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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# PARTIALLY DISSENTING OPINION OF JUDGE BRUNO SIMMA ON THE MEANING OF THE TERM "IRANIAN PROPERTIES"

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**Table of Contents**

# I. INTRODUCTION: APPLICABLE LAW AND TREATY INTERPRETATION

1. While I find myself in agreement with most of the decisions and reasoning adopted by the Majority, I hold a different view with regard to the definition by the Majority of the term "Iranian properties" and, hence, to the scope *ratione materiae* of the obligation contained in Paragraph 9. The Majority claims that the interpretation of this treaty provision on the basis of the pertinent rules of public international law opens the way, indeed necessarily leads, to the definition of "Iranian properties" by way of exclusive application of a conflict-of-law analysis. According to the Majority, this method is to be applied to all items in question in the present case: *extra legem rei sitae nulla salus.* With all due respect, I see things differently: I base what I consider to be the correct view on the existence of a shared understanding by the Parties to the General Declaration of 19 January 1981, maintained over a long time, that by "Iranian properties" were to be understood assets fully paid for by the Claimant which would not qualify as "Iranian" according to the Majority's conflict-of-law analysis.

2. Paragraph 9 of the General Declaration of 19 January 1981 reads as follows:

> "9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement (…), the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, 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."

3. I am not persuaded by the reasoning of the Majority, set out in paragraphs 93 to 164 of the Partial Award, according to which a state-of-the-art interpretation of the term "Iranian properties" in Paragraph 9 will lead to a clear and unambiguous result insofar as, in a first step, it will lead us to the concept of "ownership", whose substance in turn is to be determined by reference to "title", the passage of which, in a second step, needs to be assessed either by reference to the law designated by the contract of sales governing each transaction or, by default, by reference to the universally accepted rule of conflict of laws applicable to the transfer of title, namely the *lex rei sitae* /*lex situs*. If what is before us were a regular commercial case, I would share such a private law approach without hesitation. In the context of the Hostage crisis and the Algiers Accords, however, it is unconvincing and, much to my regret, I cannot subscribe to it.

4. I would have no objection to the reasoning of the Majority if it were not for the fact that the instrument at the basis of the present case is an international treaty. The Majority view pays lip service to this fact by subjecting this treaty to an interpretation which the Majority claims to be in accordance with the respective rules of the Vienna Convention on the Law of Treaties, but

unfortunately this exercise is cut short half-way by the claim that its result is already to be found in the Tribunal's Partial Award 529, embodied in the notion of "title". I would submit that the main flaw of the Majority's view ultimately consists in its very premise that the term "Iranian properties" has a clear and unambiguous meaning. This premise limits the scope of Paragraph 9 to an extent that, in my view, does violence to an interpretation of the Algiers Declaration made in good faith as well as against the background of the Declaration's specific political context.

5. The Majority's reference to ownership and title does not advance the interpretation of Paragraph 9 in any way; what it does is to add an additional, unfortunately erratic, layer on what the Majority regards as treaty interpretation. The story starting with "property", from there moving to "ownership", then to "title" and finally to transfer of title effected by the domestic law of the location of the tangible property, does nothing but lead away from a genuine international legal solution. A story well told by my colleagues of the Majority, versed in domestic and private international law it may be, but it cannot persuade me that the Parties' intention was to subject all assets in question, without exception, to a conflicts-of-law test which these assets would have to pass in order to be "owned" by Iran and thus pass the threshold for qualification as "Iranian". That the Parties would have thought of, and also agreed on, such an elaborate definition when negotiating the end of the Hostage crisis with all its drama and pressure, is for me hard to believe.

6. As the Majority admits, the General Declaration is an international treaty which does not provide its own set of definitions of terms relevant in our context. Hence, these terms must be interpreted in accordance with the relevant rules of general international law on the matter.[1] In other words, since our Tribunal in deciding the present case is operating on the plane of public international law, what is to be applied in the interpretation of the Algiers Declarations cannot be but public international law.

7. The rules on treaty interpretation just referred to have found their expression in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (in the following: "Vienna Convention" or "VCLT"). These Articles have been commonly applied by international courts and tribunals,[2] including the present one. Their authority, however, is not just treaty-based, and their substance extends beyond the Vienna Convention; the rules in question are generally recognized as

[1] See e.g. *Exchange of Greek and Turkish Populations, PCIJ, Ser. B, No. 10 (1925),* p. 17: "the difference of opinion which has arisen regarding the meaning and scope of the word 'established', is a dispute regarding the interpretation of a treaty and as such involves a question of international law."

[2] See J. Romesh Weeramantry, Treaty interpretation in investment arbitration, 2012, p. 13 (1.31).

forming part of customary international law.[3] Such acceptance as custom is of particular relevance if one of the parties to a dispute is not a party to the Vienna Convention, as is the case in the present dispute.[4]

8. As concerns our Tribunal in particular, it has held at various instances, and both Parties have agreed, that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention.[5] The Tribunal has also acknowledged that "the general rule of treaty interpretation is set forth in Article 31 of the Vienna Convention".[6]

9. Article 31 of the 1969 Vienna Convention restates the applicable general rule of interpretation as follows:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any

[3] Including by the International Court of Justice, see e.g. in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010,* p. 46.

On the abundant use of I.C.J. jurisprudence on treaty interpretation by arbitral tribunals in general, see Alain Pellet, The Case Law of the ICJ in Investment Arbitration, ICSID Review, Vol. 28, No. 2 (2013), pp. 223-240 (at 231).

[4] For an analogous line of reasoning see *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*, ICSID Case No ARB/87/3, Decision on bifurcation, 5 March 2013, pp. 10-11, para. 43: "In the ordinary course, the principles for construction of relevant provisions of the ICSID Convention and the BIT are as provided under the Vienna Convention on the Law of Treaties ('Vienna Convention'). Although Turkey has not acceded to the Vienna Convention, the Parties nonetheless agreed that the Tribunal may proceed on the basis that the principles stated in the Vienna Convention may be applied in construing the BIT, either as a matter of consent, or, in any event, as reflecting the accepted principles of customary international law.".

[5] See *Islamic Republic of Iran and United States of America*, Decision No. DEC 32-A-18-FT, at 14-15 (6 April 1984), reprinted in 5 IRAN-U.S. C.T.R. 251, 259; *Islamic Republic of Iran* and *United States of America*, Award No. ITL 63-A15 (I:G)-FT, para. 17 (20 August 1986), reprinted in 12 IRAN–US C.T.R. 40, 46; *Islamic Republic of Iran* and *United States of America*, Decision No. DEC 62-A12-FT, para. 8 (4 May 1987), reprinted in 14 IRAN-U.S. C.T.R. 324, 328; *Islamic Republic of Iran* and *United States of America*, Award No. 382-B1-FT, para. 47 (31 August 1988), reprinted in 19 IRAN-U.S. C.T.R. 273, 287; *Islamic Republic of Iran* and *United States of America*, Partial Award No. 597-A11-FT, para. 181 (7 April 2000); *United States of America, et al.* and *Islamic Republic of Iran, et al.* Decision No. DEC 130-A28-FT (19 December 2000).

[6] *Islamic Republic of Iran* and *United States of America*, Iran v. United States, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT, 9 September 2004, 38 IRAN-U.S. CTR 77, at 107.

> subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

10. In applying these rules, the Tribunal has, first, to examine whether an "ordinary meaning" of the term "properties" can be established in current international law. As will be seen below, no such ordinary meaning has been generally accepted and I concur with the majority on that assessment.

11. Secondly, in the absence of an ordinary meaning of our term in general international law, the Tribunal has to ascertain the meaning which the parties to the specific instrument in question intended to give to the term "properties". Our interpretation thus has to trace the intentions of the Parties at the time of the adoption of the Algiers Declarations[7] and, if possible, establish a common understanding of the Parties as to the meaning of the term "Iranian properties", in light of the object and purpose of the Algiers Declarations. In order to establish such common understanding, the subsequent conduct of the Parties relating to the application of Paragraph 9 as well as their conduct in the proceedings before our Tribunal is to be taken into account. And last, but not least: the entire operation thus before us must proceed in accordance with the principle of good faith. In that analysis, I think, the majority view misses the decisive point, namely that the Parties originally agreed on a specific meaning to be given to the term *inter se*.

## II. INTERPRETATION IN ACCORDANCE WITH ARTICLE 31, PARA. 1, OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

### A. No "ordinary meaning" of the term "property" in international law

12. International jurisprudence and academic literature are replete with statements that no interpretation is needed in the presence of a so-called *acte clair*. Unfortunately, such statements oversimplify matters: whether the meaning of a term is clear or not always supposes an act of

[7] As the International Court of Justice held in its 2009 Judgment in the Case concerning *Navigational and related Rights*, opposing Costa Rica and Nicaragua (*I.C.J. Reports 2009*, p. 242): "[T]he terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention."

interpretation, however brief, almost instinctive or "subconscious" that act may be.[8] In the words of Lord McNair, the maxim of clear meaning "is in truth a *petitio principii* because it begs the question whether the words are, or are not clear – a subjective matter because they may be clear to one man and not clear to another, and frequently one or more judges and to their colleagues."[9] Any careful look at judicial or arbitral practice confirms this. We note, for instance, that whenever the International Court of Justice found a text to be "sufficiently clear in itself"[10], this was done after subjecting the text in question to a detailed analysis.[11] Turning to the case at hand, despite the considerable efforts deployed by Iran to establish some kind of common international legal notion of "property", it appears that no such ordinary meaning of the term has found acceptance in general international law. Rather, any search for such a common, ordinary meaning will lead to a variety of results.

13. The Oxford Dictionary, for instance, offers more than one definition of the term "property" and speaks of the "fact of owing something or of being owned, the (exclusive) right to the possession, use or disposal of a thing; ownership and proprietorship".[12] In a legal context, Black's Law Dictionary also proposes a rather broad definition of the term "property", stating that "[t]he term is said to extend to every species of valuable rights and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects."[13] A further definition to be found in Black's Law Dictionary, drawn from U.S.-case law, reads as follows: "Property embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial, or a private ownership. […] Term includes not only ownership and possession but also right to use and enjoyment for lawful purposes." [14] These

[8] Thus, the following statement of the ICJ: "If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter" also presupposes a finding of what the "natural and ordinary meaning" amounts to: *Competence of the Assembly regarding admission to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 4, at 8.

[9] Arnold McNair, The Law of Treaties, 1961, at 372.

[10] *Admission of a State to the United Nations (Charter, Article 4), Advisory Opinion, I.C.J. Reports 1948,* p. 57 (at 63).

[11] Cf. *ibid.;* recognized by our Tribunal: *Iran v. United States*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT, para. 85 (9 September 2004), reprinted in 38 IRAN-U.S. C.T.R. 77, at 109: "(…) When the ICJ, in keeping with the practice of its predecessor the PCIJ, states that a "convention is sufficiently clear in itself", it always does so after an analysis of the text under consideration (…)."

[12] Oxford English Dictionary. Online edition.

[13] Black's Law Dictionary, Sixth Edition, at 1216.

[14] *Ibid*.

definitions reflect the unspecific meaning of the term "property" in as far as they show that the term can be used to indicate items as well as exclusive rights to items.

14. Varieties of treaties use the term "property" in a variety of circumstances, without thereby demonstrating any common understanding of the concept. The Respondent in our case has also argued in favor of an ordinary meaning of "Iranian properties"; but according to the view ultimately adopted by the United States, it is to be the meaning of property or ownership determined by the title to property, which, in turn, is to be determined by the respective *lex situs* of the items, following widely accepted rules on conflict of laws.[15] Such a specific, narrow definition, however, cannot possibly be regarded as the ordinary meaning of the term "properties" arrived at by way of proper treaty interpretation.

15. In any case, the very absence of agreement on the matter between the Parties, or within the Tribunal, demonstrates that it cannot be held that the term "Iranian properties" is self-explanatory, i.e. an "*acte clair*".

16. Even if it were found to be correct that, in general, the ordinary meaning of the term "Iranian properties" would denote tangible properties over which Iran held title in accordance with the applicable conflict-of-law rules and by *renvoi* to domestic law, in the present case we cannot overlook several elements that put an end to the assumption that the Parties to the Algiers Declarations might have held in common any understanding to that effect. As I will demonstrate, the Parties have for a long time shared an understanding of what "Iranian properties" were to be, but it was a very different one. Thus, in sum: in the context of the General Declaration as well as in light of its object and purpose, it is apparent that a conflict-of-law analysis of exclusive application for the definition of the term "Iranian properties" is not sustainable with regard to the transfer obligation of Paragraph 9.

17. Furthermore, the present case does not allow us to proceed from a presumption that something like a tacit agreement might exist between the Parties on the applicability of a conflict-of-law-plus-domestic-law analysis for the qualification of all assets claimed by Iran. This is particularly relevant considering that the laws on passage of title are different in the United States (applying the Uniform Commercial Code: as a default rule, title passes upon delivery) and in Iran in which a consent-based system governs (title passes upon agreement).[16] It is therefore more than

[15] See paras. 87-89 of the Partial Award.

**[16]** See paras. 153-156 of the Partial Award.

unlikely that the Parties could have agreed on the application of the *lex situs* to all and every property under U.S. jurisdiction without expressly saying so.

18. I would also assign significance to the particular circumstances of the negotiations leading to the Algiers Declarations, in particular bearing in mind that the text was prepared in English only and by the U.S. negotiators.[17] It is thus reasonable to assume that the Iranian side understood the term "property" in its most general sense. Moreover, as Richard Lillich observed in 1982, the Accords were "cobbled together in haste and confusion as part of a package deal whose overriding purpose, at least from the U.S. perspective, was to secure the release of the hostages being held in Iran. It covers a wide range of claims – governmental and private - without much elaboration of detail."[18]

19. Furthermore, even if there existed in general international law an "ordinary meaning" confirming the private law / conflict-of-law proposition (*quod non*), Parties to a specific treaty are free to agree to give a term a special meaning with effect *inter partes* in accordance with Article 31, para. 4, of the Vienna Convention. The "ordinary meaning" of a treaty term may thus be replaced, or superseded, by a different meaning, if the common intention of the Parties to that effect can be established. International jurisprudence and practice provide examples of wider definitions of the term "properties" without reference to any conflict-of-law rules, that is, definitions adapted to the object and purpose of the treaty.[19] Hence, there is no rule or prohibition standing in the way of parties to a treaty agreeing on a particular meaning as long as such an agreement does not defy all reasonableness or collide with rules of peremptory international law *(ius cogens*). In my view, this is precisely how the Parties to our Case intended commonly to understand the term "Iranian properties" and deal with these accordingly in Paragraph 9: namely not to subject a specific class of

[17] Cf. Mohsen Mohebi, The International Law Character of the Iran-United States Claims Tribunal, 1999, at 113.

[18] Proceedings, American Society of International Law, The U.S./Iranian Hostage Settlement, 76th Proceed. Am. Soc. Int'l Law. (1982), at 6. Lillich commented upon the Claims Settlement Agreement, but in doing so he also described the general atmosphere prevailing in the negotiations leading to the adoption of the Algiers Declarations.

[19] For an early example of such a wide definition, see the findings of the American-Venezuelan Commission in the *Rudloff* case (interlocutory), according to which "[t]he taking away or destruction of rights acquired, transmitted and defined by a contract is as much wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property…"(R.I.A.A., vol. IX, at 244-255, at 250); ); see also the jurisprudence of the European Court of Human Rights in the context of the protection of 'property', which goes even further. For instance, the term "possessions" or "propriété" and "bien" (in the French version) in Article 1 of the Additional Protocol No. 1 has been defined as follows by the Grand Chamber: "The concept of 'possession' ('bien' in the French version) within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law." ECHR, *Bélané Nagy v. Hungary* (Just Satisfaction) no. 53080/13 [GC] of 13 December 2016, § 73

assets, i.e. items fully paid for by Iran, to the conflict-of-law analysis applicable in other cases and to coin for these items a special meaning to which I will turn shortly. However unanimously the college of private or comparative international lawyers may store all vehicles of the "property" brand in the garage of *lex situs* and prohibit any outside parking, as it were, this was of no concern to our states parties when they agreed to override *lex situs* in order to include certain additional assets in the treaty term "Iranian properties".

20. To continue our exercise of treaty interpretation: there exists no hierarchy between the different paragraphs of Article 31 of the VCLT. In searching the correct interpretation to be given to the term "Iranian properties", paragraphs 1 and 4 may be used concomitantly for the purposes of interpretation.

21. In the present case, it is the task of the Tribunal to search for the real intention of the Parties to the Algiers Declarations as expressed in the text of these Declarations, that is, by interpreting, in good faith, the provision of Paragraph 9. The parties to a treaty are thus presumed to have expressed their intention by the text adopted. Nevertheless, the different elements to be used for interpretation in accordance with Article 31, paragraph 1, of the VCLT, are interdependent;[20] state-of-the-art interpretation cannot stop at the purportedly clear meaning of a term. Only if a term is interpreted in good faith, in its context and in light of the object and purpose of the treaty, can the intention of the Parties be confirmed. The purportedly clear meaning of a term cannot override such intention, which is the premise to any expression of a will to be bound.

22. In order to examine whether the Parties did actually intend to give a special meaning to the term "Iranian properties", or more precisely, to introduce such a special meaning in order to cover a specific class of properties, it will be necessary to assess contemporaneous documentary evidence as well as the conduct of the Parties in the aftermath of the entry into force of the Algiers Declarations. However, before doing so, the Tribunal will have to look into the context as well as the object and purpose of the General Declaration and particularly Paragraph 9.

### B. Context, object and purpose of the Treaty

23. The (external) context of the conclusion of the Algiers Declarations does not support a narrow, conflict of law-based definition of the term "Iranian properties".

[20] Patrick Daillier, Alain Pellet, Droit international public, 6th Edition, 1999, at 258.

24. Following the taking of the hostages on 14 November 1979, the U.S. President adopted Executive Order 12170, decreeing to block "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States."

25. Treasury Regulation 535.201, issued to implement the above Presidential Order, uses similar language: "No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever, may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized."

26. In the same vein, Treasury Regulation 535.311 defines property, property interest or property interests in broad terms, probably meaning "assets", not "properties" in a strictly legal sense, including but not limiting the term to tangible and non-tangible property, e.g. money, checks, bonds, financial securities, judgments etc.

27. Treasury Regulation 535.312 states that the term "interest", except as otherwise provided, when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

28. The negotiations leading to the Algiers Declarations were, at least from the Iranian perspective, prompted in the first instance by the US freeze of Iranian assets. The object and purpose of the Algiers Declarations was thus twofold: to put an end to the hostage crisis and to unfreeze Iranian assets. A statement by Warren Christopher before the US Senate Committee on Foreign Relations in February 1981 points at the essence of the bargain as viewed by Iran: the negotiators of the Algiers Accords were working "… towards a restoration of the financial position which existed prior to the freeze order."[21]

29. As stated in the Preamble of the General Declaration[22], the Parties entered into negotiations in order to seek "a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran." The Preamble also draws attention to the fact that the Algerian Government played a decisive role in this process and "consulted

[21]Hearings before the Committee on Foreign Relations; United States Senate, 97th Congress first session, at 28 et seq.

[22] To be taken into account in the interpretation of a treaty, cf. Article 31, para. 2, VCLT.

extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran"(the Majlis).

30. Among the requirements for the release of the hostages set forth in that Resolution – the so-called Majlis Resolution – we find in particular the (broadly phrased) condition "that the freeze on Iranian assets should be lifted." In the absence of any further documentation on the context of the negotiations, we must conclude that the Majlis Resolution represents the negotiating position of Iran at the time.

31. Consequently, the General Declaration is to be seen as a response to these requests of the Iranian government; and its Paragraphs 4-9 as the direct corollaries to the requirements contained in the Majlis Resolution.

32. Further support for this broader reading of the term can be found in General Principle A, on which the undertakings contained in the General Declaration are based. General Principle A states that the United States "will restore Iran's financial position, in so far as possible, to that which existed prior to 14 November 1979", and that "[i]n this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9". In that regard I note that in its Interlocutory Award in Case No. A15 (I:G) ("ITL Award No. 63"), this Tribunal has stated that General Principle A when speaking of the obligation to restore Iran's financial position contains a "sweeping statement" and a "broad commitment".[23]

33. Turning to the (internal) context of Paragraph 9 within the Declaration, the provision is placed under the heading "other assets", which is arguably intended to serve as a catch-all-clause. This understanding is confirmed by the last part of Paragraph 9 which reads as follows: "… the United States will arrange … for the transfer of Iranian properties … which are not within the scope of the preceding paragraphs".

34. Hence, in view of the context, object and purpose of the General Declaration, as expressed in the Preamble and in Principle A, it is unlikely that the term "Iranian properties" was meant to have a restrictive meaning, limited to tangible property over which Iran held title in accordance with a domestic-law or conflict-of-law analysis, since any such limitation could not

[23] *Islamic Republic of Iran* and *United States of America*, Award No. ITL 63-A15 (I:G)-FT, para. 19 (20 August 1986), reprinted in 12 IRAN –US C.T.R. 40, 47f.

possibly have led to a "mutually acceptable" resolution of the crisis through the conclusion of the Algiers Declarations.

35. Indeed, if only items already delivered to Iran were to be transferred under the Paragraph 9 obligation, the result would effectively be that only items subsequently on loan in the United States or sent there for repair or kept in storage, would fall within the scope of the provision. While this result might not be "absurd" or "unreasonable" within the meaning of Article 32 of the Vienna Convention, it is highly unlikely that the Iranian Government would have agreed to such a limited obligation, excluding from the U.S. duty to arrange for transfer most of the properties finding themselves under the Respondent's jurisdiction. In a state-of-the-art interpretation of Paragraph 9, the Tribunal must proceed from the assumption that the Parties to the Declaration intended to give this provision an *effet utile.*[24] As the Tribunal has held in the past, "the act of entering into a treaty in good faith carries with it the obligation to fulfil the object and purpose of that treaty – in other words, to take steps to ensure its effectiveness."[25]

36. An interpretation limiting the transfer obligation to items already delivered is therefore to be excluded.

## III. THE RELEVANCE OF SUBSEQUENT CONDUCT BEYOND ARTICLE 31, PARAGRAPH 3(B), OF THE VIENNA CONVENTION

### A. Subsequent "practice" and subsequent "conduct" distinguished

37. Article 31, paragraph 3 (b), of the VCLT includes "any subsequent practice in application of a treaty which establishes the agreement of the parties regarding its interpretation" as a means of interpretation, in addition to the search for ordinary meaning in light of the object and purpose of the treaty.[26]

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[24] J.-M. Sorel / V. Bore-Eveno, Article 31, pp. 830-835 in: O. Corten / P. Klein (eds.), Vienna Conventions on the Law of Treaties, A Commentary, 2011, Vol. I.

[25] *Islamic Republic of Iran and United States of America*, Decision No. DEC 62-A21-FT, para. 14 (4 May 1987), reprinted in 14 IRAN-U.S. C.T.R. 324, 330.

[26] In fact, subsequent practice can also assist the adjudicator in ascertaining the object and purpose of a treaty. Such use of subsequent practice has been made by the International Court of Justice in several instances. See e.g. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 51 (para. 27*); Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815 (paras. 27 and 30); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306 (para. 67).

38. The work of the International Law Commission confirms that recourse to subsequent practice in treaty interpretation leads to "objective evidence of the understanding of the parties as to the meaning of the treaty"[27]. As the Permanent Court of International Justice stated in its Advisory Opinion on the *Competence of the International Labour Organisation*: "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."[28] The Permanent Court found in that case that subsequent practice did confirm the meaning which it had deduced from the text and which it considered to be unambiguous.

39. Subsequent practice can also clarify the original intention of the Parties.[29] As our Tribunal has noted, such practice, far from playing a secondary role in the interpretation of treaties, "constitutes an important element in the exercise of interpretation…The subsequent practice of the parties to a treaty may be relevant in shedding light on the original intentions of the Parties."[30]

40. In the jurisprudence of international courts and tribunals subsequent conduct of States parties to a treaty has also been taken into account in instances in which such conduct remained short of establishing an agreement. [31] Hence, the actual significance of the conduct of parties subsequent to the conclusion of an agreement for the purpose of the latter's interpretation extends beyond the narrow understanding of Article 31, paragraph. 3 (b), of the Vienna Convention. This is of particular relevance for our present case.

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[27] Commentary to Article 27(3)(b) of the Draft Articles on the Law of Treaties, Report of the International Law Commission on the work of its eighteenth session, 4 May-19 July 1966, Document A/6309/Rev. 1, Yearbook of the ILC 1966, vol. II, p. 221.

[28] *Competence of the International Labour Organisation, P.C.I.J, Advisory opinion of 12 August 1922, Series B, No. 2*, p. 39.

[29] See also I.C.J., Advisory Opinion on the *Status of South West Africa*, I.C.J. Reports 1950, pp. 135-136. "Interpretations placed upon legal instruments by the parties to them, though conclusive to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."

[30] *Iran* and *United States of America*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT, paras. 111-112 (9 September 2004), 38 IRAN.U.S. C.T.R. 77, 117, quoting Sir Gerald Fitzmaurice, Law and Procedure of the International Court of Justice 1951-4: Treaty interpretation and other Treaty points, 33 (1957) BYInt'l L, p. 203 (p. 211): "In interpreting a text, 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." See also J.-P. Cot, La conduite subséquente des parties à un traité, 70 RGDIP, 1966, pp. 632-666.

[31] Unless one construes an agreement in the meeting of minds through unilateral conduct and silence, or tacit acceptance, by the other Party. Such construction and the subjective element contained therein requires that "a party acts under a treaty in the belief of a certain meaning of its terms and that the other parties were aware of that understanding and accepted it as what the treaty stipulates." :O. Dörr, Article 31, in: O. Dörr / K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary, 2012, p. 560; on the controversy surrounding such construction of an agreement, see, in particular, Y. Le Bouthillier, Article 32, p. 862; in: O. Corten /P. Klein, Vienna Conventions on the Law of Treaties, A Commentary, Volume I; and A. Aust, Modern Treaty Law and Practice, 2000, p. 200.

41. Furthermore, subsequent practice is to be regarded as a means of treaty interpretation even in cases where such practice is not common but remains unilateral, if such unilateral behavior illustrates the contemporaneous understanding of the Parties.[32]

42. The conduct of only one State Party will of course have special relevance when it comes to the understanding of that State of its own obligations and the scope thereof. As the International Court of Justice held in 1950, "[i]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." [33]

43. This view is based on the premise, to which I subscribe, that the Parties are presumed to apply a treaty in conformity with their original intent.[34]

44. As to the place of unilateral conduct not establishing agreement within the Vienna Convention's canons of treaty interpretation, the International Law Commission recognized that, while it may not be taken into account at the same level as subsequent practice evidencing agreement of the Parties, a certain probative value can nevertheless be ascribed to it.[35]

45. In fact, and in the alternative, unilateral conduct of the kind under consideration here could also be included in the category of supplementary means of interpretation referred to and admitted in Art. 32 VCLT. Article 32 contains a list of such supplementary means, but does not exclude that the interpretation of a treaty be based also on other means not expressly mentioned in Article 32. With regard to the subsequent practice of one party to a bilateral treaty, in our case the practice of Iran, this has recently also been recognized by the International Law Commission, in its 2018 Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Conclusion 4 of which in paragraph 3 expressly recognizes "conduct by

[32] J.-P. Cot, La conduite subséquente des parties à un traité (note 31) at 645: " … en revanche, simple indice de la volonté des Parties, [la conduite subséquente] peut être retenue même si elle émane d'un seul Etat. Sa valeur probatoire dépend alors des circonstances de l'espèce…. [D]ans le cas d'un acte unilatéral, la conduite ultérieure de l'Etat dont émane l'acte peut fournir un indice tantôt favorable, tantôt défavorable à sa thèse."

[33] *Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950,* pp. 135-136.

[34] See L. Sbolci, Supplementary means of interpretation, in: E. Cannizaro (ed.), The Law of Treaties beyond the Vienna Convention, 2011, pp. 158-159 and 160-161.

[35] Commentary to Article 69 of the Draft Articles on the Law of Treaties, Report of the International Law Commission covering the work of its sixteenth session, 11 May -24 July 1964, Document A/5809, Yearbook of the ILC,1964, vol. II, p. 204.

one or more parties in the application of the treaty", as a supplementary means of interpretation.[36] Unilateral behavior of a Party can thus usefully be taken into account in addition to preparatory work and the circumstances of the conclusion of a treaty.[37]

46. For instance, when a party has manifested ambivalent or even inconsistent conduct, international courts and tribunals will, in general, hold such conduct against that State in their interpretation of the treaty.[38] Some statements and practices might be accepted as admissions (against interest), even without any precluding effect or estoppel being attached to them. Evidently, each case will present its specificities and courts and tribunals will apply a margin of appreciation in admitting the use of such "inconsistent conduct" as a tool of interpretation.

47. Furthermore, it could be said that there are aspects of subsequent practice, respectively conduct**,** relevant in treaty interpretation which are not expressly covered by the rules of Article 31 or even 32 VCLT. Arguably, they might fall under the application of the principle of good faith, consecrated in Article 31, paragraph. 1, VCLT.

48. Finally, where the parties intended to convey a special meaning in the sense of Article 31, paragraph 4, subsequent practice "may contribute to bringing this special meaning to light."[39]

49. The preceding considerations are of particular importance in our case in which it would be artificial to establish an "agreement" of the parties regarding the interpretation of the term "Iranian properties" in their respective subsequent practice lasting up to the present.[40] However, what I hope to have demonstrated is that even the subsequent unilateral conduct of one party to a

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[36] See UN General Assembly, Report of the International Law Commission, seventieth session 2018, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties", Document A/73/10, para. 51.

[37] L. Sbolci (note 35), p. 159. See also the case concerning *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports, 1999*, p. 1096, at 80.

[38] W. Karl, Vertrag und spätere Praxis im Völkerrecht, 1983, pp. 156 et seq.

[39] Second Report of Special Rapporteur Georg Nolte, Doc. A/CN.4/671, p. 12. Available at: http://legal.un.org/docs/?sym:bol=A/CN.4/671.

See also Draft conclusion 7, Possible effects of subsequent agreements and subsequent practice in interpretation:
"1. Subsequent agreements and subsequent practice under Article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.
2. Subsequent practice under Article 32 may also contribute to the clarification of the meaning of a treaty." Report of the ILC on its 2018 Session, p 14; see fn 37.

[40] The threshold for any such agreement to be found being too high; see *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999-II*, pp. 1076 – 1087, paras 50-63.

Treaty can help to establish the original intention of all or both parties. This will be the case in particular where the parties in a first phase, for a considerable time, did agree on the meaning of a term, before that agreement evaporated for whatever reason. Let us now proceed to the application of the legal rules and principles thus established to the facts of our case.

50. In the examination of the subsequent practice of the United States and, in a more limited way that of Iran, we will have to scrutinize domestic implementing measures of the United States as well as pleadings and other filings in relation to our case. Different probative value will have to be given to each of those documents, such as, in particular, the reports submitted by the United States concerning Iranian tangible properties in the United States.[41]

### B. The US implementing measures

51. On 19 January 1981, the President of the United States issued several Executive Orders directing the transfer of Iranian Government assets, with a view to implement the Algiers Declarations. Executive Order No. 12281 is entitled "Direction to Transfer Certain Iranian Government Assets". It dealt with "properties, not including funds and securities, owned by Iran or its agencies, instrumentalities, or controlled entities".[42] Given that the draft of Executive Order 12281 was shared between the parties during the negotiations and not opposed, according to some even "agreed" to, by Iran, this Order will have to be given greater probative value than any other piece of domestic law-making when it comes to assessing the real intention of the Parties at the conclusion of the General Declaration.

52. The declared purpose of Executive Order 12281 was "to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January, 19 1981." As this Tribunal held in Partial Award 529, by issuing Executive Order 12281, the U.S Government "directed and compelled … persons to transfer such properties as directed by the Government of Iran, and thereby took steps towards ensuring" compliance with the U.S. treaty obligation. [43]

53. Insofar as the Order was intended to implement Paragraph 9 of the General Declaration, constituting the necessary corollary, an imperfect *actus contrarius***,** to the "blocking" Order 12170 of 14 November 1979, it represents a decisive element for the purpose of a proper interpretation of

[41] See paras. 116-121 of the Partial Award.

[42] Paragraph 1-101 of Executive Order No. 12281.

[43] Award No. 529, para. 41, 28 IRAN-U.S. C.T.R. at 126.

the term “Iranian properties”: while Executive Order No. 12170 had frozen all property and interest in property of the Government of Iran, Executive Order No. 12281 subsequently ordered the transfer of such properties, excluding funds and securities.

54. Somewhat surprisingly, however, Executive Order No. 12281 does not contain any definition of the term ”properties”, but determines in rather broad, not strictly legal, terms that all properties, save funds and securities not at issue in these Cases, blocked under Executive Order No. 12170 are to be transferred. Had it been the intention of the Parties to limit the transfer obligation to items over which Iran held title in accordance with the applicable domestic law to be determined by the relevant conflict-of-law rules, be it the *lex contractus* or the *lex situs*, we might have expected the Order to say so in its operative part. No such determination is made in the Order, however, and there is no indication that the scope of the transfer obligation was limited in that way. One would have expected the United States to at least adopt a terminology to the effect that only “titled” properties were to be transferred. However, at no point does the Executive Order mention the terms “title” or “titled properties”. The same goes for the implementing measures.

55. As already stated, any such limitation of the ordinary meaning cannot be presumed and no convincing case has been made by the United States that the Parties, in 1981, had the common intention to give the term “Iranian properties” only such a limited meaning.

56. The corresponding Treasury Regulations 535.215 and 535.333, adopted in implementation of Executive Order No. 12281, read as follows:

> 535.215:
> “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 19, 1981 as directed after that date by the Government of Iran, acting through its authorized agent….”
>
> 535.333:
> “(a) The term ‘properties’ as used in § 535.215, includes all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, including debts […] (b) Properties are no Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged. (c) Liabilities and property interests maybe considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of a defense, counterclaim, set-off or similar reason.”

57. The reading of the U.S. implementing measures thus quoted, and in particular the reading of paragraph (b) of Treasury Regulation 535.333 in an *a contrario* manner, lead to the conclusion that the United States Government understood its transfer obligation to apply to all properties in relation to which Iran had discharged all necessary obligations. Again, there is no mention whatsoever as to the law applicable to the transfer of title, let alone *lex contractus* or *lex situs*. In my view, this indicates that the United States did not, at the time of the adoption of the Accords, understand the entirety of "Iranian properties" to be subject to a conflict-of-law analysis.

58. In my view, the fact that the terms "owned by Iran" appear in the text of Treasury Regulation No. 535.333 does not support the argument upheld by the Majority, according to which the Parties had intended to determine the items falling under the category of "Iranian properties" by way of application of conflict-of-law rules across the board. The term ownership, the phrase "owning" something, is just as broad, in its ordinary meaning, as the term "property" itself; both are used and are interchangeable with the term "entitlement" which probably best describes the situation of tangible properties fully paid for but not delivered.[44]

59. All in all, I therefore consider that Executive Order No. 12281 and the subsequent Treasury Regulations are evidence of the United States' understanding that Paragraph 9 of the General Declaration commanded the undoing of the effects of the Executive Order No. 12170 and was not concerned with scholarly distinctions of titled and untitled properties – a reading which to me seems very much in line with Warren Christopher's analysis of the essence of the bargain, the Majlis Resolution, and the analysis of the Preamble and General Principle A as mentioned above.

### C. Ambivalent pleadings and other documents

60. While the Iranian Government appears to have consistently claimed that "Iranian properties" subject to Paragraph 9 included items fully paid for and not delivered (see e.g. Brief, 25 October 1982, including Claim G-13), the pleadings of the United States relating to the determination of "Iranian properties" are marked by ambiguity.

61. In a diplomatic note of 23 September 1981, filed as part of the U.S. Government's Statement of Defense of 22 March 1983**,** the US Government stated that "… several private parties holding Iranian-owned military supplies and equipment have informed the US Government that the items in their possession are physically deteriorating or, due to changing market conditions, declining in value. Examples of such items are listed in the enclosure to this note. Holders of these

[44] See the definitions quoted in para. 13 above**.**

items have requested the US Government to approve the sale of the property in order to prevent any further erosion of its value" … "The Department believes it will be in the best interests of both the United States and Iran to conserve the value of this Iranian property." In that note, reference is further made to the transfer obligation in Paragraph 9, as well as to General Principle A. All of this indicates that the terminology of "Iranian properties" was being used as including items purchased by Iran but not yet delivered. A view expressed like this in an official, albeit isolated, document, speaks against an all-embracing *lex situs*/delivery approach to the term "properties".

62. In the Statement of Defense itself, the United States maintained that "properties for which Iran had not paid or which Iran did not otherwise own, and properties whose title was encumbered by liens, were not required to be transferred". The language used here is of great importance: it allows to hold, by way of inference or *a contrario* interpretation, that the United States admitted in that pleading that properties for which Iran had paid, but which it not otherwise owned, were subject to the transfer obligation.

63. Further in the same pleading, the United States argued that the term "Iranian properties" in paragraph 9 has "no application to tangible properties in which Iran has only an interest, including tangible properties for which Iran has not paid, over which title or ownership is contested, and in which other persons have legal rights…". Again, arguably, under this view tangible properties for which Iran had paid, were regarded by the Respondent as falling within the scope of the transfer obligation of paragraph 9.

64. In fact, it was only from 2001 onwards (20 years after the General Declaration and following the Tribunal's Partial Award 529 !) that the United States began to assert explicitly and unambiguously that the term "properties" should be understood as based on a conflict-of-law analysis, while it initially had pleaded the "center of gravity" of the contract. The *lex situs* rule as the law to be applied appeared as a much belated *deus ex machina*. I regard it therefore inadmissible for the Tribunal to use a (re-)interpretation and definition of quite recent origin for the purpose of elucidating the contemporaneous understanding of the United States of the term "properties" in 1981.

65. In response to an Order of the Tribunal, dated 16 December 1983, requesting the Parties to submit a joint document identifying the properties at issue in the present claim, the Parties, unable to produce a joint report, submitted separate reports concerning Iranian tangible properties in the United States,[45] the so-called "Consolidated Reports". To the extent that these reports constitute

[45] See para. 122, fn 121 of the Partial Award.

unilateral documents produced in the context of the proceedings in the cases, I consider that they may be used to assess the conduct of the Parties, as defined in paragraphs 41-49 of the present Opinion, in relation to their understanding of the content of the obligation set out in Paragraph 9 and, in particular, the meaning of the terms "Iranian properties".

66. The United States submitted its first ("consolidated" but unilateral) report on Iranian tangible properties on 17 September 1984. Supposedly for the sake of clarity, in this report as well as in the following ones, the United States made the effort to classify the items under separate headings, mainly by separating the properties into five categories. (I. GOI owned tangible properties in U.S. on 19 January 1981; II. Not subject to paragraph 9; III. Claim to tangible property withdrawn; IV. Need more information; V. Export-controlled tangible property). These categories were further divided up by sub-titles (A., B., C., etc.).

67. While I do not deny that due note must be taken of the *caveat* contained in the reports, to the effect that "the categorization of tangible property claimed is based on information currently available" and could be subject to change, the Tribunal ought nevertheless to accept that the general framework and categorization used by the United States in these reports bears a certain significance, in the sense of shedding light on the contemporaneous interpretation of the term "properties" by the United States.[46]

68. In particular, from 1982 to 1990 the US Agent submitted reports repeatedly and consistently classifying items which had been fully paid for but not delivered to Iran as "I. GOI-owned tangible properties" (e.g. G-14; G-17); Claims for money, in turn, were consistently classified as "Not subject to paragraph 9" (e.g. Supp.(1)-*Hamadan*).

69. It is also significant that whenever new information had become available, items would be reclassified in the subsequent report (e.g. G-131; G-146; Supp. (2)-49; G-111). This was not the case for items fully paid for but not yet delivered. This procedural conduct provides a further indication of the United States' understanding that items fully paid for but not delivered qualified as GOI-owned and thus subject to Paragraph 9, at least between 1982 and 1990.

[46] There might also be some relevance to the following introductory notes to the Consolidated Reports: the Explanatory Introduction to Report Doc. 757 (1985) states that "Category I. [GOI-owned tangible property in U.S. on 19 January 1981] includes all items which satisfy at least some of the requirements of paragraph 9 by involving tangible property in which Iran has an ownership interest and which was located in the United States or under United States control at the time the Accords were signed."
The Explanatory introduction to Report Doc. 970 (1990) indicates that "Category I. includes all claims which satisfy at least some of the requirements of paragraph 9 by involving tangible property in which Iran may have an ownership interest and which was located in the United States or under United States control at the time the Algiers Accords were signed."

70. If the United States had already at that time held the view which it now claims to have maintained throughout (delivery leads to title), it could have, and certainly would have, reclassified items which were fully paid for but not yet delivered under the category "No GOI-owned property - Not subject to paragraph 9". However, since it did not do so, it is difficult to accept that the United States understood the term "Iranian properties" as having been determined under the *lex situs*/delivery rule from the beginning, that is, already in 1981. At no point in any category and in no comment of the US Government did the non-delivery of an item alone constitute the reason for classifying it as not GOI-owned property.

71. If it is true that, as the Tribunal states in paragraph 118 of the Partial Award, the United States mentioned that for some items "title had not yet passed to Iran", it is not quite clear what the United States considered to be the correct criterion for the passage of title. For instance, as the Tribunal rightly notes,[47] the United States classified items fully paid for but not yet delivered as falling under the category of GOI-owned tangible properties. This, to me is an indication that the terminology was not being used in an incorrect way, sneaked in by sloppiness, as the Majority seems to believe,[48] but rather that the Parties actually shared an understanding of the term "Iranian properties" different from the meaning that the Majority now ascribes to it**.** It is therefore at the very least questionable to state that the United States was relying "on Iran having title to an item as the criterion for establishing whether that item was Iranian" and to infer that the conflict-of-laws approach was on the United States' mind throughout the proceedings.[49] Rather, it seems more plausible, and I am in fact persuaded, that both Parties to the Algiers Declaration for a long time shared a broader concept of "properties": items to which Iran was entitled because it had paid for them, would fall under the Paragraph 9 transfer obligation in addition to items owned by Iran under a conflict-of-law method agreed on by both Parties.

72. Moreover, in case of some of the claims it is obvious that they were wrongly classified, such as in case of claim G-15, concerning *Peter Clerk*, who asserted that he had delivered the paintings to agents of Iran. That claim was rather incongruously classified under the sub-title (A) "No-GOI owned tangible property" – which is not legally correct, even under a *lex situs* analysis. Nevertheless, it is to be noted that ("A" is a sub-title under the main heading "II. Not subject to paragraph 9" which in turn is the legally correct classification. Furthermore, relevant comments of the United States always stated that items had already been delivered. In 1990, in its comments on

[47] Para. 119 of the Partial Award.

[48] See paras. 119-121 of the Partial Award.

[49] Para. 118 of the Partial Award.

claim G-14, the United States stated, without reclassifying the claim, that it "should be withdrawn". Such statements cannot be explained away as having been caused by sloppiness or ambiguity; it was clear from the beginning what the classification meant, i.e. that the items of the respective claim did not fall under the definition of Paragraph 9, rather than they were not Iranian properties as such.

73. In any event, even classifications that were allegedly incorrect from a legal point of view do not prevent the Tribunal from drawing conclusions from such classifications used by the U.S. Government in its successive reports and filed in our case. These conclusions allow the Tribunal to infer the contemporaneous understanding of the Parties, i.e. also that of the U.S. Government, to the effect that the term "properties" in Paragraph 9 was not limited to items already delivered.

74. Let me mention *ex abundante cautela*, that in no way do I argue that properties owned by third parties should be considered "Iranian properties" within the meaning of Paragraph 9. It goes without saying that property owned by third parties did not become Iranian on the basis that it was (wrongly) classified as such in the reports. Rather, what these reports show is that there existed no common understanding of the Parties to the effect that the *lex situs*, i.e. transfer of title by delivery, was to be determinative for the definition of all "Iranian properties" for the purposes of Paragraph 9.

75. In the same vein, let me note that the reports were not to be used in order to determine whether a particular item was indeed GOI-owned property. Each claim needed to be assessed individually and in light of the circumstances relevant to the particular case. Nevertheless, the reports are indicative of the views of the Parties as to the notion of "Iranian properties". In particular, it can be inferred from the classification of certain undelivered items as GOI-owned properties that the Parties had not expressly or tacitly excluded these items from the scope of Paragraph 9.

76. My conclusion as to the purport of the U.S. reports finds a certain parallel in the findings of the International Court of Justice in the *Nicaragua* case, where, with regard to certain official publications of the United Nations listing Nicaragua as one of the States having accepted I.C.J. jurisdiction in accordance with Article 36, para. 5, of its Statute, the Court stated that it had "no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (…), and the rejection of an opposite interpretation (…)."[50]

[50] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 1984*, p. 392 (p. 409, para. 37).

77. In light of this statement, I believe that the Majority's finding to the effect that the United States reports are not to be considered as adequate evidence of a contemporaneous understanding and that they do not provide "an adequate basis for the Tribunal to presume a framework from which to infer any such understanding",[51] to be somewhat cavalier and, in fact inadequate in itself. These ambivalent and at times "incongruous"[52] reports of the United States might not be adequate to establish that a given item was Iranian property, but on the other hand they do not support, in fact they contradict, the argument of the Majority according to which the term "Iranian property" is to be assessed by reference exclusively to a conflict-of-law operation.

78. In the present context, the reports constitute important evidence concerning the United States' interpretation of the term "Iranian properties". These admissions[53] are all the more important as they constitute statements against interest; they were not required by anyone and were consistently made from 1982 to 1990. But again, it would go too far to assign to them any constitutive effect in the sense of *per se* establishing Iranian ownership over certain items.

## IV. THE ROLE OF PARTIAL AWARD 529 IN THE INTERPRETATION OF "IRANIAN PROPERTIES"

### A. Introduction

79. It has been emphasized time and again that the Tribunal's decision on the meaning and scope of "Iranian properties" must be consistent with its earlier decisions in the same case. I fully agree. Among such earlier decisions, Partial Award 529 of 6 May 1992 plays by far the most important role.

80. Evidently, even in the absence of a rule on *stare decisis*, the Tribunal as a standing adjudicative body[54] must ensure that its awards do not reverse its own earlier decisions, even more so when those decisions were taken in the same case. Coherence of the Tribunal's case law must be discernible and persuasive, or else its legitimacy and credibility will suffer. Nevertheless, such considerations cannot, and must not, lead a tribunal, or an individual judge, to accept an earlier interpretation considered to be plainly wrong after careful analysis of the ordinary meaning of a term

[51] See para. 121 of the Partial Award.

[52] See para. 119 of the Partial Award.

[53] See paras. 122-124 of the Partial Award.

[54] As opposed to an arbitral tribunal established on an *ad hoc* basis for the purpose of resolving one particular dispute. See *Glamis Gold, Ltd v. United States of America*, UNCITRAL, Award (8 June 2009), para. 3.

within the context of a treaty in light of its object and purpose and having taken into account the intentions of the contracting parties and their subsequent practice.

81. Fortunately, no such conflict arises in the case at hand. Let me emphasize that the interpretation of the terms "Iranian properties" that I have advocated in the preceding text in no way departs from what our Tribunal has said in Partial Award 529; rather, the interpretation I support here is fully consistent with the Tribunal's earlier findings made with binding force. It appears to me that the purported inconsistency between the meaning of "Iranian properties" as determined by an interpretation going" the whole way" like mine, and what the majority claims in support of its incomplete interpretation exercise soon ending up in conflict-of-law thinking, is based on a flawed reading of Partial Award 529.

82. In order to assess the relevance *vel non* of Partial Award 529 for the definition of "Iranian properties", the context in which the Partial Award was rendered and the contemporaneous submissions of the Parties are of particular importance. It might therefore be useful to recall the submissions leading to the findings of Partial Award 529, before turning to the analysis of the Partial Award proper.

83. In the following, I will argue that the submissions of the Parties read together with the Tribunal's findings in Partial Award 529 do not allow the Tribunal to draw any conclusions as to the correct interpretation of the notion of "Iranian properties". In this regard, the Partial Award is neutral. It made no express determination, either in the direction of defining our notion by reference to transfer of title or the application of rules of conflict of laws, along UNCC principles or general principles of private international law (*lex situs*), or in favor of the definition of the term "Iranian properties" by state-of-the-art treaty interpretation as done in the present Opinion.

84. To lead attention to the decisive point right away: the parts of Partial Award 529 relevant in our context served one distinctive purpose; namely to determine the conformity of the U.S. Treasury Regulations with the transfer obligation of Paragraph 9. Nowhere was the Tribunal requested to define the terms "Iranian properties" and the Partial Award simply was not designed to offer any positive definition in this regard.

85. Consequently, Partial Award 529 is of no assistance to the Tribunal at the current stage of the proceedings as concerns the interpretation of the meaning and scope of the terms "Iranian properties".

### B. The limited function of Partial Award 529

86. Let me return briefly to the question of what the Tribunal was asked to determine in what was to become Partial Award 529.

87. In its submissions in the respective phase of Case No. A15 (II:A), Iran argued that the United States had breached its obligations under the Algiers Declarations by failing to arrange for the transfer to Iran of all Iranian tangible properties subject to United States jurisdiction, or, in the alternative, by failing to compensate Iran for the United States' refusal to arrange for such transfer.

88. Iran contended that by issuing Treasury Regulations which excluded certain Iranian properties from the scope of Executive Order 12281, namely properties subject to storage and other charges, as well as in the case that tax and warehouse liens had not been paid, that the properties were otherwise not owned by Iran, or that they were subject to United States export controls, the United States had breached its transfer obligation set out in Paragraph 9.

89. Iran thus sought an award finding that the United States had breached the Algiers Declarations, ordering the United States to arrange for the transfer of Iran's properties that had not been transferred, and further ordering the United States to compensate Iran for all direct and indirect damages Iran had allegedly suffered from this breach.

90. Iran also requested that the Tribunal direct the United States to revoke Treasury Regulation 535.333 as well as Executive Order 12281 insofar as Iranian property was defined therein, and to redefine the term property for the purpose of Section 535.215 of the Regulations as any "property in which the Government of Iran has an interest."

91. In paragraph 38 of Partial Award 529, the Tribunal rephrased the questions to be examined by the Tribunal at that stage as follows:

> "(i) has the United States violated its obligations under General Principle A and paragraph 9 by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties where statutory liens had not been discharged, necessary obligations charges and fees had not been paid, the properties could be considered contested by virtue of a defence, counterclaim, set off, or similar reason, or where Iran's ownership of such properties was at issue;
>
> (ii) has the United States violated its obligation under General Principle A and paragraph 9 by issuing and maintaining Treasury Regulations that permit the licensing of the sale of certain Iranian properties; and
>
> (iii) has the United States violated its obligations under General Principle A and paragraph 9 by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties subject to U.S. export control laws or by failing to offer compensation for such properties."

92. The findings of the Tribunal, set out in the reasoning of the Award as well as in the operative paragraph (paragraph 77 lit. (a) to (k)) are, hence, limited to the three issues thus posed.[55]

93. What is particularly telling is that the Tribunal refrained from dealing with the last submission of Iran, namely that the Tribunal direct the United States to redefine the term of property for the purpose of Section 535.215 of the Regulations as any "property in which the Government of

[55] Award No. 529, para.77, 28 IRAN-U.S. C.T.R. at 140-141. In full, the operative paragraph of Partial Award 529 reads as follows:

"a) The obligations of the United States under the General Declaration of 19 January 1981 with respect to tangible Iranian properties were, first, to remove the restrictions it had imposed during the period from 14 November 1979 to 19 January 1981 upon the mobility and free transfer of those properties and to direct persons holding those properties who were subject to the jurisdiction of the United States to transfer the properties as directed by the Government of Iran and, second, to take steps to ensure that this directive will be complied with.

b) United States Executive Order No. 12281 of 19 January 1981 was consistent with the obligations of the United States under the General Declaration.

c) United States Treasury Regulations that excluded from the transfer direction properties in which Iran had only a partial or contingent interest were consistent with the obligations of the United States under the General Declaration.

d) United States Treasury Regulations that excluded from the transfer direction properties which were owned solely by Iran but as to which Iran's right to possession was contested by the holders of such properties on the basis of any liens, defences, counterclaims, set-offs or similar reasons, were inconsistent with the obligations of the United States under the General Declaration. The Tribunal is not on the present record in a position to determine the relevant facts with respect to any particular property.

e) United States Treasury Regulations that permit the sale of Iranian properties by the holders of those properties under certain conditions and pursuant to treasury licenses are not, per se, inconsistent with the obligations of the United States under the General Declaration, but the Tribunal is not presently in a position to determine whether any licenses authorizing sales pursuant to those Regulations were either consistent or inconsistent with the obligations of the United States under the General Declaration.

f) United States Treasury Regulations authorizing it to refuse to permit exports of Iranian properties that were subject to United States export control laws applicable prior to 14 November 1979 and the refusal of the United States pursuant to those laws to permit exports of such properties were consistent with the obligations of the United States under the General Declaration.

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

h) With respect to property that has not been transferred as required by the General Declaration because the United States has not fulfilled its obligations under the General Declaration, the withdrawal by Iran of a claim against the holder of that property or the settlement of such a claim between Iran and the holder of the property subsequent to 26 February 1981 does not per se relieve the United States from liability to Iran for losses caused by such non-transfer.

i) The Respondent, The United States of America, is obligated to compensate the Claimant, The Islamic Republic of Iran, for the damages it has suffered as a result of those actions the Tribunal has found or finds in further proceedings in Part II:A of Case No. A15 to have violated the obligations of the United States under the General Declaration.

j) 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.

k) The Respondent, The United States of America, is not obligated by the General Declaration to compensate the Claimant, The Islamic Republic of Iran, for any storage charges, depreciation or other losses incurred with respect to Iranian properties prior to 19 January 1981. Consequently, Part II:B of Case No. A15 is dismissed."

Iran has an interest." (see above) Instead, the Tribunal limited itself to the three issues it considered ripe for a decision to be taken by the Tribunal at that stage.

94. The Tribunal proceeded to the determination as to whether the United States had violated its obligations under the Algiers Declarations within the framework it had thus set. In the relevant part of the decision, the Tribunal found that the scope of the transfer obligation included properties owned solely by Iran and as to which Iran's right to possession was contested on the basis of any liens, defenses, set offs or similar reasons; and that it was not in a position, at that stage, to make any determination as to specific properties and compensation to be awarded.

95. Conversely, the Tribunal found that the scope of the transfer obligation excluded "properties owned by others" or in which Iran had only "a partial interest" shared with others, or properties in which Iran had a "contingent interest".

### C. Analysis and purported inconsistency

96. Nothing in Partial Award 529 – in its reasoning or in its operative part – was intended to provide a positive definition and interpretation of the term "Iranian properties" under Paragraph 9. In support of this point I will demonstrate that (i) the use of the terms "owned solely" does not have the relevance that the Majority ascribes to it; nor (ii) that it was necessary for the Tribunal to make an implicit comprehensive determination of the terms "Iranian properties" in order to enable it to arrive at findings on the alleged unlawfulness of US implementing measures; and that, (iii) in fact, it would have been improper for the Tribunal to make such a comprehensive determination, since both Parties had chosen to refrain from arguing any such determination at that stage of our case; with the Tribunal concentrating instead on the question whether certain properties (on which a lien etc. was asserted) should be included in the scope of the transfer obligation.

(i) *"Owned solely"/"Ownership"*

97. Much weight has been ascribed by the Majority view on the definition of "Iranian properties" to the use of the words "owned solely" and "ownership" in the Partial Award. For them, it is the use of the term "owned" which serves as the starting point, if not as evidence, for the inference that the Tribunal had the concept of "title" and "transfer of title" in mind when rendering Partial Award 529, and, hence, that it made its choice in favor of the applicability of the general principles of private international law, applying the *lex situs* to movable property whenever no explicit or implicit agreement as to the law applicable to the transfer of title between the contracting parties can be identified.

98. However intricate the legal construction undertaken by the majority may be, I cannot regard it as persuasive, since it deliberately disregards the inherent limits of Partial Award 529, such as the limited scope of the decision determined by the arguments and submissions of the Parties and the questions before the Tribunal.

99. Against this background, the wording "owned solely" by Iran is correctly to be understood as the opposite to "partially owned" and contingent, and – in the context of Partial Award 529 – as excluding properties not solely Iranian from the transfer obligations, such as properties in which Iran had possessory interests only. The wording "owned solely" by Iran does not stand alone and is not linked to any definition, explicit or implicit, of the term "Iranian properties" in Paragraph 9. It is purely and simply meant to describe tangible properties covered by the transfer obligation, namely properties that Iran owns alone. That is the respective reach of Partial Award 529 and there is no compelling reason to read more into its findings than what is explicitly held therein.

100. In passing, it might also be worth noting, that the Partial Award does not use the word (or the concept of) "title". In fact, no concepts of transfer of property can be found in this Partial Award; the Tribunal simply did not offer any positive definition of "Iranian properties", neither in the reasoning and nor in the operative paragraph of Partial Award 529. All this hints towards the conclusion that the Tribunal was using the term "owned" in a broad sense, without prejudging the question as to how the term "Iranian properties" is to be determined.

*(ii) No "necessary implication"*

101. While the Tribunal in Partial Award 529 does not use the word "title" or refer to other concepts of transfer of property, in its operative part (the only part of the decision that could bear any relevance as being *res judicata* in our case), it might still be relevant to see whether concepts such as these are "necessarily implied" in the Tribunal's findings. [56]

102. They are not. The Tribunal's task was merely to examine whether the exclusion of certain properties from the U.S. Transfer Directive was lawful and whether the United States had

[56] As the International Court of Justice held in the *Genocide* case "In respect of a particular judgment, it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues, secondly any peripheral or subsidiary matters, or *obiter dicta*, and finally matters which have not been ruled upon. (…) If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it, …"*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at 94, para. 123.

breached its obligations under Principle A and Paragraph 9 of the Algiers Declarations by adopting certain limitations to that effect. This determination was – as we can see from reading the operative paragraph of the Award – perfectly achievable and legally sound without the Tribunal having to go into the determination of the properties at issue. Thus, such a determination was no "necessary step" in the reasoning to reach the decision set out in the operative paragraph of the Tribunal's Partial Award and, hence, Partial Award 529 did not proceed to provide any legal definition of the term "property".

103. In view of the above, and with case A-15 (II:A) now to be decided, no given definition of that term or determination by the application of conflict-of-law rules on the transfer of title can be presumed.

*(iii) The Parties' arguments did not deal directly with the definition of "Iranian properties"*

104. In its Statement of Claim Iran had initially requested the Tribunal to direct "the U.S. Government to revoke Treasury Regulation section 535.333 and Executive Order No. 12181, insofar as Iranian property is defined and to redefine the term property for the purpose of regulation section 535.215 as any property in which Iran has an interest".

105. The United States rejected this definition in its Statement of Defense, noting that Paragraph 9 "does not obligate the United States simply to order that tangible properties in which Iran claims an interest be packed up and shipped. Rather it limits the United States transfer obligation in two significant ways: 1) the transfer obligation extends only to 'Iranian properties' and not to properties in which Iran only has an interest; and 2) it is expressly made 'subject to U.S. law applicable prior to November 14, 1979.'" The United States made clear that the transfer obligation of Paragraph 9 had a more limited scope than that of the blocking regulations; it held that "[t]he transfer obligation under Paragraph 9 (…) had a much more limited purpose – to return to Iran those properties which it uncontestably owned without prejudice to the rights of persons who had non-judicial liens in such properties under applicable provisions of U.S. law."

106. Iran, in its Reply to the U.S. Statement of Defense, clarified its position by conceding that the scope of Paragraph 9 was not identical with that of the 1979 blocking regulations. Iran further stated that it was not asking "the United States to arrange for the transfer of properties legally owned by third parties solely because Iran may have some legal interest in that property."

107. Thus, as the Tribunal duly noted in paragraph 43 of Partial Award No. 529, the Parties agreed 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.

108. Such review of the Parties' early submission thus does not contradict my finding that a general, conclusive determination of ownership, title or property itself was not at issue in Partial Award No. 529; neither did the Parties intend to make a general determination of the notion of "Iranian properties". It thus appears like a particularly long shot to infer such determination from the use merely of the terminology "owned" and "ownership" by the Tribunal.[57]

109. Let me repeat: the Parties did not put these questions before the Tribunal on the way to Partial Award 529[58] because they were no precondition for making findings on the actual issues before the Tribunal at that juncture of the proceedings. The Tribunal – naturally and in conformity with its mandate – did not address the question of determining the general meaning and scope of Iranian properties; instead, it limited itself to solve the issue before it and to determine the legality *vel non* of contested Treasury Regulation 535.333.

110. Three questions were before the Tribunal at the time, formulated by the Tribunal itself (see above). The Tribunal had to decide on the three instances of alleged violations of Paragraph 9 by the United States' conduct, but none of these alleged violations required a prior positive definition of the term "Iranian properties". It was simply irrelevant, for the purpose of Partial Award 529 whether the term "properties" had a special meaning attributed to it by the Parties at the conclusion of the Algiers Declarations or whether it had to be assessed in accordance with a construction of the applicable law on transfer of title.

111. We might also take into account the fact that Iran did not object to the Tribunal's decision, not in 1992 nor thereafter. This would hint towards the conclusion that Iran did not see any detrimental effect of Partial Award 529 on its legal position and entitlements. At the same time, it is telling that the United States only started using the new argument based on the transfer of title and its respective interpretation of Partial Award 529, in 2001, almost ten years after the issuance of the Award. It would thus seem that its position on the interpretation of "Iranian properties" cannot be based on the contemporaneous common understanding of the United States and Iran, and therefore must be rejected.

[57] Hearing Transcript, Cluster 1, Day 3, Doc. 2020, p. 25: "there is a simple and universal test to determine who is the owner of a particular item, and that test is the transfer of title".

[58] One can only assume that at that time the Parties were still in agreement over the meaning of the term "Iranian properties".

### D. Conclusion on the role of Partial Award 529

112. As to Partial Award 529, I thus conclude that the findings of the Tribunal in that Award are valid and binding, and that there is no inconsistency to be found therein, whichever definition of "Iranian properties" would apply, whether relying on conflict-of-law rules or by interpreting Paragraph 9 of the General Declaration in accordance with my view of the presence of a *lex specialis* on the matter consecrated in the treaty. There is thus no way around accepting the limited scope of Partial Award 529 in the context of determining the meaning of "Iranian properties". In fact, at the stage of the proceedings leading to Partial Award 529, the Tribunal was wise enough to defer any such determination to the future, i.e. to us now.[59]

113. In brief, Partial Award 529 and its findings concerning the compatibility of certain U.S. domestic measures with the transfer obligation under Paragraph 9, do not, and were not designed to, shed any light on the proper determination of the meaning of "Iranian properties". Thus, to claim that such a determination was already made in Partial Award 529, and made with binding effect for the Tribunal now, is untenable purely and simply.

## V. GENERAL CONCLUSION

114. There are sufficient elements to permit me to conclude that the Parties for a long, in any case considerable, time shared the intention to give a special meaning to the term "Iranian properties", a meaning broader than that arrived at by a conflict-of-law determination, in order to include a class of assets which would not have qualified under such a test. My conclusion is based on a strict application of the general rules of treaty interpretation. I readily admit that none of the elements reviewed above, standing alone, would be sufficient to draw this conclusion. However, in view of the accumulation of elements – ultimately showing that a special meaning was given to the term "Iranian properties" – I remain unpersuaded by the Majority's approach which, in fact, appears as a retrospective determination of the term in the present context.

115. The classifications in the Consolidated Reports of the properties claimed by Iran, taken together with other relevant conduct of the United States in implementing its Paragraph 9 obligation, as well as with U.S. pleadings, establish, at the very least, that the U.S. did not qualify or define "Iranian properties" in accordance with the *lex situs* rule at the time of the conclusion of the Algiers

[59] Award No. 529, para. 54, 28 IRAN-U.S. C.T.R. at 132.

Declarations and for a long time thereafter.[60] Rather, the U.S. included in the category of "GOI-owned properties" items not delivered but already fully paid for. Nothing prevented the United States from changing its arguments as to the notion and scope of "Iranian properties" before the Tribunal, once Partial Award 529 had pronounced the "unlawfulness" of the exceptions set out in Treasury Regulation 535.333. But the question whether the United States was permitted to do so or not, is not the question now before the Tribunal. Here, litigation strategies and the content of the pleadings with regard to "Iranian property" are of relevance only for the purpose of ascertaining whether the Parties had at any time held a common understanding of what was to be understood by that term.

116. The special meaning that the Parties intended to give to the notion "Iranian properties" – and by which they brought a class of properties under the transfer obligation embodied in Paragraph 9 – embraces tangible properties fully paid for**,** in other words, tangible properties to which Iran was fully entitled.[61] This is the point on which I differ with the Majority view. As a matter of course, items that never existed or had not yet been manufactured are not within the scope of tangible properties. Conversely, the notion of "Iranian properties" was not meant to include purely monetary claims or claims for advance payment for items which were not in existence.[62]

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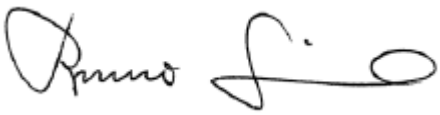
Dated The Hague, 10 March 2020



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Bruno Simma

[60] As the International Court of Justice has held in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, in circumstances where a reaction was warranted, the absence of reaction constitutes a tacit recognition or acceptance. (Judgment of 15 June 1962, Merits, I.C.J Reports, 1962, at 6, at 27-33).

[61] Such as the Encyclopedia in Claim G-31 – *Walter Johnson*.

[62] Such as the claims in *Bank Saderat* (G-162); *Eisenman* (G-16; existence not established) or *Encyclopedia* (G-31; non-existence established).