F14 or Phoenix missile equipment to third parties. The second is the disclosure provision, which requires written consent of the United States Government before Iran can disclose any plans, specifications and information concerning the F14 and Phoenix missile to third parties. And the third is the security provision, which requires Iran to maintain adequate security measures to preserve the security of equipment and information equivalent to those employed by the US Government for the protection of security.

60. Third, the United States asserts that it has not made any claim for breach of the 1974 Agreement. The United States has invoked the 1974 Agreement as a relevant source for interpreting General Condition B.9 of the LOAs. The United States recalls that General Condition B.9 requires Iran to "employ all measures necessary to preserve" the security of United States' classified material, but it does not specify what such measures might be. In interpreting what the Parties meant by the phrase "all measures necessary," it is helpful, according to the United States, to look at contemporaneous agreements between the Parties, such as the 1974 Agreement. Thus, the United States maintains, the 1974 Agreement is relevant to the merits of the Counterclaim, but "only as it assists to define the obligations under the LOAs."

D. Is the Counterclaim Cognizable?

1. Iran's Arguments

61. Iran asserts that the Counterclaim is inadmissible because it fails to meet the requirements of the Tribunal Rules. Iran maintains that the deficiencies of the

Counterclaim are so fundamental that Iran's right to reply has effectively been denied.

62. Iran first submits that, contrary to the requirement of Article 18(1)(e) of the Tribunal Rules, the United States has not stated the facts supporting its Counterclaim: the United States has asserted only that Iran had failed to carry out its obligations under General Condition B.9 without stating any facts that could be construed as constituting such a breach. The United States has even tempered this assertion of breach by merely stating that it has "reason to believe," that it has "apprehensions" and that it was "compelled to assume" that Iran has failed to carry out its obligation to maintain the security of information obtained under the FMS Program. In Iran's view, this constitutes an admission that the United States does not know whether there has been a breach of any LOA. In this connection, Iran also notes that, in its written pleadings, the United States writes that, due to its inability to send security experts to Iran, it has been unable to examine Iran's performance of its contractual obligations.

63. Iran also contends that the Counterclaim fails to satisfy the requirements of Article 18(1)(d) of the Tribunal Rules, which requires a Statement of Claim to indicate the general nature of the claim. First, the United States' assertion that it has "reason to believe" or that it has an "apprehension" that Iran has breached its obligations under the LOAs cannot be a statement of claim, however general the requirement under Article 18(1)(d) might be. Second, the United States does not specify the remedial measures it claims to have taken.

64. According to Iran, in deciding whether a claim meets the specificity requirements of Article 18(1) of the Tribunal Rules, the Tribunal has taken into account whether the objection of non-specificity had been raised in written pleadings filed in response to the statement of claim in question, and whether this statement of claim was sufficiently clear and detailed to allow the respondent to prepare a response to all parts of the claim.[39] Iran submits that, in the present Case, it has consistently objected to the Counterclaim's lack of specificity for the last twenty years; yet, the United States has failed to provide any particulars. Iran contends that, under these circumstances, it has been impossible for Iran to provide even a preliminary factual and legal response to the United States' pleadings, other than on basic issues of jurisdiction.

65. Therefore, Iran maintains that the Counterclaim should be dismissed as it fails to state a cognizable claim. In support, Iran refers to a series of Tribunal awards, which in its view reflect the basic principle that a claim should be dismissed when the claimant has failed to state properly facts constituting a basis for its claim.[40]

66. In Iran's view, even if the United States were now to address the deficiencies of the Counterclaim, the Tribunal should not prejudice Iran by accepting jurisdiction over the Counterclaim, as the undue delay in specifying the substance

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[39] Iran refers to Motorola, Inc. and Iran National Airlines Corporation, et al., Award No. 373-481-3 (28 June 1988), reprinted in 19 Iran-U.S. C.T.R. 73, 77.

[40] Iran points to Cyrus Petroleum Ltd. and Islamic Republic of Iran, Award No. 230-624-1 (2 May 1986), reprinted in 11 Iran-U.S. C.T.R. 70; Esahak Saboonchian and Islamic Republic of Iran, Award No. 524-313-2 (15 November 1991), reprinted in 27 Iran-U.S. C.T.R. 248; Parviz Karim-Panahi and United States of America, Award No. 532-182-2 (26 June 1992), reprinted in 28 Iran-U.S. C.T.R. 225; Unidyne Corporation and Islamic Republic of Iran, Award No. 551-368-3 (10 November 1993), reprinted in 29 Iran-U.S. C.T.R. 310, para. 107.

of the Counterclaim would constitute a fundamental breach of due process. With the passage of time, the failures of the United States have had the effect of prejudicing Iran's case and denying Iran its basic right to prepare a defense by depriving Iran, inter alia, of timely access to the evidence and persons involved.

2. The United States' Arguments

67. The United States maintains that the Counterclaim meets the requirements of Article 18 of the Tribunal Rules.

68. In the United States' view, Tribunal practice demonstrates the general nature of, and the low threshold for, the pleading requirements for statements of claim. In particular, the United States contends, it is not necessary to include a detailed statement of facts. In the rare cases where the Tribunal has dismissed preliminarily a claim for defects in pleadings, the claimant typically failed to provide extremely basic information (for instance, the claimant failed to identify clearly the respondent parties).[41] The United States also submits that the Tribunal has indicated that it will refuse cases on the basis of Article 18 of the Tribunal Rules only in "exceptional circumstances."[42]

69. The United States contends that such circumstances are not present in this Case and that sufficient information has been provided in the Counterclaim for Iran to respond to

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[41] The United States refers to In Re Refusal to File Claim Concerning Sara Helali, Decision No. DEC 3-Ref 11-2 (7 May 1982), reprinted in 1 Iran-U.S. C.T.R. 134; Re: Refusal to File the Claim of Jurij Bodnar, Decision No. DEC 13-Ref 13-2 (23 September 1982), reprinted in 21 Iran-U.S. C.T.R. 6; Re: Refusal to file Claim of the Ministry of Economic Affairs and Finance of the Islamic Republic of Iran, Decision No. DEC 33-Ref 24-3 (4 May 1984), reprinted in 6 Iran-U.S. C.T.R. 27.

[42] Reference is made to Questech, Inc. and Ministry of National Defense of the Islamic Republic of Iran, supra note 12, at 109.

its particulars. The Counterclaim devotes distinct sections to each of the Article 18 requirements and explains with sufficient detail the facts supporting the Counterclaim, the general nature of the claim, the amount requested, and the points at issue. The United States recalls that the annexation of additional evidentiary material is a discretionary matter under Article 18(2) of the Tribunal Rules. The United States notes that Iran has been able to respond to the Counterclaim repeatedly and not just on jurisdictional issues.

E. Is the Tribunal's Jurisdiction over the Counterclaim Limited to an Offset?

1. Iran's Arguments

70. In the event that the Tribunal considers that it has jurisdiction over the Counterclaim, Iran submits that this jurisdiction is limited to an offset against amounts that may be awarded to Iran in respect of the LOAs to which the United States has made reference in its written pleadings.

71. Iran contends that considerations of fairness dictate that the jurisdiction of the Tribunal be limited to an offset. In this connection, Iran asserts that the United States could have filed a direct claim against Iran before 19 January 1982 but that it chose not to, that there is no express jurisdictional basis to hear official counterclaims under the Claims Settlement Declaration, that the Counterclaim has remained unspecified for more than 20 years, and that it is not even based on the contracts invoked by Iran in its claims.

72. Further, Iran argues that Westinghouse Electric Corporation,[43] in which the recovery on counter-counterclaims was limited to the amounts recovered on the counterclaims, constitutes a useful precedent, and that the solution adopted there should be transposed to the present Case.

2. The United States' Arguments

73. The United States argues that, in the first instance, it is for the party bringing a responsive claim to determine whether this responsive claim is a counterclaim or merely a set-off. In the present Case, the United States' purpose in filing the Counterclaim was to be fully compensated for Iran's breaches of the LOAs, regardless of the amount (if any) that Iran might eventually recover. The United States adds that both Parties have consistently referred to the United States' claim as a counterclaim and not as a set-off. Thus, in the United States' view, both Parties understand that the United States is seeking complete compensation for a counterclaim that is not in any way limited to a set-off.

74. The United States submits that there are no legal grounds for limiting the jurisdiction of the Tribunal over the Counterclaim to an offset. To do so would not only be

[43] Westinghouse Electric Corporation and Islamic Republic of Iran Air Force, Final Award No. 579-389-2 (26 Mar. 1997), reprinted in 33 Iran-U.S. C.T.R. 60.

contrary to Tribunal precedents,[44] but also to the position Iran has taken in previous cases.[45]

75. Responding to Iran's argument based on Westinghouse,[46] the United States points out differences between the two cases, including, for example, that Westinghouse, unlike this Case, involved counter-counterclaims and the equitable allocation of loss between the parties due to the frustration of the contracts at issue there (rather than compensation for breach of contract). These differences, in the United States' view, make the precedent inapplicable to the present Case.

VI. REASONS FOR THE AWARD

A. Jurisdiction over Official Counterclaims

1. Introduction

76. Article II, paragraph 2, of the Claims Settlement Declaration provides the Tribunal with jurisdiction "over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." Iran argues that this provision is controlling and that it excludes jurisdiction over official counterclaims. The United States disagrees with both of these arguments. The United States maintains that the Tribunal has jurisdiction over official

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[44] The United States refers to Gould Marketing, Inc. and Islamic Republic of Iran (Ministry of National Defence), Award No. 136-49/50-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 272; Anaconda-Iran, Inc. and Islamic Republic of Iran, et al., Interlocutory Award, supra, note 13, at 227; Anaconda-Iran, Inc. and Islamic Republic of Iran, Final Award No. 539-167-3 (29 Oct. 1992), reprinted in 28 Iran-U.S. C.T.R. 320, at para. 4; Avco Corporation and Iran Aircraft Industries, et al., Partial Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-U.S. C.T.R. 200.

[45] The United States refers to Iran's submissions in Anaconda-Iran, Inc. and Islamic Republic of Iran, et al., supra, note 13.

[46] Supra, note 43.

counterclaims on the basis of Article II, paragraph 2, of the Claims Settlement Declaration, as well as on the basis of Article III, paragraph 2, of the same Declaration and Article 19(3) of the UNCITRAL Rules.

77. As noted in Case No. A1, "the extent of the Tribunal's jurisdiction has been determined by Iran and the United States in the Algiers Declarations, which contain detailed provisions on the jurisdiction of the Tribunal, and ... consequently, the Tribunal has no jurisdiction over any matter not conferred on it by the Declarations."[47]

78. The Tribunal has consistently held, and both Parties agree, that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention. See Islamic Republic of Iran and United States of America, Decision No. DEC 32-A18-FT, at 14-15 (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 259; Islamic Republic of Iran and United States of America, Award No. ITL 63-A15(I:G)-FT, para. 17 (20 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 40, 46; Islamic Republic of Iran and United States of America, Decision No. DEC 62-A21-FT, para. 8 (4 May 1987), reprinted in 14 Iran-U.S. C.T.R. 324, 328; Islamic Republic of Iran and United States of America, Award No. 382-B1-FT, para. 47 (31 Aug. 1988), reprinted in 19 Iran-U.S. C.T.R. 273, 287; Islamic Republic of Iran and United States of America, Partial Award No. 590-A15(IV)/A24-FT, para. 73 (28 Dec. 1998); Islamic Republic of Iran and United States of America, Partial Award No. 597-A11-FT, para. 181 (7 Apr. 2000); United States of America, et al. and Islamic Republic of Iran, et al., Decision No. DEC 130-A28-FT (19 Dec. 2000).

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[47] Islamic Republic of Iran and United States of America, supra note 26, at 152.

2. General Rule of Interpretation

79. The general rule of treaty interpretation is set forth in Article 31 of the Vienna Convention, which provides:

> Article 31 General rule of interpretation
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> 1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

80. The Tribunal will first apply this general rule to determine whether it has jurisdiction over official counterclaims pursuant to Article II, paragraph 2, of the Claims Settlement Declaration.

a. Ordinary Meaning of the Terms

81. Article II, paragraph 2, of the Claims Settlement Declaration refers expressly to "claims", but not to

"counterclaims." Iran asserts that, as a result, the Tribunal is without jurisdiction to entertain official counterclaims.

82. Before one can conclude that silence on the issue of counterclaim in Article II, paragraph 2, of the Claims Settlement Declaration means that official counterclaims are excluded, one has to go through the exercise of interpretation pursuant to Article 31 (and, if necessary, Article 32) of the Vienna Convention. The maxim expressio unius est exclusio alterius does not constitute a mandatory directive applicable in all cases where a treaty is silent on a subject: it merely reflects a common sense principle applicable in many, but not all, situations.[48] The meaning of silence in a treaty has to be resolved in each particular instance on its own merits.

83. The same can be said, mutatis mutandis, of the application of the so-called Vattel rule, viz., that

> it is not possible to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept the meaning which the deed naturally presents.[49]

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[48] Although the Tribunal has invoked the maxim expressio unius est exclusio alterius in several awards (See, e.g., Islamic Republic of Iran and United States of America, Partial Award No. 597-A11-FT (7 April 2000), at para. 245; Behring International, Inc. and Islamic Republic Iranian Air Force, et al., Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-U.S. C.T.R. 238, 264; Islamic Republic of Iran and United States of America, Interlocutory Award No. ITL 63-A15(I:G)-FT (20 August 1986), reprinted in 12 Iran-U.S. C.T.R. 40, 59; Mobil Oil Iran Inc. et al. and Islamic Republic of Iran, et al., Partial Award No. 311-74/76/81/150-3 (14 July 1987), reprinted in 16 Iran-U.S. C.T.R. 3, 27), it has never relied on that maxim as the exclusive basis for its interpretive decisions. The same is true in the present Case: the maxim expressio unius est exclusio alterius is but one element to be considered in the exercise of interpretation, which must encompass all the elements of Article 31 (and, if necessary, of Article 32) of the Vienna Convention.

[49] Emer de Vattel, Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains, Nouvelle édition, Paris 1820, Livre II, § 263, translation by Charles G. Fenwick, Carnegie Institution, Washington D.C., 1916, at 199 (Emphasis in original).

84. That rule merely begs the question. Before one can draw any conclusions concerning the clarity of a text, one has to interpret the terms employed in their context and in light of the object and purpose of the treaty. As Judge Anzilotti said in his dissenting opinion in The Diversion of Water from the Meuse:

> it is always dangerous to be guided by the literal sense of the words before one is clear as to the object and intent of the Treaty; for it is only in this Treaty, and with reference to this Treaty, that these words - which have no value except in so far as they express the intention of the Parties - assume their true significance.[50]

85. The Tribunal cannot conclude that the text of Article II, paragraph 2, of the Claims Settlement Declaration is clear without taking into account the elements of Article 31 of the Vienna Convention. When the ICJ, in keeping with the practice of its predecessor the PCIJ, states that a "convention is sufficiently clear in itself,"[51] it always does so after an analysis of the text under consideration. Before affirming the clear nature of the provision, the Court first rejects, explicitly or implicitly, the arguments to the contrary.

86. Accordingly, the fact that Article II, paragraph 2, of the Claims Settlement Declaration does not refer to "counterclaims" is not the end of the matter, even if it could weigh in favor of the view that official counterclaims are excluded. But even this is uncertain.

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[50] 1937 P.C.I.J. (Series A/B), No. 70, at 46. In its judgment in that case, the Court also stated that a treaty provision must "be interpreted in conjunction with the other articles, with which it forms a complete whole" and that the object of the treaty should not be ignored. Id. at 23.

[51] Admission of a State to the United Nations (Charter, Article 4), I.C.J. Reports 1948, 57, at 63.

87. The Tribunal stated in Case No. A2 that "a right of counter claim is normal for a respondent."[52] On that view, an explicit authorization of counterclaims would be unnecessary; on the contrary, express language would be necessary to exclude counterclaims. In this connection, it is noteworthy that prominent international tribunals with jurisdictional grants similar to Article II, paragraph 2, of the Claims Settlement Declaration (i.e., jurisdictional grants that permit parties to bring claims against one another on an equal footing) have considered that they could entertain counterclaims, even if their constitutive instruments did not expressly refer to counterclaims.[53] For instance, the respective Statutes of the PCIJ,[54] the ICJ[55] and the International Tribunal for the Law of the Sea ("ITLOS")[56] do not expressly refer to counterclaims. Yet, these institutions determined that they could entertain counterclaims and adopted rules governing them.[57] Similarly, the treaties establishing

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[52] Islamic Republic of Iran and United States of America, supra note 19, at 103. This view was also shared by the dissenting Members (Mahmoud M. Kashani, Shafie Shafeiei and Seyyed Hossein Enayat), who opined at p. 108: "Moreover, counter claim is a right that every defendant benefits from; it is not a right that has to be granted by the Claims Settlement Declaration."

[53] Naturally, there are differences between the Claims Settlement Declaration and the constitutive instruments of these other international tribunals (a significant difference is the mention of "counterclaims" in Article II, paragraph 1, of the Claims Settlement Declaration. See infra paras. 88-89), but the point under analysis here is the ordinary meaning of the terms employed in Article II, paragraph 2, of the Claims Settlement Declaration. To determine that ordinary meaning, it is useful to look at similarly worded provisions applicable to other international tribunals.

[54] Statute of the Permanent Court of International Justice, adopted 13 December 1920, P.C.I.J. (Ser. D) No. 1.

[55] Statute of the International Court of Justice, adopted 26 June 1945, Acts and Documents concerning the Organization of the Court, No. 5.

[56] Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1833 U.N.T.S. 3.

[57] As to the PCIJ, see Article 40 of the 1922 Rules of Court and Article 63 of the 1936 Rules of Court.

As to the ICJ, see Article 63 of the 1946 Rules of Court, Article 68 of the 1972 Rules of Court, Article 80 of the 1978 Rules of Court and Article 80 of the 2000 Rules of Court.

the mixed arbitral tribunals after the First World War did not refer to counterclaims, but the majority of these tribunals considered that they could entertain counterclaims;[58] the few mixed arbitral tribunals that prohibited counterclaims adopted express rules to that effect.[59]

b. Context

88. Iran points out that Article II, paragraph 1, of the Claims Settlement Declaration refers both to "claims" and to "counterclaims." Iran maintains that if the Parties had wished to allow official counterclaims, they would have done so expressly in Article II, paragraph 2, of the Claims Settlement Declaration, as they had done in paragraph 1.

As to ITLOS, see Article 98 of the Rules of the Tribunal.

[58] The following mixed arbitral tribunals recognized a party's right to file counterclaims (the relevant provisions of the Rules of Procedure of the tribunal in question are noted in the parentheticals): England-Austria (Articles 26-28), England-Bulgaria (Articles 26-28), England-Hungary (Articles 26-28), Italy-Germany (Article 34), Italy-Austria (Article 34), Italy-Bulgaria (Article 34), Italy-Hungary (Article 34), France-Germany (Article 14(e)), France-Bulgaria (Article 14(e)), France-Austria (Article 14(e)), France-Hungary (Article 14(e)), Greece-Germany (Article 14(e)), Greece-Bulgaria (Article 14(e)), Greece-Austria (Article 14(e)), Greece-Hungary (Article 14(e)), Romania-Germany (Article 13(e)), Romania-Hungary (Article 13(e)), Siam-Germany (Article 14(e)), and Czechoslovakia-Germany (Article 24): see Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les traités de paix, Vol. 1-5, Paris, Librairie de la Société du Recueil Sirey, 1922.

[59] The rules of the following mixed arbitral tribunals stated that counterclaims were not permitted and that any claim a respondent may wish to bring against a claimant had to be introduced separately; however, the same rules also stated that the tribunal in question could join related cases or order that they be heard together: England-Germany (Article 13), Poland-Germany (Article 28), Belgium-Germany (Article 29), Belgium-Austria (Article 29), Belgium-Bulgaria (Article 29), Greece-Turkey (Articles 51 & 56), Romania-Turkey (Articles 51 & 56). See Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les traités de paix, Vol. 1-5, supra note 58. In Installations Maritimes de Bruges v. Hambourg Amerika Linie, 24 December 1921, 1 Recueil des décisions des tribunaux arbitraux mixtes, at 877, the Belgium-Germany Mixed Arbitral Tribunal recognized that the right to counterclaim is normal and that it was only prevented because of the express prohibition of Article 29 of the Rules of Procedure of that tribunal ("Att. que les deux requêtes introductives sont basées sur un seul et même fait, qui est la collision survenue le 25 octobre 1911 entre le vapeur Parthia et Duc d'Albe et un mur du port de Zeebruge, et que la seconde requête eût pu prendre la forme d'une simple demande

89. The fact that Article II, paragraph 1, of the Claims Settlement Declaration refers to "claims" and "counterclaims," whereas paragraph 2 of the same Article refers only to "claims," does not necessarily imply that the Parties sought to exclude counterclaims in official cases, because there are particular reasons why express mention of counterclaims was required in paragraph 1 but not in paragraph 2 of Article II of the Claims Settlement Declaration. Article II, paragraph 1, of the Claims Settlement Declaration confers on the Tribunal jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," but the Tribunal has no jurisdiction over claims of one government against the nationals of the other State.[60] Without express mention of counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal would have been prevented from hearing any type of claims by a State Party against nationals of the other State.[61] By contrast, since each State Party could file claims against the other under Article II, paragraph 2, of the Claims Settlement Declaration, the same rationale does not apply to that provision. Based on the foregoing, the Tribunal determines that the absence of any reference to counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration, without more, does not warrant

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reconventionnelle si l'article 29 du Règlement de procédure ne l'interdisait absolument." (emphasis added)).

[60] See Islamic Republic of Iran and United States of America (Case No. A2), supra note 19.

[61] The Mexico-Venezuela Mixed Claims Commission provides a useful analogy. The Commission was established pursuant to the Protocol of an Agreement between the Ambassador from Mexico to the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of all unsettled Claims of Mexican Citizens against the Republic of Venezuela, 26 February 1903, reprinted in United Nations, Reports of International Arbitral Awards, Volume X, at 695. It had jurisdiction over "all claims owned by citizens of the United States of Mexico against the Republic of Venezuela." In the Del Rio Case, reprinted in United Nations, Reports of International Arbitral Awards, Volume X, at 697, the Commission considered that it did not have jurisdiction over counterclaims of Venezuela under the Protocol. However, it found that an exchange of notes

the conclusion that official counterclaims are not permitted under that provision.

90. The context of Article II, paragraph 2, of the Claims Settlement Declaration is not limited to Article II, paragraph 1, of the Claims Settlement Declaration. Other provisions of the Claims Settlement Declaration, however, do not provide any indication as to whether the Tribunal has jurisdiction over official counterclaims. In fact, counterclaims are not even mentioned in the Claims Settlement Declaration outside of Article II, paragraph 1.

91. By contrast, both the UNCITRAL Rules and the Tribunal Rules mention counterclaims at Article 19(3). Before examining the potential relevance of these rules to the question of the Tribunal's jurisdiction over official counterclaims, the Tribunal will address the preliminary question of whether these rules form part of the context for the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration.

92. Article 31, paragraph 2, of the Vienna Convention provides:

> The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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between the two countries provided it with jurisdiction to hear counterclaims of Venezuela.

93. It is doubtful that the UNCITRAL Rules or the Tribunal Rules qualify as an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" (Article 31(2)(a) of the Vienna Convention). They certainly do not constitute an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (Article 31(2)(b) of the Vienna Convention). There remains the possibility that these rules form part of the text of the Claims Settlement Declaration. In this connection, the United States argues that Article III, paragraph 2, of the Claims Settlement Declaration incorporates the UNCITRAL Rules into the Claims Settlement Declaration.[62]

94. The Tribunal disagrees. The mere mention of the UNCITRAL Rules in Article III, paragraph 2, of the Claims Settlement Declaration does not incorporate them into the Claims Settlement Declaration. Article III, paragraph 2, of the Claims Settlement Declaration only provides that "the Tribunal shall conduct its business in accordance with the [UNCITRAL Rules] except to the extent modified by the Parties or by the Tribunal to ensure that the [Claims Settlement Declaration] can be carried out." Thus, it was understood from the beginning that the UNCITRAL Rules would be modified by the Parties or by the Tribunal. In fact, the Tribunal began revising the UNCITRAL Rules during the summer of 1981.[63] As noted earlier,[64] the Provisional Tribunal Rules entered into force on 10 March 1982, i.e., before the United States filed

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[62] The United States made that argument in the context of its assertion that Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules provide the Tribunal with jurisdiction to hear official counterclaims. See supra para. 18.

[63] This was done in the presence of the Agents of the two States.

[64] See supra note 2.

its Counterclaim on 31 March 1982. Accordingly, as of 10 March 1982, if the Claims Settlement Declaration did incorporate any corpus of rules at all, it was the Provisional Tribunal Rules (and, from 3 May 1983, the Tribunal Rules), and not the UNCITRAL Rules.

95. Yet, it is not clear if the Tribunal Rules have been incorporated by reference in the Claims Settlement Declaration. Article III, paragraph 2, of the Claims Settlement Declaration does not contain explicit language to the effect that the Tribunal Rules have been "incorporated by reference" therein. Rather, it provides that the UNCITRAL Rules will be modified "to ensure that the Claims Settlement Declaration can be carried out." This indicates that the Claims Settlement Declaration takes precedence over the Tribunal Rules in the hierarchy of norms.

96. In any case, the Tribunal does not consider it necessary to decide whether the Tribunal Rules have been "incorporated by reference" in the Claims Settlement Declaration in order to consider these Rules in interpreting Article II, paragraph 2, of the Claims Settlement Declaration. The Tribunal is satisfied that the Tribunal Rules at least constitute "relevant rules of international law applicable in the relations between the parties"; pursuant to Article 31(3)(c) of the Vienna Convention,[65] the Tribunal Rules should be taken into consideration for the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration.[66]

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[65] Article 31(3)(c) of the Vienna Convention provides that "[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties."

[66] By contrast, the UNCITRAL Rules are not "relevant rules of international law applicable in the relations between the parties." As noted above (supra para. 94), the UNCITRAL Rules have been superseded by the Tribunal Rules and are no longer applicable between the Parties.

97. Article 19(3) of the Tribunal Rules provides that "the respondent may make a counterclaim or rely on a claim for the purpose of a set-off if such counterclaim or set-off is allowed under the Claims Settlement Declaration." This could be read merely as confirming that the Claims Settlement Declaration governs which counterclaims are permitted; pursuant to this interpretation, Article 19(3) of the Tribunal Rules does not provide any additional information as to whether counterclaims are permitted under Article II, paragraph 2, of the Claims Settlement Declaration.

98. On the other hand, Article 19(3) of the Tribunal Rules could be read as indicating that official counterclaims are permitted so long as the substantive claim made therein is of the type that could be heard by the Tribunal under Article II, paragraph 2, of the Claims Settlement Declaration, i.e., a claim of one State against the other "arising out of contractual arrangements between them for the purchase and sale of goods and services."[67] Therefore, according to this second interpretation, Article 19(3) of the Tribunal Rules would confirm that a counterclaim that could have been filed as an autonomous claim under Article II, paragraph 2, of the Claims Settlement Declaration would fall within the Tribunal's jurisdiction.

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[67] In this connection, the rules of the PCIJ, the ICJ and ITLOS provide an instructive analogy. These rules state that the counterclaim must "come[] within the jurisdiction" of the court or tribunal. This requirement - which parallels Article 19(3)'s requirement that a counterclaim is permitted if "allowed under the Claims Settlement Declaration" - has been interpreted as requiring that the substantive claim made in the counter-claim fall within the jurisdiction of the Tribunal as recognized by the Parties, i.e., that it could otherwise have been filed as an autonomous claim. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, supra note 34, at paras. 30-31; Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, 190, at para. 33.

99. The Tribunal does not consider it necessary to decide which of these interpretations should be adopted; suffice it to say that consideration of Article 19(3) of the Tribunal Rules does not provide a clear answer to the question of the Tribunal's jurisdiction over official counterclaims.

100. It may also be noted that Article 19(3) of the Tribunal Rules is a modified version of Article 19(3) of the UNCITRAL Rules, which provides that "the respondent may make a counter-claim arising out of the same contract."[68] It appears doubtful that the modification of Article 19(3) of the UNCITRAL Rules was intended to prevent counterclaims arising out of the same contract as the claim. Rather, it seems that this modified version was adopted only to ensure that Article 19(3) conformed with the special jurisdictional regime of Article II, paragraph 1, of the Claims Settlement Declaration. First, the modification was adopted in response to the suggestion of the Iranian Members that the defense of set-off be allowed even if that set-off did not arise out of the same contract, transaction or occurrence that formed the subject matter of the national's claim.[69] Second, because Article II, paragraph 1, of the Claims Settlement Declaration provides that claims and counterclaims must arise out of "debts, contracts ..., expropriations or other measures affecting property rights," whereas Article 19(3) of the UNCITRAL Rules only refers to "contract[s]," Article 19(3)'s counterclaim authorization would otherwise have been inconsistent with the terms of the Claims Settlement Declaration absent modification.[70] This being noted, even if the history of the

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[68] This provision has been quoted in full, supra Section IV. Relevant Provisions.

[69] See paragraph 6 and Annexes C and D of the Minutes of the 16th Meeting of the Tribunal (17 Nov. 1981). See also Computer Sciences Corporation and Islamic Republic of Iran, et al., supra note 14, at 309-10.

[70] Computer Sciences Corporation and Islamic Republic of Iran, et al., supra note 14, at 310.

modifications to Article 19(3) of the UNCITRAL Rules shows that the Tribunal's concerns were related to Article II, paragraph 1, of the Claims Settlement Declaration, it still does not tell us how - in the face of a general reference to the Claims Settlement Declaration by Article 19(3) of the Tribunal Rules - Article II, paragraph 2, of the Claims Settlement Declaration is to be interpreted. Therefore, the Tribunal cannot draw any firm conclusion from the history of the modifications to Article 19(3) of the UNCITRAL Rules.

101. In light of the foregoing, the Tribunal finds that the context of Article II, paragraph 2, of the Claims Settlement Declaration does not provide a clear answer to the question of the Tribunal's jurisdiction over official counterclaims.

c. Object and Purpose

102. The United States argues that allowing counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration accords with the object and purpose of that provision, which in the United States' view was to provide a forum for the Parties to settle all of their disputes relating to contractual arrangements. Iran replies that the terms of Article II, paragraph 2, of the Claims Settlement Declaration envisaged the Parties settling their contractual disputes by bringing claims against each other within the deadline prescribed in Article III, paragraph 4, of the Claims Settlement Declaration. Iran also maintains that, because each State party could bring contractual claims against the other, it was not necessary to allow counterclaims.

103. It is certainly true that the Tribunal was established to decide, inter alia, contractual disputes between Iran and the United States and that allowing

counterclaims in official cases would serve this object and purpose. However, as noted by Iran, Article II, paragraph 2, of the Claims Settlement Declaration refers to the filing of "claims." Hence, we come back to the question of how to interpret the fact that only "claims" are mentioned in Article II, paragraph 2, of the Claims Settlement Declaration.

104. As to Iran's argument that it was not necessary to allow official counterclaims since each State Party could bring contractual claims against the other, the Tribunal considers that this does not constitute a persuasive argument in support of the contention that official counterclaims are excluded. In international law, counterclaims are routinely permitted in disputes between two parties able to bring claims against each other because they promote judicial economy and fairness.[71]

105. The Tribunal concludes that the object and purpose of Article II, paragraph 2, of the Claims Settlement Declaration does not constitute a decisive argument one way or the other.

d. Subsequent Practice of the Parties

106. Article 31(3)(b) of the Vienna Convention provides:

> 31. (3) There shall be taken into account, together with the context:
>
> (a) ...
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) ...

[71] See the examples mentioned supra in notes 57 and 58.

107. The United States contends that the subsequent practice of Iran and the United States shows that they interpreted the Claims Settlement Declaration as providing the Tribunal with jurisdiction over official counterclaims. Iran disputes this and asserts that the focus of interpretation must remain the plain and ordinary meaning of the terms employed in the Claims Settlement Declaration, as Article 31(3)(b) of the Vienna Convention merely provides for a subsidiary aspect of the interpretation of treaties.

108. The Tribunal will first comment on the role of subsequent practice in the interpretation of treaties. The Tribunal will then examine whether there is a subsequent practice of the Parties establishing their agreement regarding the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration.

i. The Role of the Parties' Subsequent Practice for the Interpretation of Treaties

109. Subsequent practice, pursuant to Article 31(3)(b) of the Vienna Convention, is an element of the general rule of interpretation. In its commentary to Article 27(3)(b) of the Draft Articles on the Law of Treaties[72] - the precursor to

[72] Article 27 of the Final Draft Articles on the Law of Treaties provided as follows:

General rule of interpretation

1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:

Article 31(3)(b) of the Vienna Convention - the International Law Commission stated:

> The importance of ... subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty ... The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements.[73]

110. Article 31(3)(b) of the Vienna Convention specifies that the subsequent practice of the parties "shall be taken into account, together with the context," the context being one of the elements mentioned in Article 31, paragraph 1, of the Vienna Convention. The International Law Commission has pointed out that the successive paragraphs of (what was to become) Article 31 of the Vienna Convention do not lay down "a hierarchical order for the application of the various elements of interpretation in the article."[74] Rather, the provisions of that article "form a single, closely integrated rule... [Thus,] the opening phrase of paragraph 3 'There shall be taken into account together with the context' is designed to

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(a) Any subsequent agreement between the parties regarding the interpretation of the treaty;
(b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.
(Emphasis added)

[73] Commentary to Article 27(3)(b) of the Draft Articles on the Law of Treaties in ILC, Report of the International Law Commission on the work of its eighteenth session, 4 May - 19 July 1966, Document A/6309/Rev. 1, Yearbook of the International Law Commission 1966, Vol. II, at 221-222.

[74] Id., p. 219.

incorporate in paragraph 1 the elements of interpretation set out in paragraph 3."[75]

111. Hence, far from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties.[76] The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.[77]

112. The subsequent practice of the parties to a treaty may be relevant in shedding light on the original intentions

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[75] Id., p. 220 (emphasis in original).

[76] Advisory Opinion on the Competence of the International Labour Organization with Respect to Agricultural Labour, 1922 P.C.I.J. (Ser. B) No. 2, at 39 ("If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty."); Advisory Opinion on the Jurisdiction of the Courts of Danzig, 1925 P.C.I.J. (Ser. B) No. 15, at 18 ("The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive."); Corfu Channel (United Kingdom v. Albania), Judgment of April 9th, 1949, I.C.J. Reports 1949, 4, at 25 ("The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of compensation."); International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950, 128, at 135-36 ("Interpretations placed upon the legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.").

[77] See, e.g., United States of America, et al. and Islamic Republic of Iran, et al., Award No. 108-A16/582/591-FT, supra note 23, at 71; United States of America and Islamic Republic of Iran, Case No. A17, Decision No. DEC 37-A17-FT (18 June 1985), reprinted in 8 Iran-U.S. C.T.R. 189, at 201; Burton Marks, et al. and Islamic Republic of Iran, Interlocutory Award No. ITL 53-458-3 (26 June 1985), reprinted in 8 Iran-U.S. C.T.R. 290, at 295; Islamic Republic of Iran and United States of America, Award No. 382-B1-FT, para. 68 (31 Aug. 1988), reprinted in 19 Iran-U.S. C.T.R. 273; Islamic Republic of Iran and United States of America, Partial Award No. 529-A15-FT, para. 48 (6 May 1992), reprinted in 28 Iran-U.S. C.T.R. 112.

of the Parties[78] and is compelling evidence of the parties' understanding as to the meaning of the treaty's provisions:

> In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what the correct interpretation is.[79]

113. In fact, it has been asserted that the effect of subsequent conduct "may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning."[80]

114. As noted by Sir Ian Sinclair, "[t]he value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent. A practice is

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[78] See supra note 76; R. Jennings et al. eds., Oppenheim's International Law, Ninth Edition (1992), Volume 1, at 1275, footnote 20; Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points, (1951) 27 Brit. Y.B. Int'l L. 1, 20; Jean-Pierre Cot, La conduite subséquente des parties à un traité, (1966) Revue Générale de Droit International Public 632-666; Lord McNair, The Law of Treaties, 1961, at 424 (when there is a doubt as to the meaning of a provision or an expression contained in the treaty, the subsequent practice of the parties "has a high probative value as to the intention of the parties at the time of its conclusion"). In this connection, Lord McNair refers to the comment to Article 19 of the Harvard Research Draft Convention, which states:

> In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.

[79] Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, (1957) 33 Brit. Y.B. Int'l L. 203, at 211 (emphasis added).

[80] Decision of the Eritrea-Ethiopia Boundary Commission regarding the Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia (13 April 2002), para. 3.8 & para. 3.9. See also Peter Malanczuk, Akehurst's Modern Introduction to International Law 367 (1998); Fitzmaurice, supra note 79, at 212; J.-P. Cot, supra note 78.

a sequence of facts or acts and cannot be established by one isolated fact or even by several individual applications."[81] However, the parties' interpretation of the provision in dispute could be established by a "shorter period of continuity" than is required to establish a rule of customary law.[82]

115. In determining whether there is a relevant subsequent practice, the Tribunal may consider action taken in application of the treaty such as the filing of counterclaims and "assertions or admissions made in the course of the proceedings before a tribunal."[83]

ii. Is there a Subsequent Practice that establishes the Parties' Agreement regarding the Interpretation of Article II, Paragraph 2, of the Claims Settlement Declaration?

116. In the Tribunal's view, the Parties have engaged in a concordant, common and consistent practice in filing counterclaims to official claims, and this practice reflects an agreement as to the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. Iran's objections in the present Case to the Tribunal's jurisdiction over official

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[81] Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd Ed., 1984, p. 137.

[82] Italy-United States Air Transport Arbitration, Advisory Opinion of 17 July 1965 (Riese, President; Metzger, Monaco, arbitrators), 45 ILR 393, 419 (1972).

[83] Decision by the Eritrea-Ethiopia Boundary Commission regarding the Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, supra note 80, para. 3.30. See also Corfu Channel (United Kingdom v. Albania), supra note 76, at 25 (in finding that it was not the parties' intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of compensation, the Court considered the assertions made by the parties during the course of the proceedings before it).

counterclaims have been rendered nugatory by its conduct in other cases.[84]

117. The Tribunal holds that the filing of official counterclaims by both Parties demonstrates their common understanding that such counterclaims were allowed under Article II, paragraph 2, of the Claims Settlement Declaration.

118. The Tribunal notes that Iran has filed counterclaims in Cases Nos. B23,[85] B26,[86] B31,[87] B32,[88] B33,[89] B73,[90] and

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[84] In this connection, reference can be made to the Beagle Channel Arbitration (Argentina v. Chile), Award of 18 February 1977 (Sir Gerald Fitzmaurice, President; Dillard, Gros, Onyeama, Petrén, Arbitrators), 52 ILR 93 (1979). There, the arbitral tribunal examined the effects of the subsequent practice of the parties on their respective legal positions. The tribunal observed that the Argentine conduct in the post-Treaty months "was not consistent with the interpretation of the Islands clause of the Treaty which Argentina" later maintained in the arbitral proceedings (at 198, para. 129). It noted, on the other hand, that the corresponding Chilean acts warranted a quite different conclusion, not because Chile could by her own acts confer upon herself rights or territorial attributions not provided for in the Treaty, "but simply because these acts were consistent with, and bear out, the interpretation of the Islands clause which Chile now, as then, puts forward as being the correct one."(at 221, para. 165).

[85] United States Postal Service and Iranian Ministry of PTT, Case No. B23, counterclaim filed on 24 Aug. 1982. The counterclaim was signed by the Legal Counselor of the Ministry of PTT. The claimant withdrew its claim on 8 November 1982. The respondent stated that it nevertheless wished to pursue its counterclaim (see submissions of 31 January 1983) but then withdrew it on the ground that there was no claim before the Tribunal (see Iran's Withdrawal of Counterclaim, filed 13 December 1983).

[86] United States Federal Aviation Administration and Civil Aviation Organization (CAO), Case No. B26, counterclaim filed on 29 Aug. 1986. The counterclaim was asserted in the second Statement of Defense (a first statement of defense had been filed on 28 Jan. 1986) and signed by the Deputy Director for Administrative and Financial Affairs, CAO of Iran. The claimant argued that the counterclaim was meritless but did not argue that it was outside the Tribunal's jurisdiction. The case was terminated by an Award on Agreed Terms pursuant to which the United States government was to receive payment of $20,000 in full and final settlement of all disputes related to Cases Nos. B26 and B60: United States of America and Islamic Republic of Iran, Award on Agreed Terms No. 463-B26/B28/B35/B60-2 (22 Jan. 1990), reprinted in 24 Iran-U.S. C.T.R. 291.

[87] National Bureau of Standards, Department of Commerce (U.S.) and Iran Electronic Industries, Iran Aircraft Industries, National Iranian Copper Industries Co., Tehran Polytechnic Institute, National Iranian Oil Co., Case No. B31, counterclaim filed on 7 March 1983. The counterclaim was asserted by the National Iranian Copper Industries Co. (NICIC). The case was terminated by an Award on Agreed Terms, United States of America and Islamic Republic of Iran, et al., Award on Agreed Terms No. 376-B31-3 (11 July 1988).

"reserve[d] the right to do so" in Case No. B25.[91] The counterclaims in Cases Nos. B23 and B31 were filed before Iran objected to the Tribunal's jurisdiction over official counterclaims in the present Case.[92] The counterclaims in Cases Nos. B26, B32, B33 and B73 were filed long after that objection was raised; when submitting these four counterclaims, Iran did not preserve its jurisdictional position with respect to the Counterclaim in the present Case, although it could have easily done so. Moreover, Iran has in fact asserted in its submissions in some of these cases that the Tribunal has jurisdiction to entertain official counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration.[93]

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[88] Defense Logistics Agency (U.S.) and Deputy Minister of War, Imperial Iranian Navy, Imperial Iranian Air Force, Military Industries Organization, Case No. B32, counterclaim filed on 28 June 1985. The "Islamic Republic of Iran" asserted a counterclaim "on behalf" of the Iranian Air Force; the submission was signed by the Deputy Defense Minister for Legal Affairs. The case was terminated by an Award on Agreed Terms, United States of America, et al. and Ministry of Defense of the Islamic Republic of Iran, et al., Award on Agreed Terms No. 517-B32/B74/12786-12892-3 (26 July 1991), reprinted in 27 Iran-U.S. C.T.R. 275.

[89] United States of America (Department of the Air Force) and Islamic Republic of Iran (Air Force), Case No. B33, counterclaim filed on 6 Aug. 1984. The statement of counterclaim was signed by the Commander of the Iranian Air Force. The case was terminated by an Award on Agreed Terms, Islamic Republic of Iran and United States of America, Award on Agreed Terms No. 459-B14/B33-2 (26 Dec. 1989).

[90] Northern Virginia Community College and Islamic Republic of Iran (Iranian Navy Mission to the United States & Office of the Armed Forces, Attaché of Embassy of Iran), Case No. B73, counterclaim filed on 9 Oct. 1987. The Iranian Ministry of Defense asserted the counterclaim; the statement of counterclaim was signed by the Deputy Minister of Defense for Legal Affairs. The case was terminated by an Award on Agreed Terms, Northern Virginia Community College and Islamic Republic of Iran, Award on Agreed Terms No. 441-B73-2 (9 October 1989).

[91] The International Communication Agency (U.S.) and Bank Melli Iran, Case No. B25, Statement of Defense filed 24 Aug. 1982, at 7.

[92] Iran did not raise the issue of the Tribunal's jurisdiction over official counterclaims in its Statement of Defense to the United States Counterclaim, filed on 8 July 1982; it raised it for the first time in its Reply to the United States Counterclaim Concerning the Jurisdiction of the Tribunal, filed 12 April 1983.

[93] See "National Iranian Copper Industries Corporation (NICIC)'s Opinion concerning the validity of its Counterclaim notwithstanding the conclusion

119. The United States did not object to any of Iran's counterclaims on the basis that the Tribunal did not have jurisdiction to entertain counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration.[94] In fact, in Case No. B31, the United States recognized expressly the

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of National Bureau of Standard (NBS)'s claim in Case No. B/31 against NICIC," filed 24 May 1985 in Case No. B31:

> It follows that, irrespective of whether NICIC is recognized by the Tribunal [as] a national in the sense of Article VII paragraph 1 of the Claims Settlement Declaration, or [as] Iran in the sense of Article VII paragraph 3 of the Claims Settlement Declaration, in view of the fact that N.B.S. is an integral part of the Government of the United States, the Tribunal has jurisdiction, under Article II, paragraphs 1 and 2 of the Claims Settlement Declaration, over NICIC Counterclaim against N.B.S.

See also, in Case No. B33, Iran's Statement of Counterclaim, filed 6 August 1984:

> In compliance with paragraph 2, Article II of the Claims Settlement Declaration and paragraph 3, Article 19 [of the Rules], Iran submits its Counterclaim against the United States.
>
> Jurisdiction
>
> The present Counterclaim results from the contractual arrangement between Iran and the United States regarding sale of fuel and fueling services to the aircraft of either party at bases located in the territory of selling state and derives from the same general and practical agreement on which Counterrespondent based its claim. Hence, the Tribunal has jurisdiction to hear the Counterclaim in line with paragraphs 1 and 2, Article II of the Claims Settlement Declaration.

In the same case, see Iran's Rebuttal Memorial, filed 12 June 1989, where, in reply to the United States' contention that Iran had not established that the counterclaim arose out of the same contract as the claim, Iran wrote:

> Iran's Counterclaim ... has been asserted in conformity with Article II, 2 of the Claims Settlement Declaration. Contrary to Para. 1, paragraph 2 ... does not expressly refer to the requirement that the Counterclaim must arise from the same contract, transaction or occurrence that constitutes the subject matter of the principal claim. This point as well as the necessity for settlement of all the disputes which constitute the subject matter and the objective of the Algerian Declaration ... clearly reveal that Iranian Air Force has legitimately and rightfully asserted and demanded its claims through Counterclaim.

[94] In Case No. B32, the United States argued that the Tribunal had no jurisdiction over the counterclaim because it did not arise out of the same contract as the claim, but out of an adverse ICC award, see Memorial of the United States, filed 26 Sept. 1988, and Memorial in Evidence and Rebuttal, filed 31 Aug. 1990. Similarly, in Case No. B33, the United States objected to the counterclaim on the basis that it did not arise out of the same contract as the claim, see Reply of the United States to Respondent's Statement of Defense (Corrected version), filed 25 Oct. 1984.

possibility of filing a counterclaim to an official claim.[95] Moreover, the United States has itself submitted counterclaims in two cases - the present Case and Case No. B41[96] - and a claim for set-off in Case No. B7.[97]

120. Neither in Case No. B41 nor in Case No. B7 did Iran assert that the Tribunal lacked jurisdiction to hear counterclaims or claims for set-off in cases under Article II, paragraph 2, of the Claims Settlement Declaration; rather, it argued that the counterclaim and the claim for set-off did not arise out of the same contract as the claims.[98] In the present

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[95] "Memorial of the United States on the Issue of whether the Respondent's Counterclaim survives the Termination of the Claimant's Claim," filed 31 July 1985:

> In the view of the United States, a counterclaim to an official claim may survive the withdrawal of the underlying main claim, if the counterclaim meets the requirements of Article 19 of the Tribunal Rules ...

[96] Technical Laboratory & Soil Mechanics Affiliated to the Ministry of Roads and Transportation of the Islamic Republic of Iran and Federal Highway Administration of the United States Department of Transportation, counterclaim filed on 7 July 1982. The United States asserted a counterclaim against "Iran". Case No. B41 was terminated by an Award on Agreed Terms, see Technical Laboratory & Soil Mechanics of the Ministry of Roads & Transport of the Islamic Republic of Iran and Federal Highway Administration of the U.S. Department of Transportation, Award on Agreed Terms No. 470-B41-3 (21 Feb. 1990), reported at 24 Iran-U.S. C.T.R. 305.

[97] Atomic Energy Organization of Iran and United States of America, Statement of Defense of the United States, filed 7 September 1982. The claim for set-off was later withdrawn by the United States on the basis that it did not arise out of the same contract, transaction or occurrence as the main claim, see Minutes of Pre-Hearing Conference of 4 March 1983; Letter of the Agent of the United States to President Lagergren of 8 June 1984; Atomic Energy Organization of Iran and United States of America, Partial Award No. 132-B7-1 (8 June 1984), reprinted in 6 Iran-U.S. C.T.R. 141, at 144.

[98] In Case No. B41, the claimant objected to the counterclaim on the basis that: a) it did not arise out of the same contract or transaction as the original claim; b) it was asserted not against the claimant, but against the Iranian Ministry of Roads and Transportation, which, in the claimant's view, was not a party to the case. See "Response to Statement of Counter-Claim and Response to Statement of Defence," filed 17 Sept. 1982; "Response of Claimant to Respondent's Defenses Filed on 18 October 1984," filed 21 Oct. 1988; "Claimant's Request for Declaring the Honorable Tribunal's Lack of Jurisdiction to Decide Counterclaim of the Principal Respondent," filed 30 Aug. 1989.

In Case No. B7, the claimant objected to the claim for set-off on the ground that it did not arise out of the same contract as the main claim, see Iran's Reply Memorial, filed 17 January 1983:

Case, not only did Iran fail to raise the issue of the Tribunal's jurisdiction over official counterclaims in its Statement of Defense to the United States Counterclaim (filed 8 July 1982),[99] Iran in fact acknowledged in that submission that the Tribunal has jurisdiction over official counterclaims when it asserted:

> Article II of the Claims Settlement Declaration only permits the submission of counterclaims which arise out of the same contract that constitutes the subject matter of the Claim.[100]

121. It was only on 12 April 1983, after having filed counterclaims in two other official cases, that Iran saw fit to object to the Tribunal's jurisdiction over official counterclaims in the present Case. However, as explained by Lord McNair, "evidence that both Parties adopted the same meaning of a treaty provision before a dispute arises is of higher probative value than evidence as to the view of one party only."[101]

> In accordance with Article 19-3 of UNCITRAL Rules any Counter-Claim or set-off claim must arise from the same contract invoked in the principal claim. In other words, in order to be heard by the Arbitral Tribunal a Counter-Claim or a set-off claim must be of a single origin with the principal claim.

See also, in the same case, Iran's Memorial to Pre-Hearing Conference, filed 2 March 1983:

> Under the said Article [i.e., Article 19(3) UNCITRAL Rules], a counter claim for the purpose of set-off is only possible when such a counter claim is arising out of the same contract. Therefore, Claimant raises an objection to the Respondent's set-off claim in reliance of Article 19-3 of the Uncitral rules and requests the Tribunal to reject Respondent's counter claim and to refrain from accepting such claim.

[99] See supra note 92. It should also be recalled that, pursuant to Article 21(3) of the Tribunal Rules:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

[100] Emphasis in original.

[101] Lord McNair, supra note 78, at 427.

122. Thus, the practice of the Parties shows that they considered that the Tribunal had jurisdiction over official counterclaims.

123. Nonetheless, Iran asserts that the practice of the Parties on official counterclaims is not "concordant, common and consistent." Iran first observes:

> If the parties' practice is anything to go by, it appears that a very different interpretation of Article II(2) has been given by the United States in its Memorial dated 8 December 1981 filed in Case A/2 from that which is asserted here. In particular, the United States notes in that pleading that Article II(2) "contains no provision with respect to counterclaims", and having stressed the precision with which the parties set out which claims and counterclaims were admissible in Article II(1) of the Claims Settlement Declaration goes on to say that "[h]ad the parties intended for broader jurisdiction, they could and would have done so. They did not. There is no ambiguity here; there are no murky issues of interpretation." This is an approach with which Iran fully agrees. The United States is thus barred from raising the opposite argument now.

124. However, Iran's description of the United States' views improperly juxtaposes two excerpts made in different parts of the United States Memorial in Case No. A2. At pages 10-11 of this Memorial, after contending that Article II, paragraph 2, of the Claims Settlement Declaration could not provide a basis for Iran's claims against nationals of the United States, the United States wrote:

> As noted above, this paragraph contains no provision with respect to counterclaims. The absence of a limiting provision on counterclaims in paragraph 2 follows from the grant in that paragraph of jurisdiction by the Tribunal over official claims <u>by either party</u> arising out of contracts between them for the sale of goods and services. [Emphasis in original]

In this first excerpt, the United States does not contend that the absence of an express reference to counterclaims in

Article II, paragraph 2, of the Claims Settlement Declaration means that the Tribunal is without jurisdiction over official counterclaims. It simply explains why no express mention of counterclaims was necessary in the context of Article II, paragraph 2, of the Claims Settlement Declaration: in contrast to Article II, paragraph 1, of the Claims Settlement Declaration - where, without express mention of counterclaims, the jurisdiction of the Tribunal would have been limited to claims of nationals of one State against the other State - under Article II, paragraph 2, of the Claims Settlement Declaration, both Parties can file claims.

125. As to the second excerpt, it is taken from a section where the United States summarized its argument that neither paragraph 1 nor paragraph 2 of Article II of the Claims Settlement Declaration provided the Tribunal with jurisdiction over claims of one State against the nationals of the other:

> The inclusion of a carefully delimited class of counterclaims confirms that claims by a government against nationals of the other party are permitted only in response to, and as part of, an action initiated by a national of the other party against that government. Had the Parties intended to provide for broader jurisdiction, they could and would have done so. They did not. There is no ambiguity here; there are no murky issues of interpretation.

126. Thus, in its Memorial in Case No. A2, the United States did not argue that official counterclaims are prohibited.

127. In its Hearing Memorial of 27 February 2003 in this Case, Iran also maintains that there is no "concordant, common and consistent" practice of the Parties because:

> If the individual cases [i.e., the cases in which an Iranian respondent filed an official counterclaim] are analysed, it can be seen that they can be easily distinguished from the facts presently before the

> Tribunal and, on no interpretation, can be regarded as establishing a practice of the Tribunal to accept jurisdiction over official counterclaims. These cases involved respondent entities separate from the Government of Iran and/or cases where a counterclaim may have been submitted, but the Tribunal's jurisdiction over the main claim was simultaneously disputed. In other examples, the Iranian respondent subsequently withdrew its counterclaim [footnote omitted].

128. These arguments are not persuasive. Even if the Tribunal's jurisdiction over the main claim was disputed, Iran still believed that it was entitled to file counterclaims to official claims. Similarly, the fact that some counterclaims were later withdrawn is not relevant, because there is no indication that the counterclaims in question were withdrawn on the belief that the Tribunal did not have jurisdiction over official counterclaims.[102] Finally, the practice of Iranian respondents in filing official counterclaims is attributable to Iran and therefore constitutes relevant subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention. Article VII, paragraph 3, of the Claims Settlement Declaration provides that:

> "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

In Case No. A16, the Tribunal examined, in light of Article 31(3)(b) of the Vienna Convention, the practice of Bank Markazi Iran and United States banks in certain settlement

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[102] In Case No. B23, the counterclaim was withdrawn on the ground that there was no claim remaining before the Tribunal. See supra note 85. In Cases Nos. B31 and B33, the counterclaims were withdrawn pursuant to settlement agreements, see supra note 87, para. 5 of the Award on Agreed Terms; and supra note 89, Article VII of the settlement agreement. The counterclaims in Cases Nos. B26, B32 and B73 were terminated pursuant to settlement agreements, see supra notes 86, 88 and 90.

negotiations under the Undertakings.[103] It held that, because Bank Markazi was "an entity of Iran," its practice could be "attributed to Iran as one of the parties to the Algiers Declarations."[104] The Iranian respondents that submitted counterclaims (or reserved the right to do so) in official cases were all either entities controlled by the Government of Iran or organs of the Iranian Government: the Ministry of PTT asserted the counterclaim in Case No. B23[105]; Bank Melli Iran reserved the right to submit a counterclaim in Case No. B25[106]; the Civil Aviation Organization asserted the counterclaim in Case No. B26[107]; the National Iranian Copper Industries Corporation ("NICIC") asserted the counterclaim in Case No. B31[108]; the "Islamic Republic of Iran" asserted the counterclaim in Case No. B32 "on behalf" of the Iranian Air Force (the statement of counterclaim was signed by the Deputy Defense Minister for Legal Affairs)[109]; the "Islamic Republic of Iran" asserted the counterclaim in Case No. B33 (the statement of counterclaim was signed by the Commander of the

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[103] 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 Democratic and Popular Republic of Algeria, 19 Jan. 1981, reprinted in 1 Iran-U.S. C.T.R. 13.

[104] United States of America, et al. and Islamic Republic of Iran, et al., Award No. 108-A16/582/591-FT (25 Jan. 1984), supra note 23, at 71.

[105] Supra note 85.

[106] Supra note 91.

[107] Supra note 86.

[108] Supra note 87. The counterclaimant in this case (NICIC), affirmed that it "is Iran in the sense of Article VII paragraph 3 of the Claims Settlement Declaration" and that it was "in a position from the inception to file with the Tribunal a claim against N.S.B. based on the obvious breach by a United States agency of contract for shipment of commodities purchased." See National Iranian Copper Industries Corporation (NICIC)'s Opinion concerning the validity of its Counterclaim notwithstanding the conclusion of National Bureau of Standard (NBS)'s claim in Case No. B/31 against NICIC, filed 24 May 1985.

[109] Supra note 88.

Air Force of the Islamic Republic of Iran)[110]; and the Ministry of Defense asserted the counterclaim in Case No. B73.[111]

129. Iran also argues that the filing of official counterclaims by the Parties does not constitute relevant subsequent practice because those counterclaims were filed purely as a "defence strategy."

130. This argument is not convincing. First, it is doubtful that the subjective intention of the parties is relevant when determining whether there was a subsequent practice of the parties according to Article 31(3)(b) of the Vienna Convention. Further, if the filing of official counterclaims was purely a "defence strategy," Iran should have preserved its jurisdictional position with respect to the Counterclaim in the present Case.

131. Finally, Iran argues that the fact that the Parties filed official counterclaims does not imply that the Tribunal has jurisdiction over such counterclaims, as the question of the jurisdiction of an international tribunal cannot be regarded as an inter partes question.[112] Iran adds that the Tribunal must decide, ex officio or proprio motu, whether it has jurisdiction over a case, even if the litigants are not in dispute as to the Tribunal's jurisdiction.

132. These arguments miss the point. It is true that the Tribunal examines whether it has jurisdiction over a case even if none of the litigants objected to it. This is precisely why, when asked to record a settlement between a private claimant and a State Party as an Award on Agreed Terms, the

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[110] Supra note 89.

[111] Supra note 90.

[112] See supra para. 45.

Tribunal examines whether it has jurisdiction over the matter.[113] Yet, if the two Parties that created the Tribunal, i.e., Iran and the United States, were to agree to submit a case to the Tribunal, then this would arguably be sufficient to grant the Tribunal jurisdiction over such case, as it would constitute an international agreement modifying the Algiers Declarations with respect to the particular case. But this is not the issue here. The issue here is one of interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. The Tribunal has found that Iran and the United States have interpreted the Claims Settlement Declaration as providing the Tribunal with jurisdiction to entertain official counterclaims. According to Article 31(3)(b) of the Vienna Convention, the Tribunal shall take into account this practice of the two Parties to the Algiers Declarations. Thus, it is necessary to examine the practice of the Parties in determining the correct interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. This does not make jurisdiction an inter partes question.

133. In light of the above, the Tribunal holds that there is a subsequent practice of the Parties establishing a common understanding regarding the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to hear official counterclaims.

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[113] See Islamic Republic of Iran and United States of America (Case No. A1), supra note 26, at p. 152:

> With regard to the first sub-issue, it is an undisputed fact that the extent of the Tribunal's jurisdiction has been determined by Iran and the United States in the Algiers Declarations, which contain detailed provisions on the jurisdiction of the Tribunal, and that, consequently, the Tribunal has no jurisdiction over any matter not conferred on it by the Declarations. Therefore, if requested to make an Award on Agreed Terms, the Tribunal will make such examination concerning its jurisdiction as it deems necessary.

e. The Meaning resulting from the Application of Article 31 of the Vienna Convention

134. As noted above, consideration of the ordinary meaning of the terms employed in Article II, paragraph 2, of the Claims Settlement Declaration, of the context of this provision, and of its object and purpose does not lead to a univocal conclusion as to the Tribunal's jurisdiction over official counterclaims. However, the subsequent practice of the Parties clearly supports interpreting Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to entertain official counterclaims. The Tribunal considers this factor to be decisive.

135. Hence, the Tribunal has jurisdiction to entertain counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration. In light of its holdings above, the Tribunal dismisses Iran's argument based on restrictive interpretation.[114] In any event, it is doubtful whether the principle of restrictive interpretation has any role to play in the interpretation of treaties today.[115]

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[114] Iran argues that there is an established principle of restrictive interpretation of provisions conferring jurisdiction. In this connection, Iran refers to United States of America and Islamic Republic of Iran, Award No. 106-B24-1, supra note 24, at 99, where Chamber One held:

> It is a well established principle of international law that provisions conferring jurisdiction upon an arbitral tribunal shall be interpreted in a restrictive manner. The question as to whether the Tribunal has jurisdiction over the claims in this case must be decided on the basis of this principle.

To the same effect, see also Lillian Byrdine Grimm and Islamic Republic of Iran, supra note 23, at 80; Alexander Lyons Lianosoff and Islamic Republic of Iran, Award No. 104-183-1 (20 January 1984), reprinted in 5 Iran-U.S. C.T.R. 90, 93; Iranian Customs Administration and United States of America, Award No. 105-B16-1, supra note 24, at 95. Chamber One did not refer to any authorities in support of this view.

[115] The Tribunal reiterates the doubt expressed in its Decision in United States of America, et al. and Islamic Republic of Iran, et al., Decision No. DEC 130-A28-FT, supra note 24, at para. 67 ("to the extent, if any, that the rule of restrictive interpretation has any role to play in the

3. Article III, Paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules

136. In light of the Tribunal's determination that it has jurisdiction over official counterclaims under Article II, paragraph 2, of the Claims Settlement Declaration, it is not necessary to examine whether Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) UNCITRAL Rules afford an independent basis for the Tribunal's jurisdiction over official counterclaims.[116]

B. Official Claims and Counterclaims Must be Outstanding on 19 January 1981

137. Although an express requirement that official claims be outstanding does not appear in Article II, paragraph 2, of the Claims Settlement Declaration, as it does with respect to private claims in Article II, paragraph 1, one can infer its existence from Article I of the Claims Settlement Declaration. Article I provides, in relevant part:

> Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this Agreement [19 January 1981] shall be submitted to binding

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interpretation of treaties today ..."). See authorities cited in note 17 of that Decision. See also Brownlie, Principles of Public International Law (6th ed.), Oxford, Oxford University Press, 2003, at 606 ("As a general principle of interpretation this [i.e., the principle of restrictive interpretation] is question-begging and should not be allowed to overshadow the textual approach: in recent years tribunals have given less scope to the principle"). In the Tribunal's view, the principle of restrictive interpretation of provisions conferring jurisdiction is just an instance of application of the principle of restrictive interpretation. The Tribunal does not consider that the approach taken by Chamber One in the early awards referred to by Iran (see supra note 114) ought to be followed today.

[116] The Tribunal has already made some comments on Article III, paragraph 2, of the Claims Settlement Declaration and Article 19(3) of the UNCITRAL Rules: see supra paras. 91-100. In view of these comments, it seems doubtful that Article 19(3) of the UNCITRAL Rules could constitute a basis for the Tribunal's jurisdiction over official counterclaims.

> third-party arbitration in accordance with the terms of this Agreement.[117]

138. Article I, therefore, contemplates that claims brought under Article II, including any official counterclaim brought under Article II, paragraph 2, were already in existence as of 19 January 1981, the date the Claims Settlement Declaration entered into force.

C. Official Counterclaims Must Arise Out of the Same Contractual Arrangements as the Claims

139. The Tribunal finds that its jurisdiction over official counterclaims is limited to counterclaims arising out of the contractual arrangements forming the subject matter of the main claim.[118]

D. The Counterclaim in the Present Case

140. Iran also contends that the Tribunal is without jurisdiction to entertain the Counterclaim in this Case. In this connection, Iran maintains that the United States has not established that the Counterclaim was outstanding on 19 January 1981 and that the Counterclaim does not arise out of the same contracts as Iran's claims in Case No. B1. Iran also argues that the Counterclaim is not cognizable.

141. In accordance with its powers under Article 21(4) of the Tribunal Rules, the Tribunal decides to join to the merits the issues of whether it has jurisdiction over the Counterclaim in the present Case, and of whether the Counterclaim is cognizable. In light of the above, the

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[117] Emphasis added.

[118] As noted earlier (see supra para. 52), both Parties agree that, if the Tribunal has jurisdiction over official counterclaims, then that jurisdiction is limited to counterclaims arising out of the contractual arrangements forming the subject matter of the main claim.

Tribunal need not decide now whether its jurisdiction over the Counterclaim would be limited to a set-off: that issue is also joined to the merits.

VII. AWARD

142. In view of the foregoing,

THE TRIBUNAL DECIDES AS FOLLOWS:

A. The Tribunal has jurisdiction to entertain official counterclaims if outstanding on 19 January 1981 and arising out of the contract(s) that form the subject matter of the claim(s).

B. All other issues addressed during the Hearing on 22-24 September 2003 - namely whether the Tribunal has jurisdiction over the Counterclaim in the present Case, whether the Counterclaim is cognizable, and whether, if the Tribunal does have jurisdiction over the Counterclaim, its jurisdiction is limited to a set-off - are joined to the merits.

C. A separate Order will be issued shortly to schedule further pleadings in this Case.

Dated, The Hague
09 September 2004

Krzysztof Skubiszewski
President

In the Name of God

Bengt Broms

Gaetano Arangio-Ruiz

Assadollah Noori

Concurring in part,
Dissenting in part.

In the Name of God

George H. Aldrich

Koorosh H. Ameli
Concurring in part,
Dissenting in part.
Separate Opinion

In the Name of God

Charles N. Brower

Mohsen Aghahosseini
Dissenting as to
the finding that the
Tribunal has jurisdiction
to entertain official
counterclaims.

Gabrielle Kirk McDonald