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Cases Nos. A15 (II: A), A26 (IV), AND B43

FULL TRIBUNAL

AWARD NO. 604-A15 (II: A)/A26 (IV)/B43-FT

THE ISLAMIC REPUBLIC OF IRAN,

Claimant

And

THE UNITED STATES OF AMERICA,

Respondent

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SEPARATE OPINION OF  
JUDGE HAMID REZA NIKBAKHT FINI

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## TABLE OF CONTENTS

HEADING	PAGE
I. Prologue.....	5
II. Introductory Remarks.....	5
Part One: Public International Law.....	6
I. Treaty Interpretation.....	6
I.1. Interpretation of Paragraph 9 of the General Declaration.....	8
I.1.a. The Text of Paragraph 9 .....	11
I.1.b. The Context of Paragraph 9.....	13
I.1.c. Object and Purpose .....	14
I.1.d. Subsequent Material and the Practice of the Parties.....	16
I.1.e. Subsequent Conduct of the Parties .....	17
I.1.e.(i) Points of Agreement Between the Parties.....	18
II.1.e.(ii) The Conduct of One Party .....	20
I.1.f. Treatment of the Subject in the Award.....	22
I.1.g. The Question of Admission.....	24
I.1.h. Principles of Good Faith and Effectiveness.....	27
<i>I.1.h. (i) Good Faith.....</i>	<i>27</i>
<i>I.1.h. (ii) Effectiveness (Defeat of the Purpose of Paragraph 9) .....</i>	<i>28</i>
I.2. Tribunal Precedent in Treaty Interpretation in Other Areas .....	30
I.2.a. Treaty Interpretation by the Tribunal in Cases Involving Domestic Law Issues.....	30
I.2.b. Tribunal Approach in Contractual Cases between Two States.....	33
I.2.c. Tribunal Practice on the Subject of Property in Investment Cases.....	35
I.3. Interpretation of General Principle A and Paragraph 8 .....	38
II. Conclusions on the Issues of Treaty Interpretation and Iranian Properties.....	45
Part Two: Municipal Law (Private international Law Analysis).....	47

I. Treatment of the Private International Law by the Majority .....	47
I.1. Introduction .....	47
I.2. A New Interpretive Case by the Majority (Under the Municipal Law).....	49
II. Theoretical Considerations with Practical Effects .....	53
II.1. Algiers Declarations and the Application of a Municipal Law .....	53
II.2. Problems with the Application of Private International Law .....	55
II.2.a. Specifics of the Choice of Law Rule of the Tribunal .....	57
II.2.b. Choice of law Rules in the Present Case .....	59
II.2.c. Characterization.....	61
II.2.d. Connecting Factor .....	64
II.2.e. Renvoi.....	66
II.2.f. Proof of Domestic/Foreign Law in the Tribunal.....	69
II.2.g. Mandatory Rules of Law and Public Policy of the Forum.....	72
II.2.h. General Principles of Private International Law or General Principles of Law .....	73
III. Tribunal Precedent and the Municipal Law (Contractual and Commercial Claims) .....	76
IV. Conclusions.....	87
Part Three: Due Process Considerations.....	91
I. No Effective Argument by the Parties of the Controlling Legal Theory of the Award.....	91
II. Jura Novit Curia .....	93
Part Four: Individual Claims.....	96
I. Dissenting Opinion.....	96
I.1 Claim G-111 (Zokor).....	96
I.2. Claim G-15 (Clerk-Yellow Grass).....	99
I.3. Claim G-16 (Eisenman).....	100
I.4. Claim Supp. (1)-5 (Teichmann).....	103
I.5. Claim G-128 (Stadler) .....	105
I.6. Claims Involving Money and Advance Payments.....	114
I.6.a. Claim G-162 (Bank Saderat) .....	115
I.6.b. Claim Supp (1)-3 (EROS/ERIM) .....	116

I.6.c. Claim G-109 (Red Crescent) .....	116
I.6.d. Other Claims .....	116
I.6.e. Kharg Claims (G-165 through G-190 & 1996-A through 1996-E) .....	117
II. Concurring Opinion.....	119
II.1. Claim G-18 (Stradivarius).....	119
II.2. Claim Supp. 2(12) (Mashayekhi) .....	122
II.3. MORT Claims (G-7, G-8, G-13).....	123
II.3.a. Claim G-8 (Porta Kamp Housing Units) .....	124
II.3.a. (i) Claim for Direct Damages .....	124
II.3.a. (ii) Claim for Loss of Use .....	127
II.3.a. (iii) Mitigation .....	127
II.3.b. Claim G-7 (Port of Vancouver) / Claim G-13 (Shipside) .....	128
II.4. Aircraft Claims.....	129
General Conclusions .....	131

1. I file this Separate Opinion to register my views as to the findings of the present Partial Award.<sup>1</sup> I disagree with the findings and reasonings of the Award concerning the general legal issue in this Case, *i.e.*, the treaty interpretation and the central point in this respect, that is, the interpretation of the phrase “Iranian properties” in Paragraph 9 of the General Declaration.<sup>2</sup> This point will be elaborated in Part One of this Opinion. My observations as to the Award’s reasonings on issues of private international law and the application of the domestic laws will be presented in Part Two. As to the individual claims, I agree with some of the findings and disagree with some other. In Part Four of this Separate Opinion, my detailed views as to each individual claim will be presented. Finally, I have serious concerns over certain due-process implications of the Award as rendered by the Majority. This point will be treated in Part Three of this Separate Opinion.

### *I. Prologue*

2. The major legal issue in this Award is the interpretation of the term “Iranian properties” in Paragraph 9 of the GD, and that is the main point that I cannot agree with the Award’s reasonings and conclusions. To me, the legal reasonings of the Majority would only make sense if we were to ignore one thing and to assume another: to ignore that the properties at issue in this Case are subject to an international treaty; and to assume that the United States did not know its own laws when signing the treaty or implementing its terms. Neither proposition is of course conceivable. Yet, the whole structure of the Award in this central and vital point is built around these two premises. The structure will fall apart if either of the two premises is proved wrong.

### *II. Introductory Remarks*

3. The present Case is essentially a treaty interpretation dispute between the two Parties to the Algiers Declarations. The Parties disagree on the correct interpretation and implementation of Paragraph 9 and General Principle A (GPA) of the GD. In the jargon of the Tribunal, these cases are referred to as “A cases” (thus the caption A15), where the only jurisdictional basis is Paragraph 17 of the GD.<sup>3</sup> This jurisdictional provision vests the Tribunal with the power to

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<sup>1</sup> I will refer to the present Partial Award as “the Award” in this Separate Opinion.

<sup>2</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981, reprinted in 1 *Iran-US C.T.R.*, p. 3 (hereinafter: GD or the treaty)

<sup>3</sup> To the same effect is the corresponding Article II(3) of the Claims Settlement Declaration: The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the

entertain the “disputes between the parties as to the interpretation or performance of any provision of this [General] Declaration.”

4. The natural expectation from this background is that the Tribunal in deciding the disputes between the Parties, focuses on the treaty interpretation under the established rules of international law. This is what the Tribunal has done in all similar “A” cases over the 38 years of its history. However, as will be explained, treaty interpretation in the present Award has taken the back seat in the Majority’s analysis and conclusions, apart from a superficial lip service. Instead, the municipal law has occupied the pole position, surprisingly to interpret the treaty. Underestimating the applicable treaty provisions, has led to a situation that everything is being decided based on the municipal law, and in this Case a specific law of one of the State Parties, to defeat the same Party’s treaty obligation.

5. The origins and the story giving rise to the dispute are explained in the text of the Award. As it is readily understood from the text, it was the municipal laws and regulations of one Party to the treaty that was in the core of the situation leading to the dispute in the first place - for the settlement of which a very comprehensive treaty was concluded and a specific dispute mechanism was set up - and now a single rule of the law of the same Party is relied upon by the Majority to devoid the terms of the treaty of any meaningful effect.<sup>4</sup>

## ***Part One: Public International Law***

### ***I. Treaty Interpretation***

6. The rules of treaty interpretation are not in dispute. While neither Party has adhered to the Vienna Convention on the Law of Treaties (VCLT), both Parties, as well as the Tribunal, have always relied on the rules of interpretation as developed in the Convention. It should also not be disputed that the rules of treaty interpretation are not exclusively limited to the provisions of the VCLT.<sup>5</sup> However, by and large, VCLT covers most areas in this subject.

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Government of the United States of America and the government of the Islamic Republic of Iran (Claims Settlement Declaration), reprinted in 1 *Iran-US C.T.R.*, p. 9 (hereinafter: the CSD).

<sup>4</sup> By way of comparison, one may imagine that in a direct nationalization case the court or the arbitral tribunal declines to award compensation, because the same domestic law that nationalized the property and gave rise to the dispute does not allow compensation for nationalized property or does not recognized the property as foreign property; and all this in the face of an international treaty that governs the dispute.

<sup>5</sup> R. Gardner, *Treaty Interpretation*, OUP (2008), p. 6.

7. The main aim of any treaty interpretation is to find out the intentions of the parties to the treaty. The intention is formed at the time of the conclusion of the treaty. A treaty must be implemented by both parties in accordance with the original intentions behind the conclusion of the treaty.<sup>6</sup>

8. The intention is discovered from different sources. The main source is of course the text of the treaty in its entirety. Then comes external sources listed in Articles 31 and 32 of the VCLT. These sources are well celebrated and explained in numerous writings and decisions, and there is no need to repeat them here. In the present Case, as will be explained, the practice of the parties during the implementation of the treaty occupies a prominent place for the purpose of interpreting what is meant by the term “Iranian properties” in Paragraph 9 of the GD.

9. In this respect, it is fair to suggest that one must make distinction between the intention at the time of the conclusion of the treaty, and the litigation strategy after a dispute is arisen as to the interpretation and implementation of the treaty. Further, the implementation measures at the early days after the conclusion of the treaty and when no dispute between the Parties existed, will be very useful and objective means to discover the real intent. It should be beyond dispute that the original intention and the contemporaneous implementing measures and conducts should be given more weight than the strategies adopted by lawyers before a forum after a dispute arises. This is not only the dictate of common sense, but also in accord with the principle of good faith which is essential for both the implementation<sup>7</sup> and interpretation<sup>8</sup> of treaties. Moreover, the words or conduct of the party who has undertaken a duty to do something is a stronger indication of the meaning of the text.<sup>9</sup> If in a treaty one party is to perform the object of the agreement and the other party is only the passive addressee of the object, obviously the conduct of the obligor party in implementing the treaty will shed more light on the intention of the parties, in particular with lack of objection of the obligee. It would certainly shed light on the intention and understanding of the obligor.

10. I believe these must be the guiding principles to interpret the Algiers Declarations on the subject of the dispute in the present Case. Now, let see how the Majority engages in this task.

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<sup>6</sup> *Oppenheim's International Law*, 9<sup>th</sup> ed., Jennings & Watts (1996), 1267: “The purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen.”

<sup>7</sup> Article 26 of the VCLT.

<sup>8</sup> Article 31 of the VCLT.

<sup>9</sup> Emer de Vattel, *The law of Nations*, Book II, Chapter XVII, § 266: “In order to discover the true meaning of the contract, attention ought principally to be paid to the words of the promising party.”

### ***1.1. Interpretation of Paragraph 9 of the General Declaration***

11. The Award begins its interpretive journey with quoting Article 31 of the VCLT.<sup>10</sup> Immediately after the quotation and with no argument or reasoning, it reaches the conclusion:

“The Tribunal finds that the text of Paragraph 9 is clear and unambiguous.”<sup>11</sup>

12. It is to be reminded at the outset that this so-called “clear and unambiguous” text (Paragraph 9) has been one of the most controversial texts in the history of the Tribunal. It has been subject of three important and ground-setting awards by the Tribunal with contradictory results<sup>12</sup>; plus, one decision on a revision request<sup>13</sup> and many individual opinions in those awards, opposing each other. The interpretation by the Parties in this very Case of only the term “Iranian properties” during 35 years of implementation and litigation, is witness to how clear is the text. It suffices to have a look at the Respondents’ treatment of this term from 19 January 1981 till the end of the hearings, where at least three versions of the meaning of the term “Iranian properties” were forwarded over a period of 35 years.<sup>14</sup>

13. The Award begins with this self-serving and question begging premise and tries to represent that it is interpreting or defining the term “Iranian properties” in Paragraph 9. This is obviously against the established rules of interpretation:

The finding whether a treaty is clear or not is not the starting point but the result of the process of interpretation. It is frequently stated that if the meaning of a treaty is sufficiently clear from the text, there is no occasion to resort to rules of interpretation in order to elucidate the meaning. Such a proposition is however of limited usefulness.<sup>15</sup>

14. While the Award tries to engage in a process of interpretation, it in fact does not attempt to make the meaning of the disputed term clear in accordance with the rules of interpretation

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<sup>10</sup> Paragraph 102 of the Award.

<sup>11</sup> Paragraph 104 of the Award.

<sup>12</sup> Case B1(4), Partial Award 382-B1(4)-FT (1988), 19 *Iran-US C.T.R.*, 273; Case A15(II:A), Partial Award 529-A15(II:A-II:B)-FT (1992), 28 *Iran-US C.T.R.*, 112; Case B61, Partial Award No. 601-A3/A8/A9/A14/B61-FT, 38 *Iran-US C.T.R.*, 197.

<sup>13</sup> Decision on Iran’s Revision Request in Case B61, No. DEC 134-B61-FT (2011), not printed.

<sup>14</sup> The Separate Opinions filed in the present Award is another example of the divergent interpretations of the Paragraph.

<sup>15</sup> *Oppenheim’s International Law, op. cit.* (note 6), 1267.



under international law. The Award takes the meaning of the term “Iranian property” for granted, and then applies, in abstract, the rules of private international law, the so-called general principles of private international law, to it. In other words, the Award first assumes a meaning for the term “property” under private law concepts in general, and then applies that meaning to the term “Iranian properties” in a treaty without paying due attention to its place or the fact that it is a treaty term within its particular environment. And there lies the fundamental problem with the approach taken by the Award. As will be discussed below when analyzing the Tribunal’s case-law on “A” cases, the domestic law may be helpful to decide who owns a piece of property, or who is a national of certain State, or what is the status of certain legal proceedings before national Courts. It cannot, however, interpret a treaty term as to what the Parties meant by terms like “Iranian properties” or “Iranian/American national”<sup>16</sup> or “termination of proceedings”.<sup>17</sup> Instead of extracting the meaning of the disputed term (“Iranian properties”) under the rules developed for treaties, the Majority enters into the realm of private law and looks at it in terms of the law of property in different domestic jurisdictions. This is putting the proverbial cart before the horse. In other words, the Majority simply jumps over the problem which the Tribunal is supposed to resolve, and would have the reader believe that the problem is resolved. The problem is not resolved; it is simply swept under the rug.

15. Curiously, before citing Article 31 of VCLT<sup>18</sup> and the finding that the text is clear,<sup>19</sup> the Award has already concluded that the Tribunal had already in 1992 “interpreted the meaning of the term ‘Iranian properties’ in Award 529<sup>20</sup> and is not called upon to reopen its decision on the matter.”<sup>21</sup>

16. Apart from the anomalous nature of this finding with the treatment of the same issue in no less than 62 paragraphs (Paragraphs. 102-164), the statement does not reflect the whole picture. As will be explained below, at the time the Tribunal rendered Award No. 529 in 1992, the identity of the “Iranian Properties” in large parts was not in dispute between the Parties. True, the Tribunal in 1992 refers to the notion of the Iranian properties and ownership. In paragraphs 43, 44, 55, 59 and 77 of the Award 529, the Tribunal specifies what the Iranian properties are in the sense of Paragraph 9 obligations of the United States. However, there the only point of

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<sup>16</sup> Subject of the interpreting Article VII of CSD in case No. A18 on the issue of dual nationality, discussed below.

<sup>17</sup> Subject of the interpreting General Principle B in case No. A15(IV) on the issue of the termination of legal proceedings, discussed below.

<sup>18</sup> Paragraph 102 of the Award.

<sup>19</sup> Paragraph 104 of the Award.

<sup>20</sup> The Partial Award 529-A15 (II: A-II: B)-FT, 6 May 1992, 28 *Iran-US C.T.R.*, 112 (hereinafter, the Award 529 or the Award No. 529).

<sup>21</sup> Paragraph 100 of the Award

reference for the Tribunal was the Algiers Declarations and the implementing regulations (Executive Orders and Treasury Regulations), because the ownership under domestic law was not an issue. Many of the properties that the Majority now considers not owned by Iran, were then considered by the United States as the Iranian properties. Ownership under U.S. law (or under any other municipal law), whether based on *lex contractus* or *lex situs* was not in the minds of the Parties and naturally was not even pleaded. The Tribunal was dealing with a situation where the United States viewed items paid by Iran as “Iranian properties” under Paragraph 9 of the General Declaration. The dispute before the Tribunal was based on the United States’ refusal to transfer such properties because of some other incumbrances, not related to ownership. In other words, as far as the Tribunal was concerned, Iran’s ownership over the properties for which Iran had contracted and paid for, was an agreed upon fact and a foregone conclusion. Any reference to ownership or sole ownership in Award No. 529 was, and logically could not be otherwise, based on the representations by the Parties. The Parties never represented to the Tribunal that they disagreed on Iran’s ownership under domestic theories like *lex contractus* or *lex situs*. They represented that they disagreed as to whether a “lien” on the properties allowed the United States to withhold transfer.<sup>22</sup>

17. Thus, the reference by the Majority that the Tribunal has interpreted the meaning of the term “Iranian properties” in Award 529, would only be true if the present Award proceeded along the lines by which the contracted and paid items are considered “Iranian properties”. Otherwise, the statement is a distortion of the Tribunal’s Award No. 529.

18. It is true that the Tribunal “is not called upon to reopen its decision [in Award No. 529] on the matter.”<sup>23</sup> But again, the Majority has acted conversely. As we will see below, after the issuance of the Award No. 529, the United States gradually changed its position on the issue of the ownership and the definition of the “Iranian properties.” By 2001, new theories were introduced in this respect, mainly based on the law of contract in municipal law; and in 2013 for the first time the legal notion of the “*lex situs*” entered the discussions in this Case from the Bench<sup>24</sup>, and remarkably positioned itself as the exclusive legal basis of the present Award on the question of the ownership. After the issuance of the Award No. 529 in 1992, hundreds of pages of brief and evidence or transcript of the hearings have been added to the record. It was

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<sup>22</sup> See, e.g., Paragraph 47 of the Award 529, where it says: “The Tribunal finds it difficult to justify a definition that excludes properties admittedly owned solely by Iran in view of the scope of paragraph 9 of the General Declaration which extends to “all Iranian properties.”

<sup>23</sup> Paragraph 100 of the Award.

<sup>24</sup> See my discussions in Part Two of this Separate Opinion.

the Majority who made the ownership under municipal law of property a major issue, as witnessed by the Award. If these are not attempting to reopen the former decision of the Tribunal, then what one may call them?

***1.1.a. The Text of Paragraph 9***

19. Paragraph 9 in essence provides for the transfer of all Iranian properties within the United States' jurisdiction which are not mentioned in other parts of the GD. In this Paragraph, the United States has promised to arrange "for the transfer to Iran of *all* Iranian properties which are located in the United States and abroad and *which are not within the scope of the preceding paragraphs.*"<sup>25</sup>

20. As it is obvious from the text of the Award, the Majority interprets the term "Iranian properties" in Paragraph 9 as properties whose title before 19 January 1981 rested with Iran under U.S. law.<sup>26</sup> And since, according to the Majority, the U.S. law is "delivery based" on the question of transfer of title, then properties had to be delivered to Iran in order to be considered "Iranian properties" and subject to transfer obligation. The problem with this reading of the text of Paragraph 9 is its circular character. Paragraph 9 by nature cannot carry such an interpretation. Paragraph 9 was adopted, in fact, to transfer to Iran the "Iranian properties" which were frozen in 1979. During the freeze period, no action, including delivery to Iran, could be carried out with respect to such properties. This was the situation when the Parties began negotiating the Algiers Declarations. Both Parties were aware that delivery was suspended in accordance with the mandate of U.S. laws.

21. With such a background in mind, it is not unreasonable to assume that in a negotiation to unfreeze those properties and transfer them to Iran, the "delivery" could not have had any place in the process. It would simply be absurd to say that 1) the purpose of the negotiation of the

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<sup>25</sup> Italics supplied. A conspicuous feature of Paragraph 9 is that the term "properties" is used in plural form. Paragraph 9 is the only place in the Algiers Declarations that the term is used in plural. In other places it is used in singular form. Paragraph 11 refers to the "property" of the United States or its nationals in Iran. In Paragraphs 12-14, "property" of the former Shah and his relatives is at stake. The Executive Order 12170 (14 November 1979) which blocked all Iranian assets and gave rise to the present dispute, too, uses the term property. However, the Executive Order 12281 (19 January 1981) which was issued to implement Paragraph 9 used the term as "properties" (owned by Iran). The term "properties" (in plural form) appears 5 times in this Order.

<sup>26</sup> For example, Paras 129, 130, 164. Though according to the Majority the U.S. law is not necessarily determinative, but both in theory and practice it becomes the only law applicable. This is because the decisive legal basis relied upon by the Majority is the law of *situs*. The properties were located in the United States, otherwise they could not have been frozen and thus not subject to Paragraph 9 and not subject to the present dispute.

treaty was to return to Iran the items whose delivery was frustrated by U.S. law; and 2) yet the delivery to Iran before the date of the treaty (during the freeze period when delivery was legally impossible) was the precondition of the transfer. The whole idea would contain an inherent contradiction leading to absurdity. And yet out of all the possible definitions of the term “Iranian properties”, the Majority has opted for the most remote and absurd definition: A definition where the “delivery” before the date of the treaty is a precondition. And this is why I strongly believe that the Majority has forgotten its main assignment, that is, to interpret a treaty, and interpret it in a proper way. The Majority first defines “property” in general terms and outside the treaty framework in abstract, and then applies it to the terms of the treaty. The correct way would be to try to discover what the Parties meant by the terms of the treaty (here the “Iranian properties”), and, if necessary, then invoke general international law, and seek the help from other sources including municipal law.

22. The Majority tries to justify its approach by holding that international law does not contain any definition of the property.<sup>27</sup> In so doing it forgets that the Tribunal is not determining the meaning of just any property. What is at stake is the “Iranian properties” within the context of the Algiers Declarations. Whether or not international law contains a definition of property is not at issue here. No one is in the business of finding a definition for property in international law. The point is to find the intended meaning of the term “Iranian properties” within this specific treaty.

23. From the inception of the modern theories of international law, the authorities were alert that domestic concepts like delivery as a precondition to ownership should not enter into international law and relations between States, simply because it is established in municipal law. As far back as 400 years ago, Grotius, referring to this concept in the context of ownership writes that: “But that there should be a formal delivery made, is that is required only by the civil law; which, because it is now received by many nations is improperly styled the law of nations.”<sup>28</sup>

24. As will be explained below, a combined reading of the text of the Algiers Declarations, the negotiation history, the implementation measures, the conduct of the parties after the conclusion of the treaty, the positions of the Parties during the litigation, all point to the fact

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<sup>27</sup> Paragraph 137 of the Award.

<sup>28</sup> *The Rights of War and Peace* (1625), Book II, Chapter VI(i); Richard Tuck edition, Liberty Fund (2005). See, also Chapter VIII (xxv): “Delivery is not by the law of nature required in the transfer of property.” The suggestion is not to apply these general verdicts here. Rather, the point is to remain loyal to one’s main environment and to avoid transgressing borders rashly.

that the “Iranian properties” under the Algiers Declarations has a meaning of its own. That is explained in the following pages.

***1.1.b. The Context of Paragraph 9***

25. The language in Paragraph 9 succeeds four paragraphs, all four concerning the transfer of all Iranian assets to Iran by the United States. Paragraph 4 concerns the transfer of “all gold bullions owned by Iran ... in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets ... in the custody of the Federal Reserve Bank of New York.” Paragraph 5 concerns the transfer of all Iranian deposits and securities in the overseas branches of the U.S. banks. Paragraph 6 concerns the transfer of all Iranian deposits and securities in the U.S. branches of the U.S. banks. Paragraph 8 refers to the transfer of “all Iranian financial assets (funds or securities) located in the United States and abroad apart from the assets referred to in Paragraphs 5 and 6.” Paragraph 9 follows the suit and refers to the U.S. obligation to arrange for the transfer of “all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs [Paragraphs 4-8]”.

26. The broad language in these paragraphs in the treaty could only refer to a huge operation in State level. Paragraph 9 is a catch-all provision to ensure that no Iranian properties would fall outside the transfer obligation. There is no indication of any domestic law application to this huge operation.<sup>29</sup> As will be seen below, I cannot find any instances that the Respondent in its implementation of the above-mentioned Paragraphs ever brought up an issue of domestic law. During the implementation period of the Algiers Declarations, the only issue raised by the United States concerning its Paragraph 9 obligation was that Iran had to first pay its dues to the holders of the properties.<sup>30</sup> Domestic law issues only came into play when the Respondent faced an adverse ruling on that interpretation. In 1992 the Tribunal ruled that such a condition was not compatible with the terms of the Algiers Declarations<sup>31</sup>. It was then that the United States, in the second phase of this Case, raised certain points of municipal law. It is seen as a

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<sup>29</sup> See, the Award No. 597 in Case A11, Para. 196: “Points II and III of the General Declaration imposed upon the United States the obligation to cause or arrange for the return to Iran of certain specified Iranian assets. In those Points, the High Contracting Parties established a detailed mechanism through which the United States would arrange for or cause the return of those assets to Iran. It is noteworthy that the Parties did not link the return of those assets to any litigation, either domestic or international, brought by Iran.” 36 *Iran-US C.T.R.*, 115, 133

<sup>30</sup> “Dues”, as meant by the United States, were not limited to a specific property held by a U.S. national; rather if that national had claims against Iran in general, even though unrelated to that specific property, still could avoid transfer. See, Treasury Regulation 535.333(c), quoted in Paragraph 12 of the Award.

<sup>31</sup> The Award No. 529, Paragraphs 53 and 77(d).

litigation strategy and not an issue of treaty interpretation. Yet even then, the United States never raised the point which now has become the central part of the Award. The United States never even hinted that it did not transfer the “Iranian properties” because the *lex situs* did not consider them “Iranian properties.”

27. An *a contrario* analysis of the Algiers Declarations will make the issue clearer: Whenever the Parties have felt that domestic law would be relevant, they have expressly mentioned it in their agreement (the Algiers Declarations). In Paragraph 9, the Parties subjected certain properties (the so-called export-controlled items) to the U.S. domestic law. In Paragraphs 12-15, the Parties agreed that the return of the property and assets of the former Shah would be subject to the decisions of the U.S. courts in accordance with U.S. law. Any exception is also expressly mentioned.<sup>32</sup> Apart from these express references, domestic law does not play any role in the GD. If the Parties intended that domestic law should also apply to any other item, they could have provided for it. Paragraph 9 must be interpreted in light of these considerations. This is the context of the treaty.

### *1.1.c. Object and Purpose*

28. The object and purpose of the treaty and Paragraph 9 are also important components of the interpretation. The Iranian Majlis Resolution of 2 November 1980 reflected in the preamble of the GD is a relevant instrument in interpreting the Algiers Declarations. “This Resolution constituted the basis of the Iranian position throughout the negotiations and is referred to in the Preamble of the General Declaration.”<sup>33</sup> While it is not directly applicable, it is not disputed that the negotiations began based on that Resolution, and the United States during the negotiations admitted its relevance as the framework of the negotiations. The United States in its first official response to the Resolution wrote: “The Government of the United States has received and has carefully reviewed the resolution ... The United States accepts in principle the resolution as the basis for ending the crisis.”<sup>34</sup>

29. The United States’ Secretary of State during the negotiation of the Algiers Declarations, explains the Majlis Resolution and its role in opening the way to resolve the crisis:

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<sup>32</sup> Indeed, in contrast to Points I-III (paragraphs 1-11 of the GD), Point IV (paragraphs 12-15) is drafted mainly based on domestic law, with few exceptions expressly mentioned in the text.

<sup>33</sup> Award 590-A15(IV)/A24-FT (1998), para. 23, 34 *Iran-US C.T.R.*, 105, 114.

<sup>34</sup> A. Lowenfeld, *Trade Controls for Political Ends*, vol. 3 (2nd ed. 1983), DS-810.

The Majlis Resolution demanded that the United States: Pledge not to interfere in the affairs of Iran; Lift the freeze on Iranian assets and put all these assets at the disposal of Iran; Cancel all economic and financial sanctions against Iran, cancel all U.S. claims against Iran, and assume financial responsibility for any claims made against Iran; Return to Iran the assets of the Shah and his close relatives ... On November 10 [1980], Mr. Christopher [head of U.S. negotiating delegation] and his team flew to Algiers to deliver the U.S. response ... Mr. Christopher told the Algerians that we accepted in principle the Majlis Resolution as a basis for ending the crisis.”<sup>35</sup>

30. In order to assess the significance of the term “in principle” in the above statement, one has to see the text of the Algiers Declarations as finally adopted. A look at the text of the General Declaration would reveal that the conditions set by Majlis were largely adopted in Points I to III, but not in Point IV (return of Shah’s assets). The few exceptions include the U.S. law clause in Paragraph 9, and the establishment of the Security Account in Paragraph 7 (which was necessary to implement the termination of the legal proceedings under General Principle B). The Majlis Resolution reveals the object and purpose of the Algiers Declarations. The text of GD points to the fact that the Resolution was the guiding principle in the negotiations. It was largely implemented. Even the structure of the Resolution found its way into the treaty (the four points). The GD is designed based on the four points in the Resolution.

31. General Principles A and B are also relevant as object and purpose. It is not disputed that the two Principles were added by Iran towards the end of the negotiations when the text (the four points) was ready. It is obvious that they were to fill any gap in the text, so that the original object and purpose be safeguarded.

32. The aggregate result of these provisions establish that the purpose of both Parties was to transfer “all Iranian properties which are located in the United States and abroad” to Iran. The United States undertook to “arrange” such transfer. This language and the usage of the over-expansive terms like “all” and “abroad” are imported directly from the Majlis Resolution. These terms in turn respond to the same expansive language of the Executive Order 12170 (14 November 1979) blocking “*all property* and interests in property of the Government of Iran ...

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<sup>35</sup> Hearing before U.S. Senate, February 1981, Statement of Edmund Muskie, p. 21. Government Printing Office, 1981.

within the possession or *control* of persons *subject to the jurisdiction* of the United States.”  
(Italics supplied)

33. It is within this context that Paragraph 9 refers to “Iranian properties”. The aim was to release and transfer all the properties blocked by Executive Order 12170 and arrange their transfer to Iran. As put by the U.S. chief negotiator, Warren Christopher, a few weeks after the conclusion of the Algiers Declarations:

“The only funds or properties which are required to be paid over to Iran are those funds and properties which were frozen by the President’s order of Nov. 14, 1979.”<sup>36</sup>

34. Without paying attention to these significant elements, it is not possible to offer a meaningful interpretation of the Algiers Declarations. The Tribunal has always paid due attention to these important factors.<sup>37</sup> In sum, Paragraph 9 cannot be interpreted in isolation. It is part of a bigger deal at State level and as such can only be interpreted within the context that it was created.

#### ***1.1.d. Subsequent Material and the Practice of the Parties***

35. After the adherence to the Algiers Declarations, the relevant Committees of the United States Congress held series of meetings to assess the Declarations and the United States’ obligations thereunder. Immediately after those meetings, the United States issued a series of Regulations to implement its obligations. A number of provisions in those Regulations were later held (by the Tribunal) to be inconsistent with the commitments under Algiers Declarations<sup>38</sup>. The Tribunal’s holdings on certain inconsistencies in those regulations, point to the fact that the United States interpreted and implemented its commitments restrictively. Nevertheless, those Regulations prove the United States’ understandings of its undertakings under the Algiers Declarations. Indeed, the regulations establish the United States’ understandings in the most restrictive and minimalistic manner.

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<sup>36</sup> the Statement of Warren Christopher before U.S. Congress (February-March 1981), page 140, Government Printing Office, 1981.

<sup>37</sup> In other parts of the present Case (A15/I: G and A15/I: C), the Tribunal was confronted with situations for which there were no clear provisions in the Algiers Declarations. Relying on the General Principle A and the general purpose of the return of all Iranian assets, the Tribunal was able to resolve the problem by ordering the return of the assets to Iran: Case A15(I:G), Award No. ITL63-A15-Ft (20 August 1986), 12 *Iran-US C.T.R.*, 40; Case A15(I:C), Award No. 78-A15-FT (12 Nov. 1990), 25 *Iran-US C.T.R.*, 247.

<sup>38</sup> See, the Award 529.



36. The most relevant regulation is the Treasury Regulation No. 535.333 issued on 26 February 1981. This Regulation defines “Iranian properties” and directs U.S. subjects to transfer such properties to Iran. The Iranian properties are defined as follows:

Properties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties ... are discharged.”<sup>39</sup>

37. Whatever was the thinking behind this style of writing, one thing is obvious: The United States did not see its undertaking in Paragraph 9 to have any relation to the applicable domestic law on ownership or title. The United States understood the term “Iranian properties” (under Paragraph 9) or “properties owned by Iran” (under Executive Order 12180 issued the same date as the Algiers Declarations – 19 January 1981), as properties for which “all necessary obligations, charges and fees relating to such properties are paid and liens against such properties are discharged.” It can’t be clearer than this. Items paid by Iran is considered “Iranian properties” under Paragraph 9.

38. This is the contemporaneous understanding of the United States immediately after the adherence to the Algiers Declarations; the understanding that is reflected in its domestic law. As stated, the understanding was reached after thorough examination of the treaty during a number of sittings in both houses of the Congress and after hearing each and every person involved in the negotiations of the Algiers Declarations. As will be explained below, this understanding was maintained years after the date of the Algiers Declarations. There is also no evidence that Iran understood this very point differently.

### *1.1.e. Subsequent Conduct of the Parties*

39. A point of confusion in the Award is that it does not distinguish between the subsequent practice of the parties in implementing a treaty (leading to agreement between the parties) and the subsequent conduct of one party in implementing its obligation in accordance with the treaty. The purpose of this part of my opinion is to show that both elements are present here. As to the first element (agreement between both Parties), the Award obviously confuses

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<sup>39</sup> This way of definition (negative definition), it seems, is either a matter of style or the result of the restrictive and minimalist approach taken by the United States.

between the agreement of minds over the particular subject at issue here, and agreement over the totality of the legislative measures adopted by the United States to implement the Algiers Declarations. While on the face of it, it might seem that the Parties disagreed on this point (and the Award builds up on this aspect), yet, as we will see, even the disagreement is revealing as to the common understandings of the Parties.

***1.1.e. (i) Points of Agreement between the Parties***

40. Iran objected to the implementing legislation on account of its prohibition as to the transfer of items for which the holders believed Iran owed them. This disagreement between the Parties was resolved in 1992 by the Award of the Tribunal and is not at issue here at all. However, as to the issue before the Tribunal now, *i.e.*, the role of domestic law in determining the ownership of the properties, there was no disagreement between the Parties because that was not an issue. Executive Order 12180 and the implementing legislation (Treasury Regulations) did not consider the domestic law as an element in determining the ownership, and naturally Iran had no reason for objection to that aspect of the legislation.

41. The Majority's confusion originates from this simple observation. In dealing with the subsequent practice in form of the implementing legislation, the Award takes the disagreement over the "lien issue" which is already resolved and is not at issue before the Tribunal, and superimposes it to the issue of ownership under domestic law, which was not a point of disagreement at all. The result is an inevitable defect, to the point of fallacy, in the reasoning of the Award under VCLT.

42. As a result, the positions of the Parties over different aspects of the implementing legislation, indeed reveal an agreed upon practice under VCLT (Article 31). In other words, the United States defined the treaty term ("Iranian properties") as properties fully paid by Iran and over which no dues were outstanding. Any property which fulfilled that criterion (the price paid with no dues) was considered "Iranian properties" and subject to transfer obligation under Paragraph 9 of the GD. There is no evidence before the Tribunal that the United States hindered the transfer of any property fulfilling those two conditions. Iran also considered the properties for which it had paid as Iranian properties and subject to transfer obligation. This is an important point in interpreting Paragraph 9. Neither Party considered that the term "Iranian properties" under Paragraph 9 had any relation to domestic law or private international law concepts. Even if they had different ideas about the meaning of that term, they were in

agreement in one aspect: “Iranian properties” is not defined by any domestic law concept. The United States has expressly stated in 1985 that:

“The United States has conceded Iran’s ownership (although not necessarily its right to possession) in all properties classified in sub-categories I: Government of Iran (GOI)-owned tangible properties in U.S. on January 19, 1981. In fact the United States has challenged Iran’s claim of ownership only in category II: A.”

43. “Sub-categories I: Government of Iran (GOI)-owned tangible properties in U.S. on January 19, 1981” are those properties for which Iran has paid in the price of goods. As stated, the United States had no problem with the ownership of those items under Paragraph 9. The United States refused to transfer them on account of right to possession. At the peril of repetition, by right to possession the United States meant liens on the properties, like warehouse charges, customs duties, claims or counterclaims by the holders against Iran and Iranian entities.

44. Invoking concepts like “title” or “ownership” under private international law or domestic law will not cure the defect. Because, even where the United States refers to these terms, still they are defined under Paragraph 9 and not under U.S. domestic law. Otherwise, the concept of “Iranian properties” for items “fully paid” would not have even crossed the U.S. mind. The references to “ownership” or “title” in the instruments issued by U.S. Government, or later in pleadings before the Tribunal (as in the consolidated reports filed by the U.S.) do not support the approach by the Award. On the contrary, they could only mean that the United States was interpreting ownership or title within the perimeters of Paragraph 9 and not in accordance with its domestic law. The United States considered that it is obligated to transfer “Iranian properties” (Paragraph 9); then it interpreted that “Iranian properties” must mean properties “owned by Iran” (Executive Order 12180); and then, it interpreted the properties “owned by Iran” as properties that were paid for and with no lien over them (Treasury Regulation). This understanding was further supported during the litigation in form of the consolidated reports and admission in U.S. pleadings. This is a reasonable course of interpreting a treaty, unlike the strange route the Majority takes in this Award. Had the United States understood the terms “ownership” or “title” in terms of their domestic significance, it would have applied its domestic property law and would have drafted Treasury Regulations differently, or at least would have taken a different position in its pleadings. In other words, the reference to “ownership” or “title” in the Respondent’s pleadings does not strengthen the Award’s position;

rather it establishes the fact that in dealing with the properties subject to Paragraph 9, the United States understood these terms as properties for which Iran has paid with no lien involved.

45. Thus, the element of common understanding of the parties in subsequent practice, in terms of the VCLT (Article 31) is present here. Both Parties consider these properties as owned by Iran and subject to transfer obligation under Paragraph 9 of the GD. This is one of the occasions where the Majority in order to go against the common understating of the Parties and to go its own way, had to portray the U.S. government lawyers who were implementing the Algiers Declarations or preparing the pleadings as ignorant towards their own law.<sup>40</sup> This point will be explained below separately, because this is a crucial part of the Majority's reasoning and without that the position taken by the Majority is unattainable.

### ***II.1.e. (ii) The Conduct of One Party***

46. The conduct of one party to a treaty in implementing the treaty could also reveal the true meaning of a term in the treaty. It could fairly be looked at as an objective element to discover the understanding of the Party as to the meaning of a provision in the treaty. In particular if the conduct relates to the party who is charged with the implementing the treaty. The conduct of the party who is the obligor and is supposed to fulfill an obligation under the treaty, reveals its understanding of the relevant treaty term. It is this conduct that gains importance in this Case: The United States' understanding of its own obligation under Paragraph 9.

47. The practice of the Parties in implementing a treaty is so decisive in its interpretation that McNair calls it "solid grounds."<sup>41</sup> As he writes:

"When there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called practical construction), has a high probative value as to the intention of the parties at the time of its conclusion. This is both a good sense and good law."<sup>42</sup>

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<sup>40</sup> Paragraphs 119 and 121 of the Award.

<sup>41</sup> *The Law of Treaties*, Oxford (1961), p. 424.

<sup>42</sup> *Ibid*, at 425. He quotes Rousseau who recognizes the same point: "Il arrive assez fréquemment que la jurisprudence internationale procède à l'interprétation d'un traité l'application qui en été faite par les Parties contractantes, cette attitude révélant l'interprétation qui en fait a été effectivement suivie par les auteurs de traité."

He then quotes a number of international cases to the same effect.<sup>43</sup> As to the measures and legislation taken by one party after the conclusion of the treaty, he writes:

“Legislation subsequently enacted by the parties to a treaty for the purpose of giving effect to it can afford evidence of the meaning attached by them to the provisions of the treaty.”<sup>44</sup>

He also approvingly quotes Fitzmaurice that:

“Sometimes reference to the subsequent practice of the parties is not so much a principle of interpretation as a rule of evidence. It is a question of the probative value of the practice of the parties as indicative of what the treaty means.”<sup>45</sup>

48. Therefore, the intention of the parties is discerned not only from the text and context of a treaty, but also from the parties’ behaviour in implementing the treaty. It should be noted that Iran was not the obligor under Paragraph 9; Iran was not supposed to adopt implementing laws and regulations; was not supposed to give direction to its nationals to transfer the properties and the manner of transfer; was not the party who had to explain why the properties were not transferred. All these were to be performed by the United States. All expected from Iran was to object in case of non-compliance, which it did. As a result, the U.S. actions after the conclusion of the Algiers Declarations are by far more revealing as to the meaning of the “Iranian properties” under Paragraph 9. As detailed above, every implementing measure

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<sup>43</sup> *Ibid.* For instance, he refers to the following cases: 1922 PCIJ *advisory Opinion on the Competence of the International Labour Organization with respect to Agricultural Labour*: “As regards the inclusion of agriculture, the Court is unable to find in Part. XIII read as a whole any real ambiguity. The Court has no doubt that agricultural labour is included in it. If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the treaty. The treaty was signed in June, 1919, and it was not until October, 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organisation. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form and another. All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity”; PCIJ 1925 *Advisory Opinion upon the Interpretation of Article 3 (2) of the Treaty of Lausanne*: “The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the Parties at the time of the conclusion of that Treaty.”; PCIJ 1928 *Advisory Opinion on the Jurisdiction of the Courts of Danzig*: “The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive. This principle of interpretation should be applied in the present case.” See, also, the authorities cited by the Award in footnote No. 89.

<sup>44</sup> *Ibid.*, at 426. See, also, R. Gardner, *Treaty Interpretation*, Oxford (2008), p. 228.

<sup>45</sup> *Ibid.* See, also the Tribunal’s Award in *BI(counterclaim)*, where the Tribunal quoting Fitzmaurice says that “recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording *the best and most reliable evidence*, derived from how the treaty has been interpreted in practice, as to what the correct interpretation is. (Italics supplied by the Tribunal), ITL83-B1-FT, 38 *Iran-US C.T.R.*, 77, 118.

adopted by the United States and its definition of the Iranian properties under Paragraph 9, plus its official position before the Tribunal during the implementing period, point to the conclusion that the term “Iranian properties” has nothing to do with domestic law or private international law concepts. The United States in clear terms and consistent practice, considered fully paid items as “Iranian properties” under Paragraph 9. The relevance of the municipal law surfaced very late in the litigation.

49. As the Tribunal has emphasized in *Westinghouse v. Iran*, the contemporaneous behaviour of the Parties should take priority over the litigation strategies adopted later:

“[A] contemporaneous conduct during the negotiation and initial implementation of a contract, takes precedent to the position a party takes during the litigation.<sup>46</sup>”

#### ***1.1.f. Treatment of the Subject in the Award***

50. The instances of the United States’ official measures in the implementation of the Algiers Declarations, its official positions before the Tribunal, and even express admission by the United States were detailed above. The legal authorities in this respect were also discussed. Now, let’s see what the Award’s response to this situation is. The Award has two responses in its usual summary treatment of the point: First) the United States did not know its own law; second) admission may be averted later.

51. As to the first, Paragraph 119 of the Award reads:

[D]espite having identified Iran’s title as the criterion for establishing whether an item of property is “Iranian,” in the United States Reports, as well as in its Hearing Memorial of 5 July 1990, the United States, rather incongruously, classified items that had been fully paid for by, but not delivered to, Iran as “GOI-owned tangible properties.”

Or, in Paragraph 121, the Award says, “[a]s indicated above, however, the United States Reports exhibit a significant degree of incongruity.”

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<sup>46</sup> *Westinghouse Electric Corp. v. Iran et al.*, 33 Iran-US C.T.R, 60 at 89.

52. In other words, the United States neither knew its own law, nor was aware of the commitments it made under an international treaty. In terms of treaty interpretation, the statement is extraordinary, approaching limits of eccentricity. It does not for a moment entertain the idea that perhaps when the U.S. officials “identified Iran’s title”, had Paragraph 9 in mind and not the Uniform Commercial Code (UCC), and perhaps they found the U.S. domestic laws, such as UCC, irrelevant to this particular treaty obligation. Indeed, as stated, all evidence point to this conclusion. This is a clear instance of the Majority beginning from municipal law and not international law, while its task is just the opposite. Instead of interpreting a treaty term under the established rules of international law, the Award first defines the term under external sources (definition of property under private international law or domestic law) and then imports that definition into the treaty.

53. What is more, when faced with the opposite interpretation by the very Party who has signed the treaty, snubs that interpretation by admonishing that Party of ignorance towards its own law. It is unbelievable how far one can go to insist on his own wrong position. The position by the Award demonstrates a deep confusion between the rules governing the mistake of fact and law on the one side, and the discovery of the intention of the parties in a treaty interpretation on the other. Even the United States has not contemplated such a drastic contention. In the U.S. Reports and in its Memorials, the United States was not considering or stating anything about the “title” of the property under domestic law. For the United States, such “title” was not the issue. U.S. rightly took it for granted that the properties at issue were Iranian properties in the meaning of Paragraph 9 of the General Declaration, as long as they were paid for. For the lawyers who drafted the United States Reports and Memorials, it apparently has been obvious (based on fresh evidence of the negotiations and conclusion of the Declarations between Iran and U.S.) that they should not deal with the “title” under a municipal law, whether U.S. law or any other law.

54. The Award forgets that the admission by the United States (for which the Award struggle to somehow justify), is based on the U.S. position in the Treasury Regulations, as quoted above. The U.S. officials and lawyers who drafted such phrases, were simply applying the U.S. law adopted to implement a treaty, *i.e.*, the provisions of the Treasury Regulations which were issued to implement the Algiers Declarations. The Treasury Regulations in this Case are the domestic *lex specialis* directly applicable to properties under Paragraph 9. Thus, when the Award implies that the government of the United States did not know its own law, it is not even dealing with a position taken in litigation. It is choosing between two domestic laws. It is

advocating the view that the authorities who issued the Treasury Regulations did not know their own law, and the members of the Tribunal are rectifying the so-called mistake of the Respondent's officials by introducing another set of laws on their own.<sup>47</sup>

55. Thus, the only way to justify the conclusions reached by the Majority is to deny the reality. When the U.S. government lawyers were categorizing the "Iranian properties", they were fully in a position to appreciate their own law. They applied U.S. law to Paragraph 9 in two respects: export-controlled properties (which the Tribunal found consistent with Paragraph 9), and laws covering domestic liens (which the Tribunal held inconsistent with Paragraph 9). Nothing prevented them to apply U.S. law (UCC) on ownership and the requirement of delivery to Paragraph 9. How the Tribunal would have treated it is beside the point. The point is, they did not. And they did not, in full consciousness and in a positive manner, by preparing lists and categories and by positively and expressly conceding that they were "Iranian properties."

56. The only way to defeat this obvious and irresistible evidence of intent and practice, is to say that they did not know their own law: They did not know that before delivery the title does not change hand under U.S. law. And that is exactly and admittedly what the Majority does in order to pull itself up from a defeatist situation. But the problem is that the Majority commits a bigger mistake. The argument on error by lawyers does not work in a treaty interpretation setting, which is dealing with the discovery of intent. A mistake by definition is something which is capable of correction. Intent to be bound is formed once and for ever, and when the intent is reduced to a signed contract or treaty, it cannot be corrected later, unless by amending the contract which indeed is a new intent.<sup>48</sup>

57. And here I come back to my initial suggestion that, the legal reasonings of the Majority would only make sense if we ignore that an international treaty is applicable to the properties at issue in this Case; and to assume that the United States did not know its own laws when signing the treaty or implementing its terms. Neither proposition is of course conceivable.

### *1.1.g. The Question of Admission*

58. As stated, the United States before the Tribunal's 1992 Partial Award (Award 529) expressly acknowledged that properties paid by Iran were "Iranian properties" irrespective of

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<sup>47</sup> See my discussions in Part Two *infra*.

<sup>48</sup> Error in terms of Article 48 of VCLT belongs to another area and is not at issue here, nor is it invoked.



non-delivery.<sup>49</sup> The Majority's answer, once again, shows its unnecessary and peculiar insistence in going one step ahead of the Party who had made the admission. The arguments made in Paras. 122-124 of the Award are justifications offered by the Award, not by the Respondent. And they are wrong. The main reason offered by the Majority is a quotation from Bing Cheng. The quotation on its face relates to admission of fact: "an admission does not preclude a party from averting the *truth* ... an admission is not necessarily conclusive as regards the *facts* admitted."<sup>50</sup> There is no quarrel with this principle. The "principle of contradiction" in logic simply says that two contradictory statements cannot both be true. If, *e.g.*, the United States admitted that a property was in U.S. on 19 January 1981 and later found out that it was already transferred, no one would blame it for the mistake, if the evidence showed that the item had indeed been transferred. Bin Cheng argues this principle under the general rubric of "good faith." He makes it clear that he is talking of an *argumentum ad hominem* which is a known concept in logic with no application to the issues discussed here. Referring to the decisions of international tribunals, he says that a government might in certain circumstances take issue with the reports made by itself by offering evidence that "such reports were induced by mistake or were procured by fraud or undue influence." He concludes that an "admissions may be vitiated by duress, excusable error, fraud or undue influence."<sup>51</sup> Thus, the point raised by Bing Cheng cannot be used as an authority for our Case.

59. Here, however, we are dealing with the discovery of intention of a party to the treaty at certain moment in time, that is at the moment of adhering to the treaty. How can one use the arguments like "principle of contradiction" or "mistake of fact" for this situation (which would rather misleadingly be defined as mistake of intention and/or change of intention)? All the signs point to the direction that the United States at the moment of conclusion of the treaty did not have any intention to involve internal law in its implementation. For ten years after the conclusion of the treaty, all the official measures and positions of the United States prove the same. The central legal ground followed by the Award was raised 32 years after the conclusion of the treaty; and even that not by the United States but by the Tribunal.<sup>52</sup>

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<sup>49</sup> Under Paragraph 9, the United States was to "arrange ... for the transfer to Iran all Iranian properties". This clearly refers to those properties which had not been delivered to Iran, otherwise Paragraph 9, one of the pillars of the General Declaration, would largely become devoid of significance.

<sup>50</sup> Para. 123 of the Award. Italics supplied.

<sup>51</sup> Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 147.

<sup>52</sup> See my discussions in Part Two *infra*. See, also, the Concurring Opinion of President van Houtte, Paragraph 12.

60. The issue of change of position (even if it were applicable) is not helpful in the circumstances, either. The same point was elaborated in the Tribunal's Award in Case B1 (Counterclaim)<sup>53</sup>. In this Case, the Parties were in dispute as to the possibility of filing a Counterclaim in "B" cases, that is cases under Article II (2) of the CSD (also referred to as "official claims"). As the Tribunal held, the Article does not foresee such a possibility. However, in the early 1980s both Parties had filed a number of counterclaims in "B" cases. Iran very soon changed its position and for two decades maintained that the Article did not allow filing of counterclaims. Iran argued that it had never acknowledged expressly the Tribunal's jurisdiction over official counterclaim; and indeed from 1983 it consistently maintained its objection to the jurisdiction of the Tribunal over the counterclaim in Case B1. Iran also argued that in a separate interpretive Case, the United States had taken the position that the Tribunal had no jurisdiction over counter-claim in "B" cases. The United States on the other hand relied on a number of arguments in favour of Tribunal' jurisdiction, including the ordinary meaning of the term counterclaim in domestic and international practice, object and purpose of the Algiers Declarations, and the subsequent practice.<sup>54</sup>

61. In view of the circumstances, the Tribunal in 2004 had to decide whether it had jurisdiction over a counterclaim in "B" cases. As usual, the Tribunal treated the dispute as a dispute over the interpretation of the treaty. The Tribunal concluded that:

“[C]onsideration of the ordinary meaning of the terms employed in Article II, paragraph 2, of the Claims Settlement Declaration, of the context of this provision, and of its object and purpose does not lead to a univocal conclusion as to the Tribunal's jurisdiction over official counterclaims. However, the subsequent practice of the Parties clearly supports interpreting Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to entertain official counterclaims. The Tribunal considers this factor to be decisive.”<sup>55</sup>

62. The Case, thus, was decided on the sole ground of the practice of the Parties after the adherence to the Algiers Declarations. The Tribunal did not enter into the question that Iran in

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<sup>53</sup> Case B1(Counterclaim), ITL83-B1-FT, 38 *Iran-US C.T.R.*, 77.

<sup>54</sup> *Ibid*, at 87-88.

<sup>55</sup> *Ibid*, at 126.

the early years after the conclusion of the Algiers Declarations was mistaken or interpreted the Declarations wrongly. Iran's change of position, too, was not heeded to despite the fact that the change occurred in the early 1980s and maintained consistently for two decades. Because, the Tribunal was dealing with the interpretation of the treaty and not factual or even legal issues in a particular context.

### ***1.1.h. Principles of Good Faith and Effectiveness***

#### ***1.1.h. (i) Good Faith***

63. These two principles are essential in treaty interpretation or treaty implementation. Treaties are to be performed and interpreted in good faith<sup>56</sup>. Without this element, law of treaties cannot function. A rule somewhat close to the principle of good faith is expressed in Article 27 of VCLT, where it states that a party may not invoke the provisions of its internal law to justify a failure to perform.

64. As it is explained in the text of the Award, after the conclusion of the Algiers Declarations, the United States refused to transfer the Iranian properties unless Iranian parties settled their dues with the holders of such properties. In essence the United States invoked its domestic law on liens. This was despite the fact that Iran had put at the disposal of the Tribunal \$1 billion for such settlements and there was no need for a second guarantee in form of liens. The United States insisted on its interpretation of the term "Iranian properties" and its obligation to transfer them: No transfer unless liens are settled. The conduct was against the duty to implement the treaty in good faith, because the provision of \$1 billion security by Iran was itself a part of the overall deal and was incorporated in the General Declaration in Paragraph 7, few lines above Paragraph 9. It is also not disputed that during this period the United States had no problem with releasing the properties after dues were settled and the holders were paid. Most of such settlements were indeed through Tribunal awards, either contentious or on agreed terms, involving Iranian parties.

65. In 1992 in the Award 529, the Tribunal dismissed the U.S. interpretation and ruled that the precondition was unlawful<sup>57</sup>. This time, the United States instead of releasing the properties, came forward with another theory: Iran must prove its ownership under *lex contractus*.

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<sup>56</sup> Articles 26 and 31 of VCLT.

<sup>57</sup> Award 529, Paragraph 77(d).

Evidently, from this stage, the treaty interpretation took a back-seat and the Case was embroiled into litigation strategy.

66. Yet, as far as the Majority's treatment of the subject is concerned, this distinction between intention to be bound and litigation strategy to avoid implementation is ignored in its entirety. Above that, the Majority bases its decision on a litigation factor which did not even come from the Parties. The change from *lex contractus* to *lex situs* which now forms the basis of the definition of the term "Iranian properties" in Paragraph 9 is a virtually judge-made formula. The United States never ever invoked this concept. It was proposed by one member of the Tribunal and developed in the Award and was crowned as the prime legal concept in this Case. I am wondering here where is the principle of good faith in interpretation which occupies such a prominent role in VCLT, and is the first principle pronounced in Article 31, positioned even before the text and the ordinary meaning.

***1.1.h. (ii) Effectiveness (Defeat of the Purpose of Paragraph 9)***

67. Enough has been written on the importance of this principle in the interpretation of treaties. Whether it is considered as a component of the object and purpose of a treaty or otherwise, in the present Case it could perform a prominent task. As International Law Commission has put it:

"When a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted."<sup>58</sup>

68. In particular, in an instrument like the Algiers Declarations which was to achieve a global goal (release of the assets and the transfer of all Iranian properties from the United States to Iran), the individual provisions must be interpreted in light of such a global goal.<sup>59</sup> Insistence on factors like "delivery" would simply defeat such goal and would strip the treaty of any *effet utile*. This point was explained earlier. If the whole purpose of a provision in a treaty is the transfer of property to a party (the property whose delivery to that party was frustrated by events), any preconditioning of delivery during that period would defeat the purpose of the treaty.

69. Paragraph 67 of the Award says:

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<sup>58</sup> YBILC (1966), vol. II (part two), p. 219.

<sup>59</sup> M. Fitzmaurice, in M.D. Evans (ed.), *International Law*, OUP (2003), p. 190 (referring to Thirlway).

“From this perspective, Iran submits that delivery cannot be considered part of the test for “Iranian properties,” since that would be contrary to the purpose of Paragraph 9. In that respect, Iran argues that requiring delivery to Iran of the properties at issue in the present Cases in order for these properties to be considered “Iranian properties” would defeat the purpose of Paragraph 9 since, if the property had been physically delivered to Iran, the obligation to arrange for its transfer would not apply; this is because Iran would already be in possession of the property, and there would be nothing to transfer.”

70. I believe Iran’s position makes sense. The Award itself recognizes that the items of property claimed by Iran under paragraph 9 of the GD mainly and substantially are subject of contracts of sale and situated in the U.S. For example, in paragraph 126 it is said: “a substantial category of items consists mainly of properties that were the subject of various purchase agreements between Iran and a seller within the jurisdiction of the United States”.<sup>60</sup> In such a situation, insistence on the element of delivery would militate against the principle of “effectiveness” in interpretation of paragraph 9, importance of which for the Tribunal is derived from Article 31 of the VCLT, as emphasized by the Tribunal in its interpretive decision in Case A21.<sup>61</sup> The Tribunal in that Case discussed extensively the duties of the United States in implementing the treaty (Algiers Declarations) in good faith, with the end result that must be the “effectiveness” of the Tribunal instrument (Algiers Declarations).<sup>62</sup> Thus, the interpretation of the term “Iranian properties” by the Majority in this Case and the intervention of the concept of delivery, makes one of the major provisions of the Algiers Declarations ineffective or devoid of any purpose against the object and purpose of the treaty. To me, the Award pays little respect to the principle of effectiveness in the sense that it has not considered the object and purpose of the Algiers Declarations and one of its main provisions, which is so fundamental that goes to the root of the Declarations as a whole.

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<sup>60</sup> See also Para. 130: “As noted, a substantial category of items in the present Cases consists of properties that were the subject of various purchase agreements between Iran and a seller within the jurisdiction of the United States.”

<sup>61</sup> *Islamic Republic of Iran and United States of America*, Decision No. DEC 62-A21-FT (4 May 1987), 14 *Iran-US C.T.R.* 324.

<sup>62</sup> As the Tribunal put it: “On the other hand, the act of entering into a treaty in good faith carries with it an obligation to fulfil the object and purpose of the treaty – in other words, to take steps to ensure its effectiveness ... [I]f it were to be established that recourse to the mechanisms or systems existing in the United States had not resulted in the enforcement of awards of this Tribunal against United States nationals would the question arise as to what further measures, if any, the United States might be required to take in order to ensure the “effectiveness” of the Algiers Declarations.” *Ibid*, Paras.14 and 16.

## ***1.2. Tribunal Precedent in Treaty Interpretation in Other Areas***

### ***1.2.a. Treaty Interpretation by the Tribunal in Cases Involving Domestic Law Issues***

71. In the past 38 years of the Tribunal's existence, the Tribunal has on many occasions been called upon to interpret the specific provisions of the Algiers Declarations over which the Parties were not in agreement. In some instances, issues of domestic law were involved. The Tribunal's practice in such cases has always been to concentrate on its main task. The issues of domestic law were dealt with in proper manner to serve this main task, *i.e.*, the interpretation and implementation of the treaty (the Algiers Declarations). It would be helpful to recall a few of those instances to see how the Tribunal has handled the situation.

72. In Case No. A15 (IV),<sup>63</sup> *e.g.*, the underlying issues were entirely devoted to the U.S. domestic litigations and the rules of civil procedure in Federal and State levels. The issues concerned interpretation and implementation of the General Principle B of the GD. In particular, in the second phase, detailed issues with respect to court activities in domestic level were examined. The aim of such investigation, however, was to test whether the United States had terminated the proceedings in U.S. courts in accordance with General Principle B. The notion of termination (of legal proceedings before U.S. court) was not defined in accordance with U.S. procedural law (as the law of the forum). The U.S. internal court proceedings and relevant procedural rules were not the Tribunal's concern. They were "facts" based on which the Tribunal determined the implementation of the obligations under General Principle B. In the first phase of the proceedings, the Tribunal without attention to the domestic concepts as to how domestic proceedings are terminated, ruled that:

"The Tribunal will examine these facts [concerning the treatment of proceedings in U.S. domestic courts] in the second phase of the proceedings in this Case. If, as a result of such examination, the Tribunal concludes that Iran was reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981 in any litigation in respect of claims described in Article II, paragraph 1, of the Claims Settlement Declaration or in respect of claims filed with the Tribunal until such time as those claims are dismissed by the Tribunal for lack of jurisdiction, then the Tribunal will find that the United States has not complied with its obligations under General

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<sup>63</sup> The Award 590-A15(IV)-FT (1998), 32 *Iran-US C.T.R.*, 92.

Principle B of the General Declaration and under Article I and Article VII, paragraph 2, of the Claims Settlement Declaration. In that event, the United States will be required to compensate Iran for any expenses that Iran was caused to incur as a result of making appearances or filing documents in United States courts after 19 July 1981 in any litigation in respect of claims described here above.<sup>64</sup>

73. It is apparent that the Tribunal adopted its own criteria based on the provisions of the Algiers Declarations for the definition of a terminated or suspended lawsuit in domestic courts, without any attention to the domestic notions on that subject, like “dismissal” or “stay” or other modes of termination or suspension under U.S. State or Federal procedural laws and regulations. The criteria adopted by the Tribunal were based on the understanding from the totality of the evidence before it, including the text of the General Principle B and other provisions of the Algiers Declarations, the Majlis Resolution,<sup>65</sup> and other evidence which pointed to the understanding that Iran should not have been involved in U.S. litigation based on *lex fori* or the U.S. municipal laws in any manner.

74. The Tribunal in the second phase of the same Case,<sup>66</sup> followed the same suit. It developed its own criteria as to what activities in U.S. courts corresponded with the mandate of General Principle B and what did not. Had the Tribunal followed the practice in U.S. courts as to what activity was necessary for a party to litigation and what was not, the result would have been different.

75. In Case A21,<sup>67</sup> the Tribunal dealt with the U.S. domestic enforcement measures. However, those measures were examined in light of the United States’ obligations under the Claims Settlement Declaration<sup>68</sup>. The Tribunal reached the conclusion that the Iranian parties should try to enforce the Tribunal awards within the enforcement mechanism of the United States. While the Tribunal did not and could not take issue with the manner of enforcement measures before U.S. courts, it decided that the United States was obligated to put in place machinery to make the provisions of the Algiers Declarations effective for the enforcement of the Tribunal’s awards. The U.S. domestic enforcement measures (laws) like New York Convention, as

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<sup>64</sup> *Ibid*, para. 101.

<sup>65</sup> *Ibid*, para. 23.

<sup>66</sup> Leading to the Award No. 602-A15(IV)/A24-FT (2 July 2014), not printed.

<sup>67</sup> *Op. cit.* (note 61)

<sup>68</sup> Article IV of the CSD.

adopted in the United States, or Federal Rules on the subject were simply looked at as facts. The question was, whether those mechanisms served the purpose of the Algiers Declarations.<sup>69</sup>

76. Then in the directly related Case of A27,<sup>70</sup> the Tribunal held that the United States had failed to put in place a machinery to enforce the Tribunal's awards. This is despite the fact that the United States courts had applied the 1958 New York Convention, adopted as the U.S. domestic law, and based on the criterion in that Convention had reached the conclusion that the Tribunal's Award was not enforceable. Domestically, perhaps one could see nothing wrong with the decision. But the Tribunal was looking at the domestic law and procedure only through the catalyst of the treaty: whether the domestic law achieved the goals of the treaty.

77. In Case A18<sup>71</sup>, the nationality of the individuals was at issue. The subject of the nationality of individuals is in essence within the exclusive domain of the internal laws of States.<sup>72</sup> The Tribunal, without interfering into that domain (under Iranian and U.S. municipal laws), looked at the subject from an international angle. It concentrated on the question that what quality of the nationality of a person would make him/her eligible to bring a claim before the Tribunal under Article VII of the CSD. The Tribunal examined the internal laws of Iran and the United States on the subject, but it did it only as far as it could assist the Tribunal in its main task, *i.e.*, the meaning of the Iranian or American "national" in Article VII of CSD. What that term meant under Iranian or U.S. laws was not the Tribunal's concern. Like the World Court's decision in *Nottebohm*, the Tribunal neither interfered into the domestic domain on nationality, nor gave the domestic law any undue significance at international level. At the end, the Tribunal furnished its own criteria as to what qualities a person should possess in order to fit within the definition of the term "national" of Iran or the United States under Article VII of the CSD.

78. A similar approach was taken by the Tribunal towards the nationality of corporations. The Algiers Declarations provide that corporations are considered Iranian or American if "natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock."<sup>73</sup> This created a complicated problem for the Tribunal, in particular for large and publicly owned corporations

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<sup>69</sup> 14 *Iran-US C.T.R.* 324, 330.

<sup>70</sup> Award No. 589-A27-FT (1998), 34 *Iran-US C.T.R.*, 312.

<sup>71</sup> Decision No. 32-A18-FT, 5 *Iran-US C.T.R.*, 251.

<sup>72</sup> I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed., p. 36; M. Shaw, *International Law*, 7<sup>th</sup> ed., p. 480; *Nationality Degrees in Tunisia and Morocco*, PCIJ, Series B, No. 4, p. 349.; *Nottebohm*, ICJ Reports (1955), p. 23.

<sup>73</sup> Article VII(1) of the CSD



with millions of shares exchanged every day. Here, too, in the absence of clear terms in international level, the Tribunal developed a criterion to meet the requirements under the Algiers Declarations without resorting to any municipal law.<sup>74</sup>

79. Such is the Tribunal's treatment of the issues in interpretative ("A") Cases. In all these Cases, one observes a clear and consistent pattern. First, the Tribunal is looking into the terms of the Algiers Declarations to understand the intentions behind the terms. That is, the intentions of the Parties to the Algiers Declarations, not any meaning of those terms in private international law or domestic law or any other law. Second, the Tribunal is to make sure that those terms were used by the Parties to have an *effet utile*. The interpretation should not lead to a result where the provisions of the treaty remain idle.

### ***1.2.b. Tribunal Approach in Contractual Cases between Two States***

80. The Tribunal's disinclination to resort to domestic law is not limited to the so called "A" cases. The Tribunal in general has been reluctant to apply the domestic laws of one of the State Parties, either in inter-State contractual disputes (the so called "B" cases) or even in investment cases.

81. The Tribunal had many occasions (if we take the criterion followed by the Award in the present Case) to refer to domestic laws of Iran or the United States. One issue was the interpretation of the term "goods" in Article II (2) of CSD. In Case B36, the issue was a contractual dispute between Iran and the United States over the purchase of certain military and non-military items located in Iran. The question was raised whether "goods" included "immovable property", and further whether certain fixed installations at issue there should have been considered immovable. While the goods were located in Iran, the Tribunal did not see any reason to apply domestic concepts (under Iranian municipal law). It simply held that:

It is the Tribunal's view that immovable property does not fall within the meaning of "goods" as contained in Article II, paragraph 2, of the CSD. Black's Law Dictionary defines "goods," *inter alia*, as "all things ... which are movable at the time of identification to the contract for sale...." (5th ed.) In light of this definition, it is clear

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<sup>74</sup> Flexi van v. Iran, 1 *Iran-US C.T.R.*, p. 455.

that the fixed installations sold under the 1945 Contract cannot be classified as goods and, hence, falls outside the Tribunal's jurisdictional subject matter.<sup>75</sup>

82. In the same case, another issue was the application of the time bar under domestic law. The relevant contract contained an express choice of law clause.<sup>76</sup> Iran argued that the United States filed this Claim in 1982, while the contract was concluded in 1948. Accordingly, Iran relied on the time-bar provisions in the relevant jurisdiction (Washington D.C. where the prescription period was 5 years for such contracts), and argued that the Claim was time-barred. Quoting its earlier award in *Alan Craig and Ministry of Energy of Iran*, the Tribunal ruled:

Municipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim. The Tribunal's position in *Craig* may be the case when the claim is based exclusively on international law. However, such a general rule does not necessarily exclude the application of municipal statutes of limitation to an international claim where certain aspects of the case are properly governed by municipal law.<sup>77</sup>

83. The Tribunal's approach is in conformity with the practice of the international tribunals. The practice of the Permanent Court of International Justice (PCIJ) or International Court of Justice (ICJ) does not lead to any contrary conclusion. Perhaps the most famous case before the World Court on the application of domestic law and issues of choice of law is the *Serbian Loans Case* before PCIJ. It should be observed first that the dispute before the Court was not a dispute under international law. There was no treaty involved and the Case was brought under the principle of diplomatic protection and following a special agreement. Indeed, in view of the fact that the dispute concerned only matters of domestic law, the Court at first struggled as to whether it had jurisdiction. It decided that jurisdiction existed because the dispute was

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<sup>75</sup> Award 574-B36-2 (1996), 32 *Iran-US C.T.R.* 162, para. 38. If we take the present Award's reasoning, the Tribunal in Case B36 should have looked at Iran's Civil Code (Article 11-22) where the rules for movable and immovable properties are laid down which in some respects are unique to Iranian legal system.

<sup>76</sup> The clause provided that: "This Agreement shall be interpreted and enforced in accordance with the laws of the United States of America, and more especially with reference to those in force within the District of Columbia."

<sup>77</sup> *Op. cit.* (footnote 75), Paras 65-66 (referring to Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 382.).

brought before the Court by special agreement.<sup>78</sup> Yet, when deciding the dispute, the Court based its decision on the “actual nature of the obligation”:

The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the practice of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law.<sup>79</sup>

### *1.2.c. Tribunal Practice on the Subject of Property in Investment Cases*

84. Before the present Case, the only opportunity where the Tribunal had to pronounce itself on the issue of property was in the investment cases.<sup>80</sup> The Tribunal has treated quite a number of investment disputes in 1980s and 1990s. The subject matter of such disputes by definition is property and assets located in the host State. In many such cases the Tribunal had to resolve disputes over the ownership of the expropriated properties, while the expropriation itself was treated under international law. As a result, the Tribunal’s precedent in this respect is important for the determination of the issues of property and ownership.

85. As a general rule, the Tribunal did not apply any domestic law or private international law concept in determining ownership in those cases.<sup>81</sup>

86. In *Saghi v. Iran*, a large number of shares of two Companies were at issue. The Claimants claimed that while the shares are not registered in their name, they were the beneficial owners of those shares. Iran argued that the Commercial Code of Iran bars the beneficial ownership as claimed. Under Article 40 of the Commercial Code, transfer of the shares in a company should be reflected in the Company register and signed by the transferor. “Any transfer which takes

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<sup>78</sup> I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed., p. 37.

<sup>79</sup> PCIJ, Series A., no. 20, para. 87. Even if there was a reference to ownership or title in the Algiers Declarations (*arguendo*), still it is not uncommon that the “treaties confer or refer to property or title without referring to national law of the situs or any other national law.” J. Crawford, *Brownlie’s Principles of Public International Law*, 9<sup>th</sup> ed. (2019), p. 519.

<sup>80</sup> In “Expulsion” cases too issues of property were present. Most of such cases were settled. The legal issues in those cases were very similar to investment cases but in a minute scale.

<sup>81</sup> It is to be noted that in some expropriation cases before the Tribunal, unlike a conventional investment case, the source of ownership of the property at issue was Iran, in form of ancestral property inherited from forefathers. In other words, the property was generated and owned within the domestic legal regime. Even in such cases the Tribunal did not apply domestic law to determine ownership. See, e.g., *Ghaffari Case*, discussed below.

place contradictory to the provisions mentioned above shall be considered as null and void as far as the company and third parties are concerned.” The Tribunal did not pay attention to this rule and held that:

“However, the issue here is not the validity *vel non* under Iranian law of beneficial ownership interests *vis-a-vis* the company or third parties. Rather, it is whether the Government of Iran is responsible, under international law, to beneficial owners for "expropriations and other measures affecting property rights ... The Tribunal's awards have recognized that beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right ... The Tribunal concludes that the Claimants are entitled to claim compensation for the deprivation of their beneficial ownership interests in N.P.I. and Novin.”<sup>82</sup>

87. In *Birnbaum v. Iran*,<sup>83</sup> and the related Case of *Ghaffari v. Iran*,<sup>84</sup> the claim was for the Claimants' shares in an Iranian company. A major asset of the company, claimed by the Claimants, was a nine-story office building in a top business location in Tehran. However, the title deed of the building was in the name of three individual shareholders (other than the Claimants), all of Iranian nationality. Iran argued that the property did not belong to the company because under Iranian law the title deed of an immovable property is determinative of the ownership.<sup>85</sup> According to Iran, the building was rented to the company by the three shareholders. Iran also produced evidence that the Iranian owners were taxed on their rental revenue. The Claimants produced correspondence that the building was in fact purchased out of company funds. The Tribunal after assessing all the evidence, put aside the title deed and decided that the building belonged to the company.<sup>86</sup>

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<sup>82</sup> *James Saghi v. Iran*, Award 544-298-2 (22 January 1993), 29 *Iran-US C.T.R.*, 20, 20 at 24.

<sup>83</sup> 29 *Iran-US C.T.R.*, 260.

<sup>84</sup> 31 *Iran-US C.T.R.*, 60.

<sup>85</sup> Under Article 22 of Iran's Law of Registration of Deeds and Lands, the title deed of an immovable property is determinative of ownership and no contrary claim against the deed is admissible. Many jurists and judges in Iran consider this rule as a pre-emptory norm, since derogating from it would bring confusion and chaos in a crucial sector like the ownership of land in the country.

<sup>86</sup> See also, *International Technical Products Corp., et al. and The Islamic Republic of Iran, et al.*, Award No. 196-302-3 (28 Oct. 1985), 9 *Iran-US C.T.R.* 206 (setting aside the legal title of a building under municipal law and finding for the beneficial owner of the building, pp. 230-233); *Foremost Tehran, Inc., et al. and The Islamic Republic of Iran, et al.*, Award No. 220-37/231-1, at 19-21 (11 Apr. 1986), 10 *Iran-US C.T.R.* 228, 241-42 (favouring the beneficial ownership of shares over legal title under municipal law).

88. While one may point to other examples in the practice of the Tribunal, the point is that the Tribunal never applied domestic law concepts like *lex situs* in disputes over the ownership of property in investment disputes. Indeed, had the Tribunal applied domestic legal concepts in those cases, many U.S. investors or persons would have been deprived of recovery. Because, as stated, in many of those cases the local law (*lex situs*) did not recognize ownership of the claimants as alleged.

89. In order to avoid the effects of the domestic applicable law, the Tribunal in such cases resorted to a number of methods. In some cases, it simply applied its own judgment based on evidence (like *Birnbaum* and *Ghaffari* – referred to above). In a number of important cases the Tribunal applied the principle of beneficial ownership (as in *Saghi*, referred to above, and other cases referred to in *Saghi*). This wealth of case law, is dismissed by the Majority in a few lines:

“The Tribunal further notes that beneficial ownership of an item does not constitute sole ownership in the sense of holding title over that item. Therefore, the Tribunal finds that, even if beneficial ownership could be established over an item of property claimed in these Cases, such beneficial ownership would be insufficient to bring that item of property within the scope of Paragraph 9.” (the Award, Para. 133)

90. First, the contrast made here between “beneficial ownership” and “sole ownership” is not clear. Beneficial ownership is a form of ownership recognized by the Tribunal and vigorously pleaded by U.S. parties in private cases. Like any other type of ownership, it could be sole or in part. Thus, the proposition that the “beneficial ownership of an item does not constitute sole ownership” is confusing, if not confused.

91. Second, in view of the Tribunal’s long line of precedent on this subject, there is no explanation why beneficial ownership would be insufficient to bring that item of property within the scope of Paragraph 9. The concept was sufficient to establish ownership and bring a property within the scope of Article II (1) of the CSD. How the same concept becomes “insufficient to bring that item of property within the scope of Paragraph 9” of the GD, is not explained.

92. Third, the beneficial ownership was relied upon in all U.S. measures vis-à-vis Iranian properties during the implementation of the Algiers Declarations. For instance, Treasury

Regulation 535.625 issued in May 1982, required all U.S. nationals to report the Iranian properties. The specific instructions issued by the United States for reporting reads:

“Although reporters are asked to report as to tangible property in which Iran had, or asserted, any interest during the specified time period, in the view of the Treasury Department the existence of an Iranian “interest” in property does not necessarily render the property “Iranian property” for purposes of the Regulations. In other words, *an “interest” of Iran* in property sufficient to trigger the applicability of the blocking provision (section 535.201 of the Regulations) during the period of economic sanctions against Iran *is not, in every case, equivalent to legal or beneficial ownership of the property sufficient to bring it within the scope of the relevant transfer directive* (section 535.215) implementing the provisions of the Algiers Accords. Accordingly, the Treasury Department does not regard statements made on Form TFR-625, in and of themselves, to be determinative of ownership rights to reported property.”<sup>87</sup>

93. It is obvious from this clarification sent out by the United States that, while not all interests of Iran are “sufficient to bring it within the scope of the relevant transfer directive”, beneficial ownership is indeed sufficient to “bring it within the scope of the relevant transfer directive.” This definition expressly associates legal and beneficial ownership and considers the two as one and the same for the purpose of transferring Iranian properties subject to Paragraph 9.<sup>88</sup>

### ***1.3. Interpretation of General Principle A and Paragraph 8***

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<sup>87</sup> Italics supplied. Section 535.215 is the directive to transfer Iranian properties subject to Paragraph 9: “all persons subject to the jurisdiction of the United States in possession or control of properties, as defined in §535.333 of this part, not including funds and securities *owned by Iran* or its agencies, instrumentalities or controlled entities, are licensed, authorized, directed and compelled to transfer such properties held on January 18, 1981 as directed after that day by the Government of Iran.” (italics supplied). §535.333, referred to above, defines the term Iranian properties: “The term properties as used in § 535.215 means all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities, including debts. It does not include bank deposits or funds and securities. It also does not include obligations under standby letters of credit or similar instruments in the nature of performance bonds ...”

<sup>88</sup> As discussed, the evidence in the record points that the United States officials issuing the relevant directives and preparing the relevant reports and briefs concerning Paragraph 9 obligations, were fully informed of the content of U.S. obligations under the Algiers Declarations. The position taken by the Majority that they were “incongruent” (Paras. 119 and 121 of the Award) when categorizing the Iranian properties, does not stand scrutiny.

94. In some of the claims in this Case, Iran has asked for the return of the sums paid to the U.S. parties without receiving the goods, while the property remained in the United States. The claim is obviously in recognition of the fact that there is no prospect of the return of the property. Iran has asked for the return of these sums or the value of the property on three grounds. First, based on the provisions of Paragraph 9 of the GD; second, based on the provisions of Paragraph 8 of the GD; and last, under the provisions of the General Principle A of the GD (GPA). I believe the claims could have been granted under all three provisions.

95. In such Claims, the Majority has treated them as liability and claims for intangible property and dismissed them as such. The Majority views Paragraph 9 as covering only the tangible assets. There is no such limitation in the Paragraph, which provides, “the United States will arrange ... for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.” As stated before, the implementing regulations referred to “interest” and even “debt” as being covered by the definition of the “Iranian properties.”<sup>89</sup> As also stated, the United States considered that the proceeds of the sales of the Iranian properties should be returned to Iran.<sup>90</sup> It is reasonable to consider all Iranian properties within the ambit of Paragraph 9; there is no dichotomy between tangible and intangible properties in that Paragraph.<sup>91</sup> Proceeds of sale or advance payments and similar sums, all are closely linked to the tangible properties. Paragraph 9 is some sort of catch-all provision, lest any property is left untouched; in other words, the only limitation in Paragraph 9 is that the properties should not have been dealt in other parts of the Algiers Declarations.

96. Apart from Paragraph 9, Paragraph 8 of the GD is an independent ground for the recovery of such claims. Paragraph 8 deals with all the financial assets (funds and securities) of Iran not mentioned in Paragraphs 5 and 6, *i.e.*, financial assets not held by the U.S. banks and financial institutions. In a sense, this is a catch-all provision for “financial assets.” The Paragraph obviously deals with financial asset of Iran located in the United States and abroad which

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<sup>89</sup> See, footnote 87 *supra*, referring to Treasury Regulation 535.333.

<sup>90</sup> Treasury Regulations 535.540: “any part of the proceeds that constitutes Iranian property which under §535.215 is to be transferred to Iran shall be so transferred in accordance with that section”. See, also Paragraph 55 of the Award 529.

<sup>91</sup> The Award 529 refers to “tangible properties”, but the reference is not to the exclusion of the intangible properties, especially if the dues are relevant to tangible properties. Moreover, in its first order to the Parties after the issuance of the Partial Award 529 (issued on 30 June 1992, summarizing the findings and setting the plan for further proceedings), the Tribunal did not mention “tangible properties.” Tribunal only focused on Paragraph 77(j) of the *dispositif* and only referred to “individual properties”, with no mention of the “tangible properties.”

should be returned to Iran. Any sum of money belonging to Iran in any form, which was located in the United States or abroad (under U.S. jurisdiction), comes under the coverage of this Paragraph, unless mentioned in Paragraphs 5 and 6 of the GD. This is the plain text of the Paragraph and any adverse inference needs proof, which does not exist.

97. The insertion of this provision in the Algiers Declarations, together with the general commitments under the GPA, highlights the fact that there should be no lacunae and no legal vacuum under the Declarations. The common intention of the Parties was that all Iranian assets of whatever sort had to be returned to Iran. Any other interpretation would mean that the Parties intended for exceptions in the transfer of assets. There is no sign of any hidden exception in the Algiers Declarations. Any exception would need an express language. While the Parties agreed upon certain exceptions to transfer of the Iranian properties (like the *proviso* “subject to the provisions of U.S. Law...” in paragraph 9), there is no such exception for advance payments related to tangible assets

98. The general purpose of the Algiers Declarations is the return of all Iranian assets, with no exception. Iran has made no specific claim for “intangible properties.” The claim is for all Iranian properties. Any attempt to exclude cash amounts and advance payments will run against the object and purpose of the Algiers Declarations. Because it would mean that a part of the Iranian properties could remain in the United States without any justification. The language of Paragraph 8 of the GD provides a solid ground for the return of Iran’s “funds” which are “located in the United States”. Because, as said, this Paragraph has been designed to cover any assets and funds not covered by Paragraphs 5 and 6 of the GD.

99. If a particular property is sold before 1981, the proceeds of the sale belong to Iran. The United States by blocking the transfer of the properties, indeed froze those assets and the assets should have been so maintained till January 1981 when the two States agreed upon their fate. If a holder of such property sold it notwithstanding, the risk is on the United States to compensate Iran. The Majority turns the situation upside down, and conveniently concludes that since on 19 January 1981 there was no tangible property in the United States, no Paragraph 9 obligation arises<sup>92</sup>.

100. The GPA is also a relevant provision in this regard and provides for an independent ground for the return of the Iranian assets. The broad and universal nature of the GPA is not

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<sup>92</sup> See, e.g., Claim “Aseman/Air Governor”, Para. 668 of the Award; and a number of “Kharg” claims explained in Paragraphs 1224-1225 of the Award.



disputed. It is also true that in certain circumstances, the GPA may act as the sole source of rights and obligations<sup>93</sup>. Its role as the context of the Algiers Declarations for interpretive purposes is also not deniable. As a result, the GPA has direct impact on the issues at hand.

101. The main theme of the GPA is the United States' promise to restore Iran's financial position to that which existed prior to 14 November 1979. To achieve this goal, the United States has "commit[ted] itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction." The promise and the commitment are to be achieved through the provisions of Paragraphs 4-9 of the GD. Moreover, under General Principle B of the GD as interpreted by the Tribunal in 1992 in the present Case, Iran should not be put in a position to refer to U.S. courts in order to ensure the mobility and transfer of its assets.<sup>94</sup>

102. The consequences of these arrangements are clear. All Iranian assets (tangible or intangible) must be transferred to Iran. The United States has promised to ensure their mobility and free transfer. At the first instance, the assets should be transferred as set forth in paragraphs 4-9 of the GD. If there were express exceptions or reservations in those paragraphs, obviously such exceptions or reservations would operate as set forth. The same would be true in case there were special procedures for the mobility and the transfer. Otherwise, GPA may step in and act as the sole source of obligation to transfer any Iranian asset to Iran. In other words, all Iranian assets should be transferred to Iran, save for those which are expressly mentioned and excluded in the Algiers Declarations.

103. The Tribunal's case law of the past 38 years shows the same understanding and can be illustrated by the proceedings in the other parts of the present Case (Case A15) which have already been decided. Confronted with the lack of any provision in paragraphs 4-9 of the GD, the Tribunal has resorted to the GPA as the sole source of obligations and the ground for an order to return the Iranian assets.

104. In one part in Case A15 (I: G),<sup>95</sup> the Tribunal faced the question that "whether the United States is obligated to transfer to Iran any balance remaining in Dollar Account No. 1."<sup>96</sup> Iran relied on the GPA. The United States argued that "General Principle A is not ... an

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<sup>93</sup> This will be discussed in detail in the following paragraphs.

<sup>94</sup> See the Award 529, Paragraph 49.

<sup>95</sup> *The Islamic Republic of Iran v. The United States of America*, ITL63-A15-FT (20 Aug. 1986), 12 *Iran-US C.T.R.* 40.

<sup>96</sup> *Ibid*, at 43.

independent source of specific obligations”.<sup>97</sup> The Tribunal disagreed and held that General Principles “constitute an integral part of the commitments made by the two Governments.”<sup>98</sup> Based on the same holding, the Tribunal reached the conclusion that Iran's financial position should be restored.<sup>99</sup>

105. Another important point in the findings of the Tribunal was that the GPA fills any possible gap in the Declarations as to the obligation to transfer all Iranian assets. In other words, the Tribunal did not believe that the Parties left any vacuum in the Algiers Declarations.<sup>100</sup>

106. In another part of this Case, in Case (A15(I:C)),<sup>101</sup> the same approach was taken:

“The United States has not fulfilled its obligation under General Principle A of the General Declaration to restore the financial position of Iran, in so far as possible,

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<sup>97</sup> *Ibid.*, at 45.

<sup>98</sup> *Ibid.*, at 46-47: “This wording [of General Principle A] implies that these General Principles are not simply statements of purpose, as is usually the case in preambles of treaties. They are expressly described by the parties as the legal basis of their undertakings. Accordingly, it would be difficult to admit that they are deprived of any legal effects. This would be inconsistent with the ordinary meaning to be given to the terms of this provision, as prescribed by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, as well as with the principle of effectiveness (*ut res magis valeat quam pereat*), generally accepted as one of the main principles of treaty interpretation. Quite to the contrary, preceding in the General Declaration the commitments of the parties, the General Principles must be understood as embodying broad legal commitments, with the ways of their implementation being detailed in the following parts of the General Declaration. Taken in their ordinary meaning, the terms of General Principle A clearly embody commitments by the United States. They state that ‘the United States will restore the financial position of Iran ...’ and, further, that ‘the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction’. In this context, it is worthwhile to underlie that there is no dispute about the fact that the other paragraphs of the General Declaration do embody real commitments by the two Governments. These commitments indeed are more often than not introduced by the verb “will” as in General Principle A (*see* Paragraphs 2 to 6 and 8 to 14). The Tribunal is therefore unable to accept the contention of the Respondent that General Principle A is no more than a preamble and contains no operative provisions.”

<sup>99</sup> *Ibid.*, at 48: “The second sentence of General Principle A describes, also in general terms, one of the legal consequences ascribed by the parties to the duty to restore the financial position of Iran: namely to ensure the mobility and free transfer of all Iranian assets within the United States jurisdiction. The specific actions to be taken are described in detail in Paragraphs 4 to 9 of the General Declaration. Nothing in this second sentence can, however, be construed as limiting the general commitment to restore the financial position of Iran to the more narrow obligation of ensuring the mobility of the Iranian assets. The bringing about of such a mobility rather appears as a first step in the restoration contemplated by General Principle A.”

<sup>100</sup> “The silence of the Accords on such an issue does not mean that disposition of excess funds in Dollar Account No. 1 should be considered as having been left in a legal *vacuum*, as is suggested by the Respondent, which contends that only a new agreement, arrived at through fresh negotiations, could bring about a legal solution. Before accepting such a conclusion, the Tribunal must determine whether the general provisions of the Accords taken together and interpreted in the context of their framework provide legal guidance.” (*Ibid.*, at 41); and: “It is evident that the financial position of Iran would not be restored “in so far as possible” if Iranian assets previously transferred in escrow pursuant to the General Declaration were not returned to Iran when they cease to be usable for the purpose of guaranteeing the payment of, and of paying, the debts that Iran promised to in Paragraph 2(A) of the undertakings. The United States will not have fully fulfilled its obligations as long as it has not caused the return of those assets.” (*Ibid.*, at 58)

<sup>101</sup> *The Islamic Republic of Iran v. The United States of America*, ITL 78-A15(I:C)-FT (12 Nov. 1990), 25 *Iran-US C.T.R.* 247.

to that which existed prior to 14 November 1979, by maintaining Treasury Regulations that permit United States account parties to establish blocked accounts on their books in respect of standby letters of credit in favor of Iranian banks other than those referred to in subparagraph (b) *infra*.”<sup>102</sup>

107. As stated above, the Tribunal operates through the provisions of Paragraphs 4-9 of the GD. In this regard, if there existed express exceptions in those Paragraphs, obviously the exceptions became operative, under the interpretive maxim: *lex specialis derogat generalibus*. It goes without saying that in order to apply the “*lex specialis*” rule, it is necessary that a specific provision in the Algiers Declarations directly determines a specific subject.<sup>103</sup>

108. Even where the GPA is not directly applied, still the Tribunal has relied on it as the context and object and purpose of the Algiers Declarations. As far as Paragraph 9 of the GD is concerned, in Case B1 (4) and in the present Case (A15 (II: A)), the Tribunal interpreted Paragraph 9 in light of the provisions of the GPA. After finding that there exists an implicit obligation in Paragraph 9 to compensate Iran for the non-transfer of the export-controlled-properties, the Tribunal drew support from the GPA to strengthen its finding.<sup>104</sup>

109. It is argued that by the return of the Iranian financial position under General Principle A of the GD, Iran was left in the same position as it was before, *i.e.*, it was entitled to a claim of money against the U.S. holders, apparently before U.S. courts.<sup>105</sup> The argument on its face is absurd and fallacious. The same argument could be made for any other part of the Algiers Declarations. Indeed, there is no dispute that the two General Principles (A and B) were proposed by Iran at the last moment of the negotiations of the Algiers Declarations and they

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<sup>102</sup> *Ibid*, at 263.

<sup>103</sup> See, *e.g.*, Case A2, 1 *Iran-US C.T.R.*, 101, where it was stated: “It can easily be seen that the parties set up very carefully a list of the claims and counter claims which could be submitted to the arbitral tribunal. As a matter of fact, they knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement. They mentioned only on that list, aside from requests for interpretation and disputes between the Governments, claims which would be made by nationals of one of the two States. Certainly, they admitted the counter claims submitted by Iran or the United States against nationals of the other State, but under restrictive conditions which are detailed in paragraph 1 of Article II of the Claims Settlement Declaration.” (Page 103)

<sup>104</sup> The Award 382-B1(4)-FT (footnote 12 *supra*). In this Award the Tribunal found the main obligation to return the Iranian properties or pay compensation in Paragraph 9, and then relied on General Principle A for further support: “A contrary interpretation of Paragraph 9 would be inconsistent with the object and purpose of the General Declaration, notably as expressed in General Principle A of the Declaration, ... This sentence emphasizes the importance attached by the two Governments (and especially by Iran, as the preparatory work demonstrates) to the restoration of the financial position of Iran, as it existed prior to 14 November 1979.” (para. 67)

<sup>105</sup> The Award, Para. 247.

were proposed to overcome such arguments. As the Tribunal held in this very Case in 1992, the point was that Iran should not have been made to appear before United States U.S. courts to press for its rights. Relying on General Principle B, the Tribunal dismissed any argument that Iran should have been put in a situation to follow its proprietary rights before U.S. courts.<sup>106</sup>

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<sup>106</sup> The Award 529, para. 49: “Another argument arises from General Principle B of the General Declaration ... Although General Principle B refers only to the termination of judicial proceedings and the substitution of arbitration, its purpose would best be effected by also preventing the exercise of liens, as was done by section 1-102(c) of Executive Order No. 12281, because *otherwise the only way for Iran to contest a lien would be to litigate in United States courts.*” (Italics supplied)

## ***II. Conclusions on the Issues of Treaty Interpretation and Iranian Properties***

110. The Award has shied away from its main task. *i.e.*, to apply the decision of the Tribunal in Award 529 or to interpret a treaty under international law. In fact, one does not see any sign of treaty interpretation in the present Award. Instead, a non-relevant element, that is, the General Principles of Private International Law has been used as a tool to interpret a term (the “Iranian properties”) in an international treaty. While the Award tries to show that it is interpreting Paragraph 9, in fact what it looks like is simply paying a lip service to Paragraph 9; in effect, one does not see any role for international law in this Award.

111. The only way for the arguments of the Majority to make sense, apart from ignoring the relevant treaty, is to say that:

a) The United States did not know what it was committing when it signed the treaty.

b) The United States did not know its own law when implementing those commitments.

112. The Majority is doing so in order to make some sense out of its conclusions; the conclusions that on the one hand ignores important principles like due process, and on the other hand misuses principles like *iura novit curia* (both concepts will be discussed separately below). I cannot accept the Majority’s method, whereby constant changes in Respondent’s positions in pursuit of its litigation strategy has been given more value than its contemporaneous understanding and conduct as to its obligations under the Algiers Declarations. It seems to me that the important principle of good faith in interpreting a treaty has not been heeded in the Award.

113. By giving central role to title based on delivery under the law of one State Party to the dispute, the interpretation of Paragraph 9 has led to an absurd result. If the United States understood and intended the “Iranian properties” in terms of title under domestic law, the best place to refer to it was Paragraph 9 of the GD or at least the Executive Order 12281 (two documents of the same date). There is no sign of such an understanding in neither instrument. Nor any such understanding could be seen in the Treasury Regulations or the U.S. position before the Tribunal till 2001. Moreover, there is no sign that Iran would have accepted such a scenario at the time it was signing the Algiers Declarations.

114. The “Iranian properties” in the present Case hold a *sui generis* position. Reference to the private international law rules or the classic sources or the activities of international claims commissions is not helpful. In particular, the Tribunal has a wealth of precedent regarding the interaction between treaty obligations and the domestic law issues, and the question of

ownership of property. The Award ignores the Tribunal's own jurisprudence in favour of remote and irrelevant sources.

115. Important provisions of the GD, that is GPA and Paragraph 8 are not heeded at all. GPA is a significant provision in the Algiers Declarations and has been relied upon by the Tribunal in few important cases before the Tribunal, both directly and as the context, as well as the object and purpose of the Algiers Declarations. Whenever the Tribunal has felt a lacuna in the text of the Declarations as to their main purpose, *i.e.* the mobility and free transfer of all Iranian assets, it has not hesitated to apply GPA directly.

116. The same is true with Paragraph 8 of the GD. This Paragraph is directly applicable to the financial assets of Iran within U.S. jurisdiction. Its purpose is to preclude a situation where any sum that belongs to Iran is left in the United States, whether in form of advance payment, or proceeds of sales of the Iranian properties in the United States. The exclusion of these assets by the Majority is in direct contrast to the provisions of GPA, Paragraph 8, as well as principles of fairness and justice.

## ***Part Two: Municipal Law (Private international Law Analysis)***

### ***I. Treatment of the Private International Law by the Majority***

#### ***I.1. Introduction***

117. The Majority has devoted 70 pages of the Award (37-107) to the “General Issues”, of which in 43 pages (39-82) discusses the concept of the “Iranian properties” under Paragraph 9 of the General Declaration (GD). The premise of the discussion is to explore that concept under the U.S. law, supposedly the *lex situs* as provided by the private international law. As stated in the previous section (Part One), the Parties did not take this subject seriously for the reasons explained before as well as in this Part.

118. The purpose of this Part is to examine the Award’s approach from the view point of private international law in more detail and perhaps with a degree of academic flavor. I believe that it will reveal fundamental shortcomings in treating the issues before the Tribunal. This consideration will show that the Majority’s analysis of the issues under private international law is tackling the challenges before the Tribunal with the same degree of inattentiveness that is exercised for issues under public international law.<sup>107</sup>

119. To me, by entering into the domain of private international law, and through which applying the municipal law of one of the Parties to a bilateral treaty, the Majority has failed fulfilling its main task, *i.e.*, interpretation of a treaty appropriately. I believe that by reference to the so -called “General principles of Private International Law” (GPIL), and applying the U.S. law to the Case in an interpretive issue, the Parties will be taken by surprise. Because they were not made aware of the significance of this pivotal point involving investigation of law and fact, and as a result they did not argue it thoroughly before the Tribunal.

120. As stated in Part One, the subject, this new legal concept, was raised for the first time by a question from the Bench during the Hearings devoted to the General Issues on 13 October 2013. The question expressed the puzzlement in that the Parties in their written submissions with respect to property only referred to the law governing the contract, whereas in the domain

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<sup>107</sup> See my discussions in Part One of this Separate Opinion.

of private international law one might ask whether the property is not governed by the *lex situs* or the *lex rei sitae*. The question pointed to some issues of conflict of laws such as, contract conflict rules, party autonomy, center of gravity, characteristic performance, characterization, and pointed out that property is a subject governed by *lex situs* or *lex rei sitae*. It is notable that the question spoke about either “property” in general or “Iranian property” (in singular), and not the exact term used in the treaty, the “Iranian properties.” However, none of these and other related concepts of the private international law are argued in the Award at all or in detail.

121. The Award in Para. 87, states:

“In determining whether title in an item of property had transferred to Iran, the United States argues that, because public international law does not supply rules for deciding the ownership of property, the Tribunal must engage, as other international courts and tribunals do, in a “*renvoi*” analysis, that is, the Tribunal should have recourse to domestic law in deciding the present Cases. The United States contends that international law contains no substantive rules of property law, and cannot be a source of rights in property, so that it would be the municipal law of the state where the property is located that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests.”

It continues to say, however, “at the Hearing in the present Cases, the United States eventually argued that it is rather the municipal law of the state where the goods are located (*lex rei sitae*) that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests.”<sup>108</sup> The Majority for itself, likewise, concludes that “The Tribunal is unaware of any rules or principles of general public international law that govern the passage of legal title to an item of tangible property.”<sup>109</sup>

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<sup>108</sup> The Award, Para. 149. This account is not the whole truth. As it is mentioned in the same Paragraph, as well as in the Concurring Opinion of President van Houtte, for many years the United States contended that the ownership of Iran in a particular property should be considered under its underlying contract and, “it is only where the contract does not address or resolve the issue of title that the Tribunal will need to resort to the law governing the transaction (*lex contractus*)” (Para. 12). One cannot ignore that from 1982 (the date of the Statement of Defence) till 1992 (the date of the Award 529) the U.S. had not referred to any kind of municipal law at all. Indeed, when the Hearings in the present Case opened, the United States discussed “title” of properties in terms of contract, sale of goods and the applicable law in contract. Then, subsequently, the question was raised from the Bench to the Parties. The question itself made it clear that this was the first time in over 30 years of litigation and exchange of briefs that this legal concept (*lex situs*) was being mentioned in this Case. The United States eventually made an indifferent reply to the question, pointing that it would make no difference under either concept (the *lex contractus* or the *lex situs*). This position of the U.S. is in contrast with what the Award is accounting.

<sup>109</sup> The Award, Paragraph 137.



122. The contents of these statements which have been upheld by the Majority is taken from the source referred to in the Award,<sup>110</sup> where the author's suggestion is in the context of investment treaties and the location of the property in the host state. This is totally different from the term "Iranian properties" (in plural) in Paragraph 9 of the GD. These properties never were within the U.S. Jurisdiction in the ordinary course of investment in that country, nor were they subject of any dispute for the settlement for which the parties conclude an international treaty subject to international law.

123. What the above paragraphs convey, and the mentioned question(s), are the reasons for which I have decided to touch upon the issues of private international law, general principles of private international law and municipal law in the Award, to explain my position which is completely different from what the Majority explained and decided.

### ***1.2. A New Interpretive Case by the Majority (Under the Municipal Law)***

124. The starting point for the Majority is not the application of the concept of the "Iranian properties" under the treaty; instead it makes a determination outside the treaty that "property" and "title under a municipal law" are inseparable concepts. From there, it opens a new case for determination of whether the legal title to a property has passed to Iran, and holds that for this task it has to identify a domestic law based on which the title has transferred. To find a domestic law, it refers to Article V of the Claim Settlement Declaration (CSD) and states that, "[t]his provision instructs the Tribunal to apply a choice-of-law analysis to determine the relevant substantive law.... In this context, the Tribunal has specifically applied 'general principles of private international law in its decisions.'<sup>111</sup> Then it refers to certain cases decided by the Tribunal as precedent, all private cases decided by Chambers of the Tribunal and not treaty cases decided by the Full Tribunal, which I will later discuss in more detail. Further, in Paragraphs 139 and 140 the Majority justifies its findings by referring to the decisions of international commissions or mixed arbitral tribunals "in the early 20<sup>th</sup> century" and international arbitration who have applied general principles of private international law.<sup>112</sup>

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<sup>110</sup> Footnote 69 of the Award, Zachary Douglas (*The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 197 (2003))

<sup>111</sup> Paragraphs 137 and 138.

<sup>112</sup> The Majority mentions as "jurisprudence of the mixed arbitral tribunals in the early 20<sup>th</sup> century; *Liamco; Texaco v. Libya; Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi; Sapphire International Petroleum Ltd. v. National Iranian Oil Co.; British Petroleum (Libya) Ltd. v. Libya.* (Paras.139 and 140). Municipal decisions are also mentioned: "Significantly, appellate courts in Austria, England, France, Italy, and

The Tribunal Concludes:

“A long line of jurisprudence, mirroring that of the Tribunal’s, confirms the application of general principles of private international law in determining whether title to property has been transferred. The Tribunal considers itself in good company in applying such general principles in these Cases in order to define the test of “sole ownership” enunciated in Award No. 529 as the interpretation of the term “Iranian properties” for the purposes of Paragraph 9.”<sup>113</sup>

125. However, such a statement and conclusion are nowhere to be inferred from the Award 529 and cannot be represented as the mandate of the Award 529 to be applied in the present Case; nor, as the record shows, such has been the intention of the Parties, and:

a) It is against the findings of the Award 529. The “sole ownership” enunciated in the Award 529, has been defined by that Award in its *motif* in Paragraph 43 entitled “(i) *Properties as to which Iran was not the sole owner.*” It in fact reiterates the definition of the term employed by the U.S. as “uncontested and non-contingent liabilities and property interests” and more clearly it refers to properties which are not “owned by others or if it [Iran] had only a partial or contingent interest in such property”. This definition is used also in the *dispositif* of the Award 529, in Para. 77 (c) and (d).

b) The Parties themselves understood the definition and no second guessing by the Tribunal was necessary. In the same Paragraph 43 of the Award 529, it is mentioned that “the Tribunal and the Parties agree that Iran was not entitled to possession of properties owned by others or if had only a partial or contingent interest in such property”.<sup>114</sup> The obvious conclusion from the Tribunal’s holding in Award 529, as quoted, is that only partial ownership or partial and contingent interest do not qualify as the “Iranian properties” under Paragraph 9. Thus, *a contrario*, either full ownership or full and non-contingent interest is sufficient. This is in line with the arguments of the Parties before the Tribunal and indeed with the U.S. implementing measures after 1981, as discussed elsewhere in this Separate Opinion.

c) The determination of whether the properties claimed were ‘solely owned by Iran,’ was not an issue of ‘the further proceedings’ of the Award 529 as described in its paragraphs 71 -76

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the United States of America<sup>112</sup> have recognized arbitral awards that were based on the “general principles” of private international law”. (Para.140)

<sup>113</sup> The Award, Paragraph 141.

<sup>114</sup> Even in paragraph 128 of the present Award it refers to the contention of the U.S.: “The United States has submitted that sole ownership requires non-contingent and uncontested title to the property in question.”

(present Award, Para. 37). Precisely, the *dispositif* of the Award 529, at para. 77 (j), provides; “Further proceedings and submissions with respect to Part II: A, including issues related to individual properties and the determination of compensation and interest, will be described and scheduled by separate Order”. It is evident that in this paragraph which is providing the mandate for the present stage of the proceedings, ownership of the property based on the “transfer of title” cannot be an issue, especially because there was not any dispute about it in that phase of the proceeding.

126. Based on the Award 529 Iran had to have sole ownership of a property in order to have it within the concept of “Iranian properties” in Paragraph 9 of the GD. The sole ownership is already described by the Tribunal in Award 529, which only excludes partial or contingent ownership.<sup>115</sup> That was the understanding of both Iran and the United States.<sup>116</sup> But the Award takes another direction and says something else, it says “*Title Is Indicative of Property Being ‘Solely Owned by Iran’*”;<sup>117</sup> or the term “solely owned by Iran,” means whether title has been transferred between the United States contractor and the Iranian entity”.<sup>118</sup>

127. The Majority has based its conclusions on the following premises:

- a- After correlating the holdings of the Award 529 (1992) and the Award 601(2009)<sup>119</sup>, the Majority reaches the conclusion in Paragraph 98 that “[t]he Tribunal has therefore interpreted the term ‘all Iranian properties’ in Paragraph 9 to mean properties that ‘were solely owned by Iran’.”
- b- Then in Paragraph 100, it is stated “[t]he Tribunal considers that it has interpreted the meaning of the term ‘Iranian properties’ in Award No. 529 and is not called upon to reopen its decision on the matter’.”

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<sup>115</sup> See also Judge Brower’s “Concurring and Dissenting Opinion”, in this Case, Para. 22: “The term ‘Iranian properties’ in Paragraph 9 of the GD, interpreted, in the ‘context’ of Executive Order No. 12281’s reference at 1-101 to ‘properties . . . owned by Iran,’ already has been interpreted by this Tribunal in Award No. 529, the Partial Award leading to the instant Award, with *res judicata* effect for this latter Award, as meaning ‘solely owned’ by Iran, *i.e.*, thus excluding ‘partial or contingent’ ownership.”

<sup>116</sup> See, the Award, Paragraph 128.

<sup>117</sup> See the title on page 63 of the Award.

<sup>118</sup> The Award, Paragraph 126.

<sup>119</sup> *Op. cit.* (footnote 12). The Award, Para. 97, quoting Para. 152 of B61 Award: “all that was required in order to trigger the transfer obligation was that the properties be “Iranian,” in the sense that they were *solely owned by Iran*. As long as this was the case, it was simply irrelevant whether the properties had been (fully) paid for or not, or whether Iran might have breached its contracts with the United States private companies.” (Italics supplied by the Award)

- c- And in Paragraph 102, confirms that “[t]he Tribunal has consistently held that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention on the Law of Treaties.”
- d- Finally, in Paragraph 125 the Tribunal draws its conclusion by saying: “[a]t this stage of the proceedings, the Tribunal is charged with applying its decision in Award No. 529. Thus, it will determine whether claimed properties were “solely owned by Iran,” and, therefore, whether they constitute “Iranian properties” within the meaning of Paragraph 9.

128. From all these, in my view, the Award reaches the wrong conclusion in Paragraph 134, that, “[a]ccordingly, in order to apply the decision taken by the Tribunal in Award No. 529 that the term “Iranian properties” refers to properties “solely owned by Iran,” the Tribunal must determine, for goods sold, whether title to the properties claimed had been transferred to Iran as at 19 January 1981.” This conclusion from such premises, could only be termed as a *non-sequitur*, and all the above correct premises are reduced to paying a lip service to Award 529. The record of the negotiation of the treaty and the subsequent conduct of the Parties, as discussed in the previous Part of this separate Opinion, and likewise the Award 529, do not warrant such a conclusion. The question of the “Iranian properties” which fall within the scope of paragraph 9 of the GD was resolved by the Award 529 (*e.g.*, in Paragraphs 43, 44, 55, 59 and 77 (c) and (d)); but legal title of the Iranian property as prescribed by the U.S. law, was not contemplated by that Award, as already stated, because there was no dispute between the Parties.

129. What the previous Awards Nos. 529 and No. 601 conjunctively hold is obvious. All they say is that the “Iranian properties” subject of a sale contract between an Iranian entity and a private seller found in U.S. Jurisdiction, are covered by Paragraph 9, unless it is proved that a piece of property was not solely owned by Iran, in the sense that it was owned by others, or Iran had only partial and contingent interest in that property. Iranian entity’s title under municipal law is not the test, a competing claim on the property by a third person is the point reiterated by both Awards (No. 529 and No. 601). As far as the “Iranian properties” are concerned, the test is, as said before, what the Parties meant by this concept (“Iranian properties”) when they were signing the treaty.<sup>120</sup>

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<sup>120</sup> See my discussions in Part One of this Separate Opinion.

## *II. Theoretical Considerations with Practical Effects*

### *II.1. Algiers Declarations and the Application of a Municipal Law*

130. Before entering into the discussions of issues of the application of a purely domestic law by the Tribunal, the question arises as to whether the legal regime of the Algiers Declarations, as the constituent instruments and the law of the Tribunal, allows the application of the U.S. or any other domestic or national law to the Iranian State properties within the jurisdiction of the United States. To me the text of the Algiers Declarations and the history of their conclusion and implementation, as well as the case law of the Tribunal do not allow for an affirmative answer. To begin with, we need to look at the original deal struck between the Parties which led to the conclusion of the Declarations.

131. The deal between Iran and the United States was to create an equilibrium situation according to which Iran would gain free access to its blocked and frozen properties with the ability to freely transfer them to Iran. As the Tribunal has put in a similar context:

“The relevant governing principles established by the Parties are a recognition of Iran's rights in its assets, along with agreement to resolve disputes by binding arbitration, and the creation of a Security Account consisting of Iranian funds in order to satisfy awards against Iran. In this context, in the Declarations, the interests of Iran, the "owner" of the funds, were set against those of the United States and its national claimants, who had the benefit of the freeze orders and, in some cases, of judicial attachments of Iranian assets. The balance was a careful one, and was premised on maintaining equilibrium between the Parties.”<sup>121</sup>

132. Such a scenario by nature cannot make those properties subject to a domestic legal regime without leading to an absurd result. Yet the position taken by the Majority on the effect of the local law, is exactly where the Parties end up. It is inescapable that when the Parties were making the deal, certain facts were, or ought to have been, known to them. That is to say, the main premise of the negotiations was that certain Iranian properties *within the jurisdiction of the United States* were to be freed and transferred to Iran or placed under Iran's control. During the negotiations, both Parties knew well that the properties subject to the negotiations were

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<sup>121</sup> Decision 12-A1-FT (30 July 1982), 1 *Iran-US C.T.R.*, 189. at 191.

situated in the United States; they knew they were negotiating over the properties which had been subjected to fully fledged blocking orders and sanctions regulations of the United States, and that their movements were completely banned; they knew that the delivery of those properties had been made wholly impossible through respective U.S. blocking orders; they were also well-aware that substantial part of the properties they were negotiating were subject to sale contracts.

133. But, according to the Majority's position in the Award, one has to assume that the Parties were negotiating on properties in abstract, or on properties whose ownership was in dispute between the Parties. Properties whose title had to have been passed on to Iran based on a domestic law applicable to them, and that for almost all of such properties, that law would be U.S. laws and specifically the U.S. Uniform Commercial Code (UCC). More importantly, by this logic of the Majority, the negotiator must have assumed that under the UCC, delivery played a decisive role in the transfer of title and consequently on "the mobility and free transfer of all Iranian assets within [the U.S.] jurisdiction" (GPA), and on the "transfer to Iran of all Iranian properties" (Paragraph 9 of the GD). The sum of those facts or assumptions would portray a haphazard situation leading to absurd results. The history of the Algiers Declarations demonstrates that the Parties sought to remove any existing or potential obstacles created by the U.S. domestic law that might hinder the free movement and transfer of all relevant Iranian assets<sup>122</sup>. The establishment of this Tribunal and the Security Account was the most effective tool to that end. Likewise, the establishment of this Tribunal and the Security Account allowed the Parties to agree to nullify all the U.S. courts attachments against Iranian properties in the United States.<sup>123</sup> As the Tribunal confirmed in the first phase of the present proceedings, the establishment of the Security Account and the provisions of General Principle B of the GD militated against the exercise of any U.S. statutory lien against the Iranian properties.<sup>124</sup> The U.S. courts' attachments and the liens were two of the most conspicuous obstacles under the U.S. law against the free movement and transfer of the Iranian properties.

134. When we look at the GD, we see that the only incidence of the application of domestic law to the transfer of the Iranian properties in Paragraph 9, concerns export-controlled

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<sup>122</sup> For example, the language of preamble and General Principles A and B of the GD are indicative.

<sup>123</sup> The GD, Principle B.

<sup>124</sup> The Award 529, Para. 49.

properties. This point is confirmed in three previous decisions by the Tribunal.<sup>125</sup> Now the Majority of the arbitrators of the Tribunal bring a new judge-made impediment for the transfer obligation of the U.S., that is, if there is non-delivery with respect to a property then there is no transfer obligation by the U.S. (under paragraph 9). There is no justification to introduce yet another exception based on domestic law especially based on the U.S. domestic laws. Such a proposal would run counter to the provisions of the Algiers Declarations, as well as against the holding of the Award 529, which is the law of the Case and has the effect of *res judicata* for the present proceedings.

135. The structure and the nature of the Algiers Declarations and the position of the United States in implementing the Declarations, as well as the precedent of the Tribunal and the United States defensive position in the first ten years of this litigation, all point to one direction: the rules of domestic law, particularly the U.S. domestic law, may not apply to this Case.

## ***II.2. Problems with the Application of Private International Law***

136. In Part One of this Separate Opinion it was noted that the Award without any attempt to interpret the treaty as its main function, concludes that the meaning of the term “Iranian properties” in Paragraph 9 of the GD is clear<sup>126</sup>. From there, the Award concludes that the only way to consider an item of property as “Iranian” is to apply the law of the *situs* of that item to the ownership of property through the application of a choice of law rule leading to the application of one of the GPPIL. It has already been stated that this law without an exception would be the law of the United States, one of the Parties to this inter-States dispute; because, the whole purpose of the Paragraph 9 of the GD was to transfer the Iranian properties which were located within the United States jurisdiction, where they had been blocked and were under severe sanction regulations by the United States.

137. As we saw before, for reasons explained above, the two Parties have not entered into any serious analysis of the conflict of laws or choice of law rules applicable to their relations under the Algiers Declarations; they have not introduced any kind of evidence – not even one expert witness - on the questions of private international law and the *lex situs* as the core finding of the Award. There is no invocation of the *lex situs* by the Parties, and no judicial determination of the applicability of the choice of law rules of the Tribunal, nor the application

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<sup>125</sup> Decisions in Cases B1 (4), A15 (II: A), and B61, see, footnote 12 *supra*.

<sup>126</sup> Paragraph 104 of the Award.

of the GPPIL; there is no attempt to prove the content of the law which is now being applied. Yet, this complicated and un-argued issue has gained a central and pivotal role in determining the rights and obligations of the Parties under an inter-State treaty. For over 30 years the Parties exchanged thousands of pages of briefs and evidence in this Case. Even more pages were filed in a parallel Case (B61) on the same issue. The parties attended and argued many weeks of hearings in the present Case and in Case B61 in 1991, 2005-2007, and 2013-2015 and submitted their views. In all those submissions, written or oral, one does not find any reference to the rules of private international law applicable to the dispute and leading to the present discussions and conclusions in the Award. Neither Party initiated any such discussion.

138. Even if the Tribunal was suited to act as an *ad hoc* commercial arbitral tribunal, or even, generally speaking, if the Tribunal comes across a specific situation and decides that a specific foreign law (foreign law as against forum law – *lex fori*)<sup>127</sup> should be applied, and as a result the Tribunal enters into a choice of law analysis in order to determine the law applicable to the issue in dispute, the analysis needs to be complete. In other words, one would expect that the Tribunal to engage into a fully-fledged choice of law analysis; and like a national forum in such a situation, the Tribunal should proceed step by step and resolve quite a few questions to encompass all issues of private international law concerning both contract and property, and its relation with the treaty (public international law). Consequently, I believe, to invoke and apply the choice of law rules of the Tribunal and to put it as the basis of any decision of the Tribunal; at least, as all national forums do, an overview of the choice of law issues in general is required. Certainly, these general considerations and analysis would be peculiar to the particular status of this Tribunal, which is different from a national court or an ordinary arbitral tribunal constituted for a commercial or investment dispute.

139. In the next sections I will venture a journey into such an analysis with the aim of clarifying whether and truly private international law is applicable, and how its application in this Case could be justified. It is noteworthy that such an analysis is derived from and is in line with the question which first was raised from the Bench, and I have already mentioned it in the beginning of this Part, where it was pointed out that a private international law bystander will find it necessary, but this great task remained in dark if not intact.

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<sup>127</sup> This will be discussed more in the next sections of this Separate Opinion.



140. Without hesitation, I agree with the question of the Bench in the sense that from the perspective of a private international law lawyer, if the issue of domestic law was relevant at all in the present Case, one should be mindful of many issues, a few of which only will be pointed out very briefly as the following:

- 1- Is a choice of law rule applicable at all?
- 2- What is the place of characterization under of private international law in this Case?
- 3- What is the connecting factor and which choice of law rule is applicable?
- 4- What is the status of *renvoi* in the choice of law rules of the Tribunal?
- 5- Whether or not there is proof of the foreign law?
- 6- Where is the place of mandatory rules of the Tribunal law, and public policy of the forum?
- 7- Which Principles are applied, General Principles of Private International Law or General Principles of Law?

Above questions are dealt with in the following sections in turn.

### ***II.2.a. Specifics of the Choice of Law Rule of the Tribunal***

141. Without entering into the question of the characteristics of the forum of an arbitral tribunal, it is obvious that this Tribunal does have a particular forum of its own. The Tribunal is an international institution constituted by two States by virtue of a series of Treaties (Algiers Declarations) and consequently it operates under the rules of public international law. Thus, in essence and overall, the law of the forum is public international law. It goes without saying that the Tribunal has its own unique, comprehensive and self-sufficient legal system (*lex fori*) consisting of procedural, substantive, material, conflict of laws, mandatory and permissive (optional) rules. There are salient provisions in the constituent instruments of the Tribunal which precisely set forth the law of the forum. The main provision in this respect is in Article V of the CSD:

“The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances”

142. Public international law for this Tribunal is not limited to general international law. The Algiers Declarations and to some extent the related instruments (Executive Orders, Treasury Regulations, subsequent positions of the Parties to the treaty) are the particular international law or auxiliary rules applicable to the relations between the Parties. The case-law of the Tribunal and its approach on related issues, are also relevant in shedding light on the disputes including the one at hand now. All these constitute the law of the Tribunal.

143. The content of Article V as indicative of the whole law of the Tribunal, naturally provides for the choice of law rule (conflict of laws rule) of the Tribunal. This rule has been adopted in another instrument of the Tribunal, Tribunal Rules of Procedure (TRP),<sup>128</sup> to replace Article 33 of the UNCITRAL Arbitration Rules (1976) – entitled “Applicable Law”-, which reads:

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

144. There are two noticeable differences between the original Article 33 of UNCITRAL Arbitration Rules and the corresponding Article 33 as amended and adopted by the Tribunal. First, the Tribunal is not bound to apply the law designated by the Parties in any dispute, even involving a commercial contract; a) the application of choice of law rules is vested in the discretion of the Tribunal (“as the Tribunal determines to be applicable”), and b) the contract provisions only can be taken into account. Second, the scope of the “applicable law” provision

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<sup>128</sup> The final version of the TRP were issued on 3 May 1983 by the Tribunal. In accordance with the mandate of Article III (2) of the CSD, the Tribunal adopted the UNCITRAL Arbitration Rules (1976) with certain revisions, amendments and adjustments. Article 33 of the TPR in its Paragraph 1, repeats word by word Article V of the CSD quoted above. Paragraph 2 of this Article in essence is the same as in UNCITRAL Arbitration Rules, 2 *Iran-US C.T.R.*, p. 405.

in the TRP is expanded, for obvious reasons. The Parties intended to introduce the system of law of the Tribunal, and the Tribunal was to adjudicate different categories of disputes including commercial, investment, State responsibility, treaty interpretation or implementation (of the GD and the CSD), and between different juridical and natural persons. Thus, the TRP refer to sources like principles of commercial and international law and changed circumstances.

145. It is also notable that both Rules have essentially a common provision of Paragraph 2, which make the whole “respect for law” mentioned in the Tribunal choice of law rules devoid of effect by the agreement of the Parties. This by itself means a), the law of the Tribunal including its choice of law rules can be set aside if the parties so wish and b), the concept of “respect for law” with respect to the laws other than the law of the Tribunal, will be only respected by the arbitrators to the extent that the Parties bring it (prove it) for the Tribunal.

### ***II.2.b. Choice of law Rules in the Present Case***

146. The question is whether a choice of law rule is applicable in the present Case at all? As stated, there is no question that under Article V of the CSD and Article 33 of the TRP, the Tribunal may apply choice of law rules in a case, if it determines applicable for its process of decision making. There should be specific situations that the Tribunal invokes or applies its choice of law rules and begins the process of finding the applicable law and its application.

147. Under national legal systems, the courts are required to apply their own choice of law rules when there is a foreign element in the case, or “in situations involving a conflict of laws”,<sup>129</sup> or “in any situation involving a choice between the laws of different countries”<sup>130</sup>, or “in international cases”.<sup>131</sup> Moreover, choice of law rules are devices of different national legal systems by or through which the national judges can apply a law other than their own national law or rules of law to private cases or to cases of private-nature (such as the State contracts cases). Without choice of law rules the national judges cannot apply a foreign law, as the proper law, to their cases. Still, there is a specific condition for the application of foreign

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<sup>129</sup> REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Art. 1; REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), Art.1

<sup>130</sup> Rome Convention on the Law Applicable to Contractual Obligations, 1980, Article 1.

<sup>131</sup> The HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY (*Concluded 2 October 1973*), in its preamble states, “[t]he States signatory to the present Convention, desiring to establish common provisions on the law applicable, *in international cases*, to products liability” (Italic supplied).

law by the judges of national courts in some legal systems, that is, pleading and proving (of the foreign law) by the parties.<sup>132</sup>

148. The choice of law rules have found their way into international commercial arbitration for the same purpose, *i.e.* through those rules the arbitrator will find the proper (foreign) law applicable to the commercial (private or private-natured) cases instead of applying a substantive law on his/her own choice. Therefore, existence of a foreign element and a private or private-natured case are the necessary grounds for the application of the choice of law rules. There is no reason to believe anything else was in the mind of the negotiators of the CSD and TRP when they were drafting the phrases “applying such choice of law rules...as the Tribunal determines applicable...” within Article V of the CSD and Article 33 of the TRP. They must have thought where the grounds are present and where the Tribunal determines that a national legal system has to be applied, that should be so by reference to a choice of laws rule, meaning that the Tribunal cannot apply a law other than its own law directly and by its own choice.

149. In the legal system of the Tribunal, it seems that there is a wide discretion for the arbitrators where they consider a choice of law rule is applicable. Nevertheless, they should explain why they have to apply a choice of law rule in the cases concerned. They should treat the case as presented by the parties, like in all judicial forums and based on principles of impartiality of judges and arbitrators, and they should not gather information or evidence on the facts of the case. But certainly, the arbitrators are empowered to appoint experts and to put questions to and interrogate witnesses on their own motion if they are not satisfied with the evidence of the parties, or in case the foreign law has not been proven to the arbitrators’ satisfaction<sup>133</sup>.

150. The Choice of law rule in Article V of the CSD and Article 33 of the TRP should be construed as a device favourable to the parties in the sense of efficient administration of justice. In this way, it is an option for the parties to decide whether or not to utilize and plead it at all. If neither party pleads foreign law, no choice of law issue arises and the Tribunal will straightforward apply its own substantive rules of law (material rules). Choice of law rules of the Tribunal as provided in Article V of CSD and Article 33 of the TRP are of the legal nature of permissive rules which may be applied by arbitrators to the extent that the parties, as mentioned, have pleaded and agreed on it or have not derogated from it. The parties may even

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<sup>132</sup> I will discuss this condition under the heading of Proof of Foreign Law, in the next sections.

<sup>133</sup> Article 27 of the TRP

agree that the arbitrators decide the case without reference to any law, *i.e.* decide *ex aequo et bono*,<sup>134</sup> in which case, no application of a law will be pleaded, and they are not required to apply any law.

151. It could safely be contended that the choice of law rules have been introduced into the law of the Tribunal for the so-called private cases or private-natured cases in the Tribunal, because, as stated, mainly if not only, matters under private international law are concerned with commercial contracts, and also the status or capacity and nationality of private persons. Of course, issues related to a property, specially title to a property *in rem* (as a thing and against *in personam*), and more importantly issues related to a contract of sale of goods, and a foreign element is involved, are matters of private international law; but these, can only arise in private or private-natured cases and in actions *in rem*. In the contractual disputes the law applicable to the contract or contractual obligations of delivery of the goods or property and payments are the core issues to be decided by the law determined by appropriate choice of law rules<sup>135</sup>. In there, usually there is an express or implied choice of governing law which the parties wish to be applied. That is to say, that rule in fact offers an opportunity to the parties to private cases (not to the States parties in an interpretive case) to utilize it if they wish. It is imaginable that the rule has been intended to pave the way to the legitimate expectation of the parties in private cases as to the laws they deemed applicable; if they so wish, the Tribunal has the authority to apply that rule (to the extent they wish).

### ***II.2.c. Characterization***

152. The above generalities come to the mind of a private international law lawyer first; another issue which would follow is the explanation of the question: how should we characterize the subject of the dispute, the question or a factual situation? In fact, any conflict of laws analysis to determine the applicable law, if any, begins with what is normally referred to as ‘characterization’:

“In domestic matters as well as in Private International Law, the characterization of the question (‘classification’, ‘qualification’) is the preliminary process of

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<sup>134</sup> Article 33 (2) of the TRP

<sup>135</sup> See e.g. UNCITRAL Model Law 1985, where in Article 28 (2) provides: “... the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable”.

defining the juridical problem of attributing the question to a certain legal category.”<sup>136</sup>

153. Primarily, in the present Case which is a treaty interpretation dispute as against a private dispute, the first question is whether the characterization is an issue. Nevertheless, even if there is an intention (as the Award shows, though wrongly) to act like an *ad hoc* commercial arbitral tribunal (no treaty provisions involved), discussion of the issue of characterization is an important part of the full conflict of laws analysis.

154. If the Majority contends that the characterization in the present Case is required, as the question from the Bench indicates,<sup>137</sup> by way of analogy with the national courts, in the case of the Tribunal, I believe that the process of characterization should be performed by the Tribunal according to its own law, which is known as the law of the forum (*lex fori*).<sup>138</sup> It is in fact the legal regime that the Parties were contemplating when adhering to the Algiers Declarations (the treaty), to define the legal relations and legal points between the parties. I have already referred to the sources of this law.<sup>139</sup> These sources, prominent among which is public international law, and under it the Algiers Declarations together with their object and purpose and underlying cause and policy of the creation of the Tribunal, and also the legal nature of the parties (sovereign states) to the dispute, all direct the Tribunal first to decide what the dispute is; *e.g.* whether the dispute is over property or any other legal issue is involved; and if the dispute is over the property, what kind of property and what issues concerning property.

155. Considering the above, the process of characterization in the present Case is not performed in its proper manner.<sup>140</sup> It is indeed unclear how and why the Majority contends that the dispute is characterized as a matter of property. Even if one assumes that the ownership of

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<sup>136</sup> Pierre A. Lalive, *Transfer of Chattels in the Conflict of Laws: A Comparative Study*, Oxford (1955), p. 1.

<sup>137</sup> See the “Introduction” to this Part of the Separate Opinion.

<sup>138</sup> J.M. Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning the Inter Vivos Transfer of Property*, Oxford (2005), p. 114. There are other views on this subject. Without trying to enter into the dispute as to whether a court of law should characterize based on its own law (*lex fori*) or any other law, one argument of the proponents of *lex fori* is relevant here. And that is the argument concerning the sovereignty of forum: “the classification is an integral part of the system of private international law of the forum and cannot be surrendered to another law.” (Lalive, *op.cit.*, 15). This is a significant factor in the system of this Tribunal. As an international forum working in the framework of a treaty and dealing with an inter-State dispute, the Tribunal cannot surrender itself to the laws of Iran or the United States or any other legal system for a preliminary question like characterization of the property.

<sup>139</sup> See previous section

<sup>140</sup> This refers to the question which was raised from the Bench at the Hearing (see the “Introduction” to this Part of this Separate Opinion), but nothing is seen in the Award.

a property is at stake, one party (the Respondent) takes the issue of property as something which means the owner should have the title of the property based on the contract of sale of goods, that is dispute over the contractual obligations; and the other party (the Claimant) takes the issue of property as solely owned by the owner based on the treaty definition. Why should the dispute not be characterized as a treaty issue?

156. The history of the conclusion of the Algiers Declarations and the positions of the Parties over the last 30 years points to the fact that the characterization in the sense of private international law in the present Case is not an issue with any significance for the Parties, or the issue has been characterized differently from what the Majority qualifies it. The reason for that could be the understanding of the Parties that the question of ownership cannot be raised at the level of the state-to-state disputes especially over the implementation of the treaty. If the dispute is over the ownership based on the title, at least the Party whose ownership is contested (Iran) should be given the opportunity to prove its ownership (a dispute between a private person, *e.g.*, the seller, who claims title to the property, and Iran). If the delivery was the criterion of the ownership, the question could have been why the delivery was not performed? The private party to the underlying contract or the U.S. Government itself might be the cause of non-delivery. These are the sort of issues that need litigation and proof.

157. In my opinion, if one believes in applying private international law rules in the present Case, the dispute cannot be characterized as a dispute over the “title to the property” (ownership). The title of the property has been an issue in the past practice of the Tribunal in private cases. As explained below, even in such cases the Tribunal has been reluctant to apply municipal law or any conflict of laws rule. The dispute under paragraph 9 of the GD (the treaty), by its nature cannot include the ownership of a property. The dispute should be characterized as a treaty dispute, as to whether on 19 January 1981 specific properties on which Iran raise claims, could be considered “Iranian properties”, for the transfer obligation of the United States under Paragraph 9 of the GD in combination with the Award 529 and, whether it was a disputed property or solely owned by Iran *i.e.*, whether or not there was a third party claiming full or partial ownership of the property, or Iran had partial or contingent interest in that property. This is confirmed by the Tribunal in the Award 529:

“The Tribunal and the parties agree that Iran was not entitled to possession of properties owned by others or if it had only a partial or contingent interest in such property”.<sup>141</sup>

This is a dispute over a fact, and the Tribunal should determine whether there is enough evidence to show that on 19 January 1981 there was such a claim. This is what the Respondent should prove and not the Claimant. The burden is not on the Claimant to prove that its claimed property was not a contested property.

158. The Majority should have paid attention to the fact that if someone else, including the seller, had any claim of any sort, including “title” or “ownership”, against Iran at that time, it could have brought its claim to this Tribunal as a private case (under the General Principle B and the rules of the CSD). If no such claim was brought to this Tribunal, it means that the property concerned, at that time, had been an Iranian property without any dispute. This is I believe, what the Respondent understood at that time and maintained this position for many years.<sup>142</sup>

#### ***II.2.d. Connecting Factor***

159. When the legal nature of the dispute or question or factual situation by the process of characterization has been determined, the next phase in the choice of law field is the specification of the relevant connecting factors in the *lex fori*. A private international law lawyer at this stage is looking for a specified objective factor in the *lex fori* which connect the subject of the dispute with a law which should be applied to the case. In other words, connecting factor is a fact that has already been specified by the law of the forum (*lex fori*) and connect the dispute or question or factual situation to a definite or particular legal system. In fact, the connecting factor leads the judges or arbitrators to apply the correct choice of law rule through which the law applicable to the case is determined. It can be different and also varies in different legal systems and circumstances.<sup>143</sup> In the Tribunal the question is what is (are) the connecting factor(s) for the different subjects of the disputes. This question in the present Case is, after the characterization process and the determination that whether we are dealing with the contract

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<sup>141</sup> The Award 529, Para. 41.

<sup>142</sup> See my discussions in Part One of this Opinion.

<sup>143</sup> Connecting factors, however, in different legal system can be signified by nationality, domicile, residence, habitual residence, *loci delicti*, *loci conclusionis*, the place of drawing, intention of the parties, *rei sitae*. The question which had to be answered by the Award was what the connecting factor is in the Tribunal’s legal system?



issues or the property issues or the treaty issues *etc.*, what is the relevant connecting factor in the law of the Tribunal?

160. Accordingly, next to the characterization and specification of the connecting factor, the determination of the proper law should be attempted by the Tribunal. Depending on characterization of the facts in dispute,<sup>144</sup> if for example, the dispute or legal issue:

a) is relevant to contract based on the connecting factor in the *lex fori* (the law of the Tribunal), then its applicable choice of law rule will be the rule which determine the law applicable to the contract. Choice of law rules relevant to contract (*lex contractus*) in major legal systems, determine that the law which the parties have chosen expressly or impliedly,<sup>145</sup> (intention of the parties is the connecting factor), and where there is no choice, in most legal systems, the law of the country which is more or the most closely connected with the contract (the country of the most closely connection is the connecting factor),<sup>146</sup> to be applied to the dispute.

b), is relevant to a property (*in rem*), again based on the connecting factor in the *lex fori* (the law of the Tribunal), its choice of law rule is the one which determines the law applicable to the property. If, for instance, the dispute is over the ownership right of a property, mainly the choice of law rules relevant to the property specify the law of the place where the property is located, the *lex situs* (the *situs* is the connecting factor), to be applied to the dispute. Even if the end result of the application of the law applicable to a contract issue might be the same result as the application of the law applicable to the same issue under the law applicable to property, the manner of conducting the application of these two different laws is completely different from each other. One would go through the law of contract, and the other will go through the law of property, and the judges would follow each way for its own terms. One example of the difference between the application of the *lex contractus* and the *lex situs* is that

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<sup>144</sup> In the case at hand which the subject matter of the dispute under consideration is characterized (according to the Award) as ownership based on title of the property, its choice of law rules is relevant to property. Here the connecting factor in many legal systems is the location of the property (*rei sitae*).

<sup>145</sup> REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 17 June 2008, on the Law Applicable to Contractual Obligations (Rome I), Article 3: 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

<sup>146</sup> *Ibid*, Articles 4,5 and 6.

under the former, mainly *renvoi* is excepted<sup>147</sup>, whereas under the latter, mainly *renvoi* is applied.<sup>148</sup>

c), is relevant to a treaty, then it is outside the ambit of private international law, and naturally the “connecting factor and choice of law” cannot be the issue. It is very well settled for the lawyers (judges, arbitrators, advocates and legal counsels) that treaty issues are international law issues governed by public international law, and they are divorced from private law in general.

161. That was the task of the Tribunal to determine and explain the relevant connecting factors for the issues. The Majority does not seem to bother itself on this matter. One does not see any serious attempt to engage in such a practice. It is difficult to criticize Majority on this point because there is no argument on this subject.

162. The above consideration becomes more acute when we consider that for many years the Respondent characterized and argued, first, that a treaty question was the issue, no matter of ownership under private law was at issue, and then, after the Award 529 in 1992, it changed its cause to a contractual one with its relevant proper law, (*lex contractus*); and now the Award without explanation proposes that the cause is characterized as property with a different proper law (*lex situs*) with no discussion of connecting factor at all.

### *II.2.e. Renvoi*

163. It is not my intention here to offer an academic discussion of *renvoi*<sup>149</sup> here. I only point to the limited subject of possible application of *renvoi* in the Tribunal. That is, when the arbitrators by reference to the choice of law rules of the Tribunal decide to apply “the law of a country”, in the present Case *lex situs* or *lex rei sitae*, whether they should apply only substantive or material rules of that law, or they should apply choice of law rules of that country.

164. When we look at the private international law rules of different national legal systems, we find that some do provide for *renvoi* and some do not, and there are varying rules with

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<sup>147</sup> *Ibid*, Article 20. “Exclusion of *renvoi*: The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation”. “*renvoi*” will be discussed in the next section.

<sup>148</sup> *Cheshire’s Private International Law* (P.M. North & J.J. Fawcett), 12<sup>th</sup> ed. (1992), London, p. 71.

<sup>149</sup> “*Renvoi*” has been incorporated in para. 87 and in footnote 135 of para.137 of the Award, but that seems not to be the same concept in private international law.

respect to *renvoi*<sup>150</sup> even in contract disputes.<sup>151</sup> Then, a preliminary question is whether in the Tribunal, in applying choice of law rules of the Tribunal, it refers to the choice of law rules of the foreign law in which case *renvoi* will be relevant; and then whether there is single *renvoi* (remission) or double *renvoi* (transmission); Or, it directly refers to the material rules of foreign law where there is no *renvoi*. On the question of applying the choice of law rules of the Tribunal (where applicable), one may suggest that the provision in Article V of the CSD and Article 33 of the TRP do not exclude the conflict rules of the foreign law. It is conceivable that foreign law should be interpreted to include its choice of law rules. It seems reasonable, and coincides with the nature of the Tribunal to suggest that *renvoi* is inherently accepted in the law of the Tribunal in so far as the Tribunal is led to apply its own substantive law (Remission). In other words, if the Tribunal is to engage in a conflict of laws analysis and by that reaches the applicability of a particular domestic law, private international law for the Tribunal would require the entirety of that domestic law including its conflict of laws rules to be considered. This is the normal way of treating *renvoi* in international documents. For instance, as was stated in the field of contractual and non-contractual obligations in the EU Regulations (in the courts of EU Member States), *renvoi* has been excluded explicitly, and when we look at an international instrument closer to the law and purposes of this Tribunal, *i.e.* the ICSID Convention, in its choice of law rule it does contain *renvoi*.<sup>152</sup> That is, in a Convention, where the investment dispute is a dispute between private investor and the host State, and the law of State party is to be applied, *renvoi* has been explicitly accepted.<sup>153</sup>

165. This debate would have required the Award to analyze the specificity of issues of *renvoi*. A reference to one single substantive rule in a specific foreign law (the UCC), the law of one of the State parties, cannot be what the Tribunal law means, since that would suggest that: (1) necessarily the domestic law (all national legal systems of the world) for an international Tribunal not only is a matter of law but also it has priority to the law of the

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<sup>150</sup> There are two doctrines of *renvoi* that some legal systems have accepted one or both of them: the doctrine of single *renvoi*, (*Rückverweisung* in German or Remission in English), and the doctrine of double (total) *renvoi*, (*Weiterverweisung* in German or Transmission in English).

<sup>151</sup> In the REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 17 June 2008, on the Law Applicable to Contractual Obligations (Rome I) *Renvoi* has been excepted (Article 20), but under Iranian Civil Code, it seems, by virtue of Article 973 of this Code, *renvoi* is accepted for the law applicable to contractual obligations under article 968.

<sup>152</sup> Article 42(1) of the International Centre for the Settlement of Investment Disputes (ICSID) Convention. See, also, E. Gaillard, “The Meaning of ‘and’ in Article 42(1) Second Sentence of the Washington Convention: The Role of International Law in ICSID Choice of Law Process”, *ICSID Review*, vol. 18(2), 2003, 375, at 410.

<sup>153</sup> Under Iranian legal system, by virtue of Article 973 of the Civil Code, *renvoi* has been accepted in both contract and property issues.

Tribunal (which obviously is wrong), and (2) the Tribunal will allow itself to sit as the expert on that domestic law without having the necessary knowledge of that law.

166. Contrary to above points, when the Award determines that the applicable law is the *lex situs* and that is the U.S. law, and under this law the UCC, that means the material rules of law of the foreign law, become applicable. The Majority finds itself at ease to refrain from any discussion as to how it concludes that material rules and not the choice of law rules of foreign law are applicable in this Case. It does not say anything about the relevant questions such as what is the role of the U.S. rules of choice of law? In other words, why and how *renvoi* is excluded? What about law of the Tribunal?

167. Moreover, in the present Case, it is not clear that when the Award determines the property in question is governed by U.S. law as the *lex situs*, what are the relevant and applicable material rules of that law? Why is the UCC applicable (one specific municipal law of the United States), and why other laws of the U.S. are not applicable? By now we have heard of a few other U.S. laws. For example the Award suggests that proprietary rights to a movable property are governed by the *lex rei setae*, and refers to two other U.S. sources (referring to Restatement 1<sup>st</sup> and 2<sup>nd</sup>) to say that “Courts in the United States, at least traditionally, take a similar position in applying the *lex rei sitae*”;<sup>154</sup> or, reference is made to the Regulations of the Office of Foreign Assets Control (“OFAC”), or some U.S. Executive Orders and some Treasury Regulations, which were directly relevant to and are relied upon in the Award.<sup>155</sup> What is the role of these municipal laws of the U.S. in respect of property right and title to the property? A question that apparently the Majority find itself competent to answer, but with no explanation.

168. Another point is, whether or not in applying the United States law, the Tribunal should put itself in the position of a U.S. court and consider what a U.S. judge would have ruled if the present issue had been raised before him/her (the theory of foreign court). There is no doubt that had the courts of Iran or the courts of the United States been engaged in a case of choice of law analysis, they would have to support and further the policy of their governments which produced the choice of law rule of the Tribunal or created the Tribunal in general. They would not act to undermine that policy. Then the matter is twofold: interpretation of the law of the United States or Iran (when they are determined to be applicable), and interpretation of the law

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<sup>154</sup> The Award Paragraph 144.

<sup>155</sup> The Award Paragraph 174.

of the Tribunal by having in mind that it should effectively improve the aims of the rules and law of the Tribunal in its application.<sup>156</sup> It should be added that, the law of this Tribunal is in fact the law of two States which certainly has supremacy or overriding status over all other laws of either of the two States.

### ***II.2.f. Proof of Domestic/Foreign Law in the Tribunal***

169. With respect to the “foreign law” which would be determined as a result of the application of a choice of law rule, the arbitrators of the Tribunal have neither the power nor the duty to ascertain and apply the content of that law *ex officio*. It is notable in the present Award that it refers to quite a few national laws, *e.g.* U.S. (federal and state laws, such as laws of New York, Illinois, South Carolina...), Canada, France and Iran. It is the duty of the Parties not only to invoke but also to prove these laws. Principally, the judges are confined to the information regarding the foreign law applicable to the facts of the case provided by the parties. But they may examine or investigate the sources and authorities that the parties have brought before them and then accept or reject the content of the foreign law. They themselves cannot select the law, other than the law of the Tribunal, that they see relevant when neither of the parties has proven it.

170. The Award provides that the *lex situs* which is the law of the United States, is the applicable law for the determination of the Iranian properties in some of the Claims.<sup>157</sup> Thus, some of the questions are: What is the U.S law? What is the evidence of that law? Has the U.S. law been fully presented and proven to the Tribunal? I cannot see the Majority’s explanation to these questions in a convincing manner.

171. As to the proof of the law, the Tribunal needs to analyze what is the evidence of the law it is going to apply. Whether enough evidence of the law was put before the Tribunal by the parties to understand that law:

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<sup>156</sup> The Tribunal on occasion has touched upon this question. In Case No. A21, where, the Tribunal held: “[o]n the other hand, the act of entering into a treaty in good faith carries with it an obligation to fulfil the object and purpose of the treaty – in other words, to take steps to ensure its effectiveness . . . if it were to be established that recourse to the mechanisms or systems existing in the United States had not resulted in the enforcement of awards of this Tribunal against United States nationals would the question arise as to what further measures, if any, the United States might be required to take in order to ensure the ‘effectiveness’ of the Algiers Declarations.” *Islamic Republic of Iran and United States of America*, Decision No. DEC 62-A21-FT (4 May 1987), *reprinted in 14 Iran-US C.T.R.* 324, 330-331, (Paras.14 and 16).

<sup>157</sup> The Award, Paragraph 164.

“The proof of foreign law by evidence has as its aim to lay before the court material from which it will be able to conclude that the content of foreign law is sufficiently clear and precise to allow the court to understand it and then take the final step of applying it to the issue before it for determination.”<sup>158</sup>

172. In some countries like Germany, France, Belgium and the Netherlands, or generally in civil law systems, the judges, *i.e.*, national or government judges, are under the Latin maxim *iura novit curia* (the court knows the law) and must apply the law on the facts which the parties put before the judges under another Latin maxim, *da mihi factum, dabo tibi ius* (give me the facts, I will give you the law).<sup>159</sup> In these systems, the State is deemed to be responsible for the administration of justice. On the other side, many domestic jurisdictions, in particular in common law countries, treat the foreign law as a matter of fact, a notion which is not limited to specific national courts; international tribunals<sup>160</sup>, too, follow the same principle.<sup>161</sup> In a legal system like the Tribunal, especially in cases where two States are the parties, the parties bear the establishment of justice. The arbitrators of the Tribunal are not State judges. While an international tribunal may apply the maxim *iura novit curia* in questions of international law, when it comes to the application of domestic law, it cannot follow the same suit. This law must be presented to the arbitrators of the Tribunal.

173. In the Tribunal, which consists of nine members from different legal cultures, and sometimes with 5 (potentially up to 9) legal backgrounds, the arbitrators are not supposed to know the foreign law; they are custodian of the laws or rules of law mandated by the law of the Tribunal including Article V of the CSD. Morality, good faith, trustworthiness and public

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<sup>158</sup> Adrian Briggs, “The meaning and proof of foreign Law,” 34 LMCLQ, 4 (commenting on the application of Chinese law in case *neilson v. Overseas Project*, in an Australian court). The comment goes on to state that: [this formulation reflects the distinction, somewhat arid, between interpretation of foreign law, which is a matter for the expert witness to testify to, and application of it, which is a matter for the court seized... ]. As the court helpfully made clear, the parties have the choice of what evidence to put in; the trial is in no sense an inquisition (and the proposition that the court knows the law, frequently misunderstood by civilians, has no application to foreign laws). Indeed, one explanation for the absence of evidence from the claimant may have been that those advising her had not been able to find evidence which supported the interpretation of Chinese law for which she [*neilson*] contended. Such is the nature of the adversarial system.”

<sup>159</sup> Andre Fettweis, *da mihi factum, dabo tibi jus*, J.L. 179, 182 (1983).

<sup>160</sup> *Certain German Interests in Polish Upper Silesia* (Germany. v. Poland), 1926, PCIJ, Ser. A, No. 7, at 19; *Payment of Various Serbian Loans Issued in France/Payment in Gold of the Brazilian Federal Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20/21 at 19-20 (judgment no. 14); Ian Brownlie, *Principle of Public International Law*, 6<sup>th</sup> ed. (2003), 38-40.

<sup>161</sup> See, *e.g.*, P.L.G. Breteron (Australian Judge), “Proof of foreign law – problems and initiatives”, ([http://sydney.edu.au/law/events/2011/May/Justice\\_Breteron.pdf](http://sydney.edu.au/law/events/2011/May/Justice_Breteron.pdf))

policy of the forum require the arbitrators to apply the same. Moreover, being arbitrator, means to adjudicate the cases between the parties on the terms they set for themselves.

174. Therefore, I grant that for the Tribunal, the rules of law in general including the rules of any national law other than the Tribunal law are inevitably, by its nature, and whether its members are from civil law or common law background, are “matters of fact”. If the parties believe those rules are the governing law of their case, then they must first invoke and then prove them. These rules must be proved in the same manner as any other facts of the case, in principle and first and foremost by qualified expert opinion or testimony. The arbitrators have no knowledge of the rules of law (as a matter of fact) other than the rules of the Tribunal law (as a matter of law), but which the parties have established. They cannot have the role of independent investigator or fact finder, or producer of new facts for the purpose of adjudicating the case.

175. If the Tribunal is required, through its choice of law rules, to apply the law or the rules of law of another legal system or municipal law, that law or those rules must be pleaded and proved. Characterizing foreign law as a “matter of fact” means that the parties have a choice or option to plead it or not. If they do, then they have a duty to prove that law or rules according to the formal rules of evidence. Otherwise, the Tribunal should apply its own law. It is simply not the issue for the arbitrators to decide whether to apply this law or the other. That means, the arbitrators of the Tribunal cannot take judicial notice of other laws unless they have been fully proved by the parties to the case. This contention is reinforced and explained not only by the judicial culture of the Tribunal, but also by the Parties’ conduct during the past 38 years of the Tribunal business. The flexible and optional treatment of the choice of laws rule and foreign law in the Tribunal in the past indicates that foreign law in the Tribunal has been considered or characterized a “matter of fact” and not a “matter of law”<sup>162</sup>.

176. Accordingly, such an analysis of proof of foreign law by definition cannot be confined to a single article in a domestic jurisdiction (the UCC) as has been done by the Award. The analysis will cover the entire domestic legal system of that jurisdiction, and cannot be relied upon unless by the engagement and the input of the two parties to the dispute. Engagement by the arbitrators of the Tribunal may expose the Award to the perils of lack of principles like impartiality, justice, fairness and due process of law.

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<sup>162</sup> See, e.g, Sofie Geeroms, *Foreign Law in Civil Litigation, a Comparative and Functional Analysis*, Oxford University Press, 2004.

### ***II.2.g. Mandatory Rules of Law and Public Policy of the Forum***

177. In the domain of private international law and in the subject of choice of law rules a very important question is, what is known as restrictions to the applicable law, that is, to what extent the applicable law (foreign law) determined by choice of law rules of the forum, will be applied? The answer to this question by national legal systems is, to the extent that it is not against specific mandatory rules of law and public policy (*ordre public*) of the forum.<sup>163</sup> The same question and answer should apply to the Tribunal. In applying choice of law rules of Article V of the CSD and Article 33 of the TRP, similar to any other forum, the Tribunal should strongly consider its own public policy and its mandatory rules of law. In a case before the Tribunal, this means that if a conflict of laws analysis under its legal system leads it to apply a foreign law, but the application of that law will run against the contents or object and purpose of its own law, the Tribunal should refrain from applying such law.

178. An example of the above view in the jurisprudence of the Tribunal is the Case A27. When the Tribunal issued an award in a private case and Iran took the Award for enforcement to a U.S. court, the court applied the U.S. law (the New York Convention as adopted in the United States) to the question before it. Based on that law and its underlying policy, the court decided that the Award was not enforceable. When the issue came before the Tribunal, the Tribunal put its finger exactly on that point. The Tribunal concluded that the policy behind the treaty applicable to the subject (Algiers Declarations) did not allow another forum to second guess the Tribunal's awards. In other words, had the U.S. court applied the public policy of the Tribunal instead of the public policy behind the U.S. law, the result would have been quite the opposite. Thus, the Tribunal corrected the mistake made by the court and opted that in matters subject to the Algiers Declarations and the rights and obligations of the two States (under the Tribunal law), any other domestic law should look at the policy behind the creation of the Tribunal and not the legislative policy of its own.

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<sup>163</sup> REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Arts.3.3, 3.4, 9, and 21; REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), Arts. 14.2, 14.3, 16, and 26; Rome convention On the Law Applicable to Contractual Obligations, 1980, Art. 16; The HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY (*Concluded 2 October 1973*), Arts. 9 and 10.



179. The above points indicate that the Tribunal was not allowed to apply a foreign law determined by its choice of law rules, in the present Case the UCC, where its application is against mandatory rules of law and public policy (*ordre public*) of the Tribunal.

### ***II.2.h. General Principles of Private International Law or General Principles of Law***

180. Perhaps in order to avoid the complications of a true conflict of law analysis, the Majority resorts to the concept of the General Principles of Private International Law (GPPIL). The Award, in its paragraph 135 through 140,<sup>164</sup> refers to some authorities in the Tribunal's jurisprudence as well as international arbitral tribunals and municipal courts, none of which is relevant to inter-state cases, concluding that it had to apply GPPIL.

Paragraph 142 reads:

“It follows from the foregoing reasoning that the Tribunal must establish, in accordance with the general principles of private international law, the rules of law by which to determine whether the properties claimed were “solely owned by Iran,” in the sense that title to such properties, which were the subject of a sale to an Iranian entity, had been transferred to Iran as at 19 January 1981, and, therefore, whether they fell within the ambit of the term “Iranian properties” triggering the United States’ obligation under Paragraph 9”.

181. It seems, given that in certain cases some other *fora* have resorted to the GPPIL, the Majority has found it suitable to use the concept in the Award. But the Majority does not make it clear how GPPIL in fact became the choice of law rule of the law of the Tribunal (under Article V of the CSD or Article 33 of the TRP) for the present Case. Nevertheless, the way the Majority applies the GPPIL is itself confusing.

182. There is no need to dwell upon these issues more than what I have already discussed in the previous sections. The main point here is whether there is such a GPPIL leading to the conclusions reached in the Award. International *fora* may find that a legal concept is universally accepted and in a given case could be applicable to the relations between the parties.

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<sup>164</sup> These Paragraphs are found under the title: “*Determining whether Legal Title Has Passed to Iran in Accordance with General Principles of Private International Law*” in the Award.

However, in the absence of express agreement, there are two conditions for such a determination. First, the concept must be universal, that is accepted by and practiced in the domestic legal systems of all States or all legal systems.<sup>165</sup> It is hard to apply a principle as generally accepted, when in the law of one of the Parties to the dispute the principle is unknown. Second, the principle (of private law) needs to be pleaded and proven as a general principle by the parties in the international *fora* including the Tribunal.

183. While the Majority resorts to the GPPIL on the one hand, it seems to respect the principle of the “freedom of contract” on the other hand. Undoubtedly, freedom of contract is a General Principles of Law (GPL) as recognized universally. For the apparent acceptance of this principle in the Award by the majority, I may refer to the Claim G-128 (Stadler).<sup>166</sup> The consequence of recognition of this principle in that claim of the present Case is that it allows the parties to decide the moment the title to property passes. From such a conclusion on the transfer of title, one expects that whenever the Parties have specified the moment that title passes through mutual consent, the Majority would respect that consent on the manner of the transfer of title. It should not make any difference whether the agreement or consent of the parties is direct or indirect; implied or express. It is not clear whether the Majority considers this freedom as part of a substantive and material rule, or as a choice of law rule. If it is a material rule then, it can be regarded as GPL in the domain of the transfer of title of a property in general and under a contract (of sale) in particular, because one may say that it has been accepted by many national laws,<sup>167</sup> or it is a universally accepted concept.

184. The obvious conclusion from the respect for the freedom of contract as the GPL in the realm of the transfer of title is that a parallel reasoning based on the GPPIL and *lex situs* should be unusual and incomprehensible. It would be a circular, if not contradictory reasoning, to believe in the freedom of contract and to say that the parties are allowed to “decide upon the moment that title to property passes”<sup>168</sup> relying on the GPL on the one hand, and then to beg the assistance (or rather the permission) of the law of a particular jurisdiction (*e.g. rei sitae*) to conclude whether the parties are allowed to “decide upon the moment that title to property

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<sup>165</sup> An example of such concept may be the institution of the incorporated company which ICJ called it “generally accepted by municipal legal systems.” *Barcelona Traction*, ICJ Reports, 1970, p. 50.

<sup>166</sup> The Award, Paragraph 1023: “Tribunal concludes that it was the intention of MSA and SHL, the parties to the sale, that title to the Power Boiler would pass from MSA to SHL once ...” See, also the general conclusion of the Award in Paragraph 156: “The Tribunal further observes that, in a number of “delivery-based” systems, as well as in “consent-based” systems, the parties are allowed to contractually agree on the moment the title is transferred”, (referring to UCC rule that “unless otherwise explicitly agreed ...”)

<sup>167</sup> Paragraph 156 of the Award.

<sup>168</sup> *Ibid.*

passes”, on the other. If one was to draw on the parties’ ability to agree on the passage of title from *lex situs*, then it would be legitimate to raise the question that what is the role of the GPL in the freedom of contract and the parties’ ability to agree on the manner of the transfer of title? Why bother at all with the GPL or the universal concept of the freedom of contract in this respect? While there might be such inclination in some domestic jurisdictions, mainly in common law systems, and in our case, in some States of the United States, the legal regime applicable to the Algiers Declarations as an international instrument, and also by virtue of Article V of the CSD or Article 33 of the TRP, requires no assistance from national jurisdictions to grant the parties the freedom of contract.

185. It seems that the Majority is relying too much on the distinction between the *in rem* rights and contractual arrangements as far as the transfer of title of the property is concerned. To make the point clear, if, *e.g.*, the *lex situs* did not allow the parties to agree on the passage of title, and the Tribunal was determined to give the parties the freedom of contract in line with the prevailing trend, the Tribunal could only have done that by relying upon GPL, divorced from a particular jurisdiction. If we tie it to the GPPIL and to a particular jurisdiction, the argument becomes circular and untenable. It would be hard to justify such an approach in a domestic litigation, let alone in an international level. Such an eventuality might make sense if two conditions are present: 1) there is no contract between the parties 2) the dispute is over the ownership of a property between two private parties with a foreign element. The GPL on its own and alone could be relied upon as an independent concept to determine a legal point. Thus, if in a case, it is to apply the freedom of contract, there is no need to base it on the law of a particular State through the GPPIL. Put it plainly, one cannot say the parties are *free to contract* (under an international regime such as the GPPIL), provided that *lex situs* allows them.<sup>169</sup>

186. The Tribunal seems to draw upon the law of a particular jurisdiction in order to give the parties the freedom of choice in a contract through GPPIL, which is contradictory to the recognition of the concepts of the GPL to give the same parties the same freedom. In the Tribunal, this point is buttressed by the combined effect of the wide discretion at the disposal of the Tribunal in form of Article V of the CSD and Article 33 of the TRP and by all the problems of applying the domestic law of one contracting State in an international treaty; in particular, in a case like the present one, when one contracting State is responsible for the non-

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<sup>169</sup> At least in the framework of the Algiers Declarations with Article V of the CSD and the involvement of an inter-State arbitration, such an approach seems wrong.

delivery of the items, and the non-delivery of the items is essential to determine the passage of title under the laws of the same Contracting State, the application of GPPIL is redundant.

187. The above are the kind of issues which must be tackled by the highly qualified legal experts on private international law, whom we miss in this Award.

### ***III. Tribunal Precedent and the Municipal Law (Contractual and Commercial Claims)***

188. In Part One of this Separate opinion, the Tribunal's jurisprudence with respect to domestic law in interpretive ("A") and official ("B") cases was examined. In this part, the Tribunal's practice in private cases concerning commercial and contract claims will be examined.

189. The Tribunal has produced, to a large extent, consistent approach with respect to non-application of a choice of laws rule and consequently domestic law.

As Judge Brower has observed in his book on the Tribunal:

"The applicable law formulation in Article V of the Claims Settlement Declaration does not require that the Tribunal apply any specific system of conflict of law rules or any designated substantive law."<sup>170</sup>

"Although [Article V] not as clearly worded as it might have been ... the wording may have been adopted to liberate the Tribunal from tedious conflict of law issues."<sup>171</sup>

John Crook, the former U.S. Agent before the Tribunal, arrives at the same conclusion in even more express terms:

"The Tribunal has typically avoided reference to national systems of law as the source of controlling rules. Instead, it has regularly applied non-national principles derived from the parties' contracts, general principles of law or public international law. Indeed, to avoid applying particular national law rules, the Tribunal has sometimes disregarded the principle of party selection of

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<sup>170</sup> Brower and Brueschke, *The Iran United States Claims Tribunal*, Kluwer (1998), p. 632.

<sup>171</sup> *Ibid*, at 640.

applicable law [referring to CMI] that is fundamental to the ICC, UNCITRAL and French approaches.”<sup>172</sup>

Pierre Bellet, a former member of the Tribunal and a former premier président de la Cour de cassation (chief justice of the French Supreme Court), writes:

“It would have been extremely awkward for these arbitrators to have resorted to classic rules of conflicts of law, forcing the arbitrators to choose between Iranian law and American law. With tensions running high, it was worth avoiding such choices, particularly in cases where the parties alleged political or economic coercion in the execution of certain contracts. In this way claimants and their opponents were practically always in agreement not to invoke any rigid conflicts of law rules”<sup>173</sup>

Another commentator in his research on the Tribunal,<sup>174</sup> has written:

“There are no *travaux préparatoires* with respect to article V of the Claims Settlement Declaration,<sup>175</sup> but American negotiators are believed to have favored choice of law language sufficiently broad to permit the Tribunal to avoid application of Iranian law, as stipulated in many contracts expected to give rise to claims before the Tribunal.”<sup>176</sup>

190. In the *Anaconda Case*,<sup>177</sup> while interpreting Article V of the CSD, the Tribunal said that it is not required to apply any particular national or international legal system. According

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<sup>172</sup> John R. Crook, “Applicable law in international arbitration: the Iran-U.S. Claims Tribunal experience”, 83 AJIL (1989), p. 278. See also Robert B. Owen, U.S. Department of State Legal Adviser during negotiation of the Algiers Declarations, who has stated that the American negotiators decided not to seek a detailed choice of law provision since the U.S. and Iranian negotiating teams did not meet directly, but communicated through Algerian intermediaries, thus making proposals of a lengthy charter for the Tribunal impossible as a practical matter. PROC. AM. SOC'Y INT'L L. 237, 247 (1981).

<sup>173</sup> Pierre Bellet, “Foreword”, 16 L. & POL'Y INT'L Bus. 667, 673.

<sup>174</sup> Hanessian, Grant, “General Principles of Law in the Iran - U.S. Claims Tribunal”, 27 Colum. J. Transnational Law (1988-1989), 309.

<sup>175</sup> Referring to Bellet, *op. cit.*: “We have no record of why the Algiers negotiators decided to expand upon the UNCITRAL Rule.”)

<sup>176</sup> Referring to conversation with Arthur W. Rovine, the first Agent of the U.S. Government before the Tribunal (1981 to 1983).

<sup>177</sup> Award No. ITL 65-167-3 (Dec. 10, 1986), 13 *Iran-US C.T.R.* 199.

to Chamber Three, “Article V creates a novel system of determining the applicable law .... The Tribunal is not required to apply any particular national or international legal system. On the contrary, the Tribunal is vested with extensive freedom.” The Tribunal pointed out:

“This article has a vast scope of application. The Algiers Accords apply to a great number of claims arising out of contracts which may contain very different provisions regarding applicable law. More importantly, Article V creates a novel system of determining applicable law. Contrary to NICIC’s [the Respondent] contentions, the Tribunal finds that according to this system the Tribunal is not required to apply any particular national or international legal system. On the contrary, the Tribunal is vested with extensive freedom in determining the applicable law in each case. This freedom is not a discretionary freedom, however, as the Tribunal is given a rather precise indication as to the factors which should guide its decision. Contract provisions constitute one of these factors, but it is noteworthy that they are not listed first, nor foremost, among the factors enumerated. The Tribunal is of course required to take seriously into consideration the pertinent contractual choice of law rules, but it is not obliged to apply these if it considers it has good reasons not to do so. In the present Case, the TAA [Technical Assistance Agreement] does not contain any choice of law rules. For the reasons developed above, the Tribunal cannot on that ground conclude, as does the Claimant, that the TAA is self-sufficient under all circumstances and that no law shall govern the TAA. No more can the Tribunal conclude, as does the Respondent, that Iranian law is applicable because the place of conclusion and execution of the TAA was Iran. In most contract cases before the Tribunal the contracts actually were concluded and executed in Iran. If the States Parties to the Algiers Accords had intended that Iranian law would apply to all such cases which do not contain a contractual clause to the contrary, the Algiers Accords undoubtedly would have contained specific provisions to that effect. As we have seen, however, Article V created quite a different system.<sup>178</sup>

191. Therefore, the Tribunal refused to apply the law of the contract alone or Iranian law, as being applicable on the basis of the objective connecting factors. Rather, the above analysis led the Tribunal to conclude that “in the present Case, and by virtue of Art. V of the CSD, the Tribunal is required to take into consideration relevant usages of trade as well as relevant

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<sup>178</sup> *Ibid*, 232.

principles of commercial and international law”.<sup>179</sup> In conclusion, the Tribunal noted that contractual limitations of remedies, similar to the provisions of Article 9 of the TAA, are frequently included in international commercial contracts.

192. *In CMI International Inc. v. Ministry of Roads and Transportation and Islamic Republic of Iran*, the Tribunal was very explicit in its application of "general principles of law" instead of governing national law. Chamber One of the Tribunal in CMI case<sup>180</sup> interpreted article V by the following statement:

“The Claimant argued the damage questions in terms of the statutory law of Idaho, which in this case is essentially the Uniform Commercial Code. As noted above, the purchase orders provided that they were governed by the laws of Idaho. The Tribunal does not believe, however, that it is rigidly tied to the law of the contract, at least insofar as the assessment of damages is concerned. It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature ... but also claims involving alleged expropriations or other public acts.... Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws ....”

As observed by one commentator:

The Tribunal gave effect to the shared expectations of the parties and instead of applying the law chosen by the parties, applied "general principles" to the case. It stated: “Although the parties stipulated that Idaho law would apply to their contract, it is unlikely that the parties bargained for, or that MORT was even aware of, Idaho's peculiar law regarding accounting for resale profits in damage calculations.”<sup>181</sup>

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<sup>179</sup> *Ibid*, 233.

<sup>180</sup> *CMI Int'l, Inc. v. Ministry of Road and Transport et al.*, Award No. 99-245-2 (Dec. 27, 1983), 4 Iran-US C.T.R. 263, 267.

<sup>181</sup> See, e.g., Hanessian, Grant, “General Principles of Law” in the Iran - U.S. Claims Tribunal, 27 Colum. J. Transnat'l L., 1988-1989, 309.

193. *In Isaiah v. Bank Mellat*, Chamber Two of the Tribunal invoked Article V of CSD and said that it gives the Tribunal "considerable flexibility" in determining applicable law.

“While it might be argued that Iranian law must be applied to this claim on the ground that the act giving rise to the unjust enrichment took place at least partly in Iran, and that the enrichment occurred there, it might also be argued that this is unnecessarily restrictive in view of the fact that the dishonoured check was drawn on a New York bank and most of the underlying transaction occurred outside of Iran. Article V of the Claims Settlement Declaration leaves the Tribunal with considerable flexibility ... Under this rule, the Tribunal is free to apply general principles of law in a case such as this, although there is no reason to believe the result would be different if only Iranian law were applied”<sup>182</sup>.

194. *In American Bell International Inc. v. the Islamic Republic of Iran*, Judge Mosk in his concurring opinion in this Case said:

“That a limitation of amount of liability clause is valid is supported by whatever law is applicable. Article 10 of the contracts provides that the contracts are subject to the Laws of the Imperial Government of Iran and the United States in every respect, but however the governing law of [the contracts] is the law of Iran. It has been said that “the parties” freedom to choose the law which governs their contract seems to be so widely accepted that it must be said to be a “general principle of law recognized by civilized nations.” O Lando, *Contracts*, Ch., 24, in III International Encyclopedia of comparative Law 33 (1976). It might be that by virtue of Article V of the Claims Settlement Declaration, which gives the Tribunal the power to apply “such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances,” the Tribunal can apply law other than that designated by the parties to the contract. The Tribunal has not provided much guidance as to the applicable law. As a practical matter, in many cases the choice of whether to utilize

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<sup>182</sup> Award No. 35-219-2 (30 March 1983), 2 *Iran-US C.T.R.* 232, 237.



public international law, general principles of law, municipal law (past or present) or some other law will not affect the result.<sup>183</sup>

195. In some commercial cases the Chambers of the Tribunal have applied the domestic law. One example is *Jahangir Mohtadi*.<sup>184</sup> But the Tribunal's decision in this Case has nothing to do with the application of domestic law on ownership. Because in that Case Iran did not contest the ownership and there was no opportunity to go into applicable law. The text of Paragraph 35 is clear enough:

“The Claimant contends that he was the registered owner of the two properties at issue in this Case. In support of this contention he has produced title deeds to both properties, which show that the Velenjak property was registered in his name on 30 November 1967 and that the Shahsavari property was registered in his name on 24 June 1974. The Respondent does not contest Dr. Mohtadi's ownership of the properties in question, so this matter is not in dispute between the Parties. The Tribunal is satisfied that the record confirms that the Claimant was the registered owner of the properties at issue in this Case.”<sup>185</sup>

196. The same is true with the second example, *Moussa Aryeh*.<sup>186</sup> Indeed, this Case is an example of Tribunal avoiding the application of domestic law as the applicable law to ownership. In this Case, Iran did not deny the ownership of Mr. Aryeh. Iran only referred to an Article in Iranian Civil Code which limits continued ownership of dual nationals. The Tribunal dismissed Iran's argument and, thereby, indeed set aside the application of the domestic law on ownership:

“The Claimant contends that he was the registered owner of 17 pieces of real property in Iran ... In support of this contention he has produced title deeds to all the properties at issue, which show that the properties were registered in his name ... The Respondent does not deny that the Claimant was registered as the owner of the properties at issue. In fact, it states: ‘The truth

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<sup>183</sup> Award No. I.T.L.-41-48-3 (11 Jun 1984), Concurring and Dissenting Opinion of R. Mosk on Preliminary Legal Issues, 6 *Iran-US CTR* 95, 97-98 (footnote omitted).

<sup>184</sup> Award 573-271-3, 32 *Iran-US C.T.R.*, 124.

<sup>185</sup> *Ibid.*, 134.

<sup>186</sup> *Moussa Aryeh v. Iran*, Award 583-266-3 (25 Sep. 1997), 33 *Iran-US C.T.R.*, 368, 373.

of the matter is that Claimant's property continues to be registered in his own name in the Property Registers.... He can exercise his property rights with respect to his property.’ At the same time, however, the Respondent argues that under the provisions of Article 989 of the Iranian Civil Code, the Claimant did not have the capacity to own property in Iran from the date of his acquisition of United States nationality (i.e., 21 January 1966). The Tribunal notes that the title deeds of the properties at issue confirm that the Claimant was the registered owner of those properties. It notes further that this fact is not contested by the Respondent. Indeed, the Respondent maintains that the Claimant continues to own the property, despite alleging that the Claimant's title is in some way defective. The Tribunal is disinclined to question the official ownership records and is therefore satisfied that the record confirms that the Claimant was the registered owner of the properties at issue in this Case.”<sup>187</sup>

197. In the third example, *Watkins Johnson*, there are references to law of contract and the applicable law, but the Case is a familiar example of the Tribunal’s effort to avoid applying the laws of the two State Parties.<sup>188</sup> The Tribunal is obviously struggling in this respect:

“The Governing law of this contract is the Iranian Law. This contract is subject to the Laws of the Imperial Government of Iran and United States in every respect if any difference between these two laws the Iranian law will govern. In the circumstances of this Case, the Tribunal is unable to discern a conflict between Iranian and United States law on the issue of mitigation. Under United States law, the Claimant was justified in selling the equipment in mitigation of its damages. See Uniform Commercial Code, 2-703, 2-706. The Tribunal is not convinced that Iranian law is inconsistent with the principle of mitigation or requires a different result in this Case. Iran cites Article 247 of the Civil Code of Iran (FN13) to argue that Watkins-Johnson had no right to sell Iranian

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<sup>187</sup> According to Article 989 of Iran’s Civil Code, an Iranian who adopts another nationality must sell all his landed property.

<sup>188</sup> See, Brower and Brueschke, *op. cit.* (footnote 170), at 634: “What the Tribunal very rarely applied, however, is the domestic law of one of the State Parties.”

property. But title to the equipment had not passed to Iran. The Statement of Work (p. 30) to Contract No. 108 provides: "Delivered equipment and spares become IIAF [Imperial Iranian Air Force] property at time of delivery (F.O.B. destination)." Such delivery did not take place with respect to the equipment at issue here."<sup>189</sup>

198. One may find this proposition in the case law of some other arbitral tribunals. One example is *Sapphire International v. National Iranian Oil Company*<sup>190</sup> decided by an *ad hoc* tribunal in 1967. The dispute in this case concerned the interpretation and performance of the concession agreement concluded between Sapphire, the investor, and the National Iranian Oil Company (NIOC), a State corporation. Sapphire instituted arbitration proceedings claiming a breach of contract by NIOC. There was no agreement on choice of law between the parties, and the arbitrator determined the substantive law on the basis of the contract and, in particular, on the basis of the parties' intentions.<sup>191</sup>

199. The arbitrator noted that he was not bound to apply the conflict of laws rules of the seat of arbitration (Switzerland). He based his reasoning on the view that the common intention of the parties as well as the relevant connecting factors should be considered for determining the applicable substantive law. The arbitrator stated:

"Since the arbitration has its seat in Switzerland, Swiss Private International Law might be applicable, as the *lex fori*, for determining the substantive law applicable to the interpretation and performance of the agreement. However, in the view of some eminent specialists in Private International Law, since the arbitrator has been invested with his powers as a result of the common intention of the parties, he is not bound by the rules of conflict in force at the forum of the arbitration. Contrary to a State judge, who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities."<sup>192</sup>

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<sup>189</sup> Award 429-370-1, 22 *Iran-US C.T.R.*, 218 at 243-244.

<sup>190</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award, 15 March 1963, 35 ILR 136 (1967).

<sup>191</sup> *Ibid*, 170-171.

<sup>192</sup> *Ibid*, 170.

200. It is notable that the contract was both concluded and due to be performed in Iran, and therefore, both the *lex loci contractus* and the *lex loci executionis* pointed to Iranian law as substantive law. But the arbitrator was of the contention that although these connecting factors were important, they are not necessarily decisive. The arbitrator did not apply Iranian law because, *inter alia*, a) he noted that the specific character of the concession, partly public and partly private, evidenced a need to exclude the application of Iranian law, and b) he was of the view that if Iranian law would apply, the investor would not be protected against legislative changes that may alter the character of the contract,<sup>193</sup> c) (negative) intention of the parties inferred from the contract was another factor for the arbitrator. On the last point, the arbitrator, for example, referred to the arbitral clause of the contract and stated:

It is not feasible in the present case to imply an intention by the parties to submit to the substantive law of the forum of the arbitration, a forum which they did not know of at the time they concluded the agreement. However, if no positive implication can be made from the arbitral clause, it is possible to find there a negative intention, namely to reject the exclusive application of Iranian law.<sup>194</sup>

201. The other reason for which the arbitrator did not apply Iranian law exclusively and was of the view that the general principles of law had to be applied, was international arbitral precedents. It was stated as follows:

In fact, in ordinary law, the judge who decides a dispute concerning the interpretation or performance of a contract normally refers to the complementary rules contained in the positive law applicable to the contract. On the other hand, a reference to rules of good faith, together with the absence of any reference to a national system of law, leads the judge to determine, according to the spirit of the agreement, what meaning he can reasonably give to a provision of the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the

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<sup>193</sup> *Ibid*, 171.

<sup>194</sup> *Ibid*, 172.

intention of the parties not to apply the strict rules of a particular system but, rather, to rely upon the rules of law, based upon reason, which are common to civilized nations. These rules are enshrined in Article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them. Their application is particularly justified in the present contract, which was concluded between a State organ and a foreign company, and depends upon public law in certain of its aspects.<sup>195</sup>

202. To sum up, in *Sapphire*, what mattered in identifying the applicable substantive law and provided guidance to the arbitrator was the common intention of the parties and relevant connecting factors. *Sapphire* decision further indicates that a tribunal may refuse to determine the applicable law on some objective connecting factors (e.g. *lex loci contractus* and *lex loci executionis*) since it may not evidence the parties' intentions<sup>196</sup>.

203. In *Rakoil*<sup>197</sup> neither national nor any conflict of laws rules was determined as the applicable law. This case concerned a dispute over the 1973 Concession Agreement and two subsequent oil exploration agreements concluded between the parties. This case was decided under the ICC Arbitration Rules (1978)<sup>198</sup>. The ICC tribunal noted the absence of the parties' agreement on choice of law. None of the Agreements of the parties contained a provision on applicable law.<sup>199</sup> Therefore, in the absence of the parties' agreement on choice of law, based on the ICC rules, the tribunal had to apply appropriate conflict of laws rules by which the applicable substantive law was to be determined. The tribunal pointed out that the parties' agreements were contracts concluded between several companies, organized under various

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<sup>195</sup> *Ibid*, 172-173.

<sup>196</sup> See, e.g, Taida Begic, *Applicable Law in International Investment Disputes*, Eleven International Publishing, 2005, p.

<sup>197</sup> Deutsche Schachtbau-und Tiefbohrergesellschaft mbH (DST) (FR Germ.) et al. v. The Government of the State of Ras Al Khaimah (UAE) and The Ras Al Khaimah Oil Company (Rakoil) (UAE), Final Award in ICC Case No. 3572 of 1982, XIV Y.B.Com. Arb. 111 (1989).

<sup>198</sup> The ICC Rules of Conciliation and Arbitration, 1978 provided the following:

Article 13 (3): The parties shall be free to determine the law to be applied by the arbitrator on the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate. Final Award in ICC Case No. 3572 of 1982, XIV Y.B.Com. Arb. 111 (1989), at p. 117

<sup>199</sup> *Rakoil*, *op. cit.*

laws, and a State agency. The tribunal, found inappropriate to apply the law of the State of nationality of any one of the companies or the law of the State on whose territory one or several of these contracts were entered into.<sup>200</sup> Instead of that, the tribunal referred to the common practice in international arbitration and stated:

The Arbitration Tribunal will refer to what has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will. Reference is made in particular to the leading cases *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* . . . *Texaco Overseas Petroleum Company v. The Government of Libyan Arab Republic* ... The Arbitration Tribunal therefore holds internationally accepted principles of law governing contractual relations to be the proper law applicable to the merits of this case.<sup>201</sup>

Therefore, in this case, without applying any rule of conflict of laws, it was decided that, as in many arbitral awards in the field of oil drilling concessions, the proper law applicable to the merits of the dispute should be internationally accepted principles of law governing contractual relations in the oil industry. This decision is clearly contrary to Art. 13(3) of the ICC Rules (1978) under which the Tribunal had to identify the conflict of laws rules which it deemed appropriate and by which the proper law had to be determined. It was so only and merely in order to apply the implicit will of the parties to the dispute.

204. It might be added that in recent years, the notion of “rules of law” is used in the rules of many arbitral institutions. In this context, and in view of the ever-increasing delocalized aspects of arbitration, it is widely held that the notion of applicable law under a particular system of national law is being replaced by a de-nationalized “rules of law”. As a result, it is believed that the modern concept accepted by international arbitration is that the arbitral tribunal is bound neither by the conflict of laws rules at the place of arbitration nor by any other

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<sup>200</sup> *Ibid*, 117.

<sup>201</sup> *Ibid*, Footnote omitted.

conflict of laws rules.<sup>202</sup> The modern approach towards determining the applicable substantive law in the absence of an agreement by the parties indicates that a tribunal may select the rules of law rather than having to select a particular national legal system.<sup>203</sup> Reference to the rules of law is seen as the detachment from systems of national law as the proper law. As a matter of fact, on occasions in commercial arbitrations, arbitral tribunals without reference to any choice of laws rule determined that a so-called *lex mercatoria* governed the dispute exclusively.<sup>204</sup>

#### ***IV. Conclusions***

205. Case A15 (II: A), being a treaty interpretation Case, should be treated as such and should be interpreted under the rules of international law. The Award does the opposite. The Award takes it for granted that it knows the meaning of the disputed term, “Iranian properties”, in Paragraph 9, and then applies rules of private international law to justify the application of municipal law of the U.S. to define that treaty term. The approach leads to confusion and anomaly.

206. The United States on 14 November 1979 had a good idea of what Iranian assets and properties meant and it successfully froze “all Iranian properties”. Out of billions of pieces of property under U.S. jurisdiction, Iranian properties constituted a minute fraction. The fact that during 15 months of freeze period, apparently, no U.S., or, in general, non-Iranian person complained of any wrongfully frozen property demonstrates that only “Iranian properties”, and no other property, was frozen. The history of the blocking Iranian properties demonstrates that the 14 November 1979 freeze order was not a fishing-expedition to be corrected later. There is no report of any complaint by third parties seeking to unfreeze their properties. Specific properties, only Iranian, were blocked and the Parties have negotiated to release and transfer

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<sup>202</sup> Delaume, G. R., *Law and Practice of Transnational Contracts*, Ch. IV, Booklet 1, Release 88-1, Oceana (1988) at p. 321; On the background of choice of law process in ICC arbitration see Craig, W. L./Park, W. W./ Paulsson, J., *International Chamber of Commerce Arbitration*, 3rd ed., Oceana (2000) at pp. 320-323; Rubino-Sammartano, M., *International Arbitration: Law and Practice*, KLI (2001) at pp. 426-438.

<sup>203</sup> Maniruzzaman, A., “Choice of Law in International Contracts: Some Fundamental Conflict of Laws Issues”, 16(4) JIA 141 (1999); See also the arbitration rules of the LCIA.

<sup>204</sup> Craig, W. L., “International Arbitration and National Restraints in ICC Arbitration”, 1 *Arbitration International* 49 (1985) at p. 67.

those specific properties.<sup>205</sup> In this situation, domestic law and domestic courts may find no place in the Parties' deal.

207. Any reliance on the U.S. law on the question of ownership in this Case would create a vicious circle and would lead to absurd situations. It was U.S. law which prohibited the delivery of the goods to Iran during the freeze period; it was U.S. law which blocked Iranian financial assets thereby prohibiting Iran to meet its payment obligations; it was U.S. law which again prohibited the delivery after 19 January 1981 through "unlawful" Treasury Regulations. Now, if the United States based on the UCC argues that there is no title because there was no delivery and thus no obligation under Paragraph 9, the argument will obviously be untenable and will lead to a vicious circle. To allow a party to a treaty to rely on its own law to avoid international commitments is against all tenets of the law of international responsibility.

208. Finally, there is an issue of judicial fairness as well as equity *infra legem* here. As shown above, the Tribunal has, in dozens of cases, awarded against Iran by disregarding *lex situs*. Had the Tribunal shown the kind of restraint and limitations applied now by the Majority, American claims worth hundreds of millions of dollars would have been dismissed, including at least one claim by the government of the United States.<sup>206</sup> The Parties to the Algiers Declarations, Iran and the U.S., have rarely objected to the methodology. One may argue that the legal regime of the Algiers Declarations and its unique law, as well as the involvement of States, required such an approach. Now that Iran is the Claimant in a Case before the Tribunal, setting aside 38 years of precedent and reversing the approach is unfair.

209. It is beyond dispute that the fundamental changes or modifications of the rules on conflict of laws in Article V of the CSD as against Article 33 of UNCITRAL Arbitration Rules (1976), shows a conscious decision by the Parties. Given the nature of the Tribunal and the cases before it, it is simply impossible to apply any particular conflict of law rule to disputes before the Tribunal, except in rare cases that might be appropriate, *e.g.* by pleading of the parties and in private cases. In any event, the application of domestic substantive (material) or conflict of law rules to the treaty-based State-to-State disputes is not conceivable and the Tribunal has never tried it; it does not seem also it has been the intention of the Parties to the Algiers Declarations.

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<sup>205</sup> See, *e.g.*, the Statement of Warren Christopher (head of the U.S. negotiating team) before U.S. Congress (Feb.-March 1981): "The only funds or properties which are required to be paid over to Iran are those funds and properties which were frozen by the President's order of Nov. 14, 1979." (footnote 36 *supra*).

<sup>206</sup> Case B36 referred to above, resulting at an award of more than \$30 million in favour of the United States, paid out of the Security Account immediately.



210. The analysis under private international law suffers from other sorts of defects. One does not see in the Award, any real analysis of conflict of laws or principles and issues of private international law. The approach is very simplistic. *Lex situs* is assumed to be governing and then one article in the UCC decides many Claims in this Case. In some instances (like Claims G-111 and G-128),<sup>207</sup> it is not precisely clear whether the Award is applying the law of property or the law of contract. The reason for flaws and confusions is that the Parties have not discussed these points in detail. Looking at the Tribunal's case-law in this respect, it seems that the Tribunal has been more inclined to look at the issue as a matter of evidence rather than a strict application of the applicable law. This is not limited to expropriation and State to State cases. In private cases, too, the Tribunal has resorted to general concepts without entering into an applicable law analysis in order to determine the entitlement of a party to certain property. Resort to concepts like beneficial ownership and *quantum meruit* and unjust enrichment demonstrates the Tribunal's struggle to attribute property to its real owner.

211. There are clear instances in the precedent of the Tribunal that have secured recovery (for the U.S. parties) where the application of the strict rules of conflict of law or domestic law would have deprived the claimants from recovery. For example: in *Isaiah v. Bank Mellat*,<sup>208</sup> the application of the normal principles of banking law, including mandatory Iranian banking regulations, would have deprived the Claimant not only from his property but could even deprive the Tribunal of jurisdiction. Yet, the Tribunal applied a combination of beneficial ownership and unjust enrichment concepts in order to compensate the Claimant in a banking dispute. We saw that in *Saghi v. Iran*, the Tribunal set aside the application of the mandatory Iranian law in favour of beneficial ownership and expressly ruled that the terms of the Algiers Declarations required such a departure. Setting aside the nominal owner and giving effect to the real or beneficial owner has been the routine practice of the Tribunal in its awards. *Saghi* Case lists no less than eight Tribunal decisions to that effect.<sup>209</sup> Cases like *Ghaffari* and *Birnbaum* were also mentioned, where the Tribunal in calculating which properties should be included among the expropriated company's assets, set aside the title deed and ruled that the building belonged to the company because it was paid out of company resources.<sup>210</sup>

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<sup>207</sup> These claims will be discussed in Part Four of this Separate Opinion.

<sup>208</sup> Award No. 35-219-2 (30 March 1983), 2 *Iran-US C.T.R.* 232.

<sup>209</sup> *James Saghi v. Iran*, Award 544-298-2 (22 January 1993), 29 *Iran-US C.T.R.*, 20, Paras. 18-23.

<sup>210</sup> *Fereydoon Ghaffari v. Iran*, Award 565-968-2 (7 July 1995), 31 *Iran-US C.T.R.*, 60. *Quantum meruit* was the basis of awarding for the claimants in cases like *Ultrasystems (Ultrasystems Inc. v. Iran et al.)*, 2 *Iran-US*

212. Moreover, the Tribunal has already ruled in B61 Partial Award<sup>211</sup> that issues between the holders and Iran which might affect the legal situation of a property (like partial payment or other contractual issues) has no bearing on the United States obligation to return Iranian properties under Paragraph 9.<sup>212</sup> The only explanation of this holding of the Tribunal is that domestic law has no bearing on the obligations under Paragraph 9.

213. Choice of law rules in Article V of the CSD and the Article 33 of the TRP cannot be determined applicable in the so-called A cases where the dispute concerns the interpretation of the Algiers Declarations, neither can they be determined applicable where it leads to the application of the law of one of the State Parties to the dispute where the dispute is between two States, and thus absolve that Party from a responsibility under Algiers Declarations. This is reinforced by the principle of reasonable and good faith interpretation (Article 31 VCLT) by which it cannot be assumed that the Parties to the Algiers Declarations intended any rule in the Declarations to be used against the other and/or make one of them immune to the responsibility, *i.e.* leading to an absurd result.

214. The above explanations in fact reveal the task before the Tribunal and the fact that without the views of the experts on private international law, the U.S. laws and its conflict of laws rules, it is incautious to engage in the question of choice of law rules of the Tribunal at all. If the choice of law rules are to be applied, the Tribunal should explain and ascertain all issues of private international law, some of which were enumerated and pointed out in this Part of my Separate Opinion, relevant to the Case. In other words, at least a U.S. law expert, appointed by the Tribunal, having an eye on the Tribunal's legal system, should have informed the Tribunal of the relevance and position of the U.S. laws on the subject with due regard to the Tribunal law.

215. The present Award lacks such considerations and I cannot be contented with the reasoning of the Award on the subject of the application of private international law, general principles of private international law and domestic laws.

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*C.T.R.*, 100, 111), and *Morison Knudson (Morison-Knudson Pacific Ltd., v. Iran et al., 7 Iran-US C.T.R., 54, 76).*

<sup>211</sup> *Op. cit.*, footnote 12.

<sup>212</sup> *Id.*, Para. 152.

### ***Part Three: Due Process Considerations***

#### ***I. No Effective Argument by the Parties of the Controlling Legal Theory of the Award***

216. The central theory behind the Award's reasoning over the determination or interpretation of the "Iranian properties" under Paragraph 9 is the concept of "*lex situs*". The Award obviously enters into this analysis from the view point of the "law of property" and not the "law of contract." This approach and the concept of *lex situs* were initiated and mainly developed by the Tribunal and not by the Parties<sup>213</sup>.

217. From 1982 (when this Case was filed by Iran) until 2001, domestic law did not play any material role in the pleadings of the Parties. Iran's position consistently was that the obligation to transfer under Paragraph 9 covered all the properties that were purchased by Iran and blocked by the United State in 1979. Until 1992, the United States concentrated on its position that there was no obligation to transfer until Iran had paid all its debts and dues to the holders of the properties. The corollary of this position obviously was that had Iran paid its dues to the holders, then the United States' obligation to transfer under Paragraph 9 of the GD would have been triggered. All the implementation measures by the United States and all its pleadings before the Tribunal during that period served that interpretation. Where Iran had paid the full price for the goods, the United States categorized the goods as "Iranian-owned" under "Paragraph 9 of the Algiers Declarations". In other words, the central premise for the United States in defining its own obligations under the Algiers Declarations was Paragraph 9 of the GD, and not any title or ownership concept under any domestic law.

218. In 1992, the Tribunal in Award 529, held that since Iran had deposited sufficient funds with the Tribunal and that any dues by Iran were guaranteed to be paid out of that fund, the United States breached the treaty by authorizing its subjects not to transfer Iranian properties until their dues were paid.<sup>214</sup>

219. It seems that from that point, the Respondent gradually moved towards the definition of the "Iranian properties" under domestic law concepts. It was only in 2001 that the

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<sup>213</sup> See Part Two of this Separate Opinion, "Introduction". See also Concurring Opinion of Hans van Houtte, Para. 12; it is notable that contrary to the assertion of President van Houtte in this paragraph, where he says, from the Hearing when the question from the Bench raised "the Parties' argumentation focused on the *lex situs*", one cannot see serious argumentation on the part of either Party, especially on the side of the Claimant.

<sup>214</sup> Award 529, paras. 49 and 77(d).

Respondent introduced a fully-fledged theory based on its own domestic law. However, up until the hearings of this Case in 2013, the United States' theory was a contractual one. The law of property did not play any role in the United States' litigation strategy. As a result, the concept of *lex situs* not even once was mentioned by the United States between 1982 and 2013. 220. The position remained so till October 2013 towards the end of the Hearings of this Case allocated to the General Issues. The General Issues phase included the legal arguments over the meaning of the "Iranian properties" in Paragraph 9. The United States continued its contractual-based arguments until the end of its round during the hearings. On the third day of the hearings, (after full presentation by both Parties), a question was raised from the Bench recognizing that the pleadings of the Parties up until that moment only concerned the law of contract and did not refer to the concept of *lex situs*.<sup>215</sup>

221. While thereafter the Parties had occasional references to the subject during later hearings allocated to individual items, the significance of the concept was never explained to the Parties by the Bench. The Parties were never informed that the concept would gain a make-or-break status in the final award. In particular, the Claimant was never made understand the significance or relevance of this concept. As it was explained in Part Two above, it was neither pleaded nor proved by the Respondent, nor was ever dealt with by the Claimant in that way.

222. The situation, as explained, should have serious due process implications. The fact that the Parties had an opportunity to argue the issue in later hearings allocated to other issues (individual claims) will not change the implications. The subject was not only new and posed by the Bench after 30 years of litigation, it is also very technical and in need of legal opinion of highly qualified experts.<sup>216</sup> There was no such opportunity. Because as stated, the Tribunal never made even a hint that the concept could gain a central and make-or-break status. It will not count as an exaggeration if one says that it is an unexpected judge-made concept. The Award analyses questions of private international law with all its defects,<sup>217</sup> compares the laws of different nations, refers to the case-law of international claims commissions,<sup>218</sup> and comes to the conclusions on those subjects, all on its own. None of the arguments in this part of the Award is made by the Parties.

223. True, there is no authority to oversee the outcome of the Tribunal's activities; but this should make the Tribunal feel even more responsible and sensitive to due process issues. The

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<sup>215</sup> See Part Two of this Separate Opinion, "Introduction".

<sup>216</sup> See Part Two of this Separate Opinion.

<sup>217</sup> *Ibid.*

<sup>218</sup> Paragraphs 125-141 of the Award, particularly para. 139 and footnotes 141-152.

determinations of the Tribunal are final in its most strict form. There is no annulment or review committee, nor recourse to domestic courts or any other authority whatsoever. This situation puts a heavy burden on the Tribunal to be extremely cautious on the Parties' procedural rights, both professionally and ethically.

224. To sum up, the Award, as it stands, suffers from a serious due process defect. Not only the Parties are ambushed by the Tribunal, significant points of domestic law in the highly controversial and sophisticated field of private international law are being decided without a single expert assistance.

## *II. Jura Novit Curia*

225. The consequence of the above point is that the Majority has apparently felt that it knows the law and is in no need of expert opinion on the issue of municipal law. This is a controversial subject in international arbitration. Should an arbitral Tribunal apply law on its own, or it should follow the pleadings and expert opinions presented by the Parties?<sup>219</sup> The controversy in the present Case is, however, academic. Because as far as this Case is concerned, if one was to apply the concept, what the Tribunal may claim knowledge and command is international law and not the domestic law of a certain State. As Judge Anzilotti has put it:

“The Court is reputed to know international law but it is not reputed to know the domestic law of different countries.”<sup>220</sup>

225. The Tribunal, in Award No. 601,<sup>221</sup> taking a note from the principle *jura novit curia* states that in issues of interpretation, it, “as a judicial forum, is presumed to know the law”.<sup>222</sup> From its citations of the judgments of the Permanent Court of International Justice and the International Court of Justice (ICJ) in support of that statement, it becomes obvious that the Tribunal meant that its arbitrators should know the law of the Tribunal including the provisions of its constituent instruments and rules of International law only. The Tribunal also referred to the ICJ judgment in *Fisheries Jurisdiction (United Kingdom v. Iceland)*, where the Court precisely mentions that the law which the Court must consider on its own initiative is “all rules of International law”:

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<sup>219</sup> Or perhaps should seek the expert opinion on its own initiative. The different interpretations by members of the Majority on this point is telling in this respect. See the separate opinion of other Judges of the tribunal specifically, Concurring Opinion of President Hans van Houtte.

<sup>220</sup> Advisory opinion in *Danzig Case*, PCIJ, Series A/B, No. 65, 61-62

<sup>221</sup> *Islamic Republic of Iran and United States of America, op. cit.* (footnote 12).

<sup>222</sup> *Ibid*, at p. 248 (para.130)

The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.<sup>223</sup>

226. It is obvious that the law referred to by the Tribunal in that Case was not municipal law, but the law as addressed by the constituent instrument of the Tribunal (Algiers Declarations) and international law. Whether it is the provisions of GD or CSD, the Tribunal is required to both know and apply those provisions on its own.

227. It is irrelevant whether the nine arbitrators of the Tribunal or any one of them are versed in the United States' commercial and property law, or have had academic experience on that subject. As was explained in the previous part, the proof of foreign law is a matter for the Parties and not the arbitrators. Because, the foreign law before an international forum is a matter of fact.

228. As a result, even if the Tribunal was to apply some system of domestic law, the simplistic approach taken by the Award is very disturbing and not tenable. The Award simply applies an Article from a U.S. domestic Code (the UCC) and considers its job done. Section 2-401 of UCC is applied over the board to decide the passage of title.<sup>224</sup>

229. Since the Parties were not seriously concerned with the application of the domestic law to this Case for a considerable period of time that the Case was *sub-judice*, and since the concept of *lex situs* appeared very late during the proceedings and was developed in essence by the Tribunal,<sup>225</sup> the Parties did not introduce any expert witnesses on this point, and the Tribunal did not invite them to provide one. Experts who could and should have explained concepts like choice of law rules, the applicable law to contractual matters, and property

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<sup>223</sup> Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, I.C.J. Reports (1974), 3, at 10 (referred to in footnote 100 of the B61 Award).

<sup>224</sup> The properties at issue in this Case are scattered in different States within the United States. These States have incorporated UCC in their legislation. There is no investigation or expert opinion as to whether the operation of Section 2-401 in a particular State is exactly the same as in all other State.

<sup>225</sup> See Part Two of this Separate Opinion, "Introduction".

matters, and many other concepts of private international law in general and in different States of the U.S., Iran and the Tribunal, a few of which very briefly treated by the Award.<sup>226</sup>

230. Obviously, Iranian law and some other national laws could be at issue as well.<sup>227</sup> Such subjects needed to be explained by the United States' experts; then it had to be responded by Iran's experts. This is a very routine and usual way of managing a case in international arbitration. In some modern arbitration proceedings, the experts are even confronted. A Case of such importance between two States involving intertwined issues of treaty law and (according to the Majority) domestic law, is handled very simplistically by the Majority *ex officio*. No expert help is sought.

231. The relation between the passage of title and the contract of sale is itself a controversial issue. By no means have universal rules been developed on the subject. Suffice to say that the Majority, in order to achieve its objective, has to pronounce that the Respondent misapplied its own law.<sup>228</sup> If the United States' lawyers did not know their own law, the matter must be too complicated for an international arbitral Tribunal to handle on its own and without expert assistance. Even members of the Majority interpret the subject differently.<sup>229</sup>

232. Further, the very practice of arguing and reasoning by the Tribunal, *proprio motu*, is against the fundamental rules of procedure. Foreign law before the Tribunal is in need of proof.<sup>230</sup> The Tribunal cannot enter into the realm of proof in place of the Parties. It is the duty of the Parties to prove the facts.<sup>231</sup>

233. This is another situation which has created great concern in my mind as to the due process implications of the treatment of the central legal theory in this Case by the Majority.

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<sup>226</sup> See, the Award, in particular Paragraphs 134-148.

<sup>227</sup> See Part Two of this Separate Opinion.

<sup>228</sup> Paragraphs 119 and 121 of the Award.

<sup>229</sup> See, separate opinion of president van Houtte, in particular, para. 17.

<sup>230</sup> See Part Two of this Separate Opinion.

<sup>231</sup> *Ibid.*

## ***Part Four: Individual Claims***

234. In this part, I will explain the reasons why I can or cannot agree with the decision of the Majority regarding many individual claims involved in this Case. This part will be presented in two categories: (a) dissenting opinion, and (b) concurring opinion.<sup>232</sup>

### ***I. Dissenting Opinion***

#### ***I.1 Claim G-111 (Zokor)***

235. I begin this part with claim No. G-111, because the treatment of this claim by the Majority not only suffers from the general defects discussed in previous parts, but contains contradiction *inter se*. While all the elements point to the ownership of Metro (the Iranian entity involved) under the criteria set by the Majority, still the Majority, in its quest to reject Iran's "ownership" in any way possible, denies to bring these items under the notion of the "Iranian properties", resorting to mere legal technicalities.

236. The facts of this claim are detailed in the Award (paragraphs 892-915). The underlying contract between the Iranian and American parties was signed in 1978 and contained an applicable law clause. Article 45 of the General Conditions of the Contract (incorporated by reference into the relevant contracts) expressly subjects the contract to the Iranian law:

"Disputes between the employer and the manufacturer, whether involving the execution of the contract or related to interpretation and construction of the Articles of the contract, the General Conditions or the supporting documents, should be settled through negotiation. If negotiations are not successful, the disputes should be settled according to the Iranian laws by recourse to the competent judicial authorities, unless agreements and regulations pertinent to such a case exist between the Imperial government of Iran and the government of the manufacturer's country."

237. The Majority agrees that:

- i. The *lex contractus* is the Iranian law (Paragraph 968 and 971).<sup>233</sup>

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<sup>232</sup> There might be some instances of disagreement in the part "Concurring Opinion. This is due to the fact the claims consist of different parts. The agreements or disagreements are mainly identified in the text.

<sup>233</sup> Curiously, the Majority uses terms like "probably" (para. 971) or "arguably" (para. 968) or "may be" (para. 973) in this respect. It is difficult to appreciate the significance of these terms in a final decision by a court or arbitral tribunal. In any event, it seems that the Majority considers the contracts subject to the Iranian law.



- ii. Under Iranian law, the ownership of the purchased items was vested in Metro (the Iranian purchaser) at the moment of the agreement (in 1978), or at latest when the items were manufactured (in 1980).
- iii. The *lex situs* (Louisiana law) allows the *inter se* agreements on the question of transfer of title.

238. Such facts should be more than enough to consider the items “Iranian” even under the criteria set by the Majority for the transfer of title (where it believes the title is subject to the *lex situs*). But the Majority still wants more. It wants an explicit agreement on the transfer of title (Paragraph 974) under the *lex situs* with all the flaws in its applicability, and against the express rules of law of the Tribunal in Article V of the CSD and Article 33 of the TRP.<sup>234</sup> To achieve its goal at any cost, the Majority engages into technical arguments in remote areas of law, like U.S. law of insolvency, the concept of the executory contract, French and Belgian doctrines of *inter parte* and *erga omnes* distinction, the derogation from the fallback rule, and other subtleties of the Illinois legal system. Remote, in the sense that these arguments do not typically appear in inter-State disputes, and thus characteristically were not analyzed by the Parties and were not scrutinized by experts in this field. These points are squeezed into two paragraphs with no examination or detailed treatment (paragraphs 974 and 977).

239. While it represents to “apply its own “general principles of international private the Majority probably puts itself in the position of an Illinois judge; how a judge in Illinois would decide this issue? Because only that court could have the self-confidence to engage itself with the subtleties that the Majority attempts in deciding this claim under Illinois law. However, even if one was to place itself in the shoes of a municipal judge, the courts of Tehran would be the right one.<sup>236</sup> Since the contract of sale is admittedly subject to the laws of Iran, any contractual consequence, including the passage of title, will be governed by the laws of Iran. In this sense, it is quite possible to suggest that even a court in Illinois would have to refer

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<sup>234</sup> See, Part Two of this Separate Opinion.

<sup>235</sup> Hans van Houtte Opinion, paragraph 17.

<sup>236</sup> It is under *renvoi* doctrine in private international law that a court puts itself in the position of the foreign court (foreign court doctrine), but we cannot see any discussion on this issue in the Award. See my discussions in Part Two of this Separate Opinion. To put the Tribunal in the position of Tehran courts could be by way of analogy and on the premise that if pursuant to the forum selection clause of the 1978 Agreement the case was raised in Tehran court. See also President Hans van Houtte’s Concurring Opinion, Paragraph 17.

the issue to the Iranian law and a judge there under the doctrines of *renvoi* (remission) or foreign court would put himself in the shoes of a judge in Tehran.

240. While the precise answer to these points would need an expert opinion, by the application of the Iranian law, as discussed in the Award, the main effect of a contract of sale is that immediately after the contract is concluded, the buyer becomes the owner of the goods. The arguments on unidentified goods under Iranian law does not change this conclusion, because as explained in the Award, the goods were manufactured during the relevant period.

241. By the relevant period, in the legal regime of the Algiers Declarations, it is meant the period before 19 January 1981. And, this is another area where the Majority contradicts itself. The critical date for the Majority is 21 December 1984. This is the date on which the Parties concluded a settlement agreement by which Zokor (through its administrator) agreed to release the items to the buyer (Tehran Metro). The agreement contained a clause which provides “the title to the remaining equipment ... shall pass to Metro when such equipment ... leaves the territorial waters of the United States on route to Iran.”

242. This is a novel clause in a contract for the sale of industrial equipment, *i.e.*, passing the title after leaving the territorial waters; and there is a reason for the novelty. As confirmed by the Award, under the law applicable to the contract (Iranian law), ownership would be transferred upon the conclusion of the contract or upon manufacturing the equipment, both dated before 1981. The only reason for the non-transfer of the items before 1984 was the U.S. Treasury Regulations, which the Tribunal has already found to be unlawful. In other words, the items belonging to Metro remained in the United States because of an act in violation of the Algiers Declarations. The record indicates that the clause was put there only as a matter of convenience. As explained in Part One, the Treasury Regulations allowed all U.S. subjects to hold Iranian properties for their claims and dues against Iran, despite a cache of \$1 billion deposited by Iran to satisfy such claims; and that was the reason the Tribunal later found those Regulations as unlawful. However, as long as those “unlawful” Regulations were in place, there was no guarantee that when Zokor released the items to Metro, some other U.S. person would not try to attach them. Indeed, as it is explained by the Parties, the threat of attachment was very real during the settlement negotiations. That was the reason to insert that unusual clause in the settlement agreement.<sup>237</sup>

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<sup>237</sup> A review of the settlement agreement will reveal the intention to insert such a clause (the reference to the U.S. territorial waters).

243. Now, Iran is before the Tribunal seeking justice against the “unlawful” Treasury Regulations. And what is the Tribunal’s answer? To allow the same Regulations work against Iran one more time; the same Regulations which the same Tribunal has held to be unlawful! It was the fear of the application of those “unlawful” Regulations that forced the parties to insert such a clause in their agreement, not that they believed title had not passed. Instead of understanding the situation and respecting its own pronouncement, the Tribunal indeed gives effect to those unlawful Regulations.

244. In conclusion, giving effect to a clause in 1984, while under applicable law the ownership was already with Metro in the relevant period (before 19 January 1981), seems confusing. More confusing is to resort to all kinds of technicalities and legal subtleties to avoid the correct application of the applicable law; and all of it in few sentences, without the help of any expert in U.S. and Iranian law.<sup>238</sup> As a result, I cannot agree with the conclusions of the Award in this part.

### ***1.2. Claim G-15 (Clerk-Yellow Grass)***

245. This claim concerns the purchase of a painting from an unknown artist (Pierre Clerk) for a rather modest amount of \$3000. It is not disputed that the Iranian entity involved (Tehran Museum of Contemporary Arts – TMCA) paid the full amount to the painter in 1978. According to Mr. Clerk, he was not able to ship the painting to Iran because of disagreement over shipping costs. In late 1979 or early 1980, as recounted by the painter, people from the Iranian Consulate in New York contacted him and informed that two officials would pick up the painting. According to him, immediately after the call, two men dressed in suits and “riding in a large black limousine” picked up the painting against receipt, but he misplaced the receipt later. TMCA denies ever receiving the painting. It initiated legal action against the painter in early 1980s, but later abandoned the action, apparently for want of disproportionate costs.

246. The Majority holds that on balance it is not persuaded that the painting was still in the United States on 19 January 1981. The issue is treated summarily in few lines. The decision is reduced to the fact that the Majority has no reason not to believe Mr. Clerk.

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<sup>238</sup> Interestingly, both parties introduced experts on *valuation* of the property at issue in this claim. The experts offered detailed account of their opinion on the subject; they were examined and cross-examined, and the Tribunal had opportunity to question them. It should be added that on the issue of *lex contractus*, the parties have discussed sufficiently both in their written pleadings during the last ten years of the exchange of briefs and during many weeks of the hearings. But, as stated in Parts One and Two of this Separate Opinion, they did not discuss the issue of *lex situs* with any degree of detail, and much less or never the complicated issues raised in the Award.

247. In view of the rather small amount of this claim, I would offer two brief points. First, considering lack of evidence, and if, as it seems, the matter is reduced to who to believe, I find TMCA more credible in this story. For one thing, it is not typical of a big museum holding billions of dollars of art works to deny receiving a \$3000 painting, and even initiating legal proceedings to retrieve it. For another, Mr. Clerk's story looks fanciful. Late 1979 or early 1980, coincides with the peak of the U.S. Embassy crisis. It is hard to believe that the Iranian consulates in the United States would engage themselves with affairs like retrieving an item of little value. Even if they did, sending two men in suits in a "large black limousine" (which presumably must have been rented) to retrieve a \$3000 painting, does not seem real. It is also not disputed that since 14 November 1979, all Iranian properties in the United States were frozen and U.S. subjects were prohibited, sanctioned by fine, to transfer any property to Iran. These points, plus the fact that it is impossible to prove the negative, and the fact that Mr. Clerk cannot produce the receipt he allegedly obtained from the two men in suits, leaves the preponderance of evidence in favour of TMCA.

248. More importantly is the treatment of the Majority in terms of legal conclusions. The issue of proof, as stated, is treated very summarily (in 7 lines)<sup>239</sup> and it is concluded that the painting should not have been within U.S. jurisdiction on 19 January 1981. This conclusion should be the end of the matter for this claim. However, then the Majority continues in 4 paragraphs to prove that even if the painting was in the United States, under the rule of *lex situs*, it would not be considered Iranian properties, because no delivery had occurred. This rather lengthy but unnecessary treatment, could only highlight my belief that the Majority is using every opportunity to establish its own legal theory, even if there is absolutely no reason to discuss it. Therefore, I disagree with the treatment and the decision of the Majority in this claim.

### ***1.3. Claim G-16 (Eisenman)***

249. This Claim and its treatment by the Majority, in many respects, resembles the Claim G-15. The Claim involves a number of architectural drawings. The drawings were purchased by TMCA from an American Architect, Mr. Eisenman. There is no dispute that the items were ordered and fully paid for before 1979. The total amount paid was \$13000.

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<sup>239</sup> Paragraphs 267-268 of the Award.

250. According to the affidavit filed by the curator of the architectural department of the TMCA at the time, Ms. Nasrin Faghieh, the items were purchased in 1978 during her business trip to New York. She visited Mr. Eisenman's works and decided to purchase 8 collages from an existing collection titled "House of Boxes." She has testified in express terms that the works were existing and available. Indeed, the letter sent by the architect to Ms. Faghieh makes it clear that the transaction involved existing works.

251. Mr. Eisenman never sent the purchased works to TMCA. Soon after the purchase was made, the popular movements in Iran began, leading to the establishment of the Islamic Republic in February 1979. When TMCA tried to retrieve the purchased items through its lawyers in New York, it was confronted with a startling reason to withhold the purchased items. Mr. Eisenman revealed to the counsel that he refuses to send his works to Iran under the present revolutionary regime, even adding that he would rather burn them than see them go to the present regime. Another rather shoddy reason offered in the same conversation was that his partner was owed money for work done for the Shah's regime. No detail of the claim and its relation to the purchase is offered.

252. When the present litigation began before the Tribunal, the United States in its consolidated report categorized the items at issue in this part under the rubric "GOI-owned tangible property in U.S. on January 19, 1981." The United States further suggested Iran to contact Mr. Eisenman, which Iran did to no avail. But over the course of litigation, the story changed. In 2001 the United States filed the affidavit of Mr. Eisenman where he stated that at the time of purchase the works were not yet produced and did not recall when they were finished. In other words, he was telling that he received money for a non-existing work, and the work (8 small drawings) was still not done over three years after receiving the consideration. He added that all pieces of the purchased work have been misplaced or destroyed later, yet was completely happy keeping the money received upfront!

253. As stated, the Majority treats this claim very much like G-15, *i.e.*, it concludes, very briefly, that after carefully reviewing the evidence, Iran was unable to prove that the collages existed on 19 January 1981, and thus the claim "must fail."<sup>240</sup> Then, totally unnecessarily, continues to argue that there was no delivery, and thus under the New York Code no title passed.

254. What the Majority does not pay attention, is the rules on the burden of proof and the preponderance of evidence. Simply because an affidavit in 2001 says the items were not

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<sup>240</sup> Paragraphs 296-297 of the Award.

complete at the time of purchase does not prove the point. All other contemporaneous evidence militates against this statement. First, the allegation was made almost 20 years after the litigation began and indeed contradicted earlier presentations. As stated, in the consolidated report, the United States had considered these items as “GOI-owned tangible property in U.S. on January 19, 1981.” Thus, the new position of the United States should be considered as a positive defence, in need of proof under Article 24 of the TRP. Second, the position of Iran has been consistent over the 30 years of litigation. The affidavit of Ms. Faghieh makes it clear that she saw the items as finished works in 1978, and decided to purchase them for the museum. Moreover, she says that the “dictated policy” of TMCA was “to place no orders, but to purchase existing works”, which seems a reasonable statement. Second, the letters exchanged in 1978 between the parties point to existing items. Mr. Eisenman in his correspondence refers to items “available for sale”, and he even attaches an inventory with prices and measurements per item, and markings for the agreed items. Third, during the 1984 when TCMA’s lawyers were pursuing the matter, the issue of non-existence was never raised. Mr. Eisenman’s statements like “I would rather burn them”, or “in the interim the revolution took place and work was not picked up”, could only refer to existing items in the relevant period.

255. The Majority ignores all these evidences, and concentrates on one affidavit. An affidavit offered 20 years after the fact, and which contradicts all the contemporary facts and events, and further offered by a person who did not have the decency of returning the money when he decided to keep the items.

256. As stated before, there is no dispute that TMCA has purchased the drawings from Mr. Eisenman and has fully paid for the items. Iran presents that it is entitled to the return of the items pursuant to the holding of the Tribunal in Partial Award 529. Iran does not see any reason why the items should not be returned to Iran. One might add that when TMCA commissioned this work, it was in the process of purchasing artworks from around the world. The Museum was collecting works from likes of Picasso, Monet, Van Gogh, Renoir, Gauguin, Jackson Pollock and Andy Warhol. It does not make sense that the Museum would engage in commissioning of future works or copies of mass-produced articles from a not very well-known architect.

257. In conclusion, the Tribunal's established rule on the burden of proof is the preponderance of evidence, or "more likely than not."<sup>241</sup> In view of the evidence discussed above, it is more likely that the items were in existence on 19 January 1981.

258. To this the Majority adds, unnecessarily, the issue of ownership and the position of the municipal law. This point was discussed before.<sup>242</sup> Here, I would like to add that giving a decisive role to the domestic law in this particular claim which negates the very U.S. obligation of Paragraph 9 of the GD is unfair. The seller who has received the consideration upfront, and has the obligation to deliver, neither delivers nor returns the money. And the Tribunal sanctions this behaviour by legalistic means, obviously leading to utterly unjust results.

259. All these aside, the adjudication is not between two private parties, it is between two States one of whom committed itself to arrange for transfer of such properties (or its sums paid) to the other who has paid for them. The Tribunal is not in a position to say to the other party that it is neither entitled to the property nor to the sums paid for that property, and therefore the obligor state has no responsibility.

260. I therefore register my dissent to the decision of the Majority in Claim G-16.

#### ***1.4. Claim Supp. (1)-5 (Teichmann)***

261. This claim involves equipment fully paid by Iran but not delivered on account of U.S. sanctions and laws prohibiting the transfer. Before 1992 (when the Tribunal issued the Award 529), the United States did not feel obliged to transfer the items, because it considered this claim a claim for money not tangible property. Further, the United States maintained that the claim was resolved by the Tribunal in the context of a private case.

262. The properties at issue here were subject to a claim before Chamber One of the Tribunal. There, in 1986, the Tribunal concluded that the Iranian party must be assumed to have paid for the equipment; the U.S. party had "manufactured or procured the goods and attempted to ship them to Iran. It was prevented from doing so by circumstances amounting to *force majeure*."<sup>243</sup> By *force majeure*, the Tribunal meant the events during 1979-1981. The goods were sold in 1982. As to this fact, that Tribunal said, the "later resale of the goods by

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<sup>241</sup> See, Award No. 602-A15 (IV) and A24-FT (217 July 2014) in Case A15 (IV), para. 144. The present Award too follows the same standard (see, e.g., Claim G-146); however, the Majority's approach in this respect, to my view, is not consistent.

<sup>242</sup> See Parts One and Two of this Separate Opinion.

<sup>243</sup> *Henry F. Teichmann, Inc. et al, v. Hamadan Glass Co.*, Award No. 264-264-1 (12 Nov. 1986), 13 *Iran-US C.T.R.*, 124, para 63.

Teichmann was justified once it became apparent that export was impossible, in an attempt to limit the losses suffered. Thus, there was no breach on the part of Teichmann which would require the reimbursement to Hamadan of \$363,000 representing the price of the goods.”<sup>244</sup> The Tribunal credited the Iranian party with the proceeds of the sale.

263. Chamber One in its Award No. 264 in 1986 did not directly refer to the ownership of the goods in question in that the issue was not contested. The U.S. party did not claim ownership, and indeed claimed that it had to sell the goods because all attempts to ship them to Iran were rendered impossible on account of the circumstances. During the same period and in the present Case before the Full Tribunal, the United States did not contest ownership on account of title under municipal law. It contended that there was no duty to transfer under Paragraph 9, because the claim was for money and not goods (probably because they were already sold), and that any claim was resolved by the Tribunal by crediting the proceeds of sale to the Iranian party. In view of these facts, the Tribunal should have considered the properties in question as Iranian under Paragraph 9, because they were fully paid for, and neither the holder nor the United States had contested the Iranian party’s entitlement to the goods on account of lack of ownership.

264. The issue of sale of the Iranian properties in the United States constituted a special category and special regulations were applicable to this category. As it is elaborated in the Award 529 in this Case, Treasury Regulation 535.540 were issued to allow the sale of the Iranian tangible properties after 1981.<sup>245</sup> The details of the relevant regulations are discussed in the present Award as well as in the 1992 Award 529, and to some extent in the first part of this Separate Opinion. It is not known whether the properties at issue in this part were sold in full observance of Regulation 535.540; they were sold only 20 days after the issuance of the Regulation. What is relevant here, is a matter of principle and the fact that Regulation 535.540 in allowing the sale of the items presupposes that they were “Iranian properties” and that Paragraph 9 is applicable, otherwise there would be no need to go so far as issuing a Regulation to license the sale of such properties. The Regulation provides that the proceeds of the sale should be deposited in a blocked account. Further, it provides that any part of the proceeds that constitutes Iranian property shall be transferred to Iran. If the proceeds of sales constitute

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<sup>244</sup> *Ibid.*

<sup>245</sup> The Award 529, Paragraph 55. These were the properties whose transfer was prohibited under Regulation 535.201 and were defined as the Iranian properties in Regulation 535-333. The latter regulation provided that, “The term properties as used in §535.215 means all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities, including debts. It does not include bank deposits or funds and securities ...”



“Iranian property” under U.S. law, the property itself must be considered Iranian property. As stated, Chamber One, in its Award No. 264 confirmed the Iranian party’s entitlement to such proceeds and credited the amount<sup>246</sup>. Indeed, as referred to in the Award, in that period the seller referred to the goods as “your” (buyer’s) material in Baltimore.” (Para. 403)

265. Finally, although the Majority has summarily dismissed any argument on changed circumstances, the principle is expressly mentioned in Article V of the CSD and Article 33 of the TRP. One of the most suitable instances to apply the principle is this claim, where the goods were fully paid for and the seller had attempted several times to ship the goods but it was rendered impossible by external circumstances. These circumstances had their origin in the laws and regulations of one of the Parties (the U.S.) to the present Case. Ignoring this situation, could only -- as I have already stated as another example that defeats the purpose of paragraph 9 of the GD -- allow a State to benefit from its own domestic laws, some of which have already been declared in the Award 529 as inconsistent with the Algiers Declarations.

266. In general, many factors including the U.S. domestic law in form of the Treasury Regulations and this Tribunal’s previous approach towards these properties would militate in favour of considering the fully paid items as “Iranian properties” subject to Paragraph 9 of the GD.<sup>247</sup> As a result, I cannot agree with the conclusions of the Award in this Claim.

### ***1.5. Claim G-128 (Stadler)***

267. This Claim is dismissed based on the theory of ownership or transfer of title followed by the Majority. The legal points with regard to the approach followed by the Majority, and my views on the Majority’s approach, were discussed in detail in Parts One and Two above. I disagree with the Majority’s conclusion on account of the fact that even if one was to apply municipal law concepts, still the property at question here (the boiler) should have been considered Iranian property.

268. The Claim concerns a piece of property subject to a sale contract between private parties, which was ultimately made subject to a transfer obligation under an international treaty,

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<sup>246</sup> Even if one was to apply municipal law to the issue of ownership, Iranian law has the closest connection with the underlying contract. The contract is for a turn-key project to be performed in Iran. Most of the material were manufactured and delivered, with the exception of one part which was held in the United States due to the events in 1979 in relation to Iran and the U.S. Under Iranian law, the goods were considered the property of the buyer.

<sup>247</sup> The Tribunal has found the provisions of the Treasury Regulation 535-540 inconsistent with the U.S. law as well as international rules on sovereign immunity, because “they subjected Iran to the jurisdiction of the United States”, Award 529, para. 57.

adding an inter-State element to the situation. Without the latter element, the dispute would obviously have been a contractual issue subject to the law applicable to contractual obligations (the law governing the contract – the *lex contractus*); a very familiar principle in private international law.<sup>248</sup> The inter-State element means that the dispute is not between the parties to the underlying contract, in which case no conflict of laws rules, or material or substantive rules of a national legal system become involved. Because the dispute is substantially at public international law level.

269. If the Tribunal is willing to deal with legal issues concerning a property subject to a sale contract, it must determine the issue with due regard to the terms of the contract. Article V of the CSD and Article 33 of the TRP expressly provide that the “contract provisions” should be taken into account. Thus, the Tribunal, in determining the issue of title of the property concerned in this claim, had to observe the terms of its underlying sales contract. The Majority has determined this issue by its general manner of choice of law rules and in the context of what it calls the “general principles of private international law” (GPPIIL).<sup>249</sup> My point concerning this Claim is that there is an underlying contract in this Claim which has determined the manner of the transfer of title. Hence, the Tribunal should accept and apply it directly and should not subject its admissibility to the choice of law rules of the Tribunal.

270. As stated in Part Tow, the resort to GPPIIL and at the same time applying a domestic law to get to the concept of freedom of contract is circulatory and, in this Claim, it is against the express rules of law of the Tribunal. The Majority in fact follows the said circular reasoning. After quoting Section 36-2-401 of the South Carolina Code in Paragraph 1022, in Paragraph 1023 of the Award, it concluded that:

“Based on the evidence presented and the concurring statements made by the Parties in this Claim [G-128], the Tribunal concludes that it was the intention of MSA and SHL, the parties to the sale, that title to the Power Boiler would pass from MSA to SHL once (i) MSA had been paid in full and (ii) MSA had handed over to SHL the original freight forwarders’ warehouse receipts. Hence, MSA and SHL explicitly

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<sup>248</sup> See, as an example, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I Regulation), Article 3, Freedom of Choice: 1) A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. ... 3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

<sup>249</sup> The Award, Paragraphs 135-136.

agreed on the “manner” in which, and the “conditions” on which, title to the Power Boiler would pass from MSA to SHL, in accordance with Section 36-2-401 (1) of the South Carolina Code.

271. The reference to the “Section 36-2-401 (1) of the South Carolina Code” at the end of the quote is curious. It insinuates that the Parties agreed to apply the South Carolina Code to their contractual relationship. We know that this is not the case and it is evidently not true. This conclusion needs to be looked at from two important perspectives: 1) the law applicable to the contract, and 2) the arrangements between the Parties. Neither is paid any attention to in the Award.

272. Article 33 of the Contract in question (Mazandaran Contract) provides that:

“The provisions of this contract shall be interpreted and the relations between the parties hereto determined in accordance with Iranian law.”

Article 31 of the Contract provides for arbitration in Tehran and in accordance with the Iranian arbitration law. These provisions have not been given any significance in analyzing the legal points concerning this Claim.

273. Applying these provisions, the Iranian ownership of the property at issue here should not be under any dispute. Under the principle of the freedom of contact<sup>250</sup> which appears, as I have already mentioned, to have been accepted by the Majority,<sup>251</sup> the property would have become Iranian from the moment of the conclusion of the contract, or at least from the moment the equipment was manufactured. This is the mandate of Article 362 of the Iranian Civil Code.<sup>252</sup>

274. However, the contract also contains Article 28, adding a new dimension and certain conditions on possession and ownership. The Article as agreement of the parties apparently derogates from the mandate of Article 362 of the Iranian Civil Code, in that the parties point to a special arrangement on the transfer of ownership:

Art. 28.0 Ownership: Title and right of possession shall vest in Buyer at the times set forth below for the respective categories: a) Materials – as from the moment of acceptance of works as defined in Article 15.0 above or receipt of final payment by

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<sup>250</sup> See Part Two of this Separate Opinion.

<sup>251</sup> Paragraphs 146-148 of the Award.

<sup>252</sup> Quoted in Paragraphs 154 of the Award.

the seller whichever is later, b) Unit Equipment – as of the moment of arrival, CIF Work Site, and after acceptance certificates have been issued.”

275. It is significant that these arrangements are made within the ambit of the Iranian law applicable to the contract. Whatever the position of the Iranian law on this derogation, what is totally irrelevant is the law of South Carolina. The Parties have chosen the Iranian law, and within that legal system, have agreed on the manner of the transfer of title. The Tribunal now is settling the dispute (the issue of title) under its own law that recognizes the agreement of the parties directly as “contract provisions”, and this law should be respected by the arbitrators of the Tribunal. One may ask, why a strange law which is not designated by the Parties should govern the relationship between the parties?<sup>253</sup>

276. But the main and the more important point is this: What is the need to seek the assistance (or permission) of the South Carolina Code at all? Paragraph 1023 of the Award is a clear example of applying the principle of the freedom of contract. The Paragraph expressly relies on the fact that “it was the intention of MSA and SHL, the parties to the sale, that title to the Power Boiler would pass from MSA to SHL once (i) MSA had been paid in full and (ii) MSA had handed over to SHL the original freight forwarder warehouse receipts.”

277. If one is of the contention, though wrongly under the law of the Tribunal, that the Tribunal needs an applicable law to justify its conclusions, as it was discussed above, the contract does have an applicable law provision and that is the Iranian law<sup>254</sup>. Therefore, the

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<sup>253</sup> Even if the contract contained no choice of law clause, still the applicability of the South Carolina law would be very suspect. It is widely believed that in case a contract does not incorporate a choice of law provision (especially when one party is State), a negative inference is highly advised. When the parties do not mention an applicable law, and in particular when they *instead* themselves draw the manner of the transfer of title in detail, it could only mean that they were unwilling or unable to reach agreement on the law of any particular jurisdiction. The *intention* was to distance themselves from any particular law. Marc Blessing in his article on this point, which is based on a real ICC arbitration case involving very similar issues (Iranian property manufactured and existing in the United States in the same period), refers to this point. None of the contracts involved contained a choice of law clause. The arbitrators reached the conclusion that “both parties – by a sort of shouting silence – had made an implied negative choice of law in the sense that under no circumstances should the contract be governed by the national law of either one of the parties.” (Blessing, 14 J. of Int. Arb, 1997, p. 46). The tribunal in this Case (peopled by Bernardinin-Blessing-Movahed) opted for a so called “denationalized solution”, applying *lex mercatoria* without a need to apply any particular system of domestic law (Id., p. 47). The present Award, however, does not even want to go that far in the face of a clear choice of law clause. Not only Iranian law is ignored, denationalized concepts like *lex mercatoria* (expressly allowed by Article V of CSD) is also set aside, in favour of a law which the parties have certainly *not* chosen for the contract.

<sup>254</sup> The law chosen by the parties. It is a very well recognized principle of choice of laws rule that the choice can be express or implied. See for example, Rome I Regulation, footnote 145, *supra*.

law of South Carolina is irrelevant. It is also irrelevant for the added reason that by designating Iranian law, the parties have made an express negative choice of the law of any other jurisdiction.

278. Article 28 of the contract was quoted above. As stated, it is significant that the arrangements under this Article are made within the ambit of the Iranian law applicable to the contract. Therefore, the interpretation and the effects of that Article should be made under Iranian law. The main question here is whether Article 28, wholly or partly, survived the events of 1978-1979, that is the discontinuation of the contract and the bankruptcy of SHL.

279. The facts of this Claim, the discontinuation and the bankruptcy are clear and undisputed. The price of the goods was paid by Iran (MSA), and the goods were delivered to a port in the United States for shipment to Iran. SHL (or Kedzep) were involved only on paper. From the beginning everybody understood that the price was to be paid by MSA (ultimately by MWPI) and the equipment was to be manufactured by CE. The goods were not to be sent to Canada. They were to be shipped from the United States directly to Iran. Any concept of ownership by SHL or Kedzep, could only be formed on pure formalistic and legalistic grounds, divorced of any reality.

280. Yet, the bankruptcy and its effects could be studied in two directions. First the position of the Iranian law as the law applicable to the contract, and then the position of the contract itself.

281. Article 363 of Iran's Civil Code (the law applicable to the contract), providing that:  
"If the consideration or the subject-matter of a sale was a specified object and before its delivery one of the parties becomes insolvent, the other party shall have the right to demand that specific object."<sup>255</sup>

This provision comes right after the main provision of the Civil Code on proprietary effect of the contract of sale and purchase (Article 362 Iran's Civil Code), where it is provided that:

"The consequence of a regularly effected sale [a valid contract] are as follows:

a) As soon as a sale is affected, the purchaser becomes the owner of the subject matter of the same and the seller becomes the owner of its price."<sup>256</sup>

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<sup>255</sup> Translation by M.A.R. Taleghany, Rothman and Co. (1995).

<sup>256</sup> *Ibid*, also quoted in Paragraph 154 of the Award.

282. The combined effect of these two sequential articles is that the parties to a sale contract are protected against bankruptcy. The bankruptcy not only does not affect the cardinal rule of Article 362, it might even accelerate the delivery. In other word, when a party to the contract of sale becomes bankrupt and the subject matter of the sale is an identifiable object, the main rule of Article 362 continues to operate (the purchaser is the owner of the subject matter), with the effect that the administrator of a bankrupt party may not include the subject matter of such a contract within the assets of that party. However, if there was a respite for the delivery, the delivery becomes accelerated and the purchaser has the right to collect the item immediately<sup>257</sup>.

283. However, as stated before, under Article 28 of the Contract, the transfer of title was to take place “from the moment of acceptance of works ... or receipt of final payment by the seller whichever is later.” The first of those two provisions (acceptance of works) became moot, when SHL filed for bankruptcy. From that moment (31 October 1979), the possibility of SHL continuing with the project and reaching to the stage of acceptance of work was removed. There was no prospect of delivery or acceptance. That Article in the Contract became inoperative. What remained were two provisions: First, the other condition of the transfer of title, *i.e.*, full payment. Second, Article 33 of the Contract which provides for the applicability of the Iranian law to the whole contract.

284. Under any system of contract or treaty interpretation, in such a situation where a provision in the agreement becomes inoperative and moot, one should resort to a relevant fallback provision in order to allow the contract to survive and operate. Unless the inoperative provision is so essential that may affect the contract as a whole (making it *e.g.*, illegal or totally inoperative), allowing the contract to survive is the most sensible method of interpretation.<sup>258</sup>

285. In the present Claim, the task of the Tribunal (from the Majority’s point of view) is to determine the question of ownership over the boiler. The Majority relies exclusively upon Article 28 of the Contract.<sup>259</sup> The obvious flaw in this reasoning is that the provision on the acceptance of work became moot and unworkable due to no fault of the Iranian party. From

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<sup>257</sup> This is a logical concept under Iranian law as reflected in Article 363. Any other provision would negate the principal concept of the Iranian law on the transfer of title in a sale agreement (Article 362). From the moment the agreement is concluded, the purchaser becomes the owner of the subject matter. If the seller becomes bankrupt after the date of the agreement, the subject matter of the agreement is not his anymore. It belongs to the buyer (if it is an identifiable object like the boiler in present Claim). Article 363 thus protects the contracting party from the effect of bankruptcy, probably in view of the bankruptcy laws which might require immediate seal of the property.

<sup>258</sup> The situation is much like the partial illegality of a contract which does not affect the remaining parts of the contract and the remaining parts stay operative. *Chitty on Contracts*, Vol. 1, 25<sup>st</sup> ed. (London), page 644 (Section 1187).

<sup>259</sup> Paragraph 1028 of the Award.

that moment, the task of the Tribunal is to look into the contract to see whether the question of the transfer of title could be resolved by other provisions of the contract, which survived events due to the bankruptcy. Two provisions of the contract still could be relevant. First and foremost is the general coverage of the Iranian law as the law applicable to the entire contract and the relationship between the parties. One may also mention the first condition of the transfer of title under Article 28 which is the full payment. Under either proviso, a fair solution would be possible.<sup>260</sup>

286. The Majority, however, does not consider these relevant points and opts for a solution which is not only legally problematic, but is utterly unfair. Legally, the solution ignores the relevant provisions of the contract and the law applicable to it, in favour of a provision which had become moot and frustrated. As for fairness, the solution by the Majority in fact rewards a party with the ownership of a property for which it never paid (and was never supposed to pay); the party who declared itself bankrupt and left its contracting partner helpless amid a huge project. By any notion of justice and fairness, that party is not entitled to own the goods. Indeed, the Majority gives that party a windfall. As stated above, all the parties involved, including SHL itself, knew from the beginning that SHL was not supposed to own the property. Its name on the papers was only a practical technicality.

287. It would be unfair to allow SHL to announce bankruptcy and thereby refuse to complete the work, yet be rewarded by the ownership of an equipment it never paid, nor it was the intention of any party to the contract (including SHL) that it would own the equipment at any time. This is a prime example of an absurd result out of the interpretation of either a treaty or a contract.

288. The Tribunal precedent in similar situations, confirm the above point. The Tribunal in cases involving insolvent companies has never paid any attention to the ownership deed under the local law, but has searched who the real owner was, in the sense that who had paid for the property. In the two related Cases, *Birnbaum*<sup>261</sup> and *Ghaffari*,<sup>262</sup> discussed in Part One of this Separate Opinion, the ownership of an office building in Tehran was in dispute. The Tribunal in practice treated the company involved as insolvent and had to calculate the assets of the

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<sup>260</sup> See, e.g., the U.K. Law Reform Act of 1943 (on frustration of a part of the contract): “Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract. (Section 2(4)).

<sup>261</sup> *Birnbaum*, 29 *Iran-US C.T.R.*, 260.

<sup>262</sup> *Ghaffari*, 31 *Iran-US C.T.R.*, 60.

insolvent company to determine the share of the Claimants (the shareholders of the company). Iran argued that according to the official title deed of the building and thus under Iranian law, the building did not belong to the company but to one of the shareholders (an Iranian national not before the Tribunal). Under Iranian law, the title deed of immovables is dispositive of the ownership. The Claimants argued that the building was bought using Company funds, but for some unknown reason it was decided to register it under a different name. In view of the evidence confirming the Claimants' version, the Tribunal set aside the title deed, and added the value of the building to the assets of the company.

289. It is undisputed that any work on Mazandaran project ended in January 1979. Between then and October 1979, no prospect of continuation of the project was in sight. Any residual hope was ended in October 1979 when SHL filed for bankruptcy. By this time, it is also undisputed that the boiler (property at issue here) was delivered by CE (the manufacturer) and was fully paid by MSA. At this moment, whether one applies the *lex situs* rule or the provisions of Mazandaran Contract (the main contract), MSA would be the owner of the boiler. The only intervening element is the original of the warehouse receipt which according to the Majority could potentially once again transfer title from MSA to SHL. Absent this element, which will be referred to below, there could be no dispute that MSA owned the boiler on 19 January 1981. Because, the contract for the manufacture of the boiler was between MSA and CE, and the latter received full payment from MSA and in turn delivered it to the port of shipment, and delivered the original documentations (warehouse receipts) to MSA.

290. The same result will be reached applying the rules of the main contract. Articles 3.8.1 of the SHL-Mazandaran Contract provides that:

“Seller shall arrange that any rights and titles (together with the obligations connected therewith) relating to the project which Seller may acquire vis-à-vis third parties, can if so required by Buyer be assigned to Buyer in the event of discontinuation or termination of the Contract as referred to in articles 23 and 24 respectively.”<sup>263</sup>

291. Thus, assuming that title was not transferred pursuant to Article 28 of the Contract, it should have been passed to the Iranian side upon suspension of the work in 1978-1979 and discontinuation of the Contract.

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<sup>263</sup> Article 24 refers to the discontinuation of the Contract at the full discretion of the Buyer (the Iranian side). That is order of discontinuation without giving any reason. However, as to the effect of discontinuation I Article 3.8.1, the reason for discontinuation is irrelevant.



292. The Majority heavily relies on the point that the original warehouse receipts were sent to SHL by MSA.<sup>264</sup> The first point with respect to the Majority's conclusions is that they are based on inaccurate characterization of the Parties' positions. Paragraph 1023 of the Award states that:

“Based on the evidence presented and the concurring statements made by the Parties in this Claim G-128, the Tribunal concludes that it was the intention of MSA and SHL, the parties to the sale, that title to the Power Boiler would pass from MSA to SHL once (i) MSA had been paid in full and (ii) MSA had handed over to SHL the original freight forwarder warehouse receipts.”

293. The problem with the Majority's conclusions on the warehouse receipt is that the evidence to prove the transfer of the receipts to SHL is circumstantial and in many aspects contradictory. On the one hand, we have the May 1978 telex by MSA to SHL which clearly states that only copies were sent to SHL; the original receipts are needed to clear the boiler from customs office. It further states that the originals will “eventually” be sent to MWPI (not SHL). On the other hand, we have the October 1980 telex from the Trustee to CE and the affidavit of Mr. Yudin, both stating, *after the event*, that MSA sent the original of the receipts to SHL. There is no argument or proof as to how, why, and when MSA supposedly dispatched the originals to SHL. While MSA was explicitly saying it would send the originals to MWPI (after customs clearance which never occurred), how is it concluded that MSA sent the originals to SHL? The conclusions are based on hearsay and indirect oral information from a bankrupt company which is desperately after any source of assets.

294. The Majority by the same relaxed attitude concludes that MSA was fully paid by MWPI (para. 1025 of the Award). The only evidence relied upon, is Mr. Yudin's affidavit without any document as to the alleged payment. No first hand evidence is in the record.

295. The only reasoning by the Majority, apparently to resolve this contradiction, is that the Trustee must have had the original receipts, otherwise he could not have sold the boiler in 1987. However, the same deductive reasoning could be made the other way round. Since the equipment was never shipped to Iran, MSA could not have forwarded the original receipts to MWPI or SHL, because they were needed to clear the boiler from the customs.

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<sup>264</sup> Paragraphs 1026 and 1027 of the Award.

296. Indeed, two important points militate against the theory that the Trustee had the original receipts. First, the fact that the boiler was sold in 1987, eight years after the Trustee claimed it had the original documentation. Passage of such long period is stronger evidence that the Trustee did not have the necessary documentation. Otherwise, staying idle for eight years until the boiler became scrap metal does not make sense. It is significant that according to the evidence in the record, in 1980, there was an offer by an Algerian oil company to purchase the boiler for higher than the original purchase price. But doubts as to KEZEP's ownership did not allow the sale to proceed. Second, if the Trustee had the required documents, why he needed to correspond with CE and ask them for help? Why he needed to seek legal advice as to the possible ownership of SHL? It is to be noted that the correspondence with CE was for the purpose of asking them to inspect or maintain the equipment. CE had done its job, received the whole amount, and delivered the boiler to freight forwarder. The main entity to be convinced to release the boiler was the port authority and not CE. There is no record of any dealings with the port authority on the question of ownership or release until the sale of the equipment in 1987. The details of the sale in 1987 is also not clear.

297. Moreover, if equipment worth \$2 million is sold for \$45,000, it is not unreasonable to say that it was sold as scrap metal, in particular in view of the large amount of metal used in a big boiler. It is also reasonable to assume that the boiler was sold to clear warehouse charges accumulated for 10 years. No sophisticated document, procedure, or formalities are necessary for such a sale.

298. In conclusion, the ownership of the property at issue here is regulated in a contract of sale by the parties to that contract. The Majority treats it *in rem* as if it is an isolated piece of property in need of determining who owns it. The interplay between *lex situs* and *lex contractus* is treated in a strange way in the Award. The notion of property is also treated divorced from the Tribunal's precedent. Ignoring such arguments here has led to an utterly unfair situation. The ownership of the party who has paid for the property is ignored in favour of a party who has not paid anything and was not supposed to own the item in any manner.

### ***1.6. Claims Involving Money and Advance Payments***

299. As stated in Part One of this Separate opinion, in some claims in this Case, Iran is seeking the return of the advance payments paid for the tangible properties, or the value of properties for which Iran has paid in full but the U.S. parties have withheld both the property and the amounts received. This category includes around 30 items ordered by Kharg Chemical

Company,<sup>265</sup> five group of items relating to the so-called “aircraft claims” (also referred to as Cluster 7 claims),<sup>266</sup> and 3 belong to other claims.<sup>267</sup> I will discuss these cases briefly here. The claims regarding Kharg items, will be discussed within the general category of Kharg claims (under I.6.e. below).

300. As also discussed in Part One of this Separate Opinion, the primary ground for the claim of the return of the Iranian funds not held by U.S. banks and financial institutions, is based on Paragraph 9 of the GD. Paragraph 8 and General Principle A of the GD are pleaded in the alternative.

***1.6.a. Claim G-162 (Bank Saderat)***

301. The facts of this Claim are explained in the Award.<sup>268</sup> The record shows that the total price of the contract for the purchase of 300 metric tons of copper wire rods, amounting to \$603,547.69, was paid by the Iranian company to the American seller. Later, complications in the transaction led to a situation that both the property and the amount paid remained in the United States. The advent of the crisis between Iran and the United States and later the U.S. sanctions added to the complications.

302. No matter how we look at the situation, the reality is that from 1979, the amount of \$603,547.69 was left within the U.S. jurisdiction and in the possession of a U.S. private institution. Even if one was to identify the amount as a liability, still under Section 535.333(a) of the Treasury Regulations, the amount would constitute Iranian property.

303. The only answer by the Majority is that Paragraph 9 is restricted to tangible property in existence within the United States on 19 January 1981. I have argued elsewhere in this Separate Opinion that Paragraph 9 does not contain such a restriction. There, I have explained my position as to the issue of the so-called intangible property claims, and the relevance of Paragraph 9, as well as Paragraph 8 and GPA. I believe that this claim falls within the ambit of Paragraph 9.

304. The end result of the Majority’s approach is that the Iranian party is deprived of the property as well as a rather large sum (\$603,547.69) for the past 40 year. Sanctioning such a result is against the text and the spirit of the Algiers Declarations, not to mention the most

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<sup>265</sup> Paragraph 1212 *et seq.* of the Award, Claims Nos. 165-190 (excluding Nos. 167 and 176), and claims 1996 A-F).

<sup>266</sup> Claims G-131; Supp (2)44; Supp (2)49; Supp (2)55; Supp (2)64 in Cluster 7 (aircraft claims).

<sup>267</sup> Claims G-105 and G-109 in Cluster 8; and G-162 in Cluster 10.

<sup>268</sup> Paragraphs 1191-1204 of the Award.

elementary notion of justice. As also explained elsewhere, the Tribunal in property cases has never succumbed to such legalistic arguments at the expense of justice.

***1.6.b. Claim Supp (1)-3 (EROS/ERIM)***

305. In this claim, the funds are expressly credited to Iran's account. Iran had paid money for the production of certain tapes and they were not produced. As a result, the manufacturer credited Iran with the amount received but not spent. Whether under the three aforementioned provisions of the Algiers Declarations or under any notion of justice, the amount should be returned to Iran. Moreover, in this very claim, Iran had, once more, made the U.S. parties whole by paying sufficient amounts through the 1990 settlement in the so-called "small claims." The Majority concludes that the issue of the five tapes were settled in that settlement.<sup>269</sup> Under any notion of justice, the United States should have been made accountable to return the Iranian sums in the books of the same company whose claim was settled and paid for by Iran.

***1.6.c. Claim G-109 (Red Crescent)***

306. This is another Claim dismissed on such technical grounds.<sup>270</sup> The evidence in the record indicates that the entire price of the contract was paid but the manufacturer only shipped about half of the items, while collecting the whole payment. Later, the manufacturer cancelled the balance of the contract and credited the balance of the consideration in favour of the Red Crescent. The credited amount was never paid to the Red Crescent. In these circumstances, allowing the U.S. party to keep the amounts for which no goods were delivered, and the amount is credited in favour of the Red Crescent and remained in the books of the seller, is unconscionable.

***1.6.d. Other Claims***

307. Some other claims are dismissed based on the position that they involve money and not tangible property. Like Claim G-31 (Mazandaran University), 2-(64) (Scot aviation), 2-(49) (Midway), 2-(44) (Air Search). The arguments above apply equally to these claims.

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<sup>269</sup> Paragraph 705 of the Award.

<sup>270</sup> The Award classifies this Claim as a claim for the return of the advance payment. But Iran has identified its relief ads damages for the value of the property/asset under Paragraphs 8 and 9 and General Principle A. So, the classification is not entirely correct. The nature of the transaction is different from other contracts in this Case. Here, Iranian Red Crescent Society had ordered a series of bandages. The items are apparently manufactured in series and in identical form for many customers.

308. To sum up, three provisions of the Algiers Declarations (General Principle A, Paragraphs 8 and 9 of the GD) all militate in favour of the return of these sums. Yet, it is denied based on some legalistic arguments or an inexplicable interpretation of these provisions. Moreover, the principle of beneficial ownership, well established in the case-law of the Tribunal in similar situations supports the return of these sums. Finally, denying the return of the sums is utterly against any notion of justice and fairness.

*1.6.e. Kharg Claims (G-165 through G-190 & 1996-A through 1996-E)*

309. These series of claims consist of 29 Claims involving 43 orders or invoices. The orders were placed in 1978 and 1979 and were paid in full. Most of the orders were delivered to Iran's freight forwarder but were caught by the freezing orders and were never transferred to Iran. Bulk of the claims and invoices are dismissed summarily by the Majority, to which I register my dissent. Grounds for dismissal are by and large similar to the treatment of other claims, and thus I will deal with them briefly. These grounds may be divided into the following categories:

310. **First**, some Claims are dismissed on account of the conclusion that Iran was unable to prove the property's existence in the United States on 19 January 1981.<sup>271</sup> This is despite the fact that all items were purchased by AIOC (the agent of the Iranian company in the United States) and it is not denied that by the time of the blocking order of 14 November 1979, they were in the United States. While during the freeze period transactions of these properties were prohibited, according to the United States, many of the items were sold during this period. Though it is alleged that the sales were licensed, there is no evidence of any valid license in the record.

311. Some 11 claims involving 18 invoices are said to have been sent to an account called "surplus" or "scrap" account before 19 January 1989. There is no evidence that the items themselves were scrapped. It is rather, most probably, an accounting jargon inside AIOC administration and does not refer to the physical property actually scrapped. There is no evidence that any of these items were actually scrapped. This is supported by the fact that Iran has been able to show items that were said to have been sent to "surplus account" but then were allegedly sold to third parties.

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<sup>271</sup> See, in particular claims: G-165, G-178, G-180, G-181, G-182, G-183, G-184, G-185, G-186, G-188, G-189, 1996-B, 1996-C.

312. It is noted that during the freeze period, Iran was not only denied the receipt of the items, it was unable to gather evidence as to the status of the items. In such circumstances, expecting Iran to prove the existence of the items at the exact date of 19 January 1981 is not fair.

313. **Second**, some claims are dismissed based on the theory of ownership regarding the transfer of title pursued by the Majority.<sup>272</sup> As to this category, I refer to my arguments in Parts One and Two of this Separate Opinion.

314. **Third**, some claims are dismissed on account of the Majority's view that Paragraph 9 is restricted to tangible properties.<sup>273</sup> This category overlaps, to some extent, with the first category. Because in most cases, the reason for an item not surviving till 1981 was that it was sold to third parties or returned to the vendor. As to this category, I refer to my arguments in Part One of this Opinion.

315. **Fourth**, many items are dismissed on a rather strange ground, to the effect that the United States has done enough to satisfy its Paragraph 9 obligations. This general and vague ground finds no place in Paragraph 9 or any of the provisions concerning the return of the Iranian assets. As the Tribunal has confirmed in an earlier award, Paragraph 9 obligation is an obligation of result and not the best effort.<sup>274</sup> Whenever the Parties to the Algiers Declarations intended to stipulate an obligation of conduct, they have expressly done so, as to some extent, in Point IV of the General Declaration.

316. To sum up this part, items under the Kharg claims (also known as Cluster 10 claims) all fall within the ambit of Paragraph 9 of the GD. First, there is no serious dispute as to the fact that most of these items are Iranian properties. Second, the evidence on the pre-1981 sales of the properties is not convincing. Legally no such sale was possible and no valid title could be transferred. Factually too the evidence of pre-1981 sale is not convincing.

317. To admit the allegation of disposal before 19 January 1981, would amount to allow one Party to benefit from all its actions in all circumstances and avoid any consequences of its actions. This is breach of treaty with impunity. In this case, it was the United States who first declared a state of emergency and regulated the rules of conduct during the emergency; it

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<sup>272</sup> See, in particular claims G-169 and G-175.

<sup>273</sup> See, in particular claims G-175 and G-189.

<sup>274</sup> The Award 590-A11-FT, Para. 199: "While in Points II and III the United States assumed an obligation of result--*i.e.*, the obligation to cause or arrange for the return to Iran of certain specified Iranian assets--in Point IV the United States assumed an obligation of conduct or means ..." 36 *Iran-US C.T.R.*, p 84, 133.

thereby prohibited any transfer of the Iranian properties and declared any dealings in such property prohibited, null and void and incapable of transferring any right or interest. But, when after the settlement between the Parties, Iran came after its properties, the United States represents that the property was sold or otherwise dealt with during that period. Nonetheless, the Majority admits those transactions as valid. That means, the provisions of the U.S. law prohibiting the transactions could only work in favour of the United States and not against it.

318. Finally, the end result is that the U.S. party pockets huge amounts received from the Iranian party with impunity furnished by the legalistic grounds in the Award. Once again, I repeat that such a result runs against the text and spirit of the Algiers Declarations, in particular GPA, Paragraph 9 and Paragraph 8, as well as rules of justice and fairness.

## ***II. Concurring Opinion***<sup>275</sup>

### ***II.1. Claim G-18 (Stradivarius)***

319. The claim involves a piece of art (a Stradivarius violin) taken from Iran to the United States. There is no dispute that it was purchased by Iran's Ministry of Culture in 1976 and belonged to Iran. There is also no dispute that the holder (Mr. Forough) held the violin on loan, and this is well documented.<sup>276</sup> It was and remains an Iranian property, and the Award, too, holds the same. Mr. Ali Forough has never claimed ownership, except contradictory references, later in the proceedings, to vague topics like "trust" or "life-time gift." He has admitted Iran's ownership in several documents in the record. In view of this, the arguments in the Award regarding the ownership under French law<sup>277</sup> is redundant and out of unnecessary obsession with municipal law. The same is true, even more forcefully, for the purely academic discussion of the conflict of law theories and the laws of the Netherlands, Iran, and the State of Indiana in this Claim.<sup>278</sup>

320. In any event, in the Award it is rightly held that the United States is liable for not returning the item. The Award finds that the "United States shall take steps to ensure that the

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<sup>275</sup> In this section, I offer my explanations on claims which I concur as to the result. The views are obviously subject to my arguments in the general parts of this Separate Opinion expressed before. Further, the views here do not suggest that I agree with all the reasoning or all the details expressed in the Award. In some of the Claims, I disagree with certain conclusions, which are explained.

<sup>276</sup> See, in particular, Paragraph 323 of the Award.

<sup>277</sup> Paragraph 322 of the Award.

<sup>278</sup> Paragraph 327 of the Award.

holder or holders of the Stradivarius will transfer the instrument to Iran within” four months of the issuance of this Award, or pay compensation in the amount of \$5,286,583.61, representing the fair market value of the violin on 14 October 2013, plus interest from that date in the amount of \$1,368,135.11,<sup>279</sup> and post-award interest based on the “prevailing prime bank lending in the United States” from the date of the Award until the date of payment.<sup>280</sup>

321. I agree with the ruling in this claim. But I would have had different approach which is clearer than the way the Award has gone. My problem with the award of this amount is how the Award has reached to the amount of \$5,286,583.61, representing the fair market value of the violin on 14 October 2013. This date indeed is the date that an expert in this field, Mr. Keane, appeared before the Tribunal and testified as to the value of the item. While he was appointed by the Claimant, everybody, including the Respondent and its witness (Mr. Martens), praised his expertise in the field. Mr. Keane, being the only expert on the item in question and its value, put the figure of \$6.5 million as its market value as of the date of the testimony (14 October 2013).<sup>281</sup> Mr. Keane also mentioned that if the Tribunal was to deduct the buyer’s premium, the value would be \$6 million. The Respondent’s expert did not disagree; only suggesting that the value would come to \$5.65 million to account for the “buyer’s premium.”<sup>282</sup>

322. When speaking of a highly specific piece of art with highly exclusive market, the Tribunal either should rely on the view of the expert who has appeared before the Tribunal, or rely on a higher expertise in the field to ignore the expert witness’ valuation. In the absence of the latter, the Tribunal should simply accept the expert witness’ view as the value of the item. In particular, as stated, when the valuation is not rebutted, and what’s more is largely endorsed by the Respondent.

323. However, in an extraordinary turn of events, the Award simply throws out the opinion of the only and the unanimously agreed-upon expert before the Tribunal and tries to value the Stradivarius itself! It takes the reported sales of six presumably comparable instruments; adjusts the sales upward by 4% per annum till the date of valuation (14 October 2013), then deducts the “buyer’s premium” (on average 15.5%), and finally takes the average of the

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<sup>279</sup> Paragraph 2611(B) (12) of the Award.

<sup>280</sup> Paragraph 2611(B) (28) of the Award.

<sup>281</sup> In accordance with this testimony, Iran is asking \$6 million in damages (as of 2013), in case the instrument is not returned.

<sup>282</sup> Paragraph 1843 of the Award.



adjusted six sales, reaching the exact figure of \$5,286,583.61.<sup>283</sup> The result is obviously questionable to say the least.

324. First, if the average of the adjusted sales (as described) is the basis of the valuation, what is then the significance of the 14 October 2013 in the Majority's calculations? The date could only make sense if the value determined by the expert on that date was the basis of the valuation. The calculation could have continued to the date of the Award. Second, the very act of putting aside the valuation by the expert, whose unique expertise was described above, and trying to determine the value of an object with zero knowledge on any aspect of it, is unnecessary and futile. Surely, every expert in this field would justify his appraisal by presenting a few similar sales. But putting aside the expert's conclusion, and instead, using his data as an independent valuation by the Tribunal is reckless, simply because the Tribunal's knowledge and expertise in this field is nil. Third, the figure is too exact to represent a reality-based market value in art world. It is of course the result of the adjustments made (4% annually upward and 15.5% downward).<sup>284</sup> But this 4% itself is a wild estimate provided by the expert with lots of caveats, and the 15.5% is even more speculative. Fourth, looking at the statistical population used by the Award to achieve the average, all six are sold below the price put by the expert for the instrument in question here. This obviously has pushed the result downward. Indeed, the prices used by the Award do not take into account the whole story reported by the expert. Mr. Keane explained that while it was said that the Kyd-Perlman (one of the violins used to reach the average price) was sold \$5.5 million, a simple arithmetic would reveal that it was sold for \$7-8 million. Still the Award uses the figure of \$5.5 million.

325. Another point is the application of the so-called "buyer's premium." This is the amount the auction houses or dealers take as their commission for sale. As the name tells, it is paid by the winner (the buyer) on top of the bid (on top of the hammer price). The Award deducts this amount from the fair market value of the instrument, as if we are dealing with a commercial auction. The dispute is over the violation of a treaty. The Award has reached the conclusion that the Respondent has breached the treaty. The remedy for the breach of treaty is clear. What is not clear is why a State should receive less than the full price of its property in a breach of treaty situation. If an expert determines that the price of the property at a given moment is \$6.5 million and the figure is not rebutted, then that is the fair market value of the property and that

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<sup>283</sup> Paragraph 1863 of the Award.

<sup>284</sup> The 15.5% is an average figure. Apparently, the Award has used the Sotheby's public auction rates, that is 25% for the first \$100,000; 20% up to \$2,000,000, and 12% above \$2,000,000. Paragraph 1843 of the Award.

is what the injured State should receive. Iran is not buying this object in an auction. If Iran had this instrument, it would probably have kept it in a museum. Putting it in a situation of auction sale is not fair. Suppose the Stradivarius is not returned to Iran by the U.S., and Iran goes to the auction to buy the same, it should pay the buyer's premium, *i.e.*, 15.5% above the amount awarded to it. Then the amount awarded is not a full remedy for the injured party.

326. As stated, here the expert suggested that if buyer's premium is to be deducted, then the value would be \$6 million. This is a 7.5% deduction. The Claimant in all sincerity accepted this figure. Of course, the expert explained that the buyer's premium could vary from 4 to 20 percent. I am not in favour of any deduction for the buyer's premium at all, because the setting is miles away from a commercial dealing. But if the Award is concerned about going over the Claimant's sought relief, it, at least, should respect the rate suggested by the expert. That is, to put the value of the instrument at \$6 million as of 14 October 2013. As a result, I would have awarded the Claimant \$6 million for the value of the Stradivarius violin as of 14 October 2013.

327. All this, of course is in case the United States fails to deliver the instrument. In case the United States is prepared to deliver the instrument to Iran, the Tribunal will have to assist the Parties for a smooth handover, to avoid further problems.

## ***II.2. Claim Supp. 2(12) (Mashayekhi)***

328. In view of the fact that this claim, too, involves musical instruments of historical value, much of what said above (in Claim G-18) is applicable to this claim, as well. As in G-18, here too, the instruments were valued by Mr. Keane. The Award makes it clear that the reliability and credibility of the evidence given by Mr. Keane was not disputed by the United States, nor his level of expertise was challenged by the United States and its witness, Mr. Martens (Paragraph 1839).

329. Here, the Award accepts the values proposed by Mr. Keane, but deducts, between 20 and 25 percent, from the amounts proposed by him. While Iran, in its claim, has already substantially reduced Mr. Keane's valuation, yet the Award reduces it further and rather arbitrarily. The difference is not much, but the act of determining value of objects that the Tribunal has no expertise in is questionable.

330. As stated, I am not in favour of deducting anything on account of the buyer's premium. But the Tribunal should have respected the expert's view, upon which Iran's claim is based. Indeed, Iran's claim in this part is very modest. It has already claimed modest amounts and has

duly reduced the prices determined by the expert. Yet the Award in three of the four items, reduced further \$5000 each with no apparent justification, other than applying the Sotheby's table.

331. I would have awarded the Claimant \$990,625 for the value of the four Gaglianos and two bows as of 14 October 2013. In case the United States is prepared to deliver the items to Iran, the Tribunal will have to assist the Parties for a smooth handover, to avoid further problems.

332. As a result, I concur with the conclusions of the Award in this Claim, subject to the explanations above.

### ***II.3. MORT Claims (G-7, G-8, G-13)***

333. These Claims involve road-building equipment and portable housing units purchased by Iran's Ministry of Road and Transportation (MORT). The items were delivered and stored in the United States, but not shipped due to the events in 1979 in the Iran-U.S. relations. There is no dispute as to the ownership of the items.

334. My issue with the Award's treatment of these Claims is the way the damages are treated and calculated. The Award rightly points to the accepted view on reparation for the breach of international obligations, as set forth in the celebrated PCIJ judgment of 1928 in *Factory at Chorzów* and quoted by the Award:

The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>285</sup>

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<sup>285</sup> *Factory at Chorzów* (Ger. v. Pol.), Judgment (Merits), 1928 P.C.I.J. (ser. A) No. 17, at 47 (13 Sept.). As also explained by the Award, *Chorzów Factory* Case “is widely regarded as the most authoritative exposition of the principles governing reparation for injury caused by internationally wrongful acts.” The Award also refers to the ILC Articles in this respect: “Under customary international law, as reflected in Article 31 (1) of the ILC Articles,

335. It is obvious from this celebrated passage that there must be a difference between a lawful and an unlawful act in terms of determining the amount of compensation. In case of a lawful act, the Tribunal has always awarded full compensation, including the actual value of assets. If the asset was a going concern, the Tribunal awarded the value of the going concern which by definition goes beyond the value of the physical assets.<sup>286</sup> However, the quoted passage provides for a different treatment in case the act was unlawful. Lost profit (*locrum cessans*), “which would not be covered by restitution in kind or payment in place of it”, should be added to the full value of the assets (*damnum emergens*).<sup>287</sup>

336. In the present Claim, all the elements of an internationally wrongful act are present. The Tribunal laid the principle in its 1992 Award 529 in the present Case, and the present Award explicitly finds that the United States’ action with regard to the properties at issue in this part was unlawful and in breach of the treaty. However, as in the case of the musical instruments and indeed in all other claims, the Award apparently considers it a sin to award even full compensation to Iran, let alone lost profits.

### ***II.3.a. Claim G-8 (Porta Kamp Housing Units)***

337. In this part, Iran claims damages for the certain properties held in the United States between 1979 and 1984. The claim consists of different sections:

#### ***II.3.a. (i) Claim for Direct Damages***

338. MORT purchased 238 housing units in 1978 for a price of \$7,309,995; the units were delivered to a port in Houston (Gulf Port). The claim is for diminution of value as a result of corrosion and other damages due to storage in the Port for five years. It is agreed that the property suffered 75% damage during these years.

339. The Award reduces the number of the units by a quarter to only 60 units. This peculiar and rather arbitrary reduction is based on nothing but speculation. The Award relies on a letter

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the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

<sup>286</sup> *Sedco Inc. v. National Iranian Oil Company*, Award ILT-59-129-3 (27 March 1986), 10 *Iran-US C.T.R.*, 180; *Amoco International Finance Corp. v. Iran et al.*, Award 310-56-3 (14 July 1987), 15 *Iran-US C.T.R.*, 189, at 197: “Obviously the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking ... In the traditional language of international law it equates the *damnum emergens*, which must be compensated in any case.”

<sup>287</sup> See, Judge Brower’s Concurring Opinion in *Amoco Finance*, *ibid*, p. 300.

sent by MORT's attorney in Houston to Iran's general counsel in Washington D.C. (the U.S. law firm dealing with Iran's legal affairs in the United States), where it is said that 60 buildings are stored in Golf Port facilities. This ambiguously worded statement is given precedent to a number of evidence in the record all pointing to the fact that the number reached by the Award cannot be true.

340. As explained in the Award, the original contract provided for the purchase of 400 units at the price of \$11,905,245.<sup>288</sup> Iran represented that this figure was later reduced to 238 units at the price of \$7,309,995. The change order is not in the record. What the record contains, is reliable and official documents pointing out that the number of pieces<sup>289</sup> stored in the Gulf Port facilities were 635.<sup>290</sup> These documents are produced by the Parties directly involved in the transactions, *i.e.*, MORT (the owner) and Golf Port (the holder). To translate the number of "pieces" into housing units, we have in the record the statement of the manufacturer of the units (Porta-Kamp), which in 1983 expressly says that each unit consists of 2 to 4 pieces.

341. Relying "on the most conservative of the figures reflected in the available contemporaneous evidence"<sup>291</sup> will lead us to at least 158 units (4 pieces per unit, 633 pieces). But as the Award suggests,<sup>292</sup> the more reasonable approach is to take the average figure (3 pieces per unit) which will result in 211 units. This will explain more reasonably that the figure of 238 mentioned by Iran must be the true number of housing units.

342. The above conclusion could be buttressed by another analysis. The same evidence mentioned above (Porta-Kamp 1983 letter) indicates that the original cost of each piece (not each unit) was approximately \$11,000.<sup>293</sup> The Award, based on this number, has calculated that each housing unit must have costed \$33,000.<sup>294</sup> A simple arithmetic will show that this statement corresponds with the total purchase price in the record. As explained in the

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<sup>288</sup> Paragraph 537 of the Award. In some documents the figure is \$11,906,245.

<sup>289</sup> As explained by the Award, different terminology is used in this regard (units, houses, components, crates, and module, Paragraph 539 of the Award). The first two must refer to complete housing units and the others to pieces for later assembly. I use the term "pieces" for the latter category.

<sup>290</sup> The figure in different documents in the record is something between 633 and 635. As explained in the Award (footnote 381), the custodian of the properties in the United States (Gulf Port), in its pleadings in 1981 before the U.S. court has referred to 635 pieces. Another reliable and official document is the 1983 settlement agreement between MORT and Gulf Port, which mentions the figure as "approximately 633 pieces." Another document referred to in the same footnote refers to 634 pieces.

<sup>291</sup> Paragraph 541 of the Award.

<sup>292</sup> Paragraph 542 of the Award.

<sup>293</sup> Paragraph 522 of the Award.

<sup>294</sup> Paragraph 542 of the Award.

Award,<sup>295</sup> the total price for 238 units, according to Iran, was \$7,309,995. Dividing this figure by the cost of each unit (\$33,000) will result in 222 housing units. Even if we put aside this total price (as the Award has done), other elements in the record would prove the arbitrary nature of the 60 units provided by the Award. For instance, the Tribunal's Award No. 28-307-3 (9 March 1983) concerning the settlement agreement for these very properties, refers to the prefabricated housing units including approximately 633 pieces with a bulk of approximately 1,345,178 cubic feet. This corresponds to 38000m<sup>3</sup>. If 60 prefabricated housing units would take up 38000m<sup>3</sup>, then the area of each unit must have been 264m<sup>2</sup>. This is almost the size of a tennis court, not a prefabricated housing unit to be used by the road building staff. Moreover, the record includes pictures of the housing units in Gulf Port facilities, and they show wooden housing units of normal size.

343. Of course, four decades after the fact, the Tribunal, reasonably and justifiably, has to sometimes enter into the realm of estimation. The different figures mentioned above witness this process. However, what is certain from the above analysis is that 60 units could only be reached in an arbitrary process. In the absence of decisive evidence, the trier of fact will look at all the relevant evidence to reach a fair result. The Tribunal's rules on the burden of proof requires preponderance of evidence not "the most conservative" approach. Here, as showed above, the preponderance of evidence points to the fact that Iran's figure of 238 is more likely to be true. But as stated above, even "the most conservative figure" is not as small as 60 units.

344. Against all these evidence and facts, the Award relies on one line in a letter written by someone who has never seen the units and has never been part of the transaction. The local attorney is reporting to Iran's general counsel in the United States on the status of the lawsuit by Gulf Port against MORT in Houston. In passing, she mentions that she could not find anyone with the information as to the condition of the subject property; and that the law firm knows that there are sixty buildings which are being stored along with all the accoutrements.

345. The information in this half-page letter is so vague and so general that nothing could be made out of it. The attorney apparently had not seen the property and could not find anyone to give any information on the property. Moreover, an Iranian official who visited Golf Port storage in 1983 and filed affidavit with the Tribunal, together with some pictures of his visits, points to three different addresses where the subject property was stored. He also points out that some of the units were erected and some were still in packing. He adds that the erected

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<sup>295</sup> Paragraph 537 of the Award.

houses were all looted and unusable, and MORT only was able to ship part of the packed units. Thus, it is also probable that the attorney was referring to the erected houses (“buildings”) and not the whole items.

346. As a whole, against all the evidence referred to above, this single letter which in passing refers to sixty “building” in a general and obviously uninformed manner has been given precedence; with the obvious result of an arbitrary conclusion. This degree of determination to try to find any irrelevant and remote source to reduce the recovery of the victim of an unlawful act is difficult to understand.

### ***II.3.a. (ii) Claim for Loss of Use***

347. Iran has claimed damages for the loss of use of the assets during the period of breach. The Award rejects the claim on its entirety. Regardless of the amount claimed and the issue of the proof, the categorical dismissal of this head of claim does not seem justified.

348. First, the consequences of an unlawful act under international law is not discussed at all. I explained this point at the start of my discussion in this part.<sup>296</sup> Second, the Award relies on one decision rendered by the Tribunal and concludes that the present claim does not meet the criteria set forth in that decision.<sup>297</sup> The Tribunal in *Sedco Inc. v. NIOC*,<sup>298</sup> awarded the claim for loss of use of a number of oil rigs. *Sedco* did not involve a breach of treaty, nor an unlawful act in any other way. Still, *Sedco* recognizes that depriving access to the owner of an asset involves loss of use. It cannot be denied that MORT was deprived of the use of these properties for three years, between March 1981 and February 1984<sup>299</sup> and the deprivation was unlawful. Although Iran introduced expert witness on this point, but even without witness, it is obvious that loss of access involves loss of use. Expert normally quantifies the damages for loss of use. The categorical denial of this claim, thus does not seem justified. At least a “conservative amount”<sup>300</sup> could be awarded.

### ***II.3.a. (iii) Mitigation***

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<sup>296</sup> See, consequences of an unlawful act in international law, with reference to *Chorzów Factory*, *supra*.

<sup>297</sup> Paragraph 2037 of the Award.

<sup>298</sup> The Award No. 309-129-3 (7 July 1987), 15 *Iran-US C.T.R.*, 23.

<sup>299</sup> Paragraph 2023 of the Award.

<sup>300</sup> The Award, Paragraph 2053 of the Award.

349. I agree with the Award's approach towards the mitigation, finding that MORT acted reasonably to enter into a settlement agreement with Gulf-Port; and that the unlawful Treasury Regulations were the main cause of damages. I only add a general point in this respect. As the Tribunal recognized in Award 529 in the present Case, "the U.S. national holders of such liens were given access under the CSD to the Tribunal to recover any amounts due to them from Iran."<sup>301</sup> By depositing sufficient amounts in the Security Account (Paragraph 7 of GD), Iran secured all the legitimate dues of the U.S. claimants, as in this case, Gulf Port. It was an international law agreement that by the establishment of the Security Account, Iranian properties in whatever situation they were, should be free in the U.S., and the U.S. should have arranged for their transfer to Iran; if any person had any claim on those properties, should have referred to the Tribunal to avail itself of that Security Account. Withholding assets for want of any kind of dues would amount to double guarantee and in fact double claim, as in reality it did. This ruling by the Tribunal, indeed should be viewed as a dismissal of any argument on mitigation of damages in all instances similar to the present claim. When the owner of an asset deposits sufficient amounts to meet all the dues alleged by the holder, the latter should simply release the assets and avail itself of the deposited amount. If the holder still insists on receiving cash, it has indeed accepted the risk of its unreasonable (and in the present circumstances unlawful) behaviour. In such circumstances, requiring the owner yet another mitigatory act is not reasonable. In January 1981, Iran offered the ultimate mitigatory act by depositing cash in advance for all such dues. This fact alone should dispose of any argument on the mitigation of damages.

### ***II.3.b. Claim G-7 (Port of Vancouver) / Claim G-13 (Shipside)***

350. As explained in the Award, legal arguments in these claims are not much different from Claim G-8.<sup>302</sup> The properties involved, the claims by Iran, and the defences by the United States, are also by and large similar.<sup>303</sup> These are all Iranian properties withheld in the United States pursuant to the unlawful Treasury Regulations. As a result, my explanations, above, with regard to Claim G-8 on claims for loss of use and mitigation apply here equally.

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<sup>301</sup> Paragraph 49 of the Award 529.

<sup>302</sup> Paragraph 2085-2091 of the Award.

<sup>303</sup> Paragraph 2086-2139 of the Award.



#### ***II.4. Aircraft Claims***

351. This group of claims involves aircraft parts sent by Iranian airlines to the United States for repair.

352. The first claim in this group is Claim G-11 (and the associated Claim Supp (2)-67). The properties at issue here belonged to Iran Air. 17 items were sent from Iran to the United States and all were withheld by U.S. Customs in New York. There is no dispute that the items were still in the United States on 19 January 1981 and that they were held for want of dues to U.S. Customs. The Respondent has conceded liability in this Claim. The main argument between the Parties is that since out of these 17 items, 2 were borrowed by Iran Air from other airlines, whether the 2 are subject to Paragraph 9 obligation or not. The Award says no, because Iran Air did not own them; they were borrowed items. I disagree.

353. First, apparently the practice of borrowing parts between airlines is routine and happens all the time. Iran's expert witness, Mr. Ahmadi, explained during the hearings that any settlement between the airlines occurs through IATA. The Airlines do not send their invoices to each other. They send them to the "clearing house" in IATA and receive their dues from IATA through direct debit out of the debtor airline's account. One could fairly suggest that if an airline did not return the borrowed item, the owner would refer to IATA and make itself whole through IATA's facilities. While the record does not contain any document in this respect, but it is likely that the two airlines who loaned the items to Iran Air (Pan-Am and TWA) used such facility: 1) It is highly unlikely that they would have waited long and would not have claimed for their items. 2) There is no evidence or contention that they made any claim against Iran Air for these two items. Both being U.S. airlines, could have easily referred to the Tribunal, using the facility of the small-claims, and claimed for these two items. There is no evidence of any claim either before the Tribunal or any other forum. Thus, it would be fair to suggest that the items were paid for by Iran Air through IATA facilities. Such an occurrence would involve an automatic ownership of Iran Air. There should be nothing wrong with such an ownership, because IATA rules and machinery are agreed upon by all of its members beforehand. Furthermore, we are dealing with the obligation of the U.S. under paragraph 9 of the GD which could include, or there is no reason to exclude, such kind of proprietary rights.

354. Second, in 1979, the United States blocked these items as Iranian property (Executive Order 12170, 14 November 1979). Subsequently, after 19 January 1981, the United States

unblocked the same properties under the same definition through Executive Order 12281. However, under the Treasury Regulations of 26 February 1981, the items were excluded from transfer, not because of any problem with ownership, but, by virtue of unpaid storage charges under section 535.333 of the Treasury Regulations. Thus, the United States treated all 17 items equally. There was no distinction between these 2 items and the other 15. They were considered properties “owned by Iran” under Treasury Regulations 535.215, but subject to the Treasury Regulations 535.333 exception and thus excluded from the transfer obligation.

355. As explained in Part One of this Separate Opinion, the theories based on domestic law appeared 20 years after the fact or even during the hearings. The Award holds that neither the IATA system nor the U.S. treatment of the two items as Iranian property could have an effect on the ownership of the items. This is another instance where, as explained in Part One, the Tribunal in fact concludes that the United States did not know its own law when treating these items as “Iranian Properties.” When these properties were blocked in 1979; and when they were excluded from transfer obligation in 1981; and when sold in 1982; they were inevitably considered “Iranian properties.” What the Majority says, however, is that the United States blocked and excluded and sold, property belonging to its own nationals.

356. As to the valuation of the items in this part, Iran has claimed replacement value based on expert testimony. The expert has offered a range of values based on fair market value method. The Tribunal has followed the replacement value method, but with a range of deductions not easy to justify. In the circumstances, where we are dealing with aircraft parts withheld unlawfully and in breach of an international obligation, and parts which are in daily demand for the operation of the fleet, awarding replacement value based on the price of new items would be fairer. The Tribunal has in the past awarded the replacement value based on the price of the new item in less sensitive industries and where the government’s action in withholding the items was not found to be unlawful.<sup>304</sup>

357. Two of the aircraft claims are dismissed due to the issue of title.<sup>305</sup> Regarding these two, I refer to my views in Parts One and Two of this Separate Opinion concerning the treatment of the issue of the “Iranian properties” by the Majority.

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<sup>304</sup> *Oil Field of Texas v. NOIC*, Award 258-41-1 (8 October 1986), *12 Iran-US C.T.R.*, 308: “The question whether the equipment at issue was used or new is not as such determinative as to its value. Rather, as the Claimant seeks and is entitled to its replacement value, what has to be determined is the amount it would have cost to replace the three blowout preventers that had been leased to and were retained by NIOC, based on the market conditions for such equipment at the time.” (para. 44)

<sup>305</sup> Supp (2)-44; and Supp (2)(49).

358. Claim G-146 (Aseman/Aircraft Governor) is dismissed because of doubt as to the existence of the items in the United States on 19 January 1981. The evidence suggests that the items at issue in this Claim were sent to the United States and were in the United States in 1979 when blocking order was issued. At least for the propellers, the evidence suggests that they were never returned to Iran. The Majority suggests that it is more likely that they had been resold by the holder before 1981.<sup>306</sup> But there is no evidence in the record pointing to that direction. I would rather believe that the items must have been with Air Governor (the holder) by the time the blocking order was issued on 14 November 1979: 1) the evidence suggests that the items were in the United States in August 1979;<sup>307</sup> 2) During the proceedings, the United States only referred to partial shipment and that Aseman owed Air Governor \$20,000-\$30,000; and further that Air Governor scrapped the items to mitigate the losses;<sup>308</sup> 3) the United States has the burden of establishing its contention that they were sold or scrapped between 1 August 1979 and 14 November 1979; 4) if they were sold or scrapped between 14 November 1979 and 19 January 1981, still the United States would be informed (in view of the blocking regulations) and had the burden of establishing it; 5) as stated in the Award, Aseman sent a telex to Air Governor on 3 November 1980 informing the change in the status of the company.<sup>309</sup> It rather points to the fact that Aseman still had not received the items;<sup>310</sup> 6) Aseman sent another telex on 23 October 1986 to Air Governor, again pointing to its governmental status and that it was still waiting for the items;<sup>311</sup> 7) Aseman consistently followed the items by requested their return even after filing this Claim with the Tribunal.<sup>312</sup> In view of these points, I would rather believe it is more likely that the items were with Air Governor during the relevant period.

### ***General Conclusions***

359. This Separate Opinion offers my views as to the Award's reasonings and the conclusions in this rather large and multifaceted case. The Award is issued in nearly 700 pages containing 2611 paragraphs, and this demonstrates the large host of issues involved in this Case. In a rare occurrence in the history of the Tribunal, eight out of nine members of the

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<sup>306</sup> Paragraph 668 of the Award.

<sup>307</sup> *Ibid.*

<sup>308</sup> Paragraph 647 of the Award.

<sup>309</sup> Paragraph 644 of the Award.

<sup>310</sup> The prospect of any future dealings with Air Governor in November 1980, one year after the still unresolved crisis, must have been nil. Thus, Aseman would not have sent the telex in the hope of any future business relations.

<sup>311</sup> The Award, Paragraph 646.

<sup>312</sup> *E.g.*, the telex of 2 December 1986, *Ibid.*

Tribunal have individually annexed their separate opinions, adding to the significance of the Award and the issues involved.

360. In my view, the Award sidesteps its main task which is the interpretation of a treaty under international law, and favours non-relevant sources and concepts such as General Principles of Private International Law to interpret an international treaty concerning one of its most important concepts, the “Iranian properties.” The result is a text with anomalies and contradictions. The Party who has signed the treaty and has adopted laws and regulations to implement it is branded as ignorant to its own domestic law when committing itself to the treaty and when defining the terms of the treaty, even though that Party had implemented the treaty in that way for years. The other Party to the treaty is assumed to have disputed such definition or interpretation, where there is no sign of it in the record.

361. Bolstering the element of delivery in defining the “Iranian properties” in Paragraph 9 of the GD has led to an absurd result. The Parties consciously have abstained from any reference to domestic law in this part of the GD, since any reference to title based on delivery under domestic law of one Party would certainly lead to the breakdown of the negotiation and would go counter to the purposes of Paragraph 9.

362. The central and the key theory behind the interpretation of the term “Iranian properties” in Paragraph 9 (*lex situs*), is a judge-made concept. Neither Party introduced it during 30 years of litigation, nor the Parties were made understand the significance of this theory for the Tribunal. This practice in the Award creates concern over the due process implications of the Award.

363. The Tribunal has generated a wealth of precedent in treaty interpretation, the interactions with municipal law, and the treatment of the concept of property and ownership. The majority simply ignores this valuable jurisprudence and opts for remote and irrelevant sources outside the Tribunal.

364. While the Majority has based its entire reasoning on the definition of the “Iranian properties” in Paragraph 9 on choice of law theories and municipal laws, and while the Tribunal, and not the Parties, is the author of these theories, arguments on these sources are scant. No real reasoning on important concepts in private international law is offered. Even GPPIL is invoked in a very simplistic and passing manner. There are many flaws in its application without any explanation by the Majority. No regard to the important subject of the proof of municipal law shown, and no assistance from experts is sought. That is so only to

justify unduly the application of the municipal laws of the Respondent to refute its treaty obligation. This is another cause for concern regarding the due process implication.

365. On the question of the burden of proof, the Tribunal Rules and precedent regarding the standard of proof (preponderance of evidence) is not followed. In most cases, as discussed in Part Four, a remote evidence is favoured over the stronger evidence and expert testimony.

366. In general, as explained, the Award in most parts is disappointing. Many “Iranian Properties” including sums paid by the Iranian entities were simply left in the hands of the U.S. holders who unduly benefited a windfall. The deal struck between the Parties in the Algiers Declarations could not and does not allow such a result.

367. In Claims awarded in favour of the Claimant, amounts are deducted with no justification, even against the views of the sole and unrebutted expert, and this is against the Tribunal’s past practice. In the past, the Tribunal has awarded millions of dollars against Iran in expropriation cases, all of them held to be lawful. In such cases the Tribunal has usually awarded the full value of the assets plus lost revenue,<sup>313</sup> or going concern value,<sup>314</sup> and even the DCF value,<sup>315</sup> which contains elements of lost profit.

Dated, The Hague,

10 March 2020



H.R. Nikbakht Fini

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<sup>313</sup> See, e.g., *Sedco Inc. v National Iranian Oil company*, Award 309-129-3 (9 June 1987), 15 *Iran-US C.T.R.*, 3, at 111.

<sup>314</sup> *Amoco International Finance, op. cit.*, footnote 286.

<sup>315</sup> *Starrett Housing Corp. v. Iran et al.*, Award 314-24-1 (14 August 1987), 16 *Iran-US C.T.R.*, 112; *Phillips Petroleum Co. v. Iran et al.*, Award 425-39-2 (29 June 1989), 21 *Iran-US C.T.R.*, 79 (later annulled on account of the settlement between the parties: Award 461-39-2 (19 January 1990), 21 *Iran-US C.T.R.*, 285).