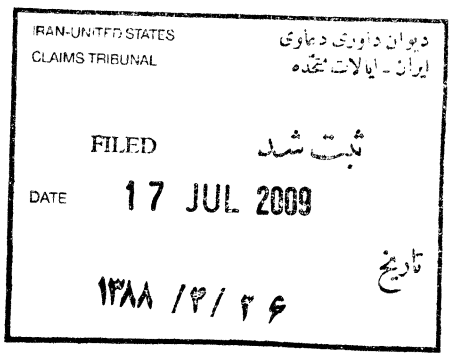
IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

Cases Nos. A3, A8, A9, A14 and B61
Full Tribunal
Partial Award No. 601-A3/A8/A9/A14/B61-FT



THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

SEPARATE OPINION OF JUDGE KOOROH H. AMELI,
CONCURRING IN PART, DISSENTING IN PART

Introduction

1. I concur in Section VI (B) and relevant parts in Section VIII, paragraph 183, of the Partial Award, holding that the finding of the United States "implicit obligation" to compensate Iran for the losses it has incurred as a result of the 1981 United States refusal to allow the return of Iran's export- controlled properties, including the military properties, in the Tribunal's Partial Award in Case No. 529- A15 (II: A & II: B)- FT[1] applies to the present Case by virtue of the *res judicata* effect of that finding.

2. I also concur in Section VI (E) and relevant parts in Section VIII, paragraph 183, of the Partial Award, holding that the finding of the Tribunal in the same Partial Award on the United States liability for its unlawful Treasury Regulations of 26 February 1981 applies

[1] *The Islamic Republic of Iran* and *The United States of America*, Partial Award No. 529- A15 (II:A and II: B)-FT (6 May 1992), *reprinted in* 28 Iran- U.S. C.T.R. 112.

to the military properties at issue in the present Case and scheduling further proceedings for the exchange of briefs and evidence to deal with the precise impact of the Treasury Regulations and the quantification of the damages Iran has suffered as a consequence.

3. In my opinion, however, it would have been more appropriate for the Tribunal to deal with both issues together and render a final rather than a partial award here in order to avoid any risk of isolation of the impact of the implicit obligation issue on the Treasury Regulations violations and *vice versa* as well as to establish a reasonable degree of recovery for that violation at least at the same time when so wrongly denying any recovery on the implicit obligation.

4. I dissent from Section VI (C) and relevant parts in Section VIII, paragraph 183, of the present Partial Award, dealing with the issue of the Claimant's "Compensable Losses," including the scope of the United States "implicit obligation" under the Algiers Declarations. In this part, the majority, which paradoxically consists of one Member who opposed to the very finding of the "implicit obligation" in the A/15 (II: A), as well as another Member who originally voted for the finding of "implicit obligation" in A/15 (II: A), have come up with a totally unsustainable and contradictory decision replete with manifest errors of facts and law and disregard for due process, which, as described below, clearly turn the decision to an impermissible *de facto* re-writing of the original finding of the "implicit obligation."

Summary of the reasons for my dissent

5. The extraordinary decision of the majority in the present Case on the scope and manner of application of the finding of "implicit obligation" has been achieved through the adoption by the majority of a tailor- made loss assessment methodology, which, together with the so-called supporting evidence, were belatedly shoe-horned into the proceedings as the proverbial Trojan Horse by the United States only in the middle of the Hearing of this Case in clear contravention of the basic principles of due process, contrary to the Tribunal's own Procedural Order and to Iran's prejudice. The entire United States case in B61 on the scope of its liability under the finding of "implicit obligation", including the facts, evidence, legal arguments and valuation reports, which until the Hearing was

constructed on a value-based premise at one point in time, *i.e.*, 26 March 1981, suddenly changed in the middle of the Hearing into a *comparison* between the financial position at two points in time, 13 November 1979 and 26 March 1981, with an avowed view to resulting in zero recovery.

6. The massive 2003 submission by the United States, by far the most substantial U.S. pleading until then, was entirely based on a "value on 26 March 1981" loss assessment methodology, as a correct application of the A/15 (II: A) finding of "implicit obligation."[2] That position, tallied, at least in part, with Iran's position in its 1999 pleading, surely must have led Iran to prepare itself accordingly for the Hearing. To abruptly change that position and bring an entirely new case in the middle of the Hearing[3] and, more troubling still, to *subsequently* try and introduce *new evidence* to back this

[2] Even in its earlier submission of 1995, while challenging the correctness of the Tribunal's finding of "implicit obligation" in A/15 (II: A) or its application in Case No. B/61, the United States acknowledged that if the said finding were to be found applicable to B/61, the extent of Iran's recovery would be the value of the Iranian properties less deductions to account for the age, conditions and obsolescence "as of the valuation date." Consolidated Response of the United States: Part II Response to Compensation and Damages Claims: Brief (18 April 1995) (Doc. 225), pp. 3- 4. *See* also, *ibid*, n. 5. The 5 April 1995 valuation report by Price Waterhouse, submitted with the U.S. Brief, similarly focused on the valuation as of *one specific point in* time and not based on a comparison between *two points in time*. *Ibid*, Exhibit 1. The United States also made it specific in the same submission that it would consider the term "losses" to mean "the amount, if any, that Iran lost as a direct result of the non – export of the property at issue, *up to the fair market value of that property*." *Ibid*, p. 5, n. 9. (Emphasis added.) The U.S. position in that submission was not based on *comparison* between Iran's financial position at *two points in time* but that Iran's "losses" should be represented by the *reduced market value* of the properties *at one point in time* after the date of the Algiers Declarations. It was stated there, for example, that "the amount of any losses that Iran may have incurred in connection with the alleged non- export of particular property at issue in this case is often far lower than the fair market value of the property as of March 26, 1981." *Ibid*, p. 9. With respect to the property for which Iran had paid only a portion of the contract price, the United States admitted in that submission that "Iran's losses are limited to the amount that it paid, provided it has not already been reimbursed for that amount." *Ibid*, pp. 12- 13. It follows, therefore, that if Iran had paid the full amount of a certain property, its losses recoverable under the A/15 (II: A) Award would be equal to that amount. This demonstrates that as early as 1995, the United States interpretation of the term "losses" in the A/15 (II: A) Partial Award was to include "the fair market value" of those properties, a position consistently maintained by the United States until the 2005 Hearing in the present Case.

[3] Indeed, the Tribunal admits in the present Award that the United States 46- page "general Response" of 1 March 2006 "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." Present Partial Award, para. 97, finding it to be "a pleading in the nature of a post- Hearing brief" rather than a response to Iran's 2005 "Supplemental Documents," the Tribunal rejected that U.S. Brief. The paradox here is that the majority admitted Exhibits A through C to the same Brief, including the attachments thereto, which were part and parcel and supportive of the arguments in that very Brief. *Ibid*, para. 96. How the majority was able to separate between the two inextricably linked documents (Brief and the related Exhibits), dismissing one while admitting the other, remains an enigma. More puzzling still is the fact that the substance of the said rejected U.S. Brief has become the underlying premise of the majority's decision on liability.

belated proposition seven months into the Hearing, is both patently prejudicial to the right of the Claimant as well as against the orderly conduct of the proceedings and the basic principles of due process, as enshrined in the rules of procedure in international arbitration and this very Tribunal.[4] A big question mark would, therefore, be hanging over the decision of the majority in the present Award as far as the procedure is concerned, casting doubt on the credibility of this decision from that point of view.

7. Question of admissibility aside, in adopting and applying this purpose- built United States methodology, the majority does not shy away from making it abundantly clear that under such a methodology, no loss whatsoever can ever be proven, no matter what evidence is submitted on the nature and extent of the Claimant's losses in the Individual Claims. That is made clear in the part of the present Award where it is stated that:

> "in light of [] 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 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."[5]

8. Indeed, as the majority in this Partial Award has opined that the Tribunal's finding of "implicit obligation" in the A/15 (II: A) Partial Award was made *in abstract,* and in light of the fact that both Parties were asked and directed by the Tribunal for more than a decade to prepare and submit *evidence* on the nature and extent of the losses, one would naturally have expected the Tribunal to adopt a *concrete* methodology, one which would involve close examination of the *evidence* submitted by the Parties upon the Tribunal's instruction. If the original finding was in abstract, as the majority contends, by adopting,

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[4] Under Article 15 (1) of the Tribunal Rules, "the parties are [to be] treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." Here, apart from having to divert resources to respond to a completely new case brought by the United States only at the Hearing, Iran was clearly deprived of the opportunity to present evidence in response to Exhibits A through C to the 2006 General Response of the United States, particularly the affidavits of Dr. Brzezinski and Ms. Biancaniello (and the attachments thereto), which were clearly submitted to support the theory that ultimately became the basis of the majority's decision. Equal treatment of the Parties and provision of a full opportunity at any stage have gone missing in this context.

[5] Partial Award, para. 172.

yet again, of another *abstract* methodology, the Parties have clearly been deprived of the opportunity to have their *evidence* on the nature and extent of the losses carefully examined by the Tribunal whereas this was supposed to have been precisely the phase for such an examination. It cannot be that the Tribunal make one decision allegedly *in abstracto* at the first stage of the proceedings, require the Parties to submit *evidence* on the nature and extent of the losses but ultimately make its final decision also *in abstracto* without taking any of the proffered evidence into account.

9. The absurdity of the ultimate outcome of this dead-end approach is all too obvious particularly in the fact that the Claimant is held at the end to have failed to demonstrate the losses, which the majority itself had made clear earlier in the Award, cannot be proven in any event. The majority has in fact set the bar at an impossible height and then blames the Claimant for not clearing it. Added to the perplexity is the fact that this *bar* was, according to the majority itself, "in the nature of a post- Hearing brief"[6] introduced and complemented by the Respondent right in the middle of the Hearing, *i.e.*, at the latest possible stage of the proceedings. In any event, the vicious circle resulting from this approach would lead to a manifestly absurd result: the total frustration, *in substance*, of the original finding of an "implicit obligation."[7]

10. Moreover, by taking such an abstract and "evidence- free" approach, the majority clearly went back on the Tribunal's own word, both in the A/15 (II: A) Partial Award[8]

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[6] Partial Award, para. 97.

[7] The Vienna Convention on the Law of Treaties in Article 32(b), ironically adopted in the present decision as one of the grounds of interpretation, actually prohibits an interpretation that "leads to a result which is manifestly absurd or unreasonable."

[8] In the Partial Award in Case No. A15 (II: A and II: B), having held that the finding of an *implicit obligation* in the earlier Partial Award No. 382-B1-FT (31 Aug. 1988) in Case No. B1 (Claim 4), *reprinted in* 19 Iran-U.S. C.T.R. 273, extends to, and applies in, Case No. A15 (II: A), the Tribunal, referring to the inadequacy of the evidence on the question of "losses," expressly noted that the further proceedings in that Case would be devoted to the completion of "evidence" as to the occurrence, nature and extent of such losses. Partial Award No. 529-A15 (II: A and II: B)-FT (6 May 1992), at para. 65, *reprinted in* 28 Iran-U.S. C.T.R. 112, 136. The Tribunal was specific in the *dispositif* of the said Partial Award that further proceedings and submissions with respect the Part II: A of the Case will focus, *inter alia*, on "individual properties and the determination of compensation and interest." *Ibid*, para. 77 (j). In Case No. B61, following the issuance of the Partial Award in Case No. A/15 (II: A and II: B) and subsequent to a Pre-Hearing conference between the Parties on how to schedule further proceedings, the Tribunal by issuing an Order 8 April 1993 (Doc. 192), directed the Parties to file their final consolidated submissions "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

and the subsequent procedural Orders issued in both A/15 (II: A) and the present Case, that the present stage of the proceedings is all about dealing with the *evidence* of the loss. Surely, questions will go begging, and to which the majority has failed to respond in the present Award, as to why the Parties, particularly the Claimant, have been dragged, *at the Tribunal's behest*, through years of proceedings, investing massive costs, time and manpower, in order to prepare and submit evidence of the nature and extent of the losses under the A/15 (II: A) finding of "implicit obligation" only to face an abstract decision at the end, which, by all accounts, could have been made back in 1992 when A/15 Award was rendered. Having been led, and specifically instructed, by the Tribunal for so long to prepare and submit *evidence* of the losses, the Claimant, in particular, would be perfectly within its rights to legitimately expect that the evidence on the nature and extent of the losses be carefully dealt with on their merits and that the ultimate decision be taken on that basis and only after such consideration. That has now become unjustifiably redundant as a result of this hollow approach.

11. In fact, all the elements of the underlying decision of the majority in the present Award were present both in 1988 when the Tribunal found the "implicit obligation" for the first time in Case No. B/1 (Claim 4) and in 1992 when the same "implicit obligation" was again found to exist and applicable in Case No. A/15 (II: A). In light of the general considerations underlying the decision of the majority in the present Partial Award, the majority did not, and cannot, point to any material new fact or development since 1988 or 1992, which could possibly justify this decision. The fact that the Tribunal in neither of those previous Cases came up with the confused and tortured proposition as in the present Award or anything even remotely similar to that, despite having been in a position to do so, is a strong indication that something must have gone badly wrong in the present Award.

12. In addition, despite proclaiming that in interpreting the Algiers Declarations, "the Tribunal has consistently applied Articles 31 and 32 of the Vienna Convention on the

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performance, the amount of compensation and the method of valuation used to establish that amount." *Ibid*, para. 5 (a).

Law of Treaties of 23 May 1969,"[9] the majority, by taking a *detour*, has also turned a blind eye on the critical fact that in their written pleadings in both A/15 (II: A) and in the present Case (until the turn- around at the Hearing), the common position of both Iran and the United States was, and in the A/15 (II: A) Case still remains, that the assessment of Iran's losses under the finding of an "implicit obligation" should be based, in the main, on the *value* of the Iranian properties subject of these Cases as of the date on which the United States announced its refusal to allow the export of those properties.

13. The above would squarely fall under the provisions of Article 31 (3) (a) and (b) of the above- mentioned Convention, which requires taking into account "any subsequent agreement" or any "subsequent practice" of the Parties to a treaty concerning the interpretation and/or application of that Treaty. The provisions of Paragraph 9 and General Principle A of the General Declaration, having been merged into the Tribunal's Partial Awards in Cases Nos. A/15 (II: A) and B/1 (Claim 4), the Parties common understanding of the effect of the Tribunal's finding must be considered as a significant controlling factor, if not dispositive altogether, in deciding the issue. The majority's total disregard of this controlling factor in the present Case is as inexplicable as it is in sharp contrast with the position the same majority took only recently in Case No. B/1 (Counterclaim) where it found that the filing of certain counterclaims by *both* Parties in the official "B" Cases at the initial stages of the Tribunal's proceedings amounted to "a subsequent practice of the Parties establishing a common understanding regarding the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to hear official counterclaims."[10]

14. If, as held in that Case, the common position of the Parties with regard to their understanding of a specific provision of the Declarations is considered as amounting to the "subsequent practice" of the Parties in interpreting those provisions, then it would logically, and by necessary implication, follow that the common position of *both* Parties

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[9] Partial Award, para. 136. Article 31 (3) of the said Convention, in particular, provides that: "[t]here shall be taken into account , together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Ian Brownlie (Ed.), *Basic Documents in International Law*, (4th ed. 1995), 388, 402.

[10] *The Islamic Republic of Iran* and *The United States of America*, Interlocutory Award No. ITL 83-B1-FT (9 September 2004), para. 133.

in the very Case the Award of which the Tribunal is applying here, *i.e.*, A/15 (II: A), with regard to the meaning and effect of the provisions of Paragraph 9 and General Principle A should equally have the same effect in the present Case. The inconsistency in the application of the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties by the majority and their failure to even point to the common position of the Parties on precisely the issue of the scope of the "implicit obligation" and compensable losses under the A/15 (II: A) Award, is a significant lacuna in the present decision.

15. Complementing and buttressing the above argument is the contemporaneous evidence of the United States understanding shortly after the signing of the Algiers Declarations in 1981 that should Iran be denied of receiving any of its tangible properties as a result of the exercise of the United States discretion under the U.S. law proviso in Paragraph 9 of the General Declaration, Iran should be reimbursed the value or monetary equivalent of such properties as a substitute performance by the United States.[11]

16. The above factors, critical as they are in deciding this, were blindingly obvious but for unexplained reasons, the majority, unlike Case No. B/1 (Counterclaim), chose not to take note of them. If only for the sake of consistency, the majority should have taken those significant factors into account and acted differently than it has in the present Case.

17. In essence, the majority's distaste and dislike of the very finding of "implicit obligation" can be easily detected from the tone of the decision. Repeated attempts to re-write that finding in different parts of the present Award such as those on the ownership

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[11] In fact, the Tribunal carefully considered this factor in its Partial Award in Case No. B/1 (Claim 4) in the context of "the subsequent practice of the Parties in the application of the Algiers Accords" under Article 31 (3) (b) of the Vienna Convention. B/1 (Claim 4) Partial Award, *supra*, at para. 68 by referring to the U.S. communication of 26 March 1981 in which the United States admitted that although "the export of [Iran's] defense articles would not be approved," nevertheless "Iran will be reimbursed for the cost of equipment in so far as possible." The Tribunal considered the above statement, together with the subsequent U.S. sale proposals, as nothing but "a clear recognition of a duty to pay compensation for the items which were not transferred to Iran pursuant to that Paragraph [9]." *Ibid*, para. 69. The fact that the Tribunal did not confine this finding to the FMS properties or those in the United States possession, confirms that the U.S. obligation to pay compensation extended to *all* Iranian "defense articles." The Tribunal further buttressed its above finding by immediately adding that that finding :

> "is consistent with general rules of international law, which do not authorize a State, in normal circumstances, to take *or retain* foreign property without compensation." *Ibid*, para. 70. (Emphasis added.)

The above rule applies, *a fortiori*, to the military hardware, including warships, military vessels, aircraft, or other implements of war, which under customary international law in peace time would have to be returned to the owner State if, for one reason or the other, they end up in the territory of another State.

rights and the impact of the U.S. refusal on those rights as well as the introduction of a totally novel discussion, *i.e.*, the *right of export* which is in essence the same as *export risk* that had already been considered and resolved in favour of Iran in the Partial Award in Case No. A/15 (II: A) are all evidence of such dislike and the zeal to revise and reverse that finding. The consequence of that attitude is the majority's ultimate decision in the present Award, which practically frustrates the "implicit obligation" in substance while paying only lip- service to the *res judicata* effect of that finding. Such conduct is particularly unacceptable on the part of the one Member who was part of the majority that voted in favour of the finding of "implicit obligation" in A/15 (II: A).

18. For the reasons described below, the totally confused decision of the majority in this regard, being in the nature of a *de facto* revision of the Tribunal's original finding in A/15 (II: A) Award, constitutes a prime example of a manifest error of law. The majority on the one hand appears to accept the *res judicata* effect of the A15 (II:A) Award and rejects the request for its revision while on the other hand accepts the United States third alternative argument and frustrates the application of that Award in the guise of interpretation obviously to save the majority.[12]

19. The explanation of all the reasons for demonstrating the flawed nature of the majority's decision would require a much more extensive treatment. However, I shall try below to summarize the reasons for only some of the procedural and substantive flaws, which underlie my dissent from this rather uniquely inexplicable decision, First, I shall deal with the critical grounds on which the majority's decision is based and then explain in more detail the background and evidence on which, I believe, the decision should have been made.

20. I must, however, add that Iran's Claim based on the United States breach of the Algiers Declarations due to the introduction of the 26 February 1981 Treasury Regulations still remains to be pleaded by the Parties and eventually dealt with by the Tribunal, opening a new avenue of recovery for Iran with respect to the very same

[12] The United States first argument was that the Tribunal should revise and correct the finding of the "implicit obligation" in the A/15 (II: A) Partial Award and its second argument was to confine that finding to Case No. A/15 (II: A) only and not to extend that to Case No. B/61.

property at issue in B/61.[13] This totally different legal premise, which gives rise to *damages* that, by definition, should wipe out *all* of the consequences of the unlawful act, warrants a different damage- assessment approach than the flawed and result- oriented approach adopted by the majority with respect to the "implicit obligation" claim.

21. The fate of the Iranian properties *inside* the United States or within its jurisdiction very much depends on a careful examination of all the surrounding circumstances the most prominent of which is the Treasury Regulations' impact on Iran's enjoyment and use of its ownership rights. I can only hope that in the further proceedings in this Case and with the help of both Parties, the Tribunal will put right what went so badly wrong in the present proceedings. To this end, both Parties should focus on very precise and to- the –point pleadings, supported by relevant evidence, in order to clearly describe the nature and quantify, under an appropriate methodology, the extent of the damages arisen from, the unlawful Treasury Regulations, particularly in light of the recent legislative developments in the United States, which appear to have compounded the previous restrictions on the Iranian properties still located there, including the properties at issue in this Case.

Main flaws of the majority opinion in the present Award

22. At the outset, the majority draws in paragraph 137 of the present Award a distinction between the "implicit obligation" itself and "the scope of that obligation." By doing this rather artificial distinction, the majority effectively has laid the ground for a totally new

[13] The United States Treasury Regulations § 535.333 (b) provided that "[p]roperties 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." This redefinition of Iranian properties, one month before the announcement of the U.S. export- refusal decision on 26 March 1981, remained in force in the United States for years to come even after the Tribunal found it in 1992 in the A/15 (II: A) Partial Award to be violative of the Algiers Declarations. It must be noted, however, that due to a flurry of legal challenges by the U.S. Claimants against the constitutional validity of the Algiers Declarations, the U.S. Department of State, in announcing the "reluctant" acceptance of the Declarations by the new Administration, added that the transfer of Iranian assets need not be affected until "the Secretary of the Treasury determines that the authority of the United States to order these transfers has been subject to a definitive legal ruling." 31 C.F.R. Treasury Regulations § 535.221 (b), 46 Fed. Reg. 14,335 (1981). That definitive legal ruling came only in July 1981, almost six months after the effective date of the Algiers Declarations, in the U.S. Supreme Court Decision in *Dames & Moore* v. *Regan*. No. 80-2078 (July 2, 1981). These and a whole host of other legal and factual considerations, which might have affected Iran's property rights, will be subject to further proceedings in this Case.

interpretive exercise to determine what it perceives as "the scope" of the implicit obligation by pretending that the Tribunal did not decide that question in the A/15 (II: A). Later, the majority in a mere footnote shrugs off, without detailed analysis, the standard of compensation in the Tribunal's 1988 Partial Award in Case No. B/1 (Claim 4) as irrelevant and different as it provided for the full value of the properties at issue in that Case while in the A/15 (II: A) Award, the standard is described as the full value of the losses.[14] However, the majority does not expressly explain there the reasons for this decision in disregard of the requirement of Article 32 (3), which obligates the Tribunal to give the reasons upon which the award is based.

23. The majority's inference of the existence of a difference in the standard of compensation between the two Awards is apparently based on the hypothetical assumption that the term "loss" used in the A/15 (II: A) Partial Award is necessarily different from, and does not include, "value" that was used in the B/1 (Claim 4) Partial Award. This proposition is, of course so patently wrong, not least because both Iran and the United States in both A/15 (II: A) Case and the present Case (until the Hearing) adopted the position that the term "loss" as used in the A/15 (II: A) Partial Award *does* include "value" of the properties as of the date of refusal and *that* "value" is the principal remedy to be awarded to the Claimant under the A/15 (II: A) Award. The United States itself in its latest pleading filed in 2001 in Case No. A/15 (II: A) has acknowledged that:

> "In this Case, if the Tribunal finds that U.S. non- compliance with Paragraph 9 resulted in the non- transfer of particular items of property, *Iran may be deemed to have lost the value of the property.*"[15]

How the majority so blatantly disregard this critical factor, which shall be addressed more fully later in this opinion, remains a mystery.

24. Leading authorities on the subject confirm that the main element of "loss" as a result of another party's actions is actually the "loss of the value of a given property" that is

[14] Award, p. 74, footnote 131.
[15] Response of the United States to Claimant's Brief and Evidence in Case Nos. A/15 (II: A), A/26 (IV) and B/43, Doc. 1435, p. 141. (Emphasis added.)

affected by such action, particularly when tangible property is involved.[16] How the majority could detach "value," which is the natural and principal ingredient of "loss" is, at best, question begging. The premise of the distinction between "value" and "loss" in the way the majority has done here being totally erroneous, the entire case for a new interpretive exercise would, therefore, collapse.

25. Next, the majority correctly points out that in the Partial Award in Case No. A15 (II: A and II: B), it was held that the United States implicit obligation 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."[17] However, without going into details of that Award and conspicuously dropping the follow- up quotation in the very same paragraph of that Partial Award that "[f]ailure to transfer the monetary equivalent of Iranian-owned properties not themselves exportable certainly conflicts with such a [restoration] purpose,"[18] the majority immediately in the next paragraph eliminates Paragraph 9 of the General Declaration from the picture and adopt solely General Principle A as "the basis for the implication of an obligation to compensate."[19] The anomaly is in the majority's decision to give preference, contrary to the principle *generalia specialibus non derogant*, to the *general* provisions of the General Principle A over, and at the expense of, the *specific* provisions of Paragraph 9.

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[16] It has been stated that "[o]ne of the major ideas used by courts in assessing damages is the concept of 'value.'" Dan B. Dobbs, *Handbook on the Law of Remedies*, (1973), § 3.2, p. 138. "The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money. For example, if the defendant damages the plaintiff's property, the damages remedy does not give the plaintiff back his property in its original condition, but does give him a money substitute." *Ibid.* The author makes it clear that "[g]eneral damages are almost always measured in terms of value, particularly if tangible property is involved." *Ibid.* The U.S. valuation expert, Ernst & Young, in its opinion attached to the last U.S. pleading in this Case before the Hearing also stated that: "we have reviewed, *in conjunction with the attorneys from the State Department*, the relevant rulings of the Tribunal and have jointly determined that 'fair market value' is the appropriate standard to use in our valuation." Ernst & Young valuation report on the assessment of losses on Rockwell Claim in B/61, U.S. Rebuttal of 2003, Doc. 416, Exhibit 2, p. 2. (Emphasis added.) The assessment of the "fair market value" of the subject properties as of 26 March 1981 for the purpose of assessment of losses "in conjunction with the attorneys from the State Department" and having reviewed "the relevant rulings of the Tribunal" must have meant to tell the Tribunal something about the meaning of the so- called "scope" of the implicit obligation in B/61.

[17] Award, para. 138, quoting from Partial Award in Case No. A15 (II: A and II: B), para. 65, *supra*, at 136.

[18] Partial Award in Case No. A15 (II: A and II: B), para. 65.

[19] Award, para. 139.

26. Whereas it is required under Article 32 (3) of the Tribunal Rules to "state the reasons upon which the award is based," the majority does not, however, give the reasons for this rather odd exercise of putting the proverbial cart before the horse by placing General Principle A in the prominent position at the expense of Paragraph 9, which is plainly contrary to the very text of Paragraph 65 of the Partial Award in Case No. A15 (II: A). That Partial Award itself makes it clear that it had adopted the finding of the "implicit obligation" from the earlier Partial Award in Case No. B1 (Claim 4), which was based *principally* on Paragraph 9 with General Principle A merely playing a supplementary role to buttress the main ground. In fact, the very "implicit obligation" to make a substitute performance in the form of payment of the "monetary equivalent" of the property the export of which had been refused, was originally found to exist, albeit implicitly, in Paragraph 9 itself. The role of General Principle A was to emphasize that if that "substitute performance" was not carried out by the United States and Iran was not paid the "monetary equivalent" of its property, such outcome would be against the restoration obligation prescribed in General Principle A. It is indeed a perverse situation if General Principle A is used, as it now has been in the present Award, to justify what was expressly found to be against the very purpose of the restoration obligation enshrined therein.

27. What the Tribunal did in Case No. A15 (II: A and II: B) was not to change in any way the structure of the reasoning and the underlying basis of the original finding in B1 (Claim 4) Award. The Tribunal, correctly recognizing the general nature of the said finding, simply adopted and extended that finding to Case No. A15 (II: A). Ignoring that, the majority in the present Award first mischaracterizes the Partial Award in Case No. A15 (II: A) by erroneously suggesting that General Principle A, and not Paragraph 9, of the General Declaration is the basis for determining *the scope* of the implicit obligation and then compounds its error by building upon this misconstruction through the adoption and application of a result- oriented loss assessment approach.

28. Paragraph 9, as interpreted in 1988 by the Tribunal, required that the United States choose between two clear options: (a) either to arrange for the transfer of *all* Iranian tangible properties within its jurisdiction, including military and other export- controlled properties, (b) or, should it opt for exercising its discretion to refuse to allow the export of certain Iranian tangible properties, including military properties, it should fulfill a

substitute performance obligation in the form of transfer to Iran of the properties' *monetary equivalent*. The bottom-line was that the transfer obligation stipulated in Paragraph 9 should be carried out one way or another either in the form of the property itself or, if that is not possible, in the form of their monetary equivalent. This is indeed the most sensible interpretation, which is "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[20]

29. The interpretation of the meaning and effect of General Principle A, in conjunction with Paragraph 9, that *failure to transfer the monetary equivalent of Iranian-owned properties not themselves exportable certainly conflicts with the restoration purpose stipulated in General Principle A* was certainly *not* confined to the B/1 (Claim 4) Case. It was in fact referred to and quoted, not once but twice, in the text and among the reasons or *motifs* of the Partial Award in Case No. A15 (II: A), which according to the present Partial Award should necessarily have *res judicata* effect here in B/61. There certainly must have been good reasons for the Tribunal in the A/15 (II: A) Award to make reference to, and quote, the obligation to "transfer the monetary equivalent of the Iranian-owned properties not themselves exportable" among the *motifs* for the finding of an "implicit obligation. The fact that the majority in the present Award has erroneously chosen to give prominence to the *general* provision of General Principle A to supersede the *specific* provisions of Paragraph 9 and then completely eliminate Paragraph 9 from the equation is unacceptable in and by itself. Compounding that error is the majority's disregard of the express language in both B/1 (Claim 4) and A/15 (II: A) Awards on the meaning and effect of the restoration obligation in General Principle A, which clearly requires at least the payment of the "monetary equivalent" of the export- controlled properties subject to U.S. export refusal. Failure by the majority to give this clear *motif* in both previous Awards, particularly the A/15 (II: A) Award that is applicable here, its due weight amounts to acting totally arbitrarily and selectively in applying the principle of *res judicata*.

30. Ironically, the majority admits in the present Award that "[t]he financial position of an entity is measured by reference to that entity's assets and liabilities *at a certain point*

[20] Article 31 of the 1969 Vienna Convention on the Law of Treaties.

in time."[21] It is further acknowledged that "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* …"[22] One would assume that the natural result flowing from the above announcements would clearly be that the "restoration of Iran's financial position to that which existed prior to 14 November 1979" should necessarily involve the return to Iran of "the value of those tangible properties, measured in monetary terms" as it stands "at a certain point in time." After all, this is the natural consequence of what the majority professes, which incidentally corresponds precisely to the interpretative finding in the B/1 (Claim 4) Award from the meaning and effect of the restoration obligation in General Principle A, a finding also adopted and quoted in the A/15 (II: A) Award. It also corresponds with the common position of the Parties, Iran and the United States, in their pleadings up to the present time in Case No. A/15 (II: A) the Award of which the Tribunal purportedly applies in this Case.

31. Under these circumstances where even the majority, perhaps inadvertently, admits in this very Award that Iran's financial position, which is to be restored under General Principle A, consists of the value of Iran's assets *at one point in time*, it is perplexing, to say the least, to see the same majority suddenly suggesting 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."[23] If Iran's financial position consists of the value of its properties in monetary terms at one point in time, then "restoration" must mean exactly that and *not* a comparison at *two* points in time. The contradiction cannot be clearer.

32. Regrettably, the majority hardly explains the reason for this proposition, except by citing an earlier Award in A15 (I: C) Case.[24] In that Case, the Tribunal did the comparison to establish the liability of the United States and not to define *the scope* of

[21] Partial Award, Paragraph 143. (Emphasis added.)
[22] *Ibid.* (Emphasis added.)
[23] Award, para. 145.
[24] *Ibid.*

that liability or the extent of compensation due.[25] In fact, the Tribunal was very specific in Case No. A15 (I: C) that it would defer the "eventual assessment of damages" to the later stage of proceedings. Therefore, the relevance of General Principle A, if at all, to the question of *the scope* of the United States liability and the assessment of damages was not even an issue in that Case. For that reason alone, that Award cannot be invoked by the majority in support of its proposition that the *comparison- based approach* for the assessment of Iran's losses in B/61 "is consistent with the Tribunal's jurisprudence."[26]

33. Moreover, the majority conveniently disregards, *inter alia*, the one Tribunal Award which is directly relevant to the Tribunal's consideration and application of the restoration obligation in General Principle A in deciding *the scope* of the U.S. liability and the remedy to be granted under that provision.[27] Case No. A/15 (I: G) arose from Iran's request for the return of part of its financial assets in the United States in the form of excess funds remaining in the dollar Account No. 1 with the United States Federal Reserve following the initial financial settlements under the Algiers Declarations. To decide that Case, the Tribunal relied almost exclusively on the United States restoration obligation under General Principle A and found that those excess funds, constituting Iranian assets, which had within the United States under Paragraph 9 of the General Declaration, were required to be returned to Iran to fulfill the requirement of restoring Iran's financial position to that which existed prior to 14 November 1979.

34. The point is that at issue in that Case, too, was the return of specific Iranian asset and the Case was decided on the basis of General Principle A. However, unlike the majority's approach in the present Award, the Tribunal in that Case did not confine itself to a mere comparison between Iran's financial position before 14 November 1979 and 19 January 1981 to see whether there had been a change. The remedy granted *under General Principle A* was the return of the specific asset at issue there. That asset represented

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[25] Interlocutory Award No. ITL 78-A15 (I:C)-FT, para. 31, *reprinted in* 25 Iran- U.S. C.T.R. 247, 260.
[26] Partial Award, para. 145.
[27] Interlocutory Award No. ITL 63-A15 (I: G)-FT (20 August 1986),, *reprinted in* 12 Iran- U.S. C.T.R. 40. The position taken by the Tribunal in that Case corresponded to the decision the Full Tribunal took two years later in Case No. B/1 (Claim 4) that the restoration of Iran's financial position to that which existed before 14 November 1979 under General Principle A requires the return of the Iranian assets or, where this is not lawfully possible, the return of those assets *monetary equivalent*. A comparison was totally out of the question as it would have rendered the whole restoration obligation completely redundant, which outcome is contrary to the interpretive principle of effectiveness (*ut res magis valeat quam pereat*).

Iran's financial position which existed before 14 November 1979 and the remedy under General Principle A was held to be its return. Same remedy, albeit in the form of monetary equivalent, was granted, *inter alia*, under General Principle A in Case No. B/1 (Claim 4). It is a clear enough expression of the Tribunal's interpretative jurisprudence with regard to the manner in which General Principle A should be applied in practice. In light of the above, it is unclear how and on what basis the majority has suddenly decided in the particular Case to shift this well- settled jurisprudence and adopt this rather peculiar reading of General Principle A.

35. I should also note in this regard that the majority in Paragraph 150 of the present Award, by borrowing the language of the A/15 (II: A) Partial Award, admits that the structure of the General Declaration "is entirely forward looking."[28] This holding, carried to its logical conclusion, would bar and preclude a finding on the extent of liability that is based on a backward- looking methodology involving a comparison with a pre-Declarations date. General Declaration, being "entirely forward-looking" cannot be read and used as a premise to justify the use of a method, which is clearly "backward-looking."

36. The inherent contradiction in the majority's reasoning comes to a head when in the same Paragraph, it is openly stated that the losses Iran has suffered with respect to its properties during the period between 14 November 1979 and 19 January 1981 are not compensable under the Algiers Declarations. Ironically, this proves exactly the point I mentioned above, *i.e.*, defining *the scope* of the U.S. liability under the provisions of General Principle A with the use of a backward- looking comparison- based methodology is totally inappropriate. If that had been the Case, the Tribunal would and should have disposed of the entire Case No. A/15 (II: A) in 1992 because (a) the determination of Iran's losses under part II: A of that Case required, according to the majority in the present Case, a *comparison* between 13 November 1979 and 26 March 1981 and (b) in light of its finding in part II: B of that Case, no loss would be recoverable by Iran for almost the same period. Clearly, therefore, there would have been no point in scheduling further proceedings and asking the Parties to file brief and evidence on the nature and

[28] Quoting from the Partial Award in Case No. A15 (II: A and II: B) *supra*, at para. 69, 28 Iran- U.S. C. T. R. at 138.

extent of the losses. This is *unless* the methodology adopted in the present Award by the majority is wrong.

37. The majority's decision to bring the *right of export* into the picture in determining the scope of the "implicit obligation" is another extraordinary feature of their decision, particularly the selective manner in which it has been applied. Going all the way back to the finding in the B/1 (Claim 4) Partial Award, repeated in the A/15 (II: A) Partial Award, the majority points to, and quotes from, the parts of those Awards in which it was found that the United States preserved its right, under the U.S. law proviso in Paragraph 9, to refuse the export of military items.[29] However, from there, the majority goes completely astray, which ultimately results in a legal muddle. First, the *res judicata* is attached *only* to that part of the finding dealing with the U.S. preservation of right to refuse export, as constituting "an underlying reason *(motif)* for, the Tribunal's finding of an implicit obligation to compensate."[30] Then, the majority puts the right of export into a straight jacket, claiming that that preservation of right by the United States must mean that "Iran did not posses a right, either before 14 November 1979 or after the entry into force of the Algiers Declarations, to export its military properties."[31] A few observations have to be made in this respect.

38. First and foremost, the majority's approach leaves us with this paradox that the issue of whether or not Iran had a *right of export* under the applicable U.S. laws, including the Arms Export Control Act ("AECA"), was squarely before the Tribunal in 1988 when the Tribunal found the "implicit obligation" for the first time in Case No. B/1 (Claim 4), a Case that also involved General Principle A. If the *right of export* factor had any significance or even relevance to either the very finding of "implicit obligation" itself or the "scope" of such obligation, the Tribunal would have been expected to address and decide it in that Case. It did not. By the same token, the Tribunal was, or must be assumed to have been, aware of Iran's *right of export* when it rendered the Partial Award in Case No. A/15 (II: A) in which it *again* found the existence of an "implicit obligation" on the part of the United States to compensate Iran for losses resulting from the U.S.

[29] Award at para. 155.
[30] *Ibid*, para. 157.
[31] *Ibid*, para. 158.

refusal to allow the export of the Iranian export- controlled properties. The absence of any reference to, let alone reliance on, this particular issue by either the Parties or the Tribunal in the two directly relevant Tribunal Cases, despite the issue being squarely before the Tribunal, must be instructive in analyzing the issue.

39. The same question keeps arising that if the issue of Iran's *right of export*, as characterized by the majority in the present Award, had been considered relevant at all to the "scope" of the implicit obligation, the Tribunal would have been well- positioned in 1992 to decide the whole Case there and then. Again, it did not. Nor, for that matter, did the Tribunal give any indication in the said Award that the so-called *right of export* was a relevant factor to the "scope" of the implicit obligation and that the Parties should in further proceedings address this issue in discussing the "scope" of the United States "implicit obligation." The very fact that in the A/15 (II: A) Partial Award, the Tribunal did address the question of *export risk* prior to 14 November 1979 and considered it irrelevant to the finding of "implicit obligation," while not at all addressing the so- called *right to export*, is telling in this context. In fact, the discussion of the *export risk* in that Award, which was ultimately resolved in Iran's favour, incorporated the *right of export* issue simply because these two are part and parcel of the same issue and cannot be divorced from each other even if they are assumed, *arguendo*, to be separate questions. Why did the Tribunal not give any indication that the *right of export* matters at all either as to the finding of "implicit obligation" or the "scope" thereof. The answer is simple enough: it did discuss and decided the matter, except under the caption *the risk of export*. These are all strong indications that the artificial attempt by the majority to treat *the risk of export* and *the right of export* separately is unavailing and that this line of reasoning has only been developed *post hoc* by the majority in the present Award in an attempt to make the underlying decision look legally justifiable.

40. Next, as the Tribunal made it clear in the B/1 (Claim 4) Award, the mere existence of the Arms Export Control Act of the United States does not mean that the Iranian military properties were not exportable. Rather, it was the concrete *exercise* of that right, as formally conveyed to Iran that would trigger the export restriction. The majority is utterly wrong in declaring that Iran did not have a right of export either before 14 November 1979 or after 19 January 1981. The reasons are simply that (a) immediately prior to 14

November 1979, there was *no* blanket refusal of the export of Iranian military properties, despite private meetings at the White House and elsewhere considering that move and even if there had been, Iran was not put on notice; (b) many export licenses, 68 in total, had been admittedly issued to Iran after the Islamic Revolution until 14 November 1979 under the same Arms Export Control Act, which, if anything, demonstrates that Iran, under the very same law, still had the right and legitimate expectation of export of its military properties. The uncontested fact that by 14 November 1979, Iran had still in its possession valid and enforceable export licenses, which were suspended only on 28 November 1979, two weeks after President Carter's 14 November 1979 Executive Order, goes only to demonstrate that, contrary to the majority's abstract and totally erroneous hypothesis, Iran had the right of export until 14 November 1979.

41. Moreover, after the signing and entry into force of the Algiers Declarations, too, the situation had changed again as the earlier Executive Order 12270 was replaced by new Executive Orders. True, the provisions of the Arms Export Control Act remained in force but again the mere existence of those provisions *per se* did not mean that the *preserved right* of the United States under Paragraph 9 of the General Declaration was in fact *exercised*. The actual *exercise* came on 26 March 1981 with respect to Iran's military properties. Between 19 January and 26 March 1981, a period during which the United States Government had not yet decided whether or not to *exercise* its right under the U.S. law proviso in Paragraph 9, Iran cannot be simply assumed to have lost the right of export particularly in light of the provisions of Paragraph 10 of the General Declaration which expressly revoked *all* trade sanctions previously directed against Iran.[32]

42. Further, the Claimant has argued that the refusal to return its military properties is also contrary to their State immunity under the Treaty of Amity. It is well- settled that State property in general enjoys immunity in the territory of another State, subject to the limited commercial activity exception. The A/15 (II: A) Award has already held that Iran's export controlled property in the United States enjoys sovereign immunity both under United States law and international law.[33] It was also held that the 1955 Treaty of

[32] The Memorandum of Conversation dated 26 March 1981 expressly refers to Paragraph 10 of the General Declaration as a relevant provision in the context of Iran's military properties. *Infra*.
[33] Partial Award in Case No. A/15 (II: A), *supra*, para. 57.

Amity is included in the U.S. law proviso in Paragraph 9 of the General Declaration.[34] The Treaty of Amity, Article XI, paragraph 4, deals with the State immunity of the property of the High Contracting Parties.[35]

43. Further, the military property, including warships and military aircraft, of a State within the territory of another State are, in ordinary circumstances, subject to absolute immunity from jurisdiction and cannot be seized, retained or executed upon. This has been officially acknowledged in 1979 by the United States with respect to Iranian military property. In a letter by the then Assistant Legal Adviser of the U.S. State Department, the official position of the United States on the issue was explained as follows:

> "The military property owned by the Imperial Iranian Air Force does not fall within the limited waiver immunity provisions of Article XI, Section 4 of the Treaty of Amity, Economic Relations and Consular Rights, of August 15, 1955, 8 UST 899, TIAS 3853, because a state's armed forces are not 'enterprise[s]' as that term was understood by the United States Government. The negotiating history of both identical and related provisions in similar treaties indicates that the term encompassed only those entities transacting business for an economic purpose."[36]

44. Recently, too, the United States in an *amicus curiae* submitted to the U.S. Court of Appeals in July 2006 reaffirmed that Iran's Ministry of Defense is part of the Iranian State and that its property related to arms purchases enjoy *absolute immunity* and do not fall under the commercial activity exception.[37]

45. The situation in international law with regard to the immunity of State property, including the military property, has been extensively treated in Hazel Fox's recent book

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[34] *Ibid*, para. 18.

[35] The Treaty of Amity Article XI (4) provides: "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

[36] Letter of 24 July 1979 by David Small submitted in Case No. A15, Doc. 1599 and at the IHSRC Cluster Hearing of the present Case.

[37] This was referred to in the IAF Cluster Hearing of the present Case, Doc. 780, p. 18.

on the Law of State Immunity.[38] Especially with respect to military property, it has been said there that:

> "Ships of war were recognized to be immune from local jurisdiction from the eighteenth century or earlier …."[39]

46. An example has been mentioned, albeit with regard to warships, which could be instructive here. Noting the preservation of the immunity of such ships in the 1926 Brussels Convention (Article 3) and the Law of the Sea Convention (Articles 95 and 29-31), reference was made to the judgment by the District Court of Amsterdam concerning leave to attach a Peruvian warship in order to recover the salvage money for assistance rendered during sea trials.

> "Although the 1926 Brussels Convention did not apply because Peru was not a party, the Court held that no attachment may be levied on a vessel belonging to a foreign power which is intended for use in the public service. The vessel, a warship was delivered by Peru to Dutch companies for refitting, was to be regarded as intended for use in the public service even during sea trials when it sailed under Peruvian command and was manned by a Peruvian crew."[40]

47. To buttress its absolute immunity, Article 3 of the 1944 Chicago Convention on International Civil Aviation has excluded State aircraft "used for military, customs or police service," from the scope of its application except that it may not fly over or land in the territory of another State "without authorization by special agreement or otherwise, and in accordance with the terms thereof," which again itself excludes the unilateral jurisdiction of the territorial State to refuse safe conduct when the aircraft has entered with authorization. The 1919 Paris Air Navigation Convention Article 32 on State aircraft provides that in the case of authorization of a State military aircraft to fly over and land in another State, "the military aircraft shall enjoy, in principle, in the absent of special stipulation, the privileges which are customarily accorded to foreign ships of war." However, even without an authorization, its military reconnaissance aircraft flew over and after interception had to land in an unfriendly country, the United States successfully

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[38] Hazel Fox QC, The Law of State Immunity, (Oxford University Press 2002).
[39] *Ibid*, p. 391.
[40] *Wijsmuller Salvage BV* v. *ADM Naval Services*, District Court of Amsterdam, 19 November 1987, *ibid*, p. 392.

claimed from China the return of its military aircraft in the *Hainan Island Incident* of 1 April 2001.[41] The United States military aircraft was returned on 3 July 2001 after China accepted its apology for the intrusion. In this incident, the United States claimed that its right to sovereign immunity was violated by China's detention of the aircraft.

48. All the above are in accord with the provisions of the 2004 U.N. Convention on Jurisdictional Immunities of States and Their Properties, which not only provides for the principle of immunity of State property from pre or post-judgment measures of constraint such as attachment or arrest,[42] but goes even further, specifically providing for absolute immunity for military property. Article 21 of the said Convention, under the caption "Specific categories of property" provides that:

> "1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non- commercial purposes under article 19, subparagraph (c):
>
> …
>
> (b) property of a military character or used or intended for use in the performance of military functions."[43]

49. It should be pointed out here that the United States Assistant Legal Adviser stated clearly in his letter of 24 July 1979 that:

> "Since customary international law is a part of U.S. law, we would assume that an immunity based on such law would exempt the equipment [of Iranian Air Force] …."[44]

50. It is clear, therefore, that military equipment of a State, enjoying absolute immunity from jurisdiction, cannot under normal circumstances be retained or made useless, let alone without compensation. The case is stronger here where the military property at issue was either sent to the United States for repair, recalibration, or other tests *with the*

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[41] Note, *An Analysis of State Responsibility for the Chinese-American Collision Incident*, 77 New York U.L.Rev. 1404, 1406-07 (2002) and n. 16; *see also* M. Bouorbonniere & L. Haeck, *Military Aircraft and International Law*: *Chicago Opus*, 66 J. Air L. & Com. 885, 891-892 (2001).

[42] Part IV, Articles 18 and 19 of the Convention concerning "State immunity from measures of constraint in connection with proceedings before a court.".

[43] The U.N. General Assembly Resolution 59/38, which adopted the said Convention was specific that the task of the International Law Commission's task in drawing up this Convention on jurisdictional immunities of States and their property was "with a view to its progressive development and codification."

[44] Letter of David H. Small, *supra*, p. 2.

specific prior knowledge and/ or approval of the United States or the new equipment purchased or manufactured by various U.S. companies with the formal approval of the relevant contracts by the U.S. Government. Naturally, Iran, or any other country for that matter, would not have agreed to make such massive investment in U.S. arms industry if it had not had the go-ahead from the U.S. Government. More specifically, each military contract before entry into force and start of the implementation was subject to close scrutiny by relevant departments within the U.S. Government. Most of these contracts were logistical support contracts for the Foreign Military Sales Program that was directly administered by the United States and which would have failed without such support. Therefore, this consistent practice of allowing and licensing the conclusion and implementation of military contracts between Iran and the American companies was the underlying reason for Iran to continue to make such a massive investment in the United States arms industry.

51. Obviously, Iran would not have made such an investment if the export of the related equipment to realize that investment would have been at the sole and *arbitrary* discretion of the United States at any given moment and, worse still, without entailing liability for payment of compensation. Ironically, as will be explained more fully below, the understanding of the U.S. Government and its chief negotiator of the Algiers Declarations shortly after the conclusion of the Algiers Declarations was that should United States choose to exercise its discretion to ban export of the Iranian military property, it would have to pay the costs of those properties to Iran. This was a very sensible understanding as one State cannot be allowed to protect and preserve its strategic interests at the expense of another State.

52. It bears repeating that in light of the resolution of the U.S. Embassy crisis and the aim of moving towards normalization of the relations through, *inter alia*, revocation of all trade sanctions directed against Iran between 4 November 1979 until 19 January 1981, Iran was well within its rights, under customary international law, the Treaty of Amity and the new circumstances brought about by the conclusion of the Algiers Declarations and resolution of the crisis, to demand the return of its military property or, should that not be possible, seek compensation for the value of those property. Iran and the United States were not at war at the time and with the Embassy crisis behind them, there was no

justification for the continued retention of the Iranian military equipment without compensation.[45] Such a conduct, if anything, could put the operation of the Algiers Declarations in jeopardy on the basis of material breach that Iran has pleaded, rather than resolution of the dispute under international law.

53. The United States undertook to terminate all legal proceedings in the United States against Iran[46] and, more specifically, to terminate the litigations by the U.S. Government, U.S. nationals or persons other than U.S. nationals related to the Embassy incident and to bar and preclude any future claim arising from that incident. This is particularly relevant to the issue of restoration obligation under General Principle A, which begins with the phrase "[w]ithin the framework of and pursuant to the provisions of the two Declarations." Thus, the provisions of General Principle A must be interpreted and understood in light of the other provisions of the two Declarations, including, *inter alia*, General Principle B, Paragraphs 10 and 11 of the General Declaration. It is therefore clear that the restoration obligation was in the context of the new circumstances created as a result of the Algiers Declaration under which the United States had to revoke all trade sanctions against Iran and terminate and not pursue any claims arising from the Embassy incident. To allow that incident to interfere as a relevant factor in determining the United States obligations under the Declarations would be to ignore the letter and spirit of General Principle A and other relevant provisions of the General Declaration. It may be recalled that under General Principle B, all other property claims of the two governments and their nationals against the other government were to be resolved and with the exception of a few intergovernmental cases they all have been resolved and paid for under the two Declarations.

54. In light of all the above, the United States would have been precluded from using the Embassy incident as a reason for exercising its discretion under the U.S. Arms Export Control Act to refuse to allow the return of the Iranian military properties without compensation. That would have been contrary to the letter and spirit of the Algiers Declarations for the simple reason that one Party to an international agreement, entered

[45] The fact that right until the day of the seizure of the U.S. Embassy in Tehran, Iranian military aircraft were transporting Iranian military equipment from the United States confirms that the only reason for a halt to those shipment was the seizure of the Embassy, which was resolved by 19 January 1981.
[46] General Principle B of the General Declaration.

into for the purpose of resolving a specific crisis, cannot rely on the same incident underlying that crisis to avoid implementing them.

55. In conclusion, therefore, even if one were to accept that, despite the new circumstances as a result of the Algiers Declarations, the United States had legitimate reasons for resorting to § 38 of the Arms Export Control Act under the U.S. law proviso in Paragraph 9 of the General Declaration and lawfully retain Iran's military equipment, the very minimum requirement, as found in both B/1 (Claim 4) and A/15 (II: A) would have been for the United States to pay compensation for the resulting losses as *substitute performance*. However, to suggest, as the majority does, that the United States was entitled to refuse to return Iranian military properties without paying any compensation simply defies customary international law, the Treaty of Amity, the Algiers Declarations and two Awards of the Tribunal having *res judicata* effect here, especially after resolution and payment of all claims of the United States and its nationals against Iran before the Tribunal, including the claims of the U.S. companies related to the properties at issue here.

56. Therefore, the assumption by the majority based on an abstract misconstruction of the U.S. law proviso of Paragraph 9 of the General Declaration that Iran did not have the right of export before 14 November 1979 and after 19 January 1981 is both legally and factually erroneous and it cannot be a valid ground for denying Iran the value of its military properties.

57. The paradox inherent in the majority's reasoning with respect to Iran's *right of export* is this: Case No. B/1 (Claim 4) also involved Iranian military properties, which were at all times subject to the relevant U. S. export control laws and regulations. United States had at all times, before 14 November 1979 and after 19 January 1981, the discretion to exercise its right to refuse the export of those properties. Thus, under the reasoning of the majority in the present Award, in B/1 (Claim 4), too, "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."[47] Similarly, both Cases involved the restoration obligation in General Principle A as a ground for determination of the "scope" of the implicit

[47] Award, para. 158.

obligation. In B/1 (Claim 4), the Tribunal specifically held that as a result of the United States continuous refusal to allow the export to Iran of its own properties:

> "Iran, therefore, has been completely deprived of its property by the conduct of the United States, even if the United States never expressed its intention to appropriate this property and never attempted to dispose of it without Iran's authorization. Such deprivation, undoubtedly, entails for Iran prejudicial consequences similar to those which would have been the result of an expropriation."[48]

58. Thus, in that Case, which was identical to the present Case as far as the so-called *right of export* is concerned, it was found by the Tribunal that as a result of the United Sates refusal, Iran had suffered losses equal to the value of its properties as of 26 March 1981 because Iran was irreversibly deprived of its properties located within the U.S. jurisdiction.

59. Question is now this: how could the Tribunal determine the "scope" of the "implicit obligation" in one Case involving military properties and in which Iran, at least according to the majority, never had any *right of export*, as being equivalent to the full monetary equivalent of those properties at a specific date but in another Case involving exactly the same factor, the same Tribunal employs the *right of export* as a ground to deny the existence of any loss whatsoever. This outcome cannot be explained unless one assumes that the entire finding of the implicit obligation has been revised and re- written by the majority in the present Award. The majority has clearly violated the fundamental principle underlined in both Partial Award in Cases Nos. A/15 (II: A) and B/1 (Claim 4), namely that although the United States preserved its right to refuse export of Iranian military and other export- controlled properties, the exercise that right carries with it a concomitant obligation of paying compensation to Iran. The principle of "either return or compensation" has been replaced in the present Award by "no- return, no-compensation," disturbing the careful balance struck by the Parties in the Algiers Declarations.

60. The above considerations apply, *a fortiori*, to the part of the present Award where the majority speaks about Iran's *ownership rights*. In that part, the majority flatly suggests

[48] Partial Award in Case No. B/1 (Claim 4), *supra,* para. 70. (references omitted.)

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."[49]

61. The majority's reasons for this proposition are as follows:

(a) the United States did not transfer to itself or any third party Iran's ownership rights;
(b) Iran retained its ownership rights;
(c) United States did not take possession of Iran's export- controlled properties; and
(d) United States did not deprive Iran of its right to sell these properties.

None of these reasons can withstand close scrutiny from either legal or factual point of view.

62. To begin with, at issue in the present Case, as in B/1 (Claim 4) is *Iran's losses* and not *U.S. gains*. Therefore, as far as *Iran's losses* are concerned, it is immaterial whether the United States transferred to itself or to third parties, Iran's ownership in those properties although the record is clear that the United States consistently authorized, aided and abetted the sale, disposition and transfer of Iranian properties to and by third parties. Equally immaterial in the context of *Iran's losses* is the possession or non-possession of properties by the United States, an issue clearly addressed and rejected in the A/15 (II: A) Award.

63. Moreover, it is incomprehensible how the Tribunal in B/1 (Claim 4) held that mere continuous prevention of Iran from receiving its military properties in Iran, as a result of the U.S. decision of 26 March 1981, constituted a complete deprivation but here, in precisely the same circumstances, Iran is found to retain its ownership rights and ability to exercise those rights.

64. The most extraordinary aspect of the majority's decision, namely that Iran did not lose any of its ownership rights is, at best, a tame effort to justify the ultimate decision. First and foremost, this announcement is clearly in the face of the finding of the Tribunal in B/1 (Claim 4) that the continuous and irreversible prevention of the return to Iran of the military items owned by Iran due to the U.S. decision of 26 March 1981 amounted to a *complete deprivation* of Iran's property.[50] That finding of *deprivation* was obviously

[49] Award, para. 167.
[50] Partial Award in Case No. B1 (Claim 4), para. 70.

based on *Iran's* perspective and not whether or not U.S. would have gained any material benefit in the form of unjust enrichment, which, in any event, is not a prerequisite in a finding of deprivation. This said, it should be noted that through its decision, the United States might have gained benefits of a different type, *e.g.*, strategic benefits, at Iran's expense. It is puzzling, therefore, how the very same decision having exactly the same effect on the same type of Iranian property could be found in the present Case not to have affected Iran's ownership rights at all.

65. The finding in B/1 (Claim 4) is so broad in scope that there is no escape from its application here. One possible distinguishing factor, *i.e.*, the contemporaneous offer of sale of those properties by the United States was addressed and dismissed in the same B/1 (Claim 4) Award as it "did not necessarily permit the establishment of the full value of the goods."[51] That consideration applies, *a fortiori*, in the present setting where the U.S. offer of sale was made specifically with a view to enforce the possessory rights of the holders of Iranian properties, which conduct has been found to be violative of the Algiers Declarations. It would be anomalous to suggest that Iran would have been expected to comply with sale proposals, which had been designed to sanction and enforce a violation of the treaty obligations of the United States. In addition, the evidence in the record of the present Case also shows that the United States routinely authorized and licensed the sale of Iranian properties by the holders of those properties before and after its offer of sale which sales resulted in proceeds as low as a few percentage of the original purchase price. Therefore, whether or not Iran would have taken up the U.S. offer did not seem to make the slightest difference at the time.

66. The other distinguishing factor, *i.e.*, the possession of the subject properties in B/1 (Claim 4) and their non- possession in the present Case is also a non- starter, as it was expressly addressed and dismissed in the Partial Award in Case No. A/15 (II: A). There, the Tribunal correctly found that the finding of implicit obligation in B/1 (Claim 4) was general and not conditioned by the U.S. possession of the property in that Case.

67. The examples given by the majority for the exercise of ownership rights by Iran are of trivial nature and do not include any major aspects of enjoyment and use of property

[51] *Ibid*, para. 72.

rights. The examples include Iran's consolidation of its properties in one storage facility, destruction of some of its property and challenging the sale of some others. The majority does not, however, paint the complete picture here and for good reasons, too.

68. As a result of the Treasury Regulations introduced on 26 February 1981, one month before the 26 March 1981 decision was announced, the United States authorized all the American and non- American holders of Iranian tangible properties within its jurisdiction to refuse to hand them over to Iran until such holders are paid for all the dues and debts Iran might have owed them with respect to those properties. Those Regulations, which were found in 1992 to be unlawful in that they violated the Algiers Declarations, were apparently kept in force and applicable until at least 2001, resulting in Iran being deprived, for many years, of even having access to, and the possession of, its properties within the United States, let alone trying to exercise any meaningful ownership rights on them.

69. The destruction of some of Iranian properties was also triggered at least partially by the above circumstances, *i.e.*, due to the properties having been held, in violation of the Algiers Declarations, by the U.S. holders in sub-standard conditions for years, which might have led to their rapid deterioration or decay, warranting their destruction. Ironically, the *Behring* Case cited by the majority is a prime example of such circumstances under which Iran, despite its insistence, was denied by the holder for many years even access to, let alone possession of, the properties unquestionably owned by it, all that sanctioned by the unlawful Treasury Regulations of the United States. During those years, in which *Behring* even refused to allow an inventory being made of Iran's properties, the evidence in the record show that many items were perished, damaged or simply went missing as a result of unsuitable storage conditions in the *Behring* warehouse.[52] Despite Iran's repeated calls, both Behring and the United States Government continuously insisted that Iran's possession of its property at Behring would

[52] With respect to the Iranian properties stored under unsuitable conditions at Behring warehouse for many years, Behring by invoking on warehouseman's lien, sanctioned by the unlawful Treasury Regulations of 26 March 1981, refused to give Iran proper access and persistently resisted the preparation of an inventory of the properties stored there, so much so that Iranian Air Force's authorized representative at the time, Col. Mokri, was flatly denied access to visit the properties in December 1981. Award No. 523-382-3 (29 October 1991), para. 54.

be conditioned on Iran paying in full all *Behring* Claims and this despite the dispute-resolution mechanism of the Tribunal having been available to Behring, whose claim was pending at the same time. Finally, with the threat of auction of Iranian properties by *Behring* and the Tribunal's inability to stop that auction, while the *Behring* claims were concurrently proceedings before the Tribunal, Iran was apparently left with no other choice but to enter into a last minute settlement at the eve of the auction, paying all *Behring* Claims plus interest.[53] It was only after such settlement that the properties were released to Iran to move to another warehouse with more suitable conditions. But if those so- called "consolidation" and "storage" of properties, particularly under these distress circumstances, is a bar to a finding "deprivation" when the nominal owner was virtually unable to exercise any meaningful ownership rights, the then the whole international law of state responsibility, as well as the Tribunal's practice on deprivation and other measures affecting property rights, would have to be re- written.

70. Finally, the majority wrongly mentions that the so- called *successful* challenge by Iran to the proposed sale of its property was *before the Tribunal*. First, this is factually incorrect because, as already observed, despite the Tribunal's Order, the U.S. court authorizing the sale allowed the auction to proceed, which action by the U.S. court, and lack of intervention by the U.S. Government, led Iran into a settlement with *Behring*. Bearing in mind that the proposed sale of Iranian military property stored at *Behring* warehouse was in enforcement of the unlawful lien that *Behring* asserted on those properties, the majority was least expected to invoke this particular example to justify its decision, particularly in light of the fact that two of the Members forming the majority here were also among the majority in A/15 (II: A) that found the violation on the part of the United States for authorizing the enforcement of, *inter alia*, possessory liens such as the one invoked by *Behring*.

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[53] On 7 July 1983, Behring filed a notice of sale on 15 August 1983 of the Iranian properties it was holding at the time pursuant to the 26 March 1981 Treasury Regulations in order "to satisfy debts for storage charges allegedly owed by Respondents." Tribunal's Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), p. 5. This prompted Iran's protest and a request on 4 August 1983 from the Tribunal to require Behring not to sell Iranian properties. However, despite the Tribunal's Interim Award No. 25-382-3 on 10 August 1983 which required Behring not to carry out the sale, Behring, in manifest disregard of the Tribunal's decision, simply informed Iran that the sale would proceed as scheduled on 15 August 1983. This led to the signing of a Memorandum of Agreement on 14 August 1983 between Iran and Behring according to which Behring secured $ 800,000 "virtually all the relief it had sought." *Ibid,* pp. 6- 7.

71. The majority also gives two additional reasons in a final bid to stave off the undermining effect of the B/1 (Claim 4) finding. These are the factual differences between the two Cases, namely that (a) purchase of properties through FMS program was made by Iran from the United States itself and (b) items had been fully paid for by Iran

72. First, the basic argument is that if the *no change in Iran's pre- existing rights* is the majority's criterion, then these factual variations become completely irrelevant, *i.e.*, it would be immaterial whether the military items had been purchased from the Government or from private companies and whether they had been fully paid for.

73. Second, as to the payment of properties prices, two points must be mentioned. One is the irrelevance of this fact because under the mechanism established by the Algiers Declarations, as the majority itself admits in this Award, particularly the automatic payment by virtue of the Security Account, all U.S. holders of the Iranian properties had been guaranteed of receiving full payment of any claim related to those properties, including any interest due. In fact, with the resolution of all such private Claims either through settlement agreements or by issuance of contentious Awards, all of those Claimants have now received full payment and the issue is no longer before us any more. Therefore, that is a redundant issue with no relevance to our present decision. The other issue which has been totally disregarded by the majority is the fact that if full payment for items is a relevant factor, a significant part of the military items at issue in B/61 consists of the equipment and parts, which had been previously purchased and fully paid for by Iran but sent to the United States for various reasons, including repair, calibration, use in the design and manufacture of various test stations, *etc*., or new items also fully paid for but only awaiting shipment with Iran's forwarding agents in the United States. These fully- paid items have apparently escaped the majority's attention but they are part of the Case and this would dent the majority's attempts to explain away its finding. In any event, this creates a self- contradiction in the majority's decision.

74. Below, I will deal with the analysis of the origin of the finding of the "implicit obligation," from the Algiers Declarations and its aftermath as well as the Tribunal's findings in the two relevant Partial Awards and the Parties' conduct as reflective of their understanding and interpretation of those findings. This analysis will hopefully show why

and where the majority has gone wrong in its understanding of the previous finding of "implicit obligation" and how instead the Tribunal should have approached the question from the outset.

The background of the United States "implicit obligation"

75. In order to understand the substance of the Full Tribunal's finding of implicit obligation in Case No. A/15 (II: A) and particularly paragraph 65 of the Partial Award in that Case, it would be helpful to go back to the origins of that finding, which lie in the Full Tribunal's Partial Award in Case No. B/1 (Claim 4) and the relevant provisions of the General Declaration. This will necessarily involve, *inter alia*, a careful review of the Parties' contemporaneous conduct and their common understanding at the time of the conclusion of the Algiers Declarations as well as in the course of the proceedings, particularly after the Full Tribunal Award in Case No. A/15 (II: A), which conduct, as mentioned above, under the relevant provisions of the Vienna Convention on the Law of Treaties, have a controlling role in deciding the issue.

The Algiers Declarations

76. This much is undisputed that Paragraph 9 of the General Declaration includes a general transfer obligation of *all* Iranian properties, including the military properties. In principle, therefore, the United States committed itself to transfer *all* Iranian properties within its jurisdiction. No Iranian property of any type was excluded from the scope of that paragraph. As the Full Tribunal held in its Partial Award in Case B/1 (Claim 4):

> "Paragraph 9 obliges the United States to 'arrange for the transfer to Iran' of all Iranian properties which are not included in the preceding paragraphs of the General Declaration. The Parties agree that the Iranian properties referred to in Paragraph 9 include military properties."[54]

77. The U.S. law proviso, however, was found by the Tribunal to vindicate the subsequent U.S. administration's decision not to transfer the Iranian military properties located within the United States territory or otherwise subject to the United States

[54] Partial Award No. 382-B1-FT (31 August 1988), *supra*, para. 46.

jurisdiction.[55] Rejecting the United States argument to the contrary, the Tribunal held that the above finding did not constitute the end of the matter, as far as the United States transfer obligation under Paragraph 9 was concerned. As shall be seen later, the Tribunal expressly found that despite the justifiability of the United States' refusal based on the U.S. law proviso in Paragraph 9, the United States nonetheless continued to remain under an obligation to fulfill that "transfer obligation, albeit differently and through the payment of the monetary equivalent of the property so withheld. Complementing this finding, the Tribunal also held that the United States obligation, under General Principle A of the General Declaration, to restore Iran's financial position to that which existed prior to 14 November 1979, further supports the above finding.

78. The conclusion flowing from those provisions is, as will be more fully explained below, simple and yet compelling: while the transfer of the properties themselves was rendered impossible through the United States' own policy decision being exercised under the U.S. law proviso in Paragraph 9, a *substitute* performance, namely the transfer of the *monetary equivalent* of those properties, was still possible and indeed mandated under that Paragraph. Otherwise, the Tribunal held, Iran's financial position would not be restored to that which existed prior to 14 November 1979, as required under General Principle A of the General Declaration.

Post- Declarations developments

The February/ March 1981 Senate Hearing

79. Shortly after the signing of the Algiers Declarations, the Parties began to make their respective positions clear with respect to the transfer obligation. Iran demanded U.S. compliance with its undertaking under Paragraph 9 of the General Declaration, maintaining that the United States was in any event obligated to fulfill the transfer obligation with respect to *all* Iranian properties including military equipment and that the

[55] It is important to bear in mind that Iran's interpretation at the time of the signing of the Declarations and thereafter, remained that notwithstanding the U.S. law proviso, the United States was obligated to transfer Iran's military properties and that the proviso cannot be interpreted in a manner as to thwart the entire transfer obligation. This interpretive dispute was judicially resolved only in 1988 by the Full Tribunal in the B/1 (Claim 4) Award from which the concept of "implicit obligation" was born.

U.S. law proviso in Paragraph 9 must be seen only as facilitating the fulfillment of the main transfer obligation and not as a devise to thwart the transfer obligation.

80. The United States' new administration, on the other hand, while reluctant to go ahead with the implementation of the Declarations at all, started to send signals, though not officially until 26 March 1981, that it might refuse fulfilling its transfer obligation under Paragraph 9 through invoking the U.S. law proviso incorporated therein. The records of the Senate Hearings of February and March 1981 included the first signals of the brewing problem as well as the United States' contemporaneous understanding of the meaning of Paragraph 9. The 19 February 1981 exchange between Senator Lugar and the U.S. chief negotiator, Warren Christopher, would shed some light on the issue.

81. Senator Lugar appeared to take a position similar to Iran's understanding from the terms of Paragraph 9, *i.e.*, the transfer of Iranian military properties "appears to be a part of the agreement …."[56] Mr. Christopher, however, gave his interpretation that the U.S. law proviso would provide the new administration with the discretion to decide not to export the Iranian military properties.[57] He admitted at the same time that he would not know Iran's position on the issue.

82. What is significant in this exchange is the fact that even in the eyes of the U.S. chief negotiator of the Algiers Declarations, if the decision of the new U.S. administration were to invoke the U.S. law proviso in Paragraph 9 in order to refuse the transfer of military properties, Iran would still be entitled to receive the value of the same properties. The relevant part of the record reads as follows:

> "I have no doubt that paragraph 9 gives the new administration the right to control the sending out of war materials from the United States. If there are properties owned by Iran in the United States of that character. I understand, or at least I read, that it is the intention of the administration to convert those to cash and that this cash could be made available to Iran. That certainly would be permissible under the agreement."[58]

[56] Hearings before the Committee on Foreign Relations of the United States Senate, Ninty- seventh Congress, First Session, February 17, 18 and March 4, 1981, p. 55.
[57] *Ibid.*
[58] *Ibid.*

83. This statement, strikingly similar to the finding of "implicit obligation in both Cases Nos. B/1 (Claim 4) and A/15 (II: A), inescapably leads to certain logical conclusions. First, it is clear that the exchange of views, particularly as to the commitment to transfer at least the cash equivalent of the properties to Iran, was with respect to the Algiers Declarations and specifically concerning the meaning and effect of the U.S. transfer obligation within Paragraph 9 of the General Declarations. Clearly, it was *not* outside the framework of the Algiers Declarations, particularly Paragraph 9.

84. Second, the understanding of the United States chief negotiator of the Declarations precisely a month after their conclusion was as clear as crystal that the new United States administration had a choice before it *with respect to how to fulfill its transfer obligation under Paragraph 9*, either to transfer Iran's military properties *or alternatively* to use its discretion under the U.S. law proviso and refuse to transfer those properties but instead transfer their value to Iran. Thus, the choice was between the transfer of either the properties themselves or their value. In other words, the transfer obligation prescribed in Paragraph 9 simply had to be fulfilled one way or the other, as Senator Lugar clearly indicated. The United States chief negotiator of the Algiers Declarations agreed and interpreted Paragraph 9 of the General Declaration as meaning that the United States' refusal to allow the return of the Iranian military properties, though justified, carried with it a concomitant obligation to at least return to Iran the value of those properties. A refusal on the part of the United States to allow the transfer of Iranian military properties without taking any liability was, therefore, out of the question.

85. Third, Mr. Christopher's statement that the transfer of the cash equivalent of the value of Iran's military properties "would be permissible under the [Algiers] agreement" cannot provide an escape route from the inescapable result of his statement. By referring to the *permissibility* of transferring the monetary equivalent of Iranian property *under the agreement*, he was certainly responding to Senator Lugar's question as to how the United States intends to fulfill the *transfer obligation* under Paragraph 9 that "appears to be a part of the agreement." Mr. Christopher was clearly trying to address Senator Lugar's concern as to the permissibility *under the Algiers agreement*, and particularly in the face of Paragraph 9, of a blanket denial of export by the United States, which in Senator

Lugar's view, had the potential of being interpreted as a violation of the express terms of the treaty.

86. Fourth, what Mr. Christopher said at the time is in fact what the Full Tribunal found seven years later first in the B/1 (Claim 4) Partial Award and later in 1992 in the A/15 (II: A) Partial Award, namely that the United States could only be considered to have fulfilled its *transfer obligation* under Paragraph 9 with respect to military properties if it made available to Iran their monetary equivalent. That is what the B/1 (Claim 4) Partial Award termed as the "substitute performance." In trying to vindicate the new administration's likely decision to refuse the transfer of Iran's military properties, Mr Christopher made it clear that such decision was *not* a one-way street and that to be in compliance with "transfer obligation" in Paragraph 9, United States would have to transfer the value of the properties the export of which were refused. In fact, the "substitute performance" in the form of payment of monetary equivalent of the subject properties was a *sine qua non* condition of the lawfulness of the exercise of the United States discretion on the basis of the U.S. law proviso in Paragraph 9 of the General Declaration.

87. Fifth, it is significant that, in conveying his interpretation of the meaning and effect of Paragraph 9, Mr. Christopher refers to "the intention of the administration to convert those [military properties] to cash [that] could be made available to Iran."

88. Unlike the contentions of the United States in Cases Nos. B/1 (Claim 4), A/15 (II: A) and the present Case, Mr. Christopher did not say that the United States has no obligation whatsoever under Paragraph 9 should it decide to invoke the U.S. law proviso to refuse the transfer of the Iranian military properties and that the U.S. role would be limited to merely *assisting* Iran in an *ex gratia* manner in the disposition of its properties. To the contrary, he does not even mention Iran as playing any role but refers to the intention of "the administration" to convert the Iranian military properties into cash and transfer that cash to Iran. Mr. Christopher is unmistakably talking about the United States *itself* converting those properties into cash and transferring that cash to Iran as the value of its military properties *in fulfillment of its obligation under Paragraph 9*. As a supplementary note, I would add that the language used by Warren Christopher was of general nature

and extended to Iran's military properties as a whole and not just government- to-government FMS properties. This is directly at odds with the U.S. argument in the present Case that the obligation to pay the *monetary equivalent* of the military properties is limited to the FMS properties in its possession and that it does not extend to the military properties purchased outside the FMS program and not in the U.S. possession.

89. Nowhere in his statement does he even hint that his understanding of the U.S. monetary obligation under Paragraph 9 is outside the framework of the Declarations and simply a gratuitous offer of assistance out of pure courtesy, which gesture would have been quite odd in the circumstances prevailing then. The inescapable consequence of these statements is that Iran could not, in any event, be left empty- handed with respect to its military properties, FMS or non- FMS, in the U.S. possession or in private hands, within the United States jurisdiction by virtue of the U.S. exercise of its discretion under the U.S. law proviso in Paragraph 9.

90. Sixth, Warren Christopher's acknowledgement of the permissibility under the Declarations of the transfer of the value of Iran's military properties in lieu of the properties themselves directly contradicts his later assertions in several subsequent affidavits that such a course of action would somehow amount to "ransom" or that it might improve, rather than restore, Iran's financial position to that which existed prior to 14 November 1979. His impression at the time seems to have been quite different.

91. His statements before the U.S. Senate, which because of their contemporaneousness carry more probative weight, seem also to be at odds with the suggestion later developed by the United States in its pleadings in different Cases, including the present one, that the United States had no obligation whatsoever under Paragraph 9 and/or General Principle A *either for the transfer of properties or the payment of their value*. This position, developed *post hoc*, was clearly *not* in the mind of Warren Christopher at the time and that is a critical factor in deciding the Case. Equally importantly is the fact that the above statements flatly contradict the proposition in the present Award that the "losses" mentioned in the finding of "implicit obligation" in the Partial Award in Case No. A/15 (II: A) somehow excludes the "value" of the properties.

The 26 March 1981 Notification

92. On 26 March 1981, the Chargé d'Affaires of the Algerian Embassy in Washington, Minister Slim Debagha, was officially called to the State Department to be notified of the decision of the United States as to the export of Iranian military equipment. The Memorandum of Conversation recording that meeting, distributed by the United States during the 5 November 1987 Hearing in the Case No. B/1 (Claim 4), describes the purpose of the meeting, held at the request of Mr. Lindstrom, to be the provision of a response to the Algerian Embassy's request for:

> "Official confirmation of the U.S. position on export of *military equipment from the U.S. to Iran, including Iranian- owned military equipment which had been purchased in the United States prior to November 2, 1979.*"[59]

93. The decision announced that day was, therefore, clearly general in nature and concerned *all* Iranian military property of any kind and from any origin, whether FMS or non- FMS, within the United States jurisdiction.[60]

94. During that meeting, Mr. Lindstrom, Director of the Office of Iranian Affairs in the State Department basically repeated what Warren Christopher had said before the U.S. Senate a few weeks earlier. In the Memorandum of Conversation, Mr. Lindstrom categorically stated with respect to all Iranian properties that:

> "exports of such equipment will not be approved, but Iran will be reimbursed for the cost of the equipment insofar as possible."[61]

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[59] Memorandum of Conversation dated 26 March 1981, p. 1, second paragraph. (Emphasis added.)

[60] This understanding is confirmed by the language used in the Diplomatic Note of 23 September 1981 in which reference was made to the decision of 26 March 1981 as the source of non- exportability of the Iranian military property in the possession of private U.S. companies. The relevant part of the said Diplomatic Note reads:

> "The Embassy will recall that on March 26, 1981 the Department informed the Embassy that the United States Government is unable to license the export of Iranian- owned military supplies and equipment presently in the United States."[60]

Thus, there is no question that the decision conveyed to the Algiers Embassy on 26 March 1981 for transmission to Iran was with respect to *all* Iranian military property within the United States jurisdiction irrespective of whether or not they were in the hands of the United States or private U.S. companies and whether or not they were FMS- related.

[61] Memorandum of Conversation dated 26 March 1981, p. 1, second paragraph.

95. The use of the phrase "insofar as possible", which also appears in General Principle A and from which it seems to have been borrowed, demonstrates that the United States' acknowledgement of Iran's right and entitlement to the "value" of its military property within the United States jurisdiction was derived from the terms of the Algiers Declaration, as subsequently and more explicitly confirmed in the U.S. Diplomatic Note of 23 September the same year.

96. Without detailed elaboration, Mr. Lindstrom repeated Mr. Christopher's earlier statement that:

> "Our decision on this matter is consistent with the Algiers agreements, which specify that the removal of trade sanctions shall be subject to applicable U.S. laws …."[62]

97. This is significant in two regards. First, it makes it clear that the United States statement of position in that meeting to the effect that the Iranian military properties would not be exported but Iran would be reimbursed for their value was made *within* the context of the Algiers Declarations.

98. Second, it makes it equally clear that in the United States' view, Paragraph 10 of the General Declaration concerning the revocation of all trade sanctions directed against Iran up to 19 January 1981 was of direct relevance to the question of export of Iran's military properties.[63]

99. The logical conclusion drawn from Mr. Lindstrom's statement in this regard is that following the signing and coming into force of the Algiers Declarations and *before* the notification of the new United States administration's policy decision on 26 March 1981, Iran would have been justified in relying on Paragraphs 9 and 10 of the General Declaration in expecting the return of its military properties. After all, with the Embassy crisis resolved, a dispute resolution mechanism in place to decide the claims of the holders of Iranian properties and the trade sanctions revoked, there seemed no barrier on

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[62] *Ibid.*

[63] Paragraph 10 provides:

> "Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date."

the way of the return of Iran's military properties at that time. However, in light of the United States choosing to exercise its discretion under the U.S. law proviso, United States would become obligated under the same provisions to perform the *substitute* performance, *i.e.*, payment to Iran of the value of those properties.

100. Nevertheless, the United States' belated policy decision undoubtedly included *within the context of the Declarations* a clear recognition of Iran's entitlement to at least the value of its properties. As with Warren.Christopher's earlier statement before the Senate, there is nothing, either expressly or implicitly, in Mr. Lindstrom's statement to suggest that the recognition of Iran's right to the value of its military properties was a matter of courtesy or of *ex gratia* nature, which again would have been unthinkable in light of the stated policies of the new United States Administration.

101. Ironically, it is implied in both Warren Christopher's statement before the Senate and Mr. Lindstrom's statement of 26 March 1981 that the obligation to reimburse Iran the value of its properties is intended to preserve the balance of Paragraph 9 and keep the United States' performance *consistent* with, and *permissible* under, its commitments in the Declarations. The payment of the monetary equivalent was clearly seen by two of the most senior U.S. officials at the time as a *balancing factor* to keep the United States within its treaty obligations, otherwise the United States action would *not* have been consistent with, or permissible under, the Algiers Declarations, as Senator Lugar had earlier implied.[64]

102. Of course, as Senator Lugar had predicted during the Senate Hearing, Iran strongly disagreed with this U.S. interpretation of Paragraph 9 and the U.S. law proviso therein, arguing instead in a *Note Verbale* dated 16 April 1981 that the United States "refusal to deliver to Iran the [military] parts and equipment belonging to it" was "in violation of the January 19, 1981 Declaration of the Democratic and Popular Republic of Algeria which

[64] The reference in the third paragraph at page 2 of the 26 March 1981 Memorandum to the United States offer to assist Iran in disposing its military properties then in the hands of third parties and remittance of the proceeds to Iran does not mean absence of any U.S. obligation because due to Iran's ownership, United States would in any event have needed Iran's consent for the disposition of its properties, whether FMS or non- FMS. The significant point, however, is the United States' acknowledgement that in order for its policy decision of refusing to transfer Iran's properties to be *consistent* with the Algiers Declarations, Iran would have to be reimbursed for the value of its properties.

formally provided for full restitution of all Iranian property and assets."[65] Iran persistently followed its restitution or specific performance claim as its primary request until it was decided, first with respect to FMS properties in 1988 by the Full Tribunal Award in Case No. B/1 (Claim 4) and then four years later with respect to non- FMS export- controlled properties in the Full Tribunal Award in Case No. A/15 (II: A).[66]

103. Finally, it should be noted that during the 26 March 1981 meeting, Mr. Lindstrom also went on to describe the categories of properties located within the U.S. jurisdiction. First, with respect to the military equipment in the custody of the U.S. Department of Defense, he represented that "in most cases, we expect to receive full reimbursement of what Iran paid for the property."[67]

104. As to the other category of Iranian military properties, *i.e.*, those in the hands of U.S. companies in the United States, Mr. Lindstrom repeated that his Government is ready to assist Iran in disposing those properties and "remit the proceeds to Iran,"[68] which is another indication of the United States' acknowledgement of Iran's entitlement to the value of its military properties in the hands of the United States companies. Of course, whether or not Iran was at the time in a position at all to freely dispose of its properties and realize their real value is quite another story, which will probably have to be dealt with in the further proceedings in this Case.

105. These statements, made only two months after the signing of the Algiers Declarations, if considered in conjunction with the content of the Diplomatic Note of 23 September 1981, completely belie the contentions of the United States that under the

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[65] State Department translation of the original *Note Verbale* dated April 16, 1981, first paragraph.

[66] The well- publicized delivery of certain military equipment to Iran during 1985 by the new United States Administration perhaps reinforced Iran's argument that the U.S. reliance on the U.S. law proviso in Paragraph 9 was no bar to the transfer to Iran of military equipment, particularly those owned by Iran itself.

[67] Memorandum of Conversation of 26 March 1981, p. 1, 3rd paragraph. As to the "Iranian- owned military equipment in the hands of U.S. nationals in the United States, Mr. Lindstrom stated that "we do not have specific knowledge" but 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." *Ibid*, p. 2, 3rd paragraph. This statement flies in the face of (1) the United States general census carried out in 1980, which must have given the Government all the information it needed and (2) the unlawful U.S. Treasury Regulations § 535.333 which had been introduced one month earlier and characterized Iranian properties as *non- Iranian* if there were any unpaid dues, debts, claims or otherwise related to them. Moreover, the statement is belied by the situation at the time when, due to the constitutionality challenge by certain U.S. claimants to the Algiers Declarations, all Iranian properties remained subject to judicial attachments, which situation continued until July 1981 Decision by the U.S. Supreme Court in *Dames & Moore*.

[68] *Ibid*, p. 2, 3rd paragraph.

Algiers Declarations, United States reserved the right to refuse allowing export of Iranian export- controlled properties without incurring any liability whatsoever.

The Diplomatic Note of 23 September 1981

106. Next, in this Diplomatic Note of 23 September 1981, the United States took a very concrete stance with regard to the military properties in the hands of private U.S. companies, which is equally instructive in the determination of the issue at hand. Repeating its earlier policy decision of a total ban on the transfer of Iran's military properties formally notified to Iran on 26 March 1981, the United States went on to again explain its proposal, which it had made earlier on 26 March 1981, namely "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."[69]

107. This is, of course, similar to the offer made by the United States with respect to the Iranian military equipment at issue in Case No. B/1 (Claim 4), which was turned down by Iran and the Tribunal subsequently found in its Award in that Case that Iran's refusal to accept that sale offer was justified in the circumstances, as the proposed sales would not have resulted in the market value of those properties.[70] There is no indication that the situation was any different with regard to this offer. In fact, if anything, Iran appeared even more justified to decline the proposed sale made with respect to the privately- held Iranian properties. Here, the United States was simply trying to protect the claims and interests of its own nationals through the sale of Iran's properties under stress conditions and placing the proceeds in a blocked account as a *second Security Account* in addition to that established under the Algiers Declarations, which conduct was subsequently found

[69] Diplomatic Note of 23 September 1981, p. 2, first paragraph.

[70] Some examples of the actual sales of the Iranian properties subject of the present Case, which were carried out under Treasury Department license and without Iran's consent, show that the proceeds were a fraction of even the original purchase price. Some items related to IBEX project were sold, for example, by Ford Aerospace to TECOM for $ 100,000 whereas their original purchase price was $ 1,835,000 and for which Iran sought $ 9,161,386.12 as their 1981 replacement value. Some other items, consisting of antennae, were also sold by Ford Aerospace to GTE and Fort MEADE in 1983 for a mere $13,850 while their original purchase price was $484,535 and Iran's relief sought was $ 2,419,080.24. It means that the actual sale proceeds were less than 3% of the original purchase price and 0.5% of what Iran believes was their replacement value in 1983. Sale proceeds equaling less than 3% to 5% of the purchase value and less than 1% of Iran's relief in this Case could perhaps have been compelling reasons for Iran's rejection of the subsequent U.S. sale offer.

by the Tribunal in Case No. A/15 (II: A) to be in breach of the Algiers Declarations. In a nutshell, the United States was in fact seeking Iran to acquiesce in committing a violation of the Algiers Declarations. Under these conditions, Iran would have been justified to refuse to accept the United States offer of sale of its properties, as it would have been in breach of the Algiers Declarations and not resulting in the market value.

108. Be that as it may, the evidence in the record clearly show that subsequent to the entry into force of the Algiers Declarations and at the time the United States was apparently seeking Iran's consent for the sale of its properties, the holders of such properties quite regularly went ahead in auctioning Iranian properties, some of them even to the U.S. Government agencies, through obtaining licenses from the U.S. Treasury.[71] Therefore and unless perhaps regarded as a litigation tactic, it is hard to see the rationale underlying the reasons for the contemporaneous approaches by the United States at the time, which gave the impression that it was seeking Iran's consent for the sale of its properties whereas in reality, such consent was regarded as totally irrelevant at the time by both the United States Government and the U.S. holders of such properties.

109. Moreover, in Case No. B/1 (Claim 4), referring to the United States repeated proposals for the sale of Iran's military properties of a similar nature, including the 26 March 1981 proposal, the Tribunal expressly held that:

> "such proposals cannot be construed other than as a clear recognition of *a duty to pay compensation for the items which were not transferred to Iran pursuant to that Paragraph.*"[72]

110. Therefore, far from being an element on which the United States might rely to escape liability, the sale proposals at the time has already been interpreted by the Tribunal as an acknowledgement of liability by the United States to reimburse Iran the

[71] A good example demonstrating the circumstances of the sales of the properties subject of the present Case, which actually too place after the Algiers Declarations, is the sale of properties related to the IBEX project. Ford Aerospace, one of the IBEX contractors, sold some items to the firm TECOM pursuant to an agreement dated 27 January 1981, just eight days after the entry into force of the Algiers Declarations and before the introduction of the 26 February 1981 Treasury Regulations § 535.333 or the July 1982 Treasury Regulations §535.540 formally authorizing such sales. This shows that, notwithstanding the entry into force of the Algiers Declarations, for the United States who authorized those sales through licensing and for the American holders of Iranian properties, Iran's knowledge of and consent to those sales were irrelevant

[72] Partial Award in B/1 (Claim 4), para. 59. (Emphasis added.)

value of its non- exportable properties in order to strike the requisite balance in Paragraph 9 and bring about the restoration of Iran's financial position to that which existed prior to 14 November 1979. Such a final and binding decision by the Tribunal, which construes the content of the U.S. communications to Iran and proposals of sale of Iran's properties as "recognition of a duty to pay compensation" under the Algiers Declarations, should surely not have escaped the attention of the Tribunal in the present Case.

111. That repetition in the 23 September 1981 of the earlier position taken on 26 March 1981 meeting may not be as important as the U.S. acknowledgement in the September Note that this offer of reimbursement to Iran of the value of the properties was premised on the General Principle A. The United States made it perfectly clear in that Note that despite what it termed as the consistency of its policy decision in refusing to transfer Iran's military properties, which had been in the hands of private U.S. companies, Iran's entitlement to the value of those properties was "[i]n view of the general principle [A] 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."[73]

112. The significance of this Diplomatic Note is two- fold. First, it reflects the contemporaneous reading and interpretation of the United States of the terms of Paragraph 9 and General Principle A, thus carrying more weight than its legal arguments constructed *post hoc* in denying any liability.

113. Second, the September 1981 Note describes the reimbursement to Iran of the 1981 *value* of its military properties in the possession of U.S. companies as arising from "the general principle [A] that the United States restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979." The content of the Note makes it abundantly clear that the United States contemporaneous interpretation of General Principle A was that the restoration of Iran's financial position to that which existed prior to 14 November 1979 requires the reimbursement to Iran of the 1981 *value* of the subject properties at the time their export was refused.

[73] *Ibid.*

114. As already mentioned and shall be seen in more detail below, this was also the interpretive position that the United States took in its written pleadings in Case B/61 until the Hearing and it is also the United States present position in Case No. A/15 (II: A).

The relevance of Article 31 (3) (b) of the Vienna Convention on the Law of Treaties

115. As already explained, the United States contemporaneous representations shortly after the Algiers Declarations, as well as those in its written pleadings both in the present Case and in Case No. A/15 (II: A), carry significant legal consequences which cannot be easily brushed aside or disregarded.

116. They clearly demonstrate the U.S. understanding and interpretation of Paragraph 9 and General Principle A to the effect that should it choose to exercise its discretion under the U.S. law proviso in Paragraph 9 and ban the export of Iran's military properties, Iran would in such a case be entitled to the value of those properties as of that time. Considering Iran's similar position on the measure of loss,[74] which has always been premised principally on the properties' value, albeit on the "replacement" rather than "fair market value," consistently pursued during the proceedings in both A/15 (II: A) and B/61, it seems that this common position of the Parties falls within the ambit of the provisions of Article 31(3)(b) & (c) of the Vienna Convention on the law of Treaties with respect to both "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," and "any subsequent practice between the Parties regarding the interpretation of the treaty or the application of its provisions."

117. The contemporaneous statements of position by the chief U.S. negotiator of the Algiers Declarations as well as by the United States Department of State would, in my opinion, unquestionably qualify as the "subsequent practice" within the meaning of Article 31 (3) (b) of the Vienna Convention. The Tribunal has recently held that subsequent practice "constitutes an important element in the exercise of interpretation"[75]

[74] Iran, of course, relies on the use of the general term "losses" in the A/15 (II: A) Award and argues that "losses" include, but not limited to, the "replacement value" of the properties at issue.
[75] Interlocutory Award No. ITL 83-B1-FT (9 September 2004), para. 111.

through "shedding light on the original intentions of the Parties and is compelling evidence of the parties' understanding as to the meaning of the treaty's provisions."[76]

118. In fact, the Full Tribunal has already made such a determination. In B/1 (Claim 4), the Tribunal held that:

> "the proviso inserted in Paragraph 9 could not be construed to excuse the United States from arranging for the transfer of these properties in form of a monetary equivalent, that is, to substitute compensation for the value of these properties in place of their export when it was only such export that is prevented by application of the U.S. law referred to in this proviso."[77]

119. But more importantly, to support that finding, the Tribunal held in the same Case:

> "the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to Article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defense articles would not be approved, the United States expressly stated that 'Iran will be reimbursed for the cost of equipment in so far as possible.' Furthermore, in its Hearing Memorial, it unconditionally confirmed:
>
> > The United States does not, however, dispute Iran's right to the value of its properties."[78]

120. There is no question that until the United States' last- minute change of position only at the Hearing of the present Case, both Parties were in agreement that if the Tribunal decided to reject the United States' request for "revision" of the finding of "implicit obligation" in A/15 (II: A) Award and moved to the stage of assessment of the scope of that implicit obligation in terms of quantification of the losses Iran might have incurred as a result, the premise of such assessment would principally be the *value* of the properties as of 26 March 1981. The valuation report prepared on the instruction of the United States and submitted together with its 2003 Rebuttal, focused exclusively on the Fair Market value (FMV) of the subject properties as of 26 March 1981. The United States' U- turn during the September 2005 Hearing on General Issues, later elaborated in

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[76] *Ibid*, para. 112.
[77] Partial Award in Case B/1(Claim 4), para. 66.
[78] *Ibid*, para. 68.

its 1 March 2006 written Response, irrespective of the question of admissibility that requires separate treatment, seems to have little impact on this consistent practice stretching over 24 years in interpreting the relevant provisions of the Declaration and their application in practice.

121. The Full Tribunal recently in Case B/1 (Counterclaim) adopted precisely this very legal basis as the foundation of its interpretive determination. There, too, the Tribunal relied on the bulk of Iran's conduct, mainly in Cases other than B/1, rather than its persistent jurisdictional objection in that specific Case. The reasoning of the Tribunal in B/1 (Counterclaim) applies *a fortiori* to the present issue because the official position of Iran and the United States regarding the extent of the United States implicit obligation and the premise of assessment of Iran's losses was principally the same, *i.e.*, value of the properties on 26 March 1981.

The relevant Tribunal Awards

122. The United States argument that its decision to invoke the U.S. law proviso as a basis of non- transfer of Iranian military properties would entail no responsibility was rejected by two consecutive Tribunal Awards, which have also clarified the measure of losses flowing from such action.

123. Below, I would briefly deal with the two Awards in Cases B/1 (Claim 4) and A/15 (II: A) and the findings they include with respect to the scope and the extent of the United States implicit obligation and assessment of Iran's losses. This is despite the fact that the contemporaneous statements of position, formally made by some of the highest ranking American officials, are sufficient to constitute, in and by themselves, an independent basis for the finding that (a) the United States implicit obligation to compensate Iran for refusing to allow the export of Iranian export- controlled properties, including military properties, would include at least the *value* of such properties, and (b) the restoration of Iran's financial position to that which existed before 14 November 1979 can only be brought about by the payment of the value of those properties that Iran by the United States.

The Partial Award in Case No. B/1 (Claim 4)

124. Because the finding of an implicit obligation in the Full Tribunal's Award in Case A/15 (II: A) is based on, and has its origins in, the Award in B/1 (Claim 4), it is only natural that the findings in B/1 is carefully examined and understood. The Tribunal's reasoning in B/1 (Claim 4) Award, particularly those underlying the finding of implicit obligation, constitute a vital key to understanding the finding of liability in the A/15 (II: A) Award, especially its paragraph 65, and thus the scope of the United States liability in B/61.

125. As an introduction, the Full Tribunal held in B/1 (Claim 4) that Paragraph 9 of the General Declaration includes *military* equipment and that, therefore, the Iranian properties referred to in that Paragraph include military properties in general, as the Parties also agreed. The relevant part of the said Award reads as follows:

> "Paragraph 9 obliges the United States to 'arrange for the transfer to Iran' of all Iranian properties which are not included in the preceding paragraphs of the General Declaration. *The Parties agree that the Iranian properties referred to in Paragraph 9 include military properties.*"[79]

126. Next, the Tribunal also held that the U.S. law proviso in Paragraph 9 of the General Declaration merely authorizes the United States to invoke its domestic laws to refrain from arranging for the transfer of the military Iranian properties, but at the same time obligates the United States to pay to Iran the value of those properties instead.[80] As noted earlier, that is reminiscent of the statement of Warren Christopher before the U.S. Senate, the Linstrom statements recorded in the 26 March 1981 Memorandum of Conversation and the content of the 23 September 1981 Diplomatic Note of the United States.

127. In this regard, however, it must be borne in mind that Section 38 of the Arms Control Export Act ("AECA") merely entrusted the President of the United States with the power and discretion to determine that such exports may be inconsistent with "world peace and the security and foreign policy of the United States."[81] But, the Award makes it clear that no pre-14 November 1979 U.S. law, *per se*, banned the export of Iranian

[79] B1 Partial Award, para. 46. (Emphasis added.)
[80] *Id*, para. 49.
[81] *Id*, para. 58.

military properties. It was the policy determination notified to Iran on 26 March 1981, the blanket export ban, and not the law, that resulted in non-transfer of Iranian properties.

128. Furthermore, in light of the general nature of Paragraph 9, which includes *all* Iranian military property, whether or not in the United States possession or FMS-related, the Tribunal went further in the Partial Award to find that:

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

129. The general language used by the Tribunal in that Award makes it equally clear that in the eyes of the majority of the Full Tribunal in that Case, the United States obligation, or implicit obligation, to compensate Iran as a result of non- export of properties extended to *all* Iranian military properties, whether or not FMS- related and whether or not in the United States possession.

130. Then in order to buttress its core finding and at the same time to set the standard of compensation to be applied, the Full Tribunal reasoned that the obligation to transfer the Iranian properties referred to in Paragraph 9 could also be in the form of their "monetary equivalent", which undoubtedly *is* transferable. Thus, the Tribunal held that:

> "the proviso inserted in Paragraph 9 could not be construed to excuse the United States from arranging for the transfer of these properties *in the form of a monetary equivalent*, that is, to substitute compensation for the value of these properties in place of their export when it was only such export that is prevented by application of the U.S. law referred to in this proviso."[82]

131. It appears that, having been influenced by the content of the Memorandum of Conversation dated 26 March 1981, which was presented by the United States only at the Hearing of that Case as well as the earlier statements of Warren Christopher before the U.S. Senate, the Tribunal, too, struck a fine balance in resolving the general interpretive

[82] *Id*, para. 66. (Emphasis added.)

question before it, according to which, the transfer obligation stipulated in Paragraph 9 could only be considered as fulfilled if the properties' monetary equivalent is paid to Iran. The restoration of Iran's financial position to that which existed prior to 14 November 1979, prescribed in General Principle A, was also interpreted in the above light. It is noteworthy that the finding of the Tribunal seems to be based on an actual performance of the "transfer obligation", although by way of a substitute monetary performance, thereby giving effect to the *entire* Paragraph 9, and not merely the U.S. law proviso. It follows necessarily that any suggestion of non- payment of compensation to Iran or a suggestion of similar effect, as the one the majority adopted in the present Award, would surely distort the fine balance, which was built into that Paragraph, as recognized by the Tribunal.

132. The Tribunal made it perfectly clear that the payment of the *monetary equivalent* of the military properties subject to the export ban and the United States restoration obligation under General Principle A go hand in hand and are complementary of each other. The relevant part of the Award is self- explanatory:

> "Failure to transfer the monetary equivalent of Iranian-owned properties not themselves exportable certainly conflicts with such [restoration] purpose." *Id*, para. 67.

133. The above finding is highly instructive in that it sheds light on the substance and meaning of General Principle A, making it clear that the payment of the *monetary equivalent* is the essential prerequisite of the United States restoration obligation under General Principle A *vis- a- vis* Iran. It makes it equally clear that the interpretation adopted in the present Award, which excludes the *value* of property from the meaning of *losses* recoverable under General Principle A and leads to a pre-determined result that neither transfer nor any compensation is required in this Case, bears no resemblance to, nor does it follow, the relevant Tribunal findings on the issue.

134. To further support the above finding, the Tribunal pointed to the United States' repeated offers to Iran, made subsequent to the Algiers Declarations, to have Iran's military properties sold and their proceeds transferred to Iran as:

> "a clear recognition of a duty to pay compensation for the items which were not transferred to Iran pursuant to that Paragraph." *Id*, para. 69.

135. The significance of this finding is two- fold. First, it makes it clear that the U.S. contemporaneous offers of sale were regarded by the Tribunal as acknowledgment of "a duty to pay compensation" and *not* as diplomatic gesture.

136. Second and more importantly for the purpose of this Case, the Tribunal's finding further demonstrates that the fulfillment of the restoration obligation under General Principle A would require *the payment of value* of the properties the export of which was refused.

137. The Tribunal's efforts in that Case to *determine the measure of compensation* led to an *analogy* of the Case with that in expropriation. It was first held that *as a result* of the United States continued prevention of the return to Iran of the items it owns:

> "Iran, therefore, has been completely deprived of its property [] even if the United States never expressed its intention to appropriate this property and never attempted to dispose of it without Iran's authorization." *Id*, para. 70.

138. Then, using the concept of expropriation as *a vehicle for determining the resulting consequences and the level of compensation due*, the Tribunal held as follows:

> "Such deprivation, undoubtedly, entails for Iran prejudicial consequences *similar to* those which would have been the result of an expropriation. Under international law the State responsible for such deprivation is liable to compensate for *the full value of the deprived property* at the date the deprivation became effective." *Id*, emphasis added.

139. Ironically, as noted before and will be shown further below, the United States itself in its 2003 Rebuttal in B/61 and in its written pleadings in A/15 (II: A), adopted the very same concept of expropriation as the most appropriate criterion in measuring Iran's losses pursuant to the finding of the "implicit obligation.".

140. Consequently, it is self-evident that the main basis of the finding of liability and the measure of compensation for Iran's losses in Case No. B/1 (Claim 4) was, as in Case No. A/15 (II: A), the terms of Paragraph 9, as confirmed by General Principle A, which

require the transfer of *all* Iranian properties or, when the actual transfer is not possible, the transfer of the monetary equivalent of those properties instead. The findings in the B/1 (Claim 4) Award are entirely consistent with, and appear at least in part to be based on, the contemporaneous representations of the United States officials, concerning the meaning and effect of Paragraph 9 and General Principle A. Read together and in conjunction with the B/1 (Claim 4) Award, they leave absolutely no doubt whatsoever as to the U.S. acknowledgement of its duty to compensate Iran for its military properties *and* , more importantly, the exact measure of such compensation.

141. Subsequent to the Award in Case B/1 (Claim 4) with all its legal findings, including the interpretive question of the United States liability for *substitute monetary performance* under Paragraph 9 and General Principle A, none of the Parties raised any question with respect to the Award *or any of its legal findings*, either under Articles 35-37 of the Tribunal Rules within the 30 day time- limit or on under any other basis at any time thereafter. Thus, despite having the opportunity, the United States did not even file a request for "interpretation of the award" under Article 35 of the Rules whereas it would surely have been expected to make such a request had it seriously had any ambiguities or disagreement with any aspect of the findings in the Award including the Tribunal's *general* interpretation of the meaning of Paragraph 9, General Principle A, the U.S. duty to compensate Iran and the measure of such compensation. Indeed, the bulk of the U.S. arguments in the present proceedings regarding the allegedly erroneous nature of those findings could, and should, have been raised and properly dealt with in 1988. That is clearly not the case.

142. Having accepted in Case B/1 (Claim 4) that Iran's losses as a result of the United States' refusal to arrange for the transfer of Iranian military properties should be measured at least by *the value* of those properties and having firmly adhered to that position in its last written pleading before the Hearing in the present Case, it is difficult to digest how the majority could possibly accept the last minute change in the United States position and adopt it as the premise of its Award. The conduct of the United States with respect to the B/1 (Claim 4) Award together with its position taken in A/15 (II: A) and in the present Case, should preclude it from changing its position or, at the very least, seriously undermines the weight and credibility of its so- called comparison- based theory

of measuring the losses, which appears to have been carefully engineered to result in zero recovery.

The A/15 (II: A & II: B) Award

143. The Tribunal in the section of the Award under the title "properties subject to U.S. export control laws" started to deal with the question of liability from the premise already established by the B/1 (Claim 4) Award.[83] There, it was held[84] that:

> "as the Tribunal held in [the B/1 (Claim 4)] Partial Award, the United States did not violate its obligations under the Algiers Declarations by issuing and maintaining Treasury Regulations that permit it to refuse to license exports of Iranian properties subject to U.S. export control laws applicable prior to 14 November 1979. Neither did the United States violate such obligations by refusing to issue such licenses."

144. Therefore, it is quite obvious that the Tribunal followed the finding of the B/1 Partial Award with regard to the nature of the U.S. measures in preventing the export of the Iranian export-controlled properties. In so doing, the Tribunal was fully conscious, and in fact took note, of the relevance of its findings in this context to the properties at issue in Case B/61 by pointing out that:

> "most of the tangible Iranian properties that were not transferred pursuant to Iran's directions after 19 January 1981 because of export control laws are likely to have been military properties covered by the Arms Export Control Act." *Id*, para. 60.

145. The Tribunal then repeated the findings of the B/1 (Claim 4) Award on the general issue of liability in the following terms:

> "The Tribunal noted in its Partial Award in Case No. B1 (Claim 4), at para. 65, that it does not follow that the General Declaration does not require compensation of Iran when the application of the United States law clause in paragraph 9 of the Declaration prevents the transfer of military properties. The Tribunal proceeded to hold (para. 66) that an obligation to compensate Iran in the event that certain articles are not

[83] Partial Award No. 529-A15(II:A and II:B)-FT (6 May 1992), para. 59.
[84] *Ibid.*

> returned because of the provisions of U.S. law applicable prior 14 November 1979 was implicit in paragraph 9."[85]

It added that:

> "The Tribunal explained that holding by stating (para. 67) that a contrary interpretation of paragraph 9 would be inconsistent with General Principle A which committed the United States to 'restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.'"[86]

146. Then and most significantly, the Tribunal directly dealt with one of the focal arguments of the United States, which was also raised in B/61. Disregarding the *general* language of the Tribunal's finding in the B/1 (Claim 4) Award, the United States for the first time raised argument that the factual difference between B/1 (Claim 4) and A/15 (II: A) to the effect that unlike Case B/1 (Claim 4), many of the properties in Case A/15 (II: A) do not appear to be in the U.S. possession, should prevent the Tribunal from making a similar finding of an "implicit obligation" on the part of the United States to compensate Iran with respect to the export- controlled properties at issue in A/15 (II: A). The United States effectively argued in that Case, as well as subsequently in the present Case, that the finding of the "implicit obligation" should be strictly confined to the B/1 (Claim 4) Case and not extended to other Cases, such as A/15 (II: A) and B/61, where Iranian properties were not in the United States possession because in that Case the properties were in the possession of the United States, although title remained with Iran, and that the non- payment of compensation would have led to the United States being therefore unjustly enriched.

147. The Tribunal clearly took note of that argument in the following terms:

> "In the present Case, unlike Case No. B1 (Claim 4), it does not appear that many, if any, of the properties at issue are in the possession of the United States. The Tribunal, therefore, must determine whether a duty of compensation should also be found in the present Case."[87].

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[85] *Ibid*, para. 61.
[86] *Ibid.*
[87] *Id*, para. 62

148. After enumerating the factual distinctions between B/1 (Claim 4) and A/15 (II:A), as described by the United States such as non- ownership and non- possession of the subject properties by the United States as well as alleged existence of the possibility of sale of such properties at the time, as a basis for the non- extension of the finding of "implicit obligation" to A/15 (II:A), the Tribunal in paragraph 65 referred to the *general nature* of the finding of liability in the B/1 (Claim 4) Award, which extended to military and non-military items alike and did not distinguish between properties *in the U.S. possession* and those that were *not*.

149. On the question of *possession* as a relevant factor in deciding the issue of liability, It should be noted that in the B/1 (Claims 4), too, the United States had argued in its pleadings that the Iranian properties at issue in that Case were being kept in the U.S. possession merely for safe- keeping and that Iran had continued to remain the nominal owner of the properties and could, therefore, arrange for the sale of those properties at any time, subject to the approval of the United States Government, and recover their value.

150. The so-called acceptance of liability by the United States in that Case was, therefore, in that specific context, namely that the United States was ready to pay the 1988, and not 1981, value of the properties to Iran as a buyer, subject to various deductions that the United States suggested should also apply to further reduce the 1988 price. That argument was flatly rejected in that Case, as the Tribunal decided that neither of the following factors (a) the mere fact that Iran was being considered by the United States as the nominal owner of the subject properties and (b) that Iran could at any time have asked for the sale of those properties by the United States, are material or even relevant to the determination of the United States liability under the finding of "implicit obligation."

151. Having considered all possible facets of the Case and of the *export-controlled* properties at issue in Case A/15 (II: A), which admittedly included at the time both the considerable inventory stored until 1985 at *Behring* Warehouse and the *E-Systems* items both at issue in B/61, and after reviewing the factual differentiations of A/15 (II: A) with Case B/1 (Claim 4), the Tribunal dismissed all of the United States arguments, founded

on the above- mentioned differentiations, as a basis for not finding any compensation obligation in A/15 (II: A), holding that:

> "the General Declaration imposes upon the United States an implicit obligation to compensate Iran for losses it incurs as a result of the refusal by the United States to license exports of Iranian properties subject to U.S. export control laws applicable prior to 14 November 1979. Such an obligation derives from Paragraph 9 and General Principle A which requires that the United States restore Iran's financial position to that which existed prior to 14 November 1979." *Id*, para. 65.

152. As can be observed, the Tribunal carefully considered the relevant provisions of the General Declarations, *i.e.*, Paragraph 9 and General Principle A, which approach is entirely in line with the Tribunal's earlier finding.

153. Thus, it is all too obvious that the Tribunal in Case A/15 (II:A) did no more than taking the *general* finding of liability in the B/1 (Claim 4) Award to its logical conclusion by applying it to the similar Case in A/15 (II:A).

154. Critically for the purpose of analyzing the decision of the majority in the present Case, in A/15 (II: A) Award and in finding the existence of an "implicit obligation" with respect to *all* Iranian export- controlled properties, irrespective of whether or not they were in the possession of the United States, the Full Tribunal quoted from part of the B/1 (Claim 4) Award that

> "Failure to transfer the *monetary equivalent* of Iranian- owned properties not themselves exportable certainly conflicts with such a purpose [the restoration of Iran's financial position]."[88]

155. This quotation and the phrase within the brackets added by the Tribunal itself makes it evident that in the Full Tribunal's view, the restoration of Iran's position to pre- 14 November 1979 in A/15 (II: A), too, would require the "transfer [of] the monetary equivalent of Iranian- owned properties not themselves exportable," otherwise, there would have been no logical need to make this specific quotation from the earlier B/1 (Claim 4) Award.

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[88] *Ibid*, para. 63, quoting from para. 67 of the B/1 (Claim 4) Award. (Emphasis added.)

156. The quotation of this important finding of the B/1 (Claim 4) Award in paragraph 63 of the A/15 (II: A) Award, which is part of the *motifs* of the Tribunal's decision in paragraph 65 has *res judicata* effect in the present Case, sheds light on the substance of the "restoration obligation" in the General Principle A, as applicable in A/15 (II: A).

157. To be sure, the Tribunal once again repeated exactly the same phrase in the key paragraph 65 of the A/15 (II: A) Award in which the Tribunal conclusively makes the finding of "implicit obligation" with respect to Iranian export- controlled properties not in the possession of the United States.

158. In that paragraph, the Tribunal has found that first, the U.S. obligation to compensate Iran in the event certain properties were not returned to Iran because of U.S. law applicable prior to 14 November 1979 is implicit in Paragraph 9 and second, that "failure to transfer *monetary equivalent* of Iranian- owned properties not themselves exportable certainly conflicts with such a purpose [of restoring Iran's position to pre- 14 November 1979.]"

159. It seems all too clear, therefore, that the Full Tribunal's interpretation in A/15 (II: A) Award of the *scope* of the restoration obligation in the General Principle A included the requirement of the "transfer of the monetary equivalent of Iranian- owned properties."

160. This being the case in the A/15 (II: A) Award and contrary to what the majority has attempted to do in the present Case, there is no need to re-interpret Paragraph 65 of the A/15 (II: A) Award because the paragraph itself is sufficiently clear. This conclusion becomes all the more strengthened when in the said paragraph in the A/15 (II: A), the Tribunal followed that finding up immediately by dismissing the "possession or non-possession" of Iran's export- controlled properties as having any differentiating effect on the question of the United States liability. The Tribunal made it clear in Paragraph 65 of the A/15 (II: A) Award that:

> "Neither does the Partial Award [in Case B/1 (Claim 4)] distinguish between properties in the possession of the United States 9 as was the case in B1 (Claim 4)), and those not in the possession of the United States (as is the case here), as far as the obligation to compensate in the event of a refusal to transfer or to grant export licenses is concerned."[89]

[89] *Ibid*, para. 65.

161. Then, after (a) defining the effect of the General Principle A as requiring the transfer of the *monetary equivalent* of the property at issue and (b) dismissing the U.S. possession as a relevant factor in the finding of liability, the Tribunal immediately came to the outright conclusion as follows:

> "The Tribunal finds that in this respect the reasoning of the Partial Award in Case No. B1 (Claim 4) applies *equally* in the present Case."[90]

162. Therefore, having found that, notwithstanding the United States non- possession of the subject properties, the same reasoning used in B/1 (Claim 4) in finding the "implicit obligation" *equally* exists in Case No. A/15 (II: A) with respect to the export- controlled properties at issue in that Case, there could be no conclusion but that the finding of "implicit obligation" should have no less effect than that in the B/1 (Claim 4) Case.

163. There is no logic in the suggestion, as the majority has attempted to make in the present Award, that the scope of liability in A/15 (II: A) and, by comparison, in Case B/61, is anything less than that in Case B/1 (Claim 4) in that the recoverable losses under the A/15 (II: A) Award do not include the "value" of the properties and, worse still, that under the result- oriented comparison theory, reduce the U.S. liability to zero in the present Award.

164. In fact, having referred to, and quoted from, the "transfer of the monetary equivalent of the properties" as the requirement of the restoration obligation under General Principle A and as the most natural consequence of the non- transfer, while dismissing the possession factor, one can only conclude that the consequences should be at least the same with respect to the property at issue in the present Case. The *res judicata* effect of the A/15 (II: A) findings, including the *motifs* underlying those findings, requires no less.

165. Indeed, the Tribunal would have been expected to make it clear if it believed that a different standard of compensation, which would not include the "value" of properties, should apply in case of non- possession of the properties by the United States. However, the dismissal of all the differentiating factors and the references, not once but twice, to

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[90] *Ibid.*

the "transfer of the monetary equivalent of Iranian- owned properties" as the natural consequence of non- transfer in the A/15 (II: A) Award would dispel any doubt as to the Tribunal's position concerning the scope of the U.S. liability under Paragraph 9 and General Principle A. Thus, the phrase "full value of [the] losses" referred in the latter part of paragraph 65 of the A/15 Award has, thus, been clarified earlier in the same paragraph and in paragraph 63 both of which make clear reference to the "monetary equivalent" as being required to fulfill the General Principle requirement of restoration.

166. The use of the broad and elastic term "losses" in the A/15 (II: A) Award was indeed warranted, *inter alia*, because the sheer variety of the export- controlled properties at issue in the A/15 (II: A) and the differentiating factual and legal circumstances surrounding them were such that it would have been imprudent to confine the losses to only the "value" of the properties. For example, unlike the B/1 (Claim 4), the properties at issue in A/15 (II: A) had been in the hands of private American parties, which had charged Iran for the storage and other associated charges. Moreover, in order to keep some of the properties from forced auctions authorized under U.S. law and in violation of the Algiers Declarations, Iran had been forced to incur legal expenses and probably other losses such as payment of extra amounts in settlements, as in the *Behring* settlement. In addition, in B/1 (Claim 4), the items of property at issue in that Claim had been clearly identified and described before the November 1987 Hearing of the Case.[91] However, the items of property at issue in A/15 (II: A) had not been fully identified in 1992 and the precise contours of the claim not fully explained. As reflected in the Tribunal's Award in A/15 (II: A), the "factual submissions on individual properties and damages are not yet complete" and the pleadings were "insufficient" to make "any determination as to the nature of the damages Iran incurred or as to the amount of any such damages."[92]

167. Consequently, the Tribunal could not at that stage foreclose the possibility that some of these associated "losses" beside the "value" of the properties, might be proven in further proceedings to arise from the United States refusal to export. If only for that

[91] The items of property at issue in Claim 4 included an INS Kousseh submarine, an F-14 aircraft, a Hawk air defense Battery together with its firing controls and spares, an AH-1J attack helicopter, a 214A helicopter plus thousands of repair- and return items. All these items had been subject of prolonged meetings between the Parties during 1984 to 1986, which culminated in fully detailed lists attached to the 5 March 1986 Joint Report in that Case (Doc. 476).

[92] Partial Award No. 529- !5 (II:A and II:B)-FT, at ¶¶ 31 and 67.

reason, the Tribunal quite appropriately adopted a broad and all- inclusive term "losses" in order to afford both Parties the opportunity to elaborate the nature and extent of any such "losses." However, as explained above and in light of the express reference in the same Award to the "monetary equivalent" of the property being a required under General Principle A's "restoration obligation," to suggest, as the majority does in this Award, that the use of the term "losses" in the A/15 (II: A) Award should be read to exclude the "value" amounts to a great leap of faith, turning the finding of "implicit obligation," and its underlying *motifs*, on their head.

168. Perhaps, it is useful to briefly refer to a point, which the majority has focused so much in the present Award to justify its misconstruction of the A/15 (II: A) Award, *i.e.*, the Tribunal's reference in paragraph 65 of the A/15 (II: A) Award to the pre- 14 November 1979 and its possible relevance or impact on the scope of liability and the quantification of the "losses" recoverable under that Award. In this regard, it must be stressed right at the outset that the answer to all possible questions on this very issue is in the A/15 (II: A) Award itself and more specifically, Paragraph 65 thereof.

169. Two points are worthy of note in this regard.

First, the Tribunal held that:

> "With respect to properties subject to U.S. export control laws, the period from the time the relevant contracts were entered into up to 14 November 1979 must be considered in determining Iran's financial situation."[93]

This makes it perfectly clear that, contrary to the majority's finding in the present Award, the pre- 14 November 1979 is not confined to a specific date, namely 13 November 1979 but covers a long period stretching back to the time of the conclusion of the relevant agreements in the 1970s. Confirming this reading is the fact that whenever in the Declarations, the Parties had wished to stipulate a specific date, they did so expressly.

This finding, on its face, against the finding of the majority in the present Award that by reference to pre- 14 November 1979, a specific point in time was meant.

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[93] *Ibid.*

170. Second and with respect to the risk of non- exportability before 14 November 1979, although the Tribunal in A/15 (II: A) pointed to the fluctuation of the risk of export licenses being granted during that rather lengthy period prior to 14 November 1979, stretching back to the early 1970s, the Tribunal makes it clear in the end that such risk in the context of Iran's export- controlled properties was rendered redundant, as the decision by the United States not to return those properties was a *strategic policy decision,* which had nothing to do with the risk of export license being denied. The relevant passage of the Award reads as follows:

> "*Although* 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.*"[94]

171. Thus, the Tribunal made it clear that the chances of granting or denying export licenses and/ or the level of such risk was effectively made superfluous as a result of the United States policy decision, made upon political and strategic considerations, to impose a blanket ban on the transfer of *all* export- controlled Iranian properties after the signing of the Algiers Declarations.

172. Interestingly, the Tribunal's finding of U.S. liability in A/15, found to be applicable in B/61, is based precisely on that *U.S. policy decision.* Thus, the above- quoted holding of the Tribunal in A/15 (II: A) is immediately followed by the following decision:

> "If the United States thereby caused losses to Iran, there was in the Algiers Declarations an implied obligation for the United States to compensate Iran for the full value of such losses, since Iran's financial position would otherwise not be restored fully."[95]

173. As a complementary note, it must be said that taking into consideration of the pre- 14 November 1979 situation in determining Iran's financial position was meant to see if there were any unpaid dues and debts as regards the properties at issue. It must be borne

[94] *Ibid* (Emphasis added.).
[95] *Ibid.*

in mind that by the time the A/15 (II: A) Award was issued, *i.e.*, 1992, there were still many Claims by the holders of Iran's export- controlled properties were pending before the Tribunal. By making reference to the pre- 14 November 1979 situation, including the contractual situation, the Tribunal sought to ascertain that in calculating the amount of compensation due Iran, any outstanding dues and debts by Iran related to those properties under the relevant contracts, must be taken into account. This, by the way, was the reading of the A/15 (II: A) Award in the United States most comprehensive Brief in B/61 filed in 2003.

174. It should, of course, be remembered that by the time the present Case came to the Hearing, *i.e.*, 2005, the purpose of that part of the A/15 (II: A) Award was already met because of the resolution of all the private claims brought by private U.S. contractors for all the pre- 14 November 1979 dues and debts related to the properties. Therefore, by 2005, Iran's pre- 14 November 1979 position had already been taken into consideration.

The A/15 (I: G) Award

175. In the A/15 (I: G) Case, the issue was the disposition of over U.S. 485 million of Iranian funds remaining with the Federal Reserve Bank in Dollar Account No. 1 following the payment of the syndicated bank loans.

176. While recognizing that there were no specific provisions in the Declarations or the related agreements regarding the transfer of the excess funds in Dollar Account No. 1, the Tribunal, holding that this silence should not mean "a legal *vacuum*", held that in order to find a solution to the problem:

> "the general provisions of the Accords taken together and interpreted in the context of their framework provide legal guidance."[96]

177. Rejecting the United States argument that the General Principle A is simply a statement of purpose, containing no independent operative obligation, *id,* paras. 15 and 17, the Tribunal held in that Case that:

[96] Interlocutory Award No. 63-A15(I:G)-FT (20 August 1986), para. 41.

> "Taken in their ordinary meaning, the terms of General Principle A clearly embody commitments by the United States … The Tribunal is therefore unable to accept the contention of the Respondent that General Principle A is no more than a preamble and contains no operative provisions."[97]

178. In dismissing the United States arguments in that Case, the Tribunal also made an important determination, namely that the U.S. interpretation would effectively mean that the "restoration" commitment embodied in the General Principle A would be "deprived of any legal effects" and that this would be contrary to the ordinary meaning to be given to the terms of General Principle A under Article 31, Paragraph 1, of the Vienna Convention on the Law of Treaties as well as the principle of effectiveness also known as *ut res magis valeat quam pereat*). *Id*, para. 17. More specifically, after holding that General Principles A and B "constitute an integral part of the commitments made by the two Governments,"[98] *id*, para. 16, the Tribunal found that:

> "These General Principles are not simply statements of purpose, as is usually the case in preambles of treaties. They are expressly described by the parties as the legal basis of their undertakings. Accordingly, it would be difficult to admit that they are deprived of any legal effects. This would be inconsistent with the ordinary meaning to be given to the terms of this provision, as prescribed by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, as well as with the principle of effectiveness (ut res magis valeat quam pereat), generally accepted as one of the main principles of treaty interpretation." *Id*, para. 17.

179. Most importantly and for present purposes, while the Tribunal's decision in that Case was entirely based on the U.S. "restoration" obligation pursuant to General Principle A, quite contrary to the belated position taken in the present Case, the United States did not raise any approach based on the "comparison" of Iran's financial position with respect to the excess fund before 14 November 1979 and after 19 January 1981, requesting that Iran should only be awarded any losses that might have been incurred as a result of diminution or erosion of its financial position. Unlike the present Case, the United States did not argue in that Case that because there had been no change in Iran's financial position, Iran must be assumed to have incurred no losses. By application of the

[97] *Id*, para. 18.

[98] *Ibid*, para. 16.

comparison- based methodology adopted by the majority in the present Case, the claim in A15 (I: G) Case, too, would have resulted in an award of no-loss because there had been no change in Iran's financial position before 14 November 1979 and after 19 January 1981.

180. The most interesting aspect of the A/15 (I: G) Award is the Tribunal's interpretation and application of General Principle A. In that Case, the Tribunal's reading of the effect of General Principle A was that restoration of Iran's financial position to that which existed prior to 14 November 1979 under General Principle A requires the return to Iran of the financial asset at issue in that Case plus interest, and that in the absence of any finding of breach or violation of the Algiers Declarations.[99]

181. Iran's excess funds in that Case could be compared with the monetary equivalent of the properties at issue in B/61 and it can be logically concluded, by way of analogy, that if in A/15 (I: G), the "restoration obligation" under General Principle A required the return of the Iranian assets at issue, in B/61, too, the same "restoration obligation" cannot but require the return of the *monetary equivalent* of the properties at issue here, which represent a different part of the Iranian assets.

182. That finding in A/15 (I: G), therefore, provides further support to all the other sources explained above as to the interpretation and application of relevant provisions of the General Declaration in B/61, and particularly the General Principle A.

The Parties written pleadings

183. The arguments and contentions of the Parties in the written pleadings of relevant Cases such as B/1 (Claim 4), A/15 (II:A) and B/61 are strong indications of their interpretation and understanding of the meaning and scope of the finding of "implicit obligation" and monetary consequences flowing therefrom in terms of methodology to be employed for the measurement of Iran's losses.

[99] *Id*, paras. 53-55 and 70. *See also*, K.H. Ameli, *The Iran-United States Claims Tribunal*, in *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution Summaries of Awards, Settlement Agreements and Reports* (1999), 246, 258.

184. In Case B/1 (Claim 4) where the dispute concerned the consequences of the U.S. refusal to allow the transfer of Iran's military properties pursuant to Paragraph 9, both Parties argued that Iran is entitled to the value of its properties, the only difference being Iran arguing in favour of the 1981 value whereas United States was arguing in favour of the current value at the time of the Judgment, a position that was ultimately rejected by an overwhelming majority of the Tribunal.[100] In 1987, the United States had argued that:

> "the United States is not obligated to return military properties to Iran. The United States does not, however, dispute Iran's right to the value of properties."[101]

The above acknowledgement in 1987 seems to be an identical repetition of the U.S. representations during the 26 March 1981 meeting and in the 23 September 1981 Diplomatic Note.

185. Despite the premise of the U.S. liability in that Case, which is the same as the present Case, *i.e.*, the "implicit obligation" as a result of the exercise of its discretion under the U.S. law proviso in Paragraph 9, the United States never raised any question of a comparison between the value of properties before 14 November 1979 and after 19 January 1981 as the measure of Iran's loss there. In light of the Tribunal's reference to, and reliance on, the General Principle A and the U.S. restoration obligation as one of the grounds for the finding of "implicit obligation," the United States was surely expected to raise the "comparison" theory for the measurement of Iran's losses under that finding in B/1 (Claim 4). It clearly did not.

186. Interestingly enough, neither Aldrich nor Judge Brower, who were Tribunal Members in that Case as well as in the present Case, raised such a comparison- based theory at the time as a basis for the assessment of the financial consequences of the "implicit obligation" under General Principle A. Rather, both of them supported the post-1981 "value" of the properties at issue as the proper measure of Iran's losses in that Case. Judge Aldrich joined the majority for the value as of 26 March 1981 whereas Judge Brower proposed the value as of 31 December 1984. The third American Judge in that

[100] United States Hearing Memorial of 14 September 1987, Doc. 556, pp. 32-47.
[101] *Ibid*, p. 32.

Case, Judge Holtzmann, also suggested the value, albeit the value as of the date of the Award as the basis for calculating Iran's losses. The notable lack of reference to, let alone reliance on, a "comparison" based methodology in that Case, which involved General Principle A as a basis of liability, is telling evidence of the error so manifestly made by the majority in the present Case in introducing that methodology as the sole basis for measuring Iran's losses.

The B/61 written pleadings

187. Iran consistently took the position in seeking its alternative relief, *i.e.*, monetary compensation, that United States is liable for the value of Iran's military properties at issue as of 26 March 1981.

188. Interestingly, the United States, too, took that same position in its most recent and most comprehensive written pleading prior to the Hearing in the present Case, *i.e.* the 2003 Rebuttal, more than 10 years *after* the Full Tribunal Award was issued in A/15 (II: A).

188. To begin with, the United States made it clear in its last written pleading before the Hearing that, under its interpretation of the B/1 (Claim 4) Award, which was adopted in the A/15 (II: A) Award, Iran's losses referred to in that Award should be measured by *the value* of the properties at issue. In the 2003 Rebuttal Brief of the United States in Section V dealing with the question of "the amount of compensation to which [Iran] is entitled"[102] if the Tribunal dismisses all the U.S. arguments of non- liability, the United States argued as follows:

> "In Case No. B/1 (Claim 4), the Tribunal characterized the United States' implicit Paragraph 9 obligation as 'substitute compensation,' which the Tribunal defined as the transfer of 'the monetary equivalent of Iranian-owned properties not themselves exportable.' Partial Award 382 at ¶¶ 66, 67, 19 Iran- U.S. C.T.R. at 293-94. This compensation obligation, the Tribunal wrote, is analogous to that which results from a lawful expropriation. See id. At 295, ¶ 70. Though the United States believes the expropriation analogy is imperfect since the lawful exercise of U.S. export control laws did not deprive Iran of any right, the analogy nevertheless is

[102] Doc. 392, p. 136.

> helpful insofar as it provides direction for the calculation of 'the monetary equivalent' of the properties at issue in this Case."[103]

190. Further in the said Brief and before detailing its valuation approach, the United States made it perfectly clear that:

> "In order for Iran to receive compensation for any Iranian- titled property that it claims in this Case, Iran must first prove the fair market value of that property in the U.S. market as of the valuation date. According to Tribunal case law, fair market value is the amount a willing buyer would pay a willing seller for a property, taking into account the condition of the property."[104]

Elaborating on this, the United States argued that:

> "In Award No. 382 in Case No. B/1, the Tribunal concluded that the United States made its determination of non- exportability shortly before March 26, 1981, with respect to the military properties at issue in that Case. See Partial Award 382 at ¶ 71, 19 Iran- U.S. C.T.R. at 295-96. The Tribunal accordingly ruled that the properties must be valued as of March 26, 1981- the date the deprivation became effective. Id. At 296-97, ¶ 73. *Since the export- controlled properties at issue in this Case are also military in nature, the United States accepts that date as the valuation date, as does Iran. See Iran's 1999 Reply; Volume I (Doc. 310) at 124-25. Therefore, Iran must prove the fair market value of the properties as of March 26, 1981.*"[105]

191. The only additional aspect of the United States theory of loss in its 2003 Rebuttal was certain deductions to account for mitigation, depreciation and obsolescence, etc. The United States argued that "to calculate Iran's actual losses" in B/61, the "fair market value" of the subject properties should be subjected to certain deductions in order to arrive at "the actual net value of the property."[106] Referring to the Tribunal Award in the *Shahin Shaine Ebrahimi et al.*,[107] United States took the position that the calculation of

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[103] *Ibid.*
[104] *Ibid,* p. 140
[105] *Ibid,* p. 144. (Emphasis added.)
[106] *Ibid,* p. 137.
[107] *Ibid,* citing Award No. 560-44/46/47-3 (12 October 1994), at ¶ 213, 25 Iran- U.S. C.T.R. 20, 69.

Iran's losses in B/61 should start with the assessment of "the full value of the property."[108]

192. Needless to mention that all of the Ernst & Young valuation reports submitted together with the U.S. 2003 Rebuttal, which was the last U.S. written pleading before the start of the Hearing, were, upon instruction of the United States Government, prepared to reflect the *Fair Market Value* of the properties subject of Case B/61 as of 26 March 1981. Neither the pleading itself nor the valuation reports attached thereto contained any argument or calculation, which would be based on a *comparison* between Iran's financial position between the two points in time, namely 26 March 1981 and 13 November 1979.

193. The critical aspect of this last United States Brief before the Hearing in the present Case was its interpretation of the effect of General Principle A, *i.e.*, consideration of Iran's financial position prior to 14 November 1979. Referring to the latter part of Paragraph 65 of the A/15 (II: A) Award concerning the restoration of Iran's financial position to that which existed before 14 November 1979 under General Principle A, the United States gave its interpretation of the said holding to Case B/61 as follows:

> "The Tribunal has stated that, in determining Iran's losses, it will take into consideration 'the position of Iran that existed prior to 14 November 1979 with respect to such property, and the contractual arrangements and other relevant circumstances of the transactions relating to such property.' Id. This statement reflects settled principles of international law, which provide that compensation is intended to 'reestablish the situation which would, in all probability, have existed if [the] act had not been committed.' Amoco Int'l Finance Corp., 15 Iran- U.S. C.T.R. at 247, quoting Case Concerning the Factory at Chorzow (Germany v. Poland), 1928 P.C.I.J., Ser. A. No. 17 (Judgment of Sept. 13, 1928).Only by taking the circumstances of the transactions into account can an accurate assessment of Iran's losses be made. Accordingly, Iran must deduct any amounts that it failed to pay with respect to the property. Otherwise, Iran would obtain the full value of something for which it never fully paid, and therefore would be enriched unjustly.
>
> Accordingly, with respect to those properties as to which Iran had title even though Iran had not paid in full, the amounts still owed on the property as of the valuation date, plus interest, must be deducted from any

[108] *Ibid.*

> U.S. liability. Iran still would have owed those amounts to the property holder."[109]

194. It is, therefore, clear that the United States interpretation of the meaning and effect of the restoration obligation in General Principle A, as referred to in Paragraph 65 of the A/15 (II: A) Award as recent as 2003 was merely for the application of certain deductions, which purpose has already been met in view of the resolution of all private Cases.

195. The United States also referred to Paragraph 65 of the Full Tribunal's Partial Award in A/15 (II: A), stating that:

> "The Tribunal has stated that, in evaluating losses, it 'will take into account as to each property … the position of Iran that existed prior to 14 November 1979 with respect to such property …." Partial Award 529 at ¶ 75, 28 Iran- U.S. C.T.R. at 139. In addition, the Tribunal has recognized that '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 …' Id. At 137, ¶ 65."[110]

196. In interpreting this part of Paragraph 65 of the A/15 (II: A) Award, the United States similarly suggested applying a certain discount to account for the risk of non-exportability.[111] It did *not* read the said part of the Award, which pointed to the restoration obligation under General Principle A, as including, let alone requiring, a comparison between Iran's financial positions on 26 March 1981 and 13 November 1979.

197. That was the final position of the United States in the ordinary course of the exchange of pleadings in this Case. By that time, so close to the Hearing, this similarity of both Parties position could and should have been considered as an interpretive agreement between the Parties that:

(a) the measure of determining Iran's losses as a result of the United States "implicit obligation" under Paragraph 9 of the General Declaration as well as Paragraph 65

[109] *Ibid,* pp. 155-5
[110] *Ibid,* p. 158.
[111] *Ibid,* p. 161.

of the A/15 (II: A) Award, is based on the "value" of the properties at issue on the date of U.S. refusal, which both Parties in the present Case agreed to be on 26 March 1981;

(b) the role of the restoration obligation under General Principle A and paragraph 65 of the A/15 (II: A) Award is confined to ascertaining that there would be no outstanding amounts for Iran's pre- 14 November 1979 dues and debts left unpaid in calculating the value of the related properties as of 26 March 1981.

198. The Tribunal clearly should have done this in the present Award, dismissing the belated introduction of a completely new Case by the United States in the middle of the Hearing as unwarranted and in contravention of the United States position in both B/61 and A/15 (II: A) on the issue.

199. The change of the U.S. theory of loss from the *value as of 26 March 1981* into one based on a *comparison* between Iran's financial position between 26 March 1981 and 13 November 1979 came right in the middle of the Hearing on General Issues in September 2005 and was subsequently appeared in a more polished and elaborated manner in writing on 1 March 2006, merely five months before the start of the Hearing on Individual Claims. This latter pleading was presented in the guise of the response to Iran's 1 February 2005 Supplemental Documents.

200. The Claimant objected to the admissibility of those parts of the United States 2006 submissions, together with the related evidence, dealing with this last minute change of position, as not being in compliance with paragraph 11 of the Tribunal Order of 1 April 2005 (Doc. 488), which provided that the U.S. response to Iran's 2005 Supplementary Documents "must be limited to those documents." The majority in the present Award has correctly accepted Iran's objection and dismissed those parts of the United States 2006 Response, which related to General Issues, including the complete change of the premise of the U.S. position on liability. Inexplicably, however, the same majority has exempted from this dismissal some of the evidence, which was part and parcel of those very some rejected parts, namely the affidavits of Zbigniew Brzezinski and Rose Biancaniello and attachments thereto.

201. The majority has made this rather extraordinarily contradictory decision on the self-constructed and hypothetical ground that these evidence *are responsive* to some of Iran's 2005 Supplemental Documents. This line of reasoning is in direct conflict with the United States very own admission in its 2006 Response that *none* of Iran's 2005 Supplemental Documents had anything to do with the question of liability, let alone the new U.S. position of which Iran must certainly be assumed to have been unaware in March 2005 when it submitted its Supplemental Documents. Despite the majority's pretence to the contrary, it is crystal clear that those affidavits and the attached documents were submitted as the factual back- up of the parts of United States 2006 Response, which have been dismissed by the majority. Distinguishing between the Brief and the related supporting evidence, dismissing one while admitting the other is simply question- begging.

202. The only possible explanation for the majority's admission of these evidence could be that without them, the factual premise for the application of the "comparison- based" theory of loss would collapse and with it the entire basis of the present Award. However, the majority should be well aware that it could not do so without violating the express terms of its own Order of 1 April 2005, exposing the Claimant to clear prejudice by admission of clearly inadmissible evidence and by not giving it the opportunity to present evidence in response, thereby affecting its right of defense.

The A/15 (II: A) written pleadings

203. As the majority in the present Case has found that the finding of an "implicit obligation" in the Award issued in Case No. A/15 (II: A) has *res judicata* effect in, and is applicable to, the present Case, the Tribunal must surely look into the Parties' pleadings and arguments in that Case in order to see if there is a common interpretation among them on the way which the finding of "implicit obligation" should apply and the methodology for calculation of Iran's losses as a consequence. The Tribunal could not turn a blind eye on the Parties' pleadings in that Case, particularly those of the United States, which are of decisive importance as to the Parties' understanding of the relevant findings of the A/15 (II: A) Award and the interpretation of the provisions of the

Declarations, particularly Paragraph 9 and General Principle A, as merged into Paragraph 65 of the A/15 (II: A) Award.

204. In its 26 September 2001 Response, more than nine years after the A/15 (II: A) Award, the United States gave its reading of the findings of that Award with respect to export- controlled properties.

205. There, the United States started its arguments as follows:

> "even if the Tribunal concludes, with respect to a particular property, that Iran has established that the United States is not in compliance with Paragraph 9, that the non- compliance caused the non- transfer of property and that the non- transfer caused a loss, Iran must still prove both the fact and the amount of all losses it claims."[112]

In this context, the United States clearly had in mind the part of Award No. 529 in A/15 (II: A), which provided that:

> "In determining the amount of compensation, the Tribunal will take into account as to each property evidence of loss by Iran, the position of Iran that existed prior to 14 November 1979 with respect to such property, and the contractual arrangements and other relevant circumstances of the transactions relating to such property."[113] Partial Award No. 529 at ¶ 75, 28 Iran-U.S. C.T.R. at 139.

206. Then, with regard to the proof of the losses, arguing that "Iran is entitled only to those remedies allowable under international law,"[114] the United States presented its position as to the standard of measuring the loss under the parameters set in the A/15 (II: A) Award. It was argued that:

> "In this Case, if the Tribunal finds that U.S. non- compliance with Paragraph 9 resulted in the non- transfer of a particular item of property, *Iran may be deemed to have lost the value of the property*."[115]

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[112] Response of the United States to Claimant's Brief and Evidence in Cases Nos. A/15 (II: A), A/26 (IV) and B/43, Doc. 1435, p. 136.
[113] *Ibid.*.
[114] *Ibid,* p. 139.
[115] *Ibid,* p. 141. (Emphasis added.)

The United States then elaborated that:

> "While these actions would not amount to an expropriation, the Tribunal's substantial jurisprudence on the valuation of tangible property in the context of Iran's expropriation of U.S. nationals' property provides useful guidance on how to measure the value of Iran's tangible property in this Case.
>
> Under Tribunal jurisprudence, 'full value' is the general standard of compensation applicable to a claim where a party asserts that it was deprived of its property. Sedco, Inc. v. National Iranian Oil Co. [NIOC], AWD 309-129-3 at ¶ 30 (July 2, 1987), 15 Iran- U.S. C.T.R. 23, 34. Where a claimant's tangible property is at issue, 'fair market value' is the appropriate measure of 'full value.' Id. At 35. Thus, in order to begin a determination of what Iran lost as of the date of the supposed non-compliance, Iran must prove the fair market value of the property in question on that date."[116]

207. In sum, the United States argued that in such cases, *i.e.*, non- transfer of Iranian export- controlled properties due to the United States decision, the standard of compensation to measure Iran's losses under the finding of "implicit obligation" in A/15 (II: A) Award, is "the fair market value as of the date that the United States may be charged with failing to meet its obligations under the Accords with respect to that item of property, taking into account depreciation and other factors affecting value."[117]

208. Even citing the finding in Case B/1 (Claim 4), the United States went on to specifically argue that:

> "the Tribunal has made clear time and again that the value of a claimant's loss must be determined as of the date of the deprivation."[118]

209. It is self- evident that according to the United States, the measure of loss under the parameters set by the A/15 (II: A) Award was the fair market value of the property as of the relevant time, which in B/61 is 26 March 1981, taking into consideration various other factors such as depreciation, mitigation, etc. Given the fact that Iran's position in A/15 (II: A) Case on how to measure its losses, too, is also principally based on the

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[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid,* p. 142.

"value" of the properties the export of which has been refused, there remains no doubt on the existence of a subsequent agreement between the two Parties to the Algiers Declarations concerning the interpretation of the relevant provisions of those Declarations (Paragraph 9 and General Principle A), as now merged into the A/15 (II: A) Award. The Tribunal could and should have taken judicial note of this common position of the Parties in the most relevant Case, the Partial Award of which is found to be applicable to the present Case. The majority's disregard of this critical factor in reaching its decision is beyond explanation.

Procedural and substantive problems of the U.S. comparison- based theory of loss

210. Having reviewed all the above, which demonstrate that compensation for Iran's losses as a result of the United States "implicit obligation" includes the "value" of the subject properties as of 26 March 1981, it may be appropriate to see the unsustainable nature of the findings of the majority in the present Award and, particularly, the application of the comparison- based theory of loss. This novel theory, belatedly introduced by the United States and embraced by the majority in the present Award, is both inadmissible as a procedural matter and totally hollow in substance, representing a hastily assembled construction *post hoc*, which even at the late stages of the Hearing on Individual Claims in 2007 was still being in the process of being revised and perfected.

211. Its introduction only at the latter part of the September 2005 Hearing, while "market value" was until then the basis of the United States last written pleading as well as the foundation of all Ernst & Young valuation reports included therein, came astonishingly late. This conduct is totally unwarranted and prejudicial to the Claimant's right of response under both the Tribunal Rules and the well- settled rules of procedure in international litigation. If only for that reason alone, the introduction of this theory at such a late stage, especially in light of the size and complexity of the Case, should not have been allowed. This conduct surely affected Iran's right of defense in that it must be assumed to have prepared itself for the Hearing on the basis of the United States presentations in its last pleading prior to that.

212. To suddenly find itself in the middle of the Hearing with a totally different Case with entirely different theory, facts and legal arguments, Iran was definitely deprived of its right to present a full response in a timely fashion and to submit factual evidence in response to the evidence submitted in 2006 in support of the United States new theory of loss.

213. Those who might argue that the presentation of new legal theories even at the Hearing is allowed should pay close attention to the very complex legal and factual background of the present Case, which involved hundreds of thousands of items of properties, tens of contracts and contract supplements, and thousands of pages of evidence and complex mathematical calculations. This Case is, therefore an entirely different universe than Cases in which a Party, while maintaining its main theory of loss, would add an additional or complementary theory in support of its main theory. Here, however, the United States completely changed the face of its Case, including its underlying legal theory, contentions and legal arguments. It basically threw away its 2003 Case and replaced it with a new one right in the middle of the Hearing, just like changing the goal posts in the middle of the game.

214. It is interesting to note that the United States itself had argued in response to Iran's mere reservation of right "to add *new damage theories* or evidence" in the parallel Cases Nos. A/15 (II: A), A/26 (IV) and B/43 that:

> "Iran should not now be permitted [] to devise *additional theories* or submit significant additional evidence at this stage in the proceedings."[119]

The United States went further to argue based on Article 20 of the Tribunal Rules and the practice that:

> "It would be unfair and extremely prejudicial to permit Iran to change or enhance its damage theories and evidence this late in the day."[120]

[119] Response of the United States to Claimant's Brief and Evidence in Cases A/15 (II: A), A/26 (IV) and B/43 filed on 26 September 2001, Doc. 1435, p. 214.. (Emphasis added.)
[120] *Ibid,* p. 215.

215. Considering the fact that this was only during the exchange of pleadings stage of those Cases, with no Hearing being scheduled yet, and the United States was already crying foul that it would be prejudiced if such theories would be introduced in future, one can imagine the United States' reaction if Iran had attempted to change its theory of loss in B/61 *at the Hearing*. Having taken that position in A/15 (II: A), the United States should be held to that position and be precluded from doing precisely the opposite in B/61. If, as the United States argued, "[i]t would be unfair and extremely prejudicial to permit Iran to change or enhance its damage theories and evidence this late in the day," the same argument applies *a fortiori* to the present Case where the United States did not merely supplement but completely replaced its previous damage theory with a new one and subsequently introduced related new evidence right in the middle of the Hearing.

216. Moreover and in the context of weight and credibility of the "comparison" theory, question inevitably arises that had the United States genuinely believed in this theory as a basis of calculating Iran's losses under the finding of "implicit obligation" in A/15 II: A) Award, the United States would, and should, have raised it earlier in its final written pleading in 2003 and *not* at the Hearing in order to allow Iran adequate opportunity to provide a full response. If anything, this spectacular turnaround is a textbook example of prejudicial conduct by a Party. It is for the majority to explain why, instead of dismissing this clearly belated and prejudicial theory and the related evidence, it has adopted and used it as the foundation for its decision.

<u>Review of the comparison theory on its merits</u>

217. This novel theory is totally at odds with the finding in the B/1 (Claim 4), which, as explained above, was *also* based on the General Principle A and restoration obligation stipulated therein. There and on that basis, the Tribunal held that the implementation of the restoration obligation in General Principle A would require the payment of the value or monetary equivalent of properties as of 26 March 1981. Although the issue in that Case was the Iranian property purchased through FMS program and in the United States possession, the language used by the Tribunal in its finding of an "implicit obligation" and its consequences was *general* and extended to *all* Iranian military property whether

or not in the United States possession or purchased through FMS program. It was precisely for that reason that the Tribunal decided in the A/15 (II: A) Claim to extend the same finding to Iran's export- controlled property that were *not* in the United States possession and *not* procured through FMS program.

218. Moreover, if the application of General Principle A requires, as the majority in the present Case argues, a *comparison* between Iran's financial positions on two points in time, there would have been no reason for the Tribunal not to have applied that method in B/1 (Claim 4). The general abstract interpretation, flawed as it is, which the majority in the present Case has made from the restoration obligation in General Principle A leaves no doubt that the FMS origin of the properties at issue in B/1 (Claim 4) and their possession by the United States would have been no reason *not* to apply this so- called *comparison* theory in that Case as well. The outcome seems clear: either the Tribunal was wrong in B/1 (Claim 4) in its interpretation and application of General Principle A and its consequences *or* the majority is wrong in the present Case. Because the B/1 (Claim 4) Award was made almost unanimously with no objection whatsoever by any Tribunal Member, including the two American Judges who are now part of the majority in the present Case, to the interpretation and application of the restoration obligation in General Principle A, it seems pretty obvious that the new interpretation of General Principle A in the present Case must be based on an afterthought to revise the Tribunal's previous finding.

219. The fact that neither of the two Parties nor any of the Tribunal Members in B/1 (Claim 4) raised at the time even the proposition that the restoration obligation in General Principle A would principally involve a *comparison*, the impression that the Tribunal's interpretation in that Case was correct and that what is suggested in the present Case is purely based on a revisionist approach is reinforced.

220. In fact, that conduct in the very first Case where General Principle A was found relevant and applicable in the context of the "implicit obligation" and its consequences, if not dispositive of the entire issue, is at least a very strong indication of the United States' belief and understanding, as well as that of the Tribunal, that the restoration of Iran's financial position, in so far as possible, to that which existed prior to 14 November 1979

does not mean an abstract comparison between Iran's financial positions between 13 November 1979 and 26 March 1981. To the contrary, the contemporaneous conduct of the United States in B/1 (Claim 4), by *not* raising the *comparison* theory and *not* objecting to the Tribunal's finding after the Award was issued, demonstrates that, the United States' view at the time, General Principle A and the restoration obligation incorporated therein, would principally require the payment of *the value* or the *monetary equivalent* of the properties, the export of which was banned by the U.S. policy decision, as formally acknowledged in 1981 by both the U.S. State Department as well as the Algiers Declarations chief negotiator.

221. Interestingly, the United States has argued in this very Case that:

> "[The United States does] not oppose applying the Tribunal's precedent in B/1 (Claim 4) to this case"[121]

The United States has further acknowledged in the present Case that:

> "A/15 (II: A) [Award] builds upon and it explains the legal conclusions that the Tribunal first articulated in B/1 (Claim 4) [Award], but they represent *a single line of precedent*. Together they should be the basis for the Tribunal's order on how to proceed in these consolidated cases."[122]

222. In light of these representations and the fact that the United States followed through these statements of position both in A/15 (II: A) and in B/61, until it decided to change that position at the Hearing, they must be given considerable weight in the interpretation and application of General Principle A in determining the consequences of the "implicit obligation."

223. Moreover, it is noteworthy that in A/15 (II: A) Award, the Full Tribunal correctly interpreted the finding of "implicit obligation" in B/1 (Claim 4) Award as being general in scope and making no distinction between the U.S. possession or non- possession of Iran's military properties. That distinction having been dismissed as a relevant factor, the logical link between these two Awards, which in the U.S. view constitute "a single line of precedent," would lead to the equally logical conclusion that in A/15 (II: A), too, that has

[121] 1993 Pre- Hearing Transcript, Doc. 190, p. 47.
[122] *Ibid.*

been found to be applicable in B/61, the restoration obligation under General Principle A would require, at a minimum, the payment of *the value* or *monetary equivalent* of the Iranian properties at issue as of 26 March 1981. Indeed, as explained more fully above, the reference, not once but twice, in the A/15 (II: A) Award, particularly Paragraph 65 thereof, to the requirement of payment of *the monetary equivalent* as a natural consequence of General Principle A must have meant something.

224. The Tribunal in A/15 (II: A) Award would not have referred to the obligation to pay *monetary equivalent* in the context of the restoration obligation in General Principle A if it had in its mind a different theory of loss, much less a completely abstract theory based on comparison, which admittedly would lead to zero recovery in any event. Above all, if that had been the case, the Tribunal would not have requested the Parties to submit *evidence* of the losses because the abstract methodology embraced by the majority is free of any need to consider the concrete evidence submitted by both Parties in the present Case. In such a case, the Tribunal would, in all probability, have either decided the matter there and then because all the general facts and considerations upon which the majority has built its decision in the present Award had been present before the Tribunal in 1992 when A/15 (II: A) was decided. Alternatively, the Tribunal might have scheduled a much shorter proceeding, excluding any evidence, only to deal with the abstract interpretive issues surrounding the meaning and effect of General Principle A.

225. By belatedly introducing this novel theory, the United States effectively sought in an untimely fashion to undo the standard of compensation set forth in B/1 (Claim 4), which, by necessary implication, was extended to the A/15 (II: A), as clearly explained above. The majority, for reasons beyond me, also fell for this very late afterthought, adopting it wholeheartedly.

226. In the context of the B/61 Case, too, one wonders that if this comparison- based theory had been genuine, surely the United States would have instructed its valuation expert, Ernst and Young, to prepare its reports, which were to be submitted as attachments to the United States last Brief before the Hearing, *i.e.*, its 2003 Rebuttal on the basis of a comparison of Iran's financial position at two points in time and assessment

of any diminution of value and *not*, as it were, *exclusively* based on the assessment of the Fair Market Value (FMV) as of 26 March 1981.

227. It is interesting to note that the cover letter of 4 April 2003 of Ernst & Young addressed to the U.S. State Department attached to the valuation reports of Ernst & Young on individual claims contained the following passages:

> "In accordance with *your request*, Ernst & Young LLP ("Ernst & Young") has performed a valuation analysis of certain assets …."[123]

In the same letter, Ernst & Young concludes by stating that:

> "Based on our analysis, the recommended Fair Market Value of the Subject Assets, as of March 26, 1981, is reasonably presented at …."[124]

228. It is clear, therefore, that the assessment of the losses with respect of the subject properties in B/61 was, upon U.S. request and under its supervision, was made exclusively on the basis of the Fair Market Value of the subject properties as of *one date*, 26 March 1981.

229. But, the review of the valuation reports themselves provides more insight into how the decision to adopt this particular standard of assessment of losses, which is based on *one date* only, had been made. It is explained in those reports that:

> "As described in the 'Property Valuation Methodology' section of the 'Brief of the United States on Issues Common to Multiple Claims,' we have reviewed, *in conjunction with the attorneys from the State Department, the relevant rulings of the Tribunal and have jointly determined that 'Fair Market Value' is the appropriate standard to use in our valuation*."[125]

230. This makes it clear that the E & Y valuation experts *jointly* with the U.S. Government lawyers reviewed the relevant Tribunal Awards, which must surely have included both the B/1 (Claim 4) and A/15 (II: A) Awards, and by using the legal

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[123] *See*, for example, the E & Y letter of 4 April 2003 attached to the valuation report concerning Rockwell International Systems, Inc. Statement # 22, Exhibit 2 to the United States Rebuttal of 1 September 2003, (Doc. 416, at page 1.

[124] *Ibid*, p. 2.

[125] *Ibid*, valuation report, p. 2. (Emphasis added.)

expertise of the U.S. Government lawyers, came to the conclusion that, *according to those Awards*, the applicable standard of assessment of Iran's losses in B/61 is the Fair Market Value of the properties at *only one* point in time, 26 March 1981 and *not* a mere diminution of value between *two* points in time, 13 November 1979 and 26 March 1981. One is struck by the fact that this interpretation of the meaning and effect of the application of the A/15 (II: A) Award in B/61 and the way losses should be determined under that Award, was taken by the United States 11 years after the Award in A/15 (II: A) was issued. It cannot but be assumed that this was the considered view of the United States of the way the finding of the "implicit obligation" in A/15 (II: A) should be applied in B/61, particularly in light of the fact that the United States took precisely the same position concerning export- controlled properties in the Case No. A/15 (II: A).

231. Indeed, if the understanding of the lawyers at the U.S. State Department in 2003 had been that the application of the relevant Tribunal Awards, including B/1 (Claim 4) and A/15 (II: A) and the restoration obligation stipulated in General Principle A,, would require a comparison between Iran's financial positions on two specific dates, surely they would have instructed Ernst & Young to prepare a valuation based on that theory. They did not do that then, nor did they instruct Ernst & Young to carry our such an assessment even afterwards, until the Hearing in very last cluster of Individual Claims, despite Ernst & Young's acknowledgment at the Hearing on individual claims that it would have been able to do so, had it been requested. Thus, the assessment of Iran's losses based on the Fair Market Value as of 26 March 1981, as the appropriate standard applicable in B/61, was the *legal* understanding of the United States Government of the relevant findings of liability in the Tribunal Awards, most prominently those in B/1 (Claim 4) and A/15 (II: A), including the restoration obligation enshrined in General Principle A.

232. The theory is so inherently flawed that even the United States found it hard during the Hearing to explain how it works in practice. It took them until well into the Hearing in Individual Claims to find an explanation on its practical application to a concrete example but even then the result, in all probability, would be negative recovery for Iran, which would lead to the bizarre outcome that Iran had even to pay something to the United States in order to achieve the aim of General Principle A, *i.e.*, restoration of *Iran's* financial position to that which existed before 14 November 1979. Obviously, it would be

inconceivable that what the Parties would have meant by General Principle A, incorporated at Iran's request, was for Iran to pay something to the United States in order to restore *Iran's* financial position.

233. One other interesting point is the significant speculation elements involved in the original U.S. proffered version of the *comparison* theory of loss because of it reliance on the "risk of non- export" of Iranian military properties before 14 Nov. 1979 without being able to assign any concrete percentage on it. It suggested anything between 5% and 30% as representing Iran's chances of export before 14 November 1979 but did not explain the reason for this wide fluctuation and precisely in what way the risk of non- export would affect the "value" of the properties. Extraordinarily, however, in order to rid itself from being entangled in the problems inherent in the application of the U.S. version of the *comparison* theory, the majority has taken a more radical version of that theory. By developing a tortured and incomprehensible theory based on the "right to export" instead of "risk of export," while these are two sides of the same coin, the majority sidestepped the difficulties it otherwise would have encountered, a theory that even the United States did not raise and Iran had no opportunity to respond to.

Conclusion on the extent of U.S. liability/ measure of loss as a result of failure to fulfill the "implicit obligation"

234. From all the above, the conclusion is inevitable that under the findings in A/15 (II: A) and B/1 (Claim 4) Awards, the extent of the U.S. liability as a result of non-fulfillment of its implicit obligation to compensate Iran for refusal to allow the export of the Iranian military properties should be measured principally by the *value* of those properties and *not* any *diminution* of value between 13 November 1979 and 26 March 1981.

235. The finding of an implicit obligation in paragraph 65 of the A/15 (II: A) Award, which has been found to be applicable to the present Case, was itself admittedly originated from the same finding in the B/1 (Claim 4) Award in which the Tribunal found that the measure of loss for the U.S. failure to meet its implicit obligation was the *monetary equivalent* of those properties as of 26 March 1981. The reason for this finding

was simple and yet compelling; the U.S. liability was founded principally on the terms of Paragraph 9, which provides for the transfer of the properties to Iran, either a *transfer in kind* or, where this is not possible, the transfer of their *monetary equivalent*. The Tribunal found in that Case that failure to transfer the *monetary equivalent* of the properties at issue to Iran would contradict the purpose of General Principle A, which requires the restoration of Iran's financial position to pre- 14 November 1979. The essential criterion to measure Iran's losses was *the value* of the properties as of 26 March 1981. This was the essence of the finding of liability in B/1 (Claim 4), which was also adopted as the basis of liability in A/15 (II: A). Consequently, the Tribunal found in A/15 (II: A) that the same implicit obligation exists *equally* with respect to the properties at issue in that Case.

236. Therefore, it is only natural to assume that the A/15 (II: A) finding of an implicit obligation should lead to at least the *same consequences* as in B/1 (Claim 4), although the use of the broad and elastic term "losses" might suggest a broader scope, allowing recovery, subject only to establishing the *causation* link. The only distinguishing factor that could possibly have led to the adoption of a different measure of compensation than that adopted in B/1 (Claim 4) was the possession of the properties in B/1 (Claim 4) by the U.S. government and the possession of the properties at issue in A/15 (II: A) and B/61 by U.S. companies. However, it is clear that in the A/15 (II: A) Award, this factor was duly considered and dismissed, which finding, by necessary implication, would dispose of any differentiation in the measure of compensation in terms of a lesser standard of compensation. In fact, the Full Tribunal expressly held in the A/15 (II: A) Award that:

> "While it is correct that the Partial Award in Case No. B1 (Claim 4) dealt with military items, the above finding of an obligation to compensate is not limited to such properties, but rather applies to Iranian properties in general. Nether does the Partial Award distinguish between properties in the possession of the United States (as was the case in B1 (Claim 4), and those not in the possession of the United States (as is the case here), *as far as the obligation to compensate in the event of a refusal to transfer or to grant export licenses is concerned.*"[126]

[126] A/15 (II: A) Award, para. 65. (Emphasis added.)

237. The above language seems to be clearly aimed at removing any possibility of mischief in future in the form of application of a different standard of compensation resulting in a lesser recovery than that in B/1 (Claim 4).

238. Confirming this conclusion is the common position, which *both* Parties took in their most comprehensive legal Briefs submitted prior to the Hearing in B/61, *i.e.*, Iran's 1999 Reply and the United States' 2003 Rebuttal. According to that *common* position, under applicable Tribunal Awards in B/1 (Claim 4) and A/15 (II: A) as well as relevant rules of international law, Iran's losses in B/61 must be principally measured by the *value of the properties* at issue on 26 March 1981. The only difference between the Parties seems to have been that while Iran maintained that under the A/15 (II: A) Award, it was entitled to recover any type of losses it can prove even those *other than the value* of properties, United States argued that Iran's recovery should be confined to the *fair market value* of the properties, less certain deductions. The *common* ground between the Parties was that the premise of Iran's recovery should not be *less than the value of the properties.*

239. The suggestion that because of the Tribunal's recourse to the restoration obligation in General Principle A to support the main finding of implicit obligation derived directly from Paragraph 9, the Tribunal should merely look to the situation *prior to* 14 November 1979 and award Iran to that extent is question- begging in multiple respects.

240. First, it is against the Tribunal's reading in B/1 (Claim 4) of the restoration obligation in conjunction with Paragraph 9, which reading required the award of the value of the properties after the Algiers Declarations, as of 26 March 1981. The Tribunal's finding in that Case, as confirmed in the subsequent A/15 (Claim 4) Award, did *not* distinguish between properties in the possession of the United States and those that were not as far as the U.S. implicit obligation to transfer their monetary equivalent was concerned. Following this to its logical conclusion, there would be no logic to imply any distinction in the sense of a lesser degree of liability in this Case, which is to be decided based on the standard set by A/15 (II: A) Award.

241. Second, it is against the contemporaneous understanding of the United States of the consequences of Paragraph 9 and General Principle A, as reflected in the statements of Warren Christopher before the U.S. Senate, the statements of Mr. Lindstrom on 26 March

1981 and the clear statement in the 23 September 1981 U.S. Diplomatic Note. In none of them is there any distinction between the properties in U.S. Government possession and those not in its possession. Iran's entitlement to the value of its properties is recognized as a matter of treaty right. That, too, militates against the hair- splitting U.S. construction that the scope of liability and the standard of compensation might somehow be different under the two above- mentioned Awards.

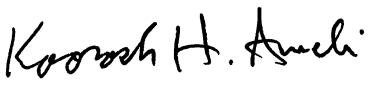
242. Third, the suggestion suffers from inherent flaws. For example, the proposition that any risk of non- export before 14 November 1979 should be deducted from the 26 March 1979 value does not make sense. Even if assuming, *arguendo*, that there was a certain percentage of risk of non- export prior to 14 November 1979, the value of the property would be 100% preserved. Therefore, *in the context of the transfer of the value of the properties*, any deduction for the risk of non- export would be out of place as such risk would only affect the *physical transfer* of the property itself and *not its value*; the fair market value of the property would stay intact. That simply does not make any sense.

243. Although, as Senator Lugar had predicted during the Senate Hearing, whether or not Paragraph 9 required U.S. to transfer Iran's military properties or not was a matter "that require[d] interpretation" p. 55, Iran contested the United States refusal to transfer based on a different reading of the U.S. law proviso, the question of Iran's entitlement to the value of its withheld properties was never under any doubt.

246. Consequently, I concur in part and dissent in part in the present Partial Award.

The Hague

Dated, 17 July 2009



Koorosh H. Ameli