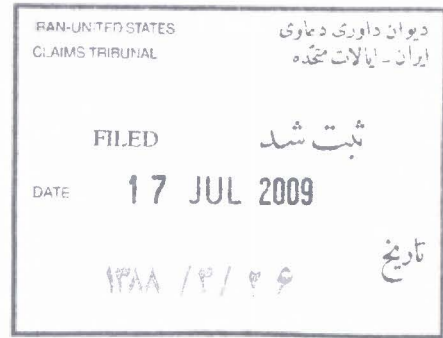


Cases Nos. A3, A8, A9, A14, and B61

Full Tribunal

Award No. 601-A3/A8/A9/A14/B61-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,
and
THE UNITED STATES OF AMERICA,
Respondent.



PARTIAL AWARD

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I. INTRODUCTION

1. At issue in these Cases are claims brought by the Islamic Republic of Iran (“Iran”) for compensation from the United States of America (“United States”) for losses that Iran alleges it suffered as a result of the refusal by the United States to license the export of certain properties that Iran asserts were owned by it and located in the United States or otherwise subject to the jurisdiction of the United States when the Algiers Declarations entered into force on 19 January 1981.¹ The properties that are the subject of dispute in these Cases are tangible properties of a military nature that were not at issue in other official (“B”) claims² involving Iran’s direct purchase of defense articles from the United States Government through its Foreign Military Sales (“FMS”) program.³ These military properties were subject to the United States export-control laws in effect prior to 14 November 1979.⁴ Included in these Cases are also claims by Iran relating to a small number of properties that were not subject to the United States export-control laws.

2. The Statements of Claim in Cases Nos. A3, A8, and A9 were filed on 15 January 1982, and the Statements of Claim in Cases Nos. A14 and B61 were filed on 19 January 1982.⁵ In these Cases, the Claimant seeks the export of military property in the possession of private parties in the United States. Alternatively, the Claimant

¹ Declaration of the Government of the Democratic and Popular Republic of Algeria (“General Declaration”), *reprinted in* 1 Iran-U.S. C.T.R. 3, 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”), *reprinted in* 1 Iran-U.S. C.T.R. 9, both dated 19 January 1981.

² Disputes between the two Governments as to the interpretation or performance of any provision of the General Declaration, under Paragraph 17 of the General Declaration and Article II, paragraph 3, of the Claims Settlement Declaration, are referred to as “A” cases, while disputes arising out of contractual arrangements between the two Governments for the purchase and sale of goods and services, under Article II, paragraph 2, of the Claims Settlement Declaration, are referred to as “B” cases.

³ Some of the properties at issue in these Cases may have originated from purchases under the FMS program.

⁴ *See* Paragraph 9 of the General Declaration, quoted *infra*, at para. 4.

⁵ The Tribunal consolidated all these Cases by Order of 30 December 1992. *See infra*, para. 15.

seeks compensation from the United States, including the replacement value of the subject property, lost investment in military projects, and other losses it alleges have resulted from the United States' refusal on 26 March 1981 to license the export of the Claimant's property under the United States laws applicable to defense articles. Iran estimated its claims for compensation in these Cases at approximately U.S.\$2.2 billion in its 2 July 1999 Reply to the United States' Consolidated Response in these Cases; that estimate has been subject to some variation in the course of the proceedings.

3. As shall be explained further below, these Cases concern a substantial amount of Iranian military properties identified in 61 claims in eight clusters. The subject property includes, *inter alia*, a broad range of weaponry, aeronautics equipment, communications devices, materials and plans for use in constructing military sites, and intelligence equipment. Iran had contracted for the purchase of most of these properties in the United States prior to the Islamic Revolution in 1979. The properties at issue in these Cases include both new equipment that had never been received by Iran and items that Iran had sent to the United States for repair or upgrading or as prime equipment to be used for the design and production of test equipment and other materials under certain military contracts between Iran and private United States companies.

4. The Parties agree that Iran's claims in the present Cases are based on General Principle A and Paragraph 9 of the General Declaration. Those provisions provide as follows:

General Principle A

Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

Paragraph 9

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

The interpretation of these provisions of the General Declaration was also at issue in a related factual context in *Islamic Republic of Iran and United States of America*, Case No. A15 (II:A) (“Case No. A15 (II:A)”). In *Islamic Republic of Iran and United States of America*, Award No. 529-A15-FT (6 May 1992) (“Partial Award in Case No. A15 (II:A and II:B)”)⁶, the Tribunal held, citing the precedent of its Partial Award in *Islamic Republic of Iran and United States of America*, Award No. 382-B1-FT (31 Aug. 1988) (“Partial Award in Case No. B1 (Claim 4)”)⁷, that the United States has an implicit obligation under the General Declaration to compensate Iran for losses it incurs as a result of the refusal by the United States to license exports of Iranian properties subject to United States export-control laws applicable prior to 14 November 1979.⁸ Also at issue in these Cases is the relevance of the United States Treasury Regulations of 26 February 1981, held to be in certain respects unlawful in the Partial Award in Case No. A15 (II:A and II:B).

II. THE PROCEEDINGS

5. Case No. B61 was one of a series of claims filed during 1982 in which Iran alleged a number of different violations of the Algiers Declarations by the United States. The Case was filed on 19 January 1982 during the six-month period when official “B” claims based on contracts between Iran and the United States could be filed before the Tribunal. It was not clear at the time whether the dispute involved

⁶ *Islamic Republic of Iran and United States of America*, Award No. 529-A15-FT (6 May 1992), reprinted in 28 Iran-U.S. C.T.R. 112.

⁷ *Islamic Republic of Iran and United States of America*, Award No. 382-B1-FT (31 Aug. 1988), reprinted in 19 Iran-U.S. C.T.R. 273.

⁸ See Partial Award in Case No. A15 (II:A and II:B), para. 65, 28 Iran-U.S. C.T.R. at 136.

contracts between the two Governments; the Tribunal Registry designated the Case as an official “B” claim and assigned it to Chamber One.

6. In its Statement of Defense, filed on 13 October 1982, the United States noted that Case No. B61 was not a proper “B” claim because it involved no contractual arrangements between the two Governments of the type required for such claims, but rather was a dispute concerning the interpretation of, or compliance with, the Algiers Declarations over which the Tribunal has jurisdiction pursuant to Article II, paragraph 3, of the Claims Settlement Declaration. The United States requested that the Tribunal redesignate Case No. B61 as an interpretive “A” case and assign it to the Full Tribunal. In response, on 6 December 1983, Iran argued that the United States was also involved as a contracting party to the contracts underlying the properties at issue in these Cases.

7. On 27 February 1984, the United States filed its “Renewal of Request for Relinquishment of Claim to Full Tribunal, and Request for Production of Documents and Modification of Schedule,” in which it renewed its request to redesignate Case No. B61 as an “A” case and to relinquish it to the Full Tribunal. In that request, the United States argued that the Case “raises an important question of interpretation and performance under the Algiers Accords, affecting properties with a substantial value and having important foreign policy implications,” and should properly be heard before the Full Tribunal. The United States pointed out that, under Presidential Order No. 1, as amended by Presidential Order No. 8, only the Full Tribunal has jurisdiction over any disputes or questions arising out of Article II, paragraph 3, of the Claims Settlement Declaration. The United States argued that Article III, paragraph 1, of the Claims Settlement Declaration only permits “claims” to be decided by Chambers, and that Case No. B61 presents a “dispute” under Article II, paragraph 3, as opposed to a “claim” based on contractual arrangements between Iran and the United States under Article II, paragraph 2.

8. On 2 March 1984, Chamber One invited Iran to comment on the United States’ request for relinquishment and scheduled a meeting for the Parties to identify contracts and properties that were at issue as well as “to reconcile differences and to

identify any discrepancies.” The Chamber requested that Iran submit documents in support of its claim prior to that meeting. The Chamber reserved for a later date a decision on whether to relinquish Case No. B61 to the Full Tribunal.

9. Iran made its substantive response to the United States’ 27 February 1984 request for relinquishment on 6 May 1986; in that response, Iran acknowledged that the subject-matter of the Case is “the violation of the obligations set forth in paragraph 9 of the Declaration by the Government of the United States of America.” Iran argued that the United States’ relinquishment request “is not capable of being heard and accepted and . . . [that] Chamber One should continue its adjudication of the case until the final stage and issue of judgment.” Despite this argument, however, Iran then stated that “[n]onetheless the Claimant has no objection to the relinquishment of the case to the Full Tribunal.” In its Order of 21 January 1987, the Chamber again “reserved for a later decision whether to relinquish jurisdiction to the Full Tribunal.”

10. In its 21 January 1987 Order, the Chamber also requested, *inter alia*, (1) that the Parties meet to identify the contracts and any Iranian property located in the United States that were at issue in Case No. B61; and (2) that the Parties submit a joint report that would describe each contract and, in so far as possible, each item of property and indicate each item’s owner and location. The Parties submitted their Joint Report on 21 July 1989.

11. As the Parties prepared the Joint Report in Case No. B61 in Chamber One, Parts II:A and II:B of Case No. A15 were proceeding together towards hearing before the Full Tribunal. At issue in Part II:A of that Case was whether certain of the Executive Orders issued by the President of the United States on 19 January 1981 or subsequent Treasury Regulations issued to modify its earlier blocking Orders and Regulations violated the United States’ obligations under the Algiers Declarations to arrange for the transfer to Iran of all Iranian tangible properties subject to the jurisdiction of the United States, and/or to compensate Iran for its failure to do so. While Part II:A of Case No. A15 primarily concerned non-export-controlled properties, it also covered some export-controlled properties, including duplicative

military properties in the possession of certain United States private companies – namely, Behring International, Inc., The Boeing Company, and E-Systems, Inc. – also claimed in Case No. B61, as well as a substantial amount of largely non-export-controlled property that is not at issue in Case No. B61.

12. On 25 May 1990, Iran filed a “Request to Expedite the Consideration of the Case,” in which it asked for a Hearing in Case No. B61. The United States’ response of 9 July 1990 opposed Iran’s Request and renewed its call to have the Case redesignated as an “A” case and relinquished to the Full Tribunal, noting that similar properties subject to export controls were also at issue in Case No. A15 (II:A). The United States suggested that, if the Chamber did not accede to its relinquishment request, the “most sensible course is to await the Full Tribunal’s decision in Case No. A/15 (II:A & II:B).” It also argued that the determination of the legal issues in Case No. B61 should be made in light of the findings of the Full Tribunal in Case No. A15 (II:A and II:B). In response, Iran disputed the assertion that Case No. B61 should be affected by Case No. A15 (II:A), asserting that “[t]he property at issue in [Case No. A15(II:A)] is ‘non-military tangible property’ while the equipment sought [in Case No. B61] is of a military nature.” Iran argued instead that the Tribunal’s Partial Award in Case No. B1 (Claim 4), a case involving military properties for which Iran had contracted with the United States and that were in the possession of the United States, determined liability in Case No. B61. In its reply, the United States pointed out that Case No. A15 (II:A) did in fact involve some military properties, and that Iran was pursuing duplicative claims in the two Cases. The United States noted in this context that a key legal issue in Case No. B61 would be decided in Case No. A15 (II:A and II:B). On 16 January 1991, Chamber One, noting the possible overlap between the two Cases, decided to await the decision in Case No. A15 (II:A and II:B) before ruling on the United States’ relinquishment request or scheduling further proceedings.

13. Parts II:A and II:B of Case No. A15 were heard on 21, 22, and 23 May 1991 in the Peace Palace, The Hague. On 6 May 1992, the Full Tribunal issued its Partial Award in Case No. A15 (II:A and II:B), in which it held with respect to Part II:A that the United States has an implicit obligation under the General Declaration to

compensate Iran for losses it incurs as a result of the refusal by the United States to permit Iran to export its properties subject to United States export-control laws applicable prior to 14 November 1979.⁹

14. After the Full Tribunal issued its Partial Award in Case No. A15 (II:A and II:B), Chamber One invited the Parties in Case No. B61 to make proposals for further proceedings in light of that Partial Award. The United States at that time proposed that Cases Nos. A15 (II:A and II:B) and B61 be procedurally linked because Case No. A15 (II:A), “not only provides the rule of decision on liability for B/61, it also provides a roadmap for the Tribunal and the parties to consider the remaining issues.” The United States also stated that “the Full Tribunal’s decision in Case A/15 (II:A & II:B) is essentially dispositive of liability issues in Case B/61,” and that the “criteria for damages are identical in both cases.” The United States suggested that “either B/61 should be formally consolidated with A/15 (II:A & II:B) for joint consideration of damage issues, presumably with A/15 (II:A & II:B) properties being considered first and serving as precedents; or, in the alternative, B/61 should be transferred to the Full Tribunal to be decided in parallel with A/15 (II:A & II:B), using the same parameters for resolution of damage issues.” Iran argued, however, that, because the issue of the United States’ liability had already been considered and decided in Cases Nos. B1 (Claim 4) and A15 (II:A & II:B), Chamber One should promptly decide the dispute at least with respect to the fully identified properties.

15. On 18 November 1992, Chamber One relinquished to the Full Tribunal jurisdiction over Case No. B61. Subsequently, by Order of 30 December 1992, the Tribunal consolidated Cases Nos. A3, A8, A9, A14, and B61 (hereinafter referred to as “Case No. B61” or “this Case”), all of which involved claims with respect to similar Iranian tangible properties in the possession of private American entities, for purpose of hearing and decision in the present proceedings by the Full Tribunal pursuant to Article II, paragraph 3, of the Claims Settlement Declaration. While Case No. B61 was not given a new “A” designation when consolidated, the Tribunal recognized it to be an “A”-type case concerning a dispute involving the interpretation

⁹ Partial Award in Case No. A15 (II:A and II:B), para. 77 (g), 28 Iran-U.S. C.T.R. at 141.

of, and compliance with, the Algiers Declarations. In that Order, the Tribunal noted that Iran had expressed a wish to pursue all these claims separately from Case No. A15 (II:A) because of its view that the consolidated Case No. B61 dealt with military properties and consequently fell under the precedent of the Partial Award in Case No. B1 (Claim 4). The Tribunal also noted the United States' argument that Case No. B61 should either be consolidated or proceed in parallel with Case No. A15 (II:A). A Pre-Hearing Conference in this Case took place on 10 February 1993.

16. By Order of 8 April 1993 in Case No. B61, the Tribunal established the filing schedule and addressed issues of duplication. Taking note of the duplication of the claims at issue, the Tribunal instructed Iran "to refrain from including into its pleadings any properties that are also at issue in Cases Nos. A15 (II:A) and B43 and/or Case No. B1 (Claims 2 & 3), which are procedurally more advanced than these consolidated Cases, and/or Case No. B1 (Claim 4), which has already been decided by the Tribunal." The Tribunal also ordered Iran to file its "final consolidated submission . . . covering all the issues to be decided in these Cases, including the legal and factual bases of the Respondent's liability, the remedies sought, and, in case the Claimant seeks compensation as an alternative to specific performance, the amount of compensation and the methods of valuation used to establish that amount."

17. On 28 February 1994, Iran submitted its Consolidated Submission in Case No. B61 addressing issues of liability and damages. In this filing, Iran relied primarily on the precedent established by the Tribunal's Partial Award in Case No. B1 (Claim 4) in arguing the United States' liability. Notwithstanding the Tribunal's 8 April 1993 Order, Iran continued to address the various claims that were duplicated in Case No. A15 (II:A). Iran further maintained its argument that the "Military Award" in Case No. B1 (Claim 4) was "dispositive of the contentious issues in Case B 61" as opposed to the "Non-Military Award" in Case No. A15 (II:A). In this regard, Iran noted that, ten years earlier, in an Order dated 24 January 1984 in Case No. A15 (II:A and II:B), the Tribunal had indicated "that the proceedings [in Case No. A15 (II:A and II:B)]

shall deal only with non-military tangible property.”¹⁰ Relying on the Partial Award in Case No. B1 (Claim 4), Iran argued that it was entitled to the “full monetary equivalent of the items in issue.”

18. On 18 April 1995, the United States objected to Iran’s continued inclusion in Case No. B61 of properties that were also claimed in Case No. A15 (II:A). On the same day, the United States submitted its Consolidated Response in Case No. B61, stating that, in its view, the Tribunal had not followed the United States’ earlier suggestion that “the Tribunal’s ruling in [Case No. A15 (II:A)] should guide the issue of liability in Case B/61.” The United States argued that Iran had recognized that the Tribunal did not regard the decision on liability in Case No. A15 (II:A) as dispositive, pointing out that “Iran devotes over half of its Brief to its arguments regarding the bases for United States liability.” The United States consequently shifted its position to argue that the Tribunal’s ruling in its Partial Award in Case No. A15 (II:A and II:B) was incorrect and that the underlying reasoning relating to export-controlled property should be reconsidered as it applied to Case No. B61.

19. In response to the United States’ 18 April 1995 Request to Dismiss Certain Claims from Case No. B61, Iran argued that “[t]he subject matter of Case A15 (II.A) is non-military items and that of Case B61 military goods This being the case, to the extent the United States demonstrates that military items with identical particulars have been put in issue in Case A/15 (II:A), they can be struck off that case and be solely adjudicated in the present case.” On 14 May 1996, the Tribunal requested that the Parties, “through a meeting of their experts,” resolve the question of the duplicative claims and how they should be dealt with. The United States responded that it did not believe a meeting of experts was necessary to accomplish the task and that the Tribunal should enforce its earlier Order. In its “Comments on Tribunal’s Order of 14 March 1996,” Iran continued to argue that the proper “demarcation line” between Cases Nos. A15 (II:A) and B61 was that the former dealt

¹⁰ The full text of paragraph 5 of the Tribunal’s Order of 24 January 1984 in Case No. A15 (II:A and II:B) reads: “*Until otherwise decided* the proceedings with regard to Claims II:A and II:B of Case No. A-15 shall deal only with non-military tangible property” (emphasis added).

only with non-military items. In that connection, Iran stated that “[t]he military items in a non-military case [A15 (II:A)] cannot even be considered as having belonged with that case for having been raised in a wrong proceeding.”

20. In order to resolve the matter of duplicative claims in Cases Nos. A15 (II:A) and B61, Iran on 26 December 1996 filed a letter in Case No. A15 (II:A), stating that, “[c]onsidering the Respondent’s contention that certain claims subject of these Cases are duplicated in Case No. B61, the Claimant informs the Tribunal that it will not pursue any further the claims Nos. G-1, G-2, G-3, G-4, G-5, G-6, G-9, Supp. (1)-1, Supp. (1)-2, and Supp. (2)-68 here to the extent that they are duplicated and/or are of [a] military nature; they will be pursued in Case No. B61.”

21. Nevertheless, some export-controlled properties remained in Case No. A15 (II:A) after the above-referenced claims were dropped. These include Claim G-019/Case No. B43 (SRI International), Claim G-102 (General Atomic Company), Claim G-103 (Geodata), Claim G-112 (Imaging Systems International), and Claims Supp. (2)-38 (Applied Hydropneumatics). The SRI International claim involves a contract with the Iranian Ministry of Posts, Telegraph and Telephone for two vans equipped with advanced electronic eavesdropping equipment. The General Atomic claim involves nuclear reactor fuel not intended for military use, but export-controlled under the Atomic Energy Act. The Geodata claim also appears to involve non-military, export-controlled items relating to a computer system designed to locate uranium deposits. These properties are regulated, according to the United States, under the Export Administration Act of 1979 and the Nuclear Non-Proliferation Act of 1978. The Imaging Systems International claim involves image-processing equipment that Iran’s Plan and Budget Organization purchased from it. The Applied Hydropneumatics claim involves a contract with Iranian National Airlines for hydraulic test equipment for aircraft that, according to the United States, are dual-use Munitions-List items. The total value for which Iran seeks compensation with respect to the remaining export-controlled properties in Case No. A15 (II:A) is approximately

U.S.\$21 million. By contrast, in Case No. B61, where the bulk of the items at issue are export-controlled, Iran seeks U.S.\$2.2 billion.¹¹

22. By Order of 18 March 1998, the Tribunal, in response to Iran's document-production request of 8 April 1997, ordered that the United States produce the official 1982 census reports for the identification of Iranian properties subject to its jurisdiction (reports on United States Treasury Form TFR-625 filed in compliance with Section 535.625 of the Iranian Assets Control Regulations),¹² "insofar as they relate to items of property that have already been made the subject of a claim in these Cases." Iran submitted its Reply to the United States' Consolidated Response on 2 July 1999. The United States submitted its Rebuttal to Iran's Reply on 1 September 2003. The Hearing was then scheduled to begin in this Case on 2 May 2005. On 1 February 2005, Iran made a submission of "Supplemental Documents." By Order of 1 April 2005, the Tribunal (1) admitted into evidence Iran's "Supplemental Documents" and directed that Iran "submit no further evidence or memorial unless so authorized in advance by the Tribunal"; (2) permitted the United States to submit a response to Iran's "Supplemental Documents" and directed that "such response . . . be limited to those documents"; and (3) postponed the commencement of the Hearing in this Case to 12 September 2005. The United States submitted its Response to Iran's Supplemental Documents on 1 March 2006. Iran subsequently requested that the Tribunal reject as inadmissible the United States' 1 March 2006 Response.¹³ In its Order of 27 April 2006, the Tribunal stated that "any arguments and evidence filed by the Respondent on 1 March 2006 . . . that is not submitted in response to the Claimant's documents shall be declared inadmissible."

23. Sixty days of Hearing took place between 12 September 2005 and 2 March 2007 at the Iran - United States Claims Tribunal in The Hague. The Hearing was

¹¹ The monetary relief sought in Case No. B61 includes a claim for the replacement value of the export-controlled properties at issue and a claim for "other losses."

¹² The reports were submitted to the Tribunal by the United States on 22 June 1998 and released to Iran pursuant to the Tribunal's Order of 9 November 1999.

¹³ The Tribunal addresses Iran's request *infra*, at paras. 91 *et seq.*

divided into two parts. The first part was devoted to the General Issues in this Case, and the second part dealt with the Individual Claims at issue in this Case.

24. During the part of the Hearing devoted to General Issues, the United States requested that the Tribunal, prior to hearing the Individual Claims at issue, render early decisions on a number of questions, namely: whether the United States has an obligation to compensate Iran for losses it incurs as a result of the United States' refusal to grant permission for the export of Iran's export-controlled properties; dismissal of some or all of Case No. B61 for lack of proof; dismissal of Iran's claims for failure to cooperate; timeliness of certain claims and evidence submitted by Iran after 1994; dismissal of Iran's claims for consequential damages; and a request to transfer to Case No. A15 (II:A) any non-export-controlled properties that might be at issue in this Case. By Order of 20 December 2005, the Tribunal ruled that any claims not identified in Iran's 1994 Consolidated Submission, including claims with respect to items of property not identified in that submission, and related evidence, shall be declared inadmissible in this Case. The Tribunal further ruled that any evidence produced by Iran after 1994 shall be admitted insofar as "[it] relates to items of property that were identified and made the subject of a claim in Iran's 1994 Consolidated Submission." In the same Order, the Tribunal determined that it would decide all other requests made by the United States during that part of the Hearing devoted to General Issues "after hearing the individual claims in [this Case]."

25. The second part of the Hearing was divided into eight clusters of Individual Claims, which consisted of the following: (1) the IBEX cluster, which was heard from 1 May through 12 May 2006, involved properties associated with a program of the Iranian Air Force to modernize and expand its existing electronic intelligence-gathering system with a new high-technology system called IBEX;¹⁴ (2) the Iran Aircraft Industries ("IACI") cluster, which was heard from 11 September through 20 September 2006, involved defense articles purchased from various contractors by

¹⁴ The private parties involved in this cluster include: ARGOSystems, Inc.; E-Systems, Inc.; Ford Aerospace & Communications Corporation; Harris International Telecommunications, Inc.; Itek Corporation; Pan American World Airways, Inc.; Rockwell International Systems, Inc.; Sylvania Technical Systems, Inc.; and Watkins-Johnson Company.

IACI;¹⁵ (3) the Iran Helicopter Support and Renewal Company (“IHSRC”) cluster, heard from 30 October through 17 November 2006, involved defense articles purchased by the IHSRC, much of which was routed through Bell Helicopter International, which served as Iran’s freight forwarder for those properties in the late 1970s;¹⁶ (4) the Iranian Air Force (“IAF”) cluster, heard from 1 December through 14 December 2006, involved properties purchased from various contractors by the IAF;¹⁷ (5) the Iran Electronic Industries (“IEI”) and (6) Iran’s Ministry of Defense (“MOD”) clusters, heard from 5 February through 13 February 2007, involved defense articles purchased by IEI and MOD;¹⁸ (7) the Iranian Navy cluster, heard from 16 February through 23 February 2007, involved properties purchased by the Iranian Navy; and (8) the Victory Van cluster, heard from 26 February through 2 March 2007, concerned over 7,000 items of property that had been stored at the warehouses of Behring International, Inc., Iran’s freight forwarder, in Edison, New Jersey as of November 1979.

III. FACTS AND CONTENTIONS

A. *Background*

26. Prior to 1979, Iran and the United States maintained close political, military, and economic ties. The Government of Iran purchased vast quantities of military

¹⁵ The private parties involved in this cluster include: AeroSystems Engineering, Inc.; Avco Corporation-Avco Lycoming Division; BLH Electronics; General Electric Company; Magnaflux Corporation; and Raytheon Company.

¹⁶ The private parties involved in this cluster include: Bell Helicopter International, Inc.; Bell Helicopter Textron (Division of Textron, Inc.); Aeromaritime, Inc.; United Technologies International, Inc.; Sundstrand Data Control, Inc.; Hydraulic Research Textron; Communications Components Corporation; Bendix Corporation; Plessey Dynamics Corporation; International Aerospace, Inc.; American Avitron, Inc.; Instrument Specialties Company, Inc.; JVC Industries; Walter Kidde & Company, Inc.; and Gould Marketing, Inc.

¹⁷ The private parties involved in this cluster include: Litton Systems, Inc.; Near East Technological Services U.S.A., Inc.; Lockheed Corporation; Westinghouse Electric Corporation; Thiokol Corporation; Stanford Technology Corporation; CBA International Development Corporation; Cubic Corporation. The IAF cluster also involves properties located at McGuire Air Force Base in New Jersey.

¹⁸ The private parties involved in this cluster include: The Singer Company; FMC Corporation; Hughes Aircraft Company; and Continental Mechanical Corporation.

goods directly from the United States Government and from private parties in the defense industry within the United States. Most of the defense articles involved in this Case were purchased during this period of good relations. In 1978, however, a broad movement of social unrest developed in protest against the authoritarian policies of the Shah's government in Iran. The civil unrest of 1978 precipitated the Islamic Revolution, leading to the Shah's departure from Iran on 16 January 1979 and the Ayatollah Khomeini's return from exile on 1 February 1979. As a result of the Islamic Revolution, a new regime was established on 11 February 1979, formalized by referendum as the Islamic Republic of Iran on 1 April 1979.

27. As a result of the Islamic Revolution, the alliance between the two Governments continued on a more tentative basis. Based in part on historical perceptions of foreign interference in Iranian domestic affairs and the close relationship of the Shah and the United States, hostility toward the United States continued to percolate in various segments of the Iranian population. On 14 February 1979, the United States Embassy in Tehran was seized by a Marxist revolutionary group. The leader of the Islamic Revolution, the Ayatollah Khomeini, immediately denounced the seizure, and a group of his followers repelled the attack and removed the occupiers, allowing the United States to retake control over the premises. The Prime Minister of the Islamic Republic of Iran on 11 March 1979 officially communicated his regrets for the incident to the United States Ambassador and stated that steps had been taken to ensure that such an incident could not occur again in the future.

28. In the Spring and Summer of 1979, while its policies vis-à-vis the United States remained uncertain, the new Iranian Government loosened its financial and military ties with the United States by significantly reducing its armament purchasing activity, canceling some contracts, and revising others. By the early Spring of 1979, the United States had temporarily halted consideration of most, but not all, Iranian applications for export licenses for military items pending clarification of the situation in Iran and its effect on United States interests. According to the United States, while some export licenses for Iranian-owned military equipment were granted in the following months, the applications were subjected to additional levels of review

within the State Department, Commerce Department, Defense Department, and the United States Arms Control and Disarmament Agency.

29. On 22 October 1979, the United States admitted the former Shah to its territory for medical treatment, causing a further deterioration in relations between the two Governments. On 4 November 1979, the United States Embassy was seized again by a militant group describing themselves as “Muslim Student Followers of the Imam’s Policy”; this time, the Iranian Government did not take any action to facilitate the release of the Embassy personnel, triggering a prolonged crisis between the two Governments. In response to the Embassy seizure, the United States Government took steps effectively to block the export of any Iranian-owned properties subject to the export-control laws of the United States.

30. The Parties disagree sharply on the course of events that took place in the immediate aftermath of the 4 November 1979 seizure of the United States Embassy. What follows is a description of evidence proffered by the United States on this point. The Director of the Department of State Office of Munitions Control (“OMC”)¹⁹ at the times here relevant, Mr. William R. Robinson, testified in an affidavit that, after 4 November 1979, when the United States Embassy in Tehran was seized, the United States informally halted processing of all pending applications for commercial exports of defense articles to Iran.²⁰ Mr. Robinson stated that, by 11 November 1979, at the latest, the United States Department of State had outlined the steps necessary to suspend all licenses for export to Iran. Further, the United States produced contemporaneous newspaper reports, according to which the United States announced

¹⁹ The Office of Munitions Control was responsible for reviewing applications for licenses for the export to foreign countries of articles regulated by the United States Arms Export Control Act. On 1 January 1990, the Office of Munitions Control changed its name to the Office of Defense Trade Controls and in 2003 to the Directorate of Defense Trade Controls.

²⁰ Together with Mr. Robinson’s affidavit, the United States produced the copy of a 12 March 1987 letter from Mr. Robinson to a Washington D.C. attorney, in which Mr. Robinson accounted for the number of export licenses issued during 1979, noting that 68 licenses had been issued. In his letter, he stated that one license had been issued in November 1979. He did not specify the date of that license. At the end of his letter, Mr. Robinson stated that “[a]ll licenses were suspended on November 28, 1979,” noting a formalization of the earlier decision to suspend exports. Mr. Robinson passed away before the Hearing took place in this Case.

on 8 November 1979 that it was halting shipments to Iran of military equipment spare parts.²¹

31. According to an affidavit by Dr. Zbigniew Brzezinski, National Security Adviser to United States President Jimmy Carter, and the Hearing testimony of Lieutenant General William A. Odom (Ret.), military assistant to Dr. Brzezinski and senior member of the White House National Security Council at the times here relevant, the President's Special Coordination Committee, established to deal with issues requiring coordination of options and the implementation of Presidential decisions in connection with sensitive national security issues,²² addressed all critical issues related to the crisis and considered actions that the United States could take in response to the 4 November 1979 seizure of the United States embassy. Lt. Gen. Odom (Ret.) testified that cutting off arms transfers and munitions supplies to Iran was one of the actions the Committee considered. Dr. Brzezinski testified that, on 8 November 1979, the White House announced the suspension of shipment of all military equipment purchased by Iran from the United States, and that the United States Defense Department implemented that decision by instructing the United States Army, Navy, and Air Force to suspend the release of materiel for shipment to Iran. Further, Dr. Brzezinski, referring to handwritten notes of President Carter on the President's copy of the Minutes of the meeting of the Special Coordination Committee held on 12 November 1979, stated that the President had directed that the proposal for an "unofficial economic embargo" against Iran be expedited, and that the United States "be very firm on this." Lt. Gen. Odom (Ret.) testified that, on 12 November 1979, President Carter directed that the transfer of all military equipment and parts to Iran be cut off; Lt. Gen. Odom (Ret.) stated that, on the same day, Dr. Brzezinski conveyed that directive to the United States Departments of State and Defense. Thus, the United States asserts, President Carter invoked his authority under Section 38 of the Arms Export Control Act to withhold export of the military articles

²¹ *U.S. Said to Halt Arms Supply*, N.Y. TIMES, 9 Nov. 1979, at A14; John M. Goshko and Don Oberdorfer, *Carter Trip to Canada Off*, WASH. POST, 9 Nov. 1979, A1, A27.

²² Dr. Brzezinski acted as chairman of the Special Coordination Committee and Lt. Gen. Odom was a member.

on 12 November 1979 at the latest, and the regulatory actions in implementation of that determination followed in the weeks ahead.

32. A licensing officer in the OMC²³ at the times here relevant, Rose Biancaniello, testified in an affidavit that, on 12 November 1979, the United States Secretary of State issued an oral decision that United States companies be notified that all exports of defense articles to Iran were to be immediately cut off. Ms. Biancaniello attached to her affidavit a document, which she identified as a handwritten list dated 12 November 1979, containing the names of a number of companies that held licenses for the export of defense articles to Iran as of that date. She testified that the list had been compiled by two OMC officers to identify telephone calls that they were to make, and as a record of telephone calls that they in fact made, on 12 November 1979, to license-holders instructing them immediately to halt shipments of defense articles identified on the license to Iran. Ms. Biancaniello stated that any direction to companies exporting defense articles to foreign countries temporarily to halt shipment of such articles prior to a formal suspension of export licenses would have been immediately effective as a stopgap measure until the official revocation of licenses could be completed; at that time, the oral notification to suspend shipments was considered official as a regulatory matter.

33. Iran disputes the accuracy and reliability of the United States' account of the facts underlying the status of its export-controlled defense articles in the United States prior to 14 November 1979. According to Iran, the United States took no formal legally binding steps pursuant to the Arms Export Control Act to halt Iran's exports during the period prior to 14 November 1979. Iran argues that the only way to guarantee that private freight forwarders in the United States would not ship military equipment to Iran was for the OMC to suspend export licenses; but the legally binding suspension of export licenses, which is a formal legal act provided for under Section 42 of the Arms Export Control Act, did not occur until 28 November 1979 – thus, well after 14 November 1979. In support, Iran points, *inter alia*, to the following evidence: (1) a memorandum dated 9 November 1979 from Lieutenant General Ernest

²³ See *supra*, note 19.

Graves, Director of the United States Defense Security Assistance Agency, to the United States Secretary of Defense, which the United States submitted together with the affidavit of Zbigniew Brzezinski, stating that “the only way to guarantee that the freight forwarders do not move materiel over an extended period is for the [OMC] to suspend the export licenses”; (2) the 12 November 1979 Minutes of the meeting of the Special Coordination Committee, also submitted by the United States together with the affidavit of Zbigniew Brzezinski, stating that the Special Coordination Committee had agreed that the United States Departments of State and Defense “should . . . informally stop or delay any shipments without taking any formal action”; (3) President Carter’s handwritten notes on his copy of those Minutes, directing Dr. Brzezinski to expedite a proposal for an “unofficial economic embargo” against Iran; (4) the statement by the Director of the OMC, Mr. William B. Robinson, in his affidavit that, “[a]fter November 14, 1979, the OMC suspended all outstanding licenses for export of military equipment to Iran”; and (5) a letter that Mr. Robinson wrote to a Washington D.C. attorney on 12 March 1987,²⁴ stating that “68 licenses to permanently export defense articles to Iran were granted from January 2, 1979 through November 27, 1979,” and that “[a]ll licenses were suspended on November 28, 1979.”

34. Continuing, Iran argues that, right up to 14 November 1979, it maintained the same expectations that it would be able to export its defense articles located in the United States as it had when it entered into the contracts with private United States companies for the repair and/or purchase of those properties. Iran asserts that no legal action was taken to suspend exports until 14 November 1979, when the United States undertook formal measures to block all of Iran’s properties located within United States jurisdiction.

35. On 14 November 1979, President Carter took a broad regulatory action in response to the crisis, freezing all Iranian assets in the United States under Executive Order 12170, which blocked the transfer of “all property and interests of the Government of Iran, its instrumentalities and controlled entities and the Central Bank

²⁴ See *supra*, note 20.

of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States (“1979 Freeze Order”). The 1979 Freeze Order remained in effect until the signing of the Algiers Declarations on 19 January 1981.

36. On 19 January 1981, the two Governments adhered to the Algiers Declarations²⁵ resolving many aspects of the crisis. Under General Principle A of the General Declaration, the United States agreed to “restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979” and “to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.”²⁶ Under Paragraph 9 of the General Declaration, the United States specifically undertook to “arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.”²⁷

37. Simultaneous with the signing of the Algiers Declarations, President Carter signed and issued Executive Orders Nos. 12279, 12280, and 12281 to begin the process of implementing the General Declaration, directing the transfer of Iranian Government assets. For the purpose of implementing those Executive Orders, the United States Department of the Treasury on 26 February 1981 issued Regulations²⁸ that revoked the 1979 Freeze Order and further specified the order to transfer Iranian properties. The Regulations defined the properties whose transfer was directed to include “all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts.”²⁹ Properties that were exempted from the transfer directive comprised (1) properties as to which Iran was not the sole owner,³⁰ (2) properties owned by Iran but

²⁵ See *supra*, note 1.

²⁶ General Declaration, General Principle A, *supra*, para. 4.

²⁷ General Declaration, Paragraph 9, *supra*, para. 4.

²⁸ 31 C.F.R. Part 535.

²⁹ 31 C.F.R. § 535.333(a) (1981).

³⁰ Partial Award in Case No. A15 (II:A and II:B), para. 43, 28 Iran-U.S. C.T.R. at 127.

where the right of possession was contested on the basis of liens, defenses, counterclaims, set-offs, or similar reasons,³¹ and (3) properties subject to United States export-control laws.³² On 22 July 1982, the United States promulgated further Treasury Regulations, authorizing the issuance of licenses for the sale of Iranian properties by the private holder to exercise such rights if certain conditions were met.³³

38. In the months after the signing of the Algiers Declarations, there was some diplomatic communication between the two Governments regarding the status of the privately held export-controlled properties, which took place as part of a larger conversation about Iran's military property, most of which, unlike the properties at issue in this Case, was in the possession of the United States.

39. Prior to 26 March 1981, the Algerian Embassy in Washington, D.C., acting as an intermediary between the two Governments, requested an official notification of the United States' position on the export of Iranian-owned military equipment from the United States to Iran. On 26 March 1981, American officials met with the Chargé d'Affaires of the Algerian Embassy to notify Iran that the United States would not

³¹ 31 C.F.R. § 535.333(b)-(c). See also Partial Award in Case No. A15 (II:A and II:B), para. 44, 28 Iran-U.S. C.T.R. at 127-28.

³² 31 C.F.R. § 535.215.

³³ 31 C.F.R. § 535.540 (1982). In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal held that it was not unlawful to exempt from the Paragraph-9 transfer directive properties as to which Iran had only a partial or contingent ownership, nor was it unlawful to exempt properties subject to export controls. The Tribunal held, however, that it was unlawful to exempt properties owned solely by Iran but as to which its right to possession was contested by the holders of such properties. With respect to Treasury Regulations that permitted the sale of Iranian properties by the holders of those properties under certain conditions and pursuant to treasury licenses, the Tribunal held that they were not *per se* inconsistent with the United States' obligations under the General Declaration, but the Tribunal stated that it was not in a position at the time to determine whether any licenses authorizing sales pursuant to those Regulations were either consistent or inconsistent with the obligations of the United States under the General Declaration. The Tribunal also noted that, if any holder of Iranian property receiving a license to sell such property pursuant to the Regulation were a holder by virtue of one of the exemptions from the transfer obligation that were found elsewhere in the Regulations, liability already existed if the exemption was one that violated the obligations of the United States pursuant to General Principle A and Paragraph 9 of the General Declaration, and licensing of the sale of the property could not affect that liability. See Partial Award in Case No. A15 (II:A and II:B), paras. 43-60, 77, 28 Iran-U.S. C.T.R. at 133, 140-41.

allow the export of Iran's military equipment from the United States.³⁴ The United States representative added that "U.S. law prohibits military exports without U.S. Government approval, which must be based on a judgment that such exports will be in furtherance of U.S. foreign policy" and that "[the United States is] presently unable to make that judgment with respect to Iran."

40. The United States communicated to the Algerian representative that Iran would be reimbursed, in so far as possible, for the "costs" of the equipment.³⁵ The United States notified the Algerian representative that the United States Department of Defense had been disposing of Iranian military equipment in its custody and was "depositing the proceeds to Iran's credit in the Foreign Military Sales Trust Fund."³⁶ That equipment was also the subject of Case No. B1 (Claim 4), and the United States' 26 March 1981 notification to the Algerian representative that the export of defense articles would not be approved formed part of the subsequent practice for the Tribunal's interpretation of the scope of the United States' obligation in that Case.³⁷

³⁴ See Partial Award in Case No. B1 (Claim 4), para. 14, 19 Iran-U.S. C.T.R. at 277.

This meeting was memorialized in a 26 March 1981 United States internal file memorandum on the "Disposition of Iranian-Owned Military Equipment in the U.S." ("26 March 1981 Memorandum of Conversation"), describing the discussions among Ralph E. Lindstrom, Director, Office of Iranian Affairs, United States Department of State; Andrew D. Sens, Deputy Director, Office of Iranian Affairs, United States Department of State; and Slim Debagha, Chargé d'Affaires, Embassy of Algeria, on 26 March 1981. This memorandum was produced to the Tribunal by the United States at the Hearing in Case No. B1 (Claim 4) on 5 November 1987 and was quoted in the Partial Award in Case No. B1 (Claim 4).

³⁵ See also Partial Award in Case No. B1 (Claim 4), para. 68, 19 Iran-U.S. C.T.R. at 294.

³⁶ The United States noted it was taking such action under a previous agreement with Iran. The third paragraph of the 26 March 1981 Memorandum of Conversation reads:

Lindstrom added that we know of quantities of Iranian military equipment in the custody of the U.S. Department of Defense. He said that the Defense Department, under a previous agreement with Iran, has been disposing of the large volume of items ordered under contracts which Iran had cancelled prior to November 1979, and is depositing the proceeds to Iran's credit in the Foreign Military Sales Trust Fund. We plan to continue this procedure with respect to all Iranian-titled property in the custody of the Department of Defense, including Iranian property which had been returned to the Department of Defense for repair.

³⁷ See Partial Award in Case No. B1 (Claim 4), para. 68, 19 Iran-U.S. C.T.R. at 294.

41. In addition, the United States notified the Algerian representative that it did “not have specific knowledge of Iranian-owned military equipment currently in the hands of third parties in the U.S., such as warehousemen and freight forwarders.” The United States further informed the Algerian representative that, “[i]f there is such equipment, the U.S. would be willing, if requested by Iran, to assist in disposing of it and remit the proceeds to Iran.”

42. The Chargé d’Affaires informed the American officials that he would advise them of the Iranian reaction to the proposed disposition of military property in the United States.

43. Iran responded to the United States’ notification on 16 April 1981, stating that it “protests [the United States’] refusal to deliver to Iran equipment belonging to it and protests the proposal of the U.S. Government to reimburse the amounts paid for those items through the Trust Fund.” The response did not explicitly address the United States’ proposal to assist in disposing of the properties in the possession of private parties and to remit those proceeds to Iran.

44. In the Fall of 1981, the United States made additional proposals in two Diplomatic Notes to the Algerian Embassy relating to military properties in the possession of private parties. In the first Diplomatic Note, transmitted on 23 September 1981, the United States reiterated its position that it was “unable to license the export of Iranian-owned military supplies and equipment presently in the United States” and noted that, on 26 March 1981, it had “offered to assist in disposing of the Iranian-owned military property which could not be exported from the United States and to remit the proceeds to Iran.” The United States also stated in that Diplomatic Note that its offer to assist Iran was made “[i]n view of the general principle that the United States restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979, within the framework of and pursuant to the provisions of the two January 19, 1981 Declarations.”

45. The United States indicated in its September 1981 correspondence that several private parties holding Iranian-owned military supplies had informed it that the items

in their possession were deteriorating and declining in value; further, the United States noted that those private parties had requested it to approve the sale of that property to prevent any further erosion in value. Stating its belief that it would be “in the best interests of both the United States and Iran to conserve the value of this Iranian property,” the United States proposed to “license the disposition of such property for this purpose and to order the proceeds in each case to be deposited in an interest-bearing account in the name of the appropriate entity of the Government of the Islamic Republic of Iran” until the claims of the holders of those properties and the Iranian Government were settled and resolved through negotiation or arbitration. The balance of the account would then be transferred to Iran. The United States asserted that, if Iran wished to challenge whether this proposal was consistent with the Algiers Declarations, it was free to do so before the Iran-United States Claims Tribunal.

46. In its second Diplomatic Note of 16 November 1981, the United States noted that it had not received a response from Iran to its 23 September 1981 proposal and reminded Iran of the problem of deteriorating properties in the possession of private parties. The United States informed Iran that it “cannot require these U.S. nationals to forego their interests in the property and can no longer require them to keep it in their possession and bear attendant expenses.” As a result, the United States stated that it “intends to authorize U.S. nationals . . . in possession of Iranian military and non-military property who have outstanding liens against such property under applicable law to foreclose on those liens, *unless* the Government of the Islamic Republic of Iran makes acceptable arrangements with the lien holders to satisfy the liens before they are executed under applicable provisions of law.”³⁸ The United States further explained that “[s]ale of any such Iranian property would in each case have to be preceded by adequate notice to Iran in order to permit Iran either to seek judicial review of the lien holders’ assertion of a legal right to foreclosure, or to settle the claim and thereby satisfy the lien.” Under such circumstances, the United States stated it would “require the seller to place the retained proceeds in a blocked, interest

³⁸ Emphasis in original.

bearing account or to provide adequate alternative security pending settlement of any claims regarding the property.”

47. Iran furnished a portion of a Diplomatic Note dated 9 January 1982, ten days before the filing of Case No. B61 before the Tribunal, in which it stated that, although it had entered into negotiations with some of the companies for settlement of disputes, “there will be no progress” in the resolution of those disputes “until the export license for these goods has been issued.” Iran protested the United States’ “inaction regarding the shipment and delivery of this equipment” and stressed that it “opposes the sale of the slightest piece of equipment belonging to Iran.”

48. Iran made attempts to consolidate at least some of these properties for storage subsequent to its initiation of this Case and the related Case No. A15 (II:A) before this Tribunal. Further contact regarding these issues between the Parties to this Case has apparently taken place mostly in the form of pleading before this Tribunal, and the properties have remained in the United States. While it continued to demand that the United States permit the export of these properties, Iran placed increasing emphasis on its claim for losses caused by the refusal of the United States to do so. Many, but not all, of the private companies holding the properties at issue here initiated claims before this Tribunal on contractual matters involving those properties. All but one of those claims, namely, *The Singer Company* and *The Government of the Islamic Republic of Iran* (Case No. 344), have been completed before this Tribunal. Implementation of the Award on Agreed Terms in that Case³⁹ has been suspended pending resolution of Case No. A15 (II:A) pursuant to an Order of 18 November 1992 issued by Chamber Two.

B. Liability

49. Relying on the Tribunal’s Partial Awards in Cases Nos. B1 (Claim 4) and A15 (II:A and II:B), Iran asserts that the United States is obligated to compensate it for any

³⁹ *The Singer Company* and *The Government of the Islamic Republic of Iran*, Award on Agreed Terms No. AAT 151-344/A9-SC (21 Sept. 1984), reprinted in 7 Iran-U.S. C.T.R. 236.

losses it suffers in connection with the United States' denial of permission for Iran to export its properties subject to United States export-control laws. Iran argues that the United States undertook to arrange for the transfer of Iranian properties to Iran in Paragraph 9 of the General Declaration, and that this obligation covers all Iranian properties, including both military and non-military properties. Iran contends that, because the United States is obligated under General Principle A to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," the United States must provide compensation in the event that the United States elects to deny permission under its export-control laws for the export of Iran's defense articles. Iran characterizes that obligation as a form of substitute performance required in place of permission for the export of the properties to Iran. That compensation, Iran argues, extends to any and all losses it has suffered in connection with those properties, including, but not limited to, the cost it faced in replacing them.

50. According to Iran, it sought inclusion of the text of General Principle A in the General Declaration at the concluding stages of the negotiation in order to ensure that the United States' verbal promises, as recorded in Paragraphs 4-9, regarding the restoration of Iran's financial position, would be honored. Iran argues that this provision underpins the transfer obligation of Paragraph 9, which must operate to ensure that Iran's financial position is restored. That financial position, Iran contends, includes its military assets in the United States.

51. Iran contends that the United States is obligated to compensate it for the replacement value of its non-exportable property without regard to whether the United States was a party to any of the contracts with private vendors. To Iran, it makes no difference that the United States was not the recipient of contractual payments. Iran argues in this context that the Parties' treaty obligations superseded any contracts that might be associated with the properties. It insists that States Parties to international agreements are free to agree, through either express or implied terms, that compensation may be paid in the absence of a breach. Iran believes that, as found in the Tribunal's Partial Awards in Cases Nos. B1 (Claim 4) and A15 (II:A and II:B), such an agreement is contained in the General Declaration, and that no finding of

breach is required to obligate the United States to compensate Iran for the non-export of its military property. Because Iran sees the United States' liability as grounded solely in the bilateral treaty obligations between the two Governments, Iran believes it presents no broader implications for State responsibility relating to export-control practices, contrary to the concerns raised by the United States in this respect.

52. Although at the pre-hearing stage the United States had indicated reluctant acceptance that the basic liability determination of the Partial Award in Case No. A15 (II:A and II:B) applies in this Case, and that this Case should be decided in accordance with the legal findings in that Partial Award and the parameters set forth therein, it denied in its later pleadings that it bears any liability for its decision not to authorize the export of military property. The United States contends that there can be no liability as a matter of law because the United States lawfully exercised a sovereign right to withhold the export of military property, which it expressly reserved under Paragraph 9 of the General Declaration, and that the Parties made no agreement for compensation in the event that the United States exercised its reserved right. The United States argues that it would be a novel proposition that conduct which is contemplated by, and is consistent with, the express terms of a treaty could nevertheless give rise to an obligation to pay compensation in consequence of an implied term in that agreement.

53. The United States observes that the Tribunal found in its Partial Awards in Cases Nos. B1 (Claim 4) and A15 (II:A and II:B) that the United States did not violate any provision of the General Declaration by refusing export permission. It contends that, as a matter of general proposition, the obligation to pay compensation is a remedy that hinges on the commission of an internationally wrongful act. The United States further argues that the International Law Commission's Articles on State Responsibility and wider international jurisprudence affirm that compensation is generally only available in circumstances where there is a breach of an international obligation. The United States acknowledges that there is an exception to the general rule that compensation is only available in cases of breach of an international obligation, namely, in the relatively rare cases in which liability to compensate is laid down explicitly and in unambiguous terms in international conventions establishing a

strict liability regime. The United States concludes that, in the absence of the commission of an internationally wrongful act or of an express provision in a treaty establishing a strict liability compensation regime, there is no basis in law to find an implied obligation to compensate.

54. The United States contends that an obligation to compensate Iran in this Case can only result from a misreading of the terms of the General Declaration. According to the United States, General Principle A is a general principle to be interpreted and implemented by means of the specific provisions of the General Declaration and the Claims Settlement Declaration. The United States points out that General Principle A is, by its own terms, subordinate to specific provisions of the agreement. The United States argues that Paragraph 9 of the General Declaration, including the U.S.-law clause reserving to it the right to exercise its export controls, constitutes a specific provision in the Algiers Declarations that necessarily takes precedence over General Principle A. Because Paragraph 9 explicitly permits the United States to continue to apply its export-control laws, the United States notes, it has not violated any provisions of the Algiers Declarations in refusing to grant export licenses for those properties. The United States argues that the finding of an implicit obligation undermines the expectations of legal drafters, who “often constr[u]ct provisions of both general and specific import in the same statute, treaty or contract, with the understanding that while the general provision will bear on the interpretation of the specific, the terms of the specific proviso govern.”

55. The United States contends that there is no evidence of a mutual understanding between Iran and the United States to justify the finding of an implied term requiring it to compensate Iran for the lawful refusal to authorize the export of military property to Iran. The United States notes that Iran did not base its original claim in this Case on any contention that the United States had an implied obligation to compensate Iran for declining to authorize the export of military property.

56. The United States asserts that the facts surrounding the negotiation of the Algiers Declarations belie any understanding that there was an implicit obligation to compensate Iran. The United States alleges that it provided Iran with a draft of

Executive Order 12281⁴⁰ in the negotiation of the Algiers Declarations, which would be used by the United States to implement Paragraph 9, and nothing in that draft required the United States to export property to Iran where that export was inconsistent with United States laws in effect prior to 14 November 1979. Because of this, the United States argues, Iran was on notice regarding the meaning that the United States ascribed to Paragraph 9 prior to the conclusion of the General Declaration and did not take issue with it at that stage. The United States contends that Iran was fully aware that certain property might not be exported due to United States export-control restrictions, and that there would be no recourse against the United States for compensation if export were denied. According to the United States, if the Parties had contemplated that Iran would be compensated for the non-export of its property following the application of United States export-control laws, they would have expressly provided for such compensation. Iran denies having received a draft of Executive Order 12281.

C. Precedent and Res Judicata

57. The United States argues that the Tribunal erred in its finding in its Partial Award in Case No. A15 (II:A and II:B) that the United States has an implicit obligation under the General Declaration to compensate Iran for losses it incurs as a result of the refusal by the United States to permit exports of Iranian properties subject to United States export-control laws applicable prior to 14 November 1979. In these circumstances, the United States urges the Tribunal to reconsider that finding. First, the United States argues that the relevant issues had not been adequately briefed and argued by the Parties prior to the issuance of either the Partial Award in Case No. B1 (Claim 4) or the Partial Award in Case No. A15 (II:A and II:B). The United States then contends that this Case is fundamentally different from Case No. B1 (Claim 4), in which an implicit obligation for the non-transfer of military property was first found to exist.⁴¹ In that Case, the United States accepted that it had contracted with Iran, had been paid for the properties in question, had possession of

⁴⁰ See *supra*, para. 37.

⁴¹ See Partial Award in Case No. B1 (Claim 4), para. 66, 19 Iran-U.S. C.T.R. at 293-94.

those properties, and it had acknowledged that it owed Iran for them. It also argues that, in light of possible repercussions for the wider practice of States regarding export licenses, there are compelling grounds for the Tribunal to revisit its earlier findings of law in this matter. The United States argues that the Tribunal is not bound by its earlier findings of law and enjoys latitude to reexamine issues and, when appropriate, to depart from those findings.

58. In response to the United States' request for reconsideration of the Tribunal's Partial Award in Case No. A15 (II:A and II:B), Iran argues that the Tribunal's finding in that Partial Award of an implicit obligation to compensate may not be reconsidered, because it has the force of *res judicata* in Case No. B61. In support of its argument, Iran alleges that Case No. A15 (II:A) involved exactly the same parties, exactly the same factual background and time period, exactly the same kind of export-controlled property, and exactly the same treaty provisions as Case No. B61.⁴² Iran further relies on Article IV, paragraph 1, of the Claims Settlement Declaration, which provides that "[a]ll decisions and awards of the Tribunal shall be final and binding." In addition, Iran asserts that the Partial Award in Case No. A15 (II:A and II:B) incorporated its basic liability finding from the Partial Award in Case No. B1 (Claim 4), including the standard of compensation according to which Iran was said to be entitled to the "monetary equivalent" of its properties held in the United States, while also allowing Iran to recover "losses" additional to the value of those properties. To the extent that it argues that the findings of the Partial Award in Case No. B1 (Claim 4) are incorporated into the Partial Award in Case No. A15 (II:A and II:B), Iran's key argument here is that the Partial Award in Case No. A15 (II:A and II:B) is the controlling precedent and should have *res judicata* effect in this Case.

59. Iran argues that, in a situation where, like here, the property is similar in kind but not the same, the Parties are the same, the legal question is the same, and Article IV of the Claims Settlement Declaration operates, the Partial Award in Case No. A15

⁴² Although some of the properties in Case No. B61, in particular those involved in the Victory Van and E-Systems claims, were the object of both Case No. A15 (II:A) and Case No. B61 at the time the Partial Award was issued in Case No. A15 (II:A and II:B), Iran did not argue that the object of these two cases was in fact the same.

(II:A and II:B) should be treated as the equivalent of a Partial Award for the question of liability in Case No. B61. Iran further argues that, consistent with the Tribunal's own practice, *res judicata* should be imposed under these circumstances in order to ensure consistency of Tribunal Awards between the same parties and on the same legal questions.

60. Iran denies that the issue of an implied obligation had not been adequately briefed in Case No. A15 (II:A). Iran asserts that, in the proceedings in Case No. A15 (II:A), it did rely on the Tribunal's finding in Case No. B1 (Claim 4) of an implicit obligation to compensate. Iran contends that, in any event, as far as questions of law are concerned, the Tribunal, as a judicial forum, is presumed to know the law and is not bound by the Parties' interpretation of a treaty. Iran further argues that, pursuant to Article 29 of the Tribunal Rules of Procedure, the parties may provide, and the Tribunal may request the parties to provide, any further submissions before the Tribunal declares the hearings closed. Article 29 even authorizes the Tribunal to reopen the hearings if necessary. Iran points out that the Parties, however, at the time did not raise any concern as to the adequacy of the pleadings on the issue or express any wish to make further submissions, nor did the Tribunal deem it necessary to request any further submissions from them.

61. Iran contends that, during the course of the proceedings that led to the issuance of the Partial Award in Case No. B1 (Claim 4) and the Partial Award in Case No. A15 (II:A and II:B), the Parties did, in fact, have ample opportunity to address the issue of the implicit obligation to compensate. Specifically, Iran argues that the Partial Award in Case No. B1 (Claim 4) illustrates that the Tribunal was fully familiar with the text of the General Declaration and the negotiating history of the Algiers Declarations, as exemplified by its discussion of the preparatory work to the Declarations in paragraph 66 of that Partial Award. Iran notes that the Hearing in Case No. A15 (II:A and II:B) took place in May 1991, three years after the Partial Award in Case No. B1 (Claim 4) had been rendered. Iran contends that by 1991 the Parties were therefore on clear notice that the Tribunal had already found an implicit obligation on the part of the United States to compensate Iran for what the latter regarded as the deprivation of its property.

62. Iran argues that the reasoning set forth in paragraph 65 of the Partial Award in Case No. A15 (II:A and II:B) is clear and convincing, indicating that the relevant issues were thoroughly deliberated.

63. Iran also contends that certain representations made by the United States subsequent to the issuance of the Partial Award in Case No. A15 (II:A and II:B) preclude the United States from arguing that Cases Nos. A15 (II:A) and B61 should be considered as distinct for the purposes of a liability holding. According to Iran, the United States explicitly and repeatedly conceded liability in Case No. B61 as it had been established in the Partial Award in Case No. A15 (II:A and II:B). Iran cites, *inter alia*, the following statement made by the United States at the Pre-Hearing Conference of 10 February 1993 in Case No. B61:

[T]he United States respectfully believes the Tribunal's decision on liability in A/15 (II:A) was incorrectly decided. But this was the Tribunal's judgment and we are prepared to live with it; we accept it.

Iran also draws attention to the United States' acceptance at the Pre-Hearing Conference, which was held nine months after the Partial Award in Case No. A15 (II:A and II:B) had been rendered, that, "[i]n the consolidated cases we addressed today, the United States recognizes it must live within the legal framework the Tribunal has established. We understand that the basic issue of liability has been decided against us." Iran also points to other similar statements the United States made at that time.

64. Iran argues that, in light of the United States' repeated statements that the Partial Award in Case No. A15 (II:A and II:B) decided the issue of liability in Iran's favor and that the United States accepted that decision and its implicit obligation found therein, the United States should be precluded from making its later arguments seeking to overturn that decision.

65. In response to the United States' argument that there is no rule of *stare decisis* within the Tribunal, and that consequently the Tribunal is not bound by its previous

awards, Iran argues that *stare decisis*, or the “doctrine of precedent,” is a legal doctrine particular to the common law and of no conceptual relevance to this Tribunal’s decisions.

66. Emphasizing the procedural interplay of Cases Nos. A15 (II:A) and B61, Iran asserts that the United States’ request for reconsideration of the holding of law of the Partial Award in Case No. A15 (II:A and II:B) is the equivalent of a petition by the United States to revise that Partial Award, a petition for its reconsideration, or a petition to set it aside, and raises preliminary issues as to the admissibility of such petitions under the Tribunal’s rules and relevant practice. Iran contends that consideration of any such United States petitions would disrupt the proceedings in Case No. A15 (II:A), which is still pending.

67. The United States denies that the Tribunal’s finding of an implicit obligation to compensate in Case No. A15 (II:A) constitutes *res judicata* in Case No. B61. According to the United States, this is because not all the three customary elements for the operation of *res judicata* are present in this Case, namely: (1) the identity of the parties; (2) the identity of the object of the claim; and (3) the identity of the specific claims themselves. The United States contends that the essence of the principle of *res judicata* is that it operates in circumstances of identical claims to prevent a later case from reopening the award in an earlier case. The United States submits that this is not the case here because neither the claims nor the properties at issue in this Case are identical to those at issue in Case No. A15 (II:A).

68. The United States also argues that, even if the elements of *res judicata* were present in this Case, which it denies, it is well established that the principle of *res judicata* is subject to exceptions in the interests of justice where a court or tribunal has committed a manifest error of law in reaching a decision. The United States submits that the Tribunal’s finding of an implicit obligation to compensate constituted a manifest error of law because, “in the absence of the commission of an internationally wrongful act or of an express provision in a treaty which established a strict liability compensation regime, there is no basis in law on which to find an implied obligation

to compensate.” The United States contends that the error here was due largely to the paucity of the Parties’ pleadings on the relevant points in Case No. A15 (II:A).

69. The United States argues that the Partial Award in Case No. A15 (II:A and II:B) was rendered in that Case and is therefore not the law of this Case. The United States notes that that Partial Award, not being a Final Award, did not finally dispose of Case No. A15 (II:A and II:B) or any part of it. *A fortiori*, according to the United States, that Partial Award could not have finally disposed of this Case, with respect to which it has the effect only of *stare decisis* and not of *res judicata*.

70. The United States does not deny that it made the statements quoted by Iran regarding the application, in Case No. B61, of the finding of an implicit obligation in the Partial Award in Case No. A15 (II:A and II:B). The United States argues, nevertheless, that those statements clearly reflected its position at the preliminary administrative phase of the proceedings. The United States insists that its arguments were not intended to be a legal commitment to a future position.

71. The United States further notes that, in its 8 April 1993 Order, immediately following the Pre-Hearing Conference, the Tribunal ordered Iran to submit a Consolidated Submission that would cover “all the issues to be decided in these Cases, including the legal and factual bases of Respondent’s liability.” That Order also requested that the United States file a response covering “all the issues addressed in Claimant’s final consolidated submission.” In the United States’ view, this left it open for the United States in its first full substantive filing to consider and argue all its positions on liability.

72. The United States contends that Iran neither relied on the United States’ representations concerning the applicability to Case No. B61 of the Tribunal’s implicit-obligation holding in Case No. A15 (II:A) nor suffered any prejudice as a result of them; consequently, there can be no estoppel, because prejudicial reliance is an essential element of estoppel. The United States relies on the 8 April 1993 Order⁴³

⁴³ See *supra*, para. 16.

to support this contention. The United States points out that in its 1995 Reply it had set out the same position that it espoused at the Hearing, that is, that the Tribunal should depart from its implicit-obligation holding in Case No. A15 (II:A). Thus, according to the United States, it is clear that Iran had every opportunity to respond to its arguments, both in its rebuttal filing and during the Hearing. The United States alleges in this context that Iran has suffered no prejudice as a result of the evolution of the United States' legal arguments in its response in this Case.

73. Properly considered as a distinct prior case, the United States asserts, the implicit-obligation precedent represented by the Partial Award in Case No. A15 (II:A and II:B) should have the effect of *stare decisis*. While such precedent is generally not to be departed from lightly, the Tribunal is nonetheless permitted to reconsider its key holdings of law in the event that a majority feels that the case was wrongly decided.

D. Compensable Losses

74. Iran contends that the United States' refusal to allow exports of Iran's export-controlled properties on 26 March 1981 resulted in a complete deprivation of those properties as of that date. Iran further submits that, according to its reading of the Partial Awards in Case No. B1 (Claim 4) and Case No. A15 (II:A and II:B), this deprivation entails for Iran prejudicial consequences similar to those of an expropriation. Iran maintains that its claim is consistent with general principles of law applicable to deprivations, irrespective of the fact that the United States was not in possession of the properties. Iran asserts that it is entitled to the replacement cost of that property under the circumstances it faced of limited access to the market for U.S.-made defense articles as well as other losses it alleges were caused by the United States refusal to allow the export of Iran's privately held export-controlled properties.

75. Iran claims that the proposals contained in the Diplomatic Notes transmitted by the United States in the Fall of 1981⁴⁴ that sales be "licensed" and that proceeds be

⁴⁴ See *supra*, paras. 44-46.

put in a “blocked” account, constituted the official position of the United States Government that (1) licenses were required for any sales of Iran’s properties and (2) that all proceeds from such sales, no matter how conducted, would have to be placed into a blocked account. According to Iran, the proposals set forth in the Diplomatic Notes made it clear that the United States was setting terms for the disposition of that property to which Iran could not agree.

76. Iran contends that, absent permission to export the properties at issue in this Case, it could exercise no ownership rights over them. Iran submits that the United States Government controls all actions relating to the properties, including export licensing, sale, movement, and Iranian access to them. According to Iran, the only exercise of ownership rights open to it under the circumstances “was to arrange to continue to have the properties stored as a kind of mitigation and that is what Iran did.” At the Hearing, Iran argued that the liens and other defenses authorized under the Treasury Regulations of 26 February 1981, which the Partial Award in Case No. A15 (II:A and II:B) held to have violated the Algiers Declarations, prevented it from selling the properties, because private contractors would not have allowed Iran to sell its properties without forcing it to litigate their possessory interests in United States courts. Consistent with its statements in its Diplomatic Note of 9 January 1982,⁴⁵ Iran further notes that, at any rate, it did not want to sell its military properties also because it was engaged in a war with Iraq and needed them for that purpose. Iran argues that, in any event, it would not have received a reasonable price, because many of the items were unique. At the Pre-Hearing Conference in 1993, Iran noted that it “paid a lot of attorney fees to prevent the sale of the goods or to protect them, and to do similar things.” In this connection, Iran points out that it had to appear before a United States court to prevent a sale of its properties pursuant to a warehouseman’s lien for unpaid invoices issued by Behring International, Inc.⁴⁶

⁴⁵ See *supra*, para. 47.

⁴⁶ See *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, 255 (“The purpose of the sale was to satisfy a warehouseman’s lien Claimant alleges to exist under New Jersey law, in the amount of unpaid storage, maintenance and other charges accrued over the period 15 January 1980 through 20 June 1983.”).

77. The United States argues that no deprivation of property has occurred in this Case because, (1) as confirmed under the Tribunal's Partial Awards in Cases Nos. B1 (Claim 4) and A15 (II:A and II:B), Iran had no right to export its export-controlled properties; (2) there was no enrichment of the United States; (3) no contractual right of Iran was breached; (4) Iran could have sold the properties at any time; and (5) Iran was no worse off after the 26 March 1981 notification that it would not receive licenses for the export of its military property than it was before that notification and, more importantly, than it was prior to 14 November 1979.

78. In the United States' view, what makes this Case different from an expropriation case is that Iran could have realized the value of the export-controlled properties at issue prior to 14 November 1979, just as it could have realized that value on 26 March 1981. According to the United States, no action, determination, or decision of the United States on 26 March 1981 prevented Iran from exercising its rights in those properties excepting the right of export, which it did not have prior to that time; thus, there is "no lost value to restore."

79. The United States disputes that its actions regarding the properties adversely affected Iran's ownership rights in those properties. While the United States acknowledges that Iran required a license to access its properties in the United States, it points out that Iran has provided no evidence that such licenses were unreasonably withheld. The United States also claims that it is not free to access Iran's properties without Iran's permission and alleges that any access it may have had through the private parties was to recover property owned by the United States Government. The United States asserts that it did not have possession or control of Iran's properties, and that Iran could have dealt directly with the private parties to sell the properties at any time.

80. The United States disagrees with Iran's submission that the United States' offers to license the sales of properties contained in the Diplomatic Notes of 23 September 1981 and 16 November 1981⁴⁷ were unreasonable. The United States

⁴⁷ See *supra*, paras. 44-46.

points out that the Diplomatic Note of 23 September 1981 first memorializes an offer that the United States made to Iran, through the Algerian Embassy on 26 March 1981, “to assist in disposing of the Iranian-owned military property which could not be exported from the United States and to remit the proceeds to Iran.” According to the United States, its offer was a good faith effort to assist Iran in conserving the value of the properties. The United States disputes that it had an obligation to do so. In this context, the United States emphasizes the unwillingness to cooperate shown by Iran in rejecting the United States’ offers of assistance transmitted orally on 26 March 1981 and in the Diplomatic Notes. It was because of Iran’s refusal to sell, the United States claims, that it devised a proposal to license the sales, and it later promulgated regulations to authorize the sale of those properties by the private holders. The United States also disputes that licenses were required for Iran to sell its properties, noting that Iran remained free to sell those properties and obtain remission of the proceeds.

81. Continuing, the United States submits that Iran has provided no evidence that it was in fact prevented from selling its properties. Concerning the attempted sale of properties by Behring International, Inc.,⁴⁸ the United States notes that Iran did not make any efforts to sell its properties in those circumstances, but was rather embroiled in litigation because it opposed sales of its property. Despite having had the ability to dispose of its properties, the United States argues, Iran made a calculated, strategic decision not to do so.

82. The Parties disagree about whether Iran’s financial situation prior to 14 November 1979 included a right or expectation that Iran would be able to export its properties subject to United States export-control laws. According to Iran, any risks that it faced in that respect are irrelevant in this Case because (1) the Partial Award in Case No. B1 (Claim 4) did not include risk in its assessment of the required standard of compensation; (2) the Partial Award in Cases Nos. B1 (Claim 4) and A15 (II:A and II:B) represent a “single line of precedent” in which such risk is not relevant; and (3) the Partial Award in Case No. A15 (II:A and II:B) disposed of the issue in paragraph

⁴⁸ See *supra*, para. 76.

65 and in the *dispositif*. Iran also argues that risk is not relevant to an inquiry on compensation, because there was no legal risk of non-export prior to 14 November 1979. According to Iran, a consideration of risk is inconsistent with the object and purpose of the Algiers Declarations, which is to facilitate a resumption of “normal financial relations” between the United States and Iran. Iran argues that, in any event, given the quantity of military equipment exported from the United States to Iran over a number of years, Iran had a legitimate expectation, prior to 14 November 1979, that the property would be exported to Iran, where it could be employed for its intended purposes.

83. According to Iran, the formulation of “losses” laid out in the Partial Award in Case No. A15 (II:A and II:B) had nothing to do with the possession of the properties but rather reflected (1) the Partial Award’s emphasis on General Principle A and (2) the presence of a “breach element” because of United States Treasury Regulation Section 535.333 authorizing, *inter alia*, liens, defenses, counterclaims, and set-offs with respect to the properties.⁴⁹ As a result, according to Iran, the standard of compensation articulated in the Partial Award in Case No. B1 (Claim 4) remains a component of the standard of compensation articulated in the Partial Award in Case No. A15 (II:A and II:B),⁵⁰ such that Iran is entitled to compensation for the monetary equivalent of its properties, plus any other losses it can demonstrate.

84. Iran also argues that it did not “freely assume,” in its contracts with private vendors, the risk that the properties at issue in this Case could not be exported. According to Iran, because some of the contracts contain a variety of export-control clauses, it cannot be concluded that Iran freely assumed the risk of non-export in those contracts.

⁴⁹ See *supra*, para. 37.

⁵⁰ See Partial Award in Case No. A15 (II:A and II:B), paras. 65 and 77(g), 28 Iran-U.S. C.T.R. at 136-37, 141 (holding that the United States is obligated to compensate Iran for the “full value” of the losses Iran incurred as a result of the United States’ refusal to permit exports of Iranian properties subject to United States export-control laws applicable prior to 14 November 1979).

85. Iran contends that a finding that it would be entitled to no compensation in this Case would result in its being deemed to have a pre-14 November 1979 financial position of zero with respect to the properties. This, Iran argues, renders General Principle A an “empty shell” and could not have possibly been the intention of the Parties in negotiating the Algiers Declarations.

86. The United States argues that an award of compensation under the circumstances underlying this Case would put Iran in a far better financial position than that it occupied prior to 14 November 1979, when it had diminished prospects of receiving export licenses for the property at issue and had no legal right to compensation for licenses that were denied.

87. The United States clarified that it is not arguing that Iran’s pre-14 November 1979 financial position is equal to zero, as Iran suggested, but rather that Iran’s substantial financial position in the properties, represented by their fair market value “for sale” in the United States, did not change as a result of the United States’ decision to invoke the U.S.-law clause to refuse to grant licenses for the export of Iran’s properties.

88. The United States submits that it is well-accepted that a government faces no liability, either under domestic or international law, for losses that may result from the exercise of its sovereign right to exercise controls over exports of military properties. It notes in this context that parties who contract for the purchase and repair of such properties assume any risks that they will be unable to export those properties, and it is widespread practice for parties to allocate risks by including export-license and *force majeure* clauses in those contracts.

89. While the Partial Award in Case No. A15 (II:A and II:B) did not distinguish between properties in the possession of the United States and those not in the possession of the United States as far as the United States’ implicit obligation to compensate Iran for the refusal to grant export licenses was concerned, the United States maintains that the fact that the export-controlled properties at issue in Case No. A15 (II:A) were not in the possession of the United States was the key distinguishing

element that led the Tribunal to establish a different standard of compensation in Case No. A15 (II:A) from Case No. B1 (Claim 4). If the standard of compensation articulated in the Partial Award in Case No. A15 (II:A and II:B) is to be applied to this Case, then Iran's financial position with regard to the export of its properties is a relevant factor to the Tribunal's determination of whether the United States caused Iran's losses.

IV. OBJECTIONS

90. During the Hearing, the Parties raised a number of objections with regard to matters that pertain to the General Issues in this Case. The Tribunal postponed its decision on a number of objections until after the Hearing. Those objections are addressed below.

A. *Admissibility of the United States' 1 March 2006 Response to Iran's Supplemental Documents*

91. Iran asserts that the United States' 1 March 2006 Response to Iran's 1 February 2005 Supplemental Documents ("United States' Response" or "Response")⁵¹ contravenes the Tribunal's Order of 1 April 2005⁵² because it is not limited to a response to Iran's Supplemental Documents. Thus, Iran requests that the Tribunal not admit the United States' Response to the extent that it is outside the scope of the Tribunal's 1 April 2005 Order and is not responsive to Iran's Supplemental Documents.

92. The Tribunal has already determined in its Orders of 1 April 2005 and 27 April 2006 that the United States' Response "must be limited to" the documents filed by Iran, and that "any arguments and evidence filed by the Respondent . . . that is not

⁵¹ See *supra*, para. 22.

⁵² See *id.*

submitted in response to the Claimant's documents shall be declared inadmissible."⁵³ The Tribunal confirms and applies these determinations in the present Partial Award.

93. Iran describes its Supplemental Documents as falling "into three general categories: (1) U.S. Government Microfiche printouts; (2) Revised Price Lists; and (3) Other Documents . . . [which include] (a) better copies of documents previously filed by Iran; (b) documents referred to by the United States, or which have been filed in part by Iran or the United States previously in this case; and (c) documents addressing specific issues." While Iran has included no briefs in its six volumes of Supplemental Documents, it did provide, in explanatory pages contained in each volume, a short description of each document submitted and, in most, but not all, cases, a short description of the reason why it was submitting the document.

94. The United States' Response does not follow the same format as Iran's Supplemental Documents: it includes a "General Response," which consists of a forty-six-page brief and five exhibits,⁵⁴ and six volumes of brief and evidence referencing specific clusters of Individual Claims. Nevertheless, the Tribunal shall consider the United States' Response admissible to the extent it addresses the same issues as those addressed by Iran's Supplemental Documents. In making its admissibility determination, the Tribunal shall therefore consider whether, at the time of their submission, the evidence and arguments presented by the United States might have been necessary to respond to Iran's Supplemental Documents or the potential uses to which Iran might have put the documentary evidence contained therein. In

⁵³ *See id.*

⁵⁴ Exhibit A: Affidavit of Zbigniew Brzezinski (attaching (1) a copy of Minutes dated 7 November 1979 of President Carter's Special Coordination Committee; (2) a copy of a memorandum dated 9 November 1979 from the Director of the United States Defense Security Assistance Agency to the United States Secretary of Defense; and (3) a copy of Minutes dated 12 November 1979 of President Carter's Special Coordination Committee); Exhibit B: copies of 8 and 9 November 1979 articles from the New York Times and Washington Post, respectively; Exhibit C: Affidavit of Rose Biancaniello (attaching (1) a copy of a Memorandum dated 12 November 1979 from the United States Department of State's Bureau of Near Eastern Affairs to the United States Secretary of State; and (2) a copy of a handwritten list dated 12 November 1979, containing the names of a number of companies that held licenses for the export of defense articles to Iran as of that date); Exhibit D: Affidavit of Mike Habala; and Exhibit E: Affidavit of Bobby Myers.

making that determination, the Tribunal shall take account of the difficulties faced by the United States in interpreting and responding to documents whose intended uses by Iran were unclear or unknown.

95. The Tribunal notes that, during the lengthy Hearing in this Case, Iran has had the opportunity to respond, and did respond, to the evidence and argument submitted by the United States with its Response.

96. The Tribunal turns first to the “General Response.”⁵⁵ Exhibits A through E included therein, as well as the attachments to Exhibits A and C, are responsive to a number of exhibits included in Iran’s Supplemental Documents addressing, *inter alia*, the exportability of Iran’s export-controlled properties prior to 14 November 1979, valuation methodology, and the quantum of Iran’s losses. Accordingly, Exhibits A through E (including the attachments to Exhibits A and C) of the “General Response” are admitted into the record of this Case.

97. The Tribunal notes that the forty-six-page brief included in the “General Response” to a very large extent sets forth and refines arguments that the United States raised for the first time during that part of the Hearing devoted to General Issues; it also repeatedly cites to the Hearing Transcript in support of arguments made by the United States. In the Tribunal’s view, that brief, rather than constituting “arguments . . . submitted in response” to Iran’s Supplemental Documents, in the sense of the Tribunal’s Orders of 1 April 2005 and 27 April 2006, constitutes, in effect, a pleading in the nature of a post-Hearing brief, which the Tribunal did not authorize the United States to submit. Consequently, the Tribunal determines that the forty-six-page brief included in the “General Response” is inadmissible.

98. The Tribunal now turns to the admissibility of Volumes II through VII of the United States’ Response.⁵⁶ As noted, those Volumes reference specific clusters of

⁵⁵ “Volume I (General Response)” of the seven-volume United States’ Response.

⁵⁶ “Volume II (Victory Van Claims)”; “Volume III (IBEX Claims)”; “Volume IV (IACI Claims)”; “Volume V (IIAF Claims)”; “Volume VI-Part A (IHSRC Claims)”; “Volume VI-Part B (IHSRC Claims)”; “Volume VII (Miscellaneous & Iran Navy Claims).”

Individual Claims, and they are subdivided into sections (Tabs 1 through 41) containing brief and, in many instances, documentary and affidavit evidence related to Individual Claims.

99. After having reviewed those Volumes, the Tribunal determines as follows:
- (a) those portions of the briefs contained in Volumes II through VII of the United States' Response that (i) set forth or refer to arguments that the United States raised for the first time at that part of the Hearing devoted to General Issues or (ii) cite to the Transcript of that part of the Hearing do not constitute "arguments . . . submitted in response" to Iran's Supplemental Documents; just as the "General Response" does, they represent a pleading in the nature of a post-hearing submission, which the Tribunal did not authorize the United States to submit, as discussed above; accordingly, they are inadmissible;
 - (b) the following exhibits submitted by the United States with its Response do not constitute "evidence . . . submitted in response" to Iran's Supplemental Documents and are therefore inadmissible:
 - i) Volume III (IBEX Claims), Tab 3, Exhibit B⁵⁷;
 - ii) Volume III (IBEX Claims), Tab 7, Exhibit B⁵⁸;
 - iii) Volume III (IBEX Claims), Tab 7, Exhibit C⁵⁹;
 - iv) Volume IV (IACI Claims), Tab 12, Exhibit A⁶⁰;
 - v) Volume V (IIAF Claims), Tab 22, Exhibit A⁶¹;

⁵⁷ Copies of: a letter dated 13 December 1983 from W. Clark McFadden, II, to Sandy Baach, United States Customs Service; and a letter dated 1 July 1983 from Archie M. Andrews, United States Department of Commerce, to W. Clark McFadden, II.

⁵⁸ Affidavit of Ervin L. Pomroy.

⁵⁹ Copy of Export License No. 26549 issued by the United States Department of State on 9 December 1975 with attached "Commodity List."

⁶⁰ Affidavit of Gary Sommerland.

⁶¹ Copies of: a letter dated 31 July 1979 from Nancy Lee Hindman, Chief, Administrative Branch, Office of Munitions Control, United States Department of State, to Anthony S. Musladin, Stanford Technology Corporation; a form document dated 4 December 1978 from the United States Department of State, Administrative Services Division of the Office of

- vi) Volume VI - Part A (IHSRC Claims), Tabs 26 and 27, Exhibits A⁶² and B⁶³;
- (c) the remainder of the exhibits submitted by the United States with Volumes II through VII of its Response are responsive to Iran's Supplemental Documents; accordingly, they are admitted into the record of this Case.

B. Iran's Objection to the United States' Statement Concerning the Balance of the Security Account

100. Iran requested that the Tribunal strike from the record of this Case a statement made by the United States during the Hearing relating to the balance of the Security Account established pursuant to Paragraph 7 of the General Declaration. The Tribunal finds that that statement by the United States pertained to matters that are not germane to this Case; consequently, the Tribunal strikes it from the record.

C. Admissibility of Videos

101. The United States requested that the Tribunal exclude from the record a video that Iran had presented at the Hearing, showing one of the warehouses where some of the items at issue in this Case were stored.

102. At the Hearing, the United States presented a video of its own in response to Iran's video. The United States stated that it did not seek to have its video considered evidence, and that it would agree to have it stricken from the record if the Tribunal

Munitions Control, to the Legal Office of Stanford Technology Corporation; and a letter dated 6 August 1979 from A. S. Musladin, Vice President, Finance & Administration, Stanford Technology Corporation, to Nancy Lee Hindman, Chief, Administrative Branch, Office of Munitions Control, United States Department of State.

⁶² Copy of a telex dated 15 November 1979 from Commander, United States Army Troop Support and Readiness Command (TSARCOM), to Commander, United States Army Plant Activity, Bell Helicopter International, referenced "Shipment of Iranian Spare Parts and Support."

⁶³ Copy of a memorandum dated 9 November 1979 from R.L. Stuart, Manager, Contracts and Procurement, Bell Helicopter International, Inc., to R.H. Weigel, TSARCOM.

were also to strike from the record Iran's video and all references to it by Iran's counsel. Iran did not formally raise the issue of the admissibility of the United States' video, although it did criticize its probative value and stated that its submission by the United States was inappropriate.

103. The Tribunal notes that neither have the Parties offered the two videos into evidence, nor has the Tribunal admitted them into evidence; they were presented for illustrative purposes only and are not part of the evidence in this Case.

D. Witness Testimony of Lt. Gen. William E. Odom (Ret.)

104. During that part of the Hearing devoted to the IACI cluster of claims, Iran objected to the presentation by the United States of Lt. Gen. William E. Odom (Ret.) as a witness to the extent he would give testimony on issues that had already been addressed during that part of the Hearing devoted to General Issues. The Tribunal considered and rejected this objection at the IACI Hearing, and Lt. Gen. Odom (Ret.) appeared as a witness before the Tribunal. At that point, Iran objected to the admissibility of his testimony. The Tribunal rules on this objection below.

105. The Tribunal holds that, during that part of the Hearing devoted to Individual Claims, revisiting a general issue or issues was possible and, indeed, took place even before Lt. Gen. Odom (Ret.) testified. Accordingly, the Tribunal rejects Iran's objection as to the admissibility of his testimony.

V. PROCEDURAL ISSUES

106. On 14 November 2008, Iran submitted a letter, alleging that the United States had recently taken a number of measures "against the properties subject matter of the present Cases" that were inconsistent with the United States' obligations under the Algiers Declarations and in violation of "the jurisdiction and authority of the Tribunal with respect to such properties." With its letter, Iran also produced a number of documents. Iran requested that the Tribunal admit "this letter into the record though it is neither further evidence nor memorial subject to requirement of seeking prior

authorization.” Iran further requested that the Tribunal “require the United States to maintain the *status quo ante* concerning the properties in question by avoiding to take, allow or acquiesce in, or giving effect, to any measures affecting the properties until the Tribunal renders its final decision on Iran’s claims”; and that the Tribunal “ensure in the wording of the award to be rendered that the rights and interests the Tribunal may find for Iran with respect to the properties be effective and enforceable without any impediments.”

107. By letter of 15 December 2008, the United States requested that the Tribunal reject as inadmissible Iran’s submission of 14 November 2008. The United States contends, in brief, that Iran’s submission (1) violates the Tribunal’s Order of 1 April 2005, paragraph 10, providing that “[t]he Claimant shall submit no further evidence or memorial unless so authorized in advance by the Tribunal”; (2) represents “an improper attempt to re-argue issues that were squarely before the Tribunal during the briefing and oral proceeding phases” of this Case; and (3) concerns actions that “are patently not germane to the issues to be decided by the Tribunal in Case B/61.” The United States further contends that it would be unfairly prejudiced if the Tribunal were to accept Iran’s submission.

108. By letter of 9 January 2009, Iran requested that the Tribunal reject the objections that the United States raised in its 15 December 2008 letter. Iran contends, *inter alia*, that its 14 November 2008 submission does not fall within the scope of application of the Tribunal’s Order of 1 April 2005, given that that Order relates only “to the filing of any further memorial and evidence in relation to issues already addressed by the parties in their submissions in the normal course of the briefing” and “has no relevance at all with the present situation where a party after the hearings changes the *status quo* to the detriment of the other party . . . or where post hearing events reveal that party’s misrepresentations to mislead the Tribunal and irreparably prejudice the other party.” According to Iran, the actions and events enumerated in its 14 November 2008 submission “are new and important developments which not only had to be brought to the attention of the Tribunal but are of direct relevance to the Tribunal’s determination of the present case.” Moreover, Iran denies that the United

States would be unfairly prejudiced if Iran's 14 November 2008 submission were admitted; rather, it would be Iran that would be prejudiced if it were not.

109. By letter of 9 February 2009, the United States renewed its request that the Tribunal reject Iran's 14 November 2008 submission.

110. As an initial matter, the Tribunal notes that Iran's 14 November 2008 submission represents neither a request for interim measures in accordance with Article 26 of the Tribunal Rules of Procedure nor an amendment of Iran's claim in accordance with Article 20 of those Rules. In paragraph 10 of its Order of 1 April 2005, accepting the documents submitted by Iran on 1 February 2005, the Tribunal directed that "[t]he Claimant shall submit no further evidence or memorial unless so authorized in advance by the Tribunal."⁶⁴ In light of this directive, and in the absence of circumstances justifying any exception thereto, the Tribunal determines that Iran's submission of 14 November 2008 is inadmissible. This determination is without prejudice to the submission being presented and considered in any other proceedings, including further proceedings in this Case.

VI. REASONS

A. *Jurisdiction*

111. The Tribunal's jurisdiction over this Case is undisputed. The Parties disagree about the obligations that General Principle A and Paragraph 9 of the General Declaration impose on the United States. The claim by Iran therefore falls squarely within the Tribunal's jurisdiction pursuant to Paragraph 17 of the General Declaration and Article II, paragraph 3, of the Claims Settlement Declaration.

⁶⁴ See *supra*, para. 22.

B. *Res Judicata*

112. In the Partial Award in Case No. A15 (II:A and II:B), the Tribunal determined in the operative part of its decision (*dispositif*), *inter alia*, that:

[. . .]

d) United States Treasury Regulations that excluded from the transfer direction properties which were owned solely by Iran but as to which Iran's right to possession was contested by the holders of such properties on the basis of any liens, defences, counter-claims, set-offs or similar reasons, were inconsistent with the obligations of the United States under the General Declaration. [. . .]⁶⁵

[. . .]

g) The United States has an implicit obligation under the General Declaration to compensate Iran for losses it incurs as a result of the refusal by the United States to permit exports of Iranian properties subject to United States export control laws applicable prior to 14 November 1979.⁶⁶

[. . .]

k) The Respondent, The United States of America, is not obligated by the General Declaration to compensate the Claimant, The Islamic Republic of Iran, for any storage charges, depreciation or other losses incurred with respect to Iranian properties prior to 19 January 1981.⁶⁷

113. In this section devoted to *res judicata*, the Tribunal concentrates on the question of whether its finding in paragraph 77(g) of the Partial Award in Case No. A15 (II:A and II:B) of an implicit obligation of the United States to compensate Iran is *res judicata* for the purposes of the proceedings in Case No. B61. If the Tribunal determines that this prior holding is not *res judicata*, then the Tribunal will next have to consider whether it has an inherent jurisdiction to overrule, or depart from, its prior awards to the extent that such decisions carry precedential value only and do not have the status of *res judicata*.

⁶⁵ Partial Award in Case No. A15 (II:A and II:B), para. 77(d), 28 Iran-U.S. C.T.R. at 140.

⁶⁶ *Id.* at para. 77(g), 28 Iran-U.S. C.T.R. at 141.

⁶⁷ *Id.* at para. 77(k), 28 Iran-U.S. C.T.R. at 141.

114. The doctrine of *res judicata* has been described as a general principle of law recognized by civilized nations.⁶⁸ In addition to enjoying widespread recognition in national legal systems, the doctrine of *res judicata* is also a well-established and settled rule of international law.⁶⁹ It has found expression in the Claims Settlement Declaration and the Tribunal Rules of Procedure. Article IV, paragraph 1, of the Claims Settlement Declaration provides that “[a]ll decisions and awards of the Tribunal shall be final and binding.” Article 32, paragraph 2, of the Tribunal Rules of Procedure states that “[t]he award shall be made in writing and shall be final and binding on the parties.” The doctrine of *res judicata* is applicable only where (1) the parties and (2) the question at issue (or the matter in dispute) are the same. This second element may be subdivided into the object (*petitum*) and the grounds of the case (*causa petendi*).⁷⁰ The three traditional elements for identification are thus parties, object, and cause.⁷¹

115. Not everything contained in a decision acquires the force of *res judicata*. In addition to the operative part (*dispositif*) of a decision, the reasons (*motifs*) provided in a decision also have *res judicata* effect to the extent that those reasons are relevant to the actual decision on the question at issue.⁷² In the *Genocide Case*, the

⁶⁸ See *Chorzów Factory* (Germany v. Poland) (Interpretation), 1927 P.C.I.J. (ser. A) No. 13, at 27 (16 Dec.) (Anzilotti, D., dissenting).

⁶⁹ See, e.g., HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) 204-7, 244-49 (Longmans, Green and Co. Ltd. 1927); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336-72 (Stevens & Sons Limited 1953).

⁷⁰ See CHENG, *supra*, note 69, at 339-40.

⁷¹ See *Chorzów Factory* (Interpretation) (Anzilotti, D., dissenting), *supra*, note 68, at 23 (commonly seen as the classic enunciation of the doctrine of *res judicata*). See also SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 (Vol. III) 1599 (4th. ed. 2006).

⁷² See CHENG, *supra*, note 69, at 348, quoted with approval in *United States of America and Islamic Republic of Iran*, Decision No. DEC 132-A33-FT, para. 29 (9 Sept. 2004). See also *Dispute Concerning the Course of the Frontier between BP 62 and Mount Fitzroy* (“Laguna del Desierto”) (Argentina/Chile), Judgment, para. 94 (21 Oct. 1994), reprinted in 113 I.L.R. 1, 43-44 (1999) (“The force of an international judgment as *res judicata* relates primarily to its operative part (*dispositif*), that is to say that part in which the tribunal rules on the dispute and establishes the rights and obligations of the parties. The jurisprudence has likewise

International Court of Justice (“I.C.J.”) stated the following with respect to the scope of the doctrine of *res judicata*:

In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given. . . .⁷³

. . . For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. . . . If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.⁷⁴

116. The underlying policy justification for the doctrine of *res judicata* is based on two fundamental purposes, one of which is of a public, and the other of a private, nature. In the *Genocide Case*, the I.C.J. summarized the rationale of the doctrine in the following terms:

Two purposes, one general, the other specific, underlie the principle of *res judicata*. . . . First, the stability of legal relations requires that litigation come to an end. . . . Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.⁷⁵

accepted that those propositions contained in the grounds of judgment (‘considerations’) which constitute the necessary logical antecedents to the operative part have the same binding force as the latter.”) (citing *Chorzów Factory* (Interpretation), *supra*, note 68, at 20-21, and *The Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic* (United Kingdom/France), Decision (14 Mar. 1978), 18 R.I.A.A. 271, 296).

⁷³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (26 Feb. 2007), para. 125 (available at www.icj-cij.org).

⁷⁴ *Id.* at para. 126.

⁷⁵ *Id.* at para. 116.

117. Turning now to the application of the doctrine of *res judicata* to the facts of this Case, the Tribunal does not agree with the United States' assertion that the Tribunal's finding of an implicit obligation in Case No. A15 (II:A) could not have the effect of *res judicata* because it was contained in a Partial Award rather than a Final Award. The Tribunal considers that the fact that the Tribunal's ruling in Case No. A15 (II:A) was rendered in a Partial Award does not preclude a finding of *res judicata*. What matters is whether the Tribunal's finding of an implicit obligation finally disposed of this issue between Iran and the United States, and not whether the Tribunal's decision was rendered in a Partial Award or a preliminary judgment.⁷⁶ A Partial Award may not decide all the issues in a case, but those issues it does decide, are decided with finality and not on a provisional basis. A Partial Award is, though partial, still an "award" for the purposes of Article IV, paragraph 1, of the Claims Settlement Declaration and Article 32, paragraph 2, of the Tribunal Rules of Procedure; hence, it is final and binding on the parties.

118. It is clear from the Parties' arguments that the United States defines *res judicata* narrowly, arguing that Cases Nos. A15 (II:A) and B61 concern different claims and properties.⁷⁷ Iran on the other hand takes a somewhat broader view of the doctrine when submitting that both Cases Nos. A15 (II:A) and B61 involve "exactly the same *kind of* export controlled property."⁷⁸ The question to be addressed by the Tribunal is thus whether the doctrine of *res judicata* requires that the exact same properties are the subject of Cases Nos. A15 (II:A) and B61, or whether it is sufficient that both proceedings deal with the same type or category of properties, that is, export-controlled properties not in the possession of the United States Government.

119. The Tribunal notes that there is some question as to whether, as a general matter, strict identity of the object of a claim is required for *res judicata* to apply

⁷⁶ See CHENG, *supra*, note 69, at 355.

⁷⁷ The Tribunal notes that, at the time it rendered its Partial Award in Case No. A15 (II:A and II:B), some overlap did exist between the properties in Cases Nos. A15 (II:A) and B61. Iran subsequently decided not to pursue its claims in relation to duplicative military properties in Case No. A15 (II:A). See *supra*, paras. 11 and 20.

⁷⁸ Emphasis added.

under international legal standards. Depending on the circumstances of the case, the doctrine of *res judicata* has been interpreted in a manner not requiring the strict identity of the object of the claim. In the *India Autos* case, for example, which was referred to by the United States at the Hearing on the General Issues in this Case, the World Trade Organization (“W.T.O.”) Panel stated that it would only be required to rule on the applicability of the doctrine of *res judicata* to W.T.O. dispute settlement “[i]f the basis of this dispute is *sufficiently similar* to that of [the earlier case] so as to come within accepted notions of the doctrine.”⁷⁹ The W.T.O. Panel went on to hold that, “for *res judicata* to have any possible role in WTO dispute settlement, there should, at the very least, be *in essence* identity between the matter previously ruled on and that submitted to the subsequent panel.”⁸⁰ The W.T.O. Panel concluded that the two matters were not the same as “neither the specific measures in this case, nor any *comparable* measures in existence at the time of that panel’s establishment, were expressly considered” in the earlier case.⁸¹ Some international tribunals have referred to *res judicata* in more general terms.⁸²

⁷⁹ *India - Measures Affecting the Automotive Sector* (Complaints by the European Communities and the United States, WT/DS146/R and WT/DS175/R), Report of the Panel, para. 7.60 (21 Dec. 2001) (emphasis added).

⁸⁰ *Id.* at para. 7.66 (emphasis added).

⁸¹ *Id.* at para. 7.91 (emphasis added). In addition, the Tribunal notes that a number of academic commentators are of the view that the doctrine of *res judicata* is concerned with substantially identical actions, rather than requiring the exact identity of the subject-matter of the dispute. See, e.g., Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 191, 202 (1999); August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 37, 71 (2004). Cf. Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 38 (1996).

⁸² See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (26 June 2002), para. 39 (“[A] judicial decision is only *res judicata* if it is between the same parties and concerns the same question as that previously decided.”) (available at <<http://icsid.worldbank.org>>). The *Waste Management* tribunal quotes *Compagnie Générale de l’Orénoque* (Franco-Venezuelan Mixed Cl. Comm. 1905), reprinted in JACKSON H. RALSTON and W.T.S. DOYLE, REPORT OF THE FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902 244, 355 (1906) (“[A] right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed.”); and *In the Matter of the S.S. Newchang, Claim 21* (American-British Claims

120. Although the Tribunal recognizes that the concept of *res judicata* may be broader in international law than found in some domestic jurisdictions, it accepts that identity of the parties, object, and cause is the proper standard by which to determine when *res judicata* operates.⁸³ Whether strict identity of the object is required depends, however, on the scope of the prior finding in question. To determine the applicability of *res judicata* in this Case, it is thus necessary to ascertain the exact scope of the Tribunal's finding of an implicit obligation in Case No. A15 (II:A) in the context of the dispute presented by the Parties.⁸⁴

121. In the proceedings in Case No. A15 (II:A), Iran claimed that the United States had "breached its obligations under the Algiers Declarations by failing to arrange for the immediate transfer to Iran of all Iranian tangible properties subject to its jurisdiction or, in the alternative, by failing to compensate Iran for the United States' refusal to arrange for such transfer."⁸⁵ Iran sought a declaratory award⁸⁶ finding such breach, compelling the United States to arrange for the transfer of Iran's properties which had not been transferred, and ordering the United States to pay for all direct and indirect damages Iran allegedly suffered from this breach, with the amount of such damages to be determined at a later stage of the proceedings.⁸⁷

122. In deciding Iran's claim, the Tribunal expressly defined the scope of its determinations. In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal stated the following:

Tribunal), *reprinted in* 16 A.J.I.L. 323, 324 (1922) (*Res judicata* "applies only where there is identity of the parties and of the question at issue.").

⁸³ *See supra*, para. 114.

⁸⁴ Where the scope of *res judicata* is at issue, it may be necessary for a court or tribunal to review the submissions of the parties in the different cases in order to ascertain the context in which a certain decision was made. *See, e.g., Haya de la Torre* (Colombia v. Peru), 1951 I.C.J. 70, 79-80 (13 Jun.). *See generally* ROSENNE, *supra*, note 71, at 1603.

⁸⁵ Partial Award in Case No. A15 (II:A and II:B), para. 16, 28 Iran-U.S. C.T.R. at 119.

⁸⁶ Requests for, and issuance of, declaratory determinations on categories of claims before the Tribunal are not without precedent. *See, e.g., Islamic Republic of Iran and United States of America*, Decision No. DEC 32-A18-FT (6 Apr. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 251, involving the question of the application of a legal standard for dual nationality.

⁸⁷ *See* Partial Award in Case No. A15 (II:A and II:B), para. 29, 28 Iran-U.S. C.T.R. at 123.

30. Considering the status of the Parties' pleadings to date, the Tribunal is not in a position to make determinations in this Partial Award on all issues presented, and particularly not on factual questions concerning specific properties or the extent and amount of the alleged damages for which Iran seeks compensation. . . .

33. At the Hearing, the Tribunal informed the Parties that it did not anticipate deciding issues of particular properties at this stage of the proceedings and that the Parties were not expected to answer the evidence concerning particular properties at that time.⁸⁸

123. The Tribunal notes that, during the Hearing of Case No. A15 (II:A and II:B), the United States did not object to the Tribunal's proposed course of action that it would not render a decision in its Partial Award with regard to specific properties. To the contrary, the United States requested that, "should the claims not be dismissed, the Tribunal now decide *at least as many legal issues as possible* with respect to particular *categories* of Iranian properties,"⁸⁹ which included properties subject to United States export-control laws. On the basis of the issue presented and in light of the express limitation on the scope of its determinations, the Tribunal, as noted, held as follows in the operative part (*dispositif*) of its Partial Award:

The United States has an implicit obligation under the General Declaration to compensate Iran for losses it incurs as a result of the refusal by the United States to permit exports of Iranian properties subject to United States export control laws applicable prior to 14 November 1979.⁹⁰

124. Having considered the scope and context of the Partial Award in Case No. A15 (II:A and II:B), it is clear that the Tribunal thus decided, in a declaratory fashion⁹¹ and almost in the abstract, an issue of interpretation of the General

⁸⁸ *Id.* at paras. 30 and 33, 28 Iran-U.S. C.T.R. at 123-24.

⁸⁹ *Id.* at para. 32, 28 Iran-U.S. C.T.R. at 124 (emphasis added). The Tribunal further notes that, when it requested that the Tribunal decide as many legal issues as possible, the United States did not appear to be concerned that the number of military properties at issue in Case No. A15 (II:A) was relatively small.

⁹⁰ *Id.* at para. 77(g), 28 Iran-U.S. C.T.R. at 141.

⁹¹ The Permanent Court of International Justice explained what it meant by a declaratory judgment in *Chorzów Factory* (Interpretation):

Declaration, without deciding questions relating to any of the particular properties that were the subject of the underlying contracts between Iran and the private United States companies. The ruling in that Partial Award expressly applied to a category of properties, which category forms the subject-matter of the claim. The Tribunal finds that the *dispositif* in paragraph 77(g) of the Partial Award in Case No. A15 (II:A and II:B) relates to a certain *category* of Iranian properties, that is, export-controlled properties, and is not limited to the specific export-controlled properties at issue in Case A15 (II:A).

125. In light of the foregoing, the Tribunal determines that the Tribunal's holding in its Partial Award in Case No. A15 (II:A and II:B) that the United States has an implicit obligation under the General Declaration to compensate Iran for losses it has incurred as a result of the refusal by the United States to permit the export of Iran's export-controlled properties has *res judicata* effect in Case No. B61.

126. In addition to arguing that the different claims and properties in Cases Nos. A15 (II:A) and B61 render the doctrine of *res judicata* inapplicable, the United States further contends that the Partial Award in Case No. A15 (II:A and II:B) is not *res judicata* because the Tribunal's finding of an implicit obligation in the Algiers Declarations constitutes a "manifest error of law." According to the United States, the error was due largely to the fact that the Tribunal had not been fully briefed by the Parties on all material points in Case No. A15 (II:A).

127. No *res judicata*-effect attaches to a decision by a competent court or tribunal when that decision is the result of a manifest error of law.⁹² The Tribunal notes that this exception to the doctrine of *res judicata* is rather narrow, because the commission of "mere" or "other" errors of law is not sufficient to deny the final and binding effect

[T]he intention of [a declaratory judgment] is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.

Chorzów Factory, *supra*, note 68, at 20.

⁹² See, e.g., *Trail Smelter Arbitration* (United States of America v. Canada), 3 R.I.A.A. 1905, 1938, 1956-57 (U.S.-Can. Arb. Trib. 1941).

of decisions.⁹³ Such a restrictive approach is entirely in line with the policy justification for the doctrine, namely, that there be an end to litigation.⁹⁴ It is further clear from the case-law of international courts and tribunals that what falls within this exception to *res judicata* are instances where a tribunal or court, in making its decision, had overlooked a relevant treaty or a piece of legislation, or had based its decision on an agreement that had admittedly been terminated.⁹⁵ What these examples have in common is that the error of law is incapable of rebuttal by the opposing party and not subject to different interpretations. Merely disagreeing with a tribunal's interpretation or construction of a treaty or other legal document does not qualify as a "manifest error of law."

128. The Tribunal finds that none of the arguments raised by the United States, however, fits, or is analogous to, the above examples of manifest error of law. Rather, the tenor of the United States' submissions was that the Tribunal had erred in imposing an obligation to compensate on the United States in the absence of breach. This, the United States argues, was inconsistent with wider principles of the international law on remedies. However, the arguments advanced by the United States on these "wider principles of international law" (including the law on State responsibility) in support of its version of the correct interpretation of the General Declaration were traversed by Iran. The Tribunal therefore does not agree that its

⁹³ The *Trail Smelter* Tribunal held in this regard:

The Tribunal is of opinion that the proper criterion lies in a distinction not between "essential" errors in law and other such errors, but between "manifest" errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law. At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a "manifest" error. Further criticisms need not be considered. The assumption that they are justified would not suffice to upset the decision.

See id. 3 R.I.A.A. at 1957.

⁹⁴ *See supra*, para. 116.

⁹⁵ *See, e.g., Trail Smelter Arbitration, supra*, note 92, 3 R.I.A.A. at 1957; *Schreck Case* (Mex.-U.S. Cl. Comm. 1868) (Claim No. 768), reported in JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (Vol. II) 1357-58 (1898).

prior finding of an implicit obligation to compensate in Case No. A15 (II:A and II:B) constitutes a “manifest error of law.”

129. Concerning the United States’ position on the issue of briefing, the Tribunal finds that the question is not whether the issue of an implicit obligation was fully briefed in Case No. A15 (II:A). Rather, the inquiry focuses on (1) whether the issue was raised,⁹⁶ and, if so, (2) whether the Parties had the opportunity⁹⁷ fully to present all the arguments they wished to raise. The Tribunal therefore need not examine how much of the Parties’ written pleadings or oral arguments in Case No. A15 (II:A) was devoted to the issue of an implicit obligation, as long as the issue was raised and the Parties had the opportunity to present arguments thereon.

130. Turning first to the question whether the issue of the implicit obligation to compensate was raised by the Parties during the proceedings in Case No. A15 (II:A), the Tribunal notes that, because its jurisdiction is of a consensual nature, the Tribunal may only decide issues that are presented to it for determination.⁹⁸ It is clear from the Partial Award in Case No. A15 (II:A and II:B) that the issue of the implicit obligation to compensate was raised in Case No. A15 (II:A), since Iran expressly relied on the Tribunal’s prior holding in the Partial Award in Case No. B1 (Claim 4) in support of its argument that the United States was under a duty to compensate Iran, even though the properties at issue in Case No. A15 (II:A) were not in the possession of the United States.⁹⁹ The Tribunal determines that it was therefore authorized to rule on the issue of the implicit obligation in Case No. A15 (II:A). In any event, the United States’ complaint is, not that the issue of an implicit obligation was not raised in Case No. A15 (II:A), but rather that it was not fully argued by the Parties. That, however, is a

⁹⁶ Judge Mohamed Shahabuddeen, a former Member of the I.C.J., writes that “it is clear that, where an issue has been raised, the Court may competently consider all pertinent arguments and authorities, *even if not presented by the parties.*” MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 140 (Cambridge 1996) (emphasis added).

⁹⁷ See also ROSENNE, *supra*, note 71, at 1603.

⁹⁸ See also *Asylum Case* (Colombia v. Peru), 1950 I.C.J. 265, 280 (20 Nov.), where the I.C.J. expressly declined to exercise jurisdiction over the question of surrender of Victor Raúl Haya de la Torre as it had not been submitted to it.

⁹⁹ See Partial Award in Case No. A15 (II:A and II:B), paras. 62-63, 28 Iran-U.S. C.T.R. at 135. See also *id.* at para. 16, 28 Iran-U.S. C.T.R. at 119.

decision that the Parties took at the time, and the Tribunal, as a judicial forum, is presumed to know the law.¹⁰⁰ In considering the issue of interpretation submitted to it for determination in Case No. A15 (II:A), the Tribunal was thus not limited to the legal arguments presented by the Parties.

131. Second, the United States never suggested that it had been denied the opportunity fully to brief the Tribunal on the issue of the implicit obligation in Case No. A15 (II:A). Article 15 of the Tribunal Rules of Procedure stipulates that each party must be given a full opportunity of presenting his case at any stage of the arbitral proceedings. If the United States had felt, in Case No. A15 (II:A), that it had been denied such an opportunity, it could have raised the issue during the course of proceedings in that Case. Furthermore, Article 29 of the Tribunal Rules of Procedure provides a mechanism for a party to make an application to the Tribunal, after the hearing is closed but before the award is made, to request that the Tribunal reopen the hearings. The United States did not submit such an application in Case No. A15 (II:A) before the Partial Award was rendered in 1992. Instead, the United States is now, in Case No. B61, requesting that the Tribunal reconsider its reasoning in the Partial Award in Case No. A15 (II:A and II:B) in essence because it is not satisfied with the outcome of that Partial Award. In light of the due process mechanisms available to a party pursuant to the Tribunal Rules of Procedure, the Tribunal cannot accept the United States' argument that the Tribunal's finding in the Partial Award in Case No. A15 (II:A and II:B) of an implicit obligation to compensate is somehow flawed because of an alleged lack of full briefing by the Parties.

132. In accordance with its findings above,¹⁰¹ the Tribunal also determines that, *inter alia*, the following holdings in the operative part (*dispositif*) of the Partial Award in Case No. A15 (II:A and II:B) have *res judicata* effect in this Case:

¹⁰⁰ See SHAHABUDEEN, *supra*, note 96, at 137 (“[W]hether or not there has been argument, the principle *jura novit curia* requires [the I.C.J.] to satisfy itself of a legal proposition before announcing it or acting on it.”) (emphasis added). See also *Lotus Case* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 31 (7 Sept.); *Fisheries Jurisdiction* (United Kingdom v. Iceland), 1974 I.C.J. 3, 9 (25 Jul.).

¹⁰¹ See *supra*, para. 115.

- Paragraph 77(d):

United States Treasury Regulations that excluded from the transfer direction properties which were owned solely by Iran but as to which Iran's right to possession was contested by the holders of such properties on the basis of any liens, defences, counter-claims, set-offs or similar reasons, were inconsistent with the obligations of the United States under the General Declaration. . . .¹⁰²

- Paragraph 77(k):

The Respondent, The United States of America, is not obligated by the General Declaration to compensate the Claimant, The Islamic Republic of Iran, for any storage charges, depreciation or other losses incurred with respect to Iranian properties prior to 19 January 1981.¹⁰³

133. The Tribunal further determines that, *inter alia*, the following reasons (*motifs*) set forth in the Partial Award in Case No. A15 (II:A and II:B) have *res judicata* effect in this Case:

- (a) in Paragraph 9 of the General Declaration, the United States preserved its right to refuse the export of Iranian properties subject to United States export-control laws applicable prior to 14 November 1979;¹⁰⁴
- (b) those export-control laws include the Arms Export Control Act, the Atomic Energy Act of 1954, the Nuclear Non-Proliferation Act of 1978, and the Export Administration Act of 1979;¹⁰⁵
- (c) by refusing to license exports of Iranian properties subject to United States export-control laws applicable prior to 14 November 1979, the United States did not violate its obligations under the Algiers Declarations.¹⁰⁶

¹⁰² Partial Award in Case No. A15 (II:A and II:B), para. 77(d), 28 Iran-U.S. C.T.R. at 140.

¹⁰³ *Id.* at para. 77(k), 28 Iran-U.S. C.T.R. at 141.

¹⁰⁴ *Id.* at paras. 59 and 65, 28 Iran-U.S. C.T.R. at 134, 136-37.

¹⁰⁵ *Id.* at para. 60, 28 Iran-U.S. C.T.R. at 134.

¹⁰⁶ *Id.* at paras. 59 and 65, 28 Iran-U.S. C.T.R. at 134, 136-37.

C. *Compensable Losses*

134. Having determined the *res judicata* effect in this Case of the Tribunal's prior holding in its Partial Award in Case No. A15 (II:A and II:B) that the United States has an implicit obligation to compensate Iran for losses it incurs as a result of the United States' refusal to license exports of Iranian properties subject to export control laws applicable prior to 14 November 1979,¹⁰⁷ the Tribunal must next consider the issue of whether Iran has incurred any such losses with respect to the properties at issue in the present Case. In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal did not decide whether Iran had in fact suffered any compensable losses in that Case and, if so, the nature and extent of such losses. The Tribunal deferred this issue to a later phase of the proceedings because it considered that the evidence presented in the pleadings was insufficient to render a decision thereon. Contrary to the position the Tribunal found itself in when rendering its Partial Award in Case No. A15 (II:A and II:B), it is able to make that determination now with respect to the export-controlled properties at issue in this Case because the Tribunal has been fully briefed by the Parties on the question of losses, both in their extensive written pleadings and during the sixty days of Hearing devoted to the General Issues and the Individual Claims. The present Partial Award aims at finding a solution to a number of issues relating to losses that remained unresolved under the Partial Award in Case No. A15 (II:A and II:B).

135. In light of the detailed written and oral pleadings by the Parties in this Case, the Tribunal is now in a position fully to consider the methodology to be applied in determining whether Iran has suffered any compensable losses in this Case and, if so, the nature and extent of such losses.

1. The Scope of the Implicit Obligation

136. In interpreting the Algiers Declarations, the Tribunal has consistently applied Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May

¹⁰⁷ See *supra*, para. 125.

1969.¹⁰⁸ In clarifying the scope of the “implicit obligation . . . to compensate Iran for losses,”¹⁰⁹ the Tribunal takes into account the role implication has as the method of interpretation to which the Tribunal resorted when it interpreted the Algiers Declarations in its Partial Award in Case No. A15 (II:A and II:B).

137. Just as the Tribunal, in adopting the concept of implicit obligation in its Partial Award in Case No. A15 (II:A and II:B), acted within the limits set by the explicit provisions of the Algiers Declarations, the Tribunal, in determining the scope of that obligation, must act in accordance with, and within the limits of, these explicit provisions. It cannot depart from them. This is the main directive the Tribunal will follow in determining the scope of the implicit obligation.

138. As mentioned above, not only does the operative part (*dispositif*) of a decision acquire the force of *res judicata*, the underlying reasons (*motifs*) also enjoy *res judicata* effect to the extent that those reasons are relevant to the actual decision on the question at issue.¹¹⁰ In the Partial Award in Case No. A15 (II:A and II:B), the Tribunal stated in the body of the judgment that the implicit obligation of the United States to compensate Iran “derives from Paragraph 9 and General Principle A which requires that the United States restore Iran’s financial position to that which existed prior to 14 November 1979”;¹¹¹ and, more succinctly, that “[t]he United States’ implied obligation to compensate derives from the obligation to restore Iran’s financial position to that which existed prior to 14 November 1979.”¹¹² The restoration obligation contained in General Principle A thus constitutes the underlying basis (*motif*) for the Tribunal’s finding of an implicit obligation to compensate in Case No. A15 (II:A) and, as such, is, in addition to the implicit obligation to compensate itself, equally binding upon the Tribunal in this Case by virtue of the operation of the doctrine of *res judicata*.

¹⁰⁸ 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

¹⁰⁹ Partial Award in Case No. A15 (II:A and II:B), paras. 65, 77(g), 28 Iran-U.S. C.T.R. at 136-37, 141.

¹¹⁰ *See supra*, para. 115.

¹¹¹ Partial Award in Case No. A15 (II:A and II:B), para. 65, 28 Iran-U.S. C.T.R. at 136.

¹¹² *Id.*

139. Given that General Principle A was considered by the Tribunal in Case No. A15 (II:A) to be the basis for the implication of an obligation to compensate, the scope of the implicit obligation is to be determined by reference to General Principle A and, in particular, to the restoration obligation contained therein. General Principle A requires the United States to “restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.” In addition, General Principle A requires that the restoration of Iran’s financial position occur “[w]ithin the framework of and pursuant to the provisions” of the Algiers Declarations and by virtue of the United States’ commitment “to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9” of the General Declaration.

140. The text of General Principle A contains express references that link that provision to the Algiers Declarations as a whole (*i.e.*, the phrase “[w]ithin the framework of and pursuant to the provisions of the two Declarations”), as well as to Paragraphs 4 through 9 of the General Declaration specifically (“as set forth in Paragraphs 4-9”). As the Tribunal observed in its Partial Award in Case No. A15 (II:A and II:B), General Principle A “cannot stand by itself.”¹¹³ Quoting from its previous holding in *Islamic Republic of Iran and United States of America*, Interlocutory Award No. ITL 63-A15 (I:G)-FT (20 Aug. 1986),¹¹⁴ the Tribunal went on to state that “the provisions of the two Declarations not only describe and detail the specific acts that the United States will have to undertake in order to implement the broad commitment defined in General Principle A, but they also limit the obligations deriving from this commitment.”¹¹⁵

141. General Principle A, and in particular the restoration obligation contained therein, must therefore not be read in isolation, but rather must be interpreted within the four corners of the Algiers Declarations. In particular, Paragraphs 4 through 9 of the General Declaration specify how Iran’s financial position was to be restored to its

¹¹³ *Id.* at para. 69, 28 Iran-U.S. C.T.R. at 138.

¹¹⁴ *Islamic Republic of Iran and United States of America*, Interlocutory Award No. ITL 63-A15 (I:G)-FT, para. 19 (20 Aug. 1986), *reprinted in* 12 Iran-U.S. C.T.R. 40, 47-48.

¹¹⁵ Partial Award in Case No. A15 (II:A and II:B), para. 69, 28 Iran-U.S. C.T.R. at 138.

pre-14 November 1979 state. The Parties envisaged that restoration of Iran's financial position was to be achieved through the return of its gold bullion,¹¹⁶ deposits, securities,¹¹⁷ and other financial assets (*i.e.*, funds and securities),¹¹⁸ as well as tangible properties.¹¹⁹ In relation to tangible properties, the obligation to transfer them to Iran was to be made "subject to the provisions of U.S. law applicable prior to November 14, 1979."¹²⁰ The Tribunal has interpreted this clause to mean that, while the United States "acted within its rights"¹²¹ to refuse the export of tangible military properties, the United States had an implicit obligation to compensate Iran for losses incurred as a result of such refusal.¹²² Therefore, in the case of export-controlled properties, if Iran's pre-14 November 1979 financial position had deteriorated as a result of the United States' refusal to allow their export, Iran's financial position would be restored through the payment of monetary compensation rather than the transfer of the properties themselves.

142. It is thus clear that, while General Principle A defines the scope of the implicit obligation to compensate, the specific provisions of the General Declaration (*i.e.*, Paragraphs 4 through 9) in turn place limitations on the restoration obligation in General Principle A.

2. The Meaning of "Financial Position"

143. Given that the United States' implicit obligation to compensate Iran was expressly linked to the United States' obligation to restore Iran's financial position, it is necessary for the Tribunal to determine the meaning of a "financial position" in the context of this Case. The financial position of an entity is measured by reference to

¹¹⁶ General Declaration, Paragraph 4.

¹¹⁷ *Id.* Paragraphs 5 and 6.

¹¹⁸ *Id.* Paragraph 8.

¹¹⁹ *Id.* Paragraph 9.

¹²⁰ *Id.*

¹²¹ Partial Award in Case No. B1 (Claim 4), para. 62, 19 Iran-U.S. C.T.R. at 293. *See also* Partial Award in Case No. A15 (II:A and II:B), para. 59, 28 Iran-U.S. C.T.R. at 134.

¹²² *Id.* at paras. 65 & 77(g), 28 Iran-U.S. C.T.R. at 136-37, 141.

that entity's assets and liabilities at a certain point in time. Iran's pre-14 November 1979 financial position with respect to the export-controlled properties at issue in this Case constitutes the net value of those tangible properties, measured in monetary terms, and reflects any rights that Iran may have possessed with respect to those properties, as well as any liabilities and other obligations or limitations relating to the properties that would affect their value. Because a financial position reflects an entity's net asset position, it is only those legally enforceable rights and obligations that are capable of assessment in monetary terms that are taken into account. The most obvious examples of such rights, and the most relevant to this Case, are the right to own a property, the right to possess it, the right to sell a property, and the right to export it. Generally speaking, the broader the scope of the rights associated with a piece of property, the more valuable the property. The absence of some or all of these rights with respect to a given property (or the presence of a limitation thereon) therefore naturally diminishes the value thereof.

144. In relation to the existence of limitations on Iran's properties, the Tribunal determined, in *Islamic Republic of Iran and United States of America*, Award No. 590-A15 (IV)/A24-FT (28 Dec. 1998), that attachments obtained by United States nationals against Iran in United States courts before 14 November 1979 "were a component of Iran's financial position" and further held that they were not required to be nullified pursuant to the Algiers Declarations, because "[t]o lift those attachments would . . . improve Iran's [financial] position, rather than merely restore it."¹²³ The Tribunal notes that the same reasoning would also apply in the converse case of legally enforceable rights in property, which would equally form a component of Iran's financial position prior to 14 November 1979. If the decision by the United States on 26 March 1981 deprived Iran of those rights, that would result in a deterioration of that financial position, requiring compensation by the United States.

¹²³ *Islamic Republic of Iran and United States of America*, Award No. 590-A15 (IV)/A24-FT, para. 161 (28 Dec. 1998), reprinted in 34 Iran-U.S. C.T.R. 105, 153.

3. Comparison of Financial Position at Two Points in Time

145. The Tribunal holds that the determination of whether Iran's pre-14 November 1979 financial position needs restoration by the United States, in accordance with General Principle A, requires a comparison of that financial position with the financial position it occupied after 14 November 1979, and in particular at the time of the United States' conduct that allegedly caused Iran to suffer losses. This holding necessarily follows from the ordinary meaning of the word "restore" and is consistent with the Tribunal's jurisprudence. In *Islamic Republic of Iran and United States of America*, Award No. ITL 78-A15 (I:C)-FT (12 Nov. 1990), the Tribunal compared Iran's financial position with respect to certain letters of credit prior to 14 November 1979 with its subsequent financial position after the United States had issued Treasury Regulations containing provisions that negatively affected Iran's rights to call upon those letters of credit. After determining that no such provisions existed prior to 14 November 1979, the Tribunal held that Iran's pre-14 November 1979 financial position was not restored after the Algiers Declarations had been entered into, due to the Treasury Regulations that prevented the transfer of the proceeds to Iran pursuant to the letters of credit.¹²⁴

146. The Tribunal further holds that, upon the particular facts of this Case, Iran's pre-14 November 1979 financial position is to be compared against the financial position Iran occupied on 26 March 1981, that is, the date on which the United States officially asked the Government of Algeria to convey to Iran that the United States would not permit the export of the items at issue in this Case. Although the Algiers Declarations entered into force on 19 January 1981, that is, some two months earlier, the Tribunal considers, as it did in its Partial Award in Case No. B1 (Claim 4), that "[i]t was reasonable for the new administration to take about two months to decide how to exercise the discretion given to it by United States law with respect to the export of defense articles to Iran."¹²⁵

¹²⁴ *Islamic Republic of Iran and United States of America*, Interlocutory Award No. ITL 78-A15 (I:C)-FT, para. 28 (12 Nov. 1990), reprinted in 25 Iran-U.S. C.T.R. 247, 258-59.

¹²⁵ Partial Award in Case No. B1 (Claim 4), para. 71, 19 Iran-U.S. C.T.R. at 296.

4. Losses

147. In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal held that the United States had an implicit obligation to compensate Iran for losses it incurred as a result of the refusal by the United States to permit exports of Iranian export-controlled properties.¹²⁶ The Tribunal further held in that Partial Award that the United States was obligated to compensate Iran for the “full value” of such losses, “since Iran’s financial position would otherwise not be restored fully.”¹²⁷ The requirement that Iran be compensated for the full value of its losses is entirely consistent with the obligation imposed on the United States to restore Iran’s pre-14 November 1979 financial position. This is because compensation for anything less than the full value of its losses would not result in a restoration of that financial position. The restoration obligation thus constituted the underlying basis for the standard of compensation adopted by the Tribunal in Case No. A15 (II:A).

148. Given that the implicit obligation to compensate (*dispositif*, Partial Award in Case No. A15 (II:A and II:B)) is based on the restoration obligation (*motif, id.*),¹²⁸ and that the restoration obligation in turn constitutes the rationale for the Tribunal’s prior holding in its Partial Award in Case No. A15 (II:A and II:B) that Iran is entitled to compensation for the full value of its losses, the Tribunal determines that, in the present Case, it is bound by the standard of compensation as established in that Partial Award by reason of the operation of the doctrine of *res judicata*.

¹²⁶ Partial Award in Case No. A15 (II:A and II:B), paras. 77(g), 65, 28 Iran-U.S. C.T.R. at 141, 137. This formulation differed from the compensation standard that the Tribunal articulated in its Partial Award in Case No. B1 (Claim 4), where it held that the United States was liable to compensate Iran for the full value of the export-controlled items at issue in that Case. *See* Partial Award in Case No. B1 (Claim 4), paras. 77(b), 73, 75, 19 Iran-U.S. C.T.R. at 296-98.

¹²⁷ Partial Award in Case No. A15 (II:A and II:B), para. 65, 28 Iran-U.S. C.T.R. at 137.

¹²⁸ *See supra*, paras. 138-139.

5. Causation

149. As is clear from the *dispositif* in the Tribunal's Partial Award in Case No. A15 (II:A and II:B), the United States is obliged to compensate Iran for the losses it incurred "as a result of" the United States' refusal on 26 March 1981 to permit the export of Iranian export-controlled properties.¹²⁹ The Tribunal has held earlier in this Partial Award that a comparison of Iran's financial position at two different points in time is required in order to determine whether its pre-14 November 1979 financial position suffered a deterioration that would require restoration and hence compensation.¹³⁰ Accordingly, the Tribunal holds that, if Iran is able to prove that its financial position on 26 March 1981 with respect to the export-controlled properties in question had deteriorated as compared to its financial position prior to 14 November 1979 as a result of the United States' 26 March 1981 refusal to allow their export, the United States is required to compensate Iran for such deterioration.

150. It logically follows that any depreciation in value that the export-controlled properties may have suffered between 14 November 1979 and 19 January 1981, or any costs that Iran may have incurred during this freeze period, should not be taken into account when assessing Iran's losses (if any), as any such depreciation or costs could not have been caused by the subsequent refusal of the United States on 26 March 1981 to permit the export of those properties. This conclusion does not only inevitably follow from the requirement of causation, it also flows from the structure of the General Declaration itself. The Tribunal notes that the Parties did not address the issue of depreciation or costs in the General Declaration, instead deeming the return, in 1981, of Iran's frozen exportable assets to constitute a restoration of Iran's financial position prior to 14 November 1979. As the Tribunal held in its Partial Award in Case No. A15 (II:A and II:B), the structure of the General Declaration "is entirely forward-looking," and Paragraph 9 "makes no reference" to any duty to compensate Iran for storage charges or depreciation for the freeze period."¹³¹ In other words, not

¹²⁹ Partial Award in Case No. A15 (II:A and II:B), para. 77(g), 28 Iran-U.S. C.T.R. at 141.

¹³⁰ *See supra*, para. 145.

¹³¹ Partial Award in Case No. A15 (II:A and II:B), para. 69, 28 Iran-U.S. C.T.R. at 138.

only were Iran's tangible and financial assets frozen, losses it may have suffered with respect to those properties during the period from 14 November 1979 to 19 January 1981 were not compensable under the Algiers Declarations.¹³²

151. The Tribunal notes that it is the position of the United States that it was not its refusal to grant export licenses that caused Iran to suffer any losses, but rather that it was Iran's own actions or inactions that caused it not to receive the properties. Throughout that part of the Hearing devoted to the Individual Claims, it became apparent that, in many cases, Iran had terminated its contracts with the United States private companies before 4 November 1979, causing the properties not to be exported.¹³³ In addition, several of the United States private companies did not ship the goods to Iran, because Iran had, in breach of the contracts, failed either to pay for the properties in question or provide shipping instructions.

152. The Tribunal finds, however, that these alleged actions or inactions by Iran are issues between Iran and the private United States companies it had contracted with and have no bearing whatsoever on the obligations that Iran and the United States assumed when entering into the Algiers Declarations. In Paragraph 9 of the General Declaration, the United States undertook to arrange for the transfer to Iran "of all Iranian properties." The only exception to this transfer obligation was established by the U.S.-law clause. Subject to this exception, all that was required in order to trigger the transfer obligation was that the properties be "Iranian," in the sense that they were solely owned by Iran. As long as this was the case, it was simply irrelevant whether the properties had been (fully) paid for or not, or whether Iran might have breached its contracts with the United States private companies. This does not mean that Iran would necessarily receive a windfall where properties were transferred to it that, for

¹³² See *id.* at para. 70, 28 Iran-U.S. C.T.R. at 139.

¹³³ Iran terminated a series of contracts forming part of the so-called IBEX project in 1979, prior to the beginning of the hostage crisis. See *Ford Aerospace & Communications Corp. and The Government of the Islamic Republic of Iran, et al.*, Award No. 289-93-1 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 24; *Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran*, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298; *Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran*, Award No. 191-59-1 (20 Sep. 1985), reprinted in 9 Iran-U.S. C.T.R. 107.

example, had not been fully paid for. Article II, paragraph 1, of the Claims Settlement Declaration provided the legal avenue for private United States companies to bring, among other things, claims against Iran for breach of contract before this Tribunal to seek redress, and many companies in fact availed themselves of this mechanism.

6. No Proof of Change in Iran's Financial Position

153. In order to succeed in its claim for compensation, it follows from the preceding paragraphs that Iran, as the Claimant, is required to prove¹³⁴ that it has suffered losses to its pre-14 November 1979 financial position with respect to the export-controlled properties that are the subject of this Case, and that such losses were caused by the United States' refusal, on 26 March 1981, to allow their export. In particular, Iran must prove that the financial position it occupied on 26 March 1981 with respect to those export-controlled properties, which reflects Iran's rights and obligations associated therewith, had deteriorated compared to its financial position with respect to the same properties prior to 14 November 1979 as a result of the United States' 26 March 1981 refusal to allow export.

154. The Tribunal shall now consider whether the United States' export ban of 26 March 1981 deprived Iran either of its property or of a right associated therewith.

a. Right of Export

155. The Tribunal notes that the issue of whether Iran possessed a right of export was raised for the first time at some length in Case No. B1 (Claim 4), in the context of Paragraph 9 of the General Declaration. In that Case, the Tribunal was called upon to decide whether the reference in that Paragraph to "the provisions of U.S. law applicable prior to November 14, 1979,"¹³⁵ legitimized the refusal by the United

¹³⁴ See Article 24 of the Tribunal Rules of Procedure, 2 Iran-U.S. C.T.R. 405, 427.

¹³⁵ General Declaration, Paragraph 9.

States to export military articles to Iran.¹³⁶ The Tribunal reviewed the provisions of the Arms Export Control Act, which was in effect prior to 14 November 1979, and observed that Section 38 thereof provided that, “[i]n furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services.”¹³⁷ The Tribunal determined that “[s]uch a provision clearly empowers the President to preclude the export of military items if he determines that such exports would not be consistent with ‘world peace and the security and foreign policy of the United States,’”¹³⁸ irrespective of whether an export license may previously have been issued.¹³⁹ The Tribunal held that the U.S.-law proviso “effectively preserved this discretion granted to the President by Section 38 of the [Arms Export Control] Act.”¹⁴⁰ The Tribunal concluded as follows:

[T]he President’s exercise of the discretion conferred upon him by Section 38 of the [Arms Export Control] Act . . . is the exercise of a sovereign right which is not subject to review by an international Tribunal. Therefore, because the United States has not renounced this sovereign right in a treaty or in any other way that binds it internationally, and in the absence of any rule of customary international law which would limit its freedom of decision, it cannot be deprived of this sovereign discretion. Under these circumstances, the Tribunal does not consider the determination made by the President of the United States to withhold export of the military articles at issue in this Case to be unlawful. Accordingly, as a result of this determination, the Tribunal finds that “the provisions of the United States law applicable prior to 14 November 1979” effectively prevented the export of the military items to Iran, and that the United States, therefore, acted within its rights under Paragraph 9 and not in violation of it by refusing to export those items.¹⁴¹

156. The Tribunal confirmed the above holdings four years later when it rendered its Partial Award in Case No. A15 (II:A and II:B). In that Case, the Tribunal

¹³⁶ Partial Award in Case No. B1 (Claim 4), paras. 55, 45, 19 Iran-U.S. C.T.R. at 290, 287.

¹³⁷ *Id.* at para. 57, 19 Iran-U.S. C.T.R. at 291.

¹³⁸ *Id.*

¹³⁹ *Id.* at para. 60, 19 Iran-U.S. C.T.R. at 292.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at para. 62, 19 Iran-U.S. C.T.R. at 292-93.

specifically referred to paragraph 62 of its Partial Award in Case No. B1 (Claim 4) and held that the United States, in refusing to grant export licenses for Iranian properties, did not violate its obligations under the Algiers Declarations.¹⁴² The Tribunal went on to hold that, “[w]hile the United States preserved in the Algiers Declarations its right to refuse the export of the properties at issue, it undertook to compensate Iran in cases where the latter suffered losses from such refusal.”¹⁴³

157. This holding by the Tribunal in Case No. A15 (II:A) that the United States had preserved its right to refuse export has *res judicata* effect in this Case because it is, in addition to the restoration obligation, inextricably linked to, and constitutes an underlying reason (*motif*) for, the Tribunal’s finding of an implicit obligation to compensate.¹⁴⁴ Obviously, if the Tribunal in its Partial Award in Case No. A15 (II:A and II:B) had come to the conclusion that the United States did not have the right to refuse export, then the United States would have been required to return the actual military items in question, resulting in the restoration of Iran’s financial position prior to 14 November 1979 through the return of its tangible military assets, thereby obviating the need for any monetary compensation. Therefore, the holding that the United States possessed a right to refuse export was a pre-requisite to the finding of an implicit obligation to compensate. Given that the latter has *res judicata* effect for the purposes of this Case, it necessarily follows that the former has such effect as well.

158. It follows from the Tribunal’s recognition of a right on the part of the United States under Paragraph 9 of the General Declaration to refuse export, in accordance with “U.S. law applicable prior to November 14, 1979,” which right the United States had expressly safeguarded in that paragraph, that Iran did not possess a right, either before 14 November 1979 or after the entry into force of the Algiers Declarations, to export its military properties. The Tribunal therefore determines that the United States’ refusal on 26 March 1981 to allow the export of Iran’s military properties did

¹⁴² See Partial Award in Case No. A15 (II:A and II:B), para. 65, 28 Iran-U.S. C.T.R. at 136-37.

¹⁴³ *Id.*, para. 65, 28 Iran-U.S. C.T.R. at 137.

¹⁴⁴ See *supra*, para. 133.

not deprive Iran of a right of export, because it did not possess that right in the first place.

159. In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal stated that, “[a]lthough the risk that the necessary export licenses would not be granted by the United States was in 1979, and particularly just before 14 November 1979, higher than it was at the time the relevant contracts were entered into, the reason why Iran’s properties were not returned was due to decisions that the United States Government took as a result of the change in its relations with Iran after the Islamic Revolution and the seizure of the American Embassy in 1979.”¹⁴⁵ This statement of causation is entirely consistent with the Tribunal’s determination in this Partial Award that Iran did not have a right, either before 14 November 1979 or after 19 January 1981, to export its military properties.

160. The risk of non-export discussed in the Partial Award in Case No. A15 (II:A and II:B) and the right of export discussed in the present Partial Award are conceptually distinct and are addressed by the Tribunal for entirely different purposes. In Case No. A15 (II:A), the Tribunal considered the risk of non-export in the context of causation in determining whether the United States had an implicit obligation to compensate Iran for losses it may have incurred as a result of the United States’ decisions. The Tribunal concluded, in essence, that the non-export of Iran’s property was attributable to decisions taken by the United States, and that, therefore, the United States’ obligation to compensate Iran remained. In contrast, in this Case, the Tribunal, having affirmed the obligation of the United States to compensate Iran for losses resulting from the United States’ decisions,¹⁴⁶ has considered whether Iran possessed a right of export for purposes of assessing whether Iran’s pre-14 November 1979 financial position had suffered losses as a result of the United States’ refusal to allow the export of Iran’s export-controlled property.

¹⁴⁵ Partial Award in Case No. A15 (II:A and II:AB), para. 65, 28 Iran-U.S. C.T.R. at 137.

¹⁴⁶ *See supra*, para. 125.

161. While the Tribunal did not accept that the United States' right to refuse export eliminated its obligation to compensate Iran, the Tribunal is unwilling to ignore the actual features of Iran's contracts with private United States companies in determining whether and to what extent Iran suffered compensable losses. In the Partial Award in Case No. A15 (II:A and II:B), the Tribunal stated that it would consider "the period from the time the relevant contracts were entered into up to 14 November 1979 . . . in determining Iran's financial situation."¹⁴⁷ The United States' sovereign right to control the export of military property remained unchanged during the period from the time the relevant contracts were entered into until 14 November 1979 and was a feature of those contracts. As such, consistent with the Tribunal's findings in Case No. A15 (II:A and II:B), it must be a factor in determining Iran's financial position.

162. The Tribunal points out, as it did in its Partial Award in Case No. B1 (Claim 4), that the fact that Iran may have been in the possession of export licenses prior to 14 November 1979 is irrelevant to the Tribunal's analysis.¹⁴⁸ Pursuant to Section 42(e)(2)(A) of the Arms Export Control Act (which was a well-known feature of United States law prior to 14 November 1979), the United States had the power to revoke or suspend export licenses previously granted "without prior notice, whenever the Secretary [of State] deems such action to be advisable."¹⁴⁹

163. Any expectation of export that Iran may have had prior to 14 November 1979 in light of the quantity of military equipment it had exported from the United States during the 1970s did not create a legitimate expectation that it could export its military property at all times prior to 14 November 1979 or a legally enforceable expectation that it would be compensated by the United States for amounts it paid under its contracts with private United States companies in the event the United States decided to refuse export of the properties at issue in this Case. A contrary finding by the Tribunal would be inconsistent with the General Declaration, which, through the

¹⁴⁷ Partial Award in Case No. A15 (II:A and II:AB), para. 65, 28 Iran-U.S. C.T.R. at 136-37.

¹⁴⁸ *See supra*, para. 155 and note 139.

¹⁴⁹ 22 U.S.C. § 2791(e)(2)(A).

U.S.-law clause in Paragraph 9, expressly preserved the sovereign discretion of the United States to control the export of military articles from its territory, and with general international law, which recognizes the sovereign discretion possessed by all States to control the export of such articles from their territories. In ensuring the restoration of Iran's financial position to that which existed prior to 14 November 1979, the Tribunal cannot create rights for Iran that did not exist at that time.

164. Indeed, there is overwhelming evidence in this Case indicating that Iran itself was fully aware that it did not have a right to have its military properties exported from the territory of the United States. It was precisely for this reason that the contracts Iran had entered into with United States private companies throughout the 1970s, and prior to 14 November 1979, reflected Iran's careful consideration of the need for export authorization in order to secure shipment of its defense articles from the United States. For example, in a contract dated 1973 between the Imperial Iranian Air Force and Litton Systems, Inc., the Air Force acknowledged that export of the contract items from the United States was "subject to approval of the U.S. Department of State, Office of Munitions Control or such other departments or agencies of the U.S. Government as may be required."¹⁵⁰ In another contract entered into between Iran Aircraft Industries and General Electric Company in 1976, it was stated that the company's contractual obligations were "at all times subject to the export control laws and regulations of the United States Government, and any amendments thereof."¹⁵¹ As sophisticated purchasers of defense articles, Iran and its subordinate entities understood that items sent to the United States for repair services, as well as newly manufactured items, would not be exported absent authorization of the United States Government.

165. In addition, it was precisely this recognition by Iran that it did not have a right of export that led to the inclusion of provisions in some of its contracts with private United States companies allocating the responsibility for obtaining the export license

¹⁵⁰ See LN-33 Inertial Navigation Equipment Logistics Support Agreement, Section 15 (29 Oct. 1973).

¹⁵¹ See International Distribution Agreement between General Electric Company and Iran Aircraft Industries, para. 8 (5 Apr. 1976).

to one of the contractual parties,¹⁵² and stipulating where the losses would fall in the event that such a license was withheld.¹⁵³ In light of the foregoing, it is thus clear that Iran did not regard export authorization as merely a *pro forma* step in contract performance but evidently envisaged the possibility that export licenses might not be granted by the United States Government.

166. Finally, the evidence in this Case shows that, prior to 14 November 1979, the United States exercised its sovereign right to refuse the export to Iran of Iran's export-controlled properties, and that the United States effectively halted such export prior to that date.¹⁵⁴ The Tribunal finds that the actions by the United States in refusing such export were consistent with United States law applicable prior to 14 November 1979.

b. Ownership Rights

167. To the extent that Iran has proven that it in fact owned the export-controlled properties in question, the Tribunal finds that the United States' refusal, on 26 March 1981, to allow their export did not interfere in any way with Iran's ownership rights in those properties. All that the United States did was to exercise its undeniable sovereign right to prohibit the export of sensitive military items,¹⁵⁵ because it was no longer perceived to be in the United States' national interest for Iran to receive the items in question. By its 26 March 1981 refusal to allow export, the United States did not transfer to itself or any third party any ownership rights that Iran may have possessed; in particular, the Tribunal notes that, insofar as Iran can prove that it owned the export-controlled properties in question on 19 January 1981, it retained ownership thereof. Furthermore, by its 26 March 1981 refusal to allow export, the United States did not take possession of the export-controlled properties in question

¹⁵² See, e.g., Contract No. 119 between the Imperial Government of Iran and Rockwell International Systems, Inc., Section 2.15 (7 Aug. 1977).

¹⁵³ See, e.g., contract between the Ministry of War of the Government of Iran and CBA International Development Corporation, Article 18 (31 May 1978).

¹⁵⁴ See *supra*, paras. 30 *et seq.*

¹⁵⁵ See *supra*, para. 155.

nor did it deprive Iran of its right to sell these properties.¹⁵⁶ In these circumstances, the United States' 26 March 1981 refusal to allow export did not deprive Iran of its ownership rights in the export-controlled properties in question, which rights were the same on 26 March 1981 as they had been prior to 14 November 1979.

168. The above finding that Iran's ownership rights in the export-controlled properties at issue were not affected by the United States' 26 March 1981 refusal to allow export is consistent with the evidence filed in this Case showing that Iran exercised ownership rights over those properties after that date. For example, throughout the years, Iran has taken steps to consolidate and store the properties in a single warehouse, to preserve their condition, and to have some items destroyed for being hazardous or expired. Iran further successfully challenged, before this Tribunal, the proposed sale of its property by a private company in the United States.¹⁵⁷

169. Bearing in mind that the United States' refusal on 26 March 1981 to allow export did not interfere with any of Iran's pre-existing rights in the military properties in question, it further follows that any analogies to expropriation, including the relevant standard of compensation associated therewith, are inappropriate. The Tribunal notes that, in its Partial Award in Case No. B1 (Claim 4), it did liken the export prohibition to a complete deprivation of Iran's property, stating that the prejudicial consequences flowing from such a deprivation were "similar to those

¹⁵⁶ Iran alleges that, in subsequent years, the United States took possession of the following Iranian-owned items: (1) seven LTC4B8D helicopter engines that Iran had purchased from Avco Corporation and sent to the United States Government for repair (the United States admitted its possession of the seven helicopter engines in the 18 April 1995 "Consolidated Response of the United States: Part I, Response to Liability Claims by Company" (Avco Lycoming)); (2) two boxes containing material subject to classified treatment that the United States removed from the Victory Van Warehouse, as the United States acknowledged in its submission of 5 February 1986 in Case No. A15 (II:A and II:B); and (3) seven classified items related to the Phoenix missile that the United States transferred from the Victory Van Warehouse to a storage facility at the Philadelphia United States Navy Yard in 1985, as the United States acknowledged in its submission of 24 March 1993 in this Case. *See infra*, para. 181.

¹⁵⁷ *Behring International Inc. and Islamic Republic Iranian Air Force, et. al.*, Interim Award No. ITM 25-382-3 (10 Aug. 1983), *reprinted in* 3 Iran-U.S. C.T.R. 173, 174-75 (the Tribunal requested "the Claimant to take whatever measures are necessary to assure that the sale of assets scheduled for 15 August 1983 is not carried out," because "the Parties should be afforded an opportunity to more fully present and argue their contentions.").

which would have been the result of an expropriation.”¹⁵⁸ However, the FMS properties that were the subject of Case No. B1 (Claim 4) were being purchased by Iran from the United States, had been fully paid for by Iran, and remained in the possession of the United States. That is not the case with the export-controlled properties in the present Case, which were in the possession of private United States entities; the United States neither had possession of them nor was a party to the underlying contracts. In these circumstances, the United States’ refusal on 26 March 1981 to permit export of the Iranian export-controlled properties at issue did not affect any of Iran’s pre-existing rights; hence, no analogy to expropriation cases is apposite.

c. No Proof of Interference with Iran’s Property and/or Rights

170. In light of the foregoing, the Tribunal finds that Iran has not proven that, as a result of the United States’ refusal, on 26 March 1981, to allow the export of Iran’s export-controlled properties, it suffered a deterioration of its financial position prior to 14 November 1979 (either through the deprivation of its property or any of the rights associated therewith) that would require restoration pursuant to General Principle A. Iran has failed to prove that it in fact suffered any losses caused by the action taken by the United States in prohibiting export that would be compensable under the implicit obligation derived from Paragraph 9 and General Principle A of the General Declaration. It follows therefore that there are no losses to compensate.

171. The Tribunal observes that, in these circumstances, any order for compensation to Iran on the basis of the implicit obligation to compensate would, in fact, improve Iran’s financial position, rather than merely restore it, as required by General Principle A. This is because Iran would receive compensation for the alleged loss of certain rights that it never possessed in the first place.

172. Finally, the Tribunal notes that, in light of all the above determinations and the ultimate conclusion reached on the question of compensable losses, it is not necessary to set out in detail in this Partial Award an analysis of each of the specific Individual

¹⁵⁸ Partial Award in Case No. B1 (Claim 4), para. 70, 19 Iran-U.S. C.T.R. at 295.

Claims. The application of the methodology for assessing whether Iran suffered any compensable losses as a result of the United States' 26 March 1981 refusal to allow the export of Iranian export-controlled properties would lead to the same result in each and every claim, namely, a finding of no compensable losses.

D. Specific Performance

173. Iran also presented a claim seeking the export of the export-controlled properties at issue in this Case.¹⁵⁹ By finding that the United States has preserved in the Algiers Declarations its right to refuse export of those properties,¹⁶⁰ the Tribunal has necessarily rejected Iran's request for specific performance in the form of United States export authorization.

E. Treasury Regulations

174. During the proceedings in this Case, Iran also referred to, and relied on, the additional holding by the Tribunal in its Partial Award in Case No. A15 (II:A and II:B) that the Treasury Regulations issued by the United States on 26 February 1981¹⁶¹ were inconsistent in certain respects with the obligations of the United States under the General Declaration and, to that extent, violated those obligations. In that Partial Award the Tribunal held that those Regulations were inconsistent with the obligations of the United States under the General Declaration to the extent that they

¹⁵⁹ See *supra*, para 2.

¹⁶⁰ See *supra*, para. 157.

¹⁶¹ 31 C.F.R. § 535.333 (1981). Treasury Regulations § 535.333 defined, in Subsection (a), the "properties" subject to the Paragraph 9 transfer direction as all "uncontested" properties and stated, in Subsection (c), that properties "may be considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason." Treasury Regulations § 535.333, in Subsection (b), stated: "Properties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged." As a result of these provisions, any holder of Iranian property who reasonably believed that Iran owed him money for storage, repair, breach of contract, expropriation, or any other reason was not compelled by the Treasury Regulations to return the property to Iran. See also Partial Award in Case No. A15 (II:A and II:B), para. 44, 28 Iran-U.S. C.T.R. at 127-28.

excluded from Paragraph 9's transfer direction tangible properties which were owned solely by Iran but as to which Iran's right to possession was contested by the holders of such properties on the basis of any liens, defenses, counterclaims, set-offs, or similar reasons.¹⁶²

175. The Partial Award in Case No. A15 (II:A and II:B) does not state clearly whether the Tribunal found that those unlawful provisions of the Treasury Regulations applied to export-controlled Iranian properties as well as the non-export controlled Iranian properties which comprised the bulk of that Case. Nevertheless, its holding had general application to Iranian properties, and nothing in that Partial Award clearly exempts export-controlled properties from that holding. In any event, the Tribunal is satisfied that those unlawful provisions of the Treasury Regulations were applicable to Iranian export-controlled tangible properties.

176. Consequently, the Tribunal holds that those unlawful Treasury Regulations applied to Iranian export-controlled properties, including those at issue in the present Case. Such unlawful Regulations warrant an award of compensation in favor of Iran for damages whenever it is proved that they caused Iran to suffer damages.

177. During the proceedings in this Case, there was limited discussion of the Treasury Regulations at issue, including the question whether they may have caused damages, and, if so, to what extent. In these circumstances, the Tribunal defers its determination of all issues concerning those unlawful Regulations in this Case,

¹⁶² See *id.* at para. 77(d) (*dispositif*), 28 Iran-U.S. C.T.R. at 140. The Tribunal has determined, *supra*, at para. 132, that the holding at para. 77(d) (*dispositif*) of the Partial Award in Case No. A15 (II:A and II:B) with respect to Treasury Regulations has *res judicata* effect in this Case.

In its Partial Award in Case No. A15 (II:A and II:B), the Tribunal stated, *inter alia*, that the issuance by the United States of Treasury Regulations § 535 “constituted a violation of the United States’ obligations under the Algiers Declarations, to the extent that they exempted from their transfer direction Iranian properties on which liens existed that Iran had not discharged.” *Id.* at para. 53, 28 Iran-U.S. C.T.R. at 131. The Tribunal went on to state that the conclusions it had reached with respect to liens applied to Iranian properties where the holder contested Iran’s right to possession by asserting a defense, a counterclaim, or a set-off. See *id.* at para. 54, 28 Iran-U.S. C.T.R. at 131-32. See also *id.* at paras. 48-52, 28 Iran-U.S. C.T.R. at 129-31.

including whether damages were caused by those Regulations, and what was the nature and extent of any such damages, pending receipt of briefings by the Parties on those issues.

VII. THE FURTHER PROCEEDINGS

178. Several issues that arise in this Case remain to be decided by the Tribunal.

179. First, there are the issues noted above with respect to damages for the unlawful Treasury Regulations.¹⁶³ The Tribunal believes that the Parties should be given an opportunity to submit briefs and evidence relevant to these issues.

180. The second issue concerns Iran's claims with respect to properties at issue in the present Case that were not subject to the United States export-control laws. These properties remain part of Case No. B61 and the Tribunal would appreciate their identification by the Parties.

181. Third, during the Hearings in the present Case, Iran asserted that the United States has taken possession of certain properties covered by Iran's claims in the present Case.¹⁶⁴ The United States admitted taking possession of these properties¹⁶⁵ but appeared to assert that they were not properly the subject of this Case. The Tribunal would welcome further comments by the Parties with respect to these properties.

182. In light of the foregoing, the Tribunal authorizes further proceedings in this Case, which shall be scheduled by separate Order.

¹⁶³ *See supra*, para. 177.

¹⁶⁴ *See supra* note 156.

¹⁶⁵ *See id.*

VIII. AWARD

183. In view of the foregoing,

THE TRIBUNAL DETERMINES AS FOLLOWS:

- a. As the Tribunal has held in its Partial Award in Case No. A15 (II:A and II:B), pursuant to General Principle A and Paragraph 9 of the General Declaration, the United States has an implicit obligation to compensate Iran for any losses it incurs as a result of the lawful refusal by the United States to permit exports of Iranian properties subject to United States export- control laws applicable prior to 14 November 1979. This determination by the Tribunal has *res judicata* effect in the present Case No. B61.
- b. General Principle A of the General Declaration requires that the United States, “[w]ithin the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, . . . restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.”
- c. Any losses to its pre-14 November 1979 financial position claimed by Iran pursuant to the implicit obligation found by the Tribunal in its Partial Award in Case No. A15 (II:A and II:B) are compensable only to the extent, if any, that Iran has proven that such losses were caused by the decision of the United States on 26 March 1981 not to permit exports of Iranian properties subject to United States export-control laws.
- d. The Partial Award in Case No. A15 (II:A and II:B) dismissed Iran’s claims for any losses incurred with respect to Iranian properties between 14 November 1979 and 19 January 1981, including storage charges and depreciation. Accordingly, any depreciation in value that the export-controlled properties at issue in this Case may have suffered between 14 November 1979 and 19 January 1981, or any costs that Iran may have incurred during this freeze

period, should not be taken into account when assessing Iran's losses, if any, as any such depreciation or costs could not have been caused by the subsequent refusal of the United States on 26 March 1981 to permit the export of those properties.

- e. The determination of whether Iran's pre-14 November 1979 financial position needs restoration by the United States, in accordance with General Principle A of the General Declaration, requires a comparison of that financial position with the financial position Iran occupied on 26 March 1981, when the United States officially asked the Government of Algeria to convey to Iran that the United States would not permit the export by Iran of Iranian properties subject to United States export-control laws.
- f. The delay from the entry into force of the General Declaration on 19 January 1981 until 26 March 1981 in notifying Iran that the United States would exercise its right to refuse licenses for the export by Iran of Iranian export-controlled properties was reasonable in the circumstances.
- g. Iran has not proven that, as a result of the United States' refusal, on 26 March 1981, to allow the export of Iran's export-controlled properties, Iran suffered a deterioration of its pre-14 November 1979 financial position, either through the deprivation of its property or any of the rights associated therewith, that would require restoration pursuant to General Principle A of the General Declaration. Iran has failed to prove that it in fact suffered any losses caused by the action taken by the United States in prohibiting export that would be compensable under the implicit obligation derived from Paragraph 9 and General Principle A of the General Declaration. Accordingly, Iran's claim based on the implicit obligation is dismissed on the merits.
- h. Iran's claim for specific performance, seeking the export of the export-controlled properties at issue in this Case, is dismissed.

- i. Those provisions of the Treasury Regulations issued by the United States on 26 February 1981 that were held by the Tribunal in its Partial Award in Case No. A15 (II:A and II:B) to have been inconsistent with the obligations of the United States under the General Declaration, and therefore unlawful, were applicable to Iranian export-controlled properties and also unlawful in the present Case.
- j. The Tribunal's holding at para. 77(d) (*dispositif*) of the Partial Award in Case No. A15 (II:A and II:B) with respect to Treasury Regulations has *res judicata* effect in this Case.
- k. By separate Order, the Tribunal will schedule proceedings with respect to the issues identified in Section VII, *supra*.

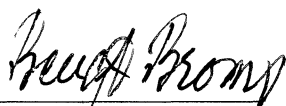
Dated, The Hague

17 July 2009



Krzysztof Skubiszewski
President

In the Name of God



Bengt Broms
Concurring in part,
Dissenting in part.

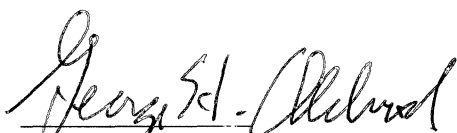


Gaetano Arangio-Ruiz*



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

In the Name of God




George H. Aldrich

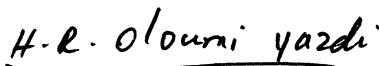


Mohsen Aghahosseini
Dissenting (*see my
Dissenting Opinion*).

In the Name of God



Charles N. Brower



Hamid Reza Oloumi Yazdi
Dissenting Opinion.



Gabrielle Kirk McDonald

*While fully concurring, I wish to indicate my objection to the spelling of the expression “res iudicata.” In fact, the correct spelling of “iudicata” is with an “i” and not with a “j.” In the history of ancient Rome (from VIII BC to VI AD) the official and literary language only used the term “ius” with an “i,” sometimes “ious,” always with an “i.” The “j” entered the neo-Latin literature only after the XII or XIII century AD. It follows that the modern use of “j” in the expression “res iudicata” (as well as in *ius*) is the result of a corruption of the original Latin word. The undeserved favor for spelling *res iudicata* with a “j,” especially on the part of international lawyers, is presumably due to the fact that the spelling and the phonetics of the words “judge” and “judgment” in English and “juge” and “jugement” in French, as well as the Italian “giudice” and “giudizio,” suggest a totally unjustified misspelling of the correct, genuinely Latin *res iudicata*.