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.

Dissenting Opinion of Mohsen Aghahosseini

1. I write this Dissenting Opinion to record my objection not to a number of innocent flaws in the present Partial Award -- unacceptable though they are -- but to a much more fundamental problem from which this Award suffers. The problem, as will be explained below, of an astonishingly rudimentary scheme designed by the majority to do injustice to one party, in the interest of another. First, though, a very short background.

1. The Background

2. Some twenty-one years ago, a full-panel of this Tribunal held, in a landmark decision, that under the terms of the Algerian Declarations the United States had committed itself either to return to Iran all Iranian military properties in the United States or, if it chose not

to license exports of such properties, to compensate Iran in the amount equivalent to the fair market value of the unreturned items. The payment of compensation, said the Tribunal, was an implied term of the Declarations, under which the United States had obligated itself to restore the financial position of Iran to that which existed prior to 14 November 1979[1] (Principle A of the General Declaration), and to arrange for the transfer to Iran of all Iranian properties located in the United States (Paragraph 9 of the same Declaration).

3. This was in Case B1 (Claim 4),[2] in which the military properties involved were those purchased by Iran directly from the United States and were in the United States' possession, mainly for repair purposes. The United States abided by the ruling of the Tribunal and, unwilling to license the return of these properties to Iran, eventually compensated Iran in accordance with the terms of a settlement agreement which was then turned into an award on agreed terms, as envisaged by the rules of the Tribunal.

4. Four years later, the issue was revisited by the Tribunal in Case A15 (II:A and II:B).[3] The Case primarily involved Iranian non-military properties, but amongst a host of disputed issues before the Tribunal, one concerned the obligation of the United States in respect of the Iranian military properties purchased not directly from the United States, but from the United States private companies, and thus in the possession not of the United States, but of those companies.

5. In its treatment of that issue, the Tribunal first carefully reviewed and unequivocally endorsed the interpretation of the Algerian Declarations in its earlier Partial Award in Case B1 (Claim 4), and in particular its finding there that the United States was under an implied obligation to compensate Iran for the non-return of properties purchased from and possessed by the United States. It then proceeded to examine whether that obligation also existed in the case of military properties purchased from, and in the hands of, the United States private companies, the return of which had been refused by the United States relying on its exports control laws.

---

[1] This is the date on which the United States had imposed sanctions on Iran, and frozen its properties in the United States.

[2] Award No. 382-B1-FT (31 August 1988), 19 Iran-U.S. C.T.R. 273 (hereinafter, the "B1 (Claim 4) Partial Award").

[3] Award No. 529-A15-FT (6 May 1992), 28 Iran-U.S. C.T.R. 112 (hereinafter, the "A15 (II:A and II:B) Partial Award").

6. Based on a painstaking review of the pertinent terms of the Algerian Declarations, and of its own holding in B1 (Claim 4) Partial Award, the Tribunal found that in so far as it concerned the United States' *liability* to compensate Iran for disallowing the export of Iranian properties, there was nothing to allow any distinction between the properties bought from and possessed by the United States itself, and those bought from and possessed by the United States' private companies.[4] In both instances, Iran would be deprived of its properties by the conduct of the United States, and in both instances, failure by the United States to pay compensation would be in conflict with the restoration of Iran's financial position. Thus, in respect of the latter type of properties, too:

> "The United States has an implicit obligation under the General Declaration to compensate Iran for losses it incurs as a result of the refusal by the United States to permit exports of Iranian properties subject to United States export control laws applicable prior to 14 November 1979."[5]

The difference, said the Tribunal, lay only in the type of compensation which the United States was required to pay: the *monetary equivalent* of the unreturned items in the former case, as against the payment of *full losses* in the latter.[6]

7. Before reaching these conclusions, the Tribunal had to resolve one further point in dispute, particularly relevant to the present Case. The United States had argued that: (i) the United States' export control laws, preserved in the Algerian Declarations, entitled the United States to refuse export licenses in certain given circumstances, without entailing any liability for the United States; (ii) prior to 14 November 1979, and particularly after the seizure of the American Embassy in Tehran on 4 November 1979, relations between Iran and the United States had deteriorated to such an extent that Iran had practically no prospect of receiving export licenses; and (iii) such being the case, the United States' decision after the conclusion of the Algerian Declarations in January 1981 not to grant

---

[4] The A15 (II:A and II:B) Partial Award, *ibid*, Paragraph 65:

> "Neither does the Partial Award [in B1 (Claim 4)] 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. 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."

[5] *Ibid*, Paragraph 77 (g).

[6] *Ibid*, Paragraph 65.

export licenses for the return of Iranian military properties could not possibly have inflicted any losses on Iran.

8. The Tribunal flatly rejected this line of argument. It found: (i) *as a matter of fact*, that the non-return of the Iranian items in the period before 14 November 1979 had nothing to do with the normal application of the United States' export control laws, but was the outcome of political decisions taken by the United States after the Islamic Revolution of Iran in February 1979, and the seizure of the United States Embassy in Tehran in November 1979; and (ii) *as a matter of law*, that as such, those decisions gave rise to liability on the part of the United States. This is what the Tribunal said in this respect:

> "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 when 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. 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 …"[7]

9. Having so determined the legal issues before it, the Tribunal went on to state that at that stage of the proceedings and on the basis of the then available records, it was not "feasible to address the issue of *specific properties* or possible losses incurred by Iran with respect to *those properties*".[8] It thus directed the Parties to brief the Tribunal on the status of each property, on the understanding that "liability of the United States exists where the United States has failed to fulfill its obligations under the General Declarations and Iran suffer[ed] losses as a result thereof".[9] In "determining the amount of compensation", the Tribunal informed the Parties, it would "take into account as to *each property* evidence of any loss by Iran … and other relevant circumstances of the transactions relating to *such property*".[10] All these were further confirmed by the Tribunal

[7] *Ibid.*
[8] *Ibid*, Paragraph 71 (emphases added).
[9] *Ibid*, Paragraph 73.
[10] *Ibid*, Paragraph 75 (emphases added).

in a subsequent Order, inviting the Parties to file their evidence and briefs.[11] That Case is as yet unconcluded.

10. This legally sound and readily justifiable ruling in the A15 (II:A and II:B) Partial Award -- that under the Declarations the United States was required either to allow the return of Iranian properties or to compensate Iran for its losses if the United States decided in its national interest not to allow the return of such properties -- met with a ruthless attack by the three American arbitrators who constituted the minority. Writing a Separate Opinion,[12] they accused the majority, in a most unconventional tone, of being "mesmerized" by the earlier B1 (Claim 4) Partial Award, and of "blindly" following its words. Here is the crux of their argument, which they kept repeating it throughout their Opinion:

> "In the first place, it is wrong -- and clearly not based on any evidence in this Case -- to assume that Iran received export licenses routinely until 14 November 1979 … On the contrary, … American export licensing policy inevitably changed once the Iranian Revolution, with its virulent anti-American overtones, succeeded in February 1979 … Certainly, the new Islamic Government of Iran could not assume in 1979 that *all* such licenses would be granted, and we cannot believe that *anyone* would have expected such licenses to be granted after the seizure of the American Embassy on 4 November 1979 ... By that time Iran had *no* prospect whatsoever of receiving U.S. export licenses."[13]

11. They were particularly displeased with the Tribunal for having concluded that "Iran should be relieved of the risks it assumed prior to [14 November 1979] with respect to export licenses … and that those risks should be imposed by the United States"[14] without first allowing the Parties to adduce evidence on the subject:

---

[11] Order of 30 June 1992, Document No. 1098:

> "Pursuant to the [Partial Award], the Tribunal establishes the following schedule for further pleadings and evidence:
> a) The Claimant is requested to file … its brief and evidence concerning all the remaining issues to be decided in this case, including issues related to individual properties and the determination of compensation and interest;
> b) The Respondent is requested to file … its brief and evidence in response …"

[12] Separate Opinion of Howard M. Holtzmann, George H. Aldrich, and Richard C. Allison, *Dissenting in Part and Concurring in Part*, 28 Iran-U.S. C.T.R. 142 (hereinafter, the "Separate Opinion of the American Arbitrators").

[13] The Separate Opinion of the American Arbitrators, *ibid*, Page 147 (emphases in the original).

[14] *Ibid*, Page 146.

> "Equally disturbing, however, is the Tribunal's refusal in the present Partial Award even to ask the Parties for evidence concerning U.S. export licenses to Iran during the period prior to 14 November 1979. In view of the fact that a further round of pleadings is being scheduled in Part II:A, which includes all the export-controlled properties subject to the implicit obligation of compensation found by the Tribunal, no delay in the resolution of this Case would have been caused by asking the Parties also to submit evidence concerning such export licensing practice and, pending examination of such evidence, to defer decision as to what, if anything, is required to restore Iran's financial position with respect to these properties to that which existed prior 14 November 1979. We cannot understand why that course was rejected by the Tribunal."[15]

12. Noticeably, the dissenting members cited with approval the reading of an implied obligation into Paragraph 9 of the General Declaration in the B1 (Claim 4) Partial Award, but argued that such an obligation belonged to the facts of that Case alone. To them, the only just solution was for the Tribunal to conclude that under the Algerian Declarations, the United States was entitled to prevent the return to Iran of Iranian properties, worth hundreds of millions of dollars, with no liability, even though the United States had committed itself, under those Declarations, to "restore the financial position of Iran, in so far as possible, to that which existed prior to 14 November 1979",[16] and had further undertaken to arrange, subject to the provisions of U.S. law applicable prior to 14 November 1979, for the transfer to Iran of all Iranian properties … located in the United States …"[17] To them, Iran and the United States had agreed in the Declarations -- in respect of the Iranian properties sent to the United States contractors mainly for repair purposes -- to give the United States a free hand: either to return the Iranian properties, if it so wished, or to block their return with full immunity.

2. The Present Case

13. The present Case concerns Iranian military properties in the hands of United States' nationals, not transferred to Iran because of the United States' refusal to grant the

[15] *Ibid*, Pages 148-9.
[16] Principle A of the General Declaration, Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (19 January 1981), 1 Iran-U.S. C.T.R. 3.
[17] The General Declaration, *ibid*, Paragraph 9.

necessary export licenses.[18] The Case therefore involves precisely the same legal issues on which the Tribunal had expressed itself first in its B1 (Claim 4) Partial Award, and then more closely in its A15 (II:A and II:B) Partial Award.

14. In recognition of this fact, the Parties in the present dispute agreed, for long after the issuance of the A15 (II:A and II:B) Partial Award in 1992, that the finding of an implied obligation in one or the other of the said two Partial Awards had settled the issue of liability in the present Case, with the United States speaking of the applicability of the A15 (II:A and II:B) Partial Award, in preference to B1 (Claim 4) Partial Award.[19] Thus, as late as February 1993, the United States represented at the pre-hearing conference of the present Case that the decision of the Tribunal in A15 (II:A and II:B) "was the Tribunal's judgment and we are prepared to live with it; we accept it".[20]

15. Indeed, it was only in April 1994 that the United States in its Consolidated Response saw fit to change course, and to argue for the first time that the finding of a compensation requirement in the A15 (II:A and II:B) Partial Award should not be followed in the present Case, because it had been decided erroneously.[21] Noticeably, this was the United States' first submission after the departure from the Tribunal of late President Jose Maria Ruda -- a world-class jurist renowned for his integrity and independence.

16. Still, after the resolution of the basic issue of liability in the A15 (II:A and II:B) Partial Award, and the instructions issued by the Tribunal on that basis, the Parties to the present Case naturally focused on the subject of losses as related to the individual properties. For over 13 years -- from the date this Case became active before the Full

[18] At issue in the Case are a few other claims relating to (i) a small number of Iranian properties not subject to the United States' export-control laws, (ii) the impact of certain unlawful Treasury Regulations, (iii) a number of items taken by the United States government, and (iv) some other claims, none of which is the concern of the present Dissenting Opinion.

[19] See Paragraphs 12-14 and 63 of the present Partial Award. In fact, as the present Partial Award correctly notes (Paragraph 12), the United States had suggested, some two years before the issuance of the A15 (II:A and II:B) Partial Award, that the Parties in the present Case should "await the [Full Tribunal's] decision in Case No. A15 (II:A and II:B)", and further that "the determination of the legal issues in Case No. B61 should be made in light of the findings of the Full Tribunal in Case A15 (II:A and II:B)."

[20] The Partial Award, Paragraph 63.

[21] See Paragraph 18 of the present Partial Award, stating, with reference to the United States Consolidated Response, that the United States "shifted its position to argue that the Tribunal's ruling in its Partial Award in Case No. A15 (II:A and II:B) was incorrect and that the underlying reasoning relating to export-controlled property should be reconsidered …"

Tribunal in 1992 to the date of its Hearing Conference in September 2005 -- the Parties prepared and submitted to the Tribunal, with the help of scores of experts and witnesses, a whole host of briefs and other materials, amounting to thousands of pages, dealing with the identifications, descriptions, conditions, purchasing prices, present values, calculations of losses, and many other characteristics of tens of thousands of military items at dispute.

17. The same is true of the Hearing Conference of the Case, apparently unparalleled -- in terms of its length, if nothing else -- in the long history of this Tribunal. It extended over sixty days,[22] during which the Parties again spent by far the greatest part of their time -- over fifty days of it -- to the issue of individual items, and the losses that Iran assertedly incurred in respect of each of them. A host of Iranian governmental entities on the part of the Claimant attended the Hearing Conference and days after days briefed the Tribunal on the specifics of the individual items related to their entities. The same was true on the part of the Respondent, which shouldered the task of dealing with issues not only related to itself, but to more than fifty private entities involved. They did so, as noted before, in compliance with the Tribunal's specific instructions. The huge costs in monetary terms of such gigantic efforts to the Parties would not be hard to imagine.

3. The Present Partial Award

18. The outcome of all that, is a Partial Award supported by five members, of whom three are members appointed by the United States. Its general scheme designed to deprive Iran of any compensation will be addressed shortly, suffice it to say here, by way of introduction, that it is a scheme which is impossible not to regard with utter contempt and disdain.

19. It is produced in some ninety pages, of which the first fifty-three pages are mainly devoted to the facts, contentions, and some procedural issues. This is followed by a lengthy treatment -- in a further thirteen pages -- of the question whether the landmark decision of this Tribunal in A15 (II:A and II:B) should be given *res judicata* effect in the present proceedings. The Partial Award, stating the obvious, finally concludes that it should.

[22] This took place intermittently between September 2005 and March 2007.

20. This is hardly surprising because, as noted earlier, a full panel of this Tribunal had twice said in the past *that* under the terms of the Algerian Declarations, the United States was obligated to pay compensation to Iran, if it decided in its national interest not to allow the return of Iranian properties to Iran, and *that* in this, there was no distinction between the properties possessed by the United States or by its nationals. The United States, too, had readily recognized the applicability of these findings to the present proceedings, both before and for sometime after the issuance of the A15 (II:A and II:B) Partial Award in 1992. Such being the facts, there was hardly any room for the Tribunal to try to deny the applicability of these Awards in a Case in which precisely the same commitment is at issue, simply because the United States had found it convenient to shift its position after a change in the composition of the Tribunal.

21. Unable to ignore the basic finding of the United States' liability as established particularly in the Tribunal's A15 (II:A and II:B) Partial Award,[23] the majority tries a different route, namely, the divesting of that Award, and the finding of liability in there, of any consequences whatsoever. It does so in the remaining twenty pages of the Partial Award which, stripped of its verbosity and tiresome repetitions, can be summarized in a few words.

22. Iran, says the majority, "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", whether in accordance with general international law or the terms of the Algiers Declarations. And that being the case, "the United States' refusal on 26 March 1981 to allow the export of Iran's military properties did not deprive Iran of a right of export",[24] nor indeed of any "ownership rights in those properties",[25] and thus could not possibly have led to the suffering of any compensable loss by Iran. Iran's claims must therefore be rejected in their entirety, without any reference to the individual properties.[26]

---

[23] As will be seen shortly, however, despite its contention that it is bound by the *res judicata* effect of the finding of liability in A15 (II:A and II:B) Partial Award, the majority does revisit that issue, and thereby contradicts its own contention.

[24] The Partial Award, Paragraph 158.

[25] *Ibid*, Paragraph 167.

[26] *Ibid*, Paragraph 172.

23. The Award need not be dignified by a point by point review of its very many flaws. Instead, and with a view to demonstrating its fundamentally disingenuous nature, a few references to some of its glaring shortfalls will be made below.

3.1. The Present Partial Award Violates the A15 (II:A and II:B) Partial Award

24. To begin with, this theory of not recognizing any right for Iran[27] -- or, as the majority implies, for any other nation -- to export its military properties, is in clear violation of the Tribunal's A15 (II:A and II:B) Partial Award; the very Award which the majority in the present Case admits to be the governing law. The reason is obvious. If the contention that Iran had no right of export either before 14 November 1979 or after the signing of the Algerian Declarations had any place in the minds of the signatories to A15 (II:A and II:B) Partial Award, they would have been required to dismiss Iran's claims there and then, simply because under such a theory, Iran could never prove any losses to its interests. If such a theory carried the slightest weight for those signatories, they could not possibly have said that the Tribunal had determined as many legal issues before it as possible. They could not have proceeded to instruct the Parties to brief the Tribunal on individual properties, a process that involved years of litigation and millions of dollars of expenses.[28]

25. The majority is apparently aware that these obvious points cannot be left unanswered. Here is the outcome of their efforts:

> "Contrary to the position the Tribunal found itself in when rendering its Partial Award in Case No. A15 (II:A and II:B), it is able to make that determination [about Iran's losses] now with respect to the export-controlled properties at issue in this Case because the Tribunal has been fully briefed by the Parties on the question of losses, both in their extensive written pleadings and during the sixty days of Hearing …"[29]

26. But what is missing here is an explanation by the majority of how years of litigation after the A15 (II:A and II:B) Partial Award, mainly on the statuses of the individual items, helped the majority to realize that under the rules of international law and the terms of the Algerian Declarations, Iran never possessed a right to export its military properties,

[27] *Ibid*, Paragraph 163.
[28] This issue of irreconcilability is particularly troublesome in the case of one single member who has joined the majority in both Partial Awards in A15 (II:A and II:B) and the present Case.
[29] The Partial Award, Paragraph 134.

and therefore could not have been damaged, under any circumstances, by the United States' refusal to allow the return of its properties.

27. It is true of course, as noted earlier, that late in the proceedings, the United States, in line with the dissenting members in A15 (II:A and II:B), presented the argument that since the events especially just before 14 November 1979 had reduced Iran's chances of export virtually to nil, the decision by the United States after the Algerian Declarations not to grant export licenses did not cause any losses to Iran. But then this was, *first*, an argument based on proof of *facts*, namely, that circumstances on the ground had *in fact* affected Iran's chances of export, and thus has nothing to do -- indeed, it directly contradicts -- the assertion by the majority that Iran, just like any other nation, had at no time any right of export.

28. *Secondly*, and equally significantly, this was an argument invoked by the United States after it shifted its position *vis-à-vis* the A15 (II:A and II:B) Partial Award, arguing that the said Partial Award should be disregarded in the present Case as a manifestly wrong decision. And quite understandably so, for a glance at A15 (II:A and II:B) Partial Award reveals that even this factual argument by the United States had been fully considered and rejected by that Partial Award,[30] and could not therefore be invoked until the Partial Award itself had been attacked.

29. In short, then, what we have here is this: *First*, the A15 (II:A and II:B) Partial Award finds that the United States is under an obligation to compensate Iran for the losses it incurs as a result of the United States' decision not to allow the return of Iranian properties, stating categorically that the deterioration in the relations between Iran and the United States before 14 November 1979 is irrelevant to this finding.[31] That Partial Award is then criticized by the dissenting members for coming to such a legal conclusion without allowing the Parties to submit evidence of deterioration in the relations between Iran and the United States, and hence the reduction of Iran's chances of export. *Later*, the United States, having argued that the A15 (II:A and II:B) Partial Award should not be followed in the present Case, proceeds to offer its evidence on Iran's reduced chances of export after the crisis in the Iran-United States relations. *And* now comes the majority's

[30] And so said the dissenting members in A15 (II:A and II:B) Partial Award. See the passages quoted in support of this on Paragraphs 11 and 12 above.

[31] See the passage cited above, Paragraph 9.

contention in the present Partial Award that, *consistent with the ruling in the A15 (II:A and II:B) Partial Award*, Iran had never had a right of export, whether during the period of crisis or friendship.

30. Amazingly, the majority does not only deny Iran's right of export, but also Iran's right of expecting export, again pretending that in this, it is not violating the terms of the A15 (II:A and II:B) Partial Award. It says in this respect that:

> "Any expectation of export that Iran may have had prior to 14 November 1979 in light of the quantity of military equipment it had exported from the United States during the 1970s did not create a legitimate expectation that it could export its military property at all times prior to 14 November 1979 … A contrary finding by the Tribunal would be inconsistent with … general international law, which recognizes the sovereign discretion possessed by all states to control the export of such articles from its territories."[32]

31. In further support of that, the majority refers to a few contracts between Iran and the United States private companies, in which Iran acknowledges that export of its purchased article is "subject to approval of the U.S. Department of State … or such other departments or agencies as of the U.S. Government as may be required".[33]

32. Apart from the elementary failure by the majority in the first passage to realize that sovereign discretion is in no way incompatible with a treaty commitment, one cannot help wondering how a simple and legally solid argument by Iran can be so readily twisted or, at best, misunderstood.

33. That argument is this: that whether or not Iran was legally entitled to receive its properties, many years of amicable relations between Iran and the United States, and many years of routinely receiving export licenses for its military properties, had created this legitimate expectation on the part of Iran, *at the time of sending or purchasing its properties* in dispute, that this time, too, they would be returned or delivered. In the words of the A15 (II:A and II:B) Partial Award, these properties had been sent for repair or purchased at the time when Iran was not "listed among the countries for deliveries to which the United States prohibited the issuance of export licenses".[34]

---

[32] The Partial Award, Paragraph 163.
[33] *Ibid*, Paragraph 164.
[34] The A15 (II:A and II:B) Partial Award, see above, footnote 3, Paragraph 60.

34. In response to this submission, the majority says, *first*, that whatever expectation Iran might have had *at the time of sending or purchasing* its properties, Iran was not entitled to legitimately expect the return or delivery of its properties *after the crises in its relations* with the United States, and *secondly*, that Iran had recognized in some of its contracts with the United States' private contractors that the return or delivery of its properties required the permission of the United States. Such is the degree of the majority's competence for understanding the Parties' arguments.

3.2. The Present Partial Award Violates the B1 (Claim 4) Partial Award

35. The majority's theory of no right of export, is equally in clear violation of this Tribunal's holding in B1 (Claim 4) Partial Award, an Award which the majority cites with approval.[35] It will be recalled that in that Award, the Tribunal interpreted Paragraph 9 of the General Declaration as containing an implied obligation on the part of the United States to compensate Iran for the full value of its properties, if the United States decided not to return them to Iran. Failure to compensate Iran, said the Tribunal, was tantamount to not restoring Iran's financial position.

36. If the majority's theory is to be believed, this interpretation of the pertinent term of the Declarations was wrong, and the United States was incorrectly held liable for payment of compensation. This is because under the majority's theory, "all that the United States did was to exercise its undeniable sovereign right to prohibit the export of sensitive military items";[36] a right recognized by "general international law" and "expressly preserved" under the Declarations.[37]

37. Faced with this evident inconformity, the majority resorts to and reproduces -- as it habitually does in the present Partial Award -- the argument made by the minority members in their Separate Opinion in the A15 (II:A and II:B) Partial Award. In B1 (Claim 4) Case, the argument goes, certain factors were present which are absent in the

[35] So do the minority members in A15 (II:A and II:B) Case, who, referring to the reading of an implied obligation into Paragraph 9 of the General Declaration, suggest that any contrary interpretation of that Paragraph "would have been inconsistent with the object and purpose of the Declaration, notably General Principle A, which stated that the United States would restore the financial position of Iran, in so far as possible, to that which existed prior to 14 November 1979". The Separate Opinion of American Arbitrators, see above, footnote 12, Page 145.

[36] The Partial Award, Paragraph167.

[37] *Ibid*, Paragraph 163.

present Case: the properties were "purchased by Iran from the United States, had been fully paid for by Iran, and remained in the possession of the United States".[38]

38. The answer to this is twofold: *Firs*t, as clearly stated in the A15 (II:A and II:B) Partial Award, the Tribunal in B1 (Claim 4) Partial Award made no distinction "between properties in the possession of the United States … and those not in the possession of the United States, as far as the obligation to compensate in the event of a refusal to transfer or to grant export licenses is concerned".[39]

39. *Second*, a glance at the text of the B1 (Claim 4) Partial Award will reveal that there, the finding of an implied compensation obligation is attributed to the United States' commitments to return Iranian properties (Paragraph 9) and to restore Iran's financial position (General Principle A).[40] And that being the case, it is difficult to see how one can justifiably differentiate between the case in which the United States disallows the return of an item in its own possession, as in B1 (Claim 4), and the case in which the United States disallows the return of an item in the possession of a United States' national, as in A15 (II:A and II:B). Clearly, in both instances the transfer of Iran's property is blocked by the action of the United States, and in both cases, Iran's financial position is not restored.

3.3. Even Absent B1 (Claim 4) and A15 (II:A and II:B) Partial Awards, the Present Partial Award Would be Totally Unjustified

40. From the brief background provided earlier, it will be gathered that certain issues involved in the present Case were decisively determined in the holdings of this Tribunal in its two Partial Awards in B1 (Claim 4) and A15 (II:A and II:B); Awards which constitute the controlling laws in the present proceedings.

41. These included: (i) the issue of liability, as to which the Tribunal found that the United States had an obligation to compensate Iran for losses it incurred as a result of the refusal by the United States to permit export of Iranian military properties;[41] (ii) the issue of risks, as to which the Tribunal ruled that any possible risk of non-export was irrelevant

[38] *Ibid*, Paragraph 169. The reference in the above-quoted passage to "fully paid by Iran" is particularly puzzling, as if the properties in the present Case have not been fully paid by Iran.
[39] See the passage cited at footnote 4 above.
[40] As noted at footnote 35 above, the minority members in A15 (II:A and II:B) Case are in accord.
[41] The A15 (II:A and II:B) Partial Award, see above, footnote 3, Paragraph 77(g).

to the question of liability, the reason being that the decisions by the United States not to return Iranian military properties had nothing to do with the ordinary case-by-case application of the United States' export-control laws, but was the result of a political choice made by the United States;[42] (iii) the issue of the existing evidence, concerning which the Tribunal noted that it was not in a position to determine whether losses had *in fact* been incurred by Iran and if so, the extent and nature of such losses;[43] and finally, (iv) the issue of further proceedings, as to which the Tribunal directed the Parties to submit their evidence on individual items.[44]

42. These findings defined the scope of *res judicata* for the present Case and determined the point of departure for the present panel. The Parties, naturally enough, worked within that framework and in their written and oral presentations focused on the issues related to individual items, in particular the valuation theories and methods. And yet, in what must come as a shock to them -- albeit as an offensive shock to the Claimant and a welcomed shock to the Defendant -- the majority in the present Award sets to simply make a mockery of these earlier findings by presenting a theory specifically rejected in those earlier findings. The majority does so while asserting at the same time that it is bound by those findings.

43. But assuming now, for the sake of argument only, that the findings in the B1 (Claim 4) and A15 (II:A and II:B) Partial Awards do not forbid the application of the majority's theory of not recognizing ant right of export for Iran, the fact remains that the rejection of Iran's claim of implied obligation would be wholly unwarranted, if only because of the incompatibility of that theory with the pertinent provisions of the Algerian Declarations. Under the present heading, it will be shown, *first*, that the relevant provisions of the Algerian Declarations do not allow the United States to prevent the return of Iranian properties with immunity and, *secondly*, that Iran's financial position prior to 14 November 1979 was most definitively adversely affected by the United States' decision not to allow the return of Iranian properties.

[42] *Ibid*, Paragraph 65.
[43] *Ibid*.
[44] *Ibid*, Paragraph 77(j); and the Order of 30 June 1992, see above, footnote 11.

44. *To begin with*, the majority's theory of Iran's zero right of export leads to this interpretation of the Algerian Declarations that, by adhering to those Declarations, Iran agreed that the fate of its military properties in the United States, worth hundreds of millions of dollars, be left to the unconstrained discretion of the United States, either to allow the return of those properties, or to block their transfer to Iran without paying any compensation.

45. But this must be rejected on the face of it. Short of exceptionally hard evidence, common sense will not accept that in the Algerian Declarations -- a treaty to which the Parties adhered on equal terms[45] -- one Party gave the other the choice of either returning or not returning its enormously valuable properties. This, indeed, would be a prime example of an interpretation leading to a "manifestly absurd or unreasonable" result; an interpretation which, under the Vienna Convention of 1969,[46] must not be adopted, even if the ordinary meaning of the terms of the treaty points to such a result.[47]

46. *Next*, as part of its scheme to deprive Iran of any compensation, the majority places unduly heavy emphasis on General Principle A, at the expense of Paragraph 9, of the General Declaration. This is then followed by the introduction of the novel concept of comparing Iran's financial positions at two different points of time, namely, just before 14 November 1979, and 26 March 1981.

47. As noted before, this concept was first put forward by the three American arbitrators in their Separate Opinion in A15 (II:A and II:B), and was then invoked by the United States late in the present proceedings. What is important to note, however, is that both the United States[48] and its appointed arbitrators[49] placed their argument essentially on a *factual basis*. They argued that the events before 14 November 1979, and particularly the seizure of the American Embassy in Tehran, had led to a change of policy on the part of the United States, so much so that "[b]y that time, Iran had *no* prospect whatsoever of

[45] Case No. A2, 1 Iran-U.S. C.T.R. 101, Page 103.
[46] The Vienna Convention on the Law of Treaties (23 May 1969), U.N. Doc. A/CONF. 39/27.
[47] The Vienna Convention on the Law of Treaties, *ibid*, Article 32 (b).
[48] See Paragraph 8 above.
[49] See Paragraph 11 above and the passage cited there.

receiving U.S. Export licenses".[50] The evidence submitted by the United States in support of this argument was also, and quite naturally, fact oriented.

48. The majority's theory, on the other hand, has nothing to do with *facts*. Iran had no prospect of export, according to this theory, not because of any deterioration in its relations with the United States, but because *legally*, it never had any such right, not even during the Shah's time, when Iran was habitually granted export licenses for billions of dollars worth of its military properties purchased from the United States, or sent there for repairs.

49. The evident irrationality of this suggestion apart, the point here in mind is that this purely *legal* theory, appearing in such a form for the first time in the present Partial Award, did not form any part of the Parties' written or oral pleadings. And quite understandably so, for the theory had no place in the A15 (II:A and II:B) Partial Award, pursuant to which the Parties were invited to plead in the present Case. As a result, its presentation by the majority as the main -- indeed, the exclusive -- ground for the rejection of Iran's claim of implied obligation is in clear violation of *due process of law*, requiring, *inter alia*, that disputes be determined not on the basis of surprise.

50. Returning to the majority's misuse of Principle A, it is stated in Paragraph 142 of the Partial Award that "General Principle A defines the scope of the implicit obligation to compensate, the specific provisions of the General Declaration (*i.e.* Paragraphs 4 to 9) in turn place limitations on the restoration obligation in General Principle A." This assertion is not only difficult to comprehend, it is wholly inconsistent with the established rules of interpretation, including *lex specialis derogat legis generali*, and *ut res magis valeat quam pereat.*

51. General Principle A, while having certain legal effects, is in essence a statement of purpose. The Tribunal in interpreting Paragraph 9 of the General Declaration in its A15 (II:A and II:B) Partial Award, referred to it as reflecting the "object and purpose" of the Algerian Declarations. This was quite sound, and in line with the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.[51] By reducing Paragraph 9 of the General Declaration to a mere limitation to General Principle A, the

[50] *Ibid*.
[51] The Vienna Convention on the Law of Treaties, see above, footnote 46, Articles 31 and 32.

majority gives exclusive effect to just one phrase of that Paragraph, i.e. the U.S. law *proviso*, at the expense of the rest of the Paragraph. Thus, General Principle A becomes the source of liability and the scope of obligation, as well as the standard of valuation.

52. And yet, in the presence of Paragraph 9, which is directly applicable to the properties at issue, General Principle A cannot be the source of compensable losses, or a valuation method, let alone the sole source of the valuation method. Once the Tribunal concluded that the United States was required to compensate Iran for its refusal to return the properties, Iran's losses had to be determined through the normal methods of valuation practiced by this Tribunal for years. What General Principle A mandates, is that the amount of compensation, determined through whatever valuation method, must ensure that Iran's financial position before 14 November 1979 is as far as possible restored.

53. This corresponds with the negotiation history of the Algerian Declarations. General Principle A was added to the Declarations at the last moment of negotiations at the request of Iran, and as an extra guarantee that Iran would receive all its frozen assets:

> "General Principle A, added at the very last stages of the negotiations, was not intended or understood by the United States to alter in any way the obligations we had undertaken in the operative paragraphs of the General Declaration. It was included because, as explained by the Algerians, Iran wanted certain underlying principles previously articulated by the United States to be reflected in the General Declaration. By this time, however, the two sides were committed to a series of substantive provisions, and the United States had absolutely no intention of adopting 'general principle' language which would have the effect of changing previously-agreed substantive terms of the Algiers Accords."[52]

54. It is simply not plausible that Iran would, at the very last stages of the negotiations, propose and insist on the inclusion of a language that would deprive it of its properties and their value. Once again, this is a clear example of an interpretation leading to a manifest absurdity, a result which must be rejected under the terms of the Vienna Convention of 1969.[53]

55. The majority's unwarranted emphasis on General Principle A is intended to serve one purpose only: to provide a legal ground for the majority's comparison theory. But the

[52] Affidavit of Warren Christopher, Document No. 394, Exh. 4, Page 10.
[53] See above, Paragraph 44.

serious deficiencies of that theory apart, it is difficult to see how that Principle, represented as a "useful guidance in the interpretation", may justifiably be invoked as the source of obligation and the valuation method, while the *lex specialis*, the directly applicable provisions of Paragraph 9, is reduced to a mere limitation of the obligation to return the items.

56. *Next*, that comparison theory itself is without any foundation:

> "The Tribunal holds that, upon the particular facts of this Case, Iran's pre-14 November 1979 financial position is to be compared against the financial position Iran occupied on 26 March 1981, that is, the date on which the United States … [conveyed] to Iran that he United States would not permit the export of the items at issue in this Case."[54]

57. In the first place, there is no satisfactory explanation by the majority as to the origin of this date of 26 March 198, and its relation to the Case at hand. Certainly, there is no reference to it in the A15 (II:A and II:B) Partial Award; an Award which the majority pretends to be following in the present Case. It is true of course that the Parties calculated Iran's losses with reference to that date. But this, as emphasized in the present Partial Award, was because Iran relied on the Tribunal's Partial Award in Case B1 (Claim 4), in which this date was set as the date of valuation. As such, the date has nothing to do with a financial comparison theory.

58. More significantly, the resort to this comparison theory leads the majority to assert, as noted before, that Iran never enjoyed any right of export, and hence its right of ownership *vis-à-vis* these properties were not affected by the United State' decision to prevent their return to Iran. These assertions (i) have nothing to do with the A15 (II:A and II:B) Partial Award, and (ii), are not in line with the basic arguments earlier made in the present Partial Award.

59. As to (i), the issue of whether Iran had a right of export at the time of entering into individual contracts belonged to the A15 (II:A and II:B) Partial Award -- where the issue of liability was decided -- and was determined to be irrelevant to the liability of the United States.[55] In response to this, the majority states that "the right of export" is

[54] The Partial Award, Paragraph 146.
[55] See the passage cited at Paragraph 9 above.

different from the "risk of export" decided in the A15 (II:A and II:B) Partial Award. That is obvious enough: the right of export is a legal and abstract concept, while the risk of export is rather of a factual nature.

60. The point which the majority fails to realize is, however, that a judicial forum may not rationally dismiss the defense of risk of export and declare it irrelevant, as this Tribunal did in A15 (II:A and II:B) Partial Award, if it was at the same time of the view that there was no legal right of export in the first place. It must not be forgotten, further, that this was a judicial forum that informed the Parties that the evidence to determine the existence and the extent of loss was not available to it, and thus invited them to submit their evidence on such subjects in their later submissions. It is plainly absurd to suggest that the Tribunal did so, without first ascertaining that there existed a right of export.

61. The same observations may be validly made with regard to the majority's assertion concerning Iran's ownership rights. The A15 (II:A and II:B) Partial Award has nothing to do with Iran's ownership rights, and there is no contention by Iran in the present Case that its military properties were expropriated by the United States' export-control laws. Hence, whether or not Iran's ownership rights in the United States were left unaffected is just irrelevant.

62. But even if this issue was of any relevance, the suggestion by the majority that Iran's ownership rights were not affected by the actions of the United States is preposterous. Here is a country, Iran, that has spent hundreds of millions of dollars to acquire the properties at issue. It has sent them to the manufacturers to be repaired and ready for use, when needed.

63. And then exactly when they are needed -- for defending the country against an imposed war -- the country of origin, the United States, intervenes in its national interest to prevent the return of the properties to the owner country. And yet the majority asserts, boldly, that the owner country's rights of ownership have not been interfered with. Evidently, the majority's definition of ownership rights is very selective, and does not include the right of use in the place of choice.

64. And as to (ii), the structural inconsistencies in the Award are not difficult to note. If Iran had at no time any right of export, and if its ownership rights were not affected by

the United States' so-called decision of 26 March 1981, why should it matter whether the United States had any duty to restore Iran's financial position or not? And why should this financial position be compared at two specific points of time? It is worth noting in this respect that the Tribunal in its B1 (Claim 4) Partial Award reached the conclusion that by refusing to return Iranian military properties, the United States was liable for the payment of compensation to Iran. This conclusion was based on Paragraph 9 of the General Declaration, although the Tribunal went on to note that other considerations, including General Principle A which contained restoration obligation, supported its finding. And yet, when the Tribunal turned to the subject of reparation, there was no reference to the United States' restoration obligation. The same is true of the A15 (II:A and II:B) Partial Award. And quite rightly so, for an authority invoked in support of a finding may not become the sole source of compensation obligation and valuation method.

4. A Nutshell Summary

65. The present Partial Award and the basis on which it dismisses Iran's claims reveal the deep dislike of its authors for the A15 (II:A and II:B) Partial Award. This is unfortunate. In that A15 (II:A and II:B) Partial Award, which was itself an unavoidable corollary of an earlier Partial Award in B1 (Claim 4), the Tribunal made this legally sound and readily justifiable finding that under the Algerian Declarations, the United States committed itself to either return Iranian military properties in the hands of the United States nationals, or compensate Iran's losses if it decided in its national interest to disallow the transfer of such properties to its rightful owner.

66. In its earlier reactions, the United States repeatedly represented before the Tribunal that it accepted the applicability of that Partial Award to the present Case, though it made it clear -- as did its appointed arbitrators who constituted the minority there -- that they did not welcome the Award. It was only after the change in the Presidency of the Tribunal, that the United States shifted its position, and argued that the said Partial Award should be set aside as manifestly erroneous.

67. Today, after very many years of litigation by the Parties mainly over the identities of individual items and the losses incurred by Iran in respect of each, the majority in the

present proceedings concludes that under the Algerian Declarations, the United States committed itself to either return Iran's properties or, if it decided not to do so in its national interest, pay no compensation at all. What this means is, of course, that as a Party to the Algerian Declarations, Iran agreed to leave the fate of its properties, worth hundreds of millions of dollars, to the unrestraint decision of the United States, one way or the other.

68. To add insult to injury, the majority says that in coming to this evidently irrational conclusion, it is only applying the findings of the A15 (II:A and II:B) Partial Award to the facts of the present Case. That is simply not true. What the majority does, in reality, is to revisit the very basic finding of liability in that Case, despite its admittedly *res judicata* effect, and to divest it of all meaningful effects.

69. As to the argument employed, the main ground on which the majority sets to summarily dismiss Iran's claim of implied obligation is a blanket denial of Iran's right of export at all times. The end result is best seen in the remarkable transformation of a finding of liability in A15 (II:A and II:B) Partial Award into a total exoneration in the present Case. Thus, while the Tribunal in A15 (II:A and II:B) Partial Award concludes that the United must compensate Iran for the 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",[56] the conclusion in the present Case is that the United States need not pay any compensation to Iran as a result of its refusal to export Iranian properties because by relying on its export control laws "[a]ll the United States did was *to exercise its undeniable sovereign right to prohibit the export of sensitive military items*".[57]

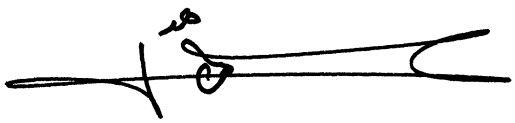
70. This argument is, in fact, nothing but a *rough* version of what the American members in A15 (II:A and II:B) Case had proposed, and was expressly rejected by the Tribunal in that Case. It is a *rough* version because, even there, there was no suggestion that Iran never had any right of export, but that the crisis in the relations between Iran and the United States had in fact reduced Iran's chances of export.

71. The problem with the main scheme of the Draft is not only that it seeks unjustifiably to replace a binding Award with a minority view. It is, more importantly, that it proposes

[56] The A15 (II:A and II:B) Partial Award, see above, footnote 3, Paragraph 65.
[57] The Partial Award, Paragraph 167.

to do so not on the basis of any new facts, but on the basis of a legal theory that was at any rate fully available to the Tribunal some seventeen years ago, if it had any intention to adopt it. There is no escaping the question by the Parties, that if under the applicable law Iran had *legally* no right of export either before or after 14 November 1979, why were the Parties instructed by the Tribunal to spend many years and many millions of dollars on collecting and presenting to the Tribunal their arguments and evidence of *facts*, mainly with regard to individual items?

Dated, The Hague
20 July 2009



Mohsen Aghahosseini