IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In his Exalted Name

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,

SEPARATE OPINION OF

JUDGE MIR-HOSSEIN ABEDIAN KALKHORAN

CONCURRING IN PART, DISSENTING IN PART

---

10 March 2020

CONTENTS

INTRODUCTION

1. The purpose of this Separate Opinion to Award No. 604 (the Partial Award in Cases A15 (II:A), A26 (IV) and B43) (hereinafter briefly referred to as "Partial Award") is to record my separate understating and interpretation regarding the term 'Iranian properties' in Paragraph 9 of the General Declaration concluded on 19 January 1981 ("GD Para. 9"). I concur with the Partial Award's finding that 'Iranian properties' in the United States on loan, 'Iranian properties' sent to the United States for repair, and other Iranian-titled properties are properties 'solely owned by Iran' on 19 January 1981, falling squarely within the scope of the United States' obligation as enunciated in GD Para. 9. That being said, I feel compelled to dissent from the majority's finding that properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery are not 'Iranian properties' for the purposes of the US obligation under GD Para. 9 because, under the supposedly applicable US law, title to such properties had not been transferred to Iran prior to delivery of the goods.

2. The majority argues in the Partial Award that "[t]he Tribunal […] has interpreted the meaning of the term "Iranian properties" in Award No. 529 and is not called upon to reopen its decision on the matter […]"[1] It further states that "[a]t this stage of the proceedings, the Tribunal is charged with applying its decision in Award No. 529. Thus, it will determine whether claimed properties were "solely owned by Iran," and, therefore, whether they constitute "Iranian properties" within the meaning of Paragraph 9."[2] According to the majority, "the legal basis of the ownership of property is title, the strongest conceivable of all real rights, and title is the right or proof of ownership. […] The Tribunal concludes that title to property is therefore the objective means by which to determine the question of ownership over the property claimed and to conclude whether the property falls within the scope of Paragraph 9. Any interest in a claimed item of property that falls short of title would be insufficient to show that the item was "solely owned by Iran.""[3] The majority then goes on to express that "[a] long line of jurisprudence, mirroring that of the Tribunal, confirms the application of general principles of private international law in determining whether title to property has been transferred."[4] The majority then continues by

[1] Partial Award [100].

[2] ibid [125].

[3] ibid [129], [131].

[4] ibid [141].

that with regard to many cases, it is the *lex situs* of the asset in question that determines the time and place of the transfer of title.[5]

3. With respect, the majority's finding regarding the scope of the term 'Iranian properties', as set out in GD Para. 9, in the Partial Award rests on two fundamental flaws: (i) Partial Award 529 has already determined the meaning and scope of the term 'Iranian properties' in GD Para. 9; (ii) the meaning and scope of the term 'Iranian properties' has to be determined by reference to a private law analysis. As I will demonstrate in this Separate Opinion, the majority is wrong in both respects. **Firstly**, Partial Award 529 did not define the term 'Iranian properties' and, indeed, given the state of the record at the time, was not in a position to do so. Therefore, it is both wrong and inaccurate to ascribe a finding to Partial Award 529 which, if presented to our predecessors who issued this Partial Award, would create nothing but astonishment on their part. **Secondly**, a proper interpretive exercise carried out pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") will result in finding a clear agreement and common understanding by the Parties regarding the meaning and scope of the term 'Iranian properties'. In light of this clear agreement by the Parties regarding the meaning and scope of 'Iranian properties' in GD Para. 9 on an international plane, there is no room for pressing into service flawed domestic law analyses regarding the definition of the term 'property'. I will shortly elaborate on the details of these points in this Opinion.

4. In the first part of this Separate Opinion, I will explain why the majority's finding that Partial Award 529 has already addressed and determined the issue of the definition of 'Iranian properties' is wrong.

5. In the second part, I will show that when one goes through a proper interpretive analysis as per Articles 31 and 32 of the VCLT, one is left with nothing but a clear conclusion that the Parties, in particular, through their subsequent practice, have commonly made clear what the term 'Iranian properties' entails for the purpose of GD Para. 9.

6. Having set out my position regarding the proper interpretive approach concerning the term 'Iranian properties' in GD Para. 9, in the third part of this Separate Opinion, I will turn to highlight the interpretive flaws of the majority's approach regarding the definition of the term 'Iranian properties' from the perspective of treaty interpretation. As discussions in this part will show, when dealing with the question of the definition of the term 'Iranian properties', the majority has

[5] ibid [142]-[145].

regrettably turned treaty interpretation rules on their head and has gone so far as declaring 'Iranian properties' clearly labelled as such by both Parties for many years and throughout several submissions as not being considered as 'Iranian properties'. Unfortunately, this failure to take proper notice of the Parties' subsequent practice and contemporaneous understanding regarding the meaning and scope of the term 'Iranian properties,' coupled with devising certain novel reasonings for which one cannot find a single trace in the Parties' submissions during the past thirty three years of written and oral pleadings in these Cases, without even providing the Parties with the opportunity to present their case in relation to those novel reasonings, has led the majority to an untenable conclusion with respect to the meaning and scope of the term 'Iranian properties'. Before doing so, however, I will show that, in any event, the majority's recourse to any domestic law, including US law, for the purpose of defining the meaning and scope of 'Iranian properties' is both wrong and inappropriate under the circumstances of this Case.

7. Finally and for the sake of completeness, I will make certain observations in relation to whether applying *lex situs* (as opposed to *lex contractus*) would be appropriate under the circumstances of this Case assuming, *arguendo*, one were to define the meaning and scope of the term 'Iranian properties' by reference to a domestic legal system. In so doing, I will draw on the President's views as set out in his Concurring Opinion.[6]

1. THE TRIBUNAL OBVIOUSLY DID NOT ADDRESS THE MEANING AND SCOPE OF THE TERM 'IRANIAN PROPERTIES' IN PARTIAL AWARD 529 IN THE WAY THE MAJORITY CONTENDS

8. The majority argues in the Partial Award that "[t]he Tribunal […] has interpreted the meaning of the term "Iranian properties" in Award No. 529 and is not called upon to reopen its decision on the matter."[7] Then, by reference to paragraphs 40 and 43 of the Partial Award 529 in the present Cases, as well as paragraph 152 of Partial Award 601 in Case B/61, the majority further asserts that: "The Tribunal has […] interpreted the term "all Iranian properties" in Paragraph 9 to mean properties that "were solely owned by Iran." Sole ownership by Iran of the properties claimed, therefore, is the test for determining whether an item of property falls within the scope of Paragraph 9. […] Moreover, the Tribunal in Award No. 529 restricted the scope of "Iranian properties" in Paragraph 9 exclusively to "tangible properties" […] that can be solely owned."[8]

[6] Concurring Opinion of Hans van Houtte.

[7] ibid [100].

[8] ibid [98]-[99].

9. The conclusion that the Tribunal has already interpreted the term 'Iranian properties' in Partial Award 529 is, in my judgement, incorrect. In point of fact, the issue of the meaning and scope of 'Iranian properties' was clearly *not* before the Tribunal when it rendered Partial Award 529. (I) Furthermore, the reading offered by the majority of paragraphs 40 and 43 of Partial Award 529 and paragraph 152 of Partial Award 601 is, in my view, wrong. (II)

I. The Issue of the Meaning and Scope of 'Iranian Properties' Was Not Before the Tribunal When It Rendered Partial Award 529

10. It is not correct to suggest that the Tribunal has already decided the meaning and scope of the term 'Iranian properties' in Partial Award 529. This is simply because the issue was *not* before the Tribunal at the time. The crux of the dispute at the time was whether the Treasury Regulations § 535.333 (b) & (c), § 535.540, as well as § 535.547, enacted in 1981 and 1982, which excluded certain properties from the scope of the "US transfer obligation",[9] complied with the US obligations under GD Para. 9 and General Principle A. The fact that the issue was not before the Tribunal at the time can clearly be seen by reference to (i) pleadings of the Parties before the rendition of Partial Award 529, and (ii) the Tribunal's treatment of the matter in Partial Award 529.

11. (i) As to the pleadings of the Parties, a simple review of the three cardinal formative briefs of the United States, as the Respondent in these Cases, which were submitted before the rendition of Partial Award 529, namely, Statement of Defense of the United States to Claims II-A and II-B,[10] Rejoinder of the United States to Claims II-A and II-B,[11] and [the Hearing] Memorial of the United States,[12] reveals that no single heading or sub-heading has been allotted to the question of the interpretation of the term 'Iranian properties' in GD Para. 9.

12. Interestingly, the Statement of Defense of the United States identifies the 'points at issue' in Claim II-A to be the following:

[9] Under GD Para. 9, the United States undertook to "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."

[10] See Doc. No. 25, Statement of Defense of the United States to Claims II-A and II-B, 21 March 1983.

[11] See Doc. No. 333, Rejoinder of the United States to Claims II-A and II-B, 27 February 1984.

[12] See Doc. No. 969, [the Hearing] Memorial of the United States, 05 July 1990.

> 1. Did Paragraph 9 of the General Declaration require the United States to order the transfer of the tangible properties listed in Iran's Exhibit IIA-3 and Exhibit IIA-11 in derogation of United States law applicable prior to November 14, 1979?
>
> 2. Did promulgation of the United States Treasury Regulation permitting the licensing of the sale of tangible properties pursuant to United States law applicable prior to November 14, 1979 violate General Principles A and B of the General Declaration?
>
> 3. Is the United States obligated under United States law applicable prior to November 14, 1979 to challenge the tax lien imposed by Clark County, Washington?[13]

13. It would be worthwhile to compare this silence in these formative briefs regarding the meaning and scope of the term 'Iranian properties' with the way this issue has been vastly discussed by the United States in its 2001[14] and 2011[15] briefs, and even much more extensively at the 2013-2015 oral hearings. A simple comparison would show that the issue is *now* before the Tribunal but not *then*.

14. (ii) Turning now to the way the Tribunal dealt with the matters at stake, our predecessors patently clarified the issues before them, as well as the ambit of their decision. As to the issues before it in Claim II-A, the Tribunal quite vividly stated:

> … The first question before the Tribunal is whether these actions [the Treasury Regulations] with respect to Iranian tangible properties were consistent with the United States' obligations, and, if not, in what respects they constituted a breach of those obligations….[16]

Moreover, with respect to the scope of its determination, the Tribunal stated:

> Considering the current status of the pleadings, the Tribunal finds that it is presently in a position to make determinations as to the following questions: (i) has the United States violated its obligations under General Principle A and paragraph 9 of the General Declaration by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties where statutory liens had not been

[13] See Doc. No. 25, Statement of Defense of the United States to Claims II-A and II-B, 21 March 1983, pp 50-51.

[14] See Doc. No. 1435, Response of The United States to Claimant's Brief and Evidence, 26 September 2001, pp 87-97.

[15] See Doc. No. 1728, United States' Brief and Evidence in Rebuttal: Issues Common to Multiple Claims, 17 January 2011, pp 56-92.

[16] Partial Award 529 [36]. The other issue before the Tribunal at that time concerned part II:B as to which the Tribunal directly made a decision.

> 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 in issue; (ii) has the United States violated its obligations under General Principle A and paragraph 9 of the General Declaration 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 of the General Declaration 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.[17]

15. As it can be clearly understood from the above statements, the issue before the Tribunal, which had been pleaded by the Parties and was ripe for decision, revolved around the 'exclusions' prescribed by the United States for its transfer obligation based on the US domestic law. To be a little more precise, the United States, in the implementation of its treaty obligation, had promulgated Treasury Regulations which had excluded from the US transfer obligation two types of properties: 'encumbered' properties, which were subject to subparagraph (b) of § 535.333, and 'contested' properties, which were subject to subparagraph (c) of § 535.333. Iran, as will be explained below, objected to these 'exclusions'.[18] This objection to the 'exclusions' appeared to constitute the core foundation for the formation of Case A/15 (II:A). Thus, a close look at the Parties' pleadings and the Tribunal's formulations of the claims at the first phase of the Case, leading to Partial Award 529, does unequivocally reveal the fact that the Tribunal was only faced with the question of whether the exclusion of 'encumbered' and 'contested' properties from the scope of the US transfer obligation was consistent with the obligations the United States had assumed in the Algiers Accords. There was no discussion between the Parties at the time – and thus naturally no decision by the Tribunal – on the 'inclusions', i.e., what properties are/should be included within the scope of the term 'Iranian properties'. Therefore, the Tribunal was not charged with the task of deciding the issue of the meaning and scope of the term 'Iranian properties'. It does not obviously make judicial sense to make an important determination on a determinative point without the Parties raising that point as an issue of dispute and without them having the full opportunity to plead their case on that issue.

[17] ibid [38].

[18] See Section 3.II.i.b *infra*.

16. It is also noteworthy that whereas the Tribunal's determinations as to the issues identified above are reflected in the *dispositif* of the Partial Award, no decision on the interpretation of the term 'Iranian properties' and/or determination of its meaning and scope could be found there.

17. Having the contents of the pleadings and the state of the record at the time in mind, and taking into consideration the articulation by the Tribunal of the issues before it and the scope of its determinations, as well as the contents of the *dispositif* of Partial Award 529, no doubt remains that the Tribunal was neither in a position to make, nor did it make, any decision on the issue of the meaning and scope of the term 'Iranian properties' in GD Para. 9.[19] One should just stay for a moment and ponder: given the status of the record and the Parties' submissions before the Tribunal in 1992, how was the Tribunal supposed to determine the far-reaching issue of the meaning and scope of the term 'Iranian properties'?

II. The Reading Offered by the Majority of Paragraphs 40 and 43 of Partial Award 529 Is Evidently Incorrect

18. According to the majority, "in accordance with the Tribunal's holding in Award No. 529, in order for an item of property to fall within the meaning of "Iranian properties" pursuant to Paragraph 9, it had to be solely owned by Iran on 19 January 1981 […] Sole ownership by Iran of the properties claimed, therefore, is the test for determining whether that item of property falls within the scope of Paragraph 9."[20] Then, embarking upon the task of determining "whether claimed properties were "solely owned by Iran," and, therefore, whether they constitute "Iranian properties" within the meaning of Paragraph 9",[21] the majority eventually concludes that "in order to apply the decision taken by the Tribunal in Award No. 529 that the term "Iranian properties" refers to properties "solely owned by Iran," the Tribunal must determine, for goods sold, whether title to the properties claimed had been transferred to Iran as at 19 January 1981."[22]

[19] It should also be noted that determining the meaning and scope of the term 'Iranian properties' was not a necessary preliminary finding for decision-making with respect to the issues before the Tribunal identified at paragraphs 36 and 38 of Partial Award 529. In this respect, Judge Simma explains in his [Draft] Individual Opinion that not only no decision was made as to the meaning and scope of the term 'Iranian properties' in Partial Award 529, offering such interpretation was not also a preliminary necessary step in deciding the point at issue in the Partial Award (i.e., non-compliance of Treasury Regulations with GD Para. 9 obligation). See Judge Simma's Partially Dissenting Opinion on the Interpretation of the Term "Iranian Properties", p 29.

[20] Partial Award [97], [98].

[21] ibid [125].

[22] ibid [134].

19. With respect, it is a flawed reading of the Partial Award 529 to suggest that paragraphs 40 and 43 of Partial Award 529 reflect what the majority is putting forward today.

20. The reference in paragraph 40 of Partial Award 529 to the requirement of the property being 'owned' by Iran is no more than repeating what was in place from the very beginning when the Accords were entered into, i.e., the requirement of 'ownership' as one also sees in Executive Order 12281 and Treasury Regulations § 535.215. The Tribunal's reference to the concept of ownership in Partial Award 529 could not be considered as being any more than repeating the requirement as 'intended and understood' by the Parties from the very beginning. The Parties had a common understanding that 'properties' and 'property interests' which are supposed to be transferred to Iran must be 'owned by Iran'. That is why in paragraph 40 of Partial Award 529 the requirement of being 'owned by Iran' is mentioned, without any prior analysis, as being a 'clear' issue.[23]

21. Furthermore, at paragraph 43 of the Partial Award, the Tribunal excludes from the scope of the term 'Iranian properties' (i) properties owned by others; (ii) properties in which Iran had a partial interest; and (iii) properties in which Iran's interest was contingent. As explained above, the notion of ownership for the purpose of the transfer obligation in this paragraph and paragraph 40 of Partial Award 529 could not possibly have been used but in the sense understood and intended by the Parties at the time, as evidenced by the practice and contemporaneous understanding of the Parties. The exclusions outlined in paragraph 43, thus, did not change anything for Iran because it did not address – and was in no way relevant to – the undelivered properties which Iran had purchased and paid for. In fact, Iran agreed with the exclusions set out in this paragraph, which reads in part: "The Tribunal and the Parties *agree* that Iran was not entitled to possession of properties owned by others or if it had only a partial, or contingent interest in such property." It does not seem reasonable to argue that Iran would have agreed to something which would have ruled the majority of its individual claims out of the scope of GD Para. 9. More importantly, the above statement, once again, shows that the meaning and scope of the term 'Iranian properties' was not a point of contention between the Parties at the time.

22. Being mindful of the foregoing discussions, it is clear that Partial Award 529 says nothing but the obvious. It, in fact, echoes the Parties' agreement and understanding as to the realm of the

[23] Paragraph 40 of Partial Award 529 reads: "*It seems clear* from the reference in paragraph 9 of the General Declaration to "Iranian" properties, that the obligation of the United States with respect to tangible properties was limited to properties that were owned by the Government of the Islamic Republic of Iran, or its "agencies, instrumentalities, or controlled entities" as Executive Order No. 12281 specified….." [emphasis added].

term 'Iranian properties'. Under Partial Award 529, the scope of the transfer obligation would, thus, include any tangible property 'owned by Iran', obviously of course in the sense commonly understood and intended by the Parties, which, as will be shown, included any property in which Iran had an ownership interest sufficient to make it subject to the transfer directive[24].[25] The Tribunal did not make, nor was it called upon to make, any determination as to what the Parties commonly understood and intended by the phrase 'owned by Iran'. This was not, as shown above, a bone of contention at the time and thus not an 'issue' for determination before the Tribunal, which conveniently described this as 'clear' at paragraph 40 and as being based on the 'agreement' of the Parties at paragraph 43. The exclusions outlined in paragraph 43 would, as *agreed* at the time by both Parties, cover: (i) 'properties owned by others', meaning properties in which Iran owned no interest or its interest was not sufficient to make it subject to the transfer directive (such as a piece of property in which Iran had only a security interest); (ii) properties in which Iran had only 'a partial interest', meaning properties in which Iran's interest was shared by other(s); and (iii) properties in which Iran had a 'contingent interest', meaning properties in which Iran's interest was contingent upon a certain event or occurrence.

23. On the other hand, it is notable that Partial Award 529 did not exclude properties as to which *title* had not been transferred to Iran under a private law analysis. This is not surprising since the Parties shared a common understanding as to the meaning and scope of 'Iranian properties' as properties 'owned by Iran' in the sense intended and understood by the Parties when they entered into the Algiers Accords. This commonly shared understanding was not even *disputed* at any time by any of the Parties up to the issuance of Partial Award 529. The explicit reference to the Tribunal and the Parties' *agreement* in paragraph 43 of the award[26] does clearly testify to the accuracy of this statement.[27] Put differently, unlike the current US argument, the Tribunal, in Partial Award

[24] The transfer directive was set out in the Executive Order No. 12281 dated 19 January 1981 in compliance with the United States' transfer obligation of GD Para. 9 and was repeated in § 535.215 of the Treasury Regulations enacted on 26 February 1981.

[25] Iran also opted for an almost identical formulation, which, in my view, is in accord with what the Parties intended and understood when they entered into the Algiers Accords. See Doc. No. 2274, Hearing Transcript, Cluster 10, Day 4, 18 December 2014, p 7 (stating that: "Iran is not claiming for the return of intangible rights, but return of tangible properties. It is the nature of the interest in the tangible property which is at issue, and whether that interest is sufficient to make that tangible property subject to the transfer obligation.") (Statement of Mr. Sellers)

[26] Paragraph 43 of Partial Award 529, which has strongly been relied upon by the majority, refers to such an *agreement* by stating: "[t]he Tribunal and the Parties *agree* that …".

[27] The Tribunal at that time did not have before it the delivery-based argument that has now been put forward by the United States, so it could not have ruled on what the United States argued for the first time some nineteen years after the filing of this Case A/15 (II-A) by Iran, and some nine years after the rendition of Partial Award 529.

529, does not say that Iran's ownership should be determined according to US law, *lex situs*, or the governing law of the contract. The Tribunal even does not refer to the term 'title'. Rather, it constantly repeats 'own' and 'ownership' – understandably in the sense used, understood, and intended by the Parties at the time – thereby actively rendering any notion of transfer of title based on any private law analysis irrelevant.

24. It does not appear that there was any objection by the Claimant to the Tribunal's decision in this respect pursuant to its issuance in 1992, nor did the Claimant take issue with these statements in its 1995-1996 memorials. This lack of objection on the part of the Claimant tends to demonstrate that the Claimant saw no problem in those statements, and was under the understandably correct belief that such considerations did not intend to exclude a great variety of its properties which must have been transferred to Iran pursuant to GD Para. 9 from the transfer obligation.

25. That said, it should also be borne in mind that, unlike in 1992, the Tribunal, while issuing its Partial Award in Case B/61 in 2009, did have before it the US delivery-based argument (in both Cases A/15 (II-A) and B/61), under which a purchased property only becomes 'Iranian' when title is transferred to Iran under the applicable domestic law. Thus, it was, one expects, the time for the Tribunal to speak out.[28] However, the Tribunal refused to give effect to the private law analysis put forward by the United States even at that time. No reference is made in Partial Award 601 to US law – or indeed any other domestic law regime – for the purpose of determining the meaning and scope of the term 'Iranian properties' or 'properties owned by Iran'. The Tribunal did not even mention the word 'title' or the phrase 'transfer of title', as was the gist of the US arguments in both Cases. The Tribunal also expressly rejected the proposition that any issues of non-shipment, partial payment, or any other breach or termination of contracts could have acted as precluding certain properties from falling within the scope of GD Para. 9.[29] Rather, it only lent credit to one veritable

[28] See Doc. No. 1435, Response of The United States to Claimant's Brief and Evidence, 26 September 2001, pp 87-97 on non-export-controlled properties; and pp 197-200 on export-controlled properties; Case B/61, Doc. No. 392, Rebuttal of the United States to Claimant's Reply Brief and Evidence: Brief of The United States on Issues Common to Multiple Claims, Volume I of III, 1 September 2003, pp 100-135.

[29] In this respect, Counsel for Iran stated at the hearing that:

> It is significant that in these paragraphs, the Tribunal significantly held that the paragraph 9 obligation applies even where the goods had not been shipped, i.e., no delivery, no formal transfer of title, on the United States current case. Because Iran had not paid for them in accordance with the contract or provided shipping instructions, i.e., even in the case where Iran was in breach of the contract. […] In sale and purchase cases within Award 601, if the contracts were governed by US law and the private companies had not shipped the goods to Iran, on the United States case, property would not have passed to Iran and would be outside paragraph 9 on its current approach.

test, i.e., sole ownership by Iran, as opposed to partial ownership. The Tribunal drew a bright distinction between the private law aspect of the contractual relationships between Iran and the US holders on the one hand, and public international law relations between Iran and the United States on the other. By declining to endorse the delivery-based and title-based arguments and repeating simply what it had correctly said in 1992 when it issued Partial Award 529, the Tribunal confirmed that the notion of 'Iranian properties' applies to properties 'owned by Iran', obviously of course in the sense understood and intended by the Parties: "…all that was required in order to trigger the transfer obligation was that the properties be "Iranian," in the sense that they were solely owned by Iran." This said nothing but to imply that the only exclusions from the scope of the term 'Iranian properties' were 'partial' and 'contingent' interests of Iran in a given piece of property.

26. Bearing all these in mind, there appears to be a striking novelty in the majority's opinion contending that "both Parties agreed, in their pleadings during the first phase of the proceedings, that the United States' Paragraph 9 obligation does not cover properties in which Iran only had an interest, rather than legal title."[30] The biggest problem with this argument is not that it is not pleaded by the Parties at any stage of the proceedings. The argument is notably problematic because a review of the early submissions of the Parties would clearly show the stark opposite to what the majority attempts to depict by resorting to a single quotation from Iran's Reply in this Case. And this is while the quotation itself, when reviewed carefully, is ostensibly taken out of its context in Iran's Reply. The issue becomes even clearer when one reads Iran's Reply as a whole. These points will be considered in some depth below.

i. A Review of the Early Submissions of the Parties Clearly Shows That the Parties Agreed That Properties in Which Iran Had an Ownership Interest Sufficient to Make Them Subject to Transfer Directive Fall within the Ambit of the Term 'Iranian Properties'

27. It is quite clear that, in their early submissions, the Parties were in agreement that properties in which Iran had an ownership interest sufficient to make them subject to the transfer obligation fit within the scope of the term 'Iranian properties' in GD Para. 9. Indeed, in a series of Consolidated Reports (submitted from 1984 to 1991),[31] the United States consistently

---

Nonetheless, the Tribunal was clear that the paragraph 9 transfer obligation would still apply in such cases.

Doc. No. 2009, Hearing Transcripts, Cluster 1, Day 1, 07 October 2013, pp 162-164 (Statement of Mr. Wordsworth). This, in my view, correctly reflects the holding of the Tribunal in Partial Award 601.

[30] Partial Award [132].

[31] There are five US Consolidated Reports at issue, all of which post-date Iran's Reply and the US Statement of Defense. See US Consolidated Report of 17 September 1984 (Doc. No. 550); US Consolidated Report of 30 October

characterised assets in which Iran had an interest less than full legal title under a US domestic law analysis as 'GOI-Owned Tangible Properties'. This characterisation applied to properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery.[32]

28. This contemporaneous understanding of the Parties, extending the term 'Iranian properties' to assets in which Iran had an interest less than full legal title as reflected in these early submissions before the Tribunal, gains more importance when one considers that these Reports involve submissions which were provided pursuant to the Tribunals' specific Order, inviting the Parties to "describe each item and indicate its *owner* and the present location of the item."[33]

29. In fact, the United States could not be clearer when it explicitly said that Iran's ownership interest in the properties rendered those properties 'Iranian' for the purpose of GD Para. 9. Thus, in the explanatory notes to one of the Reports,[34] the United States explains that: "Category I. [i.e., 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 interes*t and which was located in the United States or under United States control at the time the Accords were signed."[35] It borders on inconceivable for one to read this important and explicit statement, coupled with other indicia, the most significant of which being the subsequent practice of the Parties as reflected in the US implementing Treasury Regulations and the relevant Diplomatic Note,[36] and still suggest that the Parties posited in their early submissions that the term 'Iranian properties' excluded assets in which Iran's interest was less than full legal title.

30. Furthermore, in a yet again significant submission,[37] entitled "Comments of the United States", the Respondent patently spells out its position, and interestingly that of Iran, with regard to the inclusion of properties in which Iran's interest is less than full legal title within the ambit of the term 'Iranian properties' in GD Para. 9:

1985 (Doc. No. 757); Supplement to the Consolidated Report of The United States of 18 February 1986 (Doc. No. 774); US Consolidated Report of 05 July 1990 (Doc. No. 970); and US Consolidated Report of 01 February 1991 (Doc. No. 1008).

[32] Examples for this consistent characterisation are Claims G-16, G-31, Supp. (1)3, and Supp. (2)49.

[33] See Doc. No. 223, Order of the Tribunal, 16 December 1983 [5] [emphasis added].

[34] See Doc. No. 757, Consolidated Report of the United States, 30 October 1985.

[35] ibid, p 2 [emphasis added].

[36] See Sections 2.II and 2.III *infra*.

[37] Doc. No. 749, "Comments of the United States", 16 August 1985.

> The status of the *ownership* question will be apparent from these submissions. Inclusion of an item in its claim constitutes Iran's contention that the item is *owned* by the Government of Iran. The United States has conceded Iran's *ownership* (although not necessarily its right to possession) in all properties classified in sub-categories A - D of category I: "Government of Iran (GOI)--owned tangible property in U.S. on January 19, 1981."[38]

31. This, together with other indications,[39] shows that Iran and the United States had a common understanding – an agreement, so to speak – as to the scope of what is included within the ambit of the phrase 'Iranian properties', i.e., the 'inclusions': both States seem to have agreed that an 'ownership interest' less than full legal title– namely, an 'ownership interest' resulting from a valid purchase contract where the price had been paid in accordance with the terms of the contract and, as a result, the purchaser had become contractually entitled to delivery – was sufficient to bring the property at stake within the ambit of the term 'Iranian properties'. This was, indeed, what was understood and commonly meant by the Parties when they referred to 'ownership interest' and properties 'owned by Iran' for the purpose of the transfer obligation as outlined in GD Para. 9. It goes without saying that if a property is 'owned' by Iran in this sense, it is not – and cannot be – 'owned' in the same sense by others: thus, it makes total sense for the Claimant to submit in its Reply of 31 August 1983, relied upon by the majority, that "Iran does not ask 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". This is stating the obvious: the Claimant has not made any claim as to properties as to which it had no 'ownership interest' in the sense described above, namely, properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery. Iran's 'ownership' as to the latter properties, for the purpose of the GD Para. 9 obligation, has been 'conceded' by the United States, as it is clear from the quote above.[40] To be precise, this has, for a long time, been the point of agreement between the Parties as to the scope of the transfer obligation.

32. What the Parties had dispute about – and again that is clear also from the early submissions of the Parties including the above comment by the United States – was the ambit of the 'exclusions' from the scope of the term 'Iranian properties': the United States was of the belief that the items of property owned by Iran, in the sense described above, would be excluded from the scope of the

[38] ibid, p 4 [emphasis added].

[39] For all these indicia, see Section 2.II *infra*.

[40] See note 38 *supra*.

transfer directive if the US holder claimed a 'possessory interest' under US domestic law in those properties. The expression by the United States in the above quote to the effect that "[t]he United States has conceded Iran's ownership (although not necessarily its right to possession) […]" is eye-catching in this regard. Moreover, this is also clear from Iran's Statement of Claim of 25 October 1982, where Iran argued that the United States breached GD Para. 9 by issuing the unlawful Treasury Regulations, which exempted from the transfer obligation properties that were subject to outstanding liens. Iran's position, as reflected in paragraph B of Iran's summary of 'relief sought', is precisely made in this context where Iran raised complaint as to the 'exclusions' or 'exemptions' introduced in the relevant Treasury Regulations to the transfer obligation on the pretext of the holder's 'possessory interest' based on US domestic law. It is in this context that one should consider the US Statement of Defense, as well as Iran's Reply, together with the US Rejoinder and the Parties' Hearing Memorials, the totally of which would clearly portray the Parties' agreement as to the 'inclusions' in the scope of the US transfer obligation, as well as their 'dispute' as to the 'exclusions' from such scope: the Parties agreed as to the 'inclusion' of properties as to which Iran had acquired 'ownership interest' in the sense described above, i.e., the properties validly purchased and contractually paid for by, but not delivered to, Iran despite Iran's contractual entitlement to delivery. These were properties as to which Iran had acquired sufficient 'ownership interest' to make them subject to the transfer directive. They had, however, disagreed as to whether the holder's 'possessory interest' under the US domestic law justified the 'exclusion' of such properties from the scope of the transfer directive. Such 'exclusions', as a matter of 'dispute' between the Parties, were put before the Tribunal for a decision, and the Tribunal's decision, of course, did precisely focus on the question of the lawfulness of such 'exclusions'.

33. To be sure, it does not make sense to suggest that Iran, the Claimant in these Cases, substantially narrowed down the scope of the obligation it was owed by voluntarily excluding a great majority of the properties it was claiming for. As expected, in its Hearing Memorial submitted at the eve of the hearings of the first phase of these Cases, Iran puts before the Tribunal what it deems to be a correct reading of the term 'Iranian properties' in GD Para. 9: in Iran's view, the purchaser's contractual entitlement to delivery, pursuant to a validly concluded contract, would suffice for its *ownership* for the purpose of defining the meaning of the term 'Iranian properties' in GD Para. 9.[41]

[41] Doc. No. 943, Hearing Memorial of the Government of the Islamic Republic of Iran, 17 January 1990, p 11.

34. Therefore, contrary to the majority's view, the Claimant clearly considered, in this critical submission, properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery as falling within the scope of the term 'Iranian properties', while Iran's 'ownership interest' in these properties was less than full legal 'title' under the US domestic law analysis. It is significant to note that this position was, to a large extent, shared by the United States as reflected in the US Treasury Regulations, the Diplomatic Note, and the Consolidated Reports.[42]

35. In sum, an overall, accurate, and careful consideration of the early submissions of the Parties in their totality evidently confirms that, contrary to what the majority concludes, both Parties considered properties in which Iran had an 'ownership interest' sufficient to make them subject to the transfer obligation as falling within the scope of GD Para. 9.

ii. The Quotation from Iran's Reply Is Apparently Taken out of Context

36. Relying, *inter alia*, on a statement included in Iran's Reply in the present Cases,[43] the majority says that "both Parties agreed, in their pleadings during the first phase of the proceedings, that the United States' Paragraph 9 obligation does not cover properties in which Iran only had an interest, rather than legal title."[44] The relevant quotation from Iran's Reply reads:

> Ironically, the United States attempts to justify the truncated definition of "Iranian property" in […] section 535.333 of the Treasury Regulations by reference to the definitions of Iranian property adopted by the United States in [the Blocking Order of 14 November 1979], which was designed to bar Iran from access to its assets. […] It is obvious that in order to maximize the impact of economic measures taken against Iran in 1979, the United States would have employed the broadest possible definition of "Iranian property." […] Thus, the definition of Iranian property included not only property owned outright by Iran, but also property of others in which Iran could claim "an interest." Consistent with General Principle A, which promises to restore Iran to its pre-freeze position, Iran's position is that under Paragraph 9 of the General Declaration, the United States must arrange for the return of properties to which [Iran] is entitled under international and general United States law. Iran does not ask the United States to arrange for the transfer of

[42] For a detailed consideration of these interpretive materials: see Section 2 *infra*.

[43] Doc. No. 110, Reply of the Islamic Republic of Iran to the Statement of Defense of the United States to Claims Nos. II-A and II-B, 31 August 1983.

[44] Partial Award [132].

> properties legally owned by third parties solely because Iran may have some legal interest in that property.[45]

37. It should be noted that the quotation from Iran's Reply is apparently taken out of context. Reading the whole paragraph to which the majority refers shows that, rather than limiting the scope of the US obligation, Iran is, on the contrary, refuting the US attempts to circumscribe the reach of its obligations under GD Para. 9. Moreover, a review of Iran's Reply (Doc. No. 110) in its broad context, including the Appendix G thereto, evinces that Iran is not saying what the majority suggests.

38. To begin with, a careful consideration of the quoted part from Iran's submission shows that the Claimant does not seem to be in a position to admit or compromise any issue, even less to retreat from its position. Rather, the Claimant is objecting to the United States' attempts to circumscribe the scope of its obligation. The opening sentence of the paragraph entailing the quotation makes it clear that the quotation has been taken out of its context:

> Ironically, the United States attempts to justify the truncated definition of "Iranian property" in present section 535.333 of the Treasury Regulations by reference to the definitions of Iranian property adopted by the United States in its original order of November 14, 1979, which was designed to bar Iran from access to its assets (Statement of Defense 9, 17-18).[46]

39. Indeed, the Claimant is simply saying here that the scope of the term 'Iranian properties' should not be limited by reference to the Blocking Regulations of 1979. This is why a few lines down, it indicates that "it is the United States that is trying to deprive Iran of its property solely because someone else claims an "interest" in Iran's property",[47] thus referring to the 'exclusions' introduced by the unlawful Treasury Regulations § 535.333 (b) & (c).

40. As a matter of fact, in its Statement of Defense, the United States even did not characterise the issue of the scope of the term 'Iranian properties' as a 'point at issue', which would have necessitated Iran's response or retreat in its subsequent filing, i.e., Iran's Reply (Doc. No. 110).

41. That said, one could even go further by suggesting that the quotation so singled out and cited out of context tends, it appears, to indicate the opposite of what the majority says in the Partial

[45] Doc. No. 110, Reply of the Islamic Republic of Iran to the Statement of Defense of the United States to Claims Nos. II-A and II-B, 31 August 1983, pp 31-32.

[46] ibid.

[47] ibid, p 32.

Award. In this quotation, Iran explicitly defines the boundaries of the term 'Iranian properties' in the ensuing way: "Consistent with General Principle A, which promises to restore Iran to its pre-freeze position, Iran's position is that under Paragraph 9 of the General Declaration, the United States must arrange for the return of properties to which it is entitled under *international* and *general United States law*."[48] Thus, Iran clearly was under the belief that, pursuant to GD Para. 9, Iran was to receive properties to which it was entitled under both 'international law' and 'general United States law'.[49] Thus, Iran considered that the properties which, according to 'international law', were owned by Iran fell within the scope of GD Para. 9. What is meant by the properties to which Iran is entitled under international law, it might be asked? This would, it seems, cover 'properties' that have been considered 'Iranian' or 'owned by Iran' or 'GOI-owned' by the State Parties based on a determination of the meaning and scope of the term 'Iranian properties' in a sound interpretive process by the application of the general rules of treaty interpretation under 'international law'.

42. Furthermore, it should also be noted that the Claimant does not seem to be proposing in this quotation that properties in which Iran has an 'ownership interest' sufficient to make them subject to the transfer obligation are excluded from the scope GD Para. 9. Rather, the Claimant indicates, correctly in my view, that properties that are not 'Iranian' or 'Iranian-owned' in the sense commonly understood and agreed upon by the State Parties as explained below,[50] would not

[48] ibid [emphasis added].

[49] It should be recalled that in at least two of its early submissions, the United States expressly admitted that, for the purpose of Paragraph 9 obligation, Iran can be considered the 'owner' of property under US law if she is entitled to delivery or if she has made full payment: (i) the US position in its Statement of Defense in Case B/61, to the effect that according to US law, one may be the owner of a property if he is entitled to delivery. (Case B/61, Doc. No. 8, Statement of Defense of the United States, 13 October 1982, p 3, stating that: "United States law at all relevant times has also required a purchaser of goods either to have received delivery of the goods or at least *be entitled to delivery* under the contract of purchase before becoming the *owner* of them." [emphasis added]) and (ii) The United States' position in its Hearing Memorial of 1990 in Case A/15 (II-A) to the effect that a property is not Iranian if Iran has not paid the necessary charges, fees, or obligations. In other words, it had considered payment of all charges, fees and obligations as the only determinative factor for Iran's 'ownership' for the purpose of the transfer obligation as outlined in Paragraph 9. The United States tellingly made no reference in this Memorial to the 'transfer of title' by recourse to the formal delivery requirement under the Uniform Commercial Code ("UCC") 2-401. Since this Memorial was submitted at the eve of the Hearing, it is very important in giving a sound interpretation to the Tribunal's decisions at paragraphs 40 and 43 of Partial Award 529 with regard to the scope of Paragraph 9. See Doc. No. 969, US Hearing Memorial, 05 July 1990, p 50.

[50] See Section 2 *infra*.

be considered 'Iranian' for the purpose of GD Para. 9 by the mere existence of 'some legal interest' for Iran in those properties.[51]

43. The inherent problem of the majority's reading becomes even more evident when one considers Iran's submission in its entirety, including its Appendix G. If the majority were right that, by this statement, Iran meant to exclude from the scope of the transfer obligation all properties in which Iran had an interest regardless of the magnitude of the interest concerned, in the Appendix G of the very same document containing "amended schedule of untransferred Iranian properties", Iran should have excluded claims for properties in which it had an interest less than full legal title. However, a simple and cursory review of the list reveals that not only did Iran claim for properties in which it had legal 'title' under US law, but also it requested the return of the properties in which it had an 'ownership interest' less than full legal title, i.e., properties validly purchased and paid for which remained undelivered despite Iran being contractually entitled to delivery. To demonstrate the flaw in the majority's reasoning to the effect that Iran itself considered as excluded from the scope of GD Para. 9 properties in which it had an interest, one can simply sketch through three of the familiar Claims raised by Iran in Appendix G.

Claim No.	**Status of Iran's Interest in the Property**
Claim G-7[52]	full legal *title* under US law
Claim G-16[53]	Iranian *ownership* interest in the property (property validly purchased and fully paid for but remained undelivered)
Claim G-111[54]	Iranian *ownership* interest in the property (property validly purchased and paid for but remained undelivered despite all

[51] Such properties, if not 'Iranian-owned', would inevitably be considered as 'owned by others', a point which was elaborated above.

[52] Doc. No. 110, Reply of the Islamic Republic of Iran to the Statement of Defense of the United States to Claims Nos. II-A And II-B, 31 August 1983, Appendix G, p 1.

[53] ibid, p 2.

[54] ibid, p 11.

	pre-delivery obligations having been fulfilled by Iran so that Iran was contractually entitled to delivery)

44. It seems clear that Iran kept claiming for properties in which it had an 'ownership interest' less than full legal title, in the sense commonly intended and understood by the Parties, in its subsequent submissions, including its "Response to the United States' Request for Additional Information on Iranian Properties in the United States"[55] and all the subsequent Consolidated Reports filed by Iran.

45. In short, a simple review of the Parties' early submissions, together with the very submission that the majority puts so much emphasis on, would show that both Parties agreed that properties in which Iran had a sufficient 'ownership interest' to make them subject to the transfer obligation were considered to be 'Iranian', 'Iranian-owned' or 'GOI-owned' by the Parties and, consequently, fell within the scope of the term 'Iranian properties' in GD Para. 9. This, no doubt, covers properties validly purchased and paid for that remained undelivered despite Iran being contractually entitled to delivery. This is totally in line with the outcome achieved by the application of the general rule of treaty interpretation as outlined in Articles 31 and 32 of the VCLT, an exercise which the Tribunal is legally, and under its own mandate as prescribed by Article V of the Claims Settlement Declaration ("CSD"), expected to undertake.

❖

46. In conclusion, one cannot but conclude that the issue of the interpretation of the term 'Iranian properties' was not before the Tribunal in 1992, nor did the Tribunal make any determination in this respect in Partial Award 529. Obviously, it is neither reasonable nor legally justifiable for an adjudicating forum to make an important determination without the matter being properly placed before it for a decision and without the parties having the full opportunity to make their case. What the Tribunal did mention in paragraphs 40 and 43 of Partial Award 529 was only repeating the obviously agreed-upon points between the Parties, as to which there was no contention at the time: the term 'Iranian properties' does not extend to properties in which Iran has no 'ownership interest' or in which Iran's 'ownership interest' is 'partial' or 'contingent'. This means that the term 'Iranian properties' may cover properties in which Iran had acquired an

[55] See Doc. No. 278, Response to the United States' Request for Additional Information on Iranian Properties in the United States, 27 January 1984.

'ownership interest' in the sense commonly understood and intended by the Parties. This, as will be analysed below further, covers both properties as to which Iran holds full legal title and properties validly purchased and paid for that remained undelivered despite Iran being contractually entitled to delivery.

2. A PROPER INTERPRETIVE EXERCISE PURSUANT TO THE VIENNA CONVENTION GIVES ONE A CLEAR MEANING OF THE TERM 'IRANIAN PROPERTIES'

47. The term 'Iranian properties' is an expression used in an international treaty, i.e., the General Declaration. As such, this term should be interpreted in accordance with Articles 31 and 32 of the VCLT. The Partial Award correctly confirms this point.[56] This means that in determining the meaning and scope of the term 'Iranian properties', the Tribunal must go through an interpretive exercise. In other words, one has to begin the exercise by referring to Articles 31 and 32 of the VCLT in order to see whether the Parties have already specified the meaning and scope of the term in question.

48. Article 31 of the VCLT lists various means for treaty interpretation without explicitly determining their hierarchy or order of application. Moreover, the Article is headed 'General Rule of Interpretation' rather than 'General Rules of Interpretation'. This lack of precision regarding the hierarchy of the interpretive tools, as well as using the term 'Rule' in the singular form in the title of Article 31, is no coincidence and has been done deliberately. As pointed out by the Report of the International Law Commission,

> by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, [the International Law Commission] intended to indicate that the application of the means of interpretation in the article would be a *single combined operation*. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 [now Article 31] is entitled "General rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of

[56] Partial Award [102].

interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[57]

49. Therefore, the task of the Tribunal is to consider all the interpretive means and tools available together, 'throw them into the crucible', and try to draw a meaningful picture. Where necessary, reference should also be made to Article 32 of the VCLT on 'supplementary means of interpretation'.

50. With all due respect, the majority has not done so. It has wrongly split up all the useful available means and elements of interpretation and has interrogated them separately and in isolation, trying unavailingly to pick holes in them and dismiss them summarily, without ever bothering to see the patent overall interpretive picture and to engage in a 'single combined operation' as required by Article 31 of the VCLT. Put differently, unfortunately, rather than welding together, the majority has disjoined all the valuable interpretive tools at hand, including, the implementing Treasury Regulations, the Diplomatic Note, and the Consolidated Reports, which clearly set out the common intention of the Parties regarding the meaning and scope of the term 'Iranian properties'. In doing so, the majority has ignored the very clear message these interpretive means chorus, which is that the term 'Iranian properties' in GD Para. 9 included 'properties owned by Iran', which meant: (i) properties as to which title had been transferred to Iran prior to 19 January 1981, and (ii) properties that had validly been purchased and paid for by Iran but remained undelivered despite Iran being contractually entitled to delivery. The latter category has been referred to by Iran in its written and oral pleadings as properties in which Iran had sufficient ownership interest to subject them to the transfer directive.[58] To be sure, if one were to metaphorically describe the worthwhile interpretive elements available as pieces of a puzzle, when put together, these pieces would portray a clear picture of the Parties' common intention and understanding regarding the meaning and scope of the term 'Iranian properties'. These pieces of the puzzle are the GD Para. 9 obligation, Executive Order 12281, the Implementing Treasury Regulations, the Diplomatic Note of September 1981, as well as the Consolidated Reports and other early pleadings by the Parties.

[57] 'Report of the International Law Commission on the work of its eighteenth session Geneva', 04 May-19 July 1966 (1966) Vol. II, Yearbook of the International Law Commission 219-220 [emphasis added].

[58] An almost identical formulation was used by Counsel for Iran in the hearing. See Doc. No. 2274, Hearing Transcript, Cluster 10, Day 4, 18 December 2014, p 7 (stating that: "Iran is not claiming for the return of intangible rights, but return of tangible properties. It is the nature of the interest in the tangible property which is at issue, and whether that interest is sufficient to make that tangible property subject to the transfer obligation.") (Statement of Mr. Sellers)

51. Indeed, although the term 'property' does not have a fixed definition in customary international law, it is completely normal for the parties to a treaty to determine the meaning of the term 'property' for the purpose of their treaty relations.[59] Therefore, absent a *renvoi*, resort to domestic law for determining the meaning and scope of a treaty term would be justified only when one travels the treaty interpretation route and ends up empty-handed.

52. Furthermore, evidently, the whole purpose of treaty interpretation in accordance with Articles 31 and 32 of the VCLT is to ascertain the common intention of the contracting parties to the treaty.[60] The majority's decision on the issue of the meaning and scope of the term 'Iranian properties' fails to even come close to verify the common intention of the Parties when concluding the Accords in 1981. There are valuable, and admittedly relevant, interpretive tools available for construing the term 'Iranian properties' and, thus, becoming aware of the common will of the

---

[59] M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2010) 95. See also C Lévesque, 'Investment and Water Resources: Limits to NAFTA' in MC Cordonier Segger, M Gehring, A Newcombe, R Buckley, A Zieglerstating (eds) *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 425 (stating that: "Of course, if the Treaty itself […] recognizes the existence of the alleged 'right' in international law, it is a different situation."). Furthermore, although for certain reasons it went on to apply the law of the host state to the question of the definition of property, in *Nagel v. Czech Republic*, in which Judge Kronke participated as a member of the tribunal, it was acknowledged that: "[l]egal terms in an international treaty do not necessarily have the same meaning as similar terms in the domestic laws of the Contracting Parties. In a treaty such terms should often be considered to have an autonomous meaning appropriate to the contents of the specific treaty and to the issues it intends to regulate." See *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 09 September 2003 [296]. This is reconfirmed by Article 31(4) of the VCLT, which provides that: "A special meaning shall be given to a term if it is established that the parties so intended." In this respect, see Judge Simma's Partially Dissenting Opinion on the Interpretation of the Term "Iranian Properties", pp 8-9.

[60] In this respect, see the statement of Judge Anzilotti in his dissenting opinion in *The Diversion of Water from the Meuse* to the effect that: "it is always dangerous to be guided by the literal sense of the words before one is clear as to the object and intent of the Treaty; for it is only in this Treaty, and with reference to this Treaty, that these words – which have no value except in so far as they express the intention of the Parties – assume their true significance" 1937 PCIJ (Series A/B), No. 70, at 46; *Argentina/ Chile Frontier Case* (*Palena*) (1966) 16 RIAA 109, 174, (1966) 38 ILR 10, 89 (stating that: "the process of [treaty] interpretation may involve endeavouring to ascertain the common will of those Parties…"); WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998 [93] (stating: "The purpose of treaty interpretation is to establish the common intention of the parties to the treaty"); *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 109-110; (2002) 130 ILR 1, 34 at 3.4 (relying on the *Palena* case and noting: "In interpreting [the Treaties], the Commission will apply the general rule that a treaty is to 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. Each of these elements guides the interpreter in establishing what the Parties actually intended, or their "common will,"…"); *Award in the Arbitration Regarding the Iron Rhine* ('*Ijzeren Rijn*') (*Belgium v Netherlands*) (2005) 27 RIAA 35, 65 [53] (pointing out that "The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation …"). Brierly, the first Special Rapporteur of the VCLT, also noted that the object of treaty interpretation is "to give effect to the intention of the parties as fully and fairly as possible." JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (OUP 1928) 168.

Parties. Nevertheless, the majority unexplainably ignores those tools, and adopts an interpretive approach which cannot, by any stretch of imagination, be expressive of the intention the Parties had in 1981 when signing the Accords.

53. The majority concludes that the meaning and scope of the term 'Iranian properties' should be determined by reference to '*lex situs*'. Not only does this interpretation not withstand scrutiny, it is, more importantly, alien to ascertaining the common intention the Parties had in 1981. In fact, even as late as 2013, the Respondent still did not apparently know about this theory or its application in these Cases, and it was only upon raising the issue during the Hearing by one of our colleagues[61] that they realised that such a theory exists and can allegedly be applied in these Cases. How can, one may ask, an intention be ascribed to a party in 1981 while, even up to 32 years after the conclusion of the agreement, it did not even know about it?! More importantly, and as will be seen,[62] the application of this theory results in absurd and unreasonable results.

54. Below, I will set out the correct approach to the interpretation of the term 'Iranian properties' in GD Para. 9. To embark upon this task, I will show that the 'ordinary meaning of the term' 'Iranian properties' as enunciated in GD Para. 9 is clearly not limited to properties whose title has been transferred to Iran pursuant to a private law analysis **(I)**. Next, I will demonstrate that a careful review of the 'subsequent practice' **(II)** and the 'contemporaneous understanding' of the Parties **(III)** patently proves that the term 'Iranian properties' extends to properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery.

I. Ordinary Meaning of the Term

55. Beginning with the examination of the 'ordinary meaning' of the term 'Iranian properties', and the 'immediate context' in which it has been used, one comes across the following points: (i) the term 'Iranian properties' is a 'general' and 'generic' term, with no qualifier (like Iranian-titled properties). The catch-all nature of this term is more buttressed by the use of the word 'all' before it. (ii) The latter part of GD Para. 9, refers to 'all Iranian properties … which are not within the scope of the preceding paragraphs', i.e., Paragraphs 4-8. This, once again, establishes the across-the-board character of the transfer obligation in GD Para. 9, as well as the gap-filling nature of this Paragraph. (iii) The joint-heading of Paragraphs 8 and 9 is 'Other Assets in the U.S. and Abroad',

[61] Doc. No. 2020, Hearing Transcripts, Cluster 1, Day 3, 09 October 2013, pp 252-253.

[62] See Section 3.I *infra*.

which title is also telling. Not only is the use of the term 'assets' in the heading notable, but also the formulation of the rubric signifies the 'umbrella' character of GD Para. 9 and the subject-matter of the obligation assumed therein. (iv) No explicit or implicit reference or *renvoi* has been made to any domestic legal regime in GD Para. 9 for the purpose of defining or determining the scope of the term 'Iranian properties'. This is while with respect to other issues, such as export-controlled properties, explicit reference has been made to US domestic laws.

56. In sum, there is no restrictive language in GD Para. 9 limiting the realm of the term 'Iranian properties'. Conversely, all the literal and linguistic texts and contexts reviewed above reveal that the term 'Iranian properties' was drafted in a broad and all-embracing sense.

II. Subsequent Practice of the Parties

57. One needs to say nothing further than what has been suggested by the Partial Award regarding the significance of 'subsequent practice' for the purpose of treaty interpretation.[63] Indeed, in a sound interpretive process, subsequent practice cannot be ignored. In the words of one ILC Special Rapporteur,

> [t]he taking into account of subsequent practice under article 31(3)(b) and article 32 may contribute to a clarification of the meaning of a treaty, in the sense of a specification (narrowing down) of different possible meanings of a particular term or provision, or the scope of the treaty as a whole, or to a clarification in the sense of confirming a wider interpretation or a certain scope for the exercise of discretion by the parties (broad understanding).[64]

58. What gives more significance to subsequent practice is its specificity. Again, in the words of the ILC's Special Rapporteur, "[t]he specificity of a subsequent practice is often an important factor for its value as a means of interpretation in a particular case."[65] There are ample authorities

[63] Partial Award [105].

[64] Second Report on Subsequent Agreements and Subsequent Practice in relation to the interpretation of Treaties (UN Doc A/CN.4/671), dated 26 March 2014 ("Second ILC Report"), at pp 11-12. The draft conclusion, proposed by the ILC's Special Rapporteur, on the possible effect of 'subsequent practice' in an interpretive process further illustrates the point: "…Subsequent agreements and subsequent practice under articles 31(3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing down or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties…." See ibid, p 20.

[65] ibid, p 12. The above-mentioned draft conclusion also notes that: "[t]he value of a subsequent agreement or subsequent practice as a means of interpretation may, *inter alia*, depend on their specificity." ibid, p 20.

in the jurisprudence of the International Court of Justice ("ICJ") to illustrate the significance of subsequent practice in an interpretive process.[66]

59. In the interpretive process, subsequent practice is used to confirm or modify the preliminary result arrived at by the initial textual interpretation (or by other means of interpretation). Additionally, where the parties wish to convey a special meaning in the sense of Article 31(4), subsequent practice "may contribute to bringing this special meaning to light."[67] Furthermore, subsequent practice may contribute to a clarification of the object and purpose of a treaty. In the cases *Maritime Delimitation in the Area between Greenland and Jan Mayen*,[68] *Oil Platforms Case*,[69] and *Land and Maritime Boundary between Cameroon and Nigeria*,[70] the ICJ used subsequent practice to clarify the object and purpose of bilateral treaties.

60. A close look at these authorities shows the danger that one may face if subsequent practice is ignored in the interpretive process. Such oversight may readily result in a deviation from what the parties had originally intended when they concluded the treaty.

61. Subsequent practice has also been frequently used in the jurisprudence of the Iran-United States Claims Tribunal ("IUSCT") in different interpretive exercises. In Case B/1 (Claim 4), Award 382, the implicit obligation to compensate in case of non-return of Iranian military properties was, *inter alia*, based on the subsequent practice of the parties:

> 66. […] Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of US law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that paragraph.
>
> […]
>
> 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with *the subsequent practice* of the Parties in the application of

---

[66] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*), Judgment, I.C.J. Reports 2002, p 625, at p 656 [59]-[61] and p 665 [80]; *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*), Judgment, I.C.J. Reports 1994, p 6, at p 34 [66]-[71]; *Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), Judgment, I.C.J. Reports 2009, p 213, at p 290 (Declaration of Judge *ad hoc* Guillaume).

[67] Second ILC Report, pp 11-12.

[68] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p 38, at p 51 [27].

[69] *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), Preliminary Objection, Judgment, I.C.J. Reports 1996, p 803, at p 815 [27], [30].

[70] *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), Preliminary Objections, Judgment, I.C.J. Reports 1998, p 275, at p 306 [67].

> the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to Article 31(3)(b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that 'Iran will be reimbursed for the cost of equipment in so far as possible'.[71]

62. In Case B1 (Counterclaim), the Tribunal gave considerable weight to the practice of Iran in filing official counterclaims to reject Iran's objection to the Tribunal's jurisdiction to entertain official counterclaims.

> 111. …[F]ar from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation.
>
> 112. …[S]ubsequent practice of the parties to a treaty may be relevant in shedding light on the original intentions of the Parties and is compelling evidence of the parties' understanding as to the meaning of the treaty's provisions.[72]

63. Then having found that neither the text nor the context of Article II(2) of the CSD gives a clear answer to the question of the Tribunal's jurisdiction over official counterclaims and having found that the object and purpose of Article II(2) of the CSD is not also decisive in this respect, it concluded:

> 134. …[S]ubsequent practice of the Parties clearly supports interpreting Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to entertain official counterclaims. The Tribunal considers this factor to be decisive.[73]

64. Being mindful of all these observations, the reading according to which the term 'Iranian properties' is not limited to 'Iranian-titled properties' and extends to properties which were validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually

---

[71] *Islamic Republic of Iran v. United States of America*, Case No. B.1, Award No. 382-B1-FT, 31 August 1988, 19 IUSCTR, p 273, at 293-294 [emphasis added]. For our present purposes, the dissenting opinion of Judge Holtzmann in that Case is also of some significance. In his dissent, although he takes issue with whether the US Communication of March 1981 could be considered as state practice in the application of the treaty, Judge Holtzmann confirms that "[s]ubsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty." Thus, in his opinion, the subsequent practice of even one State party, provided that it meets the requirement of 'relational' criterion, may be considered as 'a proper basis for interpreting a treaty'.

[72] *Islamic Republic of Iran v. United States of America*, Case No. B.1 (Counterclaim), Award No. ITL 83-B1-FT, 09 September 2004, 38 IUSCTR, p 77, at 117-119.

[73] ibid, at 126.

entitled to delivery is evidently confirmed by the 'subsequent practice' of the Parties (referred to in Article 31(3)(b) of the VCLT).

65. In this connection, it is common ground that in February 1981, in implementing Executive Order No. 12281, which was solely and specifically issued for the performance of the US obligations under the General Declaration, the Department of Treasury of the United States amended Treasury Regulations laid down in 1979.[74] In this new set of Regulations, the Respondent, obviously in the capacity of taking steps to carry out its obligation under GD Para. 9, determined the scope of its obligation and defined the term 'Iranian properties'. In setting the contours of its transfer commitment under GD Para. 9, the United States enacted § 535.215 which is interestingly titled: "Direction involving other *properties in which Iran or an Iranian entity has an interest*…"[75] Then, for the definition of the properties subject to the transfer directive, i.e., 'Iranian properties', this provision refers to § 535.333. This latter provision defines the scope of the term properties as required to be transferred by virtue of § 535.215 in the following terms: "(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 or controlled entities, including debts. …" Considering these two provisions together, one logically comes to the conclusion that the United States could not be clearer than this in defining 'Iranian properties': according to the United States, the term 'Iranian properties', as used in GD Para. 9, encircled not only properties as to which Iran held title, but also properties in which Iran had an interest, as well as debts and liabilities owed to Iran.[76]

66. Moreover, the fact that the United States contemplated property interests owned by Iran to be within the ambit of its obligation under GD Para. 9 is again verified by § 535.618 of the same Regulations. Subsection (a) of this provision, titled, "Requirement for reports", provides: "Reports are required to be filed within 15 days of receipt of a direction from Iran to transfer any interests in property claimed or believed to be an interest of Iran which was blocked by the Iranian Assets Control Regulations if the party receiving the direction to transfer has not transferred such claimed interest in property." Clearly so, the United States did contemporaneously know that the transfer

[74] Paragraph 1-105 of Executive Order No. 12281 delegated the President's powers under the relevant Act to the Secretary of Treasury to carry out the Executive Order. This paragraph reads: "The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) to carry out the purposes of this Order."

[75] Emphasis added.

[76] Moreover, it is revealing that these Regulations do not make any reference to any alleged requirement of transfer of title under US law or any other domestic law.

obligation in GD Para. 9 included 'property interests' of Iran.[77] It would obviously be misleading, in this context, to suggest that 'interest' in property is an intangible asset not capable of being transferred. This is because the Parties' conduct, as further discussed below, brings into light the fact that they understood 'property interests' mentioned in subsection (a) of § 535.333 as referring to properties in which Iran held an ownership interest sufficient to make them subject to the transfer direction, namely, properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery.

67. The all-important implementing Treasury Regulations are not alone in constituting the practice of the Parties as to the meaning and scope of the term 'Iranian properties'. The US Diplomatic Note of 23 September 1981 with respect to the sale of certain Iranian military properties, which was specifically communicated to Iran through the conduit of the Republic of Algeria, is another cogent piece of evidence establishing the practice of the Parties as to the scope of the term 'Iranian properties'. In this Note, the United States referred to 'Iranian-*owned* military' properties with regard to, *inter alia*, certain properties that had been purchased and paid for by Iran but had remained undelivered.[78] This patently shows that, in the eyes of the Respondent at the time, in addition to properties as to which Iran held legal title, Iran also owned, for the purposes

[77] I should note here that the Tribunal is not faced with the issue of transferability of 'contractual rights', as to which certain doubts might validly be expressed: what is at issue here, rather, is the transfer of tangible properties in which Iran had an ownership interest sufficient to make it subject to the transfer obligation. It is misleading to suggest that the 'property interests' owned by Iran comprise of Iran's 'contractual rights', as to which ownership and possession are the same. That is, if Iran 'owned' a contractual right, it could have exercised that right in any competent forum, and thus such 'contractual rights' could not be the subject of the transfer obligation. This cannot be correct. The main reason is that the 'property interest' used in the relevant implementing Treasury Regulations means 'properties' in which Iran held an interest. This is clear from the title to the transfer directive contained in § 535.215: "Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States."

The issue has rightly been put in the following terms by the Counsel for Iran:

> Iran is not claiming for the return of intangible rights, but return of tangible properties. It is the nature of the interest in the tangible property which is at issue, and whether that interest is sufficient to make that tangible property subject to the transfer obligation. In this regard, OFAC clearly blocked tangible properties in which Iran had an interest through a contract of sale. OFAC also clearly thought Iran's interests in tangible property less than title rendered the tangible property subject to the transfer directive, as it refers to property interests and non-contingent interests in property.

Doc. No. 2274, Hearing Transcript, Cluster 10, Day 4, 18 December 2014, p 7 (Statement of Mr. Sellers).

[78] The enclosure to this Note includes examples like properties held by Sylvania and Sperry Corporation, which were properties purchased and paid for by Iran that had remained undelivered. See Doc. No. 25, Statement of Defense of the United States to Claim Nos. II-A and II-B, Exhibit 1, US Diplomatic Note of 23 September 1981.

of the GD Para. 9 obligation, properties which had been purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery.

68. This is a very significant communication which, due to its specificity, the identity of the transmitter and the recipient, as well as its temporal proximity to the time of conclusion of the Accords, is one of the best available tools for the interpretation of the Accords. It is, of course, true that, in that Diplomatic Note, the United States transmitted the concern and the request of the US holders of the Iranian military properties for selling the Iranian-owned properties due to the alleged diminution of their value. However, what is striking is the very reason the United States transmitted the Note to Iran: it only did so because these were, in the US view, 'Iranian properties', which were the subject-matter of the US transfer obligation under GD Para. 9. Otherwise, there would not have been any reason for the United States to take that step and send that Note through the Government of Algeria. Therefore, this Note is of vital importance in realising the contemporaneous understanding of the United States as to the scope of its obligation under GD Para. 9.

III. Contemporaneous Understanding

69. In line with the subsequent practice, the United States revealed its 'contemporaneous understanding' of the meaning of the term 'Iranian properties' by consistently characterising in its Consolidated Reports, starting from 1984 and continuing through February 1991,[79] properties purchased and fully paid for that had remained undelivered as 'GOI-owned properties'. The common theme of all these instances seemed to be the fact that pursuant to a valid purchase of the property and payment of the price, Iran had contractually become entitled to delivery. In such instances, the 'property interest' acquired by Iran was considered to be sufficient to make the property subject to the transfer directive. Examples of this consistent characterisation are Claims G-16, G-31, Supp. (1)3, and Supp. (2)49. All of these Claims include properties which were validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery. These pieces of property, under the new US position which is adopted as late as 2001 and further again rectified in 2013, are not to be considered as 'Iranian properties' because Iran did not acquire 'title' to them under the supposedly applicable US law, which allegedly requires delivery for the purpose of transfer of title. However, despite being obviously aware of its

[79] See US Consolidated Report of 17 September 1984 (Doc. No. 550); US Consolidated Report of 30 October 1985 (Doc. No. 757); Supplement to the Consolidated Report of The United States of 18 February 1986 (Doc. No. 774); US Consolidated Report of 05 July 1990 (Doc. No. 970); and US Consolidated Report of 01 February 1991 (Doc. No. 1008).

own law and of the fact that these properties had not been delivered, the United States persistently classified the properties that were the subject of the above-mentioned Claims as 'GOI-owned properties' subject to GD Para. 9. This, in my judgment, is the clearest illustration that the United Stated contemporaneously, and for quite a long period of time, considered these properties as being 'owned' by Iran for the purposes of GD Para. 9 obligation. One wonders how and on what basis could the majority disregard this clear contemporaneous understanding upon being engaged in a good faith interpretation of the meaning and scope of the term 'Iranian properties.'

70. These Consolidated Reports carry considerable interpretive weight as they reflect the contemporaneous understanding of the Parties which was repeatedly and consistently presented in official submissions to the Tribunal in these very Cases and these very proceedings, and, thus is relevant for the construction pursuant to Article 32 of the VCLT. Indeed, the very specific terms used by the United States for describing and categorising properties subject to GD Para. 9 (i.e., GOI-*owned* tangible properties), the consistency of such characterisation (even after presentation of new information and new documents), as well as the temporal proximity of these Reports with the time of the conclusion of the Accords, add to their interpretive value, because, under such circumstances, these Reports vividly reflect the contemporaneous understanding of the United States of the scope of its obligation under GD Para. 9.

71. This understanding is further reconfirmed by the explanatory notes to one of the Reports,[80] which state 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."[81] Thus, according to the United States at the time, the fact that Iran had validly purchased and paid for these properties, which remained undelivered despite Iran being contractually entitled to delivery, gave Iran an 'ownership interest' for the purposes of GD Para. 9, which 'interest' was sufficient for triggering the United States' transfer obligation under GD Para. 9.

72. To the extent the Parties' submissions in this regard indicated their agreement, which interestingly has expressly been noted and acknowledged by the United States, the interpretive value of these Reports is even more elevated. In fact, in addition to this telling consistency in the

[80] Doc. No. 757, Consolidated Report of the United States, 30 October 1985.

[81] See ibid, p 2 [emphasis added].

Consolidated Reports regarding the characterisation of certain purchased items as 'GOI-owned properties', the United States expressly stated in an official submission before the Tribunal that:

> The status of the ownership question will be apparent from these submissions. Inclusion of an item in its claim constitutes Iran's contention that the item is *owned* by the Government of Iran. The United States has conceded Iran's *ownership* (although not necessarily its right to possession) in all properties classified in sub-categories A - D of category I: "Government of Iran (GOI)--owned tangible property in U.S. on January 19, 1981."[82]

73. In light of this unambiguous admission by the United States, it would be very bizarre, to say the least, for the majority to hold with respect to any of the properties characterised by the United States as 'GOI-owned tangible property' that they are to be considered as 'non-GOI-owned tangible property'!

74. Unfortunately, instead of welcoming this clear admission, the only thing that the majority does in the Partial Award is paying lip service to the existence of this admission but ignoring it for all practical purposes when one reaches the individual claims which were subject to such admissions by the United States, i.e., admitting that the items that were the subject of these Claims, e.g., Claims G-16, G-31, Supp. (1)3, and Supp. (2)49, were 'GOI-owned tangible property'.[83]

❖

75. If one considers these interpretation materials as a whole in a 'single combined operation', it will certainly be possible to discover the *common intention* of the Parties as to the meaning and scope of the term 'Iranian properties' as used in GD Para. 9. This exercise does necessarily point to the conclusion that the term 'Iranian properties' embraces, in addition to properties as to which Iran held title, properties that were validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery. This latter category was clearly considered as being 'owned' by Iran for the purposes of Paragraph 9 obligation and this, in my

---

[82] See Doc. No. 749, "Comments of the United States", 16 August 1985, p 4 [emphasis added].

[83] It is notable that in the Tribunal's Interlocutory Award in Case B/1 (Counterclaim), the Tribunal acknowledged that admissions made during the proceedings by the disputants form 'subsequent practice' for the purpose of Article 31 of the VCLT:

> In determining whether there is a relevant subsequent practice, the Tribunal may consider action taken in application of the treaty such as the filing of counterclaims and "*assertions* or *admissions* made in the course of the proceedings before a tribunal." [emphasis added]

See *Islamic Republic of Iran v. United States of America*, Case No. B.1 (Counterclaim), Award No. ITL 83-B1-FT, 09 September 2004, 38 IUSCTR, p 77, at p 118 [115]. See also ibid [120] (referring to Iran's admission in Case B/1 that the Tribunal has jurisdiction over official counterclaims).

judgement, is the clear result of a good faith interpretation of the term 'Iranian properties' in GD Para. 9.

3. FLAWED INTERPRETATION BY THE MAJORITY

76. In what follows, I will show why the majority is wrong to conclude that the meaning and scope of the term 'Iranian properties' should be ascertained by reference to *lex situs* **(I)**. Next, I will demonstrate that the majority's attempts to pick holes in the valuable interpretive tools available for determining the meaning of the term 'Iranian properties' is misguided and unavailing **(II)**. Apart from these, even if one were to conclude that title (pursuant to a private law analysis) is the sole test for determining whether a given property is 'Iranian' for the purpose of Paragraph 9 obligation, it is, under the factual circumstances of the present Cases, incorrect to apply *lex situs* to the question of transfer of title *inter partes*. Rather, the correct approach, on a private international law plane, is the application of *lex contractus* to the issue of transfer of title *inter partes* in moveable properties that are intended for export sale of goods (**III**).

I. The Majority Is Wrong to Determine the Meaning of the Term 'Iranian Properties' by Reference to *lex situs*

77. The majority's unavailing attempt to pick holes in the available interpretive means leads to bypassing Articles 31 and 32 of the VCLT. However, what the majority does consequent to its detour from the treaty interpretation route by applying the US domestic law to the question of transfer of title is once again against the admitted rules of treaty interpretation. In fact, the majority's application of the *lex situs* test to properties that are the subject of this Case is plainly unreasonable and against the principle of good faith interpretation.

78. According to the majority, "the legal basis of the ownership of property is title, the strongest conceivable of all real rights, and title is the right or proof of ownership. […] title to property is therefore the objective means by which to determine the question of ownership over the property claimed and to conclude whether the property falls within the scope of Paragraph 9. Any interest in a claimed item of property that falls short of title would be insufficient to show that the item was "solely owned by Iran.""[84] The majority then goes on to express that: "A long line of jurisprudence, mirroring that of the Tribunal, confirms the application of general principles of private international law in determining whether title to property has been transferred."[85] This

[84] Partial Award [129], [131].

[85] ibid [141].

finding seems to have its basis on the Respondent's theory of *lex contractus* that was put forward in these proceedings for the first time in 2001. This theory was, of course, replaced by the theory of *lex situs* that only kicked in in response to a question raised by the bench during the hearings in 2013.

79. As suggested by the Partial Award, one may try to interpret the term 'Iranian properties' by reference to the text of GD Para. 9.[86] However, even a facial reading of GD Para. 9 does not support the conclusion that the meaning of the term 'Iranian properties' should be determined by reference to a domestic law analysis. There are two reasons for this.

80. **First**, as stated above,[87] there is no restrictive language in Paragraph 9 limiting the realm of the term 'Iranian properties' to properties whose *title* has been transferred to Iran pursuant to a domestic law analysis. Conversely, all the literal and linguistic texts and contexts relevant to Paragraph 9 patently indicate that the term 'Iranian properties' was drafted in a broad and all-embracing sense.

81. **Second**, unlike certain international agreements such as bilateral investment treaties, the Algiers Accords were not standard agreements concluded by using model treaties. In such agreements, it is impossible to have a clear understanding of the common intention of the Parties by only considering the text of the treaty divorced from its all-important context. In this regard, the Partial Award is right to recall "the complex context within which the Algiers Declarations were negotiated and concluded."[88]

82. To elaborate on this point, international investment agreements (mostly in the form of BITs and MITs) are very wide-spread. According to recent research by UNCTAD, there are currently more than 3,300 investment treaties and trade treaties with investment provisions.[89] These treaties are vastly concluded in standard form based on model treaties. Therefore, except in the cases of significant multilateral or regional agreements, negotiating these agreements is not a very complicated process. Furthermore, in most cases, there are no peculiar circumstances surrounding the conclusion of these treaties.[90] More importantly, when they are concluded and after that when

[86] ibid [104].

[87] See Section 2.I *supra*.

[88] Partial Award [107].

[89] UNCTAD, 'IIA Issues Note: Recent Developments in the International Investment Regime' (United Nations 2018) 2.

[90] The late Thomas Wälde vividly depicts this picture in one of his latest contributions to investment treaty arbitration:

they enter into force, one will rarely come across subsequent agreement or subsequent practice recording the parties' agreement regarding the interpretation of certain provisions in these treaties. In fact, apart from scant instances of explanatory notes and joint interpretations, one does not see much practice after the conclusion of an investment treaty from its contracting parties concerning the interpretation of its terms.[91] Therefore, in the majority of investment treaty cases, the investment treaty arbitration tribunal seized of construing an investment treaty term like 'property' does not have before it much negotiation history, subsequent agreement or subsequent practice for the purpose of treaty interpretation. On the contrary, the Algiers Accords are special agreements with substantial negotiations and considerable subsequent practice which were concluded in particular 'circumstances' and peculiar settings. Therefore, when interpreting the term 'Iranian properties', unlike investment treaty tribunals, our Tribunal can and must avail itself of all the valuable means of interpretation available and consider the particular settings in which the Accords were concluded. The key takeaway from this comparison is to show that the majority's presumption that the term 'property' as used in bilateral investment treaties and the Accords should be treated in the same way and should be defined by reference to domestic law is inaccurate.[92] [93]

Different from the fiction of the quid-pro-quo deal reached in a treaty, BITs tend to be largely copied from earlier practice, primarily from the model of the State pushing for negotiation of a BIT. Governments with limited BIT practice will often not appreciate the details nor does it make sense to invest the resources to develop high-level BIT expertise. They will—or at least [they] did in the past—sign or not sign the draft model treaty proposed to them by, say, the US, Germany, or the UK. So there is often little point in digging up the negotiating history where no substantive negotiations have taken place. The true history of such BITs is in the emergence of models, starting with the two 1960s OECD conventions and the ensuing development of country-specific models. […] These models, their use in repeated practice, commentary, explanation, and adjudication provide more light on the meaning of treaty terms than the 'negotiations' between, say, the US and Bolivia at the time.

See T Wälde, 'Interpreting Investment Treaties', in Binder *et al* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 777-778.

[91] In this regard, see R Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 80, 81 (stating that: "Rarely do FIATs refer to [Article 31(3) of the VCLT]. In the study conducted for this book of FIAT awards or decisions issued from 1990 to end June 2011, 5 per cent (i.e., 12 out of 258) referred to Article 31(3)" and that "[i]n practice, State recourse to subsequent interpretative agreements is rare […] This attitude may be reflective of (a) the reluctance to disturb the delicate balance of compromises embedded in most treaties, (b) the interest of one of the parties to maintain an ambiguity in the terms […]). See also T Hai Yen, *The Interpretation of Investment Treaties* (Brill/Nijhoff 2014) 54, 55 (noting that: "States parties to investment treaties rarely have "subsequent agreement" or "subsequent practice" provided in Article 31(3) except for several cases […] Given the limited availability of these means, it is easy to understand that only 13 out of 229 reviewed decisions and awards have applied subsequent agreement and 10 out of the 229 reviewed decisions and awards have considered subsequent practice.")

[92] See Partial Award [137].

[93] The comparison between the Accords and investment treaties is all the more inapposite given that the two are intrinsically different. Bilateral investment treaties are concluded to protect new (and in certain situations, also existing) investments in the territory of the host state. Therefore, the persistence of a territorial nexus between host state law and the investment is absolutely necessary. This is all the more so since one typical feature of an investment

On a related note, one may suggest that the term 'property' shall be defined by the *lex situs*. Although customary international law does not have a default definition for the term 'property', that does not mean that the parties to a treaty cannot agree to a definition of the term 'property' in their treaty. After all, these two, i.e., the treaty and customary international law, are two independent sources of international law (Article 38 of the ICJ Statute). If there is proof that such an agreement regarding the definition of the term 'property' has been made, there will be no ground to refer to domestic law for such definition.[94]

83. Apart from that, what is all the more troublesome with the majority's reasoning is the result achieved by the majority's application of the *lex situs* theory, which not only is not rooted in the 'common intention' of the Parties at all, as discussed above, but also is, with all due respect, 'manifestly absurd [and] unreasonable'.[95]

84. To illustrate the absurdity of the result of applying the theory resorted to by the majority, one can refer to the majority's analysis as to one of Iran's individual claims. In Claim G-16, from the very filing of the Claim until today, Iran has been seeking the transfer of the eight collages in question.[96] This Claim has been dismissed by the majority, *inter alia*, for the following reason:

> The Tribunal notes that, even assuming, *arguendo*, that the Collages did exist within the jurisdiction of the United States on 19 January 1981, Claim G-16 would nevertheless fail because those items would not have represented "Iranian properties" within the meaning of Paragraph 9. […] There is no evidence that the TMCA and Mr. Eisenman reached any explicit agreement regarding the passage of title to the Collages. Thus, in accordance with the default rule under the *lex rei sitae*, i.e., Section 2-401 (2) of the New York Code, […] title to the Collages could have passed to the TMCA only upon their physical delivery to the TMCA. It is undisputed, however, that such delivery never occurred. Thus, title to the Collages would not have passed to the TMCA, and, accordingly, they would not have

operation is a considerable duration of time. C Schreuer *et al*, *The ICSID Convention: A Commentary* (CUP 2009) 128 *et seq*. On the contrary, GD Para. 9 obligation had no purpose but detaching 'Iranian properties' from the territory of the United States. This was not an agreement to marry (like bilateral investment treaties) but an agreement to divorce.

[94] M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2010) 95. See also C Lévesque, 'Investment and Water Resources: Limits to NAFTA' in MC Cordonier Segger, M Gehring, A Newcombe, R Buckley, A Zieglerstating (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 425 (stating that: "Of course, if the Treaty itself […] recognizes the existence of the alleged 'right' in international law, it is a different situation.").

[95] Terminology borrowed from Article 32 of the VCLT.

[96] Doc. No. 2311, Letter from the Agent of Iran to the Tribunal, 03 March 2015, pp 6-7.

> represented "Iranian properties," even assuming their existence in the United States on 19 January 1981.[97]

85. Now, with all due respect, the absurdity of the outcome of the approach adopted by the majority speaks for itself. It is axiomatic that if Iran had taken delivery of the collages, it would not have had a claim against the United States for arranging for the transfer of the collages! In fact, the very condition precedent chosen by the majority to trigger the US obligation under GD Para. 9, i.e., delivery, is the exact reason why Iran has filed this claim.[98]

86. In addition, this preliminary conclusion by the majority becomes even more disturbing in certain claims where one considers that Iran has not been able to take delivery precisely because of the asset freeze which was laid down by the United States (a notable example being Claim Supp. (1) 5).[99] In fact, the majority is relying on the United States' own act to effectively exempt the

---

[97] Partial Award [298].

[98] In this connection, at the hearing for Cluster 1, Counsel for Iran pointed out the absurdity of the result that such an interpretation would bring about:

> Iran's position is that this interpretation is artificial and counterintuitive. Paragraph 9 of the General Declaration is predicated on the very fact that the expected transfer to Iran of properties has not taken place. How then can the provision be deprived of a very large part of its scope by saying: because that expected transfer has not taken place, the property you are claiming is not Iranian property in the first place, and so we have no obligation to transfer. That's the United States' argument. Iran says that paragraph 9 cannot be so construed, and that the United States' analysis is in fact confusing two separate and different relationships, that is the private law position, as between the buyer, the Iranian buyer and the United States seller, and the international law position as between the United States and Iran, as set out in the Accords.

See Doc. No. 2009, Hearing Transcripts, Cluster 1, Day 1, 07 October 2013, p 120. (Statement of Mr. Wordsworth)

[99] In that Claim, the non-delivery of properties was due to the actions and measures taken by the Respondent itself through enacting the Freezing Order and the subsequent Treasury Regulations, which prohibited the delivery of the properties to Iran. At paragraph 10 of the Tribunal's Award in Case No. 264, it was stated: "A further meeting was held at Hamadan on 26 September 1979. Mr. McIntyre, Mr. John Raffaelli and Mr. Gary Lucas of Teichmann travelled to Iran to attend it. [...] Pursuant to that meeting, Teichmann attempted to ship to Iran certain materials which were being held at the port of Baltimore, but this proved impossible after the detention of American nationals in November 1979, whereafter the situation continued to deteriorate […]" See *Henry F. Teichmann, Inc. and Carnegie Foundry and Machine Company v. Hamadan Glass Company*, Case No. 264, Chamber One, Award No. 264-264-1 [10]. Indeed, it is inferred from the Award in Case No. 264 that, had the Freeze Order not been issued in November 1979, the Baltimore Shipment would have been delivered to Hamadan in the normal course of events. This appears not only from paragraph 10 of the Award mentioned above, but also paragraph 9 which states: "Matters progressed to the point where Teichmann obtained a lease of a property in August 1979 to accommodate a small number of its staff whom it expected to re-enter the country." See ibid [9]. See also Doc. No. 1630, Claimant's Brief And Evidence in Rebuttal, Volume 32, Claim Supp. (1) – 5, Hamadan Glass Co., 17 May 2006, Exhibit No. 1, Affidavit of Mr. Khalili [12]. Moreover, in a telex of 15 November 1979, just one day after issuance of the Freeze Order, Mr. McIntyre of Teichmann sent a telex to Hamadan stating that: "As per our discussion in Tehran in late September, we have been trying to ship the material and equipment that was stored in Baltimore. We have encountered repeated ship cancellations and delays. Today we were advised that longshoremen refused to load our equipment and those ships are avoiding Iranian ports …" See Doc. No. 1630, Claimant's Brief And Evidence in Rebuttal, Volume 32, Claim Supp. (1) – 5, Hamadan Glass

United States from international responsibility.[100]

87. Bearing this in mind, even if one considers, *arguendo*, that delivery is a condition for rendering a property 'Iranian', a good faith interpretation would require that, where failure to deliver results directly or indirectly from the freezing of 'Iranian properties' by the United States, then non-delivery could not be relied upon as a pretext to leave out the non-delivered properties from the sphere of the transfer directive.

88. In sum, with respect, it is absurd to suggest that non-delivery is an obstacle to a claim for transfer, particularly in cases where non-delivery is due to the actions of the obligor itself. This would lead to outcomes which are evidently unreasonable and not in accordance with the requirement of good faith interpretation, as instructed by Article 31(1) of the VCLT. This is, of course, not to suggest that a *mala fides* interpretation has been put forward by the majority. Rather, my point is that the majority should have adopted a reasonable approach to construing the term 'Iranian properties' and should have refrained from offering an interpretation which is in plain contradiction to the purpose and logic of the Accords.[101]

Co., 17 May 2006, Exhibit 15, telex from Mr. McIntyre of Teichmann to Mr. Sharmini of Hamadan, dated 15 November 1979. Furthermore, there was then the Executive Order No. 12205 issued by the President of the United States on 07 April 1980, followed by 'Additional Prohibitions' laid down on 09 April 1980 by the Department of Treasury, by virtue of which the continuation or the execution of any transaction with Iran, or the shipment of any consignment to Iran, even through third countries, was banned, and the American forwarding companies were prohibited from shipment of any consignment to the destination of Iran. Bearing in mind that the cause of non-delivery of the properties was actions taken and measures adopted by the Respondent itself, it is against good faith to interpret the term 'Iranian properties' in a way that the author of the actions or measures benefits from the non-fulfilment of the condition which it has itself caused.

[100] In a private law concept, the doctrine of prevention has been adopted to counter such quasi-abuse of right situations. This doctrine is a generally recognised principle of contract law according to which if a promisor prevents or hinders the fulfilment of a condition to his performance, the condition may be regarded as waived or excused. See *Barnhill v. Veneman* (In *re Peanut Crop Ins. Litig.*), 524 F.3d 458 (4th Cir. N.C. 2008) 46. A similar notion is also reflected in Article 5.3.3 of the UNIDROIT Principles 2016. According to this provision, titled "Interference with Conditions": "If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition."

[101] As has been held by the tribunal in *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*:

> [A]n interpretation in good faith is not simply interpretation *bona fides*, as opposed to the absence of *mala fides*, or a principle providing for the rejection of an interpretation that is abusive or that may result in the abuse of rights. It also means that the interpretation requires elements of reasonableness that go beyond the mere verbal or purely literal analysis.

See *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 09 April 2015 [284]. One tribunal has also highlighted that the principle of good faith interpretation means that the interpreter must consider the consequences the parties to the treaty must reasonably and legitimately have envisaged when accepting their treaty obligations. See *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988 [4.10]. By the same token, in *Amco v. Indonesia*, the tribunal held that "any

89. In any event, I would like to point out that I concur with the President that the Partial Award's finding regarding the interpretation of the term 'Iranian properties' is fact-based and specific to the factual setting of the Cases at hand and that the conclusion reached by the majority in the Partial Award of these Cases "does not exclude that in another instance with, for example, other evidence, a different conclusion may be reached."[102]

II. The Majority's Attempts to Pick Holes in the Valuable Interpretive Tools Available for Determining the Meaning of the Term 'Iranian Properties' Are Misguided and Unavailing

90. The majority puts forward certain allegations in the Partial Award attempting unavailingly to find fault with the valuable interpretive tools available for the interpretation of the term 'Iranian properties' in GD Para. 9. Many of these arguments clearly entail pleading a new case for the Respondent. In order to observe the Claimant's procedural rights, these arguments should have been presented to the Parties so that they could comment on it. In the absence of such an invitation to comment by the Tribunal, one can say that the Claimant's right to be heard has not been observed in these particular instances. This, of course, raises serious issues of due process.

91. As Lord Justice Robert Goff, referring to Lord Denning M.R.'s and Lord Justice O'Connor's statements in *Annie Fox and others v. P.G. Wellfair Ltd*, declared in the leading case of *Vimeira*: "In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have the opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal".[103] In the same vein, in a 2007 decision, the UK Commercial Court adhered to this viewpoint. There, Mrs. Justice Gloster, citing with approval the 1984 '*Vimeira*' case and the 1985 '*Zermalt Holding SA v Nu Life Upholstery Repairs*' case held that: "If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. […] It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. This

convention … should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged." See *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 October 1983, (1992) 89 International Law Reports, p 385.

[102] Concurring Opinion of Hans van Houtte [9].

[103] Court of Appeal, *Interbulk Ltd v. Aiden Shipping Co. Ltd*. (The "*Vimeira*") [1984] 2 Lloyd's Rep. 66, at 75 (relying on *Annie Fox and others v. P.G. Wellfair Ltd* [1981] 2 Lloyd's Rep. 514, at 522 and 533).

is contrary both to the substance of justice and to its appearance. […] These principles apply to unargued points of law or construction as they do to unargued questions of fact."[104]

92. Along the same lines, one specific clause of International Law Association ("ILA") Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration which is based on the concern to assure 'due process' and tends to prevent 'taking the parties by surprise' should be taken into consideration:

> Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties.[105]

93. Quite apart from this significant point of procedural fairness, however, the points and arguments put forward by the majority in refuting the relevance and importance of these valuable interpretative tools are both plainly unavailing and inaccurate. Each of these interpretative tools, when considered accurately and objectively, would manifest the intention the Parties had regarding the meaning and scope of the term 'Iranian properties' when adhering to the Accords on 19 January 1981.

94. To be more precise, the 1981 implementing Treasury Regulations, the 1981 Diplomatic Note, and the Consolidated Reports submitted throughout 1984-1991, when analysed thoroughly in the light of the submissions of the Parties and the circumstances of the conclusion of the Accords, clearly show that the Parties intended that properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery fell squarely within the scope of the term 'Iranian properties' in GD Para. 9.

95. In what follows, I will set out the flaws in the majority's treatment of these valuable interpretive materials which are available for the purpose of interpretation of the term 'Iranian properties' in GD Para. 9. The clear reflection of the Parties' common intention in these interpretive materials immunises them vis-à-vis imprecise criticisms. I will demonstrate that the alleged faults found by the majority in respect of the relevance and the interpretive weight of the Treasury Regulations, the Diplomatic Note, and the Consolidated Reports, in addition to mostly not being pleaded by the Parties, are not actually correct. These valuable interpretive means, in my

[104] Commercial Court, *OAO Northern Shipping Co v. Remolcadores De Marin SL* [2007] 2 Lloyd's Rep. 302, at 305.

[105] Clause 8.

view, deserve a much more decent appreciation in the Partial Award, as they are the true reflectors of the common intention of the Parties. Thus, in this subsection, I will touch upon the majority's treatment of the interpretive value of the Treasury Regulations (**i**) before doing the same exercise with regard to the Diplomatic Note (**ii**). The discussion will be followed by an appraisal of the majority's comments on the interpretive value of the Consolidated Reports (**iii**).

i. The Treasury Regulations

96. At paragraphs 106 to 112 of the Partial Award, the majority considers the interpretive weight of the Treasury Regulations. At paragraph 107, the majority records its general incorrect understanding that in order for a given interpretive material to be regarded as an interpretive tool, it should necessarily fall within the scope of the means enumerated in Article 31 of the VCLT. What follows from this flawed proposition is that if a given material does not have all the specifications prescribed by Article 31 of the VCLT to constitute 'subsequent agreement' or 'subsequent practice', that means of interpretation should be totally discarded and ignored in the interpretive exercise. As will be pointed out below,[106] this exhaustive approach to the means of interpretation is plainly incorrect.

97. Having generally expressed such a rigid approach as to the cannons of interpretation, the majority goes on to maintain that the Treasury Regulations lack the prescribed conditions of Article 31 of the VCLT for 'subsequent agreement' and 'subsequent practice' since there was no agreement between the Parties regarding the interpretation of the term 'Iranian properties'. In particular, the majority seems to put forward the idea that since, in its Statement of Claim, the Islamic Republic of Iran asked the Tribunal to revoke § 535.333 of the Treasury Regulations, it has objected to anything that this Section of the Regulations contains, whether it is an 'inclusion', i.e., what has been prescribed to be included within the scope of the term 'Iranian properties', or an 'exclusion', namely, what the Treasury Regulations have stipulated for its 'exclusion' from the ambit of the term 'Iranian properties'. By saying so, the majority suggests that since Iran allegedly objected to the Treasury Regulations in 1982, one cannot conceive an agreement between the Parties regarding the interpretation of the term 'Iranian properties' and, accordingly, there is no 'subsequent agreement' or 'subsequent practice' for the purposes of Article 31(3) of the VCLT.[107]

[106] See Section 3.II.i.a *infra*.

[107] Partial Award [107]-[110].

98. As will be demonstrated below, with respect, both of these reasonings are patently inaccurate and wrong.

a. The Interpretive Canons Expressly Mentioned in the VCLT Are Not Exhaustive

99. Although it has not expressly said so, the upshot of the majority's analysis signifies that, in an interpretive exercise, one can only use the materials explicitly mentioned in Articles 31 and 32 of the VCLT. This, with respect, does not seem to be correct. As a result of such an unsound and rigid approach to Articles 31 and 32 of the VCLT, the majority has inappropriately excluded from its scope of consideration 'subsequent practice as such', i.e., a subsequent practice that lacks the element of 'agreement' between the Parties.

100. This cannot be right in a sound interpretive exercise which is embarked upon for the purpose of identifying the 'common intention' of the parties to a treaty. Subsequent practice which fulfils all the conditions of subsection (b) of Article 31(3) is not the only subsequent practice which is relevant for the purpose of interpretation. Indeed, while 'agreed subsequent practice' constitutes an authentic means of interpretation, subsequent practice in its broad sense or 'subsequent practice as such', despite carrying less interpretive weight as compared to the 'agreed subsequent practice', is nonetheless regarded as amongst the supplementary means of interpretation (i.e., Article 32). This form of subsequent practice has, in an interpretive context, been used by different international *fora*, including the ICJ,[108] ECtHR,[109] the International Tribunal for the Law of the

[108] In the ICJ Case of *Kasikili/Sedudu Island* (*Botswana v. Namibia* – 1999), a report by a technical expert commissioned by one of the parties, which had remained at all times an internal document, while not representing subsequent practice in the sense of Article 31(3)(b), could nevertheless be used to 'support the conclusions' which the Court had reached by other means of interpretation. The same was true in relation to "factual findings that the parties concerned arrived at separately" which had been "expressed in concurrent terms in a joint report". *Case concerning Kasikili/Sedudu Island* (*Botswana v. Namibia*) [1999] I.C.J. Reports 1999 [80].

[109] In *Loizidou v. Turkey*, reference was made to the "subsequent practice of the Contracting parties" to confirm the interpretation the Court had provided from Articles 25 and 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Interestingly, the Court also relied on Article 31(3)(b) without identifying any agreement regarding the interpretation of the treaty. *Loizidou v. Turkey* (Preliminary Objections) (1995), Series A, No. 310, [79]-[80]. In *Tyrer v. The United Kingdom*, the Court relied on a similar understanding of subsequent state practice in referring to national legislation, and even domestic administrative practice, as a means of interpretation, particularly in the area of evolutive or dynamic interpretation. *Tyrer v. the United Kingdom*, 25 April 1978, Application No. 5856/72, ECHR Series A, No. 26 [31].

Sea ("ITLOS"),[110] and investment treaty tribunals.[111] Therefore, even if one were to consider that the relevant provisions of the Treasury Regulations were not agreed to by Iran (which, as a matter of fact, is not in my view the case, as will be shown below),[112] and, thus, there was no 'subsequent practice' in the sense of Article 31(3)(b) of the VCLT, one could not turn a blind eye to this 'subsequent practice' of the United States in the implementation of its treaty obligation in giving an interpretation to the term 'Iranian properties'. This practice, in any event, carries interpretive value in order to ascertain the understanding of a State of the scope of its treaty obligation.

101. To be sure, materials which clarify the contemporaneous understanding of the Parties squarely fit within the scope of Article 32 of the VCLT as 'supplementary means of interpretation'. Indeed, the means of interpretation cited in Article 32 of the VCLT as 'supplementary means of interpretation', i.e., 'the preparatory work of the treaty and the circumstances of its conclusion', are not exhaustive. Support for the proposition that the materials enumerated in Article 32 of the VCLT are not exhaustive, could, in the first place, be found in the text of Article 32 of the VCLT itself, which uses the phrase 'including', thus implying that the supplementary means of interpretation mentioned in this Article must not be considered as being exhaustive. Moreover, approving the above-mentioned understanding, Villiger remarks that:

> Article 32 refers to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. It follows that the means mentioned therein serve as examples and do not exclude other supplementary means of interpretation.[113]

---

[110] In Case *M/V "SAIGA"* (*No 2*), ITLOS reviewed state practice with respect to the right of self-defence under Article 51 of the Charter of the United Nations without verifying whether such practice actually established the agreement of the parties regarding its interpretation. *The M/V "SAIGA"* (*No. 2*) *Case* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, p 262 [155]-[156]. Also, in *Southern Bluefin Tuna Cases*, reliance was made on state practice under a different convention to evaluate a state's compliance with its obligations under the UN Convention on the Law of the Sea. *Southern Bluefin Tuna Cases* (*New Zealand v. Japan*; *Australia v. Japan*) (Provisional Measures, Order of 27 August 1999), ITLOS Case Nos. 3 and 4 [50].

[111] For instance, in *CMS Gas v Argentina*, an ICSID Tribunal relied on general state practice to support its conclusion that independent claims of shareholders, whether minority or otherwise, are recognised and should be entertained in contemporary international law. *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina BIT), Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/8, 17 July 2003, (2003) 7 ICSID Report 492 [47].

[112] See Section 3.II.i.b *infra*.

[113] ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) 445 (referring to 'Report of the International Law Commission on the work of its eighteenth session Geneva', 04 May-19 July 1966 (1966) Vol. II, Yearbook of the International Law Commission 223 [20]). See also *Chevron Corporation* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award Rendered on 1 December 2008 [121] (stating that: "Article 32 VCLT permits recourse, as supplementary means of

102. Therefore, it is mistaken to imply that since certain materials have no expressly-defined place in Articles 31 and 32 of the VCLT, they do not bear any interpretive value. On the contrary, they do remain relevant as long as they constitute the contemporaneous understanding of the Parties and can be used, at the very least, as 'supplementary means of interpretation' under Article 32 of the VCLT.

b. Iran's Objections to the Implementing Measures Were Expressly Confined to 'Exclusions' and Not the 'Inclusions'; and, Thus, so far as the 'Inclusions' Are Concerned, the Implementing Measures Were Not Only Not Objected to But Agreed to by Iran's Indicative Silence

103. Even if one argues, based on a rigid reading of Articles 31 and 32 of the VCLT, that the Treasury Regulations can play a role only to the extent that they constitute an agreement between the Parties in relation to the interpretation of the treaty terms, one cannot but find that such an agreement was present in this Case. In other words, the United States' practice in the implementation of its treaty obligation by enacting the relevant Sections of the Treasury Regulations was not a unilateral practice; rather, it "established the agreement of the parties". Indeed, since it was a practice, as any other agreement implied in fact, to form an agreement, there was no need to an express oral or written acceptance by the other party. Rather, it would be sufficient that the other party also accepts the implementing measures or acquiesces in those measures in practice.

104. The idea that Iran objected to the 'inclusions' of the Treasury Regulations is, in my judgement, patently untenable. Iran's objections to the implementing measures were *expressly* confined to 'exclusions' and not the 'inclusions'. Thus, so far as the 'inclusions' are concerned,

---

interpretation, not only to a treaty's "preparatory work" and the "circumstances of its conclusion," but indicates by the word "including" that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT.") See also *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award of 23 May 2011 [135] (holding that: "… [f]or the Claimant, once the Explanatory Notes find no express place in Articles 31 and 32, they must be disregarded entirely, not only for the interpretation of the Agreement, but also for its application. The Tribunal is unable to endorse so rigid an approach to the matter. In the first place, it recalls once more its conclusion at paragraph 117 that the category of admissible supplementary means for treaty interpretation is not a closed one. The Tribunal recalls also the repeated reminders woven into the International Law Commission's Commentaries on its Draft Articles that the provisions on treaty interpretation must not be misread as introducing either a rigid, or still a hierarchical, set of rules. As the Commission says, there is in truth only one all-encompassing rule, whose elements should be combined in a logical and coherent way.") In a footnote, the tribunal refers to 'Report of the International Law Commission on the work of its eighteenth session Geneva', 04 May-19 July 1966 (1966) Vol. II, Yearbook of the International Law Commission 220.

the implementing measures were not only not objected to but agreed to by Iran's indicative silence. With all due respect, it is, indeed, counter-intuitive and obviously unreasonable to suggest that Iran objected to the 'inclusions' encompassing instances of 'Iranian properties'. Even the Respondent does not seem to assert so.

105. In the section regarding the remedy sought by Iran in its Statement of Claim, Iran prays the Tribunal to order the United States to 'redefine the term property for the purpose of Regulation § 535.215 as any "property in which the Government of Iran has an interest".[114] Two points arise from this requested relief: **first**, Iran is explicitly indicating that it agrees with the Treasury Regulations § 535.215 as it defines the term 'Iranian properties', in its title, as any "property in which the Government of Iran has an interest". One wonders what else could a clearer agreement regarding the 'inclusions' be: the United States has laid down provisions for the exclusive purpose of implementing its treaty obligation and Iran is clearly saying that she agrees with that. **Second**, Iran is implying that to the extent that subsections in § 535.333 contradict the title of § 535.215, which includes within the scope of 'Iranian properties' any "property in which the Government of Iran has an interest", those contradictory provisions should be revoked. § 535.333(a) of the Treasury Regulations does not run contrary to the title of § 535.215 since it includes within the definition of the term 'Iranian properties', 'property interests' of the Government of Iran. Iran's problem, as it appears from its submissions, was not with these 'inclusions', rather it clearly took issue with the 'exclusions' from the scope of the term 'Iranian properties'. Iran's Statement of Claim, read as a whole, cannot, by any stretch of imagination, lead to any other conclusion:

> Specifically, the U.S. Government has prevented return of the Government of Iran's physical property by issuing Executive Orders and regulations that do not require transfer of this property *until storage and other charges and tax liens are paid*…[115]
>
> […]
>
> This definition of the term "properties of Iran" [in Section 535.333] for the purpose of identifying properties that must be transferred to Iran is inconsistent with the General Declaration because *it conditions the obligation to transfer on payment of various liabilities,* some of which, like payment of storage charges accruing before January 19, 1981, are claims committed to the exclusive jurisdiction of the Tribunal

[114] See Doc. No. 1, Statement of Claims of the Islamic Republic of Iran Based upon Violations by the United States of the Algiers Declarations, p 56.

[115] ibid, p 47 [emphasis added].

> under article II, paragraph 1 of the Claims Settlement Declaration. By itself, this regulatory definition constitutes a breach of paragraph 9 of the General Declaration.[116]
>
> […]
>
> Pursuant to this Treasury regulation, warehousemen, materialmen, state taxing authorities, and other persons claiming security interests in Iranian property have refused to transfer property of the Government of Iran *unless they obtain prepayment of all allegedly outstanding charges and assessments*, including those arising prior to January 19, 1981.[117]

106. Here, Iran is plainly saying that in so far as 'Iranian properties' subject to liens and other possessory contestations are excluded from the scope of the transfer directive, the United States has committed a breach of its obligations under GD Para. 9. There is no trace of any objections to the 'inclusions' within the scope of 'Iranian properties' and there could not reasonably be any.

107. Furthermore, in the following pages of the same brief, Iran specifically names and objects to § 535.333(b)[118] and 535.333(c)[119] without pointing at subsection 535.333 (a). In addition, all the examples that Iran cites in this brief from the US breach of its GD Para. 9 obligation concern Iran's complaints with respect to Treasury Regulations § 535.333(b) (e.g., Claim G-7) and § 535.333(c) (e.g., Claims Supp. (2)11 & 12). All these instances point to 'exclusions' from the scope of the transfer directive merely on the basis of the holder's alleged possessory interests. Indeed, only these 'exclusions' formed the real basis of Iran's objections to the definition of 'Iranian properties' in the US implementing regulations.

108. To make the point clearer, almost one year earlier, when Counsel for Iran wrote a letter on behalf of Iran to the Treasury Department in the context of Claim Supp. (2)12, he noted that § 535.333(c) was in contradiction with the US obligation under GD Para. 9.[120] In addition, in the context of Claims G-11 and Supp. (2)67, the point in dispute between the Parties centred on § 535.333(b).[121] Indeed, if one dissects all the early pleadings of Iran, as well as all the

---

[116] ibid, pp 49-50 [emphasis added].

[117] ibid, p 50 [emphasis added].

[118] ibid, pp 54-55.

[119] ibid, p 55.

[120] See Doc. No. 1631, Claimant's Brief and Evidence in Rebuttal, Volume 33, Supp. (2)-11&12, IRI Radio and TV, 17 May 2006, Exhibit 13, Letter from Iran's US Attorney to the US Department of Treasury, 29 September 1981.

[121] Doc. No. 1336, Claimant's Brief and Evidence, Claim G-11 & Supp. (2)-67, Supp. (2)-20, Supp. (2)-21, Supp. (2)-26, Supp. (2)-33, Supp. (2)-38, Supp. (2)-41, Supp. (2)-42, Supp. (2)-44, Supp. (2)-46, Supp. (2)-47 & (2)-58, Supp.

contemporaneous communications between Iran and the United States, one clearly sees that Iran always kept objecting to 'exclusions' authorised by virtue of § 535.333(b) and 535.333(c) of the Treasury Regulations. No objection was ever raised to the 'inclusions' within the scope of 'Iranian properties' as set out in § 535.333(a).

109. Therefore, it is imprecise to hold that "Iran took the first opportunity it had to object to these same instruments before the Tribunal" and, consequently, it is wrong to conclude that the 26 February 1981 Treasury Regulations do not constitute subsequent practice of the Parties for the purpose of Article 31(3)(b) of the VCLT.[122] In fact, Iran's silence vis-à-vis the implementing Treasury Regulation, so far as the 'inclusions' are concerned, could not be characterised as a 'pure' silence under the circumstances. Iran was in a position to raise its objections – and, indeed, it did object to the 'exclusion' of certain properties from the scope of the term 'Iranian properties' by subsections (b) and (c) – but it did keep silent as to the 'inclusion' of properties into the scope of the US treaty obligation. This, in my view, is a prime example of an 'indicative silence', which indicates Iran's consent to the practice adopted by the United States in defining the scope of its treaty obligation. Thus, the US implementing measures, in my opinion, constituted an 'agreed' subsequent practice so far as the 'inclusions' were concerned.

110. It is vital to note here that, in our present interpretive exercise, the Tribunal is not dealing with the 'exclusions', which were already found unlawful.[123] The focus, rather, is on the 'inclusions' by the United States of properties within the scope of 'Iranian properties', which were not obviously objected to by Iran and which shed an illuminating light on the common understanding of the State Parties as to the scope of the term 'Iranian properties'. In other words, to show its agreement with the US definition of the term 'Iranian properties', Iran, as the beneficiary and as the obligee, did not need to do anything but to react. Indeed, the obligor, i.e., the United States, needed to act positively and the obligee only needed to make a reaction. This reaction was either objection, when the measure seemed unlawful in the eyes of the obligee, or silence, when Iran thought that the implementing measure complied with GD Para. 9. Thus, so far as the 'inclusions' are concerned, Iran's 'reaction' to the implementing measures adopted by the United States does indicate the 'common understanding' of the State Parties as to the scope of the term 'Iranian properties'. Iran's reaction, under the circumstances, could not be characterised as a

(2)-49, Supp. (2)-54, Supp. (2)-55, Supp. (2)-56, Supp. (2)-64, Islamic Republic of Iran Airlines (Iran Air), Vol. Two, 26 December 1995, Exhibit A-1, US Customs Service Letter to Iran's Counsel, 26 February 1982.

[122] Partial Award [108].

[123] In this regard, see Partial Award 529 [77(d)].

pure silence, but rather 'an indicative silence', 'a speaking silence', 'an alarming silence' or 'a silence surrounded by telling circumstances', which conspicuously divulged its intention as to the meaning and scope of the term 'Iranian properties'.

111. Apparently recognising the obvious flaws in the idea that Iran objected to the 'inclusions' in the Treasury Regulations § 535.333, the majority then goes on to suggest that even if one cannot find any Iranian objection to the 'inclusions' within the scope of 'Iranian properties' as defined in the US Treasury Regulations, "the mere absence of an objection would fall short of creating a 'subsequent agreement between the parties regarding the interpretation' of the term 'Iranian properties' in Paragraph 9, in application of Article 31(3)(a) of the Vienna Convention […] Similar considerations apply to the question whether the Treasury Regulations enacted by the United States to implement Executive Order 12281 constituted 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,' pursuant to Article 31(3)(b) of the Vienna Convention."[124]

112. This is, of course, a more plausible, but still inaccurate, viewpoint. As per the 'second International Law Commission [ILC] report on subsequent agreements and subsequent practice in relation to the interpretation of treaties', any identifiable agreement of the parties, without any formality and without the need to be binding, is sufficient for the purposes of forming an agreement under Article 31(3)(b). According to the above-mentioned report,[125] Sir Humphrey Waldock's Report,[126] and decisions of international courts and tribunals,[127] the ILC and international adjudicatory *fora* have clearly recognised that, in certain circumstances – in particular, where the circumstances are such that call for a reaction – an 'agreement' required for the purpose of subsequent practice under article 31(3)(b) can result from 'action' by one State and 'silence' or 'omission' by the other. Applying these rules to the facts of our present Cases, and facing with the relevant Treasury Regulations determining the scope of the US transfer obligation and the 'exclusions' thereof, it is clear that Iran immediately raised objection to the 'exclusions' contained

[124] Partial Award [111]-[112].

[125] Second ILC Report, p 30.

[126] 'Report of the International Law Commission on the work of its eighteenth session Geneva', 04 May-19 July 1966 (1966) Vol. II, Yearbook of the International Law Commission 222 [15].

[127] See, for instance, *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*) (Merits) [1962] I.C.J. Reports 1962, p 23 (referring, furthermore, to the *adage Qui tacet consentire videtur si loqui debuisset ac potuisset*); *Case concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*) (Preliminary Objection) [1996], I.C.J. Reports 1996, p 815 [30]; and *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Jurisdiction and Admissibility) [1984], I.C.J. Reports 1984, p 410 [39].

in subsections (b) and (c) in numerous letters written by its Counsel to various US Departments and also in its Statement of Claim in Case A/15 (II-A),[128] but kept silent with respect to subsection (a) of the Treasury Regulations § 535.333. Had Iran considered subsection (a) as not being in line with the US treaty obligations, she would certainly have objected, but it did not do so. This is an 'indicative' silence, which signals Iran's consent to the practice adopted by the United States in defining the scope of its treaty obligation.[129] Therefore, bearing the particular settings of the Case in mind, it is not correct to suggest in the abstract, that "the mere absence of an objection would fall short of creating a "subsequent agreement between the parties regarding the interpretation" of the term 'Iranian properties' in Paragraph 9".[130]

[128] See, for instance, Doc. No. 1631, Claimant's Brief and Evidence in Rebuttal, Volume 33, Supp. (2)-11&12, IRI Radio and TV, 17 May 2006, Exhibit 13, Letter from Iran's US Attorney to the US Department of Treasury, 29 September 1981.

[129] See Second ILC Report, p 26; 'Report of the International Law Commission on the work of its eighteenth session Geneva', 04 May-19 July 1966 (1966) Vol. II, Yearbook of the International Law Commission 222 [15]; *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*) (Merits) [1962] I.C.J. Reports 1962, p 23; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977), Reports of International Arbitral Awards, vol. XXI, part II [169]; *European Communities: Chicken Cuts*, Report of the Appellate Body (12 September 2005), WT/DS269/AB/R and WT/DS286/AB/R [272].

[130] As an aside, it is appropriate here to make a number of points in connection with what has been proposed at paragraph 112 of the Partial Award by reference to the work of Sir Ian Sinclair regarding the threshold for the establishment of 'practice' for the purpose of Article 31(3)(b): **first**, Sir Ian Sinclair does not seem to "make the categorical statement that subsequent practice, in order to fulfil the requirements of article 31(3)(b) must be "concordant, common and consistent", but rather states that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent."" [emphasis added] See Second ILC Report, pp 22-23. **Second**, even if the formulation of such a rigid test can somehow be attributed to Sir Ian Sinclair, the ICJ and most of the other international courts and tribunals have not adopted the demanding formula allegedly suggested by him (i.e., the criteria of practice being 'concordant, common and consistent'). See ibid, pp 21-24. **Third**, it is clear from the jurisprudence of international courts and tribunals that even one single action by a party, like a legislative or regulatory act, can form the basis of subsequent practice for the purpose of Article 31(3)(b) of the VCLT: for instance, a legislation passed by the parliament in the course of meeting constitutional requirements to allow the state to become a party to a given treaty can form state practice for the purpose of the above-mentioned provision. See R Gardiner, *Treaty Interpretation* (OUP 2015) 257-258 (citing a number of examples in this regard); see also *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (*Guinea/Guinea-Bissau*), Award, 14 February 1985; XIX UNRIAA 149; 25 ILM 252 (1986) [60]-[68] (taking into account an internal note by the French Ministry of Foreign Affairs, concerning the discussion of the ratification of the Convention by the French Parliament, which described the scope of the French possessions acquired by the 1886 Convention at issue, as subsequent practice under Article 31(3)(b) of the VCLT). Indeed, in Partial Award 529 in these very Cases, one single regulatory action on the part of the United States, namely, Executive Order No. 12281, has been characterised as forming "part of the "practice" of the treaty for purposes of its interpretation as provided in Article 31(3) of the Vienna Convention on the Law of Treaties." See, Doc. No. 1083, Partial Award 529 [48]. Therefore, it does not seem correct to suggest that subsequent practice "cannot in general be established by one isolated fact or act or even by several individual applications." See Partial Award [112].

113. Even assuming, *arguendo*, that the majority is correct and the US action in promulgating Treasury Regulations § 535.215 and § 535.333 does not amount to subsequent practice in the sense of Article 31(3)(b) for the purpose of the interpretation of the term 'Iranian properties' due to the lack of Parties' agreement, these implementing provisions, nevertheless, constitute, at the very least, the unilateral practice of the obligor State which remains highly relevant for realising the contemporaneous understanding of that state of the scope of its treaty obligations under GD Para. 9. In addition to shedding light on determining the common intention of the Parties to the treaty, this unilateral practice, can, at least, be utilised as a 'supplementary means of interpretation', pursuant to Article 32 of the VCLT.

ii. The Diplomatic Note

114. Turning to the interpretive value of the Diplomatic Note of 23 September 1981, the majority notes that "no evidence has been submitted that the list of examples of "Iranian-owned military supplies and equipment" that the United States enclosed with its diplomatic note of 23 September 1981 is based on anything other than communications from the holders telling the United States that, in their eyes, the items were owned by Iran. This is an inadequate basis from which to draw any general conclusions as to the United States' understanding of the intended meaning of Paragraph 9 and of its obligations under that provision."[131]

115. With respect, this bitterly brief reasoning which treats a very important official and contemporaneous communication between the Parties cursorily is defective: **firstly**, it is astonishingly remarkable that the majority has second-guessed the background of the Diplomatic Note of 23 September 1981 without being provided with the evidence of the communications from the holders with the United States by the Respondent or even without any allegation to this effect being made by the Respondent. In other words, in the absence of any allegation, let alone any evidence regarding such communications – which should have been adduced by the Respondent – it is not clear how the majority has come to the conclusion that the characterisation of the properties was made by the US holders and not by the United States itself. **Secondly**, it is very unlikely – if not impossible – that all the six (6) different US holders enumerated in the enclosure of the Note, without coordinating with each other, would have consistently characterised the properties in their possession as Iranian-owned properties and sent communications to the US Government to this effect. It is also notable that the Diplomatic Note does not appear to quote the holders when it describes the properties listed in the enclosure to the Note as "Iranian-owned military properties."

[131] Partial Award [115].

Therefore, once again, it should be concluded that it was, in all likelihood, the United States, as the author of the communication, who characterised the group of properties in this list as "Iranian-owned military property". The group, expressly labelled as "Iranian-owned military property" by the United States, included properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery. **Thirdly**, even assuming the unthinkable that all the holders from different parts of the United States chorused "Iranian-owned military property" and sent such communications to the United States, having embarked upon sending the official Diplomatic Note, which definitely bears on the interpretation of its obligations under GD Para. 9, the United States inherited the formulation and accepted the legal consequences flowing from the use of such a term in a document of such significance. Therefore, failing any indication attributing the use of the specific wording of "Iranian-owned military property" to any other person(s) in the Diplomatic Note, it is incorrect to exonerate the Respondent from a clear characterisation it willingly adopted in such a critical document.

116. The mere labelling of these pieces of property as "Iranian-owned military property" in an official communication of such significance shows that the United States contemporaneously was of the belief that her transfer obligation extended to properties validly purchased and paid for by Iran which had remained undelivered despite Iran being contractually entitled to delivery. Otherwise, there would have been no reason for the United States to send this Diplomatic Note to Iran in the first place.

iii. Consolidated Reports

117. Paragraphs 116 to 121 of the Partial Award deal with the relevance and the interpretive value of the Consolidated Reports. Recognising the inevitable importance of these early official submissions before the Tribunal in reflecting the contemporaneous understanding of the obligor, the majority attempts to call into question the consistency and congruency of these Reports, and thereby, to undermine their interpretive value. The majority does so by resorting to a point which has never been pleaded by the Parties, and as to which the Claimant's position has not been heard – as it had no opportunity to offer its views – and which is, in any event, erroneous.[132] Finally, the majority takes one step further to subvert the Reports by referring to a point which is what it calls

[132] Partial Award [118], [119], [121].

"far-reaching disclaimers" by citing one such alleged disclaimer from one of the US Consolidated Reports.[133] The inaccuracy and other flaws of each of these points will be explained below.

a. The Alleged Incongruency of the Consolidated Reports Devised by the Majority

118. Having tacitly admitted that the Consolidated Reports are relevant for the interpretation of the term 'Iranian properties' in GD Para. 9, the majority goes on to put forward an argument, not pleaded by the Parties, to diminish the interpretive value of these Reports. In particular, the majority says that the United States relied on Iran having 'title' to an item of property as the criterion for establishing whether that item was 'Iranian' for the purposes of GD Para. 9 in its Consolidated Reports.[134] Thus, the majority attempts to reject the Claimant's argument that prior to the issuance of Partial Award 529, the United States never considered the issue of Iran having 'title' to an item of property pursuant to any private law analysis to be of any relevance in determining whether that item fell within the scope of 'Iranian properties'. The majority, then somewhat strangely, goes on to reason that, "despite having identified Iran's title as the criterion for establishing whether an item of property is "Iranian," in the United States Reports, as well as in its Hearing Memorial of 5 July 1990, the United States, rather incongruously, classified items that had been fully paid for by, but not delivered to, Iran as "GOI-owned tangible properties," which is at odds with the applicable United States law governing the passage of title to tangible property."[135]

119. Clearly, the majority, by raising this line of reasoning, which has not even been implied by the United States, attempts, quite remarkably, to diminish the interpretive weight which has to be given to this critical tool of interpretation by calling into question both the consistency and the accuracy of the Consolidated Reports in characterising items of property as "GOI-owned properties".

120. With respect, it is not for the Tribunal to go beyond its tasks and plead a case for a Party: this raises serious due process concerns. The United States' responses as to the interpretive value of the Consolidated Reports are pointed out by the United States itself in its written and oral pleadings and the Tribunal should limit itself to considering these arguments. This is all the more important when the issue is of a *factual* character: how could an adjudicating body ignore over thirty years of pleading of a party regarding a factual issue and, merely based on conjecture,

[133] ibid [120].

[134] ibid [118].

[135] ibid [119] [footnotes omitted].

propose something totally different? The reasoning that the United States used the term 'title' in some of its early pleadings in the same sense currently being advocated by the United States and the reasoning of 'incongruency' in the Consolidated Reports, devised and inserted into the Partial Award, have no place in the US pleadings. In particular, one should bear in mind that the Claimant had no opportunity to present its case with respect to these points which significantly bear on one of the most important threshold issues regarding Case A/15 (II-A). Indeed, by inserting these bench-created factual and legal arguments, the majority violates the Claimant's right to be heard and generates serious issues of due process.

121. That being said, with all due respect, it is my considered opinion that, from a substantive point of view, the majority is incorrect in both respects: (i) the majority is wrong that the United States used the term 'title' in earlier pleadings in the sense it is currently putting forward; (ii) specifically, as a result of the previous proposition, the majority is wrong to suggest that there exists an incongruency in the Consolidated Reports regarding the characterisation of certain properties as 'GOI-owned'.

122. The majority says that the United States has used the term 'title' in its Consolidated Reports and thus this should be taken as showing that it considered 'title' as the relevant criterion for classifying an item as 'GOI-owned' property. To the extent that the United States might have used the term 'title' in one of its Consolidated Reports, the point seems to be unavailing. This is supported by the following reasons: first, there is no allegation by the Respondent in that Report that 'title' should be determined in accordance with US law or by reference to physical delivery. Second, in the very same Report, several claims exist where the properties in question have been characterised as "GOI-owned tangible property in U.S. on January 19, 1981."[136] This is while properties at stake in those cases, according to the current argument put forward by the United States, would not be considered as 'Iranian-titled'. Therefore, the use of the term 'title' in that Report plainly does not correspond to the latest US position on the meaning and scope of the term 'Iranian properties'.

123. Indeed, some of the very references given by the majority from the 1990 US Consolidated Report undermine the conclusion it endeavours to make, i.e., that the term 'title' was used in the 1990 Report in the same sense that it is being alleged today by the Respondent. In particular, the majority refers to page 24 of the said Consolidated Report, where the United States says with

[136] For instance, Claims G-16 and Supp. (2)49. See Doc. No. 970, Third Consolidated Report of the United States, 05 July 1990, pp 6 and 13 at Claims Table.

regard to one of the individual Claims that the holder "holds no Iranian-titled tangible property". The formulation does not appear to convey what the majority tries to imply, i.e., "the relevance of Iranian title to an item of tangible property in the United States' understanding of its Paragraph 9 obligation" in the period before the rendition of Partial Award 529. The simple reason is that this statement relates to Claim G-146 which concerned 'repair and return' items as to which the United States does not contest Iran's ownership even today. Thus, the use of the term 'title' in the quoted sentence does not echo the current US position or the majority's opinion regarding the relevance of title for determining the meaning and scope of the term 'Iranian properties'. Indeed, the United States is not saying that Iran did not have title because delivery did not take place – and, reasonably speaking, it cannot say so with respect to 'repair and return items.' It, rather, denies Iran's title because "[t]he company [who] shipped some spare parts to Iran in 1978, cancelled some orders, and scrapped other parts to mitigate losses caused by Iran's non-payment of workmen's liens in the amount of approximately $24,000."[137] A similar observation applies to another example cited by the majority, i.e., Claim G-31, where the United States says that "no additional Iranian-titled tangible property extant at the time of the Accords to be subject to paragraph 9" because first, "Walter J. Johnson […] [had] shipped all book orders to Shiraz [sic] University", and, second, "the Houbon-Weyl encyclopaedia was never ordered from its publisher in Germany".[138] Consequently, the use of the term 'title' by the United States here does, by no means, signify its current delivery-based position. Rather, it tends to exclude properties which have already allegedly been shipped to Iran or were never ordered by Iran from the scope of its GD Para. 9 obligation.

124. As such, there is no incongruency between characterising properties validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery as 'GOI-owned' on the one hand and stating with respect to a repair item or a set of items that have already allegedly been fully shipped to Iran as not 'Iranian-titled' for reasons other than the non-transfer of title due to the lack of delivery as a matter of private law on the other.

125. What the United States consistently and congruently did in its Consolidated Reports was characterising properties validly purchased and fully paid for by, but not delivered to, Iran as "GOI-Owned" properties. The veracity of this consistent contemporaneous characterisation is corroborated by the United States' position in Doc. No. 969, where the Respondent posits that:

[137] See ibid, p 24.

[138] See ibid, p 23.

> In a contract for the sale of goods where Iran has failed to pay for the goods, the property would not even be subject to transfer pursuant to paragraph 9 of the General Declaration, since the property would not be Iranian owned …[139]

126. This statement shows that what mattered for entering into play of the GD Para. 9 obligation was that the item in question must have been paid for by Iran so that Iran became entitled to delivery, irrespective of whether or not title had been transferred under US law or under any other domestic law for that matter.

127. Given the abundance of corresponding evidence showing the Parties' common intention to the effect that the term 'Iranian properties' included properties in which Iran had sufficient ownership interest to subject them to the transfer directive, it is clear from the early pleadings and communications of the Parties that the strict legal concept of 'title' by reference to US law had no exclusive role in determining the meaning of the term 'Iranian properties' or the term 'properties owned by Iran' or 'GOI-owned properties' for that matter. The majority's attempts to prove otherwise by reference to extracts taken out of context from certain early pleadings, which have not even been pleaded by the Parties to have such a significance, and as to which the Parties' case has not been heard, are both procedurally flawed, giving rise to potentially serious due process issues, and substantively untenable. What the Parties commonly admitted and consistently adhered to in their early pleadings was to treat properties validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery as 'GOI-owned properties' as being subject to GD Para. 9.

128. In sum, irrespective of the glaring procedural flaw of raising this reasoning without granting the Claimant a chance to respond, on a substantive plane, one patently observes that the use of the term 'title' in one of the earlier US pleadings does not correspond to its current legal position regarding the meaning and the role of 'title' in the definition of the term 'Iranian properties.' It thus follows that since the United States did not consider its laws to be determinative for the transfer of title or ownership for the purposes of its treaty obligation under GD Para. 9, it is wrong to hold that the US position in the Consolidated Reports was incongruent. What seems to be clear is that the US position is congruent within the framework of the Consolidated Reports and is incongruent with its current position, simply because the latter position only appears to be a litigation strategy adopted for the first time in 2001 after the issuance of Partial Award 529, which fact the majority fails to clearly acknowledge in the Partial Award.

[139] Doc. No. 969, US Hearing Memorial, 05 July 1990, p 50.

b. The Role of the Alleged Disclaimer

129. Seeking to further weaken the interpretive value of the Consolidated Reports, the majority, relying on what it calls a disclaimer in the 1985 Report, puts forward the opinion that "the disclaimer that the United States included in its 1985 Report makes clear that the Reports were "not intended to address fully the various legal issues that form the basis of Iran's claim.""[140]

130. To evaluate the veracity of this statement, it is worthwhile to review the text of the alleged disclaimer. The alleged disclaimer states that:

> This consolidated report is not intended to address fully the various legal issues that form the basis of Iran's claim. Furthermore, all information supplied in this report is based on representations made to the United States by individuals and U.S. companies, documentation made available by those companies and documents submitted by Iran. The United States was not a party to these transactions. Canvassing the number of companies involved in this claim has been an enormous undertaking, particularly given the lapse of time since the relevant transaction occurred. For these reasons, the United States reserves the right to supplement this report and to further address any legal issues.[141]

131. The first point that comes to mind is that these Reports involve submissions which were provided pursuant to the Tribunal's specific Order, inviting the Parties to "describe each item and indicate its owner and the present location of the item."[142] Therefore, one party cannot just simply fully exonerate itself of the legal significance that these submissions bear by a broad and far-reaching reservation.

132. Irrespective of this observation, and much more importantly, what makes the Consolidated Reports remarkably valuable is their consistent characterisation of properties validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery as 'GOI-owned' properties. It is critically important to note that, despite the passage of time, further contacts with the relevant holders, and presentation of new documents, the United States' characterisation of the pertinent pieces of property remained intact throughout seven years of submissions before the Tribunal: such a consistent pattern of characterisation during many years is a clear evidence of the fact that, for the purposes of GD Para. 9 obligation, the United States

[140] Partial Award [120]-[121].

[141] Doc. No. 757, Consolidated Report of the United States, 30 October 1985, p 4. Rather than being a disclaimer, this appears to be better characterised as a reservation of rights.

[142] Doc. No. 223, Order of the Tribunal, 16 December 1983 [5].

considered properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery as 'Iranian' or 'GOI-owned'. There is not even a single instance of a change in this consistent legal position during all years prior to the issuance of Partial Award 529, whereby the United States, relying on the so-called disclaimer and/or by reason of any new data obtained from the US seller or the Iranian buyer, has attempted to make, or even to imply, any change in the characterisation of the pertinent properties as 'GOI-owned'.

133. There was no change in this consistent pattern of characterisation as to the properties at stake in this Case even after the issuance of the Partial Award until the United States changed its legal position in its 2001 submission: such change can only be characterised as a litigation strategy which bears very little significance in the interpretive exercise the Tribunal is engaged in. For instance, Claim G-16 has consistently been characterised by the United States throughout its various Consolidated Reports from 1984 to 1991 as 'GOI-owned tangible property in U.S. on January 19, 1981'.

134. It will be very anomalous for one to hold today that the items subject of Claim G-16 are not owned, for the purpose of Paragraph 9, by Iran, despite seven years of accordant contemporaneous categorisation by the Respondent of the same properties as 'GOI-owned'. This is not to suggest that the factual information contained in the Consolidated Reports were all correct and the United States could not, by relying on the so-called disclaimer, introduce changes to those Reports. Important for our present purposes, however, is that the US characterisation of properties as 'Iranian' or 'GOI-owned' did never change during the time, despite all the information received by the United States from different sources. This consistent pattern of characterisation is critically telling in our endeavour to provide a sound interpretation of the term 'Iranian properties' in GD Para. 9, particularly that this pattern fully accords with the result achieved from our consideration of other interpretive elements, all of which, if thrown into a crucible, would undoubtedly show a clear and unambiguous picture of what the State Parties understood and intended from the term 'Iranian properties'.

135. Indeed, what the United States did in the above-mentioned statement in its 1985 Consolidated Report was to reserve its rights to "supplement this report and to further address any legal issues". Consequently, one would expect that, when presented with new information or documentation by the holder or Iran, the United States would have possibly changed its position as to its characterisation of properties as 'GOI-owned' or 'Iranian tangible properties'. In order to illustrate the point, we take the example of Claim Supp. (2)49. Iran raised this Claim for the first

time on 14 October 1983. Iran claimed for "[s]pare parts purchased" by Iran Air worth $11,028.30 which were characterised as "Untransferred Iranian Properties" that were held by Midway Ind. Electronics, Inc.[143] Thus, from the very beginning, the United States was put on notice that Iran claimed for purchased items which had not been delivered. In January 1984, Iran proffered certain pieces of evidence regarding Claim Supp. (2)49. Specifically, Iran produced a letter from Iran Air to Midway, stating that:

> We look forward to starting business relations with your [illegible] company again but we have some purchases made from you on which payments were made but the items were not received. The total amount shown below amounts to a figure of $11,023.30, disregarding the loss of time and delay in our work here.[144]

136. The letter also sets out the relevant purchase order numbers as well as the pay orders and the number of checks which Iran Air used to pay for the items. In addition, the letter indicates that copies of those documents were appended to it. Furthermore, Iran also submitted with that document, i.e., Doc. No. 281, a telex from Midway to Iran Air, stating that: "Will respond and adjust to everyone's satisfaction when I return from the airline TSSC meeting in Lisbon."[145] Therefore, the United States very well knew as early as 1983/1984 that the items were purchased and paid for by, but not delivered to, Iran; nevertheless, in its first Consolidated Report, the United States characterised these pieces of property as 'GOI-owned tangible property in U.S. on January 19, 1981'.[146] To be sure, in an attachment to its first Consolidated Report, the United States recognised that the items at issue in Claim Supp. (2)49 were "purchased and paid for per attached letter to the supplier" and that "[o]rders have not been received".[147]

---

[143] See Doc. No. 148, Amendment and Supplement to Reply of the Islamic Republic of Iran to the Statement of Defense of the United States to Claims Nos. II-A and II-B, 14 October 1983, p 6.

[144] See Doc. No. 281, Volume III Attachments Referred to in Appendix G of Iran's Response to the United States' Request for Additional Information on Iranian Properties in the United States, Case No. A/15 (II:A & II:B), 27 January 1984, Exhibit 49.1, Letter from M. Sanei, Head of Supply, Iran Air, to Midway Industrial Electronics, Inc., 1 May 1983.

[145] See ibid, Exhibit 49.4, Telex from Bernard Cohen, the Chairman of Midway, to M. Sanei, Head of Supply, Iran Air, 26 June 1983.

[146] Doc. No. 550, First Consolidated Report of the United States, 17 September 1984, p 10. It is clear that the United States made contacts with Midway in the interim, i.e., after it received information from Iran in January 1984 and before submitting its First Consolidated Report in September 1984, because the United States informed Iran that Midway was "willing to ship subject to arrangement between the parties". See ibid.

[147] See Doc. No. 550, First Consolidated Report of the United States, 17 September 1984, Appendix G of Iran's Reply (Modified), Comments of the United States, September 17, 1984, pp 9, 239. There is a handwritten label on the far right side of the row related to Claim Supp. (2)49 which reads "IC", which quite clearly corresponds to the category 'GOI-owned tangible property in U.S. on January 19, 1981', 'Awaiting contact from GOI entity'.

137. In December 1984, Iran provided the United States with further documents, namely, a letter from Iran Air to Midway, stating that, having not heard from Mr. Cohen following his June 1983 telex, Iran Air had purchased replacement parts from elsewhere. Iran Air requested Midway to send it a check for the total amount it had paid, that being $11,954.20, in settlement of Iran Air's account.[148] Despite having been provided with further information from Iran and in spite of getting into contact with Midway once again, in its October 1985 Consolidated Report, the United States again classified the items in question as 'GOI-owned tangible property in U.S. on January 19, 1981'.[149] The same characterisation was given by the United States to the assets in question a few months later.[150] The Respondent also repeated the same characterisations in its 1990 and 1991 Reports.[151]

138. As can be seen, the United States in five (5) Consolidated Reports and throughout a period of seven (7) years consistently characterised the properties in question as 'GOI-owned tangible property,' despite its unquestionable knowledge of the fact that these were properties purchased and paid for by, but not delivered to, Iran. This, taken together with other interpretive elements, does not lead one but to a single conclusion: it was the US contemporaneous understanding that legal title by reference to US law or any domestic law did not matter in the characterisation of a given property as 'GOI-owned' or 'Iranian property'.

139. In particular, the question that arises here is that what new information was received by the United States regarding this Claim after the Consolidated Report of 1991 that could have affected the United States' characterisation of these pieces of property in its subsequent submission of 2001? What appears from the record is that after the Consolidated Report of 1991, no new information was received by the United States regarding the underlying purchase contract. What happened in the meantime – i.e., the period between 1991, the date of the last US Consolidated Report, and 2001, the time of the submission of US response to Iran's brief and evidence in Claim Supp. (2)49 – was, in all likelihood, a change in the legal strategy by the United States, which was seemingly prompted by the findings of the Tribunal in its Partial Award 529 as to the unlawfulness

[148] Doc. No. 602, Documents Supporting the Report of the Islamic Republic of Iran on the Iranian Properties in the United States, Case No. A/15 (II:A & II:B), Vol. II, 17 December 1984, Exhibit G Supp. (2)-49.

[149] Doc. No. 757, Second Consolidated Report of the United States, 30 October 1985, p 5 at Claims Table.

[150] See Doc. No. 746, Supplement to the Consolidated Report of The United States, 18 February 1986, p 5 at Claims table.

[151] Doc. No. 970, Third Consolidated Report of the United States, 05 July 1990, p 6 at Claims Table; Doc. No. 1008, 1 February 1991, Chart II, p 4.

of certain Treasury Regulations, in order to further limit the scope of its obligation and its consequent liability in this Case.[152]

140. Therefore, the alleged disclaimer embedded in the US Consolidated Reports does not negatively influence the interpretive value of the United States' consistent and long-standing characterisation of the properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery as 'GOI-owned properties' in these Reports.

III. Even If One Were to Apply A Private Law Analysis, *lex situs* Would not, under the Circumstances, Determine the Issue of Transfer of Title

141. As stated above, it is my considered opinion that the Parties had a clear understanding of the meaning and scope of the term 'Iranian properties' and that understanding is clearly reflected in their subsequent practice and contemporaneous understanding. According to this understanding, 'Iranian properties' subsumed not only properties in which Iran had full legal title but also properties in which Iran had a sufficient ownership interest, namely, properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery.

142. Assuming *arguendo* that one were to ignore the clear agreement of the Parties and resort, instead, to the rules of domestic law in order to see whether title had been transferred to Iran before 19 January 1981, the right private international law approach, under the circumstances of these Cases, seems to be the application of *lex contractus,* rather than *lex situs,* to the question of transfer of title.

143. Despite *lex situs* generally having a place in international property law for the purpose of transfer of title, below, I will demonstrate that under the circumstances of these Cases, where transfer of title as to movables intended for export sales is at stake, *lex situs* could neither be regarded as a general principle nor provide a satisfactory solution. As I will show, under the factual setting of the Cases before us, the more appropriate approach, on a private international law plane, is the application of *lex contractus* to the question of transfer of title.

[152] The United States did reclassify certain properties in its Consolidated Reports upon receiving further information. See, for example, Doc. No. 970, Third Consolidated Report of the United States, 05 July 1990, pp 9-10, 14-15. However, such a re-categorisation did not occur with respect to Claims like G-16 and Supp. (2)49. In fact, despite the passage of time and presentation of further information, these items, which had been validly purchased and paid for by Iran but remained undelivered despite Iran being contractually entitled to delivery, remained to be classified as 'GOI-owned properties' by the United States.

144. It is generally accepted that *lex situs* is the governing conflict of laws rule in many jurisdictions regarding the determination of *in rem* rights in tangible properties. To be more precise, in the case of immovable properties, there seems to be unanimity among statutory regimes that *lex situs* determines the acquisition and loss of proprietary or *in rem* rights in such tangible properties. As to moveable properties, there appears to be a general consensus that *lex situs* applies to all questions of title when the subject-matter of the issue is the 'original acquisition' of title through unilateral actions.

145. However, when the matter under consideration is that of a 'derivative acquisition' of title to moveable property by virtue of a contract, legal regimes seem to take divergent approaches with regard to the applicable law as far as the *inter partes* effects of transfer of title are concerned. To be sure, under many legal systems, it is the law applicable to the contract (*lex contractus*), and not the *lex situs*, that determines the proprietary effects of a voluntary transfer of moveable properties for the purpose of the relationship *inter partes*. The majority admits in the Partial Award that "[i]n some conflict-of-laws systems, such as those of France and Belgium, the transfer of title between seller and purchaser (*inter partes*) is, in principle, governed by the law applicable to the sales contract (*lex contractus*) […]."[153] Similar to the French and Belgian conflict of laws approaches, the Russian Civil Code provides in Article 1210 titled "Selection of Law by the Parties to a Contract": "When they enter into a contract or later on, the parties thereto may select by agreement between them the law that will govern their rights and duties under the contract. *The law so selected by the parties shall govern the emergence and termination of a right of ownership and other rights in rem relating to movable property with no prejudice for the rights of third persons.*" [emphasis added] As is plain from the above-quoted provision, the applicable law of the contract also regulates the *inter partes* effects of ownership (acquisition and/or loss of ownership) without prejudice to competing third party interests. In addition, relying on a Supreme Court Judgment, Windahl points out that under Danish law, "[i]n all *inter partes* relationships, including title of goods, the *lex contractus* applies."[154] The same rule applies in Swedish law. In fact, "[t]he transfer of ownership from the seller to the buyer is a matter governed by *lex obligationis* [...]".[155] In

[153] Partial Award [148] [footnotes omitted].

[154] See J Windahl, 'Denmark' in A von Ziegler, C Debattista, ABK Plegat & J Windahl (eds), *Transfer of Ownership in International Trade* (2nd ed, Kluwer Law International 2011) 113 (referring to Supreme Court Judgment, U77.507 HD).

[155] BA Johnsson, 'Sweden' in A von Ziegler, C Debattista, ABK Plegat & J Windahl (eds), *Transfer of Ownership in International Trade* (2nd ed, Kluwer Law International 2011) 409.

addition, under the laws of Quebec, "[t]he law that governs the contract of sale will generally govern the transfer of ownership as between the parties."[156] [157]

146. Under Article V of the CSD, the Tribunal is tasked with "applying such choice of law rules […] as the Tribunal determines to be applicable […]". It is my considered opinion that, in the circumstances of the Cases before us, *lex situs* is not the applicable choice of law rule which is determinative of the issues concerning transfer of title *inter partes*. **Firstly**, the properties that are the subject of this Case are all movable properties. **Secondly**, the subject of our discussion is the voluntary transfer of title through a contract of sale not the original acquisition of title through a unilateral act. **Thirdly**, the properties in question were subject to export sales and were not intended to remain in the United States. **Fourthly**, as indicated in the Partial Award, "it is important to note that, in this Partial Award, all cases of transfer of property through purchase only raise this question *inter partes* and do not involve third parties with competing property claims."[158] These observations will be explained below in turn.

147. **Firstly**, the properties that are the subject of these Cases are all movable properties. It is clear that the sovereign territory observation which is a strong underpinning for the application of *lex situs* in case of immoveables[159] is not applicable with regard to most moveable properties (not surely the moveable properties in the Cases before us). As Basedow has aptly commented: "Apparently, the arguments inferred from territorial sovereignty and the reluctance of the State of location to apply foreign law to proprietary rights are of minor significance where tangibles with an inherent high degree of mobility are concerned."[160] Indeed, unlike immoveable properties, moveable properties can be relocated to other jurisdictions, and as such, their territorial nexus with

[156] PJ Cullen, 'Canada' n A von Ziegler, C Debattista, ABK Plegat & J Windahl (eds), *Transfer of Ownership in International Trade* (2nd ed, Kluwer Law International 2011) 64.

[157] As Louis d'Avout explains, "[s]ome European systems, such as France and Italy (see in particular art 51 of the Italian Private international law Act […]), even decide that the principle of a voluntary transfer must derive from the *lex contractus*, whereas the *lex situs* only applies to some effects *erga omnes*." L d'Avout, 'Property and Proprietary Rights', in J Basedow, *et al* (eds) 2 Encyclopaedia of Private International Law (2017) 1430. Indeed, Article 51(2) of the 1995 Italian Statute on Private International Law seems to be another example: whereas Article 51(1) of the Statute affirms the *lex situs* rule, Article 51(2) of this Statute provides that *lex situs* "shall govern purchase and loss of the property, except in matters of succession and when the assignment of a right *in rem* depends on a family relation or on a contract." [emphasis added] This provision indicates that the *lex situs* is not applicable as to the acquisition and loss of proprietary rights in cases of voluntary transfer of title and that acquisition and loss of title as a result of a contract are governed by the law applicable to the contract.

[158] See Partial Award [130] [emphasis added].

[159] See J Hill & MN Shuilleabhain (eds), *Clarkson & Hill's Conflict of Laws* (OUP 2016) 471, 473.

[160] J Basedow, 'The *Lex Situs* in the Law of Movables: A Swiss Cheese' (2016/2017) 18 Yearbook of Private International Law 8.

the State of location is delicate. Therefore, the justification for the application of the *lex situs* rule is less strong in case of moveable assets in contrast to immoveable properties.

148. **Secondly**, the subject of our discussion is the voluntary transfer of title through a contract of sale**,** not the original acquisition of title through a unilateral act.[161] As such, the principle of 'party autonomy' should be given great weight. As noted above, under Article V of the CSD, the Tribunal is tasked with "applying such choice of law rules […] as the Tribunal determines to be applicable […]". "Party autonomy" seems to be one of the most – or the most – fundamental choice of law rules in case of contractual relationships.[162] As to the application of the 'party autonomy' principle in the field of property law, it is trite knowledge that "the idea of party autonomy is gaining ground in national legislations as well as in European and international rulings."[163] This growing importance of party autonomy in the field of property law through the prism of contracts has negatively impacted the reign of the classical *lex situs* rule in voluntary transfers of title. Basedow commendably indicates that "[w]idely accepted as it is, the *situs* rule appears to be influenced by archaic notions of power over corporeal assets and not to be very consistent with conflict rules governing other areas of the law. In particular, its general approval with regard to property can hardly be reconciled with the wide acceptance of party autonomy in contract law. Since the purpose of many contracts is the creation, transfer or encumbrance of proprietary rights, this discrepancy between the private international law of contracts and of property is unprincipled."[164] Bearing these observations in mind, it is indeed arguable that, when two parties enter into a contract for the transfer of property, application of the law chosen by the parties to the

---

[161] For the distinction and its consequences from a French perspective, see A Flessner, 'Choice of Law in International Property Law: New Encouragement from Europe' in R Westrik & J van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 13.

[162] In *Texaco Overseas Petroleum Company* (*Topco*) *and California Asiatic Oil Company* (*Calasiatic*) v. *the Government of the Libyan Arab Republic*, the arbitral tribunal commented on the question of whether the contracting parties were entitled to choose the governing law of the contract:

> The answer to this […] question is beyond any doubt: all legal systems, whatever they are, apply the principle of the autonomy of the will of the parties to international contracts. As regards the merits, all legal systems confirm this principle which appears therefore as universally accepted, even though it may not always have the same meaning or the same scope […].

Texaco Overseas Petroleum Co. & California Asiatic Oil Co. (*TOPCO/CALASIATIC*) v. *the Government of the Libyan Arab Republic*, Award, 19 January 1977 [16].

[163] R Westrik & J van der Weide (eds), *Party Autonomy in International Property Law* (European Law Publishers 2011) 5.

[164] J Basedow, 'The *Lex Situs* in the Law of Movables: A Swiss Cheese' (2016/2017) 18 Yearbook of Private International Law 9.

proprietary questions arising out of the contract *inter partes* would bring more certainty and predictability.[165]

149. **Thirdly**, the properties in question in these Cases were subject to export sales and were not intended to remain in the United States. There are two observations here: (i) the *lex situs* rule seems to be inappropriate in cases involving transfer of moveable from one country to another. Indeed, the transfer of moveables from one country to another influences the proprietary regime of the moveable. Basedow comments in this regard that: "change of the applicable law may […] strongly disturb contractual relations, impede the use of movables as collateral and thereby undermine international trade."[166] As such, he speaks of a "growing awareness among legislators of the inconvenience that the *situs* rule may precipitate"[167] in such circumstances. (ii) In export sales, the property will have a greater link to the country of destination as it is going to be used there. In our Cases, all properties were supposed to be exported to Iran in order to be used or displayed there. Under the laws of the United States, a party to this dispute, when dealing with questions of transfer of an interest in a moveable property, the laws of the place of destination (i.e., laws of the country more closely connected to the chattel) or the law of the contract (i.e., laws of a country most closely connected to the contract) will be more likely to determine the conveyance of the proprietary interests.[168] In this context, Comment "f" to Section 244 of the US Restatement (Second) on Conflict of Laws reads that:

---

[165] The United States' Supreme Court stated in *Scherk v Alberto-Culver Co*. that 'party autonomy' is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any business transaction." See *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

[166] J Basedow, 'The *Lex Situs* in the Law of Movables: A Swiss Cheese' (2016/2017) 18 Yearbook of Private International Law 10.

[167] Ibid, p 11.

[168] Under Section 244(2) of the Restatement Second of Conflict of Laws it is only "[i]n the absence of an effective choice of law by the parties" that "a greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law." Section 191 of the same Restatement provides that: "The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 to the transaction and the parties, in which event the local law of the other state will be applied." See SC Symeonides, 'National Monograph Relating to the United States of America', in *International Encyclopaedia for Private International Law*, Suppl. 44 (Wolters Kluwer 2018) 1549 *et seq* (stating that unlike the Restatement (First), the Restatement (Second) respects party autonomy in choice of law matters and opining that rather than setting rigid conflict of law rules, like the mechanical *lex situs* rule, the Restatement (Second) pays more attention to the "state of the most significant relationship" to the specific dispute.) By stating at paragraph 144 of the Partial Award that "[c]ourts in the United States, *at least traditionally*, take a similar position in applying the *lex rei sitae*" [emphasis added], the majority

> [T]he importance of a chattel's location at the time of the conveyance in the choice of the applicable law depends somewhat upon the intended permanence of this location. If the parties intended that the chattel should remain in this location more or less permanently, the state of the chattel's location will in all probability be the state of most significant relationship, and thus of the state of the applicable law. The situation is different when it is understood that the chattel will be kept only temporarily in the state where it was located at the time of the conveyance. Here it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the conveyance, and be the state of applicable law. In determining the state of most significant relationship and thus the applicable law, the forum will consider other contexts in addition to the location of the chattel. Where it is understood that a chattel will be moved to a more or less permanent location following the conveyance, the forum will give consideration to the place of its intended destination.

150. **Fourthly**, the analysis of the Tribunal with regard to the issue of transfer of title is on the relationship *inter partes* and not the competing rights of third parties as no such cases exist in the Cases before us.[169] As a corollary, whatever the conflict of law rule regarding the proprietary effects of transfer of title *erga omnes* might be, the applicable conflict of law to be employed by the Tribunal in these Cases should be one which suits its purpose (i.e., analysing the proprietary effects of transfer of title *inter partes*).

151. Other courts and arbitral tribunals have applied *lex contractus* to the issue of transfer of title in moveable properties in export sales. For instance, in an arbitration conducted under the aegis of CIETAC, recalling that the applicable CISG had no rules regarding transfer of title, the arbitral tribunal determined that the issue of transfer of property in goods was regulated by the laws of China as this country had the "closest connection" with the contract bearing in mind that "both the place of business of the [Buyer] and the place of arbitration [were in] China." Indeed, the arbitral tribunal in that case determined the issue of transfer of title *inter partes* in accordance with *lex contractus*.[170] In another case, the Illinois District Court, relied on "most significant contacts rule" embodied in the Restatement (Second) and the UCC choice of law rules to conclude that Illinois law applies to the question of effects of a retention of title clause in a contract of

implicitly admits as much that, after the codification of the Restatement (Second) of Conflict of Laws, the *lex situs* rule is not the dominant conflict of law rule any more.

[169] In this regard, see Partial Award [130].

[170] China International Economic & Trade Arbitration Commission (CIETAC) Arbitration Award, *PTA powder* (*waste product*) case [18 April 2008], Case no. SHEN M2007075.

international sale of Creusabro 8000. The District Court applied Illinois law despite the fact that at the time of conveyance, the goods were situated in France.[171]

152. Bearing in mind the four observations made above, as well as the practice of other courts and tribunals, two conclusions are in order: (i) many of the underpinnings of the application of *lex situs* are absent in the case of export sales of moveables. In fact, there does not seem to be a general principle of private international law indicating that transfer of title in moveables intended for export sales is determined by *lex situs*. (ii) The more appropriate test for determining the *inter partes* effects of the transfer of title which brings about more legal certainty in cases of voluntary export sale of moveable property is *lex contractus* rather than *lex situs*. In this respect, I would also recall that the United States relied upon the *lex contractus* test for a long while (from 2001-2013), apparently believing that if one were to engage in a conflict of laws analysis, this would be the right approach to take with respect to determining transfer of title of the moveable properties in question.

153. As such, as indicated by the President in his Concurring Opinion,[172] under the circumstances of Claim G-111, the right approach is that the 'party autonomy' rule should have been respected by the Tribunal and the Tribunal should have applied Iranian law as the law chosen by the contracting parties to the issue of transfer of title. The application of Iranian law by the Tribunal would have resulted in finding that title in the goods was transferred to Iran upon manufacturing/identification of the goods.[173] Consequently, the result should have been that the properties were 'Iranian' for the purpose of GD Para. 9 and were subject to the United States' transfer obligation under GD Para. 9. As such, I dissent from the Partial Award's finding that the properties that were the subject of Claim G-111 are not 'Iranian properties' for the purpose of GD Para. 9.[174]

---

[171] *USINOR INDUSTEEL*, a foreign corporation (Plaintiff), v. *LEECO STEEL PRODUCTS, INC.*, an Illinois corporation (Defendant). United States District Court, N.D. Illinois, Eastern Division, No. 02 C 0540. March 28, 2002.

[172] Concurring Opinion of Hans van Houtte [15]-[19].

[173] See N Katouzian (1) *Civil Law: Specific Contracts* 126-127.

[174] It is needless to emphasise here that, in the first place, the properties that were the subject of Claim G-111 include properties validly purchased and paid for by Iran that had remained undelivered despite Iran being contractually entitled to delivery. Therefore, pursuant to a correct treaty interpretation approach, these assets constituted 'Iranian properties' subject to GD Para. 9. As stated above, even if one were to get on the private plane and analyse whether title to the machinery in Claim G-111 was transferred to Iran prior to 19 January 1981, pursuant to the applicable law of the contract in this Claim, i.e., Iranian law, title was transferred to Iran before the date of the conclusion of the Accords and, as such, the properties at stake were 'Iranian' for the purpose of GD Para. 9.

154. In conclusion, even if one were to engage in a private international law analysis for defining the term 'Iranian properties', bearing in mind the factual setting of these Cases, the more appropriate test for the determination of ownership of goods *inter partes* seems to be *lex contractus*.[175]

CONCLUSION

155. In this Separate Opinion, I reviewed and analysed the majority's approach and conclusion on the interpretation of the term 'Iranian properties'. As I tried to show, the majority inappropriately considers that this issue has already been decided by the Tribunal in Partial Award 529. Furthermore, I examined the application of the *lex situs* theory as adopted by the majority, a theory which just kicked in upon a question being raised by the bench during the Hearings and which never before had even been touched upon by any of the Parties in these long-lasting proceedings. I tried to illustrate that, for various reasons, the interpretive path chosen by the majority regarding the definition of the term 'Iranian properties, is, with all due respect, inaccurate, inchoate, and plainly wrong.

156. As explained in this Opinion, in my view, the appropriate approach to define and to determine the meaning and scope of the term 'Iranian properties', as a phrase appearing in an international treaty between two sovereign States, is an *autonomous approach* by resorting to the means of treaty interpretation outlined in Articles 31 and 32 of the VCLT. In so doing, I have the company of the valuable means of interpretation available to us, which we cannot disregard. The text and the immediate context of the term 'Iranian properties' as used in GD Para. 9, the agreed 'subsequent practice' of the Parties, unilateral practices of the obligor in implementing its treaty obligation, and the contemporaneous understanding of the Parties are the different pieces of this interpretation puzzle that have been presented to us by the Parties. These pieces of the puzzle, taken collectively, create a very meaningful picture. Ignoring the pieces of the puzzle, indeed, leads to ignoring the 'common intention' of the State Parties. From the very beginning, these pieces of the puzzle refer to the phrase 'owned by Iran', but at the time, and indeed until 2001, there was no doubt that this phrase meant 'property interests owned by Iran'. In other words, a proper collective analysis of the significant interpretative materials available to us shows that the term 'Iranian properties' used in GD Para. 9 covers all properties in which Iran has/owns an interest sufficient to make them subject to transfer obligation: in addition to the properties in which Iran

[175] In this regard, see the suggestion made by the President in his opinion: Concurring Opinion of Hans van Houtte [11] *et seq*.

held legal title, this extends to properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery. It is, in my firm and considered opinion, in the same meaning, as intended and understood by the Parties, that the Tribunal used the phrase 'owned by Iran' in paragraphs 40 and 43 of Partial Award 529 and paragraph 152 of Partial Award 601. In this sense, and as explained by Partial Award 529 at paragraph 43, the term 'Iranian properties' does not extend to properties in which Iran holds no interest or properties in which Iran's interest is 'partial' or 'contingent'. On the other hand, the term does cover properties in which Iran holds full legal title, and properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery.

157. For the reasons stated above, I feel compelled to dissent from the present Partial Award as far as its unnecessary private law analysis excludes from the scope of the term 'Iranian properties' in GD Para. 9 properties validly purchased and paid for by Iran that remained undelivered despite Iran being contractually entitled to delivery, i.e., properties in which Iran had an ownership interest sufficient to make them subject to the transfer directive. As such, I dissent from the present Partial Award as long as its general finding on the meaning and scope of the term 'Iranian properties' causes the dismissal of the following Claims as a matter of liability: Claim G-15, Claim G-16, Claim Supp. 1(5), Claim Supp. 2(44), Claim Supp. 2(49), Claim G-111, Claim G-128, Claim G-31, Claim G-162, Claim G-169, and Claim G-189.

158. As I explained in the third part of this Opinion, even if, *arguendo*, one were to get past the clear interpretation of the meaning and scope of the term 'Iranian properties' in accordance with the rules of international law and, instead, apply the rules of domestic law in order to see whether title had been transferred to Iran before 19 January 1981, the question of transfer of title *inter partes* in relation to moveable properties intended for export sales, in the factual circumstances of these Cases, shall, in my opinion, be determined in accordance with *lex contractus*, rather than *lex situs*. Such an exercise in Claim G-111 would have resulted in the finding that the machinery in question was 'Iranian' for the purpose of the US GD Para. 9 transfer obligation.

159. In any event, I would like to point out that I concur with the President that the Partial Award's finding regarding the interpretation of the term 'Iranian properties' is fact-based and specific to the factual setting of the Cases at hand and that the conclusion reached by the majority

in the Partial Award in these Cases "does not exclude that in another instance with, for example, other evidence, a different conclusion may be reached."[176]

Dated, The Hague

10 March 2020

M.H. Abedian Kalkhoran

[176] Concurring Opinion of Hans van Houtte [9].