

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

Full Tribunal

Award No.: 604-A15 (II:A), A26 (IV) and B43-FT

The Islamic Republic of Iran

Claimant

And

The United States of America

Respondent

IRAN-UNITED STATES CLAIMS TRIBUNAL دیوان داوری دعاوی ایران ایالات متحده	
CASE NO:	A 15 (II: A) پرونده شماره:
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SEPARATE OPINION OF JUDGE CHARLES N. BROWER
CONCURRING IN PART, DISSENTING IN PART

I concur in the Partial Award (“Award”) in this case except to the extent of my dissent from it stated in the paragraphs that follow.

THE NON-APPLICATION OF ARTICLE I OF THE CSD BY THE MAJORITY AND THE RESULTING MISAPPLICATION OF PARAGRAPH 77 H) OF AWARD 529-A15-FT

1. A glaring gap in the Tribunal majority’s reasoning in the Award which this Concurring and Dissenting Opinion accompanies (“Opinion”), affecting a number of the Claims at issue in this case, is its complete failure to consider at all the obligation the Parties’ undertook that they “will promote the settlement of the claims” subject to the Tribunal’s jurisdiction as provided in Article I of the Claims Settlement Declaration (“CSD”).

2. Although the Parties have not expressly raised to the Tribunal their legal obligation to promote settlements found in Article I of the CSD, the Tribunal cannot possibly proceed to decide this case without considering an obligation of the Parties clearly stipulated in one of its constituent instruments. In Award No. 601, the Tribunal explained that “as a judicial forum” it was “presumed to know the law.”¹ It cited the well-known Latin iteration of this principle, *jura novit curia*, and relevant judgments of the Permanent Court of International Justice and the International Court of Justice (“ICJ”) in support. In one of those judgments, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, the ICJ described the principle as follows:

¹ *Islamic Republic of Iran and United States of America*, Partial Award No. 601-A3/A8/A9/A14/B61-FT (17 July 2009), reprinted in 38 Iran-U.S. C.T.R. 197, 248.

The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.²

3. Accordingly, the Tribunal is presumed to know the law applicable to the case, and is required to consider, on its own initiative, the legal rules which may be relevant to the proper conclusion of the case. The relevant law that the Tribunal's majority was required to apply in the present instance is not municipal law, or a controversial rule with a narrow geographic ambit, or even a type of *lex specialis*. Rather, the Tribunal was required to take judicial notice of, and apply on its own initiative, a rule found in the legal framework established by the Parties to this case, namely its own constituent document, the CSD.

4. The Parties would not have been "taken by surprise" by any reference of the Tribunal to the text of Article I of the CSD. Despite the Parties not having argued to the Tribunal their obligation to "promote settlement of claims" found in Article I of the CSD, the Parties clearly are fully cognizant of the CSD and the obligations contained therein.³ In proceedings before this Tribunal, the existence of the CSD is manifest and notorious. Accordingly, the Tribunal would not have acted with partiality, and the due process rights of the Parties would not have been violated, had it applied Article I of the CSD.

5. In sum, the majority should have conformed to the Parties' legal obligation to promote settlement as required in Article I of the CSD. The Tribunal was capable of arriving at a tenable decision on the scope of this legal obligation with the factual record before it. The resulting reasoned decision would have had a determinative impact on the outcome of this case. It chose not to do so. The first part of this Opinion provides the missing analysis.

6. Three of the Claims discussed below, namely Claims G-7 (Port of Vancouver), G-8 (Gulf Ports Crating Co.) and G-13 (Shipside), are Claims as to which "the Parties directly concerned," following lengthy negotiations, concluded settlement agreements which then were approved by the Tribunal's issuance of Awards on Agreed Terms. Yet the majority wrongly

² Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, 1974 I.C.J., 9 (July 25).

³ This especially is so given that Article 34(1) of the Tribunal Rules of Procedure implements Article I of the CSD by providing for the Tribunal to "record the settlement in the form of an arbitral award on agreed terms" of which the Tribunal to date has issued 19 Partial Awards on Agreed Terms and 238 full Awards on Agreed Terms.

has denied those settlement negotiations and the resulting Awards on Agreed Terms any role whatsoever in its consideration of whether or not the United States in those cases has breached its obligation under Paragraph 9 of the General Declaration (“GD”). In omitting such consideration, the majority principally relies on Paragraph 77 h) of Award No. 529, the Partial Award that gave birth to the present Award. In doing so, it has misread the plain meaning of Paragraph 77 h) and ignored Article I of the CSD as well as foundational Tribunal precedents.

7. Paragraph 77 h) itself of Award No. 529 reads as follows:

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

Curiously, the paragraph starts with “because the United States has not fulfilled its obligations under the General Declaration,” apparently intending to imply conclusive violation of Paragraph 9 thereof as the subject matter of the paragraph, then proceeds to indicate nonetheless that settlement as between Iran and the property holder “does not *per se* relieve the United States from liability to Iran for losses caused by such non-transfer.” (Emphasis in the original.) *Per se*, the meaning of which is “by or in itself or themselves,”⁴ necessarily means that there are circumstances that, conjoined with the conclusion of an Award on Agreed Terms, indeed may “relieve the United States from liability” under Paragraph 9. There is no other conceivable meaning to the presence of those two words in Paragraph 77 h). They deprive Paragraph 9 of any absolute effect in relation to Awards on Agreed Terms.

8. It is “curiouser and curiouser,” to quote Alice in Wonderland, that there is not a word, a sentence, let alone a paragraph elsewhere in Award No. 529 that serves as an antecedent explication of Paragraph 77 h). Nothing is said that would illuminate for us the scope or terms of the conditionality to which Paragraph 9 plainly is subjected. Nowhere does Award No. 529 even mention Article I of the CSD. Accordingly, it was for the majority in this case to undertake an interpretive exercise that would give more precise meaning to Paragraph 77 h).

9. In Paragraphs 480, 481, 534 and 573, however, the majority reads *per se* completely out of Paragraph 77 h), citing it as absolutely eliminating consideration of the settlements

⁴ OXFORD ENGLISH DICTIONARY (online edition).

involved, and thus negating even the possibility that they may play a role in the Tribunal's application of Paragraph 9 of the GD. Thus, for example, Paragraph 534:

As a preliminary matter, the Tribunal addresses the United States' argument that this Claim should be dismissed because the Tribunal approved, by Award on Agreed Terms, the settlement of the claims in Case No. 307 between Gulf Ports and MORT. In Award No. 529, the Tribunal has held:

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

Accordingly, in line with its holding in Award No. 529, the Tribunal rejects the United States' argument based on the settlement agreement in Case No. 307 between Gulf Ports and MORT. (Emphasis added.)

10. To divine the impact on Paragraph 9 that a settlement confirmed by our predecessors can have, one must consult the two Declarations that comprise the bulk of the Algiers Accords, applying the Articles of the Vienna Convention on the Law of Treaties ("VCLT")⁵ governing their interpretation, and such jurisprudence of the Tribunal as is relevant.

11. Most significant is the fact that the very first Article of the CSD, Article I, opens with "Iran and the United States *will* promote the settlement of claims." (Emphasis added.) Notably, the States Parties' eschewed the conventional use of "shall," indicating an obligation still to be implemented, and instead used the immediately operative "will:"

Iran and the United States ***will promote the settlement of the claims*** described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party. (Emphasis added.)

The importance of settlements is implicit in the CSD's provision that for a period of six months, which in fact was extended to nine months,⁶ claims need not be filed with the Tribunal. Further noteworthy is that there is, unsurprisingly, no deadline for settlements, as the Tribunal has recognized in issuing Awards on Agreed Terms throughout the life of the Tribunal, most

⁵ U.N. Doc. A/CONF. 39/27, 23 May 1969; *reprinted in* 8 I.L.M. 679 (1969).

⁶ Iran-United States Claims Tribunal Administrative Directive No. 1, 4 July 1981, ¶ 2.

recently in its Partial Award on Agreed Terms in Case No. B1 (Claims 2 & 3).⁷ Indeed, Article III (2) of the CSD provides that the Tribunal “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out,” and the resulting Tribunal Rules of Procedure include Article 34(1) of those UNCITRAL Arbitration Rules without change:

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

ARTICLE 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall . . . , if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

12. It may come as a surprise to some to recall that starting very early in its life the Tribunal was confronted with a series of issues of interpretation requiring it to reconcile potentially conflicting or unclear provisions of the two Declarations. In one of the Tribunal’s early interpretive Decisions, Case No. A/2,⁸ one of the many interpretive decisions entirely overlooked by the majority in the over 600 pages of the Award, the Tribunal was asked by Iran to rule that under the Algiers Accords it was within the jurisdiction of the Tribunal for the Government of Iran to submit claims against United States nationals. Iran relied principally on General Principle B. of the GD. In rejecting Iran’s request, the Tribunal readily confirmed that “one must look at the specific provisions of the two Declarations for the implementation of this purpose [of General Principle B. of the GD].”⁹ Then: “[t]he provisions of each Declaration *must* be completed by the provisions of the other.” (Emphasis added.) Thus, to ascertain the scope and nature of the obligations contained in the GD, the Tribunal also *must* look to the provisions of the CSD, using each Declaration to complete the other one. This obligation reflects the interpretive rule enshrined in Article 31 of the VCLT, which provides that the terms of a treaty must be given meaning in their “context.” As the majority acknowledges in Paragraph 102, “[t]he Tribunal has consistently held that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention.”

⁷ *Islamic Republic of Iran and United States of America*, Partial Award on Agreed Terms No. 603-B1 (Claims 2 & 3)-FT (31 Oct. 2016).

⁸ *Iran-United States, Case A/2*, Decision No. DEC 1-A2-FT (26 Jan. 1982), *reprinted in* 1 IRAN-U.S. C.T.R. 101.

⁹ *Id.* at 103.

13. In a more recent interpretive decision, Case No. A21,¹⁰ the Tribunal discussed the requirement of ensuring the effectiveness of the Algiers Declarations. Iran had urged the Tribunal to decide that “‘the final and binding’ nature of the Tribunal’s awards, as this term is used in Article IV, paragraph 1, of the [CSD] and Article 32, paragraph 2, of the Tribunal Rules, imposes an obligation on the United States to satisfy such awards [in favor of Iran].”¹¹ In addition, Iran relied on General Principle B. of the GD. The Tribunal’s first sentence under “II. Reasons for Decision” restated the importance of accounting for “context”:

The question raised by Iran involves an examination not only of the express terms *of the respective Algiers Declarations, but of the totality of those instruments* in the context of general principles of international law.¹² (Emphasis added.)

The Tribunal rejected the specific request of Iran, but in doing so nevertheless continued as follows:

On the other hand, the act of entering into a treaty in good faith carries with it an obligation to fulfil the object and purpose of the treaty – in other words, *to take steps to ensure its effectiveness*.¹³ (Emphasis added.)

On that basis, in the absence of an express obligation in the Accords, the Tribunal ruled:

. . . [I]f it were to be established that recourse by Iran to the mechanisms or systems existing in the United States had not resulted in the enforcement of awards of this Tribunal against United States nationals . . . the question [would] arise as to what further measures, if any, the United States might be required to take *in order to ensure the “effectiveness” of the Algiers Declarations*.¹⁴ (Emphasis added.)

Thus, the Tribunal twice emphasized the importance of the principle of “effectiveness” in interpreting the Accords. This principle is enshrined in Article 31 of the VCLT, which provides, *inter alia*, that a treaty is to be interpreted “in good faith” and “in light of its object and purpose.” For the object and purpose of a treaty to be effectuated, meaning must be given to every part of the text. As noted in the Report of the International Law Commission to the General Assembly on the Draft Articles on the Law of Treaties, “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate

¹⁰ *Islamic Republic of Iran and United States of America*, Decision No. DEC 62-A21-FT (4 May 1987), *reprinted in* 14 IRAN-U.S. C.T.R. 324.

¹¹ *Id.* at 326.

¹² *Id.* at 327.

¹³ *Id.* at 330.

¹⁴ *Id.* at 331.

effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”¹⁵ Accordingly, it would be absurd to interpret certain provisions of the GD, or the CSD for that matter, in such a way that the interpretation adopted of one Declaration would deprive a provision of the other of effect. To render ineffective the provisions of either Declaration by adopting a given interpretation of a single provision would undermine the “object and purpose” of the Algiers Declarations as a whole. The majority in the present case was required to have due regard to the principle of effectiveness, but, in my view, it did not.

14. Further, the very first State Party request for interpretation of the Accords under Paragraphs 16-17 of the GD and Article II(3) of the CSD included an issue of interpretation of the Accords insofar as Awards on Agreed Terms were to be involved. In its Decision in Case A/1(Issue II),¹⁶ issued more than 37 years ago, on 14 May 1982, the Tribunal addressed the “Standard To Be Applied By The Tribunal In Recording A Settlement As An Award On Agreed Terms.” It framed the issue to be “under what conditions the Tribunal may make an Award on Agreed Terms embodying such settlement of claim.”¹⁷ More precisely, the Tribunal noted that “this question entails two sub-issues, the first one regarding the extent to which the Tribunal must establish that it has jurisdiction over the claim settled, and the second concerning the question of whether the Tribunal must review the reasonableness of the settlement.”¹⁸ The Tribunal decided as follows:

. . . . [I]f requested to make an Award on Agreed Terms, the Tribunal will make such examination concerning its jurisdiction as it deems necessary. . . .

The legal history of the UNCITRAL Rules demonstrates that Article 34 confers upon a tribunal the power to refuse to record a settlement This power is not limited or defined. . . . However, it is at the same time clear that the power to refuse to record a settlement cannot be exercised in an arbitrary manner.

Although the Tribunal, when deciding on a request under Article 34, should not attempt to review the reasonableness of the settlement in place of the arbitrating parties, ***the Tribunal can refuse to record a settlement in the form of an award, provided that it does not act arbitrarily, for example, if the settlement does not***

¹⁵ *Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, U.N. Doc. A/6309/Rev. 1), reprinted in [1967] Y.B. Int'l L. Comm'n 112, U.N. Doc. A/CN.4/SER. A/1966/Add. 1, 219.

¹⁶ *Iran-United States, Case A/1 (Issue II)*, Decision No. DEC 8-A1-FT (14 May 1982), reprinted in 1 IRAN-U.S. C.T.R. 144.

¹⁷ *Id.* at 150.

¹⁸ *Id.* at 152.

*appear to be appropriate in view of the framework provided by the Algiers Declarations.*¹⁹ (Emphasis added.)

It follows inexorably that each and every Award on Agreed Terms issued by the Tribunal has been issued on the basis that it is “appropriate in view of the framework provided by the Algiers Declarations,” including necessarily Paragraph 9 of the GD.

15. Further, it must be recalled that Paragraph 9 of the GD, while it requires that “[c]ommencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement . . . the United States will arrange,” prescribes no deadline for performance. A degree of latitude thus is provided for the pursuit of settlement. Likewise, Executive Order No. 12281, which forms part of the context for interpretation of Paragraph 9, provides at 1-101 that United States holders of properties “owned by Iran . . . are . . . directed and compelled to transfer such properties,” but only “as directed after the effective date of this Order by the Government of Iran,” in other words without a universal deadline, a point repeatedly confirmed by the majority in paragraphs 475-481 (Claim G-7), 534 (Claim G-8) and 573-576 (Claim G-13) of this Award.

16. The question, then, is “what is the room” within which the Paragraph 9 obligation of the GD can be affected by the Parties’ obligation to promote settlement found in Article I of the CSD, especially when it is followed by successful settlement negotiations sealed by the Tribunal with an Award on Agreed Terms? I submit that that “interpretive room,” which Paragraph 77 h) of Award No. 529 has preserved via its qualification (“*per se*”), necessarily is provided when *bona fide* settlement negotiations are undertaken, and even more so, per the Tribunal’s Decision in Case No. A1/Issue II, when they are successfully concluded, and the Tribunal has issued an Award on Agreed Terms as being “appropriate in view of the framework provided by the Algiers Declarations.” This interpretation alone allows for the obligations of Paragraph 9 of the GD to be interpreted so as to maintain the effectiveness of the obligations found in Articles I and III(2) of the CSD. Only this interpretation gives both Declarations effect. Considering the principle of effectiveness, and considering further that each of the three Awards on Agreed Terms involved in Claims G-7, G-8, and G-13 returned to Iran the properties sought by it as Paragraph 9 of the GD required, it is right to conclude that those settlement negotiations and resulting Awards on Agreed Terms were all “appropriate in view of the framework provided by the Algiers Declarations” in that both the States Parties’ commitment

¹⁹ *Id.* at 152-53.

in the CSD to promote settlement of cases and the return to Iran of its properties mandated by Paragraph 9 of the GD thereby have been served.

17. It may be objected that this interpretation effectively allows any Award on Agreed Terms *per se* to be considered as absolving the United States of liability under Paragraph 9 of the GD. Yet, the nature of the evidentiary record requires that a certain number of inferences be made as to the Parties' intent to settle. It is self-evident that when a settlement agreement is concluded and an Award on Agreed Terms is issued by the Tribunal, the Parties must have been undertaking settlement negotiations prior to the issuance of that Award. In the absence of conclusive evidence that "the parties directly concerned" eschewed or permanently abandoned settlement negotiations, an intention, that, for example, had to be expressed when a sales license was to be issued under Treasury Regulation 535.540,²⁰ it should be assumed that the Parties were intent on pursuing settlement, and, as a result, the United States and Iran both met their common obligation to promote settlement from 19 January 1981 until the moment when a settlement was concluded that included return of the Iranian party's property subject to Paragraph 9 of the GD. Sovereigns are presumed to comply with their obligations absent proof to the contrary.²¹

18. It may be further objected that settlement negotiations and the resulting settlements must have been undertaken and agreed to by Iran with unfair terms or under the duress of the unlawful Treasury Regulations. The majority gives credence to this argument as it finds, in Claims G-7 and G-8, in which settlement agreements were concluded, that Iran was "forced to enter into settlement negotiations . . . to recover [its items] because Section 535.333 excluded [its items] from the transfer directive" ²² Iran could have had other, equally credible motives, however for entering into these settlement negotiations. As argued by Iran itself, it had concluded these settlements in the hope of mitigating its damages.²³ Judge Johnson rightly has noted in his Opinion that Iran was required to mitigate its damages and in Claims G-7, G-

²⁰ Treasury Regulation 535.540 provides in Paragraph 1 that the holder must certify that he has "made a good faith effort over a reasonable period of time to obtain payment of any amounts owed by Iran or the Iranian entity, or adequate assurance of such payment."

²¹ As enshrined in Article 26 of the VCLT which obliges States to perform their treaty obligations in good faith.

²² *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶¶ 1949, 2088, (hereinafter "Partial Award").

²³ Claimant's Brief and Evidence in Rebuttal, Volume 2, Claim G-7, The Ministry of Road and Transportation (17 May 2006), at 14.

8 and G-13 had the ability to do so.²⁴ The promise of the States Parties that they “will promote the settlement of the claims” was one of the possibilities expressly and prominently envisaged by the Accords for the resolution of claims: “[T]he parties directly concerned” could (1) either pursue their claims at the Tribunal (2) or attempt to settle them, (3) or, due to the deadline for filing claims, do both, *i.e.*, protect their rights by filing their claims with the Tribunal while continuing settlement negotiations. All three options were equally legitimate. Upholding the interpretation of the majority, that Iran was “forced to enter into settlement negotiations,” would render the settlement option meaningless, thus leaving Articles I and III(2) of the CSD devoid of “effectiveness,” contrary to the VCLT mandate compelling “effectiveness.” The Parties to the Accords could not possibly have envisaged such an outcome.

19. As the Tribunal’s Decision in Case No. A21 emphasized, the Tribunal in this case, as in all others involving interpretation of the Accords, is bound to examine “the totality of those instruments [‘the respective Algiers Declarations’] in the context of general principles of international law,”²⁵ and “to fulfil the object and purpose of the treaty” by “tak[ing] steps to ensure its effectiveness.”²⁶ The proper course, therefore, in the present case would have been to rule that these particular four Awards on Agreed Terms, each of which returned to the relevant Iranian party the properties subject to Paragraph 9, precluded a finding that the United States breached Paragraph 9 in regard to those cases. To have awarded damages against the United States for it and Iran NOT interfering in these settlements, which they had pledged they “will promote,” is an affront both to the Accords and to the peaceful resolution of disputes. It amounts to the Tribunal directing the United States to take notice of ongoing negotiations and, at whatever cost, proceed to undermine, if not utterly sabotage, them. Such a result is patently absurd, and cannot have been envisaged by the two States Parties, who in “seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran” agreed to the “interdependent commitments” of the Accords.²⁷

²⁴ Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part in *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶¶ 1-37 (hereinafter “Separate Opinion of Judge O. Thomas Johnson”).

²⁵ *Islamic Republic of Iran and United States of America*, Decision No. DEC 62-A21-FT (4 May 1987), reprinted in 14 IRAN-U.S. C.T.R. 324, 327.

²⁶ *Id.* at 326.

²⁷ Preamble of the General Declaration.

THE ORDINARY MEANING OF “IRANIAN PROPERTIES”

20. I agree with the majority that the term “Iranian properties” in Paragraph 9 of the GD is to be understood as properties which “Iran” solely owns, where ownership is based upon title as determined under applicable law. Further, it appears to be undisputed that for purposes of Paragraph 9 of the GD “Iran” is to be understood as having the meaning set forth in Article VII (3) of the CSD, to wit:

“Iran” means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

The conclusion that this is the correct understanding of the term “Iranian properties” is compelled by the terms of Executive Order No. 12281 issued 19 January 1981 by the President of the United States. The Order was exhibited to the Iranian delegation negotiating the two Declarations (and various related instruments) and its terms were accepted by that delegation as an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” within the meaning of Article 31(2)(b) of the VCLT, which repeatedly has been accepted by the Tribunal as being the appropriate guidepost for interpretation of the GD and the CSD (as well as related instruments) as acknowledged by the majority in Paragraph 102 and its references to relevant Tribunal precedents.²⁸ Furthermore, this Tribunal, in the Partial Award that has given rise to the instant Award, Award No. 529-A15-FT, ruled (at Paragraph 40) as follows:

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.²⁹

21. The contrary view expressed by Judge Simma in his Partially Dissenting Opinion On The Interpretation Of The Term “Iranian Properties” (“Simma Opinion”) simply does not hold water. His first foundational error is to deny even the possibility that general principles of

²⁸ Partial Award, ¶ 102 (“[t]he Tribunal has consistently held that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention.”).

²⁹ *The Islamic Republic of Iran and The United States of America*, Partial Award No. 529-A15-FT (6 May 1992), reprinted in 28 IRAN-U.S. C.T.R. 112. See also Paragraph 64 (“By definition, Iran owns these properties, and possession is held by private persons . . .”). Note that Award No. 529 also confirms the correctness of the majority’s ruling that only tangible properties can be at issue here, see Paragraph 29 (“At issue in Part II:A of Case No. A15 is the United States’ obligation under the Algiers Declarations to arrange for the transfer to Iran of certain Iranian tangible properties within the United States’ jurisdiction.”).

private international law can give meaning to “Iranian properties” as a result of an interpretive exercise that began with the interpretive Articles of the VCLT. Judge Simma’s attempt to divine a conflict between, or incompatibility of, an interpretive exercise on the basis of general principles of private international law and an interpretive exercise that begins on the basis of the VCLT is a straw man whose sole purpose is to create room for the view that Judge Simma’s conclusion is the only conceivable VCLT interpretation of the term “Iranian properties” in Paragraph 9. His Opinion does so insidiously, by discounting the application of the VCLT interpretive Articles by the Tribunal’s majority. Judge Simma presents his Opinion as the only approach that effectively undertakes an interpretation applying, in the first instance, Articles 31 and 32 of the VCLT. The implication of Judge Simma’s approach, clearly articulated, is that the proper interpretation of the Algiers Accords via correct application of those VCLT interpretive Articles can never lead to an interpretation that ultimately requires application of private international law that may lead to application of municipal law. This cannot possibly be correct.

22. The term “Iranian properties” in Paragraph 9 of the GD, interpreted, in the “context” of Executive Order No. 12281’s reference at 1-101 to “properties . . . owned by Iran,” already has been interpreted by this Tribunal in Award No. 529, the Partial Award leading to the instant Award, with *res judicata* effect for this latter Award, as meaning “solely owned” by Iran, *i.e.*, thus excluding “partial or contingent” ownership.³⁰ The Tribunal’s contextual interpretation of the GD in Award No. 529 expressly was undertaken within the prescription of the interpretive Articles of the VCLT, an obligation that all Members of the Tribunal know is binding on them, as is readily recognized by the majority in the Award,³¹ and was directed to the issues presented to the Tribunal at that time. As a result, Judge Simma’s assertion that “Nothing in Partial Award 529 – in its reasoning or in its operative part – was intended to provide a positive definition and interpretation of the term ‘Iranian properties’ under Paragraph 9”³² undermines precisely the following statement of Judge Simma, from which he then proceeds to depart on the ground that Partial Award No. 529 was “plainly wrong:

[T]he Tribunal as a standing adjudicative body[] must ensure that its awards do not reverse its own earlier decisions, even more so when those decisions were

³⁰ *The Islamic Republic of Iran and The United States of America*, Partial Award No. 529-A15-FT (6 May 1992), reprinted in 28 IRAN-U.S. C.T.R. 112, 127.

³¹ Partial Award, ¶ 102.

³² Partially Dissenting Opinion On The Interpretation Of The Term “Iranian Properties” in *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶ 96 (“hereinafter Separate Opinion of Judge Bruno Simma”).

taken in the same case. Coherence of the Tribunal's case law must be discernible and persuasive, or else its legitimacy and credibility will suffer.³³

Judge Simma's discounting the weight of Award No. 529 on the basis that the Tribunal's interpretation of "Iranian properties" is not found in that Award's operative part of Paragraph 77, and that such interpretation had not been put forward as a question that the Parties had specifically requested be addressed, is irrelevant. The sole relevant fact is that the Tribunal did interpret "Iranian properties" expressly through application of the interpretive Articles of the VCLT as it knew that it had to, and that, as a result, such an interpretation, as noted above, has *res judicata* effect for the present Award.

23. Relying on the interpretation in Award No. 529 that "Iranian properties" means properties "solely owned" by Iran, and in the absence of any public international law of "ownership," the majority concludes that it must be determined by applying general principles of private international law as provided by Article V of the CSD, which lead to "ownership" being determined by "title." Remarkably, the Simma Opinion fails completely even to engage with Article V, in particular with its embrace of "such . . . principles of commercial and international law as the Tribunal determines to be applicable," making no distinction between private and public international law. The VCLT of course reigns for purposes of treaty interpretation. However, Article V, which provides the governing law, equally foresees that interpretation of the Algiers Accords via the interpretive Articles of the VCLT can lead to application of rules of private international law.

24. Judge Simma's second foundational error is that after acknowledging that the interpretation of "Iranian properties" begins with an attempt to establish its ordinary meaning, he asserts in Paragraph 15 that "it cannot be held that the term 'Iranian properties' is self-explanatory, i.e. an '*acte clair*',"³⁴ meaning that the term "Iranian properties" cannot possibly be interpreted by reference to its ordinary meaning. Judge Simma justifies this statement by finding that "no such ordinary meaning of the term has found acceptance in general international law"³⁵ and that "[i]n any case, the very absence of agreement . . . within the Tribunal, demonstrates that it cannot be held that the term 'Iranian properties' is self-explanatory, i.e. an '*acte clair*'."³⁶ Bootstrapping his disagreement with the majority on the

³³ *Id.*, ¶ 80.

³⁴ *Id.*, ¶ 15.

³⁵ *Id.*, ¶ 12.

³⁶ *Id.*, ¶ 15.

point is in no way determinative of the issue, of course, for as the Simma Opinion itself notes, no less a figure than Lord McNair has declared that the maxim of clear meaning “is in truth . . . – a subjective matter because [the words] may be clear to one man and not clear to another, and frequently one or more judges and to their colleagues.”³⁷ Nevertheless, despite disagreement among judges of a court, or of this Tribunal, a judgment or award is issued, which, in the case of this Tribunal, “shall be final and binding.”³⁸

25. For Judge Simma, general international law is the linchpin of his conclusion that “no such ordinary meaning of the term has found acceptance.”³⁹ He argues, in sum, that if there is no accepted meaning of a term in international law, then it is not capable of having an ordinary meaning. In other words, if a given term has not been dealt with *in extenso* in international law, and a consensus reached, then it has no ordinary meaning. This simply cannot be correct. Clearly, Judge Simma appears to have confused the rule of interpretation found at Article 31(1) of the VCLT, which requires that the terms of a treaty be given their ordinary meaning, and the rule under Article 31(3)(c), which provides that in the process of the interpretive exercise account should be made of “[a]ny relevant rules of international law applicable in the relations between the parties.” Contrary to what Judge Simma’s analysis appears to imply, these two provisions represent two separate interpretive operations.

26. When determining the ordinary meaning of a term, consideration is given to the literal interpretation of the term and its grammatical form, “the sense . . . which it generally bears,”⁴⁰ “its true sense,”⁴¹ its “natural” meaning.⁴² In Paragraph 40 of Award No. 529, the Tribunal similarly referred to the “clear” meaning of “Iranian properties.” In their search for the ordinary meaning of a term, international courts and tribunals often resort to dictionaries for assistance,⁴³ as Judge Simma himself has done.⁴⁴ Unfortunately for his analysis, however, his extracts from both the Oxford English Dictionary and Black’s Law Dictionary are self-defeating in that each

³⁷ *Id.*, ¶ 12.

³⁸ Claims Settlement Declaration, Art. IV.1., *reprinted in* 1 IRAN-U.S. C.T.R. at 10

³⁹ Separate Opinion of Judge Bruno Simma, ¶ 12.

⁴⁰ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, 1996 I.C.J. 803, 818 (Dec. 12).

⁴¹ *Id.*

⁴² Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994 I.C.J. 6, 22 (Feb. 3); Case Concerning Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections, 2004 I.C.J. 1011, 1050 (Dec. 15).

⁴³ *See, e.g.*, Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, 1996 I.C.J. 803, 818 (Dec. 12); generally, RICHARD K. GARDINER, TREATY INTERPRETATION 186 (2015).

⁴⁴ Separate Opinion of Judge Bruno Simma, ¶ 13.

one refers to “ownership,” which is at the core of Executive Order 12281, which both Parties agree is an “instrument which was made by one or more parties [the United States of America] in connexion with the conclusion of the treaty and accepted by the other parties [the Islamic Republic of Iran] as an instrument related to the treaty” within the meaning of VCLT Article 31(2)(b). In making the ordinary meaning dependent instead on its common acceptance in general international law, Judge Simma not only discards the possibility that ordinary meaning may exist by reference to its normal usage, but in doing so he also goes against the well-established principle of contemporaneity, by which the terms of a treaty are to be interpreted according to their meaning at the time the treaty was concluded.⁴⁵ The accepted meaning of a term in general international law does not necessarily reflect temporal considerations. It may in fact result from an evolutive reading of the term whose accepted meaning will have been established years after the treaty in question was concluded.

27. Once ordinary meaning(s) have been found, resort is had to the context of the terms as well as to the object and purpose of the treaty in order to select the appropriate meaning. Interpretation on the basis of a treaty’s context and object and purpose is framed by the text of the treaty. As noted by the Tribunal in Case No. A28, “a treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.”⁴⁶ By completely denying the existence of an ordinary meaning of the term “Iranian properties,” Judge Simma frees himself from the constraints of the text to pursue “the real intention of the Parties.”⁴⁷ That search he undertakes by resorting to Article 31(3)(b) of the VCLT, the subsequent conduct of the Parties, and Article 31(4) of the VCLT, where, as he explains, “[t]he ‘ordinary meaning’ of a treaty term may thus be replaced, or superseded, by a different meaning, if the common intention of the Parties to that effect can be established.”⁴⁸ Yet the search for subsequent practice cannot incorporate into the text what is not there,⁴⁹ and

⁴⁵ Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America) [1952] ICJ Reports, at 189 (“it is necessary to take into the meaning of the word ‘dispute’ at the times when the two treaties were concluded”). See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 124 (1984) (“The ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty”).

⁴⁶ *United States of America, et al. and Islamic Republic of Iran, et al.*, Decision No. DEC 130-A28-FT (19 Dec. 2000), reprinted in 36 *IRAN-U.S. C.T.R.* 3.

⁴⁷ Separate Opinion of Judge Simma. Paragraph 21 (“it is the task of the Tribunal to search for the real intention of the Parties”).

⁴⁸ *Id.*, ¶ 19.

⁴⁹ See, e.g., *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, 1992 I.C.J. 351, 586 (Sept. 11) (“such practice may be taken into account for purposes of interpretation, none of these considerations . . . can prevail over the absence from the text of any specific reference to delimitation.”)

any alleged special meaning given to a term must be established by proof that must be “decisive”⁵⁰ and “convincing.”⁵¹ Judge Simma does not even attempt to discharge this high evidentiary burden, raising only potential ambiguities or inconsistencies.

28. Thus, the ensuing paragraphs are redolent of an effort to determine the actual intention of the States Parties to the Algiers Accords, an approach that was rejected utterly by the diplomatic conference that promulgated the VCLT and opened it for signature. The International Law Commission Reports leading to that diplomatic conference flatly rejected those who advocated a treaty that would emphasize a search for the true intent of treaty parties, and instead adopted the principle that the words of the treaty necessarily express the treaty parties’ intent. Therefore, the “starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties.”⁵² The International Court of Justice has on several occasions reiterated this point,⁵³ and this very Tribunal, in Case No. A17, has expanded on this universally accepted interpretive approach, explaining that “[t]he terms [of the Declarations] themselves should be given primary weight in the analysis of the text. This is even more than normally so in a case like the present one where the Declarations were not the result of direct negotiations between the Governments of Iran and the United States, but of indirect negotiations through a third Government.”⁵⁴ In light of the Commission’s views as well as the Tribunal’s own precedents, Judge Simma’s periodic

⁵⁰ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 63.

⁵¹ Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976, Final Award, ICGJ 374, 67 (12 March 2004).

⁵² *Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, U.N. Doc. A/6309/Rev. 1), reprinted in [1967] Y.B. INT’L L. COMM’N 112, U.N. Doc. A/CN.4/SER. A/1966/Add. 1, 220 (“the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties”). This evokes the “textual” approach to treaty interpretation or the “presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text.” See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 115 (1984).

⁵³ See, e.g., Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994 I.C.J. 6, 22 (Feb. 3) (“Interpretation must be based above all upon the text of the treaty”); Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (March 3).

⁵⁴ *United States-Iran, Case No. A17*, Decision No. DEC 37-A17-FT (13 May 1985), reprinted in 8 IRAN-U.S. C.T.R. 190, 200-01.

references to the search for the “real intention of the Parties” cannot be allowed to influence the only correct approach to the interpretation of Paragraph 9 of the GD.⁵⁵

29. All in all, Judge Simma advances his Opinion as the only exercise that has been made applying the VCLT to interpret the term “Iranian properties” in Paragraph 9 of the GD, an effort that for present purposes, however, is wasted inasmuch as this Tribunal in Award No. 529, which binds us, years ago interpreted “Iranian properties” to mean tangible properties “solely owned by Iran,” thus leading us in this case to the principles of private international law dealing, as public international law does not, with ownership of tangible property. Judge Simma’s Opinion, in the end, does no more than implausibly, indeed utterly incorrectly, contend, by ignoring the evolution of this case, that no other interpretations of “Iranian properties” were ever undertaken applying the interpretive principles of the VCLT. As such, it stands as no more than an extended apologia for adoption of the position of Iran as regards “Iranian properties.”

CLAIM G-18 (ALI FOROUGH)

30. Where I diverge from the majority with respect to this claim is on the issue of our jurisdiction. Contrary to the majority’s finding that this Tribunal must determine any issue of title to a property subject of a claim by Iran, it is my view that the correct interpretation and application of the GD is that any contested issue of title was to be decided by a national court of the United States. Indeed, this was the view of Iran itself in actually going to court in four of the claims it has pursued in this case and, taking steps, in this very claim, to institute judicial proceedings in the United States. Thus, in its Claim G-14 Iran sued Mr. Robert Stern on 25 August 1983, a full two years and seven months following entry into force of the GD, in New York County Supreme Court, a court of first instance of the State of New York, to recover certain architectural drawings.⁵⁶ In that suit, Iran expressly sought a judgment recognizing that plaintiffs were “owners and entitled to the immediate possession” of the drawings.⁵⁷ After it

⁵⁵ Separate Opinion of Judge Bruno Simma at ¶ 21 (“it is the task of the Tribunal to search for the real intention of the Parties”); ¶ 114 (“the Parties for a long, in any case considerable, time shared the intention to give special meaning to the term ‘Iranian properties’”).

⁵⁶ Complaint, *Tehran Museum of Contemporary Art v. Stern*, No. 22354/83 (N.Y. Sup. Ct. 25 Aug. 1983). Claimant’s Brief and Evidence in Rebuttal, Volume 7, Claim G-14, 15, 16 & 17, Ministry of Islamic Guidance (Tehran Museum of Contemporary Arts) (17 May 2006), Ex. 9 (hereinafter “Claimant’s Brief and Evidence in Rebuttal, G-14, 15, 16 & 17”).

⁵⁷ Complaint, *Tehran Museum of Contemporary Art v. Stern*, No. 22354/83 (N.Y. Sup. Ct. 25 Aug. 1983), para. 14(a). *Id.*

received Mr. Stern's Answer on 11 October 1983,⁵⁸ Iran did not pursue its civil case. It abandoned this litigation, explaining its discontinuation of that proceeding as due to the "high cost of litigation in the United States" and it "preferred to pursue the matter within the framework of Case A/15."⁵⁹ Likewise, in its Claim G-16 at the Tribunal, Iran, on 20 July 1982, thus virtually one year and a half after the entry into force of the GD, sued Mr. Peter Eisenman in the same New York County Supreme Court, seeking to recover eight works of art to which it claimed entitlement.⁶⁰ Mr. Eisenman earlier had agreed to a temporary restraining order barring him from disposing of any of those works.⁶¹ Ultimately, however, Iran, as in its suit against Mr. Stern, failed to pursue the litigation further, citing the same reasons, *i.e.*, the "high cost of litigation in the United States" and that it "preferred" to pursue the same claim in the present case.⁶² Further, in its Supp. (2)-56 Claim, Iran, in the person of Iran Air, chose to bring suit on 15 October 1985 in the United States District Court for the Eastern District of New York against the holder of the properties in issue,⁶³ following which a settlement was reached between the Parties on 27 October 1986 and the case thereafter was dismissed, without, be it noted, either party seeking an Award on Agreed Terms from the Tribunal.⁶⁴ Finally, in the very case of Mr. Forough and the Stradivarius, it is uncontested that Iran had consulted with its attorneys in preparation for suing Mr. Forough to recover the violin via judicial proceedings in the United States.⁶⁵ Iran's abandonment of that project apparently was motivated by reasons similar to those given for discontinuing its suits against Messrs. Stern and Eisenman, as it indicated that "pursuing the matter in the United States through American lawyers required spending much cost and energy"⁶⁶ and it "preferred" to pursue the same claim in the present case.⁶⁷ Those actions by Iran, between one and a half years and four years and nine months

⁵⁸ Complaint, Tehran Museum of Contemporary Art v. Stern, No. 22354/83 (N.Y. Sup. Ct. 25 Aug. 1983). *Id.*, Ex. 10.

⁵⁹ Claimant's Brief and Evidence in Rebuttal, G-14, 15, 16 & 17, at p. 6.

⁶⁰ Complaint, Tehran Museum of Contemporary Art v. Peter Eisenman, No. 16781/82 (N.Y. Sup. Ct. 20 July 1982). *Id.*, Ex. 27.

⁶¹ Memorandum from Brian O'Dwyer to Mr. Bahman, 28 July 1982. *Id.*, Ex. 35.

⁶² *Id.* at p. 33.

⁶³ Complaint, Iran National Airlines Corporation v. The Garrett Corporation, No. CV-85-3764, (E.D.N.Y. 15 Oct. 1985). Response of the United States to Claimant's Brief and Evidence: Claims Supp. (2)-44 and Supp. (2)-56 (Airesearch) (26 Sept. 2001), Ex. 4 (hereinafter "Response of the United States to Claimant's Brief and Evidence: Claims Supp. (2)-44 and Supp. (2)-56").

⁶⁴ *Id.*, Ex. 6.

⁶⁵ Letter from the Interests Section of the Islamic Republic of Iran to Cook & Franke S.C., 30 Dec. 1983. Claimant's Brief and Evidence in Rebuttal, Volume 8, Claim G-18, Ministry of Islamic Guidance (17 May 2006), Ex. 21, Att. 25 (hereinafter "Claimant's Brief and Evidence in Rebuttal, Claim G-18").

⁶⁶ Claimant's Brief and Evidence in Rebuttal, Claim G-18, at p. 23.

⁶⁷ *Id.* at p. 8.

following the entry into force of the GD and the CSD, during which time Iran had had ample time to determine for itself the correct interpretation and application of the GD and the CSD, qualify in my view as a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of Article 31(3)(b) of the VCLT. The Tribunal has readily discussed and used this principle of subsequent practice.⁶⁸ While it was Iran that filed or indicated its intention to file proceedings in United States courts, the obvious acquiescence of the United States in such actions may be read as “agreement of the parties.”

31. In addition, there was added urgency in this Claim for Iran to have instituted judicial proceedings in the United States to establish ownership. This is, in fact, the only claim as to which the holder of the property, Mr. Forough, actively contests ownership. Indications to this effect were given to Iran by the United States when it reported, on 30 October 1985, under “Right to possession of tangible property contested,” that the “Violin was gift to Mr. Forough for use for his lifetime.”⁶⁹ In view of this assertion, and as further detailed in Judge Barkett’s Opinion with reference to Iran’s counsel acknowledging the inapplicability of Paragraph 9 to disputed property,⁷⁰ the Stradivarius could not have been deemed to be “Iranian property” understood as property “solely owned” by Iran.⁷¹ The majority attempts to disregard this fact by making the absurd statement that the possibility that the violin may have been a “lifetime gift” or what the majority terms “a trust for his use” is “irrelevant.”⁷² If the violin were indeed part of such a trust, how could it then be, solely owned by Iran?

32. Judge Barkett already has pointed out how the United States did not have any mechanisms available to require Mr. Forough to transfer the Stradivarius since ownership was contested.⁷³ To do so, as the majority appears to suggest by finding that when the United States first learned about the Stradivarius on 31 August 1983 it “should have arranged for its transfer,”⁷⁴ would have run contrary to the obligation of the United States to promote settlement

⁶⁸ See, e.g., *The United States of America, et al. and The Islamic Republic of Iran, et al.*, Award No. 108-A-16/582/591-FT (25 Jan. 1984), reprinted in 5 IRAN-U.S. C.T.R. 57, 71; *Burton Marks, et al. and The Islamic Republic of Iran*, Interlocutory Award No. ITL 53-458-3 (26 June 1985), reprinted in 8 IRAN-U.S. C.T.R. 290, 295.

⁶⁹ Consolidated Report of the United States (30 Oct. 1985) at 11.

⁷⁰ Separate Opinion of Judge Rosemary Barkett, Concurring in Part, Dissenting in Part in *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶ 7 (hereinafter “Separate Opinion of Judge Rosemary Barkett”).

⁷¹ Partial Award, ¶ 325.

⁷² *Id.*, ¶ 331.

⁷³ Separate Opinion of Judge Rosemary Barkett, ¶ 9.

⁷⁴ Partial Award, ¶ 331.

as provided in Articles I and III(2) of the CSD. In this claim, the United States actively promoted settlement with indications to Iran such as “suggest he be contacted directly”⁷⁵ or “U.S. suggests Iran contact individual or withdraw claim.”⁷⁶ Framed in terms of the obligation found in Articles I and III(2) of the CSD, the United States cannot be found liable under Paragraph 9 of the GD.

33. The single 12-line Paragraph 320 of the present Award numbering more than 600 pages in which 12 lines the majority seeks to justify its assumption of jurisdiction to decide the contested issue of ownership of the Stradivarius is a classic case of “reverse engineering.” Because the United States “assumed the risk” that Mr. Forough’s claim of the legal right to the violin during his lifetime would not be accepted, “[a]ccordingly, the Tribunal holds that it has jurisdiction to determine who held title to the Violin on 19 January 1981.”⁷⁷ Actually, it is the Tribunal that has “assumed the risk” of a contrary decision by a United States court, as will be seen below. The Tribunal first should have established why it has jurisdiction, or not, and only then opine as to who has “assumed the risk” that may result from its decision. The majority’s opening statement, that it “finds that the fact that a holder of an item asserts that it, and not Iran, owned the item on 19 January 1981 does not deprive the Tribunal of jurisdiction to decide whether the United States has performed its obligations under the Paragraph 9 and . . . to decide, . . . whether an item of property is ‘Iranian’ within the meaning of Paragraph 9”⁷⁸ is no more than an unsupported declaration of the Tribunal’s bold assumption of jurisdiction. The Tribunal thus has failed the Parties, who are entitled to a reasoned analysis supporting the Tribunal’s claim to jurisdiction.

34. The fact, if true, that Mr. Forough would be able to prove no more than that he received the Stradivarius from the Shah only as a “gift [. . .] during my [Mr. Forough’s] lifetime”⁷⁹ would in no way change my view of the jurisdictional issue in this case, for, as the Partial Award that gave rise to this one ruled in its dispositif (at Paragraph 77(c)),⁸⁰ the United States

⁷⁵ Consolidated Report of the United States (30 Oct. 1985), Ministry of Islamic Guidance (Tehran Museum of Contemporary Arts), at 11.

⁷⁶ Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990), Ministry of Islamic Guidance (Tehran Museum of Contemporary Arts), at 13.

⁷⁷ Partial Award, ¶ 320.

⁷⁸ *Id.*

⁷⁹ Affidavit of Ali Forough in Claim G-18, ¶ 8. Response of the United States to Claimant’s Brief and Evidence: Claim G-018 (Mr. Ali Forough) (26 Sept 2001), Ex. 1 (hereinafter “Response of the United States to Claimant’s Brief and Evidence: Claim G-018”).

⁸⁰ *The Islamic Republic of Iran and The United States of America*, Partial Award No. 529-A15-FT (6 May 1992), reprinted in 28 IRAN-U.S. C.T.R. 112, 140.

was not mandated by Paragraph 9 of the GD to transfer to Iran “properties in which Iran had only a partial or contingent interest” If, of course, Mr. Forough were to lose litigation brought against him for the violin by Iran in an American court, the United States at that point would be obligated either to “arrange . . . for the transfer to Iran” of the violin or to compensate Iran appropriately.

35. I add only that the course of action on which Iran, correctly in my view, had determined in commencing the various litigations cited above, is strengthened as a matter of interpretation insofar as it would in the end have avoided the possibility of contradictory outcomes in the chosen American court and this Tribunal. *See* Article 32 of the VCLT:

Recourse may be had to supplementary means of interpretation, including . . . the circumstances of its [the treaty’s] conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous

36. Regrettably, the possibility of conflicting rulings by this Tribunal and an American court has been opened by the present Award, as Mr. Forough gave every indication in his evidence before the Tribunal that he and “his” “Stradivarius” are not to be separated, certainly not during his lifetime.⁸¹ Mr. Forough’s testimony at the hearing: “Q. At these performances [in the United States and abroad], do you play the Wilmotte Stradivarius? A. I would not play anything else.”⁸² “I am a young man who found the violin of his life, and who loved the instrument, and this was my violin”⁸³ “And a young man, a romantic young man, this was my instrument”⁸⁴ “. . . [I]t takes years for a world-class violinist to learn the many nuances of a particular violin in order to be able to maximize the quality of the tone the instrument produces. I found that ideal marriage with this violin . . . I am greatly in need of my instrument professionally.”⁸⁵ “. . . [F]rom 1976 . . . until now [8 September 2010], I have continued to travel extensively to perform with it.”⁸⁶ “. . . I . . . had determined that this was

⁸¹ *See, e.g.*, Letter of Mr. Ali Forough to Dr. Saadi Hassani, 22 June 1980 (“Reclamation of this violin will greatly damage my life destiny, and me artistically and professionally”). Claimant’s Brief and Evidence in Rebuttal, Claim G-18 (17 May 2006), Ex. 21, Att. 8.

⁸² Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013) at 114.

⁸³ *Id.* at 125.

⁸⁴ *Id.* at 140.

⁸⁵ Response of the United States to Claimant’s Brief and Evidence: Claim G-018, Affidavit of Ali Forough in Claim G-18, ¶ 9.

⁸⁶ United States’ Brief and Evidence in Rebuttal, Claim G-18 (Mr. Ali Forough) (17 Jan. 2011), Ex. 2, ¶ 5.

the instrument I should play during my career.”⁸⁷ “. . . I regard and have always regarded the Wilmotte Stradivarius as my property for the rest of my lifetime.”⁸⁸ “. . . [T]his case really does not belong in the International Court [this Tribunal], the United States has nothing to do with this, and we have – there is absolutely no – it is not necessary for us to be in this kind of dilemma”⁸⁹ and “[i]f this ends against us, then I have to stand up against the United States, because they will come after me.”⁹⁰ The war over the Stradivarius presaged by Mr. Forough’s testimony has now been declared by the Tribunal, which in paragraphs 2611.B.12) of the Award commands the United States to “come after [him].”

37. A ruling by a United States court that contradicts the ruling by this Tribunal, should that occur, would have as a result, effectively, that this Tribunal will have granted Iran a post hoc \$5,386,583.61, or \$101,655.07 per person, not counting interest, ransom for the 52 American hostages held captive in Iran for 444 days, from 4 November 1979 until 19 January 1981, contrary to a fundamental basis upon which the GD and CSD were negotiated successfully. Then Deputy Secretary of State (in a later Administration the Secretary of State) Warren Christopher testified very clearly multiple times that the bedrock agreed condition of those negotiations was that nothing in the nature of ransom would be paid for the release of those 52 hostages.⁹¹ This central principle of the GD and the CSD was enforced by General Principle A. of the former Declaration, limiting the United States’ obligations under the two Declarations to “restor[ing] the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979,” at which time clearly no ransom had been paid (nor would any ever be paid) by the United States. Were a United States court to decide at the end of litigation of the matter that Iran did not own the Stradivarius in dispute, the Tribunal, by having ruled to the contrary, would be at risk of having violated the “no ransom” foundation of the Declarations and therewith General Principle A. This, of course, constitutes a further reason why the Tribunal should not have assumed jurisdiction in this case, but instead left adjudication of Iran’s ownership of the ex-Wilmotte Stradivarius to United States adjudication. These are among the “the circumstances of its [the treaty’s] conclusion” to which pursuant to Article 32

⁸⁷ *Id.*, ¶ 8.

⁸⁸ *Id.*, ¶ 11.

⁸⁹ Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013), at 152.

⁹⁰ *Id.* at 180-81.

⁹¹ Declaration of Warren Christopher, *Halliburton Company, et al. and Doreen/IMCO, et al.*, Interlocutory Award No. ITL 2-51-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 242; Hearings Before the Committee on Foreign Relations, United States Senate, Ninety-Seventh Congress, Statement of Hon. Warren Christopher, Former Deputy Secretary of State (17, 18 Feb. and 4 March 1981).

of the VCLT the Tribunal should have had “[r]ecourse” for the purpose of either “confirm[ing] the meaning resulting from application of article 31, or to determine the meaning” had the Tribunal felt that “the interpretation according to article 31: Le[ft] the meaning ambiguous. . . .” Quite obviously, were an American court to have agreed with Iran’s claim of ownership of the Stradivarius, this Tribunal likely would have confirmed that judgment. Equally obviously, it is to be hoped, an American court decision in favor of Mr. Forough would have engendered in this Tribunal a potential reluctance to find otherwise.

38. Finally, I concur with the Concurring and Dissenting Opinions of Judge Johnson and Judge Barkett⁹² insofar as they take the view that, given the inadequacy of Iran’s evidence regarding valuation of the ex-Wilmotte, the Tribunal should order further proceedings to re-evaluate it in the event that the United States proves unsuccessful in returning it to Iran within the four months allotted by the Award to it to do so.

CLAIMS SUPP. (2)-11 AND (2)-12 (KAMRAN MASHAYEKHI)

39. I dissent from the ruling of the majority as regards this claim for the reason that it in fact was settled, finally and fully, by Iran in entering into the Award on Agreed Terms with the United States settling via a lump sum payment to the United States the claims of United States nationals for less than \$250,000 issued by the Tribunal on 22 June 1990.⁹³ The justification for this conclusion rests in a series of developments in the United States District Court for the District of Columbia, which I now recount.

40. Mr. Kamran Mashayekhi, an Iranian national without dual United States citizenship prior to 1984, and his wife, Claudia Mashayekhi, a United States national, had been employed for some time prior to the Iranian Revolution in Washington, D.C. by Iran National Radio and Television, later known as Voice and Vision of the Islamic Republic of Iran. In 1978, they were commissioned to purchase certain musical instruments on behalf of their employer, which supplied the funds for such acquisition. Subsequently, in the course of the Iranian Revolution, both Mashayekhis were discharged by their employer and retained possession of those instruments as security for claims they felt they had for unpaid salaries and unreimbursed expenses incurred for their employer. Then, on 2 August 1979, both Mashayekhis filed suit in

⁹² Separate Opinion of Judge O. Thomas Johnson, ¶¶ 38-47; Separate Opinion of Judge Rosemary Barkett, ¶ 21.

⁹³ *United States of America, on behalf and for the benefit of certain of its nationals and Islamic Republic of Iran*, Award on Agreed Terms No. 483-CLAIMS OF LESS THAN US \$250,000/86/B38/B76/B77-FT (22 June 1990), reprinted in 25 IRAN-U.S. C.T.R. 327.

the United States District Court for the District of Columbia against Iran and their employer, seeking recovery of the aforesaid salary payments and expense reimbursements.⁹⁴

41. Subsequently, on 3 December 1979, the defendants in that case, represented by Thomas G. Shack, Jr. of the firm of Abourezk, Shack & Mendenhall, P.C. in Washington, D.C., filed in court an “Answer Of Defendant Iran” to the Mashayekhis’ complaint, which included three counterclaims.⁹⁵ It is to be noted that Mr. Shack and his firm acted at that time generally for Iran in the United States, coordinating and supervising the defense of the more than 300 cases that were brought against Iran following the Presidential freezing on 14 November 1979 of all Iranian assets subject to United States jurisdiction.⁹⁶ In fact, Mr. Shack’s role as general outside United States counsel during that period was so critical to Iran that the hearing in Cases Nos. A15(IV) and A24 was delayed for more than 10 months, from 14 November 2011 to 24 September 2012, at Iran’s request, due to his inability for various reasons to appear in person during that period.⁹⁷ Understandably, he and his colleagues at his firm were immediately and fully aware of the provisions, terms and necessary implications of the Algiers Accords.

42. It is a fundamental aspect of the “Answer Of Defendant Iran” that it charged both of the two Mashayekhis with joint custody and control of the musical instruments that were being withheld from it. Thus its “FIRST COUNTERCLAIM,” in Paragraph 1, states that the instruments “had last been in the possession of plaintiffs Kamran and Claudia Mashayekhi.”⁹⁸ Paragraph 4 of the same counterclaim states that “Plaintiffs have unlawfully taken and converted to their own use” the musical instruments.⁹⁹ Each of these statements is “repeat[ed] and realleg[ed]” in Paragraph 5 of the “SECOND COUNTERCLAIM”¹⁰⁰ and also in Paragraph

⁹⁴ Complaint for Debt for Services Rendered, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 2 Aug. 1979). Response of the United States to Claimant’s Brief and Evidence: Brief of the United States on Issues Common to Multiple Claims, Part 2 (Appendices) (26 Sept. 2001), Ex. 12 (hereinafter “Brief of the United States on Issues Common to Multiple Claims”).

⁹⁵ Answer of Defendant Iran, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 3 Dec. 1979). *Id.*, Ex. 14.

⁹⁶ See Affidavit of Thomas G. Shack, Jr in Case No. A15 (IV), 8 Feb. 1993. Claimant’s Brief and Evidence Concerning All Remaining Issues, Volume II, Exhibits Nos. 1-15 (15 Mar. 2001), Ex. 1; Affidavit of Thomas G. Shack, Jr in Case No. A15 (IV), 2 Apr. 2004. Iran’s Brief and Factual Support for Compensable Losses, Volume I, General Brief (19 July 2004), Ex. 1.

⁹⁷ Order of 10 November 2011 in *Islamic Republic of Iran and United States of America*, Cases Nos. A15 (IV) and A24, Full Tribunal and Order of 28 March 2012 in *Islamic Republic of Iran and United States of America*, Cases Nos. A15 (IV) and A24, Full Tribunal.

⁹⁸ Answer of Defendant Iran at 4, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 3 Dec. 1979). Brief of the United States on Issues Common to Multiple Claims, Ex. 14.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

6 of the “THIRD COUNTERCLAIM” included in the “Answer Of Defendant Iran.”¹⁰¹ That pleading closes by seeking as relief, *inter alia*, an injunction prohibiting alienation by any means of the musical instruments “presently within the control of plaintiffs.”¹⁰²

43. Thereafter, on 13 August 1980, the oral deposition of Mr. Mashayekhi in this litigation was taken under oath by Mr. Shack’s colleague, Ms. Christine Nettesheim.¹⁰³ Critically, as will be seen, Mr. Mashayekhi was asked the following questions by her, to which he gave the following answers:

Q. Since January 16, 1980 when you executed these interrogatories [a written form of question and answer under the Federal Rules of Civil Procedure in United States District Courts], I’d like to update them by asking if you still have access to these four instruments.

A. Yes.

Q. Are they in anybody else’s custody or control?

A. No.

Q. You and your wife?

A. Yes.¹⁰⁴

Counsel for Iran thereby had it confirmed by Mr. Mashayekhi, who testified under oath, hence under the penalties of perjury if he testified falsely, that both Mashayekhis had custody and control of the musical instruments, just as Iran had alleged in the three counterclaims asserted in its “Answer of Defendant Iran.”

44. Given that, as noted at the outset of the discussion of this claim, Mr. Mashayekhi was until 1984 solely a national of Iran, and not of the United States, whereas Mrs. Mashayekhi was a United States citizen, there arose concern that Mr. Mashayekhi might have no standing to assert a claim before this Tribunal, while Mrs. Mashayekhi would. In recognition of her own opportunity at this Tribunal, Mrs. Mashayekhi’s case “was severed on her own unopposed motion by Order of the Court on April 22, 1981.”¹⁰⁵

45. Thus, it came about that on 5 June 1981, fully five and a half months after the entry into force of the Algiers Accords, by which time Mr. Shack and Ms. Nettesheim had had more than

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Deposition of Kamran Mashayekhi, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 13 Aug. 1980). *Id.*, Ex. 13

¹⁰⁴ Deposition of Kamran Mashayekhi, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 13 Aug. 1980). United State’s’ Brief and Evidence in Rebuttal, Claims Supp. (2)-11 and (2)-12 (Kamram and Claudia Mashayekhi), Volume II, Appendix (17 Jan. 2011), Appendix A, p. 65.

¹⁰⁵ Memorandum at note 1, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 10 June 1981). Brief of the United States on Issues Common to Multiple Claims, Ex. 16.

sufficient opportunity to understand the Algiers Accords, Ms. Nettesheim appeared before Judge Gerhard R. Gesell in the United States District Court for the District of Columbia in support of Iran's motion to dismiss the case of Mr. Mashayekhi, which was granted. In seeking dismissal, Ms. Nettesheim argued that Iran and the Iran National Radio and Television enjoyed sovereign immunity. Judge Gesell and Ms. Nettesheim engaged in the following exchange:

THE COURT: If you are right about Verlinden [the name of a case on which Ms. Nettesheim relied for dismissal of the claim], what happens to your counterclaim?

MS. NETTESHEIM: What would happen to our counterclaim is that it would, of necessity be dismissed. What we would do - - we have two options with respect to that counterclaim.

* * * * *

We would pursue two options: The first option we would pursue with respect to the counterclaim is to assert it in front of the Iran-United States Arbitral Tribunal. It is properly maintained as a counterclaim in the Claudia Mashayekhi proceeding there. Although the Government of Iran is precluded from bringing possible claims of an affirmative nature, it can bring counterclaims in front of the Tribunal.¹⁰⁶

It is obvious from the foregoing that Ms. Nettesheim's conviction that Iran could assert a counterclaim against the claim to be made by Mrs. Mashayekhi at this Tribunal necessarily was premised on Mrs. Mashayekhi's joint custody and control of the musical instruments that she had been repeatedly alleged by Iran to be sharing jointly with Mr. Mashayekhi, and which had been confirmed under oath by Mr. Mashayekhi. Clearly Ms. Nettesheim had accepted the truth of that joint custody and control on behalf of Iran.

46. In the event, Mrs. Mashayekhi's claim for less than \$250,000 was filed with the Tribunal, and Iran failed to respond, thus never actually asserting before the Tribunal the counterclaim, the jurisdictional validity of which Ms. Nettesheim had confirmed before Judge Gesell. In fact, all but a very few of the 2,800 or so claims of United States nationals against Iran for less than \$250,000 that were filed with the Tribunal proceeded very far, due to the lump sum settlement of 1990 to which reference is made in Paragraph 39 above.

47. It is clear that the lump sum settlement included the counterclaim that Ms. Nettesheim rightly envisioned Iran being entitled to assert. The "Settlement Agreement in Claims of Less Than \$250,000, Case No. 86 and Case No. B38" ("Lump Sum Settlement Agreement") which the Tribunal's Award on Agreed Terms approved provided as follows:

¹⁰⁶ Hearing on Defendant's Motion to Dismiss, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 6 July 1981). *Id.*, Ex. 11.

Whereas, the United States and the Islamic Republic of Iran desire to settle definitively, forever and with prejudice all disputes, differences, claims, *counterclaims and matters . . . capable of arising in relation to the Claims of less than \$250,000 . . .*

* * * * *

Article I: Definitions

A. For the purposes of the Agreement, the term “the Claims of less than \$250,000” means any and all of the claims of less than \$250,000 . . . which have been submitted to the United States Department of State but were not timely filed with the Tribunal, as well as claims of U.S. nationals for less than \$250,000 which have been either withdrawn by the Claimants or dismissed by the Tribunal for lack of jurisdiction

Article II: The Subject Matter

The scope and subject matter of this Agreement are:

(i) to settle, dismiss, and terminate definitively, forever and with prejudice all the disputes, differences, claims, *counterclaims and matters . . . capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in, arising out of, or related to the Claims of less the \$250,000*

Article III: Settlement Amount

(i) In consideration of complete, full, final and definitive settlement, liquidation, discharge, and satisfaction of all the disputes, differences, claims, *counterclaims and matters . . . capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in or related to the Claims of less than \$250,000 . . .* the comprehensive lump sum amount of \$105,000,000 . . . shall be paid to the Government of the United States out of the Security Account

* * * * *

Article VI: Releases

(i) Upon the issuance by the Tribunal of the Award on Agreed Terms . . . the United States shall release and forever and definitively release and discharge the Islamic Republic of Iran . . . from any and all claims, causes of action, rights, interests and demands, whether in rem or in person, past, present or future, *which . . . could have been raised in connection with disputes, differences, claims, counterclaims and matters . . . related to, . . . or capable of arising from the Claims of less than \$250,000 . . .*

(ii) [Identical release by Iran of the United States.]¹⁰⁷ (Emphasis added.)

48. In approving this lump sum settlement agreement, the Tribunal, in Paragraph 7, confirmed that the two States Parties to the Algiers Accords could, as they had done, settle out of the Security Account claims and counterclaims that could have been, but never were, submitted to the Tribunal:

¹⁰⁷ *United States of America, on behalf and for the benefit of certain of its nationals and Islamic Republic of Iran, Award on Agreed Terms No. 483-CLAIMS OF LESS THAN US \$250,000/86/B38/B76/B77-FT (22 June 1990), reprinted in 25 IRAN-U.S. C.T.R. 327, 331-36.*

[N]othing prevents the two Governments from including within their Settlement Agreement the settlement of . . . claims not pending before the Tribunal.¹⁰⁸

49. Given the terms of the lump sum settlement agreement and the Tribunal's approval of it, can it really be doubted that the Iranian counterclaim that Ms. Nettlesheim and her colleagues as counsel for Iran in the United States District Court for the District of Columbia envisioned as "capable of arising from" Mrs. Mashayekhi's claim at the Tribunal was included in that settlement?

50. In truth, the majority has relied on nothing more than its own mischaracterization of Mr. Mashayekhi's sworn deposition testimony and silent inferences from palpably self-serving documents created by Iran. The last piece of direct evidence on the subject of the two Mashayekhis' joint custody and control of the musical instruments at issue is Mr. Mashayekhi's deposition testimony taken under oath by Ms. Nettlesheim, on which she relied expressly before Judge Gesell. In referring to that deposition, however, the majority at Paragraph 353 bowdlerizes Mr. Mashayekhi's very explicit testimony to eliminate Mrs. Mashayekhi from the picture:

On 13 August 1980, Kamran Mashayekhi was deposed by counsel for Iran in relation to Civil Action No. 79-2039. During his deposition, he testified that the four musical instruments and two bows were in his possession.

Yes, but Mr. Mashayekhi actually had answered "Yes." to Ms. Nettlesheim's question "You and your wife?" Nonetheless, in concluding that this claim was not settled by the lump sum small claims settlement agreement between the United States and Iran, the majority continuously refers only to Mr. Mashayekhi as having custody and control of the instruments in issue, and ignores the only direct evidence that such custody and control resided with Mrs. Mashayekhi as much as with Mr. Mashayekhi. Moreover, the majority at paragraph 53 of the Award relies on a letter from American counsel for Iran to the United States Department of the Treasury dated 29 September 1981 which makes the self-serving statement that "the custody of the instruments is not joint" between Mr. and Mrs. Mashayekhi,¹⁰⁹ in flat contradiction to the only sworn direct testimony on the subject, which had been elicited from Mr. Mashayekhi more than a year earlier by the very same American law firm that wrote that 29 September 1981 letter to the United States Department of the Treasury.

¹⁰⁸ *Id.* at 330.

¹⁰⁹ Letter from Shack & Kimball to Department of Treasury at 1, 29 Sept. 1981. Claimant's Brief and Evidence in Rebuttal, Volume 33, Supp. (2)-11 & 12, IRI Radio and TV (17 May 2006), Ex. 13.

51. Reliance by the majority on such questionable, weak reeds for its conclusion should be a source of extreme embarrassment to it. It should have found that this claim for the musical instruments had been settled already in 1990. Similarly, the majority relies on equally weak strands of evidence to arrive at its award of damages.

52. As fully detailed in Judge Barkett's Opinion,¹¹⁰ the majority's reliance on Mr. Keane's testimony for the valuation of the instruments is not sufficient evidentiary basis for its award of damages. Mr. Keane's testimony on 15 October 2013 was based exclusively on photographs of the instruments taken in 1978,¹¹¹ that cannot possibly account for the condition of the instruments 36 years later. In an even more questionable turn, Mr. Keane testified that the "tonal quality" of an instrument was one of the five criteria he uses to estimate the value of an instrument,¹¹² which begs the question of how 36-year-old photographs are able to relay the present tonal quality of an instrument, a logical fallacy which inevitably leads to the conclusion that by Mr. Keane's own criteria, his assessment of the instruments, and thus that of the majority, was deeply flawed. As a result, the majority's approach to the valuation of the instruments is speculative, an approach that, as noted by Judge Barkett, risks compromising the integrity of the arbitral process,¹¹³ a risk that is not expunged by the majority simply by invoking considerations of "fairness" for Iran.¹¹⁴

CLAIM G-7 (PORT OF VANCOUVER)

53. This claim should be dismissed based on a series of settlement negotiations between the Parties which resulted in an Award on Agreed Terms settling the dispute in Case No. B67. Award No. 79-B-67-2 was issued 12 September 1983.¹¹⁵ Prior to that date, it must be inferred, if the Parties were complying in good faith with their obligations, that MORT and Port of Vancouver had the intention to settle. The liability of the United States, as with the other MORT claims, cannot possibly be engaged when, acting in the belief that a settlement remained a possibility that would return to MORT the properties it claimed, in order to promote settlement as it was required to do by Articles I and III(2) of the CSD, the United States and Iran chose not to intervene.

¹¹⁰ Separate Opinion of Judge Rosemary Barkett, ¶¶ 27-30.

¹¹¹ Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013), at 20–21 (cross-examination of Mr. Keane).

¹¹² Hearing Transcript, Cluster 2 – Day 1 (14 Oct. 2013), at 123–24 (examination of Mr. Keane).

¹¹³ Separate Opinion of Judge Rosemary Barkett, ¶ 30.

¹¹⁴ Partial Award, ¶ 1918.

¹¹⁵ *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award on Agreed Terms No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 338.

54. In addition, this claim is one that the majority should have dismissed based on the Award on Agreed Terms that settled the identical claim as Claim G-7 between the United States and the Islamic Republic of Iran.¹¹⁶ Moreover, in this case, there are additional reasons for finding that the Award was “appropriate in view of the framework provided by the Algiers Declarations” to the extent of precluding the majority finding of a violation of Paragraph 9.

55. The basic facts of the two cases are the same and simple to describe. Prior to the Iranian Revolution the Iranian Ministry of Road and Transportation (“MORT”), from and through a consortium of which the American company Morrison-Knudsen was the active member, had ordered various items of road-building equipment and prefabricated housing units, including from Morgan Equipment Co. and Transworld Housing, Inc.¹¹⁷ The housing units and some of the road-building items were shipped to and stored out of doors with the Port of Vancouver in the State of Washington to await transshipment to Iran,¹¹⁸ which due to the Revolution in Iran did not happen for some years.¹¹⁹ While there the stored items became subject to tax liens and also an attachment by one of the suppliers.¹²⁰ In addition, they suffered to an extent from their long exposure to the elements, and at the same time the Port of Vancouver, after a point, was not being paid its charges for storage.¹²¹

56. On 19 January 1982, therefore, Iran, in the form of MORT, filed at the Tribunal Case No. B67 against the Port of Vancouver pursuant to Article II(2) of the CSD, which vests the Tribunal with jurisdiction to adjudicate so-called “official claims,” *i.e.*, “of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.”¹²² Clearly MORT had the status of Iran under the CSD Article VII(3), which provides that “[f]or the purpose of this Agreement . . . ‘Iran’ means the Government of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.” Just as clearly, however, the Port of Vancouver of the State of Washington was the United States for purposes of the CSD, providing the basis for the Tribunal’s jurisdiction over the case, as it was, pursuant to Article VII(4) of the CSD, “an agency, instrumentality, or entity controlled by . . . [a] political

¹¹⁶ *Id.*

¹¹⁷ Purchase Order No. 88-231-500001-1, 26 July 1978 United States’ Brief and Evidence in Rebuttal, Claim G-7 (Port of Vancouver) Volume I (17 Jan. 2011), Ex. 2; Purchase Order No. 87-2101-1, 2 Aug. 1978. *Id.*, Ex. 3.

¹¹⁸ *Id.*, Ex. 4.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Claims Settlement Declaration, Art. II(2), *reprinted in* 1 IRAN-U.S. C.T.R. 9.

subdivision” of the Government of the United States. In other words, the Tribunal would have been required to dismiss Case No. B67 for lack of jurisdiction had Iran not alleged,¹²³ and the United States accepted,¹²⁴ that the Port of Vancouver “means” the United States pursuant to the CSD. Thus, any settlement of the case necessarily would be between Iran and the United States. This *lex specialis* of the Algiers Accords, that “[f]or purpose of” the Accords “‘Iran’ means” and “the ‘United States’ means,” establishes that Article VII(3) and (4) of the CSD did not establish a one-way street. If “the ‘United States’ means,” *inter alia*, the Port of Vancouver, equally the Port of Vancouver “means,” the United States. These provisions of the Algiers Accords are definitional, – “means” – hence they establish reciprocal equivalence.

57. In Case No. B67, MORT claimed, prior to settling the matter, specifically, just as it does in its Claim G-7 here, that the United States violated Paragraph 9 of the GD. It asserted that “Clause 9 of Articles 2 and 3 of the General Declaration considers the Defendant [United States, as the Port of Vancouver] as bound to restitute the properties of the Plaintiff [Iran as MORT];”¹²⁵ and “[T]he Defendant by incorrect behaviour and trampling under feet its own obligations under the Declarations (*restitution of the goods of the Plaintiff*), has deviated from the common intentions of both the parties who are bound to execute the Declarations...”¹²⁶ (Emphasis added.) In addition, Port of Vancouver was assailed on the same basis in Case No. B62, which then was reclassified as Case No. A31.¹²⁷ Moreover, the “Settlement Agreement” between the Parties to Case No. B67 expressly stated in the fourth of its five “Whereas” recitals:

WHEREAS, MRTR [Iran, as MORT] has filed a claim before the Tribunal against Port of Vancouver [as the United States], bearing number B-67, wherein MRTR claims that the property should have been returned to MRTR **based upon points 2 and 3 paragraph 9 of the Algerian General Declaration** and claims that MRTR is not responsible for storage charges claimed by the Port . . . (Emphasis added.)

The sixth and final “Whereas” recital of the Parties’ “Settlement Agreement” stated as follows:

WHEREAS, the parties to this Settlement Agreement wish to compromise **on the basis of the Algerian Declarations**, provided that, based on this Settlement Agreement, the Port [the United States] and MRTR [Iran] **agree to dispense**

¹²³ Statement of Claim of the Ministry of Roads and Transport (19 Jan 1982) in *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Claim B-67 (19 Jan. 1982), ¶ B.2.

¹²⁴ Memorial of the United States in Opposition to Claimant’s Request for Interim Measures, *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Claim B-67, note 1 (20 Aug. 1982).

¹²⁵ Request for Urgent Examination of File No. 4R 907 and Issuance of Order for Temporary Injunction, as Stated in the Text, and Completion of the File, at 6, *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Claim B-67 (30 June 1982).

¹²⁶ *Id.* at 7.

¹²⁷ See paragraphs 59 and 60 below.

with all of their claims against each other, whether before the Tribunal, legal courts or any other judicial or non-judicial authorities, when the Port [United States] has delivered the MRTR [Iranian] properties to MRTR [Iran] and the Tribunal has authorized all payments as provided in this Agreement. (Emphasis added.)

Interestingly, and unusually as regards such agreements resulting in Tribunal Awards on Agreed Terms, this “Settlement Agreement,” doubtless because it required four staged payments to the Port of Vancouver totaling \$3,000,000, contained a provision for retention of jurisdiction by the Tribunal in case of a default by either Party in the performance of the Agreement:

Article Eight:

In the event of a default arising out of this Settlement Agreement within six (6) months of the signing of this Agreement by either party, either party may notify the Tribunal, within thirty (30) days of the event of default, by filing a notice of default with the Tribunal, with a copy to the other party. In such an event, the Tribunal shall retain jurisdiction over the case and the case shall not be stricken [sic] from the Tribunal’s register.

58. On 12 September 1983, the Tribunal approved and adopted the Parties’ “Settlement Agreement,” expressly noting:

The Tribunal has satisfied itself that it has jurisdiction in this matter within the terms of the Declaration of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran of 19 January 1981.¹²⁸

The Tribunal also took note of the Settlement Agreement’s provision for retention of its jurisdiction, which of course could be based solely and exclusively, as correctly explained by Judge Barkett in her Opinion,¹²⁹ on the Parties to that Agreement being the United States and Iran:

Proceedings before the Tribunal with respect to this claim shall be terminated on 17 March 1984, *provided that, prior to that date, no notice of default arising out of the Settlement Agreement or the Supplemental Settlement Agreement has been filed with the Tribunal by either party pursuant to Article Eight of the Settlement Agreement, as amended by the Supplemental Settlement Agreement. If such a notice of default is filed by either party, the Tribunal shall retain jurisdiction over this claim.*¹³⁰ (Emphasis added.)

¹²⁸ *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award on Agreed Terms No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 338, 338-39.

¹²⁹ Separate Opinion of Judge Rosemary Barkett, ¶ 32.

¹³⁰ *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award on Agreed Terms No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 338, 340.

That the settlement of Case No. B67 was indeed between the United States and Iran was further confirmed by the Concurring Opinion of Judge George H. Aldrich:

[T]he instant claim is a claim covered by Article II, paragraph 2 of the Claims Settlement Declaration as an official claim between a United States governmental entity and an Iranian governmental entity. . . .¹³¹

I fail to understand how the settlement by means of a Tribunal Award on Agreed Terms of a claim by “Iran,” as defined in Article VII(3) of the CSD, against “the United States,” as defined in Article VII(4) of the CSD, which claim expressly charges that the United States itself, and not a “political subdivision . . . , [or] agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof,” has breached Paragraph 9 of the General Declaration, does not bind both the Government of the United States and the Government of Iran. I am entirely in agreement with Judge Barkett, who rightfully notes that the claim in Case No. B67 and in Claim G-7 not only involves the same parties, Iran and the United States, but also the same property, the same damages claims, and the same legal obligations.¹³² Furthermore, due to Claim G-7 and Case No. B67 both alleging United States breach of Paragraph 9, the Award was “appropriate in view of the framework provided by the Algiers Declarations” in that it disposed of Iran’s Paragraph 9 claim in returning to Iran its property. Irrespective of whether Case No. B67 was correctly designated as a “B” case, *i.e.*, an “official claim,” rather than as an “A” case, per Paragraph 17 of the GD (“dispute . . . as to the interpretation or performance of any provision” of the General Declaration, including its Paragraph 9), the fact remains that the United States and Iran settled that claim, thus eliminating any jurisdiction of this Tribunal over Claim G-7.¹³³

59. I also concur with Judge Johnson’s and Judge Barkett’s conclusions regarding the application of the principle of mitigation to this claim as it concerns the evaluation of damages.¹³⁴ The majority erroneously concludes, in Paragraph 2171, that it will not apply the doctrine of mitigation on the basis of a reasoning that has been extensively and rightly criticized by Judge Barkett and Judge Johnson.

¹³¹ Concurring Opinion of George H. Aldrich in *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 348, 348.

¹³² Separate Opinion of Judge Rosemary Barkett, ¶¶ 31-37.

¹³³ In fact, the Tribunal rather facetiously reclassified Cases from time to time in order to more correctly characterize claims submitted by Iran that often, as with the Port of Vancouver, asserted confused or mixed claims. *See, e.g.*, Paragraphs 61-64 below.

¹³⁴ Separate Opinion of Judge O. Thomas Johnson, ¶¶ 1-37; Separate Opinion of Judge Rosemary Barkett, ¶¶ 38-43.

60. Finally, the majority awards Iran travel costs although by its own admission the amount claimed by Iran “is not supported by any evidence.”¹³⁵ An award of damages cannot be based on speculation alone, and I support Judge Barkett’s view that “[p]ursuant to the precedent of this Tribunal and international law, no damage . . . should be awarded . . . for which absolutely no evidence has been presented”.¹³⁶

CLAIM G-8 (GULF PORTS CRATING CO.)

61. This claim is related to the Port of Vancouver claim (G-7, just above), though Gulf Ports Crating Co. (“Gulf Ports”) does not fall within the CSD’s definition of the United States. Otherwise, like the Port of Vancouver, it was simply another repository, in both Houston, Texas, and New Orleans, Louisiana, of some of the materials that MORT had ordered prior to the Iranian Revolution from or through Morrison-Knudsen, other parts of which had been sent to the Port of Vancouver. As in the case of the Port of Vancouver, MORT did not actually arrange for shipment to Iran on the schedule originally envisioned, and stopped paying Gulf Ports’ charges.¹³⁷ As a result, it was sued on 22 February 1979 by Morgan Equipment Co., one of the suppliers to Morrison-Knudsen on behalf of MORT, in the Civil District Court for the Parish of Orleans to collect payment for what it had supplied by filing a petition for writ of attachment.¹³⁸ Morgan Equipment Co. secured the issuance of an order of attachment,¹³⁹ which, however, was never executed.¹⁴⁰ A year later, on 22 February 1980, Gulf Ports itself sued MORT in the United States District Court for the Southern District of Texas and secured an order attaching the MORT items in its custody and control.¹⁴¹ In this latter case, the United States submitted several Statements of Interest pursuant to 28 U.S.C. Sec. 517, and following the entry into force of the Algiers Accords on 19 January 1981, persuaded the Court to stay the

¹³⁵ Partial Award, ¶ 2052.

¹³⁶ Concurring and Dissenting Opinion of Judge Rosemary Barkett, ¶ 47.

¹³⁷ See Petition for Writ of Attachment at 2-3, Morgan Equipment Co. v. The Ministry of Roads and Transportation, No. 79-2721 (La. Dist. Ct. 22 Feb. 1979). Response of the United States to Claimant’s Brief and Evidence: Claim G-008 (Gulf Ports Crating Company) (26 Sept. 2001), Ex. 3 (hereinafter “US Response to Claimant’s Brief and Evidence: Claim G-008”).

¹³⁸ *Id.*

¹³⁹ *Id.*, Ex. 4,

¹⁴⁰ Morgan Statement of Defense to Counterclaim, Case No. 280, (“although a writ of attachment was granted, it was never served on any of MORT’s property. Stated differently, the Sheriff was specifically instructed by Morgan not to seize any assets via the writ”). Statement of Defense to Counterclaim in *Morgan Equipment Company and The Islamic Republic of Iran, et al.*, Case No. 280 (18 Apr. 1983), pp. 3-4.

¹⁴¹ Order Granting Writ of Prejudgment Attachment, Gulf Ports Crating Company v. The Ministry of Roads and Transportation, No. H-80-375 (S.D. Tex. 29 Feb. 1980). See US Response to Claimant’s Brief and Evidence: Claim G-008, Ex. 2, p. 4 “Gulf Ports’ . . . Order granting writ of prejudgment attachment entered on February 29, 1980.”

action permanently in favor of arbitration before this Tribunal by order of 7 July 1981. This decision was affirmed later by the United States Court of Appeals for the Fifth Circuit.¹⁴² In its Statement of Interest dated 27 February 1981, the United States cited, *inter alia*, its obligation to promote settlement as provided in Articles I and III(2) of the CSD, as it argued that the action should be stayed so that the United States was not placed “in breach of its international obligations.”¹⁴³

62. The reality is that MORT itself invited settlement talks in Vienna, Austria, where most of the many such talks were held in the fall of 1981.¹⁴⁴ In fact, MORT and Gulf Ports did meet in Vienna, and concluded a “Settlement Agreement” there on 17 November 1981.¹⁴⁵ The terms of that Agreement were that MORT would pay Gulf Ports \$886,135 for its charges through 31 March 1982, the timing of which payment was tied in Article II to Gulf Ports obtaining the necessary export licenses, “but not later than one hundred and five days of this Settlement Agreement.”¹⁴⁶ It was anticipated that MORT would be able to ship its goods prior to 31 March 1982, but nevertheless MORT agreed that it would pay, for any continued storage, further throughout 1983 should that occur, unless MORT’s failure to ship its goods was due to force majeure.¹⁴⁷ The “Settlement Agreement” expressly stated in its Article XI that:

This Settlement Agreement was the result of negotiations with respect to claims of nationals of the U.S. against the Islamic Republic of Iran as contemplated by the Algerian Declarations and was signed by the authorized representatives of the parties in Vienna, Austria.¹⁴⁸

Further, its Article VII contemplated submission to the Tribunal for its approval, which, however, did not in fact occur.

63. Sadly, notwithstanding this “Settlement Agreement,” MORT took no steps then to implement it, but it requested of Gulf Ports, which then agreed to, an extension from 31 March

¹⁴² Appeal from the United States District Court for the Southern District of Texas, *Gulf Ports Crating Company v. The Ministry of Roads and Transportation*, No.81-2298 (5th Cir. 21 Sept. 1981). US Response to Claimant’s Brief and Evidence: Claim G-008, Ex. 2.

¹⁴³ Statement of Interest of the United States, *Morgan Equipment Company v. Ministry of Roads and Transportation*, 27 Feb. 1981. United States’ Brief and Evidence in Rebuttal, Claim G-7 (Port of Vancouver) Volume II (17 Jan. 2011), Ex. 8, at 37.

¹⁴⁴ Hearing Transcript, Cluster 6 – Day 3 (15 May 2014) at 46.

¹⁴⁵ Settlement Agreement, 17 Nov. 1981. US Response to Claimant’s Brief and Evidence: Claim G-008, Ex. 7.

¹⁴⁶ *Id.*, Article II.

¹⁴⁷ *Id.*, Article IV.

¹⁴⁸ *Id.*, Article XI.

1982 until 30 June 1982.¹⁴⁹ Since any claims against MORT, however, would have to be filed at the Tribunal not later than 19 January 1982, Gulf Ports on 15 January 1982 filed its Claim No. 307 against MORT, while continuing to work for implementation of the “Settlement Agreement.” For its part, Iran itself on 19 January 1982 filed with the Tribunal Case No. B62, thus nominally an “official claim” of Iran against the United States, addressing MORT’s properties purchased from or through Morrison-Knudsen and stored at the Port of Vancouver, at Shiplside Packing Co. in Baltimore, Maryland, and also at Gulf Ports’ locations.

64. By Order of 21 October 1998 the Tribunal reclassified B62:

. . . [T]he Claimant asserts that the Respondent has failed to fulfill its obligations under the. . . [GD]. Accordingly, the dispute falls under Paragraph 17 of that Declaration and under Article II, paragraph 3 of [the CSD]. . . . In view of the above, this Case is reclassified and renumbered as Case No. A31, and . . . Chamber One relinquishes jurisdiction with respect to this Case to the Full Tribunal.

65. Twelve years later, on 29 September 2000, the Tribunal declined to order consolidation of A31 with A15 (II:A), notwithstanding that it found “that the properties at issue in Case No. A31 also appear to be at issue in . . . Case No. A15 (II:A)”:

The Tribunal’s practice in similar situations is to consolidate the cases concerned; nevertheless, in order to avoid any possible disruption of the briefing of the remaining issues in Case No. A15 (II:A), which is far advanced, and to move the legal and factual issues in Case No. A15 (II:A) expeditiously to a posture where they can be decided by the Tribunal, the Tribunal declines to consolidate Cases Nos. A31 and A15 (II:A) at this stage. The Tribunal expects to hold a Hearing in Case No. A15 (II:A) before the end of 2001.

66. In truth, the hearing in A15 (II:A) commenced only on 7 October 2013, 12 years later than predicted in 2000, and concluded only on 20 January 2015. Nevertheless the Tribunal added that “[t]he Parties may refer in Case No. A15 (II:A) to any documents filed in Case No. A31,” and provided further that “[s]hould any issues in Case No. A31 not be resolved in the Tribunal’s final determination of the claims in Case No. A15 (II:A), the Claimant will have the opportunity to pursue those issues in Case No. A31.” One wonders in retrospect why Case No. B67, the case dealt with above against the Port of Vancouver, was not likewise reclassified. The differences in the Tribunal’s handling of “B Cases” alleging United States’ violations of

¹⁴⁹ Letter from Gulf Ports Crating Company to Office of Foreign Assets Control, 30 Sept. 1982, Claimant’s Brief and Evidence in Rebuttal, Volume 3, Claim G-8, The Ministry of Road and Transportation (17 May 2006), Ex. 12, at 2 (hereinafter “Claimant’s Brief and Evidence in Rebuttal, Claim G-8”).

Paragraph 9 of the GD, reclassifying B62 as an “A Case” but leaving B67 untouched as a “B Case,” raise questions as to the consistency, if not the integrity, of the Tribunal’s procedures.

67. It was fully two years following the filing of those two cases, Claim No. 307 and Case No. B62, during which the “Settlement Agreement” of 17 November 1981 had not in fact been implemented by MORT, that Gulf Ports and MORT concluded on 24 February 1983 a second “Settlement Agreement” (“Second Settlement Agreement”),¹⁵⁰ which in fact was submitted to the Tribunal for issuance of an Award on Agreed Terms, and which the Tribunal then issued on 9 March 1983.¹⁵¹ On 1 July 1983, Gulf Ports received payment from MORT as was provided in the “Second Settlement Agreement” and the implementing Award on Agreed Terms.¹⁵²

68. By letter to the United States Agent to the Tribunal of 7 December 1983, however, the Agent to the Tribunal of the Islamic Republic of Iran informed the United States that “[a]ccording to information received from [MORT], . . . Gulf Port . . . declared its bankruptcy immediately after receiving [the funds payable to it under the Award on Agreed Terms] . . . [and] [t]he goods and properties belonging to MORT have been abandoned by Gulf Port”¹⁵³ In the same letter, the Agent of Iran, while referring “to para (9) of the [GD],” did not demand that the United States act pursuant to it, but instead demanded that “you will take prompt action for the proper implementation of the award rendered by the Tribunal.”¹⁵⁴ In other words, Iran implicitly agreed that as a settlement had been reached and approved by the Tribunal, the United States Paragraph 9 obligation under the GD had been satisfied, and in the circumstances had been succeeded by the United States obligation, later spelled out in the Tribunal’s Decision in Case No. A21, to “fulfil the object and purpose of the treaty [The Accords]” by “tak[ing] steps to ensure its effectiveness.”¹⁵⁵ Later, the Decision in Case No. A21 clarified that in such circumstances, the United States could be required directly to implement the Award. The very next month following the Iranian Agent’s demand for action

¹⁵⁰ Joint Request for an Arbitral Award on Agreement Terms, in *Gulf Port Crating Company and The Ministry of Roads and Transportation*, Case No. 307, Settlement Agreement, 24 Feb. 1983.

¹⁵¹ *Gulf Ports Crating Company and Ministry of Roads and Transportation of the Islamic Republic of Iran*, Award on Agreed Terms No. 28-307-3 (9 Mar. 1983), reprinted in 2 IRAN-U.S. C.T.R. 126.

¹⁵² Letter from Bank Melli Iran, 22 July 1983. Claimant’s Brief and Evidence in Rebuttal, Claim G-8, Ex. 21.

¹⁵³ Letter from Mohammad K. Eshragh to John Crook, 7 Dec. 1983. *Id.*, Ex. 29, at 1.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Islamic Republic of Iran and The United States of America*, Decision No. DEC 62-A21-FT, ¶ 14 (4 May 1987), reprinted in 14 IRAN-U.S. C.T.R. 324, 330-31.

the last MORT properties stored with Gulf Ports were shipped to Iran.¹⁵⁶ The majority should not have found as it did.

69. MORT and Gulf Ports concluded their second settlement agreement on 24 February 1984. Prior to that date, it is reasonable to infer that they continued to have the intention to settle even if they were not actually engaged full time in settlement discussions. As is often the case with settlement discussions, they were held at varying degrees of intensity throughout those years.

70. Thus, from 19 January 1981 to 17 November 1981, the Parties presumably were in active settlement negotiations as they concluded, on the latter date, a settlement agreement in Vienna, after which, they worked to implement the settlement agreement. It may be objected that intent to settle was absent once Gulf Ports filed its Claim No. 307 on 15 January 1982 and Iran, on 19 January 1982, submitted Case No. B62. Yet, these claims were filed in order to meet the 19 January 1982 deadline for filing claims at the Tribunal and contemporaneous evidence indicates that there was continued intent to settle. This is evidenced by a letter sent to the Tribunal by Gulf Ports on 5 May 1982 indicating that an agreement had been reached in Vienna and that Gulf Ports had sent a telex to MORT on 30 April 1982 “requesting execution of the agreement and payment.”¹⁵⁷ Thus, there remained an intent to settle. The issuance of a license to sell the property under Treasury Regulation 535.540 on 21 January 1983, which required the property holder, Gulf Ports, to have made “a good faith effort over a reasonable period of time to obtain payment . . .,” further confirmed those efforts to settle the claim. Notwithstanding issuance of that license, these efforts led to the conclusion of a second settlement agreement on 24 February 1983. The conclusion of a settlement thus remained a possibility between 19 January 1981 and 24 February 1983.

71. The liability of the United States, as with the other MORT claims, cannot possibly be engaged when, acting in the belief that the conclusion of a settlement that would return to MORT its claimed properties remained a possibility, the United States and Iran both chose to promote settlement as it was required to do under Articles I and III(2) of the CSD, rather than to intervene.

¹⁵⁶ Letter from John R. Crook to Mohammad K. Eshragh, 19 Jan. 1984. US Response to Claimant’s Brief and Evidence: Claim G-008, Ex. 12.

¹⁵⁷ Letter from Gulf Ports to Iran-United States Claims Tribunal, 5 May 1982. United States’ Brief and Evidence in Rebuttal, Claim G-8 (Gulf Ports Crating Co.) Volume II (17 June 2011), Ex. 6.

72. As with the other MORT claims, I concur with Judge Johnson's and Judge Barkett's conclusions regarding the application of the principle of mitigation to this claim as it concerns the valuation of damages.¹⁵⁸ Concretely, and as explained by Judge Johnson, Iran could have avoided a significant portion of the damages in this claim had it paid the accrued storage charges.¹⁵⁹ In addition, I also concur with Judge Barkett's additional conclusions regarding the majority's reasoning regarding damages in this claim. Judge Barkett correctly indicates that the majority incorrectly attributes to the United States the damage sustained by Iran between 1 March 1981 and the delivery of the equipment. As noted by Judge Barkett,¹⁶⁰ the earliest possible date by which MORT could have shipped the equipment was February 1982 and not 1 March 1981. The majority acknowledges that MORT located the equipment only on 17 August 1981, and since it would then have been required to prepare the equipment for shipment to Iran, a process that alone takes several months, the majority's finding that the United States violated Paragraph 9 as of 1 March 1981 is completely unrealistic. Accordingly, any damage that occurred prior to February 1982 cannot have been caused by, or be attributable to, the Unlawful Treasury Regulations. Judge Barkett also rightly notes that the majority gives no consideration to the provision of the Award on Agreed Terms which required MORT to remove all of the equipment from Gulf Ports by 30 June 1983.¹⁶¹ MORT failed to do so, removing the equipment only in February 1984. As such, the United States cannot possibly be held liable, as the majority suggests, for damage that occurred to the property after 30 June 1983.

73. In addition, I fully support Judge Barkett's criticism of the majority's award of damages for legal fees,¹⁶² a determination without any evidentiary basis. The majority awards Iran an additional U.S.\$10,000 in legal fees without any evidence to support it, as is detailed by Judge Barkett.¹⁶³ For the reasons stated above, and for those expressed by my colleagues Judge Johnson and Judge Barkett, I consider the majority's award of damages for this claim to be entirely without justification.

¹⁵⁸ Separate Opinion of Judge O. Thomas Johnson, ¶¶ 1-37; Separate Opinion of Judge Rosemary Barkett, ¶¶ 38-43.

¹⁵⁹ Separate Opinion of Judge O. Thomas Johnson, ¶ 4.

¹⁶⁰ Separate Opinion of Judge Rosemary Barkett, ¶ 44.

¹⁶¹ *Gulf Ports Crating Company and Ministry of Roads and Transportation of the Islamic Republic of Iran*, Award on Agreed Terms No. 28-307-3 (9 Mar. 1983), reprinted in 2 IRAN-U.S. C.T.R. 126; Separate Opinion of Judge Rosemary Barkett, ¶ 45.

¹⁶² Separate Opinion of Judge Rosemary Barkett, ¶ 48.

¹⁶³ *Id.*

CLAIM G-13 (SHIPSIDE)

74. This case is the third one arising out of MORT's transaction with Morrison-Knudsen, as the goods supplied by or through Morrison-Knudsen pursuant to that transaction were delivered to three companies at four ports, *i.e.*, the Port of Vancouver in Washington, Gulf Ports in Houston, Texas, and New Orleans, Louisiana, and Shipperside Packing Company, Inc. ("Shipperside") in Baltimore, Maryland. Given that MORT was involved as the Iranian party in all three cases, unsurprisingly Shipperside's history with MORT in the run-up to the Iranian Revolution, and subsequently, is similar to the experiences of the Port of Vancouver and Gulf Ports. While, for reasons unknown to the record in this case, MORT apparently did not seek to negotiate with the Port of Vancouver in Vienna in November of 1981, it did with respect to Shipperside,¹⁶⁴ as it did with Gulf Ports,¹⁶⁵ as prescribed by Articles I and III(2) of the CSD, and all three ultimately resulted in settlements being approved by the Tribunal in Awards on Agreed Terms.¹⁶⁶ Thus, from 19 January 1981 to 29 December 1981, the Parties were, presumably in active settlement negotiations, meeting in Vienna in November 1981 to negotiate a settlement, and finally concluding a tentative settlement agreement in Baltimore on 29 December 1981. As the deadline for filing claims was approaching, Shipperside filed a claim against MORT on 19 January 1982, followed by Iran filing on that same date Case No. B62. But the filing of these proceedings was not an indication that the Parties were abandoning their settlement negotiations, as Shipperside sent several telexes to MORT seeking resolution, and, on August of 1982, the Parties met again to try and reach a settlement. Further settlement discussions were held in May of 1983, and on 4 January 1984 the Parties concluded a settlement agreement. Thus, the possibility of settlement was envisaged by the Parties between 19 January 1981 and 4 January 1984.

75. In October of 1981 MORT proposed to Shipperside that they meet in Vienna to negotiate settlement of their differences.¹⁶⁷ The two did meet in Vienna in November of 1981, but did

¹⁶⁴ Affidavit of William C. Miller in Claim G-013, 16 Aug. 2001, ¶ 10. Response of the United States to Claimant's Brief and Evidence: Claim G-013 (Shipperside Packing Company, Inc.) (26 Sept. 2001), Ex. 2 (hereinafter "US Response to Claimant's Brief and Evidence: Claim G-013").

¹⁶⁵ Settlement Agreement, 17 Nov. 1981, Article XI. US Response to Claimant's Brief and Evidence: Claim G-008, Ex. 7.

¹⁶⁶ *Gulf Ports Crating Company and Ministry of Roads and Transportation of the Islamic Republic of Iran*, Award on Agreed Terms No. 28-307-3 (9 Mar. 1983), reprinted in 2 IRAN-U.S. C.T.R. 126; *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award on Agreed Terms No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 338, 340; *Shipperside Packing Company, Incorporated and The Islamic Republic of Iran*, Award on Agreed Terms No. 102-11875-1 (12 Jan. 1984), reprinted in 5 IRAN-U.S. C.T.R. 80.

¹⁶⁷ Affidavit of William C. Miller in Claim G-013, 16 Aug. 2001. US Response to Claimant's Brief and Evidence: Claim G-013, Ex. 2, ¶ 9 (hereinafter "US Response to Claimant's Brief and Evidence: Claim G-013").

not reach agreement.¹⁶⁸ The next month, however, on 29 December 1981, the Parties met again, this time in Baltimore, again at the behest of MORT,¹⁶⁹ and reached a tentative settlement agreement.¹⁷⁰ Given, however, that the settlement had not been finally completed, and that the deadline for filing claims was just 21 days away (on 19 January 1982), Shipline's claim against MORT for unpaid storage charges was filed with the Tribunal on 19 January 1982 by the United States as a "claim[] of less than \$250,000" (in fact for \$106,361.95, plus interest and costs) pursuant to Article III(3) of the CSD.¹⁷¹ Also on 19 January 1982 Iran filed Case No. B62, which is discussed in Paragraphs 59-62 above. On 4 August 1982, Shipline and MORT met in New York and agreed that what at the time was the proposed settlement of MORT with the Port of Vancouver could be used as a starting point for drafting a final settlement agreement.¹⁷² Following half a year or more, during which MORT failed to respond to Shipline's correspondence in furtherance of the settlement discussions,¹⁷³ MORT again contacted Shipline in April 1983 to arrange another settlement meeting, which then did take place in May of 1983, in Baltimore. Following a further delay due to a turnover in the office of the Agent of Iran to the Tribunal,¹⁷⁴ the Parties finally succeeded on 4 January 1984 in concluding a settlement, which was submitted to the Tribunal for approval and resulted in an Award on Agreed Terms.¹⁷⁵ The settlement was quickly fully performed, as on 1 February 1984 Shipline and MORT notified the Tribunal to that effect.¹⁷⁶

76. MORT and Shipline were in settlement discussions until 4 January 1984. Prior to that date, it is reasonable to infer that they continued to have the intention to settle even if they were not actually engaged full time in settlement discussions. As is often the case with these types of settlement discussions, they were held at varying degrees of intensity throughout those years.

¹⁶⁸ *Id.*, ¶ 10.

¹⁶⁹ *Id.*, ¶ 11.

¹⁷⁰ *Id.*

¹⁷¹ Claim of United States National, *United States of America, on behalf and for the benefit of Shipline Packing Company, Incorporated and Islamic Republic of Iran*, 19 Jan. 1982. Claimant's Brief and Evidence in Rebuttal, Claim G-131, Ex. 10.

¹⁷² Affidavit of William C. Miller in Claim G-013, 16 Aug. 2001. US Response to Claimant's Brief and Evidence: Claim G-013, Ex. 2, ¶ 13.

¹⁷³ Affidavit of William C. Miller in Claim G-013, 16 Aug. 2001. *Id.*, ¶ 14.

¹⁷⁴ Affidavit of William C. Miller in Claim G-013, 16 Aug. 2001. *Id.*

¹⁷⁵ *Shipline Packing Company, Incorporated and The Islamic Republic of Iran*, Award on Agreed Terms No. 102-11875-1 (12 Jan. 1984), reprinted in 5 IRAN-U.S. C.T.R. 80.

¹⁷⁶ Statement in Connection with Arbitral Award on Agreed Terms, 1 Feb. 1984. US Response to Claimant's Brief and Evidence: Claim G-013, Ex. 6.

77. The liability of the United States, as with the other MORT claims, cannot possibly be engaged when, acting in the belief that the conclusion of a settlement that would return to MORT the properties it claimed remained a possibility, the United States and Iran chose to promote settlement as they were required to do under Articles I and III(2) of the CSD, rather than to intervene.

78. As with the other MORT claims, I concur with Judge Johnson's and Judge Barkett's analysis regarding the application of the principle of mitigation to this claim as it concerns the valuation of damages.¹⁷⁷

CLAIM G-131 (PIEDMONT)

79. My problem with the majority's disposition of this claim is that it totally omits to address the critical, indeed determinative issue, of whether either the United States or Piedmont ever was "directed . . . by the Government of Iran, acting through its authorized agent," to transfer the items in issue to Iran Aseman Airlines. The States Parties agreed, and the Tribunal confirmed in Award No. 529 at Paragraph 40, that this requirement is a condition of the United States' obligation under Paragraph 9 of the GD, following which "direction," if given, and "Iran" does not receive the appropriate response, still does not result in a violation by the United States of that obligation unless "upon indication by Iran" thereafter the United States then fails to "ensure that the holders of those properties would transfer them to Iran."

80. The majority has put forward the argument that "Iran's direction to a holder and indication to the United States would have been futile where Iranian properties within the jurisdiction of the United States were being withheld by their holders based on Section 535.333 of the Unlawful Treasury Regulations."¹⁷⁸ It continues by adding that "even if Iran had provided directions to a holder of such properties and an indication to the United States, the United States would not have arranged for their transfer to Iran. Hence, direction and indication by Iran with respect to contested properties would not offer any prospects of success."¹⁷⁹ There is no indication whatsoever, in Paragraph 40 of Award No. 529 or in the relevant dispositif at 77 a), however, that, as the majority asserts, Iran is absolved from providing "direction" simply by virtue of the existence of the Treasury Regulation that same Award found to be unlawful.

¹⁷⁷ Separate Opinion of Judge O. Thomas Johnson, ¶¶ 1-37; Separate Opinion of Judge Rosemary Barkett, ¶¶ 38-43.

¹⁷⁸ Partial Award, ¶ 208.

¹⁷⁹ *Id.*

The majority relies on a criterion of “futility”, but never explains its contours or its source. In fact, it contradicts Award No. 529 to presume futility rather than require it to be proven.

81. There is no evidence in the record that could have supported the conclusion that Iran gave the United States “direction.” In all of the majority’s treatment of this case, no such “direction,” hence no subsequent “indication,” appears in the evidence. In Paragraph 613 of the present Award, it is stated that on the eve of the auction of the airplane parts in issue on 14 April 1981 an unidentified person “who introduced himself as the attorney for the airlines and requested that the sale be postponed, so that payment of the amounts owed Piedmont could be arranged.”¹⁸⁰ That’s all there is. Following the auction, of course, as the majority has stated in connection with another claim, which also was settled, “[i]n concluding the settlement . . . , Iran Air waived all rights to the properties [claimed] . . . [and] these properties ceased to be ‘Iranian properties’ as of [the date of settlement], [the result being that] any breach of Paragraph 9 by the United States with respect to properties at issue . . . would have ceased as of [the date of settlement].”¹⁸¹ Hence, here that obligation ended as of the judicial auction depriving Aseman of title on 14 April 1981. As the majority has recorded, the United States argued precisely the point of lack of “direction,” let alone “indication,” as required of Iran prior to that date:

. . . [T]he United States argues that none of the evidence in the record shows that Aseman directed Piedmont to transfer the G-131 Items to Iran or provided sufficient funds to direct that transfer. Without such instructions, the United States submits, there was no obligation on the part of the property holder to transfer the property, or on the part of the United States to arrange for the transfer.

According to the United States, Iran has failed to show that it notified the United States of any problems relating to the G-131 Items being held by Piedmont until 31 August 1983, when Iran submitted this Claim to the Tribunal, more than two years after the auction of the parts had taken place.¹⁸²

Nowhere has the majority dealt with the absence of the requirements of “direction” by Iran or, had there been such a “direction,” “indication by Iran.” In this respect, it has ignored the dictates of Award 529-A15-FT, which for the present proceeding is *res judicata*.

¹⁸⁰ See also Letter from USAir to the Office of Foreign Assets Control, 10 Sept. 1990. Response of the United States to Claimant’s Brief and Evidence: Claim G-131 (Piedmont/USAir) (26 Sept. 2001), Ex. 4.

¹⁸¹ Partial Award, ¶ 749.

¹⁸² *Id.*, ¶ 623-24.

CLAIM SUPP. (2)-56 (AIRESEARCH)

82. One of the more disturbing conclusions of the majority is its decision to grant this claim, find[ing] the United States in breach of its Paragraph 9 obligation,¹⁸³ notwithstanding the fact that it was Iran itself, in the person of Iran Air, that on 15 October 1985 chose to bring suit in the United States District Court for the Eastern District of New York against the holder of the properties in issue.¹⁸⁴ A settlement was reached between the Parties on 27 October 1986 and thereafter the case was dismissed.¹⁸⁵ The settlement agreement included a mutual release of claims for all the properties at issue in this claim, both the purchase orders and the repair orders.¹⁸⁶ How can it be that when Iran itself departs from what it has argued before the Tribunal is the scheme of the Algiers Accords, by itself suing the American holder of its properties, then enters into a complete settlement, it can be awarded a second bite of the apple at this Tribunal having followed the scheme which it consciously had eschewed before the Tribunal, notwithstanding the various other lawsuits it had brought in United States courts? In this case it seems to me that Iran chose a different route than Paragraph 9 of the GD and should bear the entire consequences of its decision to do so. Adding insult to injury, the majority awards Iran the legal fees incurred by Airesearch in concluding that settlement.

CLAIM G-32 (CHOGHA MISH)

83. Although the majority finally determined that “the damages claimed by Iran as compensation for the loss of use of the Chogha Mish Artifacts are unduly speculative,”¹⁸⁷ and considered only legal costs for the period beginning July 2006, the Award’s declaration that the United States was “in breach of its Paragraph 9 obligation . . . (i) between 10 October 1985 and 7 September 2000”¹⁸⁸ stands as a form of relief granted as satisfaction for an uncompensable wrongful international act¹⁸⁹ and therefore must be addressed. I do accept,

¹⁸³ *Id.*, ¶ 749.

¹⁸⁴ Complaint, Iran National Airlines Corporation v. The Garrett Corporation, No. CV-85-3764, (E.D.N.Y. 15 Oct. 1985). Response of the United States to Claimant’s Brief and Evidence: Claims Supp. (2)-44 and Supp. (2)-56, Ex. 4.

¹⁸⁵ Dismissal, Iran National Airlines Corporation v. The Garrett Corporation, No. CV-85-3764, (E.D.N.Y. 30 Oct. 1986). *Id.*, Ex. 6.

¹⁸⁶ Mutual Release of Claims and Settlement Agreement, 27 Oct. 1986. *Id.*, Ex. 5.

¹⁸⁷ Partial Award, ¶ 2455.

¹⁸⁸ *Id.*, ¶ 1144.

¹⁸⁹ See International Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Rep. of the Int’l Law Comm’n, 53rd sess, 23 Apr.-1 June, 2 July-10 Aug. 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No 10 (2001), Article 37(6) (“One of the most common modalities of

however, the majority's finding that the United States was in breach of that obligation for a succeeding period, "(ii) between 17 September 2002 and 9 October 2014."¹⁹⁰

84. On 10 October 1985 the Institute confirmed in writing to the Department of State that it had identified 30 seal impressions which might be among the items that Iran had listed as unreturned from Iran's Bastan Museum's 1970 loan of Chogha Mish artifacts to the Institute.¹⁹¹ It noted, however, that it had some difficulty identifying allegedly missing items from the list that Iran had provided to the United States on 17 July 1985.¹⁹² The Institute indicated further that in order to ship such items to the Bastan Museum it would require appropriate shipping instructions, which it had not received.¹⁹³ This information was not included in the State Department's report to the Tribunal and Iran in this case until five years later, however, on 5 July 1990,¹⁹⁴ which clearly does justify five years of the majority's 15-year initial period of the breach it has determined. Thereafter, however, it was a year, until 15 May 1991,¹⁹⁵ before the Museum requested the Institute to deliver the 30 items mentioned. Again, the Museum did not provide any shipping instructions, which Award No. 529 made clear were necessary. At Paragraph 40, the Tribunal explains that "the [Paragraph 9] obligation to 'arrange for' the transfer of properties did not include an obligation for the United States itself to ship any Iranian properties to Iran." That year, between 5 July 1990 and 15 May 1991, should be excluded from that period of United States liability. After a further year, the Institute replied, on 6 May 1992, to the Museum's 15 May 1991 letter, listing a further 43 items that Iran had indicated were missing, and, apart from requesting a complete description of any other missing loaned items, specifically requested shipping instructions, even offering to have someone hand-carry the missing objects to Iran.¹⁹⁶ Despite this, no response was forthcoming from Iran for another four and a half years, until 10 January 1997, when Iran, while listing a total of 109 objects

satisfaction provided in the case of moral or non-material injury to the State is a declaration of wrongfulness of the act by a competent court or tribunal.")

¹⁹⁰ Partial Award, ¶ 1144.

¹⁹¹ Letter from the Oriental Institute to the Office of International Claims and Investment Disputes, 10 Oct. 1985. Response of the United States to Claimant's Brief and Evidence: Claim G-032 (Oriental Institute) (26 Sept. 2001), Ex. C (hereinafter "US Response to Claimant's Brief and Evidence: Claim G-032").

¹⁹² Letter from the Oriental Institute to the Office of International Claims and Investment Disputes, 10 Oct. 1985. *Id.*

¹⁹³ *Id.*

¹⁹⁴ Report of the United States: Update on Tangible Properties Claimed by Iran, at 21.

¹⁹⁵ Letter from the Iranian Cultural Heritage Organization to the Oriental Institute, 15 May 1991. Newly Discovered Documents, Claim G-32, Iranian Cultural Heritage Organization (8 Aug. 2007), Ex. 25 (hereinafter "Newly Discovered Document, Claim G-32").

¹⁹⁶ Letter from the Oriental Institute to the Iranian Cultural Heritage Organization, 6 May 1992. US Response to Claimant's Brief and Evidence: Claim G-032, Ex. D.

claimed to be missing, once more utterly failed to provide any shipping instructions.¹⁹⁷ It appears that shortly later, on 4 July 1997, the Institute responded that it had located up to 50 of the 109 listed objects, but that as to the remaining 59 it required the “prefixes,” or “field numbers” as they are known in archaeological terms, which correspond to the particular excavation season in which the object was unearthed.¹⁹⁸ Having only the “registration numbers” did not enable the Institute to identify objects with certainty.¹⁹⁹ Shortly later, on 27 July 1997, Iran responded, requesting shipment of the 50 items mentioned by the Institute, promising to revert with the requested “prefixes” (which the record does not indicate it ever did), but failing once more to provide any shipping instructions.²⁰⁰ Following inquiries by the United States to both the Institute and Iran in September 2000 and March 2001, respectively,²⁰¹ the Institute informed the United States on 7 June 2001 that it had identified 108 of the allegedly 109 missing objects (stating that one was a duplicate).²⁰² Finally, after all the uncertain and confusing back-and-forth between the Institute and the Museum in the attempt actually to identify the missing items, the United States and Iranian Agents to the Tribunal agreed on 5 September 2001 to exchange the items in The Hague, which for reasons unknown never occurred.²⁰³ Considering all of the above-mentioned exchanges, and the time lapses involved, I find it inappropriate to have charged the United States with more than six years (17 July 1985-5 July 1990 and 15 May 1991-6 May 1992) of the 15 years between 10 October 1985 and 7 September 2000 during which the majority has found the United States to have been in breach of Paragraph 9 of the GD.

85. As to the legal costs assessed by the majority as damages, I concur with the Opinion of Judge Johnson that Iran’s joint legal fees for the Chogha Mish and Persepolis artifacts would have arisen regardless of the United States’ Paragraph 9 violation relating only to the Chogha

¹⁹⁷ Letter from the National Museum of Iran to the Oriental Institute, 10 Jan. 1997. US Response to Claimant’s Brief and Evidence: Claim G-032, Ex. E.

¹⁹⁸ Letter from the Oriental Institute to the Iranian Cultural Heritage Organization, 4 July 1997. United States’ Rejoinder to Claimant’s Reply, Claim G-32 (Oriental Institute) (20 Mar. 2013), Ex. A.

¹⁹⁹ Hearing, Cluster 9 – Day 2 (11 Nov. 2014), at 104.

²⁰⁰ Letter from Iranian Cultural Heritage Organization to the Oriental Institute, 27 July 1997. Newly Discovered Documents, Claim G-32, Ex. 24.

²⁰¹ Letter from Office of International Claims and Investment Disputes to the Oriental Institute, 7 Sept. 2000. *Id.*, Ex. 26; Letter from the United States Embassy to the Agent of the Islamic Republic of Iran, 12 March 2001. US Response to Claimant’s Brief and Evidence: Claim G-032, Ex. F.

²⁰² E-mail from the Oriental Institute to the State Department, 7 June 2001. US Response to Claimant’s Brief and Evidence: Claim G-032, Ex. 12.

²⁰³ Letter from the Agent of the Islamic Republic of Iran to the Agent of the United States, 5 Sept. 2001. Claimant’s Brief and Evidence in Rebuttal, Volume 11, Claim G-32, Iranian Cultural Heritage Organization (17 May 2006), Ex. 5.

Mish artifacts and not at all regarding the Persepolis ones,²⁰⁴ the far, far greater value of which is not disputed. It is ironic that the majority awards Iran 50 percent of its Rubin litigation costs in respect of the Chogha Mish artifacts, as to which no other damages are awarded. Judge Barkett correctly has noted the virtually inhuman stretch in reasoning required to come to the conclusion that a significant amount of legal fees would have been spent in relation to property having virtually no monetary value when the purpose of the litigation, of which the Chogha Mish artifacts were but a minor component, was to satisfy a judgment of U.S.\$71.5 million against Iran.²⁰⁵

CLAIM G-115 (UNC CHAPEL HILL)

86. Notwithstanding the fact that ultimately the Award in this case “dismisses in its entirety Iran’s request for compensation” for this claim,²⁰⁶ the Award’s declaration that “during the period from 1 March 1985 until 13 June 1989, the United States was in breach of its Paragraph 9 obligation”²⁰⁷ similar to the claim concerning Chogha Mish, stands as a form of relief granted as satisfaction for a wrongful international act for which no damages are awarded. Such a determination must be addressed.

87. The United States’ actions in relation to this claim were complicated by the fact that the holder of the macadamized fossils, Dr. Douglas Lay of the faculty of the University of North Carolina in Chapel Hill, North Carolina, made untruthful statements to both Iran and the United States Department of State over a significant period of time in addition to being unresponsive to correspondence. That raises the question of whether or not, and, potentially to what extent, the United States’ failure to meet its obligation under Paragraph 9 of the GD is chargeable to the United States insofar as it was attributable to Professor Lay’s deceitful conduct.

88. On 1 February 1983 Professor Lay informed the Iranian Interests Section in Washington, D.C. in writing, following the Section’s inquiry of him, that he would return the cleaned specimens to Iran on or before 1 August 1983.²⁰⁸ In fact, he did not do so. On 27

²⁰⁴ Separate Opinion of Judge O. Thomas Johnson, ¶¶ 48-61.

²⁰⁵ Separate Opinion of Judge Rosemary Barkett, ¶ 55.

²⁰⁶ Partial Award, ¶ 2471.

²⁰⁷ *Id.*, ¶¶ 1188, 2466.

²⁰⁸ Letter from Douglas M. Lay to Iranian Interest Section, 1 Feb. 1983. Response of the United States to Claimant’s Brief and Evidence: Claim G-115 (University of North Carolina) (26 Sept, 2001), Ex. 2 (hereinafter “US Response to Claimant’s Brief and Evidence: Claim G-115”).

January 1984, the United States was informed for the first time by Iran that the macadamized fossils were still in the possession of Professor Lay.²⁰⁹ Thereupon, the State Department, at some time after 1 March 1984, was in conversation with Professor Lay, who informed the Department that he had shipped the fossils back to Iran on or about 1 March 1984.²¹⁰ This, as the United States later would learn, also was not true. On the strength of that representation, however, the State Department on 17 September 1984 informed Iran to the same effect.²¹¹ Not surprisingly, therefore, Iran notified the United States on 17 December 1984 that the items in fact had not been received by Iran.²¹² Prompted by that notification, the State Department on 4 October 1985 started boring in on Professor Lay, requesting in writing that he provide it with documentation of the shipment he had stated falsely more than a year earlier that he had shipped to Iran on or about 1 March 1984.²¹³ Although no response had been received from Professor Lay to that inquiry, the State Department, on the basis of its last communication from Professor Lay, repeated to Iran just a few weeks later, on 30 October 1985, that the items had been shipped to it by Professor Lay on or about March 1 of the previous year, 1984.²¹⁴ Inexplicably, it was nearly four years later that the United States, having heard no more in the meantime from Professor Lay, and having again been told by Iran on 13 November 1987 that it had not received the objects from Professor Lay,²¹⁵ on 13 June 1989 inquired once more of Professor Lay.²¹⁶ It was nearly two months after that that Professor Lay, on 10 August 1989, admitted to the State Department that the objects of which Iran had been seeking the return for years were in fact still in his possession, hence he had lied to the State Department four years earlier when he had told it that he had shipped them to Iran on or about 1 March 1984.²¹⁷ Doubtless shocked by this admission of calculated deceit by Professor Lay, the State Department

²⁰⁹ Iran's Response to the United States' Request for Additional Information on Iranian Properties in the United States (27 Jan. 1984), p. 16.

²¹⁰ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 4 Oct. 1985. US Response to Claimant's Brief and Evidence: Claim G-115, Ex. 3.

²¹¹ Report of the United States Government (17 Sept. 1984), p. 41.

²¹² Report of the Islamic Republic of Iran on the Iranian Properties in the United States (17 Dec. 1984), p. 43.

²¹³ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 4 Oct. 1985. US Response to Claimant's Brief and Evidence: Claim G-115, Ex. 3.

²¹⁴ Consolidated Report of the United States (30 Oct. 1985), p. 44.

²¹⁵ Consolidated Report of the Government of the Islamic Republic of Iran in Compliance with the Tribunal Orders Dated 10 Nov. 1987 & 4 Sept. 1985 (13 Nov. 1987), p. 78.

²¹⁶ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 13 June 1989. US Response to Claimant's Brief and Evidence: Claim G-115, Ex. 6.

²¹⁷ Letter from Douglas M. Lay to International Claims Department of State, 10 Aug. 1989. *Id.*, Ex. 7.

addressed correspondence to him, first on 25 September 1989,²¹⁸ to which he did not respond, then again on 31 October 1989,²¹⁹ in which latter letter he was sternly admonished that in the absence of proof from him of legal justification to be in possession still of the fossils “you will be deemed to be wrongfully withholding property belonging to Iran. . . . [and] in such a case, the U.S. Government must then look to the holder of the properties, in this case you, to satisfy any judgment. . . . [W]e *must have your immediate cooperation*”²²⁰ (Emphasis in the original as to “must” and “immediate;” otherwise added.) Apparently, this threat of unknown magnitude to Professor Lay’s own pocketbook galvanized him into action. Though he never responded to the Department’s two strongly worded letters of 25 September and 31 October 1989, when again contacted by the Department on 26 June 1990²²¹ he informed it the following day that he had in fact shipped everything to the Iranian Interests Section in Washington, D.C. on 16 May 1990 and provided it with documentation of the shipment.²²² Professor Lay described “feeling pressured by phone calls from State Department personnel” between 1984 and 1990 when he had been contacted “via phone and letter numerous times.”²²³

89. The majority is correct in not having charged the United States with breaching Paragraph 9 during the period that it was misled by the prevarication of Professor Lay. The majority reasonably has concluded as well that by 1 March 1985, instead of only on 4 October 1985, the United States should have reacted to the notification by Iran on 17 November 1984 that it had not received the objects from Professor Lay which the United States on 17 September 1984 had represented, as Professor Lay falsely had informed it, had been shipped by him to Iran on or before 1 March 1984. The United States’ repetition to Iran of that representation on 30 October 1985, notwithstanding that it had received no response from Professor Lay to its 4 October 1985 written request for documentation of the alleged shipment, constituted a further lapse of the due attention by then required of the United States by Paragraph 9 of the GD. To have waited from then until 13 June 1989, a period of nearly four years, before chasing Professor Lay again certainly constituted a further lapse of duty. As a result, I agree with the

²¹⁸ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 25 Sept. 1989. *Id.*, Ex. 8.

²¹⁹ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 31 Oct. 1989. *Id.*, Ex. 9.

²²⁰ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 31 Oct. 1989. *Id.*

²²¹ Letter from Office of International Claims and Investment Disputes to Douglas M. Lay, 26 June 1990. *Id.*, Ex. 10.

²²² Bill of Lading from Douglas M. Lay, 16 May 1990. *Id.*, Ex. 11.

²²³ Affidavit of Douglas M. Lay, Ph.D in Claim G-115. *Id.*, Ex. 1, ¶¶ 18, 19.

majority's determination of liability in this case as extending for the period 1 March 1985 to 13 June 1989, thus excluding the period during which the United States, alerted to the issue by Iran, was actively misled by Professor Lay.

CLAIM G-172 (MIDLAND), CLAIM G-174 (PROCESS SALES AND SAGEBRUSH) AND CLAIM 1996 E/F (WILSON INDUSTRIES)

90. I concur with the Opinion of Judge Barkett, which would dismiss these claims on the basis that there is inadequate evidentiary support for a finding of liability.²²⁴

91. As to the claims in G-172 (Midland) and G-174 (Process Sales and Sagebrush), Judge Barkett correctly points out that the evidentiary confusion surrounding these claims makes it impossible to determine which properties were located in the United States on the date of the Accords.²²⁵

92. In the context of this confusion, the United States was not provided an opportunity to secure the return of the properties. Iran first requested the return of these properties in its Reply to the United States' Statement of Defense on 31 August 1983,²²⁶ after most of these properties, as explained in detail by the majority,²²⁷ had long since been sold or returned by its agent, AIOC, to settle unpaid claims owed to third parties for which Kharg had not paid.²²⁸ In its submission of 1983, Iran did not give the United States any indication that it required assistance with the transfer of the properties. As noted in this Opinion's discussion of Piedmont at Paragraph 81, the Tribunal confirmed in Award No. 529 at Paragraph 40 that the United States does not violate its obligation under Paragraph 9 of the GD unless, "upon indication by Iran" after having given "direction," the United States then fails to "ensure that the holders of those properties would transfer to them to Iran." In the present claim, the United States was never afforded the opportunity to take the requisite steps to arrange for the transfer of the properties, as it did not receive the required indication, and became aware of the properties only once they had already been sold. In any event, once the United States was made aware of the properties,

²²⁴ Separate Opinion of Judge Rosemary Barkett, ¶ 61.

²²⁵ *Id.*, ¶¶ 57-58.

²²⁶ Reply of the Islamic Republic of Iran to the Statement of Defense of the United States in Claims Nos. II-A and II-B (31 Aug. 1983), Appendix G, pp. 15-17.

²²⁷ Partial Award, ¶¶ 1404, 1450, 1470, 1539, 1611, 1654, 1667.

²²⁸ Affidavit of Arthur E. Piper, 27 Aug. 1984. Response of United States to Claimant's Brief and Evidence: Claims G-165-G-190 . . . , Volume I of III (Brief) (26 Sept. 2001), Ex. 3, ¶ 9.

it made reasonable efforts to investigate their whereabouts,²²⁹ and reported the results of its investigation to Iran.²³⁰

93. Similar evidentiary issues exist as to the G-1996 E/F (Wilson Industries) claim, which are compounded by the fact that Iran submitted that claim only on 26 December 1996, nearly two decades after the properties had been ordered. As noted by Judge Barkett, a finding of liability in this claim amounts to a denial of due process, as by 1996 the United States simply did not have the necessary information to locate the properties and arrange for their transfer.²³¹

94. The evidentiary issues in the claims described above make it impossible to arrive at a reasoned and supported damages figure.

Dated, The Hague

10 March 2020



Charles N. Brower

²²⁹ See, e.g. Letter from Office of International Claims and Investment Disputes to Process Sales Inc., 7 Oct. 1985. United States Brief and Evidence in Rebuttal, Claims G-165 to G-189 (17 Jan. 2011), Ex. 2.

²³⁰ Consolidated Report of the United States (30 Oct, 1985), at 63; Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990), at 63.

²³¹ Separate Opinion of Judge Rosemary Barkett, ¶ 60.