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

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

IN THE NAME OF GOD

Dissenting Opinion of Hamid Reza Oloumi Yazdi

Introduction

I write this dissenting opinion for two reasons. The first reason is to record, once again,[1] my objection to the unfair treatment of the present Case by the majority, especially with regard to the question of Iran's losses caused by the United States' refusal to return Iranian military properties at issue in this Case. That treatment started when my request for the enforcement of my unequivocal right to have a reasonable period of time to study and reflect on the legal and factual aspects of this gigantic Case was rejected. This rejection was in violation

[1] I submitted my resignation as a Member on 19 June 2008 to the Tribunal "to record my objection to the treatment of the Case B-61 by the Tribunal.".

of the clear and unqualified assurance of the Tribunal in its decision of 1st May 2007 to me and to the Parties; then it was followed by a premature issuance of the present ill-founded Partial Award. The second reason is to show that this Partial Award contradicts, reverses and washes out, two previous binding Awards of the Tribunal, namely the Partial Awards issued in Cases B1 (Claim 4) and A15 (II: A), whereas the latter astonishingly happens to have *res judicata* effect on the present Case. To that end, I see it imperative to begin with a brief explanation of the denial of my request for extra time, the denial which fundamentally affected the Tribunal's composition. Afterwards, I will deal with the most critical flaws concerning the merit of this Partial Award which prevents me from joining the majority here.

I. Denial of My Request for the Application of 1st May 2007 Decision of the Tribunal

It must be noted that my designation as a Member of the Tribunal took place on March 3, 2007, that is, one day after the completion of the hearings in Case No. B61. At that time, according to the Tribunal's Decision of 16 November 2006 and pursuant to the application of Article 13 (5) of the Tribunal Rules of Procedure, Judge Noori was required to serve with respect to Case No. B61. However, later on due to some unexpected developments, the Tribunal, by its Decision of 1 May 2007, released Mr. Noori from his duty under Article 13 (5) of the Tribunal Rules, and by the same Decision declared that "Mr. Hamid Reza Oloumi Yazdi has replaced Mr. Assadollah Noori, with immediate effect, as an Iranian Member in all proceedings in, and in the deliberations of, these Cases.".[2]

In the same Decision which was communicated to the Parties, the Tribunal in order to assure the Parties that my participation would be carried out in such a way as not to infringe the due process of law, specifically spoke of the availability to me of two distinct safeguards:

> Furthermore, Mr. Oloumi Yazdi will be afforded the time he requires fully and adequately to prepare for deliberations in Case No. B61. The Tribunal notes, further, that it would be open for Mr. Oloumi Yazdi at any time, should he so desire, to avail himself of Article 14 of the Tribunal Rules of Procedure.

To do my share of assisting the Tribunal in its difficult task of resolving this gigantic Case, I worked extremely hard to familiarize myself with the Case, but always mindful of the Tribunal's assurances noted above. One familiar with the work of this Tribunal will appreciate the amount of efforts and good faith endeavors that one must put to enable himself to have a meaningful participation in the deliberation of a case which has been heard over a period of 18 months and

[2] Communication to the Parties, 7 May 2007, Doc. 903, Cases No. A3, A8, A9, A14, and B61 F.T..

in which the number of the documents filed - many of them several volumes - exceeds 900.

As a matter of professional ethic, I did not find it appropriate to affect the Tribunal's performance by availing myself of the above-said assurances, namely to apply for additional time and/or the repetition of the hearing, unless and until I found it absolutely necessary and unavoidable for the fulfillment of my responsibility and mandate as an arbitrator. At a certain stage and for the first time since the commencement of the deliberations in this unique Case, I came to realize that meaningful participation at the further stages of the deliberations would be impossible for me without having some additional time for further studies and more reflections on some specific aspects of the Case. My request for additional time was a *bona fide* request based upon the Tribunal's previous representations and assurances to me and to the Parties. It was my legitimate and reasonable expectation that such a request which was based upon the clear language of 1 May 2007 Decision of the Tribunal, would be met with a positive outcome, whereas, due to the administrative mistreatment of my request, the outcome was, unexpectedly, in negative. I find that outcome as an irregularity in the application of the aforesaid Decision, because the clear language of the relevant sentence in Para. 12 of that Decision, i.e., the language of "Mr. Oloumi Yazdi will be afforded the time he requires fully and adequately to prepare for deliberations in Case No. B61" leaves no room for any degree of discretion for any one to reject that reasonable request.

The Tribunal, in fact, negated the assurance given to me and to the Parties by virtue of paragraph 12 of the Full Tribunal decision of 1 May 2007, as prerequisite for my participation in the composition of the Tribunal for Case B61. The Tribunal, by its failure to meet the said prerequisite, has deprived itself of a proper composition for proceeding in Case B61 since my participant in the composition of the Tribunal and the said assurance was an indivisible package. Indeed, by that rejection I had, in effect, been deprived of any meaningful participation in the deliberations, which deprivation might be regarded as a material misconduct,[3] and hence, as settled by the authorities,[4] relevant to the issue of the integrity of the arbitration process.

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[3] Practicing Law Institute - Commercial Law and Practice Course Handbook Series (PLI Order No. A4-4236-October 6, 1988), International Commercial Arbitration: Recent Developments, 513 International Bar Association: Ethics for International Arbitrators, at 9 where it is observed that: "An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators".

[4] In *David Goellar v. Liberty Mutual Insurance Co.*, 568 A.2d 176 (Pa. 1990), award was challenged because two tribunal members excluded the third from deliberations. For the same view, see also: Fouchard, Gillard, Goldman on International Commercial Arbitration, edited by Emmanuel Gillard and John Savage, at 1369.

II. The Issuance of Partial Award is Premature

The Tribunal, having accepted the *res judicata* effect of Award issued in A15 (II:A) on the present Case, should have followed the relevant procedure dictated by that Award for the further proceedings. Paragraph 65 of A15 (II:A) Award finds an implicit obligation in the General Declaration on the part of the United States "to compensate Iran for losses it incurs as a result of the refusal by the United States to license export of Iranian properties subject to U.S. export control law prior to 14 November 1979". That paragraph ends up with this statement: "However, the evidence thus far presented in the pleadings is not sufficient to enable the Tribunal to establish whether such losses in fact incurred by Iran, and if this was the case, what was the nature and extent of such losses, and whether any reasonable attempt was made to mitigate them".[5]

Therefore, the proper course of proceedings in the present case could not be anything other than looking at the evidence of losses in all individual claims, whereas, the Partial Award has denied the occurrence of any losses to Iran as a matter of law and not as a matter of facts and evidence. In other words, the Tribunal evaded from its duty to examine the evidences and individual claims that the Tribunal itself instructed the Parties to present. Paragraph 172 of the Partial Award illustrates this wrong approach as such: "it is not necessary to set out in detail in this Partial Award an analysis of each of the specific Individual Claims''. Such being the approach, the Partial Award's reference, *inter alia* in Paras. 151, 164, 165 and 166 to few pieces of evidence and a limited number of individual claims is superficial and can play no role in the core of its reasoning regarding the question of losses.

The Partial Award, in assessing Iran's financial position on certain points, paves its way for undue reliance on Iran's right to export by unjustifiably resting solely upon the U.S. decision of 26 March 1981 and then jumps to the conclusion of denial of Iran's losses as a result of that decision, whereas the Partial Award was rightly expected to deal with other decisions and measures taken by the United States against Iranian military properties at issue in this Case, as well. The reason is that many aspects of Iran's ownership rights had been affected and/or denied by other measures taken by the United States even earlier than 26 March 1981. Moreover, there is no reference in paragraph 65 and the *dispositif* of A15 (II:A) to that particular date, rather it uses the word "decisions" and not "decision". The mentioned selective treatment of the Partial Award as to the

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For the proper deliberations and its effect on the due process of arbitration, see: Fouchard, Gillard, Goldman, Ibid., at 1373 where it is stated: "[T]he requirement for deliberations will be satisfied if each of the arbitrators is given an equal opportunity to take part, in a satisfactory manner, in the discussions among the arbitrators and in the drafting of the award".

[5] 28 IRAN–U.S. C.T.R., 112.

different elements affecting Iran's ownership right has detrimentally affected the outcome of this Case.

III. Inconsistency Between This Partial Award on "Compensable Losses" and A15 (II:A) Award

The Partial Award in that part is nothing but an attempt to wash out the United States' implied obligation recognized by two final and binding Awards of the Tribunal in Cases B1 (Claim 4) and A15 (II:A). The treatment that the issue of implied obligation has received in this Partial Award becomes more unjustifiable when one reads the part of the present Partial Award on compensable losses after the part on *Res Judicata*, whereby the Tribunal finds that A15 (II:A) has *res judicata* effect on the present Case. The Partial Award aims to rewrite, revise, vacate and in fact totally set aside the finding of implied obligation. Its aim is not only to end up with zero compensation for Iran's multi-billion dollar Case, but also to wash out the obligation that the Tribunal had found on the part of the United States in both B1 (Claim 4) and A15 (II:A), namely the obligation to compensate losses incurred by Iran due to the application of "U.S. law clause" in Paragraph 9 of the General Deceleration. For that reason, while concurring with the *res judicata* effect of A15 on B61, I find it impossible to concur with the actual treatment that the finding of A15 on the United States' implicit obligation has afterwards received from the majority. In this Partial Award, the majority has clearly demonstrated its unfaithfulness to its earlier finding of implied obligation derived from the *res judicata* effect of A15 (II:A) on this Case. In fact, if the Tribunal had truly accepted the *res judicata* effect of A15 (II:A) on the present Case, it should have started exactly from the point where A15 ended with.

The majority in this Partial Award has been mesmerized by the wording and arguments presented in Separate Opinion of American arbitrators in A15 (II:A).[6] It is very clear that most of the arguments in that part of the Partial Award are in gross violation of the finding of the implied obligation in A15 (II:A). A correct application and implementation of A15 Award could not result in zero compensation for Iran in the present Case. The unjustifiable nature of the this approach becomes most clear, particularly where the Partial Award intends to deny Iran's losses as a question of law by the application of a totally baseless methodology and interpretation of implied obligation in abstract. Had that been a correct approach and consistent with the findings of A15, the Tribunal would have done so in A15 (II:A) some 17 years ago, and would have neither referred to the lack of sufficient evidence in that Award nor requested for further pleadings by the parties.

[6] 28 IRAN–U.S. C.T.R., at pages 142 to 158.

IV. Absurdity of A15 Caused by the Partial Award

The approach adopted by the Partial Award under the guise of interpretation and implementation of the Award in A15 (II:A), particularly when it comes to the comparison between Iran's financial position prior to 14 November 1979 and that on 26 March 1981, leads to the total absurdity of A15 (II:A). The reason is that in assessing Iran's financial position before and after 14 November 1979, the Partial Award pretends to look at Iran's ownership as a bundle of rights, but it in actual fact, mainly or even solely, concentrates on "Iran's right to export pertaining to the export-controlled properties" and then concludes that Iran's right to export has remained unchanged since Iran has never had such a right in the first place. It is evident that the Tribunal in B1 (Claim 4) has already interpreted the "U.S. law proviso" in Paragraph 9 of the General Deceleration as a phrase which justifies the United States' decision to preclude the export of defense articles to Iran,[7] and undermines Iran's right to export. There, the Tribunal, in return, explicitly ruled that the United States is under an implied obligation to compensate Iran for the losses it incurs as a result of the exercise of this proviso. The Tribunal did so while it was very well aware of the various aspects of the United States law proviso and its impact on Iran's ownership rights and also of the argument for the alleged existence of a general principle of international law that an absolute and exclusive right to export never unconditionally exists for a country regarding export-controlled properties due to the exclusive jurisdiction and authority of States over the issuance of export license, especially when it comes to the military properties.[8] And yet, the Partial Award without going to the individual claims, by relying on the comparison theory and the United States law proviso has, as pure matters of law, concluded that there are no changes in Iran's ownership right and thereupon in its financial position by virtue of the United States' decision of 26 March 1981.

In an attempt to justify this zero result, the Partial Award proceeds to add that Iran has not possessed such a right to export after or before 14 November 1979. The natural and inevitable consequence of such an interpretation would be that the Tribunal could never have found any compensable losses incurred by Iran as a result of the United States' refusal to export, no matter what facts and evidence Iran presented to the Tribunal. It follows that a decision not to export export-controlled properties by a State can in no way cause compensable losses to the owner of the export-controlled properties, since the ownership right is

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[7] 19 IRAN-U.S. C.T.R., Case B1 (Claim 4) Paragraphs 58 and 62.

[8] For this view, see: Separate Opinion of American Arbitrators in Case A 15 (28 IRAN-U.S. C.T. R, at page 144):

> [E]very nation is entitled under general international law to prohibit the export from territory under its jurisdiction, or by persons subject to its jurisdiction, of armament or other properties of strategic concern.

allegedly not affected by such a decision. This means that A15 has envisaged compensation for losses which could never occur, and this is nothing but the plain acceptance of absurdity of the issuance of A 15 (II:A) Award.

Apparently, the Partial Award by arguing that A15 Award was issued in abstract and in a declaratory fashion, and that it only intends to answer as many legal issues as possible (Para. 124), tries to hide the absurdity caused by its arguments and interpretations. Those arguments cannot, however, provide any justification for the Partial Award's approach of the employment of a legal notion of "lack of right to export" for bringing Iran's losses to zero, since at the time of issuing A15 Award the Tribunal could not have been unaware of that notion. The Tribunal in A15 has envisaged submission of further evidence by the Parties for the quantification of losses Iran has suffered. Therefore, the said approach adopted by the Partial Award is not consistent with the findings of A15 (II:A) Award, in particular, since it leaves no room for the implementation of that Award in the sense that at the stage of Case moving from abstract to the concrete, whatever facts and evidences could or might be presented by the Parties, the occurrence of losses could not be proved. That approach exactly reaches to the level of a manifest error in interpretation and application of a finding of the Tribunal which happens to have *res judicata* effect on this Case.

Another reason for my statement that the approach adopted by the Partial Award contradicts the finding of the Tribunal in A15 (II:A) is as follows. As mentioned above, the Tribunal in A15 (II:A) and B1 (Claim 4), has found an implied obligation on the part of the United States in lieu of the United States preservation of its right not to return export-controlled properties to Iran in Paragraph 9 of the General Declaration. According to the Partial Award itself, "[t]his holding by the Tribunal in Case No. A15 (II:A) that the United States had preserved its right to refuse export … constitutes an underlying reason (*motif*) for the Tribunal's finding of an implicit obligation to compensate.". (Para. 157) Then, the Partial Award continues in the next paragraph as such: "It follows from the Tribunal's recognition of a right on the part of the United States under Paragraph 9 of the General Deceleration to refuse export … that Iran did not possess a right … to export its military properties.". (Para. 158) Accordingly, the lack of right to export for Iran which is the *motif* for the holding of an implicit obligation, cannot be a notion by which the occurrence of losses to Iran is denied. Had it been the Tribunal's understanding in A15 (II:A), the Tribunal, while knowing that Iran never had an absolute right to export, would not have found an implied obligation in the first place.

V. The Partial Award Leads to a Vicious Circle

Another intolerable logical flaw in the Partial Award is caused when this Award intends to determine the scope of implied obligation by reference to the

explicit text of the Accords. In two of its Awards, the Tribunal by following a proper methodology and principles applicable to the treaty interpretation has clearly inferred an implicit obligation from the text of the treaty on the part of one of the Parties. This approach has been well demonstrated in paragraphs 65-74 of B1 (Claim 4) Award[9] and paragraph 65 of A15 (II:A) Award.[10] In the process of that interpretation, the Tribunal has paid full attention to paragraph 9 and General Principle A of the General Declaration, as well as to the relevant articles of the Vienna Convention on The Law of Treaties. The implied obligation is the outcome of this process.

Now, the Partial Award under the guise of the determination of the scope of implied obligation, goes back to the explicit text of the same phrases of the Accord to answer the issues of whether Iran has suffered any losses and whether such an obligation, in actual fact, comes to the existence or not. That is not logically a proper approach since it leads to a vicious circle. Moreover, it is evident that an implicit obligation cannot be found in, or limited by reference to, the explicit text of a treaty or a contract. In other words, the implicit obligation finds no room for its application if it is to be literally tested against the very explicit text of a treaty or a contract.

As the term "implicit obligation" suggests, implied obligation is an obligation with the same force as explicit one, which has been naturally and logically inferred from the text by taking into account all relevant elements of interpretation amongst which is "the object and purpose of the text". One of the criteria for a correct interpretation of a text is to avoid a method that "leads to a result which is manifestly absurd or unreasonable".[11] The approach adopted by the Partial Award leads to a complete absurdity and ineffectiveness of A15 Award, and that is not a proper and *bona fide* method for the interpretation and implementation of an obligation, explicit or implicit. The adopted approach means nothing but a revision of A15 (II:A) under the cover of its interpretation and implementation.

VI. Undue Reliance of the Partial Award on General Principle A

As mentioned above, the Partial Award under the guise of determination of the scope of "implied obligation", washes out this controlling and interpretative finding of the Tribunal in B1 (Claim 4) and A15 (II:A). This has mainly been done by giving a prior role to General Principle A over Paragraph 9 of the General Declaration. It seems that the Partial Award is suffering from a confusion concerning the link between a general statement and a specific one in a text. To

[9] 19 IRAN-U.S. C.T.R., at page 273.
[10] 28 IRAN-U.S. C.T.R., at page 112.
[11] See: Articles 31 and 32 of Vienna Convention on The Law of Treaties.

explain, a specific statement has the capacity of narrowing down the application of a general statement while the latter cannot do the same to the former. In both B1 (Claim 4) and A15 (II:A), the Tribunal has inferred the implied obligation on the part of the United States from Paragraph 9 and has tested the conformity of this finding against the object and purpose of the General Deceleration as stated in its General Principle A.

Paragraph 66 of the B1 (Claim: 4) Award concludes with this statement:

> Although Paragraph 9 of the General Deceleration does not clearly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.[12]

General Principle A serves as an umbrella provision to ensure that any determination by the Tribunal of the amount of compensation should put Iran in at least the same financial position as it had before 14 November 1979 events. Otherwise, The General Principle A contains no specific standard of compensation, nor any specific method of valuation. Therefore, the General Principle A, unlike the Partial Award's suggestion, cannot limit the scope of the implied obligation, especially when such a controlling authority for General Principle A finds no safe and firm bases in Parties' understanding from the Accords. The Partial Award intends to limit the scope of implementation of an obligation of special nature by reference to a text of a general nature while neglecting the objects of both the latter text and the Accord. Such a method will leave no room for the special to be applied, and, in turn, again leads to a total absurdity and ineffectiveness of A15 Award.

VII. Difficulties in Accepting the Comparison Theory

The Partial Award, by its undue reliance on General Principle A of the General Declaration paves the way for the application of the so-called "comparison theory". To implement the United States' implicit obligation and to restore Iran's financial position, the Partial Award assumes that it is necessary to make a comparison between Iran's financial positions at two certain points. Whereas, this comparison theory has neither any footstep in A15 Award nor in the early stages of this Case; and it has been lately filed and introduced by the United States in a document that has not been admitted into the record by the Tribunal. (Para. 97 of the Partial Award) To apply this theory, the Partial Award looks at Iran's financial position at two certain points of time, namely "pre-14 November 1979" and "26 March 1981". This formula is unacceptable, because further to the difficulties in accepting the latter date as the sole date on which the United States'

[12] 19 IRAN-U.S. C.T.R., at page 294.

decisions affecting Iran's property rights had been taken, the Partial Awards fails to state to what exact date the phrase "pre-14 November 1979" refers. Moreover, the Partial Award failing to comply with the requirements of paragraph 65 of A15 (II:A) Award, does not look at "the period from the time the relevant contracts were entered into up to 14 November", but its focus is on a certain date, most likely 13 November 1979, without making this point clear in the Award. The implicit reference by the Partial Award to 13 November cannot depict Iran's financial situation intended to be restored. Had this been the intention, the Parties would have used this date instead of the present formulation in General Principle A of the General Declaration which refers to "prior to 14 November 1979". In addition, it is nonsensical to say that the expectation of the Parties was to just go back to the very tense and hostile point of time that had prompted the issuance of all embargoes and freezing orders.

To compare Iran's financial position at two certain points of time, the Partial Award merely relies on the element of Iran's right to export while due to the lack of change in the United States' law, the Partial Award itself holds that that element could not be affected. Talking about the comparison while having such a perception in mind, makes the comparison a purely fruitless exercise. To that end, a selective approach has been taken by the Partial Award towards the concept of ownership rights. It is, however, to be noted that the ownership has been defined by Black's Law Dictionary as follows:

> Collection of rights to use and enjoy property, including right to transmit it to others. … . The complete domain, title or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law. … . The right of one or more persons to possess and use a thing to the exclusion of others. … The exclusive right of possession, enjoyment and disposal; involving as an essential attribute the right to control, handle, and dispose.[13]

The Partial Award evades from giving an answer to the questions, such as whether Iran's ownership rights as a bundle of rights described above, has not been affected by the United States' decisions, whether Iran was in complete domain and control of those properties, and whether Iran could enjoy or dispose of the said properties. It would have been much appropriate for the Tribunal if it, instead of examining the adverse effect of the United States' decisions on only Iran's right to export in abstract, had gone to the exercise of examining the effect of those decisions on all aspects of Iran's ownership rights through the examination of facts and evidence.

Although the Partial Award suggests that the risk of non-export and the right of export are conceptually distinct (Para160), it seems that the Partial Award is, quite often, confused between these two concepts. As explained above, the

[13] Black's Law Dictionary, The Fifth Edition.

main focus of the present Award in the application of the comparison theory is only the legal issue of Iran's ownership rights in general and Iran's right to export in particular. The Partial Award in some of its phrases gives the impression of making a comparison between Iran's chances to export at two given points and concludes that Iran's chances to export were equal at those two points. This approach is not acceptable for two reasons. Firstly, since the "risk of export" and "chance to export" are two sides of one coin, talking about the chance to export is equal to raising the question of risk again whilst it is very well known to all, including the American Members dissenting from A15 Award,[14] that the issue of risk has been resolved, once for ever, in A15 Award in favor of Iran and the Partial Award itself has acknowledged this in Paragraph 159. It is additionally clear that it does not matter whether we look at the question of risk at the stage of finding an implied obligation or at the stage of implementation of that obligation; in both situations the Tribunal's holding with regard to the risk would equally be applicable. Secondly, when the Partial Award talks about Iran's chance of export and not about its right to export, it, indeed, steps down from a legal question to a factual one. At this level, the Partial Award has also failed to take into account all relevant factors to the Iran's financial position, amongst which is Iran's legitimate expectation to receive export license in accordance with the established practices and course of dealings between the two States from the time of conclusion of the relevant contracts up to 14 November 1979. The Partial Award does not give any convincing reason for its statement in Paragraph 163 to the effect that the long term practices and course of dealings between Iran and the United States "did not create any legitimate expectation" for Iran. Here, the Partial Award, again, unduly goes back to the "U.S. law proviso" in Paragraph 9 of the General Declaration and to the lack of absolute right to export in order to justify the lack of chance to export for Iran.

In response to the point raised by Paragraph 164 of the Partial Award that Iran was aware of its lack of right to export because the contracts Iran had entered into reflected Iran's consideration of the need for export authorization, it should be stressed that that point cannot bring Iran's chance to obtain export license to zero, neither can it diminish Iran's legitimate expectation. When according to the law a body has authority to issue a license, it does not logically and legally mean that the applicant of such license has "no chance" to obtain it, especially when the long standing practices and course of dealings between the parties prove that the license had usually been granted in the past. Therefore, the chance and the expectation of Iran to obtain export license for those properties from the time Iran entered into the relevant contracts up to 14 November, is a component of Iran's financial position which has to be taken into account as a factual element in this Case. One should bear in mind that the 1955 Treaty of Amity which has been

[14] 28 IRAN-U.S. C.T.R., at page 146.

considered by the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran*[15] and *Oil Platforms (Islamic Republic of Iran v. United States of America)*[16] Cases as a valid treaty between the Parties is also a component of Iran's financial position and a source of Iran's legitimate expectations with regard to the export licenses at that period. Moreover, reference to some internal, unilateral and unofficial actions allegedly taken by the United States, one or two days before 14 November,[17] cannot affect Iran's legitimate expectations which had been shaped during a long period between the two States. Indeed, the Partial Award undermines the effect and importance of the United States freezing order issued on 14 November 1979, by suggesting that Iran's chances to obtain export licenses before and after 14 November were equal.

VIII. Standard of Compensation

An evasive method has been employed by the Partial Award to prove that "full value of losses" (in A15) should not include "market value of the properties"; there is no positive argument in the Partial Award to support such a finding. The Partial Award, in Paragraph 169, intends to rebut the standard of compensation established by paragraph 70 of B1 (Claim 4) Award, whereas that standard has to, by analogy, be applied as a minimum standard here as well, for the simple reason that in Case B61, as in Case B1, the United States' refusal to export of military property is at issue**.** The Tribunal in B1 clearly states that as a result of "determination made in 1981 by the president of the United States that the defense articles are not exportable to Iran **…** 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 … . 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 become effective.".[18] The Partial Award in Paragraph 169 suggests two distinguishing elements to escape from the application of this standard; one of them is possession. The Partial Award argues that in B1 the United States was in possession of the properties but that is not the case in B61, whereas, the element of possession has not been considered by paragraph 65 of A15 as a distinguishing factor between the findings of A15 and B1 (Claim 4) Awards. Moreover, the other distinguishing element presented by the Partial

[15] I.C.J. Reports 1980, p. 3.
[16] I.C.J. Reports 1996, p. 803.
[17] For instance, see: Paras. 31-34 of the Partial Award.
[18] 19 IRAN-U.S. C.T.R., at page 295.

Award, namely the question of whether the full price has been paid or not, has been considered as irrelevant to the issue of treaty obligations of the Parties in paragraph 152 of the Partial Award itself.

IX. Unjustifiable Approach in Admitting the United States 2006 Response

To pave the way for its intended result, the Partial Award has dealt with the United States' Response of 1 March 2006 in a very odd and selective way. While the Partial Award is mainly based on the comparison theory introduced in full by that Response under the title of "General Response", to keep up the appearance of fairness, the Partial Award does not admit that part of General Response from the above-mentioned submission into the record. So, the question of "where does the comparison theory come from?" remains unanswered.

Surprisingly, the Partial Award has, in Para. 96, accepted Exhibits A to E of the General Response into the record. According to the Partial Award, the criterion set for the admissibility of those Exhibits is whether "at the time of their submission, the evidence and arguments presented by the United States *might have been necessary* to respond to Iran's ….".[19] Whereas, pursuant to the Tribunal's Order of 1 April 2005 (Doc. 488), the test for admissibility of the United States Response is *to be responsive to Iran's filings*, not the mere possibility of being necessary to respond to Iran's assertions in the further proceedings of the Case. This test which is unprecedented in the Tribunal's history, has, by not quoting "might have *reasonably* been necessary …" chosen a very broad and elastic criterion; such a broad criterion, by its nature, allows any evidence whatsoever, to be brought into the records. Moreover, the United States presented these Exhibits only to provide support for its current, not future, arguments in General Response. Now, the question is while the Partial Award did not find the brief part of the General Response responsive to Iran's filing of May 2005, how its supportive Exhibits could be considered as responsive? The majority should not have permitted themselves to admit those documents into the record merely for the fact that they found it necessary to rest upon these documents for justifying their "no chance" argument without firstly going to the individual claims.

X. Unjustified Rejection of Iran's 2008 Filing

Iran's November 2008 Submission and solid reasoning thereof has received an unfair treatment by the Partial Award. This Partial Award has resorted to the language of Paragraph 10 of the Tribunal's Order of 1 April 2005 to find Iran's 2008 Submission inadmissible. The Partial Award, having quoted from that

[19] Para. 94 of the present Partial Award (Emphasis added).

Order the phrase "[t]he Claimant shall submit no further evidence or memorial unless so authorized in advance by the Tribunal", concludes, in Para. 110, as such: "In the light of this directive and in the absence of circumstances justifying any exception thereto, the Tribunal determines that Iran's submission of 14 November 2008 is inadmissible.".

I disagree with that conclusion for the following reasons. Firstly, the directive does not bar the Tribunal from admitting into the record the documents which demonstrate new and unexpected events and developments that undermine the bases of the situation, since the Order exclusively has meant not allowing those new submissions which could find their bases in the normal course of the events, not in the events totally unexpected. Secondly, the new developments brought to the attention of the Tribunal by Iran regarding the very properties which are at issue in this Case, are definitely ranked amongst the circumstances justifying an exception to that directive, though I do not read the directive as hard and fast as the Partial Award does.

It is needless to say that, in a Tribunal in which the Awards are final and binding and it has been chosen to have a very restricted approach to the possibility of revision of its awards, the attitude towards the admissibility of new documents should be in a way to reduce as much as possible the likelihood of any mistake in its awards and to give the Parties all the assurances that they will be fully heard before the Tribunal renders its awards. This consideration applies to the present Case as well, particularly when according to Iran's November 2008 Submission, its property rights have been seriously affected, if not denied, by the chain of measures taken by the United States and when the Partial Award is mainly based on the assumption that there is no change in Iran's ownership rights.

XI. Concluding Remarks

To conclude, I will summarize the reasons for dissenting from the majority in this Partial Award, as follows.

1. I strongly believe that the rejection of my request for an extra period of time to prepare myself for the continuation of the deliberation at that certain point of time, amounted to a cardinal irregularity in the application of the Tribunal's decision of 1 May 2007. That decision considered my participation in the composition of the Tribunal for B61 Case and the two assurances given to me and to the Parties as an indivisible package. I should, therefore, conclude that the non-fulfillment of the prerequisite of my participation in the composition of the Tribunal seriously challenges the legitimacy of the present composition.

2. Although the stance of the Partial Award regarding the acceptance of *res judicata* effect of A15 (II:A) on this Case by itself could be welcomed, the treatment that A15 (II:A) Award on implied obligation has thereafter received in the Partial Award is totally unacceptable. I do believe that the finding of the Tribunal in A15 regarding the United States implied obligation to compensate Iran for losses it incurred as a result of United States' refusal to return Iranian properties was clear enough to be followed by the Tribunal in this Case, and so there was no need for further interpretation or determination of its scope by the Tribunal.

3. I strongly disagree with the approach adopted and the conclusion reached at by the majority in denial of Iran's compensable losses. The majority's view, as reflected in the Partial Award and explained to some extent in this dissenting opinion, contains major logical, methodological and legal flaws amounting to the level of manifest error of law in the relevant parts of the Partial Award. That approach has been based on the examination of some purely legal issues such as "comparison theory" and "Iran's right to export" which could not have been unknown to the Tribunal at the time of the issuance of A15 (II:A). The majority instead of examining the facts and evidences presented to the Tribunal concerning the occurrence of losses incurred by Iran, preferred to re-examine the legal foundation of implicit obligation; and this consequently resulted in total absurdity of the Tribunal's Award in A15 (II:A). By following the majority's line of argument, under no circumstances Iran's losses could have been proved since the right to export did not, in majority's view, exist at any time for Iran.

4. The principle of due process of law has been violated at many occasions in the present proceedings. For instance, the main argument presented by the Partial Award regarding Iran's lack of right to export and consequently its zero chance at all times to get its properties, remains unexplored and not pleaded by the Parties. Moreover, upon the admission of parts of the United States' filing of 2006 into the record despite Iran's heavy objection to its responsiveness, Iran should have been given a chance to present its response to those parts of the said filing. This situation deprived Iran of its right to have full opportunity to defend itself. And finally, the categorical rejection of Iran's November 2008 filing, despite the fact that they were pertaining to the new and unexpected events and that they had undeniable impact on the core of the Partial Award's reasoning, provides another example for the Tribunal's failure to comply with the due process of law in the present proceedings.

5. It, however, remains for me to hope that the Tribunal in its further proceedings of this Case, in particular in dealing with the damages caused by the unlawful Treasury Regulations as an independent ground of liability for the

United States, will live up to its duty of justice and proves its competence in resolving the disputes with an acceptable international level.

I, hereby, reserve my right to file an extensive dissenting opinion, if deemed necessary.

Dated, The Hague
20 July 2009

H.R. Oloumi Yazdi

Hamid Reza Oloumi Yazdi