

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.

IRAN-UNITED STATES CLAIMS TRIBUNAL دیوان داوری دعوی ایران ایالات متحده	
CASE NO: A15 (II:A)	پرونده شماره:
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SEPARATE OPINION OF HANS VAN HOUTTE

1. I write separately to set forth my reasoning concerning certain issues where it does not fully coincide with the reasoning expressed in the Partial Award.
2. My first comment concerns the interpretation of the term “all Iranian properties” in Paragraph 9 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (“Paragraph 9”).
3. The Algiers Declarations¹ are to be interpreted in accordance with the Vienna Convention on the Law of Treaties (hereafter “VCLT”). The term “all Iranian properties”, therefore, should be interpreted pursuant to the canons of Articles 31 and 32 of the VCLT.

¹ Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 Jan. 1981, 1 IRAN-U.S. C.T.R. 3, and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 Jan. 1981, 1 IRAN-U.S. C.T.R. 9 (collectively, “the Algiers Declarations”).

4. I agree with the Partial Award's conclusion that the Tribunal has already interpreted the term "all Iranian properties" in Award No. 529² to mean properties that "were solely owned by Iran".³ I also agree with the Partial Award's affirmation of that conclusion, where the Partial Award finds that considering its ordinary meaning – as mandated by Article 31, para. 1, of the VCLT – the term "all Iranian properties" covers all "tangible properties that were owned by Iran or its entities".⁴
5. Consideration of the context of Paragraph 9 and the object and purpose of the General Declaration – in accordance with Article 31, paras. 1 and 2, of the VCLT – does not alter this conclusion.
6. Paragraph 9 refers to this context where it specifies, in the final clause, that it covers all Iranian properties "which are not within the scope of the preceding paragraphs". Thus, while that clause does expressly exclude from the scope of "Iranian properties" under Paragraph 9 all assets dealt with "in the preceding paragraphs" – that is, Paragraphs 4-8 – it does not indicate that Paragraph 9 covers all patrimonial elements that are not covered by Paragraphs 4-8. Nor does the subject heading for Paragraphs 8 and 9 ("Other Assets in the U.S. and Abroad") address the key question of which properties should be considered to be "Iranian" for the purpose of Paragraph 9.
7. While I agree that the term "Iranian properties" means "tangible properties that were owned by Iran or its entities", I cannot unreservedly subscribe to the Partial Award's conclusion that "the legal basis of the ownership of property is title",⁵ and its consequent finding that "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".⁶

² *Islamic Republic of Iran and United States of America*, Award No. 529-A15-FT (6 May 1992), reprinted in 28 IRAN-U.S. C.T.R. 112.

³ Partial Award, para. 98.

⁴ Partial Award, para. 104.

⁵ Partial Award, para. 129.

⁶ Partial Award, para. 134.

Instead, it may be that the Parties had a common understanding of what “solely owned by Iran” means. It is only when no such common understanding can be established that, for sales or manufacturing contracts, the specific transaction to transfer ownership becomes relevant.

8. On this particular issue, no convincing arguments and sustaining evidence have been submitted concerning the Parties’ “subsequent practice” – referred to in Article 31, para. 3, of the VCLT – to demonstrate that the Parties had a common understanding of the scope of Iran’s ownership of tangible property under Paragraph 9.
9. The supplementary means of interpretation referred to in Article 32 of the VCLT, which include the preparatory work of the Algiers Declarations, and the genesis of the General Declaration also do not shed light on this point. Given the unique and difficult circumstances in which the Algiers Declarations were negotiated, with the Government of the Democratic and Popular Republic of Algeria acting as the official intermediary, there exists no joint preparatory work that can be referred to, such as records of direct negotiations, minutes of meetings between the Parties, and the like. The Parties’ unilateral statements, the so-called “Responses”, communicated to each other through the Algerian intermediaries in November and December 1980, cannot be considered as such.
10. Considering the arguments and sustaining evidence submitted by the Parties in the present Cases, the canons of interpretation under the VCLT mentioned in the preceding paragraphs of this Concurring Opinion do not assist in clarifying what the Parties meant by the notion of “Iranian properties” beyond “tangible properties solely owned by Iran”.⁷ Consequently, in the present Cases, the issue whether properties should be considered to be “Iranian” depends on whether Iran had legal title to these properties. This conclusion is fact-based and does not exclude that in another instance with, for example, other evidence, a different conclusion may be reached.
11. Iran argued that “Iranian properties” should be given a broad interpretation for the reason that if one did not do so, many assets paid for by Iran, but to which Iran did not hold legal title, would not be covered by the United States’ obligation under Paragraph 9 (*i.e.*, the obligation

⁷ See *supra* para. 4.

to arrange for the transfer to Iran of “all Iranian properties”). I do not accept that argument. The General Declaration was concluded in very difficult and delicate circumstances and was not meant to establish a global framework to resolve whatever dispute may have arisen between the Parties out of the November 1979 events. For instance, in Paragraph 11 the General Declaration precluded whole categories of claims “arising out of events occurring before the date of this Declaration”.⁸

12. My second comment concerns the relevant legal system for establishing whether ownership to tangible property has transferred in the ‘underlying’ transaction between a seller (or a contractor) and a buyer.

13. The Parties assumed for years that the determination of whether property was “Iranian” as between the seller and the buyer was a contractual issue between those parties governed, *inter alia*, by the proper law of the contract (*lex contractus*).⁹ It was only at the Hearing session on 9 October 2013 that – in response to a question from the bench – the Parties’ argumentation focused on the *lex rei sitae*; from that point on, the *lex contractus* was virtually no longer considered.¹⁰

14. In my opinion, however, in the specific context of the present Cases, the original argumentation of the United States, focusing on the *lex contractus* for determining whether ownership to tangible property had transferred between parties to a contract, was not that off-

⁸ In Paragraph 11 of the General Declaration, the United States undertook to “bar and preclude the prosecution against Iran” of:

any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

General Declaration, para. 11, 1 IRAN-U.S. C.T.R at 6-7.

⁹ See, e.g., Hearing Memorial of the Government of the Islamic Republic of Iran (17 Jan. 1990), at 11 (Doc 943); Response of the United States to Claimant’s Brief and Evidence (26 Sep. 2001), at 87-97 (Doc. 1435); United States’ Brief and Evidence in Rebuttal: Issues Common to Multiple Claims (17 Jan. 2011), at 57-63 (Doc 1728).

¹⁰ Hearing Transcript of 9 October 2013, at 32-35.

track.¹¹ I regret that the contractual aspects of the transfer of property rights *inter partes* and the impact of the law of the contract thereupon were not further explored at the Hearing.

15. As these Cases have been finally presented to the Tribunal, I accept the Partial Award's conclusion that ownership rights may be established in accordance with the *lex rei sitae*, and that, in the present Cases, the *lex rei sitae* may determine whether properties were owned by Iran or Iranian entities. Nevertheless, I observe that the Parties could also have further elaborated on the extent to which the legal *situs* necessarily coincides with the geographical location of assets in export sales or turn-key contracts.
16. With regard to the ownership of the tunneling equipment at issue in Claim G-111 (Zokor), however, I do not subscribe to paras. 975-976 of the Partial Award, which refer to the specific ownership provision in Article 7 of the Settlement Agreement of 1984 (concluded between the insolvency administrator in charge of Zokor's estate for the benefit of all creditors and Tehran Metro) as retroactive evidence of ownership of that equipment as of 19 January 1981 in the relationship Zokor-Tehran Metro. The 1978 contract between Zokor and Tehran Metro ("1978 Agreement") governed the transfer of property. The insolvency administrator was not a party to the 1978 Agreement. Moreover, the 1978 Agreement was terminated on 14 January 1982 and its subject-matter is completely different from that of the 1984 Settlement: the former, concluded by Zokor and Tehran Metro, was for the complete installation of machinery in Tehran; the latter, concluded between Zokor and the insolvency administrator in charge of Zokor's estate for the benefit of all creditors, was for the disposal of the remaining pre-paid equipment.
17. My third comment concerns the Partial Award's application of "general principles of private international law" to determine the applicable municipal law in Claim G-111 (Zokor).¹²
18. One may wonder, *de lege ferenda*, whether in Claim G-111 (Zokor) it was necessary for the Tribunal to construe and apply its own "general principles of international private law" to

¹¹ See, e.g., concerning transfer of title *erga omnes*, J. Basedow, *The Lex situs in the Law of Movables – A Swiss Cheese*, in 18 YB OF PRIVATE INT'L L. 1-17 (De Gruyter 2016/2017).

¹² See Partial Award, paras. 967-974.

decide the property issue. Instead, one could just as well have envisaged the Tribunal deciding this issue as a Tehran court would have done. Indeed, pursuant to the forum selection clause of the 1978 Agreement, Tehran courts had jurisdiction to decide whether the tunneling equipment had become Iranian property under that Agreement, which was governed by Iranian law. The Algiers Declarations transferred jurisdiction over claims arising out of the 1978 Agreement to the Tribunal. This transfer, however, does not imply that the Tribunal should decide the contractual dispute under completely different legal rules than Tehran courts would have applied.

19. Given that Iranian law applied to the 1978 Agreement, a Tehran court would probably have applied Article 362 (1) of the Iranian Civil Code, which provides that, if the parties did not agree otherwise, “[a]s soon as the sale is effected, *the purchaser becomes the owner of the subject-matter of the sale* and the seller becomes the owner of its price”.¹³ For assets that did not yet exist when the contract was concluded, ownership is transferred to the buyer as soon as they are manufactured and identifiable.¹⁴ The restriction that, under Iranian law, this transfer of ownership is only effective between the parties to the contract (*inter partes*) is irrelevant in the circumstances because only the *inter-partes* transfer of property was at stake in Claim G-111 (Zokor).¹⁵

20. However, the Tribunal did not have to decide which rules the originally competent Tehran court would have applied, as this argument was not presented to it by the Parties.

Dated, The Hague,

10 March 2020



Hans van Houtte

¹³ M.A.R. TALEGHANY, THE CIVIL CODE OF IRAN (1995) 52 (translation of Qanuni Madani [Civil Code], 1991, art. 362(1)) (emphasis added).

¹⁴ See Partial Award, para. 154.

¹⁵ Article 231 Iranian Civil Code provides: “Transactions and contracts are only binding on the contracting parties ...”. M.A.R. TALEGHANY, THE CIVIL CODE OF IRAN (1995) 33 (translation of Qanuni Madani [Civil Code], 1991, art. 231).