IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASES NOS. A15 (II:A), A26 (IV) AND B43
FULL TRIBUNAL
AWARD NO. 604-A15 (II:A)/A26 (IV)/B43-FT

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

And

THE UNITED STATES OF AMERICA,

Respondent

SEPARATE OPINION OF JUDGE SEYED JAMAL SEIFI
CONCURRING IN PART, DISSENTING IN PART

---

10 March 2020

Table of Contents **Page**

I. Introduction

1. I agree with many of the findings and reasoning of the Partial Award dated 10 March 2020 (the Partial Award or the PA). However, I disagree with the majority's methodology in relation to the meaning and scope of the term "all Iranian properties" as used in Paragraph 9 of the Algiers General Declaration (the General Declaration or the GD). I also disagree with the majority's decisions dismissing a claim based on that methodology, including Claims G-15, G-16 and G-111. Here I take issue with the majority's methodology and findings concerning the term "all Iranian properties".

2. In these proceedings Iran claims that the United States failed to perform its obligations under Paragraph 9 of the General Declaration, which provides:

> "Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of **all Iranian properties** which are located in the United States and abroad and which are not within the scope of the preceding paragraphs" (emphasis added).

3. The United States denies responsibility, disputing in many respects Iran's claims both in fact and in law.

4. This is a dispute arising from the interpretation and performance of a treaty, i.e., the General Declaration that jurisdictionally falls squarely and exclusively within the ambit of Paragraph 17 of the General Declaration[1] as well as Article II(3) of the Claims Settlement Declaration[2] (or the CSD).

[1] Paragraph 17 provides:

> "*If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws*."

[2] Article II (3) provides:

5. A core issue in these proceedings is the meaning and scope of the term "all Iranian properties" as used in Paragraph 9 of the General Declaration, which requires an interpretation in accordance with applicable rules of international law as enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties[3] (hereinafter the Vienna Convention), which the Tribunal has consistently applied in its past cases involving interpretation of the Algiers Declarations.[4]

"*The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration*"

[3] Articles 31 and 32 provide:

Article 31: *General rule of interpretation*

"*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32: *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its 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 or obscure; or

(b) *leads to a result which is manifestly absurd or unreasonable.*

[4] *See Islamic Republic of Iran* and *United States of America*, Decision No. DEC 32-A18-FT, at 14-15 (6 Apr. 1984), *reprinted in* 5 IRAN-U.S. C.T.R. 251, 259; *Islamic Republic of Iran* and *United States of America*, Award No. ITL 63-A15(I:G)-FT, para. 17 (20 Aug. 1986), *reprinted in* 12 IRAN-U.S. C.T.R. 40, 46; *Islamic Republic of Iran* and *United States of America*, Decision No. DEC 62-A21-FT, para. 8 (4 May 1987), *reprinted in* 14 IRAN-U.S. C.T.R. 324, 328; *Islamic Republic of Iran* and *United States of America*, Award No. 382-B1-FT, para. 47 (31 Aug. 1988), *reprinted in* 19 IRAN-U.S. C.T.R. 273, 287; *Islamic Republic of Iran* and *United States of America*, Award No. 590-A15(IV)/A24-FT, para. 73 (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 129; *Islamic Republic of Iran* and *United States of America*, Award No. 597-A11-FT, para. 181 (7 Apr. 2000), *reprinted in* 36 IRAN-U.S. C.T.R. 84, 128-29; and *United States of America* and *Islamic Republic of Iran*, Decision No. DEC 130-A28-FT, para. 53 (19 Dec. 2000), *reprinted in* 36 IRAN-U.S. C.T.R. 5, 21.

6. In this Partial Award the majority has asserted that Partial Award 529 of 6 May 1992[5] has already determined the meaning of the term "Iranian properties" when it stated that this term refers to the properties "*solely owned by Iran"*.[6] The majority has further found that in any event, "*applying Article 31 of the Vienna Convention*,"[7] the ordinary meaning of "*the text of Paragraph 9 is clear and unambiguous*"[8] and it refers to "*tangible properties that were owned by Iran or its entities*".[9]

7. Thereupon, the majority has continued its interpretive endeavours further and has concluded that "the legal basis of the ownership of property is title"[10], which is stated to be "the right or proof of ownership"[11], thereby consequently, but unquestionably, suggesting that the phrase "Iranian properties" is identical to the phrase "Iranian-titled properties". Further on, ostensibly in an attempt to establish the existence of title, but also necessarily the further meaning and scope of this new phrase, "Iranian-titled property", the majority has taken its interpretive endeavours to a distinctly new level- an exercise which undermines the asserted clarity and non-ambiguity of the text of Paragraph 9. That is, the majority has suggested referring to the "general principles of **private** international law" of property (emphasis added)[12] and thereby to an applicable domestic law to determine Iran's title to the properties in question. The authority for this latter exercise, i.e., the reference to the general principles of private international law of property, and thereby application of a domestic law for determination of the meaning, scope and existence of Iranian ownership, the majority argues, is based on Article V of the Claims Settlement Declaration. Notably, Article V requires the Tribunal to "*decide all cases on the basis of respect for law*" and authorizes it to determine the law applicable to the case through "*such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable […]".*

[5] Award No. 529-A15-FT dated 6 May 1992 reprinted in 28 Iran-U.S. C.T.R. 112.
[6] The Partial Award, Paras. 97-98.
[7] Ibid., Para. 103.
[8] Ibid., Para. 104.
[9] Ibid.
[10] Ibid., Para. 129.
[11] Ibid.
[12] Ibid., Paras. 139-143.

8. In my view, the majority's finding in relation to the meaning and scope of Iranian properties is based on a false premise when it concludes that Partial Award 529 has already decided the meaning of the term "Iranian properties". To conclude from the Tribunal statements in Partial Award 529, quoted above, that Award 529 has already decided the meaning of "Iranian properties" is an extraordinary leap as it fails to explain the details and specifics of the asserted meaning. This assertion is also conflicted by the history of the proceedings. In his Separate Opinion, President Hans van Houtte writes:

> "The Parties assumed for years that the determination of whether property was "Iranian" as between the seller and the buyer was a contractual issue between those parties governed, *inter alia*, by the proper law of the contract (*lex contractus*).[13] It was only at the Hearing session on 9 October 2013 that – in response to a question from the bench – the Parties' argumentation focused on the *lex situs*; from that point on, the *lex contractus* was virtually no longer considered."[14]

9. Indeed, the text of the question from the bench on 9 October 2013 throws a bigger light on the history of the proceedings, where it stated:

> "Therefore, I was a little puzzled to see in **the written submissions of both parties only reference to the issue of the law governing the contract.** The innocently bystanding private international law conflict of law student, of course, would ask, is property not a matter which is governed by the lex situs or the lex rei sitae?" (emphasis added).[15]

10. Now, therefore, the question arises if there was no trace of discussion of *lex situs* in the whole written pleadings of the Parties, and where there is no explicit reference to the term "title" in Partial Award 529, let alone to the concept of *lex situs*, how could possibly this Award have already decided that the measure of ownership of Iranian properties is "title"?

---

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

[14] Separate Opinion of Judge Hans van Houtte, Para. 12 (footnote omitted).

[15] Hearing Transcript, Cluster 1, Day 3, Doc. 2020, p. 252.

11. The assertion of resolution of the meaning of the term "Iranian properties" already in Partial Award 529 is also betrayed by the majority's completely new endeavour at resorting to the general principles of private international law in an attempt to determine the meaning of "Iranian properties". It also disregards the proceedings leading to Award 529 where the Tribunal ordered the Parties to submit reports identifying Iranian properties as a matter of fact, i.e., "to describe each item and indicate its owner",[16] ostensibly, in order to identify the instances where the Iranian ownership of the property in question was not disputed and the instances where the United States conceded Iranian ownership of an item of property. Implementation of this order consumed several years of the Parties' time and of the proceedings and led to submission of several rounds of consolidated reports.

12. The majority's finding is equally untenable when it concludes that the meaning of a treaty term, i.e., "all Iranian properties", should be established by reference to the general principles of private international law of property and the application of a domestic law.[17] The majority's conclusion is premised on a methodology which suffers from two serious flaws and consequently produces a definition of "Iranian property" which is in contravention of the applicable treaty provision and the common intention of the treaty parties.

13. First, in the present proceedings, the Tribunal is dealing with a claim exclusively based on a treaty, that is, the Algiers General Declaration and more specifically Paragraph 9. In other words, the law applicable to the dispute, and in fact the *lex specialis* of the case, is the treaty itself. This should automatically exclude the Tribunal from making further choice of law determinations - which may be relevant in deciding contract and commercial claims. Indeed, the first sentence of Article V of the CSD, incorporating the mandatory term "*shall"*, requires the Tribunal to "*decide all cases on the basis of respect for law [...]*".[18] Deciding on the basis of respect for law not only requires the Tribunal to respect the terms of the applicable treaty but

[16] Tribunal Order, 16 December 1983, Doc. 223, Para. 5.
[17] Ibid.
[18] "*Article V: The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.*"

also refrain from employing methods which in effect are tantamount to undermining the very same terms. The majority's entry into the exercise of making "choice of law" determinations in order to establish the meaning of a treaty provision – an exercise only relevant and available for determining the law applicable to a private and commercial claim - is an important flaw of methodology which effectively results in undermining the rule of respect for law.

14. It is true that Article V of the CSD authorizes the Tribunal to make choice of law determinations in the appropriate cases. It is equally true that the Tribunal has, *inter alia*, two distinct areas of jurisdiction, one belonging to the realm of private-commercial law, the other exclusively relating to the disputes arising from the interpretation and performance of a treaty. These two distinct areas of jurisdiction and the powers pertaining to their respective exercise should never be conflated and confused.

15. Second, the Partial Award's methodology has a further flawed consequence, that is, the imposition of the rules of private international law as a tool of treaty interpretation. In other words, in a process of decision-making which is admittedly an exercise in treaty interpretation, and under the guise of the exercise of powers under Article V of the CSD, the Partial Award has effectively imposed the rules of private international law as a tool of treaty interpretation- a notion which is unheard of in the realm of Articles 31 and 32 of the Vienna Convention or in the realm of the law of treaties generally.

16. To be sure, the majority remains rather ambivalent as to the exact legal and procedural nature of the above-mentioned exercise. The majority does not specify whether it refers to the general principles of private international law of property as a tool of treaty interpretation or rather as an independent process for determining the law applicable to the claim, or perhaps both of them. However, as is clear from the preceding paragraphs, there can only be two constructions for the majority's reference to the general principles of private international law of property. They should either be construed (a) as a tool of treaty interpretation under the Vienna Convention or (b)

as part of the process of determining the law applicable to determination of the claim. As will be discussed below, both of these constructions are imbued with considerable difficulties.

17. In this Opinion I will first analyze the difficulties, as I see them, with the majority's methodology in interpreting the term "Iranian properties". Thereafter, I will follow the inquiry by discussing what I call the false premise of reading into Partial Award 529 a pronouncement as to the meaning of the term "Iranian properties". Finally, I will offer my interpretation of the term "Iranian properties" in context in the sense of the elements enumerated in Article 31 of the Vienna Convention. In so doing, I will analyze (i) the ordinary meaning of the term "Iranian properties" as distinct from its technical-legal meaning, including, in light of; (ii) the diplomatic nature of the Iranian Proposals as contained in the Majlis Resolution; (iii) the acceptance by the United States of Proposal No. 2 of the Majlis Resolution, as distinguished from Proposal No. 4; (iv) the object and purpose of the Algiers Declarations; and (v) the principle of good faith.

II. "General Principles of Private International Law" and Treaty Interpretation

18. The rules in Articles 31 and 32 of the Vienna Convention are widely accepted to apply to interpretation of treaties. The International Court of Justice has regularly applied the Vienna Convention rules as stating customary international law.[19] As, indeed, stated in Paragraph 102 of the Partial Award and supported by a list of numerous awards and decisions in footnote 77, this Tribunal has consistently held that the Algiers Declarations are to be interpreted in accordance with the Vienna Convention on the Law of Treaties.

19. Simply put, there is no place for a reference to the "general principles of **private** international law" as a tool of treaty interpretation in the Vienna Convention. Along with the "terms of the treaty in their context and in the light of its object and

[19] See, e.g., *Maritime Delimitation and Territorial Questions Case (Qatar v. Bahrain)*, Judgment of 15 February 1995, I.C.J. Rep. 1995, p. 6 at 18. See also, Crawford, *Brownlie's Principles of Public International Law*, OUP, 8th edition (2012), p. 368; Harris, *Cases and Materials on International Law*, Sweet & Maxwell, Sixth Edition (2004), p. 836.

purpose" any additional elements, which could either be considered *as part* of the context or which could be *taken into account* together with the context, are clearly identified in Article 31 (2) and (3). None of these provisions permit a reference to the general principles of **private** international law *as part* of the context or for *being taken into account* together with the context.

20. An analogous provision, and, indeed, the only element external to the treaty but still applicable in the relations between the parties, which can be taken into account together with the context, is the provision of Article 31(3)(c) of the Convention. That is, "any relevant rules of **international law applicable in the relations between the parties**" (emphasis added). However, this provision can by no stretch of imagination be extended so widely and arbitrarily to comprise the "general principles of **private** international law of property". As put by a commentator, "[t]reaties cannot be interpreted in isolation of the wider context, but at the same time, tribunals should be cautious about using Article 31(3)(c) as a guise for incorporating extraneous rules in a manner that oversteps the boundaries of the judicial function".[20]

21. Moreover, it looks quite inconsistent that while the majority is very reluctant to refer to those obvious elements of context which are internal to the Algiers Declarations and to the relations between the treaty parties, such as the Majlis Resolution[21], the Treasury Regulations[22] and the Consolidated Reports[23], at the same time, it has found consolation in the concept of general principles of private international law of property, a wide and rather vague notion which is exterior to the respective treaty and to the relations between the treaty parties, and in any case cannot have a role as a tool of treaty interpretation.

22. Opining on the meaning and content of the expression "relevant rules of international law", Gardiner, the author of the celebrated treatise on Treaty Interpretation, writes:

[20] Crawford, op. cit., p. 383, also quoting French (2006) 55 ICLQ 281.
[21] See Para. 114, the Partial Award.
[22] See Paras. 107-108, the Partial Award.
[23] See Para. 119, the Partial Award.

> "'International Law' will be a somewhat imprecise term for those who are wedded to the distinction between public international law and private international law. However, it is not surprising that the ILC, being a UN body, should have used the unqualified term 'international law'.
>
> First, in the context of treaties creating obligations between states, 'international law' can be read as referring to public international law. This is clear from article 2(1)(a) in its definition of 'treaty' referring to a written agreement 'governed by international law'. Second, one of the most widely used starting points for a definition or description of public international law is that in article 38 of the Statute of the ICJ. […] Hence the elements listed in article 38 are equated with 'international law'. More generally, it is also probably the case that nowadays the term 'international law' without adjectival qualification denotes public international law, 'private' international law being so specified or put under the description 'conflict of laws'." (emphasis added)[24]

23. By the same token, it is obvious that the concept 'general principles of **private** international law' lacks the quality of being "*applicable in the relations between the parties*", in the present case. Authoritative research and commentary confirm that as a minimum both parties should be bound by the same international rule at the same time in order for that rule to be taken into account together with the context of the treaty that its interpretation is in question.[25] A comparative review of selected provisions of the national legislation of the parties, and *a fortiori* that of a selected group of selected third countries, as the majority has done,[26] cannot meet the requirement of being applicable in the relations between the two treaty parties.

24. Furthermore, once the majority has confirmed in several paragraphs of the Partial Award that it is dealing with a dispute arising from Paragraph 9 of the Algiers General Declaration[27] and that this instrument should be interpreted in accordance with the Vienna Convention,[28] it has identified the law applicable to the case. This means that the majority is already within the ambit of Article V of the Claims Settlement Declaration, provided that it truly respects the law it has so identified.

[24] Gardiner, *Treaty Interpretation*, OUP, 2008, pp. 260-261.
[25] See generally, Gardiner, op. cit., pp.262-265.
[26] See Paragraphs 144-148 of the Partial Award.
[27] Partial Award, Paras. 93 and 94. See also Para 96.
[28] Ibid. Para. 102.

How then the majority reengages with the latter part of Article V, enters into a process of choice of law determination and links it to the applicable treaty and the Vienna Convention, which necessarily has the effect of mixing the two distinct spheres of 'public international' and 'private-commercial' together, and consequently conflating the two distinct areas of the Tribunal's jurisdiction, is a mystery.

25. The issue acquires greater importance if it is noted that in the present case the Tribunal is not called upon, nor does it have the jurisdiction in this particular case, to decide *ab initio* and in a dispositive way, the question of ownership and title as between the private property holders and the Iranian State entitles. The question of "Iranian properties", or even "Iranian-owned properties", is only a preliminary issue to determination of whether the United States performed its treaty obligations to arrange for transfer to Iran of Iranian properties. This circumstance additionally militates against the application of the choice of law rules and the general principles of private international law of property. Such principles could have been relevant when an ownership issue would have to be determined *ab initio* in a dispositive way between the respective parties claiming conflicting titles to a property, but not to a dispute arising from the interpretation and performance of a treaty between two sovereign States.

26. Accordingly, assuming as one potential scenario, that the majority has used the general principles of private international law as a tool of treaty interpretation, such an exercise would be untenable and unjustified under the Vienna Convention.

III. Application of Municipal Law by International Courts and Tribunals

27. Cases where a tribunal dealing with issues of international law has to examine the national law of one or more States are by no means exceptional. However, there is a clear distinction between (i) the application of a given municipal law as part of the 'applicable law' either governing the basis of a claim or more commonly governing a particular issue, on the one hand and (ii) reference by an international tribunal to the legal institutions of municipal law in the cases where there exists no comparable institution in international law, on the other. The first requires a specific authority to

apply municipal law either by the agreement of the parties or by operation of international law. For instance, in the *Brazilian Loans* Case the PCIJ was specifically authorized by the agreement of the parties to apply Brazilian law.[29] In the *Serbian Loans* Case international law operated to designate a system of domestic law as the applicable law in respect of some claim or transaction.[30]

28. Notably, in the process of application of a municipal law to the claim, no rule of *iura novit curia* applies to matters of municipal law before the international tribunal, and thus international tribunals "will generally require **proof** of national law" (emphasis added).[31] It is obvious that the proof of national law requires observance of all due process and fundamental procedural matters, such as provision of expert opinion, opportunity for the parties to comment on such opinion and on the content of the respective national law. In the present Case no proof of the content of the allegedly applicable domestic law as *lex situs*, in particular in relation to the delicate nature of the rights arising for the purchaser upon payment of full price, whether in the form of the right of ownership and/or possession, has been presented to the Tribunal, and to the parties, whether in the form of expert legal opinions or legal literature. Therefore, an attempt to apply the law of a given country to determine a claim before the Tribunal without the parties and Members of Tribunal having the opportunity to examine those provisions could entail serious due process implications.

29. The second scenario, as put by the International Court of Justice in the *Barcelona Traction* Case, is warranted only when the institutions of municipal law have an important and extensive role in the international field.[32] However, in this latter instance, as aptly put by the International Court of Justice in the *Barcelona Traction* Case, "it is to **rules generally accepted by municipal legal systems**" which recognize a particular legal institution and "**not to the municipal law of a particular State**, that international law refers"[33] (emphasis added).

[29] PCIJ Reports, Series A, No. 21, pp. 124-125.
[30] PCIJ Reports (1929), Series A, No. 20 and Series A, No. 21.
[31] Crawford, op. cit., pp. 52-53.
[32] I.C.J. Rep. 1970, p. 3, Para. 38 and also Para. 50.
[33] Ibid., Para. 50.

30. It is obvious that in the latter scenario there is no issue of the application of a specific national law to a claim or to an issue but rather it is the **general acceptance** of a rule by all or a prevailing majority of municipal legal systems, which informs international law and allows it to incorporate and apply that rule in the course of an international adjudication.

31. Assuming as the second potential scenario, that the majority has used the general principles of private international law of property in order to establish the general acceptability of a rule by municipal legal system**s**, this cannot be reconciled with the majority's detailed and specific reliance on specific national laws, in particular United States law[34] in order to decide Iranian title to specific properties; not to mention the fact that the content of such laws were never proven by the parties before the Tribunal.

32. In my view, a true exercise under the second scenario could possibly lead the Tribunal to identify generally accepted criteria of ownership common to a majority of national legal systems under which the issue of Iranian ownership of the properties could be decided, albeit of course within the context and object and purpose of the Algiers Declarations. Under such criteria, (i) non-delivery of a property despite the payment of its full price or (ii) the payment of part of the price together with the mechanism of the Tribunal for individual claims including the benefit of the Security Account, (iii) agreement between the treaty parties as to ownership and/or (iv) admission by the property holder or (v) by the Respondent, of Iran's ownership, should not lead to the absurd result of denial of ownership.

33. Assuming, hypothetically, that the application of the principle of *lex situs* would have been justified under the general principles of private international law, there are several compelling reasons militating against the application of the U.S. law requirement of "delivery" as a test of ownership in this Case by the majority.

[34] See for instance, Paragraph 422 of the Partial Award, where Section 2-401 (2) of the Maryland UCC was applied to determine lack of title; also as examples, Paras. 270 and 298 of the Partial Award applying the United States Code.

34. The first such compelling consideration is that we are not dealing with a normal progression of formation, performance and consummation of a contractual relationship as would exist under ordinary circumstances. All such possible stages of contractual relationship between Iranian entities and the US contractors were extensively affected with by the United States Government's sovereign interferences. This included the initial freeze orders blocking payments by Iran and performance by the US contractors and, in particular, the purported direction under Sub-sections (b) and (c) of Section 535.333 of the Treasury Regulations.[35] These provisions allowed the U.S. contractors to refrain from delivery on the basis of liens, and to contest Iran's right of possession on the basis of defences, counterclaims, set-offs or similar reasons, including, where full price was paid and thus there was a right of possession and ownership for the Iranian entity. When explaining the rationale behind subsections (b) and (c) of Section 535.333 the United States itself came to distinguish between two different categories. First, "tangible properties in which Iran has only an "interest," including, tangible properties for which Iran has not paid, over which title or ownership is contested."[36] Second, the properties over which Iran had title or a right of ownership, including the properties for which Iran had paid fully.[37] The United States argued that even under this second category and despite Iran having title or a right of ownership to the respective properties it did not have a right of immediate possession under US law because of the exercise of liens, defences, counterclaims, set-offs or similar reasons. The distinction between title or a right of ownership, on the one hand, and the right to immediate possession, on the other, and the need, from the standpoint of the Treasury Regulations, for the combined presence

[35] Subsection (b) stated: "Properties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged." Subsection (c) provided that properties "may be considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason".

[36] Statement of Defense of the United States to Claim Nos. II-A and II-B, 21 March 1983, Doc. 25, p. 18.

[37] From the following statement it can be inferred that the United States necessarily assumes that a property fully paid for generates a right of ownership for Iran: "For example, if Iran had contracted to purchase goods from a U.S. manufacturer and had paid only $1,000 of a purchase price of $2,000,000, Iran's interpretation of Paragraph 9 would require the manufacturer to transfer the goods. Such a result could not have been intended by Paragraph 9 and its language so indicates." (Doc. 25, p. 18).

of both rights for a transfer under Paragraph 9 was made clear by the United States in the following terms:

> "Where Iran had a right of ownership in the properties **plus** a right to immediate possession, the properties were to be transferred. Where Iran had fewer rights, either because it did not own the properties or because it was not entitled to possession, no transfer was called for" (emphasis added)[38];
>
> or
>
> "In the case of properties in which the holder had **a possessory right**, transfer was **not** required under U.S. law, and therefore not ordered." (emphasis added)[39];
>
> or
>
> "The United States anticipated that Iran would promptly settle the storage, repair, and related charges with the property holders, and that the property would be transferred at Iran's direction."[40]

35. In the period leading to Partial Award 529 the United States consistently acknowledged the properties purchased and fully paid for as "GOI [Government of Iran] Owned". For instance, the U.S. Consolidated Reports classified the properties at issue in Claim G-14 (Mr. Robert Stern) and Claim G-16 (Mr. Peter Eisenman), both fully paid for, as "GOI-owned" properties.[41] indeed, the United States expressly "*conceded*" Iran's ownership[42] to all properties classified in sub-categories A – D of category I, but still prevented their delivery because of the application of liens, defences, counter-claims, set-offs and similar reasons. [43]

36. Indeed, as quoted above, the language of sub-sections (b) and (c) of Section 535.333 of the Treasury Regulations combined, as well as the specific language of sub-section (c), confirm that the Regulations are not confined to the properties owned by Iran and

[38] Rejoinder of the United States to Claims II-A and II-B, 27 Feb 1984, Doc. 333, p. 3.
[39] Ibid., Doc. 333, p. 33.
[40] Ibid., Doc. 333, pp. 33-34.
[41] See, for example, U.S. First Report, 17 September 1984, Doc. 550, Claims G-14 and G-16; U.S. Second Report, 30 October 1985, Doc. 757, Claims G-14 and G-16; Iran's First Report, 17 December 1984, Claims G-14 and G-16, Iran's Consolidated Report, 13 November 1987, Claims G-14 and G-16.
[42] Comments of the United States, Doc. 749, 16 August 1985, p. 4.
[43] Ibid.

held on loan by the U.S. contractors. They clearly extend to all types of properties, including to those purchased from the U.S. contractors that were ripe for delivery under the contract, e.g. due to payment of the full price. This meaning is also confirmed by the Tribunal's finding in Paragraph 54 of Partial Award 529, where it dealt separately with sub-section (c) of Section 535.333 of the Treasury Regulations and concluded: "The same conclusion stated above with respect to liens apply to Iranian properties where the holder contested Iran's **right to possession** by asserting a defence, a counterclaim or a set-off… (emphasis added)"

37. Now, this Tribunal in Partial Award 529 came to the definitive conclusion that the prescription of non-delivery of those items of property that were solely owned by Iran, which by the United States own definition and acknowledgement extended to the properties purchased and fully paid for, was unlawful. The Tribunal concluded:

> "United States Treasury Regulations that excluded from the transfer direction properties which were *owned solely by Iran but as to which Iran's right to possession was contested by holders of such properties* on the basis of any liens, defences, counter-claims, set-offs or similar reasons, were inconsistent with the obligations of the United States under the General Declaration…" (emphasis added) [44]

38. Therefore, the above-mentioned sovereign interference by the United States not only constituted a wrongful act *per se* under international law but that it prevented the delivery of contract items to Iranian entities and thus constituted a bar to the formal transfer of title to Iran under the U.S. municipal law. Accordingly, the question of whether the contract in question can be considered as maturing into a stage of delivery and thus transfer of title, cannot be examined in isolation from the United States Government's sovereign interferences preventing the realization of the event of transfer of title. This would be tantamount to disregarding the preponderant causal link between the Respondent's act and the act of non-delivery by the property-holder, and as a result non-transfer of title, to Iran of the properties affected by the said Treasury Regulations, besides the wrongful nature of the Respondent's act under international law. Simply put, this would be tantamount to allowing the Respondent

[44] Partial Award 529, Operative Para. 77(d).

to benefit from its own wrong and also giving effect to a manifest abuse of rights under the general principles of private international law.

39. To be sure, although the statement quoted above from Paragraph 77(d) of Partial Award 529 speaks of "properties which were owned solely by Iran", the remaining part of the same sentence makes it clear that these properties were not yet given into possession of Iran or that they were not yet "delivered" to Iran. This being so, the only reasonable interpretation of the phrase "owned solely by Iran" would be that the properties were ripe for delivery under the respective contracts, for instance, for reason of payment of full price and thus the creation of "a right of ownership" for Iran. In other words, where an entitlement for delivery under the contract existed for Iran that right would be synonymous to the right to have the property transferred to it under Paragraph 9 of the General Declaration. It would be a very peculiar judicial reasoning if it permitted the Respondent to invoke the sovereign-induced non-delivery by the property-holder to excuse the Respondent's transfer obligation under Paragraph 9. This would be unheard of in any manner of judicial thinking.[45]

40. The second reason militating against the application of United States laws to determination of ownership of "Iranian properties" lies in General Principle B of the General Declaration. This provision required the United States, "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration".

41. In Partial Award 529 the Tribunal relied on General Principle B of the General Declaration as an additional reason for holding sub-sections (b) and (c) of section 535.333 of the Treasury Regulations as unlawful. The Tribunal stated:

[45] Note that again, the language of the above quoted finding is broad and there is nothing to limit the scope of that finding to Iranian properties on loan or those already delivered in the United States. This can be confirmed by the fact that the provisions of sub-sections (b) and (c) of section 535.333 of the US Treasury Regulations, the former covering liens and the latter covering other categories, both constituted the subject-matter of the Tribunal's findings in Paragraphs 47 and 54 and the Operative Paragraph 77(d).

> "Another argument arises from General Principle B of the General Declaration, the main purpose of which was to remove and bar disputes with and claims against Iran from the courts of the United States and bring them before this Tribunal. Although General Principle B refers only to the termination of judicial proceedings and the substitution of arbitration, its purpose would best be effected by also preventing the exercise of liens, as was done by section 1-102(c) of Executive Order No. 12281, because otherwise the only way for Iran to contest a lien would be to litigate in United States courts. Moreover, the U.S. national holders of such liens were given access under the Claims Settlement Declaration to the Tribunal to recover any amounts due to them from Iran. This applies to liens whether they arose before or after 14 November 1979, and whether or not such litigation had been commenced before 19 January 1981."[46]

42. The proposition that absent delivery in accordance with U.S. contract laws Iran did not have title to items of property purchased and fully paid for, necessarily assumes that Iran had to litigate in U.S. courts to confirm its title and enforce delivery. Such an assumption runs counter to the very purpose of General Principle B as underlined by Partial Award 529.
43. Moreover, the possibility for the United States judiciary becoming involved in the process of performance of Paragraph 9 provisions, including through examining Iranian entities' title to the respective properties, which could presumably have involved the application of the US property laws, was effectively excluded from the ambit of Paragraph 9. This fact also militates against the majority's approach, as it has effectively engaged in the same exercise as would have been performed by a US court.
44. The third reason militating against the application of United States laws is that this approach runs the risk of allowing the Respondent State to avoid its treaty obligations by reference to its own national laws. It is a widely accepted principle that a State may not rely on its municipal law to avoid its international obligations. Article 13 of the ILC Draft Declaration on Rights and Duties of States (1949)[47] provides that:

> "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may

[46] Partial Award 529, Para. 49.
[47] Draft Declaration on Rights and Duties of States, the annex to GA Res 375(IV), 6 December 1949.

> not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

45. An analogous provision exists in Article 27 of the Vienna Convention on the Law of Treaties and Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001).[48] Arbitral tribunals[49], the Permanent Court of International Justice (PCIJ)[50] and the International Court of Justice (ICJ)[51] have consistently endorsed this principle.

IV. Partial Award 529 and Meaning of the Term "Iranian Properties"

46. This is a short point, yet one of extraordinary importance in that getting it wrong would result in eviscerating Partial Award 529. The Partial Award's treatment of this issue, thus, may not be taken lightly. The Partial Award conveniently begins its analysis of the Iranian property debate by making the surprising assertion that the meaning of the term "Iranian properties" was already determined by the 1992 Partial Award. In addition, the Partial Award finds further support for the above proposition in Paragraph 152 of Partial Award 601. As to Partial Award 529, as explained in detail below, Paragraphs 40 and 43 of the 1992 Partial Award do not provide any support for the proposition that the Tribunal was deciding the meaning of the term "Iranian properties". Furthermore, as discussed below, equally unpersuasive is the Partial Award's reliance on Paragraph 152 of Partial Award 601. There, in rejecting the causation argument advanced by the United States, the main point made by the Tribunal was the need to distinguish between the treaty-based and contract-based considerations, and that the asserted contractual breaches would have no bearing whatsoever on the transfer obligation under Paragraph 9 of the General Declaration.

[48] GA Res 56/83, 12 December 2001.
[49] *Shufeldt* (1920) 2RIAA 1081, 1098; *Norwegian Shipowners Claims* (1922) 1 RIAA 309, 331.
[50] *S.S. Wimbledon* (1923) PCIJ, Series A, No. 1, 29.
[51] *Fisheries (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116, 132; *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, I.C.J. Reports 1989, p. 15, 51, 74; *Avena and Other Mexican Nationals (Mexico v. U.S.)*, I.C.J. Reports 2004, p. 12, 65.

a) The Impossibility of Deciding a Point, Sub Silentio, Which Was Not Put in Issue by the Parties

47. As an initial matter, it is important to identify precisely what Partial Award 529 was trying to resolve in 1992. In this regard, as reflected in Paragraphs 35-39 of Partial Award 529, headed "Issues", in which the Tribunal identifies the scope of its determinations, the scope of the Tribunal's determinations was limited, which follows that the first sentence of Paragraph 40 of Partial Award 529 cannot provide any support for the proposition that the Tribunal was resolving the parties' dispute as to the meaning of the term "Iranian properties".[52]

48. However, as already mentioned, the Partial Award begins its analysis of the Iranian property debate by making the surprising assertion that the issue was already decided by the 1992 Partial Award. The Partial Award bases its reasoning on the combined effect of Paragraphs 43 and 40 of the 1992 Partial Award, stating that,

> "The Tribunal recalls that the United States' obligation under Paragraph 9 is restricted to arranging for the transfer of "all Iranian properties" located within the jurisdiction of the United States on 19 January 1981. In Award No. 529, the Tribunal held that "Iran was not entitled to possession of properties owned by others or if it had only a partial or contingent interest in such property." Thus, in accordance with the Tribunal's holding in Award No. 529, in order for an item of property to fall within the meaning of "Iranian properties" pursuant to Paragraph 9, it had to be solely owned by Iran on 19 January 1981."[53]

49. Before considering the remainder of the Partial Award's reasoning as to this point, I would note that the omission of the phrase "The Tribunal and the Parties agree" in the passage quoted above from Paragraph 43 of Partial Award 529 would disregard the fact that a pronouncement recording an agreed position is inherently of limited weight. I note that counsel for Iran addressed this issue as follows:

---

[52] The first sentence of Paragraph 40 of Partial Award 529 reads 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."

[53] Partial Award, Para. 97.

> "The other point that I would like you to focus on is not just the factual background that the Tribunal is focusing on, but also the fact that the parties are in agreement with what the Tribunal is deciding here. You see there:
>
> "The Tribunal and the parties agree that Iran was not entitled to possession of properties owned by others, or if it had only a partial or contingent interest in such property."
>
> So, of course, the Tribunal was not discussing the hotly contested issue of what is or is not the effect of delivery under a relevant domestic law contract. So the short passage from Award 529 on which the United States has placed considerable emphasis is not helpful to it in the way it would like."[54]

50. At any rate, the Partial Award then goes on to quote the introductory phrase of Paragraph 40 to further support the proposition that the issue had already been determined by the 1992 Partial Award, concluding in Paragraph 100 that,

> "The Tribunal considers that it has interpreted the meaning of the term "Iranian properties" in Award No. 529 and is not called upon to reopen its decision on the matter. However, in light of the extensive and, at times, novel, argumentation provided by both Parties, and in particular Iran, on the matter of the common understanding of the Parties as to the definition of the term "Iranian properties," the Tribunal considers it helpful briefly to address the Parties' submissions in this regard."

51. I am not persuaded by the majority's reasoning. It is a dangerous fallacy to state that the Tribunal in the 1992 Partial Award decided on a point that was never put before it. It comes at a greater cost of distorting the pleading history of the 1992 Partial Award as well as its structure, in that as is readily apparent from the Parties' pleadings and the identification of the issues to be determined in Partial Award 529, beyond the Tribunal's pronouncements as to the unlawfulness of subsections (b) and (c) of Treasury Regulations Section 535.333, the interpretation of the meaning of the term "Iranian properties" was not even put in issue by the United States, let alone being decided by Partial Award 529. I felt it necessary, thus, to offer a more detailed treatment of this issue. In its Statement of Claim, headed "General Nature of Claim," Iran articulated its Paragraph 9 complaint as follows:

[54] Hearing Transcript, Cluster 1, Day 1, Doc. 2009, pp. 155-56 (Statement of Mr. Wordsworth).

> "The U.S. Government has failed to arrange immediately for the transfer to Iran of all Iranian non-financial assets located in the United States. Specifically, the U.S. Government has prevented return of the Government of Iran's physical property by issuing Executive Orders and regulations that do not require transfer of this property until storage and other charges and tax liens are paid. The U.S. Government has issued at least one license for the sale of the Government of Iran's property to satisfy a warehouseman's lien and judgment. The U.S. Government has failed and refused to challenge in court actions liens for state taxes imposed on the Government of Iran's property in violation of U.S. law, which has further restrained transfer of the Government of Iran's property."[55]

52. The Statement of Claim went on to specifically put the exclusions stated in subsections (b) and (c) of Treasury Regulations Section 535.333 in issue, complaining that the above exclusions would result in a very limited definition of the term "properties of Iran," which in turn, would severely limit the scope of the transfer obligation of the United States under Paragraph 9 of the General Declaration in breach of that provision:

> "Thus, the only non-financial property that must be transferred pursuant to this section of the regulations is property defined in Treasury regulation section 535.333. That section provides:
>
> > (a) The term "properties" as used in §535.215 includes all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts ....
> >
> > (b) Properties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged.
> >
> > (c) Liabilities and property interests may be considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason ....

[55] Iran's Statement of Claim, Doc. 1, p. 47.

> This definition of the term "properties of Iran" for the purpose of identifying properties that must be transferred to Iran is inconsistent with the General Declaration because conditions the obligation to transfer on payment of various liabilities, some of which, like payment of storage charges accruing before January 19, 1981, are claims committed to the exclusive jurisdiction of the Tribunal under article II, paragraph 1 of the Claims Settlement Declaration. By itself, this regulatory definition constitutes a breach of paragraph 9 of the General Declaration."[56]

53. Likewise, the United States in its Statement of Defense pointed out that the following issues are raised by Claim II:A as articulated by Iran:

> "1. Did Paragraph 9 of the General Declaration require the United States to order the transfer of the tangible properties listed in Iran's Exhibit IIA-3 and Exhibit IIA-11 in derogation of United States law applicable prior to November 14, 1979?
>
> 2. Did promulgation of the United States Treasury Regulation permitting the licensing of the sale of tangible properties pursuant to United States law applicable prior to November 14, 1979 violate General Principles A and B of the General Declaration?
>
> 3. Is the United States obligated under United States law applicable prior to November 14, 1979 to challenge the tax lien imposed by Clark County, Washington?"[57]

54. As further confirmed by the description of the issue by the United States in its Rejoinder, the United States had this to say regarding the point at issue in Claim II:A, thus framing the debate within the confines of the scope of the U.S. law clause exception:

> "Claim II-A is a dispute between the two Governments over the meaning of the phrase "subject to U.S. law" contained in Paragraph 9 of the General Declaration and its effect on the U.S. obligation to transfer Iranian tangible properties under that provision."[58]

55. Accordingly, the parties were in agreement that as far as Iran's Claim II:A in the strict sense (excluding Treasury Regulations Section 535.540) is concerned, the Tribunal's

[56] Ibid., pp. 49-50.
[57] U.S. Statement of Defense, Doc. 25, pp. 50-51.
[58] U.S. Rejoinder, Doc. 333, p. 2.

pronouncement would be limited to determining whether or not subsections (b) and (c) of Treasury Regulations Section 535.333 were lawful, considering the transfer obligation assumed by the United States under General Principle A and Paragraph 9 of the General Declaration. In fact, immediately preceding Paragraph 40 of Partial Award 529 are Paragraphs 35-39, headed "Issues", in which the Tribunal identifies the scope of its determinations. In particular, Paragraph 38 reads as follows:

> "Considering the current status of the pleadings, the Tribunal finds that it is presently in a position to make determinations as to the following questions: (i) has the United States violated its obligations under General Principle A and paragraph 9 of the General Declaration by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties where statutory liens had not been discharged, necessary obligations, charges and fees had not been paid, the properties could be considered contested by virtue of a defence, counterclaim, set-off, or similar reason, or where Iran's ownership of such properties was in issue; (ii) has the United States violated its obligations under General Principle A and paragraph 9 of the General Declaration by issuing and maintaining Treasury Regulations that permit the licensing of the sale of certain Iranian properties; and (iii) has the United States violated its obligations under General Principle A and paragraph 9 of the General Declaration by issuing and maintaining Treasury Regulations that failed to direct the transfer of Iranian properties subject to U.S. export control laws or by failing to offer compensation for such properties."[59]

56. Subsections (ii) and (iii) are not relevant to this debate. As for subsection (i), as is apparent from the wording of the questions posed, it is simply echoing the wording of subsections (b) and (c) of Treasury Regulations Section 535.333. In fact, whereas the Partial Award begins its analysis from Paragraph 43 of Partial Award 529, the preceding paragraph, headed "The Treasury Regulations Subsequent to 19 January 1981," reaffirms that the scope of the Tribunal's findings was limited to the contested provisions of the post-Accords regulations. After recording the Parties' agreement in Paragraph 41 of Partial Award 529 that the issuance of Executive Order No. 12281 by President Carter on 19 January 1981 did not violate the U.S. obligations under the Accords, Paragraph 42 reads as follows:

[59] Partial Award 529, Para. 38.

> "The Treasury Regulations adopted subsequent to 19 January 1981, however, are in certain respects inconsistent with the commitments undertaken by the United States in the Algiers Declarations, and by their issuance the United States has in those respects violated its obligations under General Principle A and paragraph 9 of the General Declaration. As previously stated [], the Tribunal will examine the provisions of these Treasury Regulations as they apply to different categories of Iranian properties." [60]

57. The above paragraph further affirms the fact that the scope of the Tribunal's determinations in Partial Award 529 was limited to assessing the lawfulness of the provisions of the Treasury Regulations adopted to implement the Accords. Thus, the first sentence of Paragraph 40 of Partial Award 529 cannot provide any support for the proposition that the Tribunal was making a general pronouncement, beyond sub-sections (b) and (c) of Treasury Regulations 535.333, as to the meaning of the term "Iranian properties".

58. In summary, in practical terms, Partial Award 529 by declaring that the exceptions contained in subsections (b) and (c) of Treasury Regulations Section 535.333 were inconsistent with the obligations of the United States under the Accords, in fact took them out of the equation and restored the broad language of Section 535.333 (a). It is important to note that subsections (b) and (c) of Treasury Regulations Section 535.333 were in fact carve-out provisions. Their meaning may only be understood against the background of the broad definition of Iranian properties in subsection (a) of Section 535.333, which clearly covers "property interests of the Government of Iran". When after the conclusion of the Accords, the Treasury Regulations were amended in February 1981 to implement the commitments undertaken by the United States under the Accords, Section 535.333 (a), entitled "Properties", provided that:

> "The term "properties" as used in § 535.215 includes all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts. It does not include bank deposits or funds and securities. It also does not include obligations under standby letters of credit or similar instruments in the nature of performance bonds, including accounts established pursuant to § 535.568."

[60] Ibid., Para. 42.

59. Section 535.215, the transfer direction, in turn, is headed "*Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.*" Repeating the transfer direction of Executive Order No. 12281, Section 535.215 of the Regulations provides that:

> "All persons subject to the jurisdiction of the United States in possession or control of properties, as defined in § 535.333 of this part, not including funds and securities owned by Iran or its agencies, instrumentalities or controlled entities are licensed, authorized, directed and compelled to transfer such properties held on January 19, 1981 as directed after that date by the Government of Iran, acting through its authorized agent. Except where specifically stated, this license, authorization and direction does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act."

60. Accordingly, what we are left with after the findings contained in Partial Award 529 is the broad language of Section 535.333 (a) without the carve-out provisions contained in subsections (b) and (c) of this Section. This constitutes a faithful reading of the scope of the Tribunal's determinations in Partial Award 529 as far as Claim II:A is concerned.

b) Reliance on Paragraph 152 of Partial Award 601

61. The Partial Award further refers to Paragraph 152 of Partial Award 601, concluding that there, "the Tribunal relied on its findings in Award No. 529"[61] as to the meaning of the term "Iranian properties". This reliance, however, is misplaced. As is apparent from the preceding paragraph, in the context of the causation debate, the United States had argued that essentially, Iran's contractual beaches under its contracts with the United States companies, as opposed to the refusal to grant export licenses, caused Iran not to receive the properties. In fact, Paragraph 151 begins with a brief restatement of the U.S. position:

> "The Tribunal notes that it is the position the United States that it was not its refusal to grant export licenses that caused Iran to suffer any

[61] Partial Award, Para. 97.

> losses, but rather that it was Iran's own actions or inactions that caused it not to receive the properties. Throughout that part of the Hearing devoted to the Individual Claims, it became apparent that, in many cases, Iran had terminated its contracts with the United States private companies before 4 November 1979, causing the properties not to be exported. In addition, several of the United States private companies did not ship the goods to Iran, because Iran had, in breach of the contracts, failed either to pay for the properties in question or provide shipping instructions."[62]

62. Thus, the Tribunal in Paragraph 152 of Partial Award 601 confronted this issue and rejected the above-mentioned arguments advanced by the United States. Essentially, in rejecting those arguments, the Tribunal made the point that contract-based and treaty-based considerations should not be confused, and that, even if the property in question had not been fully paid for, under the Treaty obligation (Paragraph 9 of the General Declaration) Iran would still be entitled to recover the property:

> "The Tribunal finds, however, that these alleged actions or inactions by Iran are issues between Iran and the private United States companies it had contracted with and have no bearing whatsoever on the obligations that Iran and the United States assumed when entering into the Algiers Declarations. In Paragraph 9 of the General Declaration, the United States undertook to arrange for the transfer to Iran "of all Iranian properties." The only exception to this transfer obligation was established by the U.S.-law clause. Subject to this exception, all that was required in order to trigger the transfer obligation was that the properties be "Iranian," in the sense that they were solely owned by Iran. As long as this was the case, it was simply irrelevant whether the properties had been (fully) paid for or not, or whether Iran might have breached its contracts with the United States private companies. This does not mean that Iran would necessarily receive a windfall where properties were transferred to it that, for example, had not been fully paid for. Article II, paragraph 1, of the Claims Settlement Declaration provided the legal avenue for private United States companies to bring, among other things, claims against Iran for breach of contract before this Tribunal to seek redress, and many companies in fact availed themselves of this mechanism."[63]

[62] *Islamic Republic of Iran and United States of America*, Award No. 601-A3/A8/A9/A14/B61-FT (17 July 2009), *reprinted in* 38 IRAN-U.S. C.T.R. 197, Para. 151 (footnote omitted).
[63] Partial Award 601, Para. 152.

63. Accordingly, Paragraph 152, in rejecting the causation argument advanced by the United States, stressed the need to avoid conflating treaty-based and contract-based considerations.[64] In so doing, the Tribunal noted that, in the words of the *Vivendi* Annulment Committee, "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions."[65]

64. It will be recalled that in *Vivendi*, the first arbitral tribunal had concluded that despite the fact that it had jurisdiction to consider the claimant's treaty claims, because a forum selection clause referred questions of contract interpretation to the local courts, and because the tribunal could not determine whether or not there was a breach of the BIT without first interpreting the contract, the claimants must bring the dispute to the local courts. The first Annulment Committee found this finding to be an "annullable error", explaining that:

> "Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucuman."[66]

65. The Annulment Committee further referred to Paragraph 73 of the ELSI case (as quoted in the commentary to Article 3 of the ILC Articles on State Responsibility), where a Chamber of the Court observed that the question of compliance with the FCN Treaty "arises irrespective of the position in municipal law"[67] and that "[c]ompliance

---

[64] In the passage quoted above, Paragraph 152 further confirms the broad meaning of the term "Iranian properties". In addition, the latter part of Paragraph 152 explains how the Security Account works as a substitute payment mechanism. In its discussion of "Iranian properties", Paragraph 152 contemplates a situation where the purchase price is only partially paid, yet the property is described as "solely owned by Iran." The fact that a purchased property regardless of whether it "had been (fully) paid for or not," is characterized as "solely owned by Iran" would spell any doubt as to the broad meaning of "Iranian properties" in Paragraph 9. Again, a treaty-based payment mechanism operates in place of the original payment mechanism and supersedes the normal contractual payment mechanism.

[65] *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment, July 3, 2002, Para. 96.

[66] *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment, July 3, 2002, Para. 96.

[67] *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, United States of America v. Italy, Judgment of 20 July 1989, Para. 73, I.C.J. Reports 1989, p. 51.

with municipal law and compliance with the provisions of a treaty are different questions."[68]

66. The Annulment Committee concluded that, "the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties."[69] The reference by the Vivendi Annulment Committee to two sets of applicable laws is important. As acknowledged by the *Vivendi* Annulment Committee, in dealing with a treaty-based cause of action, an international tribunal must determine the treaty-based claims by reference to international law as the proper law of the treaty in question.

V. The Ordinary Meaning of the Term "Iranian Properties": Context, Object and Purpose of the Algiers Declarations

67. As a preliminary observation, I would note that despite the fact that the Partial Award refers to some of the components of the general rule of interpretation such as the context of the treaty, it confines itself to a brief and conclusory analysis of rejecting the interpretive significance of a number of instruments such as the Majlis Resolution and the Consolidated Reports. The Partial Award's interpretive exercise leaves a lot to be desired in that it does not offer any positive discussion of the context and object and purpose of the Accords, thus evading a holistic approach to treaty interpretation. In addition, the Partial Award does not seem to believe that the principle of good faith and the provisions of the Treaty of Amity should have been considered during the course of the interpretive process. Among other things, therefore, the above elements have been considered below.

[68] Ibid.
[69] *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment, July 3, 2002, Para. 102.

a) The Ordinary Meaning and the Technical (Legal) Meaning

68. Applying the general rule of interpretation as contained in Article 31 of the Vienna Convention, the Partial Award simply equates the ordinary meaning of the term "Iranian properties" with its technical legal meaning, thus observing that:

> "The Tribunal finds that the text of Paragraph 9 is clear and unambiguous. The reference in Paragraph 9 to "Iranian properties," considering the ordinary and natural meaning of this term, leads to the conclusion that the obligation of the United States is with respect to tangible properties that were owned by Iran or its entities, as the Tribunal reiterated various times in Award No. 529."[70]

69. It is worth pointing out that whether the ordinary meaning of a term used in a legal instrument should be equated with its technical or legal meaning, as opposed to its common or general meaning, would depend on the common intention of the parties. Indeed, in many instances the common or general meaning is to be preferred. Thus, in a case requiring interpretation of an extradition treaty, and in the context of the interpretation of the treaty's double criminality rule, Lord Chief Justice Widgery said:

> "The words used in a treaty of this kind are to be given their general meaning, general to lawyer and layman alike. They are to be given, as it were, the meaning of the diplomat rather than the lawyer, and they are to be given their ordinary international meaning, and not a particular meaning which they may have attracted in England, or in certain branches of activity in England."[71]

70. Likewise, in the case of *Adan*, which concerned the interpretation of certain provisions of the 1951 Geneva Convention Relating to the Status of Refugees, Lord Steyn stated:

> "It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee

[70] Partial Award, Para. 104.
[71] *Regina v. Governor of Pentonville Prison, Ex Parte Ecke* (1981) 73 Cr. Appeal R 223 at 227, quoted in Gardiner, op. cit., p. 173.

> Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."[72]

71. Moreover, in a domestic law context, in the case of *Schuler A.G. v Wickman Machine Tool Sales Ltd.*, the House of Lords considered the meaning of the word "condition" used in a distributorship agreement.[73] This was a wrongful repudiation dispute, and the main question was whether the word "condition" as contained in Clause 7 (b) of the contract must bear its technical legal meaning (giving rise to the right to terminate the contract), or otherwise the parties intended its popular meaning as used by the layman. Lord Reid articulated the issue as follows:

> "In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to

[72] *Regina v. Secretary of State for the Home Department, Ex Parte Adan*, House of Lords, 19 December 2000, [2001] 2 A.C. 477, pp. 516-17.

[73] In May 1963 German manufacturers agreed to give an English company ("Sales") the sole selling rights for panel presses made by them for 4 ½years. Clause 7 of the agreement was in the following terms:

> '7. *Promotion by Sales*
>
> '(a) Subject to clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the territory.
>
> '(b) It shall be **condition** of this agreement that:- (i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses; (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative. Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this clause.'

> terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach."[74]

72. The House of Lords held that the parties had not intended to use the word "condition" in its strict legal sense. In his opinion, Lord Reid stated that "[t]he fact that a particular construction leads to a very unreasonable result must be a relevant consideration."[75]

73. In addition, the case of *Gujarat State Petroleum Corporation Limited et al. v. the Republic of Yemen* is particularly instructive on this point.[76] As part of its analysis in order to determine whether or not an event of Force Majeure continuing for six months existed, the Tribunal noted that, among other things, the Parties were not in agreement as to the meaning of the term "riot". The Claimants submitted that riot is a commonly used term which should be given a common meaning, as opposed to a technical meaning. The view of the Respondents on this point was summarized by the Tribunal as follows:

> "By contrast, the Respondents submit that the term must be interpreted in a way that is consistent with Yemeni law. For the Respondents, "riot" means "protests which are illegal, not protests which fall within the legitimate right to protest or demonstrate enshrined in the Yemeni Constitution." Relying on Mr. Al Maqtari's testimony, the Respondents

[74] *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd*., House of Lords, 4 April 1973, [1974] A.C. 235, pp. 250-51.
[75] Ibid., p. 251.
[76] *Gujarat State Petroleum Corporation Limited (India) et al. v. Republic of Yemen and the Yemeni Ministry of Oil and Minerals* (Dr. Laurent Levy (President), Philippe Pinsolle, Sir Bernard Rix), ICC Arbitration No. 19299/MCP, Final Award, 10 July 2015, Paras. 12-13. This case was a contract-based arbitration arising out of three production sharing agreements (PSAs) for the exploration and production of oil in three oil blocks in Yemen. The Claimants were three companies organized under the laws of India engaged in petroleum exploration and production. Upon a successful bidding process, the Claimants entered into three almost identical PSAs with the Ministry of Oil and Minerals of Yemen in April 2008. Almost a year later, on 17 March 2009, the PSAs were ratified by the President of Yemen. The PSAs were governed by Yemeni law.
Under the PSAs, the Claimants were entitled to conduct exploration activities for an initial period of four years (First Exploration Period). However, from January 2011, the security situation in Yemen began to deteriorate. A number of events took place, including tribal clashes and kidnappings, and as a result, on 18 March 2011, the Government declared a State of Emergency. On 10 April 2011, the Claimants sent a Force Majeure notice to the Respondents under Article 22.1 of the PSAs. However, the Claimants' notice was denied by the Respondents. Despite subsequent correspondence and meetings, the dispute was not resolved. Ultimately, on 4 February 2013, the Claimants terminated the PSAs on the basis of the continued existence of a Force Majeure situation. The Force Majeure provision (Article 22.2 of the PSAs) listed several events, including political matters such as "riot" and "insurrection", as Force Majeure events.

> contend that the term "riot" has "a technical meaning", associated with protests "which the police disperse following a declaration for open fire.""[77]

74. The *Gujarat* Tribunal, however, was not persuaded by the Respondents' argument as to favouring the technical meaning of the word riot. It reasoned that in choosing between one of the two possibilities (common meaning as opposed to technical meaning), what is relevant is "what the Parties intended" at the time they concluded the production sharing agreements:

> "[I]n giving effect to the words, the common meaning of the words as well as the Yemeni law meaning of the words may be considered. What is relevant however is always what the Parties intended at the time they entered into the PSAs. While a dictionary meaning or specific definitions in Yemeni law if there are any, is one way to look for that intent, one should recall that the Parties probably did not refer to a dictionary at the time or look for specific meanings under Yemeni law, and thus would rather think of a common (ordinary/plain) meaning of terms."[78]

75. Likewise, the Tribunal used the same reasoning in interpreting the term "insurrection", another listed Force Majeure event, holding that "the Tribunal believes that the term insurrection is to be understood in its common meaning, which satisfies both the English and Arabic versions of the PSAs."[79]

76. As to the importance of performing a holistic exercise in treaty interpretation, in the context of the WTO dispute settlement mechanism, the Appellate Body in the case of *United States – Continued Existence and Application of Zeroing Methodology*, which concerned the interpretation of Article 17.6(ii) of the 1994 Anti-Dumping Agreement, acknowledged that:

> "The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one

[77] Ibid., Para. 126.
[78] Ibid., Para. 127.
[79] Ibid., Para. 133.

> meaning or shade of meaning, *but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it*. Nor do multiple meanings of a word or term automatically constitute "permissible" interpretations within the meaning of Article 17.6(ii). Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."[80]

77. In addition, commentators also have referred to the distinction between the strict legal or lawyer's conception of property and the common sense or layman's view of the term:

> "Property theorists have distinguished between rival views of property: property as a bundle of rights and property as a relationship to a thing. The former is often described as the 'sophisticated' or 'scientific' or 'lawyer's' conception of property; the latter – the 'layperson's' or 'common sense' view of property."[81]

78. Consistent with the distinction discussed above, the early investment protection model treaties, such as the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 OECD Draft Convention on the Protection of Foreign Property of 1967, used the word "property" in its broad and non-technical sense. Over time, the term "investment" was used in international instruments to reflect this broad or layman's conception of property. For example, Article 1 of the Abs-Shawcross Draft Convention on Investments Abroad, reads as follows:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories [and] shall not in any way be impaired by unreasonable or discriminatory measures."[82]

---

[80] *United States – Continued Existence and Application of Zeroing Methodology*, Appellate Body Report, WT/DS350/AB/R, 4 February 2009, Para. 268 (emphasis added).
[81] Zachary Douglas, "Property, Investment, and the Scope of Investment Protection Obligations", in *The Foundations of International Investment Law*, 2014, pp. 369-70 (footnotes omitted).
[82] Abs-Shawcross Draft Convention on Investments Abroad, 1959, Article 1.

79. Tellingly, when the initiative began in 1957, the draft instrument, prior to being combined with another draft convention prepared under the chairmanship of Lord Shawcross, using the phrase "Private Property Rights" in place of "Investments", entitled "International Convention for the Mutual Protection of Private Property Rights in Foreign Countries".[83]

80. Similarly, Article 1 (a) of the OECD Draft Convention on the Protection of Foreign Property, entitled "Treatment of Foreign Property," reads as follows:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures."[84]

81. Furthermore, the Commentary to Article 1 of the Draft Convention (Note 2 (a) to Article 1, entitled "Object of Protection: Property"), specifically refers to the broad, common sense, and non-technical conception of property, providing that:

> "In international law the rules contained in the Convention – and therefore in Article 1 – apply to property in the widest sense of the term which includes, but is not limited to, investments. For a definition of "property" see Article 9 (c) of the Convention and the Notes thereto."

82. Article 9 (c) of the Draft Convention, in turn, defines the term "Property" as "all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company." The Commentary to Article 9 of the Draft Convention (Note 3 (a) to Article 9, entitled "Property"), provides that "[t]he definition of this term in paragraph (c), which is in conformity with international judicial practice, shows that it is meant to be used in its widest sense which includes, but is not limited to, investments."

---

[83] A. A. Fatouros, "An International Code to Protect Private Investment – Proposals and Perspectives", The University of Toronto Law Journal, Vol. XIV, No. 1, 1961, p. 87.
[84] Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, www.oecd.org/investment.

83. In turning now to Article IV, paragraph 2, of the Treaty of Amity, which is among "relevant rules of international law applicable in the relations between the parties," and thus, falls within the scope of Article 31(3) (c) of the Vienna Convention, it is clear that the word "property" in this provision signifies a non-technical or layman's conception of the term. Thus, Article IV, paragraph 2 of the Treaty of Amity, containing a broad definition of property, which also includes interests in property, provides that:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

84. It is worth pointing out that Iran has argued that the broad definition of property in Article IV, paragraph 2, of the Treaty of Amity, as further interpreted under Tribunal jurisprudence, should also be taken into account in interpreting Paragraph 9:

> "I would also recall that as between Iran and the United States, Article 4(2) of the Treaty of Amity refers to properties of nationals of either contract[ing] party as including interests in property, and the Tribunal has repeatedly held that this treaty is – and I quote from the Starrett Housing case – "a relevant source of law on which the Tribunal is justified in drawing", and indeed the Tribunal has also specifically relied on this reference to interests in property in the Treaty of Amity in allowing indirect claims by US claimants. The Starrett Housing case also refers to other cases such as Phelps Dodge and Amoco International where the Treaty of Amity was relied on as a source of law for the Tribunal."[85]

85. The United States did not specifically counter the Iranian argument quoted above. However, counsel for the United States generally addressed Iran's interpretation of the term "Iranian properties" by rejecting "Iran's broad interpretation of Iranian

[85] Hearing Transcript, Cluster 7, Day 1, Doc. 2136, pp. 54-55.

property,"[86] arguing that in effect Iran was trying to "avoid the ordinary meaning of Iranian properties".[87] Nevertheless, Paragraph 18 of Partial Award 529 is explicit that the United States agreed at that stage that the "U.S. law clause includes the Treaty of Amity".

86. Let us embark on a brief review of some of the cases referred to by Iran's counsel. It is worth pointing out that in *Starrett Housing*, the Tribunal found that the claimant's right to receive payment under existing inter-company loans had been expropriated. The Tribunal in Paragraph 361 equated "contract rights" with "tangible property" for the purposes of being protected against taking, explaining that, "[m]ore generally, international tribunals have also recognized that taking of contract rights, like taking of tangible property, is compensable."[88]
87. Significantly, among the authorities cited to by the Tribunal was the *Shufeldt* Claim, 2 R. Int'l Arb. Awards 1079, 1097 (1949), where it was stated that, "There cannot be any doubt that property rights are created under and by virtue of a contract." [89] The Tribunal held in Paragraph 362 that based on the evidence in the record, it was apparent that the claimants would not be repaid such loans and that their rights to repayment had been taken by the Iranian government. The Tribunal went on to find that:

> "[A]mong the property rights taken by the Government on 31 January 1980 were the Claimant's rights to be repaid their loans made on behalf of the Project."[90]

88. Likewise, and commenting on the *Shufeldt* case, Professor Rosalyn Higgins in her 1982 Hague Academy course stated that, "nothing would seem to turn on the distinction between contract rights and property rights *stricto sensu*."[91] She went on to point out that:

[86] Hearing Transcript, Cluster 1, Day 3, Doc. 2020, p. 18.
[87] Ibid.
[88] *Starrett Housing Corp. v. Iran*, Award No. 314-24-1, 14 August 1987, 16 Iran-U.S. C.T.R. 112, 230.
[89] Ibid., p. 231.
[90] Ibid.
[91] R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 1982, 176 Receuil des Cours, p. 340.

> "In the *Shufeldt* case the arbitrator affirmed that Shufeldt's rights were indeed of a proprietary nature, despite the fact that they were restricted to the right to extract and export chicle – and even though the government had expressly reserved title over the area."[92]

89. In turning now to the *Amoco* case, which was also mentioned by counsel for Iran, it is important to note that among the arguments advanced by the Respondent relating to Article IV, paragraph 2 of the Treaty of Amity was the argument that "Amoco's interest in Khemco is not "property" in the meaning of Article IV, paragraph 2, of the Treaty;"[93] an interpretation which was rejected by the Tribunal in the following terms:

> "107. … [T]he Tribunal notes that nothing in Article IV, paragraph2 suggests that the word "property", as used in that paragraph, should be construed as applying only to rights in tangible assets. No convincing explanation has been adduced to justify such a narrow interpretation, which is not in line with the common usage of the word, nor with the express terms of the Treaty protecting not only "property" but also "interests in property".
>
> 108. Clearly, the purpose of the second sentence of Article IV, paragraph 2 is to protect the property of the nationals of one party against expropriation by the other party. Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, *i.e.*, freely sold and bought, and thus has a monetary value. […] It is because Amoco's interests under the Khemco Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization."[94]

Equally importantly, the Tribunal in Paragraph 109 of the *Amoco* Award went on to reason that a narrow interpretation of the term "property" in Article IV, paragraph 2, of the Treaty of Amity would unjustifiably limit the protection accorded under the Treaty and thus "would lead to "a manifestly absurd or unreasonable" result within

[92] Ibid.
[93] *Amoco International Finance Corporation v. Iran*, Award No. 310-56-3, 14 July 1987, 15 Iran-U.S. C.T.R. 189, 219.
[94] Ibid., pp. 220-21.

the meaning of Article 32, paragraph b of the Vienna Convention."[95] In short, the jurisprudence of the Tribunal in interpreting the meaning of the term "property" contained in Article IV, paragraph 2, of the Treaty of Amity as a component of the general rule of interpretation, further confirms that a broad, non-technical, autonomous, and international conception of property was intended by the Parties when drafting Paragraph 9 of the General Declaration.

b) The Majlis Resolution and Interpretation of the Term "Iranian Properties"

90. The fact that the open diplomacy phase (negotiations conducted through Algerian intermediaries beginning in November 1980) was preceded by the secret diplomacy phase further illustrates the Diplomatic Nature of the Iranian proposals contained in the Majlis Resolution. It will be recalled that prior to the open diplomacy phase, the American delegation, headed by Warren Christopher, met secretly with a special envoy from Iran:

> "On the evening of September 15 Christopher, accompanied by Arnold Raphel, Secretary Muskie's Special Assistant and an expert on the Middle East, met secretly with [the German Foreign Minister] Genscher and Tabatabai at a small German government residence just outside Bonn."[96]

91. The following passage from a book chapter written by Mr. Roberts Owen, who was Legal Advisor to the Secretary of State and was involved in the secret diplomacy phase as well as the final negotiations, sheds some light on the origin and nature of the Iranian proposals:

> "As to what was to be discussed at the proposed meeting in West Germany, the Christopher team got its first inkling of Iran's agenda when Christopher sent a message through the German government cautioning that, before we committed ourselves to a meeting, we needed some assurance that the Iranian representative would have authority to speak for his government. In response the German

[95] Ibid., p. 221.
[96] Roberts B. Owen, "The Final Negotiation and Release in Algiers", in *American Hostages in Iran: The Conduct of a Crisis*, Paul H. Kreisberg (ed.), 1985, p. 305.

> Embassy soon telephoned to say that the Iranian delegate had volunteered a prediction which, if it came true, would clearly establish that he could speak for the Ayatollah Khomeini himself. The prediction was that within days Khomeini would publicly articulate four conditions for release of the hostages: that the United States would have to (1) pledge that it would not intervene in the internal affairs of Iran, (2) return all of the frozen Iranian assets to Iran, (3) cancel all U.S. claims against Iran, and (4) return the wealth of the Shah of Iran.
>
> Within three days the prediction was fulfilled. On September 12 Khomeini made a lengthy speech […] but near the end […] he suddenly articulated precisely the four conditions that had been predicted. By this time Christopher had assembled his small negotiating team, and I well remember the slightly baffled smiles around the table when we realized that the Germans' message seemed clearly to reflect a decision by the highest authority of Iran, the Ayatollah himself, to move forward toward a solution to the crisis."[97]

92. As recounted by Mr. Owen, the United States' initial reaction to Iran's demand concerning the return of its frozen assets was a qualified acceptance, in that the United States acceptance was conditional on Iran's agreement to participate in an international arbitral process, and to pay the ensuing arbitral awards:

> "From this complex of considerations we developed, after much brainstorming, the following response. "Your primary objective," we were prepared to say to Iran, "is to obtain the release of your assets from the freeze order and the judicial attachments, but the U.S. government will face serious legal obstacles in achieving that objective unless we can show our federal courts that some sort of a reasonably fair remedy is going to be provided for the claimants involved. Accordingly, in response to your third demand the U.S. government will bring about the cancellation of all commercial claims against Iran provided Iran agrees (1) to allow the claimants to submit essentially the same claims to an international arbitral tribunal and (2) to pay any awards made by the tribunal."[98]

[97] Ibid., pp. 301-302
[98] Ibid., p. 303.

93. As is readily apparent from the passages quoted above, the United States did not raise any substantive objections with respect to what subsequently was included in the Majlis Resolution as Proposal No. 2. It only expressed the position that its acceptance of the Iranian offer on this point would not be an unqualified acceptance. This point will be discussed further below in the context of the analysis establishing that the Majlis Resolution should not be approached as a unitary or indivisible instrument with one single interpretive weight. It should be divided into distinctive parts with a range of interpretive weight during the course of the interpretive process.

c) Proposal No. 2 of the Majlis Resolution, as Distinguished from Proposal No. 4

94. As is apparent from the introductory sentence of Article 31, paragraph 2, of the Vienna Convention, "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: […] (b) any 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."

95. The first point to bear in mind with respect to the Majlis Resolution is that the Majlis Resolution, being specifically referred to in the preamble to the General Declaration and in Article II(1) of the Claims Settlement Declaration, falls within the scope of the introductory phrase of Article 31, paragraph 2. Moreover, it is also covered by subsection (b) of that paragraph. A note of caution here is required. The Majlis Resolution should not be treated as a unitary instrument for the purpose of the interpretation of the Algiers Declarations. It does not have an indivisible nature and, depending on the Proposal under consideration, the appropriate weight in the interpretive process should be given to the Proposal in question. Thus, no doubt as far as Proposal No. 4 is concerned, the Majlis Resolution, being expressly rejected by the United States as discussed in greater detail below, may not be considered as part of the context of the Accords. However, the Partial Award, disregarding this distinction, in Paragraph 114 offers the following reasoning for dismissing the role of the Majlis Resolution in interpreting the term "Iranian properties":

> "Finally, in relation to the *travaux préparatoires*, diplomatic notes, and material filed in the present proceedings, the Tribunal again finds itself unable to accept Iran's contention that these documents show a common understanding of the Parties as to a broad definition of the term "Iranian properties." Iran refers to the Majlis Resolution as the preparatory work of the Algiers Declarations and, therefore, a supplementary means of interpretation according to Article 32 of the Vienna Convention. The Tribunal, however, cannot fail to observe that the Resolution was a unilateral statement released by one Party that did not meet with the agreement of the other, as evidenced by the fact that the terms of that Resolution did not find their way into the Algiers Declarations."

96. As to the interpretive role of the Majlis Resolution, and particularly its characterization in the passage quoted above, the following points are worth considering. First, the characterization of the Majlis Resolution merely as "a unilateral statement released by one Party" is misleading. It is also inconsistent with the Tribunal's previous pronouncements on the subject. For example, in the A/15 (IV) Partial Award, referring to the Majlis Resolution, the Tribunal noted that "[t]his Resolution constituted the basis of the Iranian position throughout the negotiations and is referred to in the Preamble of the General Declaration."[99]
97. As briefly mentioned, unlike Proposal No. 4, which was rejected by the United States mentioning the constitutional constraints, the United States did not raise any substantive objections while commenting on Proposal No. 2. At the same time, in its first written response, the United States did not express its "unqualified" acceptance of Proposal No. 2. Iran's Proposal No. 2, contained in the Majlis Resolution, thus may be characterized as an "Iranian Offer". The Table below details the U.S. qualified acceptance:

[99] Partial Award 590, Para. 23.

Table 1. Proposal No. 2: Iranian Offer and U.S. Conditional Acceptance[100]

Iranian Offer **(Majlis Resolution)**	**U.S. Qualified Acceptance (adding the arbitration condition)** **(First American Response, November 11, 1980)**
2. Unfreezing all Iranian assets in and outside the United States. These assets should be put at the disposal of the Iranian government, in order that we may utilize them in every possible way. The (U.S.) presidential order of Nov. 14, 1979, that blocks our assets should be declared null and void by presidential order. Financial relations would continue as before this presidential order, with the removal of economic blocks and all consequent effects. All legal procedures must be taken to avoid the presidential order concerning the confiscation of Iranian properties by the United States courts. Guaranteeing the security and free transfer of these properties must be made. No private U.S. citizen or resident of the U.S. may make a claim against these properties.	The United States accepts in principle the resolution as the basis for ending the crisis and hereby proposes the following series of Presidential orders and declarations in response to the resolution. II A. The United States is prepared to deliver to the Government of Algeria a copy of a signed Presidential order unblocking all of the capital and assets of Iran within the jurisdiction of the United States, whether located in the U.S. or other countries, in order to allow the parties to move expeditiously toward a resumption of normal financial relations as they existed before Nov. 14, 1979. D. In order to bring about the cancellation of all judicial orders and attachments relating to the capital and assets of Iran within U.S. jurisdiction, the United States is prepared to deliver to the Government of Algeria a copy of a signed Presidential declaration committing the United States to join with the Government of Iran in a claims settlement procedure which will lead to the cancellation of such orders and attachments as rapidly as possible.

As further detailed in the Table below, upon Iran's agreement with the United States' conditional acceptance of Proposal No. 2 (namely, arbitral process as well as securing the payment of any award against Iran), the negotiating process led to a binding agreement:

[100] As confirmed by the Tribunal in Partial Award 590, (Para 23 and footnote 11), this Resolution together with the United States' first and second written responses of 11 November and 3 December 1980, respectively, and Iran's written response of 21 December 1980, are found in A. Lowenfeld, *Trade Controls for Political Ends*, DS-809, et seq, (2nd ed. 1983).

Table 2. Proposal No. 2: Iran's agreement with the U.S. Conditions

U.S. Additional Comments Addressing Iran's Request for Further Clarification (Second American Response, December 3, 1980)	**Iranian Agreement with the U.S. Qualified Acceptance (Second Iranian Response, December 21,1980)**
Resolution No. II C. The United States specifically commits itself to insure the mobility and free transfer of the Iranian assets. The necessary procedural steps are set forth in comment No. 2. U.S. Comments on Its Answers Comment 2 stated: 2. With respect to the U.S. answer to Paragraph I(C), it is understood that Iran is willing to pay all of its legitimate debts to U.S. persons and institutions and that it wishes to terminate all related litigation. Accordingly, the United States agrees, in the context of the safe return of the hostages, to terminate all legal proceedings in U.S. courts involving claims of U.S. persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein and to prohibit all future litigation by U.S. persons and institutions based on existing claims against Iran, when Iran agrees to submit all existing claims of U.S. persons and institutions (except those to be cancelled and nullified pursuant to section II(B) of the answers of the United States) to an international claims settlement process for the determination and payment of such claims. This process would include binding third party arbitration of any claim not settled by mutual agreement. The United States agrees that such arbitration may be conducted, at Iran's election, by and under the rules of the International Chamber of Commerce or the World Bank's International Center for the Settlement of Investment Disputes or such other tribunal as may be	Section Two B. Since the Government of the Islamic Republic of Iran undertakes to settle its bona fide debts to American persons or institutions, the Iranian Government accepts that the claims of American entities and citizens against Iran, and the claims of Iranian nationals and institutions, be settled, in the first stage through agreement between the parties and, failing such agreement, through arbitration acceptable to the respective parties. For the purpose of repaying the above debts, the Government of the Islamic Republic of Iran will deposit with the Algerian Government an initial cash guarantee equal to $1 billion, or any other guarantee acceptable to the Central Bank of Algeria. In repaying such debts, this guarantee will be adjusted in such a way that it will never drop below $500 million.

agreed upon by Iran and the United States. The judgments and awards of the arbitral tribunal shall be enforceable in the courts of any nation in accordance with its laws. The United States is willing to consider applying the above international claims settlement process to specific claims of Iran against the United States.	

98. Thus, as is apparent from the U.S. Response to Proposal No. 2, the U.S. acceptance was not an unqualified acceptance. This is due to the fact that the United States added a condition (the international arbitration condition) to the Iranian offer. The U.S. Response, therefore, was a conditional acceptance of Proposal No. 2. As a result of Iran's acceptance of the U.S. conditions, however, a binding contract on this point was formed.

99. This is consistent with the statement of the United States' chief negotiator, Mr. Warren Christopher, in his affidavit, explaining that, "[a]s a general matter, the issue of the transfer of tangible properties of Iran of the type at issue in this case […] received relatively little attention during the negotiations"[101] and that, "there was relatively little time spent in negotiating the terms of their release to Iran."[102]

100. This situation may be contrasted with the United States' reaction to Iran's forth proposal regarding the properties of the estate of the former Shah of Iran. Indeed, the negotiating history of the Accords reveals that the United States consistently made the point that due to the constraints imposed by the U.S. Constitution, it would be impossible for the United States to accept Proposal No. 4 as originally formulated by Iran. As recounted by Mr. Owen,

> "[W]e developed the position that (a) since the only entity within the U.S. government that would have the legal power to transfer the allegedly stolen property to Iran would be the U.S. courts, Iran's only means for recovering any such property would be to bring suit in our courts and ask them to order the transfer, and (b) the executive branch

[101] Christopher Affidavit, Response of the United States to Claimant's Brief and Evidence, Doc. 1435, Ex. 1, Para. 5, p. 2.
[102] Ibid.

> of the U.S. government could offer no more than some facilitation of Iran's litigating efforts. As Christopher approached the meeting in Germany, he was prepared to say that, if Iran were to undertake such litigation, the U.S. government would take legal steps to prevent the Shah's property from being removed from the country pending the outcome of the litigation, to assist Iran in its efforts to collect information about such property, and to advise the U.S. courts that the members of the family of the Shah did not enjoy any special immunity from suit in our courts."[103]

101. Consistent with this position, upon Iran's request for clarification, the United States in the Second American Response made it clear that "under the laws of the United States," the Executive does not have the power to transfer the Shah's assets to Iran:

> "With respect to the U.S. answer to Paragraph III(C), under the laws of the United States, the only entity within the United States Government which could lawfully transfer the property or assets of the former Shah or his relatives to the Government of Iran would be a U.S. court acting pursuant to a legal proceeding brought by the Government of Iran. In fact, Iran has brought such a proceeding, which is now pending in an American court (Islamic Republic of Iran v. Mohammed Riza Pahlevi and Farah Diba Pahlevi, pending in the Supreme Court of the State of New York, Index No. 22013/79), and that pending case affords Iran an opportunity to prove its right to have the properties and assets in question transferred to Iran. The United States Government will facilitate efforts of the Government of Iran to obtain and enforce a judgment in the manner described in the United States position delivered by the Algerian delegation on Nov. 12, 1980."[104]

102. In rejecting Iran's interpretation attempting to read an obligation to transfer with respect to Pahlavi assets into Point IV of the General Declaration, the Tribunal in Partial Award No. 597 in Case A/11 explained that in its 26 November 1980 message replying to the first American response, Iran "went on to complain that the first American response had made "[n]o reference … to the transfer of these [Pahlavi] properties and assets to Iran.""[105] The Tribunal further observed:

---

[103] Owen, op. cit., p. 304.
[104] Second American Response, US Comments on Its Answers, No. 4.
[105] Award No. 597, Para. 203, p. 135.

> "The Tribunal concludes that the preparatory work of the Algiers Declarations concerning the issue of the return to Iran of all Pahlavi assets confirms the Tribunal's textual interpretation, *supra*, at paras. 186-99. The United States did not, in Point IV or any other provision of the General Declaration, undertake the obligation to bring about the transfer to Iran of those assets. No decision concerning the return of those assets to Iran figures in the Algiers Declarations. The High Contracting Parties left the matter to be resolved through litigation in United States courts."[106]

103. Accordingly, it is readily apparent that, as detailed above, as far as Proposal No. 2 as contained in the Majlis Resolution is concerned, the Resolution forms part of the context of the Accords within the meaning of the general rule of interpretation. In addition, as a component of the general rule, it further confirms that a broad, non-technical, autonomous, and international conception of the term "property" was intended by the Parties when drafting the transfer obligation of the General Declaration.

d) The Object and Purpose of the Treaty

104. Commentators point out that "in the Vienna rules, object and purpose function as a means of shedding light on the ordinary meaning," further explaining that:

> "It is to be noted, however, that this element of the rule is not one allowing the general purpose of a treaty to override its text. Rather, object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light."[107]

105. In light of the preceding discussion regarding the context of the negotiations leading up to the Accords, it should not come as a surprise that the Full Tribunal in Case A/1, echoing the same three elements discussed above, had this to say about the object and purpose of the grand bargain:

> "The relevant governing principles established by the Parties are a recognition of Iran's rights in its assets, along with agreement to resolve disputes by binding arbitration, and the creation of a Security

[106] Ibid., Para. 204.
[107] Gardiner, op. cit., p. 190.

> Account consisting of Iranian funds in order to satisfy awards against Iran."[108]

106. The negotiating history of the Accords sheds more light on the object and purpose of the Accords. In particular, reference to the "Mutual Taking of Hostages" analogy by the U.S. negotiators is telling. It will be recalled that, as discussed below, in *Dames and Moore*, the U.S. Supreme Court explained that the frozen assets served as a "bargaining chip" to be used by the U.S. President when dealing with a hostile country. This description properly signifies the underlying "linkage" between the return of the frozen assets and the release of the American diplomats. As to the direct link between the interdependent commitments undertaken by Iran and the United States, Mr. Owen has observed that:

> "Some commentators have suggested that the United States made a fundamental error in allowing Iran to link the return of the encumbered Iranian assets to the release of the hostages; the thesis seems to be that it was within the power of the United States to prevent any such linkage from taking place and that, if the suggested separation had occurred, the negotiations leading to the release of the hostages would have been vastly simpler and less time-consuming than they were. I believe, however, that all who have looked at the facts agree that the two sets of issues became irretrievably linked many months earlier when the attachments took hold and the freeze order was put in place. Delinkage had become impossible."[109]

107. Furthermore, the U.S. treatment of the frozen Iranian properties as bargaining chip has been aptly captured by the "mutual taking of hostages" analogy used by Mr. Owen. Referring to the frozen assets, he explains that:

> "Their presence in the equation in September 1980 points to the conclusion that it would have been virtually a political impossibility for officials of the Iranian government to release the hostages without first obtaining some commitment from the United States for a corresponding release of Iranian assets within U.S. control.
>
> In one sense the situation was like *a mutual taking of hostages*. It was as though, in April 1980, when President Carter decided to sever

[108] *Iran-United States, Case A/1 (Issues I, III, IV),* Decision dated 30 July 1982, I Iran-U.S. C.T.R., 189, 191.
[109] Owen, op. cit., p. 300.

> diplomatic relations with Iran and expel all Iranian diplomats from the United States, he had decided instead to seize those diplomats and hold them in custody pending release of our fifty-two nationals. In such circumstances, I would suppose, even those who share the Haig philosophy would probably have been willing to work out reciprocal commitments for release of both groups of prisoners, even though some negotiation and a "concession" would have been involved, simply because the only alternative, a more or less permanent stalemate, would have been unacceptable."[110]

108. Simply put, the Iranian properties were in fact Iranian hostages in the minds of the American negotiators; it was a textbook example of a reciprocal exchange as confirmed by the contemporaneous understanding of a key member of the U.S. negotiating team. Thus, the descriptive nature of the two sets of issues and the inevitable linkage between them should serve as a guiding principle for interpreting the Accords, including the terms of Paragraph 9.

e) The Relevance of the Principle of Good Faith

109. The reference to the principle of good faith as the first element of the general rule of interpretation as formulated in Article 31 of the Vienna Convention is a testament to its importance in the process of interpretation. It is the first principle on which international courts and tribunals must proceed in interpreting a treaty. Bin Cheng observes that, "[t]he law of treaties is closely bound with the principle of good faith, if indeed not based on it;"[111] further observing that:

> "As to the terms that a party employs, these are presumed to have been used in the contemporary and general sense in which the other party would have understood them at the time the treaty was concluded. If, therefore, a party wishes to use words in a special or restricted sense, it must expressly say so. […] In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances."[112]

[110] Ibid., pp. 299-300 (emphasis added, footnote omitted).
[111] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 106.
[112] Ibid., p. 107 (footnotes omitted).

110. The test, thus, is an objective one, namely what a reasonable person, in the circumstances, would have understood the term in question to mean. In the context of the debate between the Parties on the meaning of the term "Iranian property", counsel for Iran pointed out that "there's no contemporaneous documentation to show that either party to the Accords ever intended them to operate in that artificial and restrictive manner."[113] He placed emphasis on the importance of the common intention of the Parties as opposed to the newly invented subjective understanding of the United States, explaining that:

> "That common intention could not be derived from any subjective assessment of one party's motivations, still less so in the exceptional circumstances of negotiation of the Accords. In this respect, what I have in mind is the situation there was quite exceptional, because Mr Christopher is not in a position to recall, "This is what I said to Iran, this is what Iran said back to me", because what one has is the intermediary of the Algerian Government, so the most that can be said is, "This is the message we sought to communicate through Algeria, this is the message that we understood to be coming back from Iran, through Algeria", so it means that one is even further away from getting to some hold on the common intention of the parties, and that applies all the more so in this particular case because what is notable is that Mr Christopher is saying, "Well actually, this provision" or he says, "The type of the properties now at issue received little attention during the negotiations", and that is at paragraph 6 of his affidavit. …"[114]

111. In the context of the debate between the Parties as to their common intention with respect to the nature of the United States' obligation under Paragraph 9, the Tribunal's treatment of the issue in *Halliburton* is instructive. As is well-known, Article II, Paragraph 1, of the Claims Settlement Declaration excluded from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts". In *Halliburton*, at issue was the meaning of the term "binding contract" and whether the insertion of the word "binding" by the United States negotiators meant that the Tribunal could examine the continued

[113] Hearing Transcript, Cluster 1, Day 1, Doc 2009, p. 13.
[114] Hearing Transcript, Cluster 1, Day 1, Doc. 2009, pp. 51-52.

enforceability of choice-of-forum clauses providing for the sole jurisdiction of Iranian courts in light of the changed circumstances resulting from the Iranian Revolution. The Tribunal considered the affidavit of Warren Christopher, but cast a wary eye on its usefulness and instead gave primacy to the common intention of the Parties to the Algiers Declarations, stating that:

> "The intent of the United States negotiators in this regard is explained in the affidavit of former Deputy Secretary of State, Warren Christopher, but that affidavit is ambiguous concerning the clarity with which this intent was made known to the Algerian intermediaries, there being no direct contact between the American and Iranian negotiators. Mr. Christopher says that he proposed adding the word "binding" on January 17, 1981 and adds:
>
> When I reviewed this proposal with Mr. Ben Yahia, he appeared immediately to recognize the importance of the new term included in this provision in that it would leave it open to the Tribunal to decide whether a given contractual provision was "binding" on the parties and the Tribunal, and he specifically asked whether the United States would insist on the word "binding". I replied that we would, that it was essential, and Mr. Ben Yahia made no objection.
>
> Mr. Christopher says that Mr. Ben Yahia understood "the importance of the new term", but he does not say that the purpose of the ambiguous wording "binding contract" in relation to the enforceability of choice of forum clauses was understood and conveyed to the Iranian negotiators."[115]

112. Therefore, absent the evidence substantiating that, (i) this restrictive interpretation and limited coverage of the term "Iranian property" as well as the need for Iran to take various additional steps to make the transfer of the properties happen was intended by the U.S. negotiators, and (ii) in the words of the Tribunal, "this intent was made known to the Algerian intermediaries", and (iii) as a result, it "was understood and conveyed to the Iranian negotiators", and (iv) the Iranian negotiators agreed to them, no decisive reliance may be placed on the after-the-fact invented subjective understanding of the United States with respect to the nature of its obligation under Paragraph 9.

[115] *Halliburton Company, et al. v. Doreen/IMCO, Iran*, Interlocutory Award No. ITL 2-51-FT, 5 November 1982, reprinted in 1 IRAN-U.S. C.T.R. 242, 246

VI. The Meaning of the Term "Properties" as Defined in Sections 535.333 (a) and 535.215 of the Treasury Regulations

113. The fact that it was the common intention of the Parties to use the term "Iranian properties" in a broad sense and as a common and general term may be established, among other things, from the issuance of the implementing Treasury Regulations. The interpretive significance of this immediate post-Accords practice of the United States cannot be disregarded. The Partial Award's summary treatment of this important piece of evidence relating to the interpretive position of the United States, therefore, leaves a lot to be desired.

114. As a preliminary observation, it is worth pointing out that the Partial Award's reasoning as to why the 26 February 1981 Treasury Regulations adopted by the United States in order to implement its transfer obligation should not be given any weight in interpreting the term "Iranian properties" is unpersuasive. The Partial Award pronounces that the Treasury Regulations cannot meaningfully in the interpretive process because they do not constitute subsequent agreement between the Parties regarding the interpretation of the Algiers Declarations, or subsequent practice in the application of those Declarations that establishes the agreement of the Parties regarding their application within the meaning of Article 31 of the Vienna Convention. The Partial Award's reasoning is based on the premise that "Iran took the first opportunity it had to object to these same instruments before the Tribunal".[116] Thus, the majority points to the fact that on 25 October 1982, in its Statement of Claim in the present case, Iran referred specifically to Section 535.333 of the Treasury Regulations arguing that the United States had violated its obligations under Paragraph 9 of the Algiers Declarations, further noting that:

> "Iran's objection led to this Tribunal holding the definition of "Iranian properties" according to Section 535.333 of the Treasury Regulations to be unlawful in Award No. 529."[117]

[116] Partial Award, Para. 108.
[117] Partial Award, Para. 110.

115. It would seem that the majority has been persuaded by the argument advanced by the United States on this point. At the Cluster 1 hearing, counsel for the United States submitted that:

> "I will simply note that Iran suggested that the US Treasury regulations that defined Iranian properties, along with other statements made before the A15(II:A) partial award, including certain reports filed by the United States in the context of this litigation, should now be considered practice.
>
> Counsel apparently uses the word "practice" in the Vienna Convention sense, for interpreting the meaning of "Iranian properties", and here I would refer the Tribunal to pages 132 and 140 to 142 of Monday's transcript.
>
> Now, the United States will have more to say about these reports in the hearings in the individual clusters. For today, it suffices to observe that while the Tribunal held that almost all aspects of the US Treasury regulations were consistent with US obligations under the Accords, *the definition of Iranian properties in these regulations was precisely the one point held to be inconsistent*."[118]

116. It is worth pointing out Iran did not object to Treasury Regulations Section 535.333 in its entirety. Iran's objection was directed at the fact that the Treasury Regulations had not gone far enough in implementing the United States' obligation to transfer. In other words, Iran's objection was merely directed at the carve-out provisions contained in subsections (b) and (c) of Treasury Regulations Section 535.333, as opposed to subsection (a) which, in Iran's view, subject to the necessary adjustment to reflect the removal of the carve-out provisions, was consistent with the United States' obligation to transfer.

117. It is thus necessary to provide a brief review of the Treasury Regulations as originally adopted in 1979 to implement the freeze order, and as subsequently amended in 1981 to implement the transfer obligation undertaken by the United States under the Accords. As is well-known, on 14 November 1979, by Executive Order 12170, the President of the United States ordered the blocking of "all property

[118] Hearing Transcript, Cluster 1, Day 3, Doc. 2020, pp. 14-15 (Statement of Mr. Kill) (emphasis added).

and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran" as a retaliatory measure and in order to use the blocked assets as a "bargaining chip" to reach a deal with Iran on the Embassy crisis. In the words of the U.S. Supreme Court in *Dames and Moore*:

> "Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country."[119]

118. Obviously, the defining characteristic of this "bargaining chip" was its economic value. Accordingly, any right having an economic value was covered by the blocking regulations. It is important to note that the criterion for blocking a property as an Iranian property was not Iranian ownership under United States property law. Under Section 535.201(a) of the implementing Treasury Regulations, any property in which "Iran ha[d] any interest of any nature whatsoever" was blocked:

> "No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized".

119. Significantly, the Treasury Regulations in Section 535.311 entitled "Property; property interests" broadly defined these terms to specifically include "contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible" in addition to items such as money, goods, real estate and any interest therein, negotiable instruments, etc.

120. As already explained, during the negotiations of the Accords, this broad definition of Iranian property was in the minds of the Iranian and American negotiators. Indeed, the bargaining chip, as far as Iranian property was concerned, simply meant all the properties covered and specifically defined by the blocking order. Against this background, the Majlis Resolution, dated 2 November 1980, containing four proposals stating Iran's position, which started the negotiating process leading up to

[119] *Dames and Moore v Regan*, 453 U.S. 654 (1981), p. 673.

the Accords, was formulated in a way to specifically include various components of the "bargaining chip". I have already discussed the content of Proposal No. 2 contained in the Majlis Resolution, as well as the American response to this proposal. The focus of my present discussion, thus, would be the post-Accords Treasury Regulations issued to implement the United States' transfer obligation under General Principle A and Paragraph 9 of the General Declaration. As already mentioned, sub-sections (b) and (c) of Treasury Regulations Section 535.333 were in fact carve-out provisions. Their meaning may only be understood against the background of the definition of Iranian properties in sub-section (a) of the Treasury Regulations.

121. When after the conclusion of the Accords, the Treasury Regulations were amended in February 1981 to implement the commitments undertaken by the United States under the Accords, Section 535.333 (a), entitled "Properties", provided that:

> "The term "properties" as used in § 535.215 includes all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts. It does not include bank deposits or funds and securities. It also does not include obligations under standby letters of credit or similar instruments in the nature of performance bonds, including accounts established pursuant to § 535.568."

122. Section 535.215, in turn, is headed "Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States". Against this background, Iran's objection to the definition of the term "Iranian properties" in Treasury Regulations Section 535.333 was limited to the carve-out provisions as contained in subsections (b) and (c) of that Section. This is readily apparent from the description of the issue by the United States in its Rejoinder, where the United States explains that:

> "Claim II-A is a dispute between the two Governments over the meaning of the phrase "subject to U.S. law" contained in Paragraph 9 of the General Declaration and its effect on the U.S. obligation to transfer Iranian tangible properties under that provision."[120]

[120] U.S. Rejoinder, Doc. 333, p. 2.

123. As is apparent from the passage quoted above, the narrowly defined issue would only relate to the carve-out provisions as contained in subsections (b) and (c) of Section 535.333. This should not come as a surprise. It will be recalled that in the first phase of this Case, the United States advanced an argument which may be described as the U.S. property law argument. This argument was predominantly a payment-based argument. Under this argument, the United States contended that the exclusion of the properties subject to lien and contested properties as contained in subsections (b) and (c) of Section 535.333 of the Treasury Regulations was covered by the U.S. law clause exception of Paragraph 9. The argument was that a U.S. court applying U.S. property law would not compel a lien holder to transfer the property before the claim is paid. For example, in its 1990 Memorial, in Part II(B) "Subsequent application of the Algiers Accords establishes that the United States' obligation to arrange for the transfer of Iranian tangible property is subject to United States property and export control laws", the United States argued that:

> "[S]imultaneously with the execution of the Algiers Accords, the United States issued Executive Order 12281 and the related Treasury Regulations ordering the transfer of all Iranian property subject to the provisions of United States law. In doing so, the United States anticipated that Iran would promptly settle the storage, repair, *and related charges and obligations associated with property to which it claimed an interest*."[121]

124. In Partial Award 529, the Tribunal held that the U.S. law clause exception only covers U.S. export control laws and rejected the United States' argument that its coverage also extends to U.S. property laws. For example, with respect to the properties on which liens existed, the Tribunal held that "the issuance by the United States of Treasury Regulations Section 535 constituted a violation of the United States' obligations under the Algiers Declarations, *to the extent that they exempted from their transfer direction Iranian properties on which liens existed that Iran had*

[121] U.S. 1990 Memorial, Doc. 969, p. 37. (emphasis added) Notably, the United States argued that payment, as distinguished from delivery, was the decisive factor: "In a contract for the sale of goods where Iran has failed to pay for the goods, the property would not even be subject to transfer pursuant to Paragraph 9 of the General Declaration, since the property would not be Iranian owned." Ibid., p. 50. In rejecting the U.S. argument, the Tribunal in Paragraph 51 of Partial Award 529 noted that "there is a complete absence in this Case of any evidence that the United States suggested during the negotiation of the Algiers Declarations that the U.S. law clause had any purpose other than the preservation of strategic export controls on military items".

not discharged."[122] Thus, Partial Award 529 by declaring that the exceptions contained in subsections (b) and (c) of Treasury Regulations Section 535.333 were inconsistent with the obligations of the United States under the Accords, in fact took them out of the equation while at the same time leaving the broad language of Section 535.333 (a) intact.

125. The U.S. Statement of Defense reveals with sufficient clarity how the United States articulated its interpretive position in this regard. There, the United States, under a separate heading, namely "Seller's Remedies," articulated its position with respect to properties that Iran had purchased from United States suppliers as follows:

> "In one instance, Iran has claimed a right to properties it contracted to purchase and for which it has not paid. Such properties are not, of course, "Iranian properties" within the meaning of Paragraph 9. United States commercial practice, which permits a seller to retain and resell goods for which the buyer has failed to pay, is consistent with this interpretation."[123]

126. Likewise, the United States in its pre-hearing Memorial further developed and clarified its interpretive position as to the meaning of the term "Iranian properties" in Paragraph 9 of the General Declaration as follows:

> "In a contract for the sale of goods where Iran has failed to pay for the goods, the property would not even be subject to transfer pursuant to Paragraph 9 of the General Declaration, since the property would not be Iranian owned."[124]

127. Consistent with the passage quoted above, the interpretive position of the United States was that once the entire contract price is paid, the transfer obligation of the United States under Paragraph 9 would be triggered:

> "Iran argues (Memorial at 11) that in such situations, *even if the entire contract price is not paid*, it still is entitled to recover the property in question. Iran is incorrect. Under provisions of United States law applicable prior to November 14, 1979, Iran is not entitled to

[122] Partial Award 529, Para. 53 (emphasis added).
[123] U.S. Statement of Defense, Doc. 25, pp. 27-28.
[124] U.S. Hearing Memorial, Doc. 969, p. 50.

> possession of its property until all necessary obligations, charges, and fees have been paid."[125]

128. As can be seen in the passages quoted above, based on what I already described as a payment-based argument, the purchased property falls within the definition of the term "Iranian properties". However, under the U.S. interpretation of Paragraph 9, a U.S. seller has a "right to retain" the subject property under the U.S. law until the price is fully paid. Under this interpretive position, once the payment condition is satisfied, the U.S. transfer obligation would be triggered, because the seller's "right to retain" would cease to exist. In other words, the U.S. interpretation of Paragraph 9 under this theory is that once the price is paid, Iran's entitlement to delivery under the contract would trigger the U.S. transfer obligation. Thus, it was argued that Paragraph 9:

> "obligates the United States to arrange for the transfer of such properties by those holding them only when Iran paid its debts secured by the properties and when all other requirements of U.S. law had been satisfied."[126]

129. Now, if delivery is included in "all other requirements of U.S. law", how could the United States under Paragraph 9 arrange for the "transfer" of Iranian properties which have already been "delivered", because otherwise under the delivery-based argument they would not qualify as Iranian properties in the first place? Simply put, it would fly in the face of logic.

130. Likewise, Judge Simma's Partially Dissenting Opinion, noting that the Tribunal in interpreting Paragraph 9 must proceed on the basis of the assumption that the Parties to the Declaration intended to give this provision an *effet utile*, has articulated the problem as follows:

> "Indeed, if only items already delivered to Iran were to be transferred under the Paragraph 9 obligation, the result would effectively be that only items subsequently on loan in the United States or sent there for repair or kept in storage, would fall within the scope of the provision. While this result might not be "absurd" or "unreasonable" within the

[125] Ibid., pp. 48-49 (emphasis added)
[126] U.S. Statement of Defense, Doc. 25, p. 30.

> meaning of Article 32 of the Vienna Convention, it is highly unlikely that the Iranian Government would have agreed to such a limited obligation, excluding from the U.S. duty to arrange for transfer most of the properties finding themselves under the Respondent's jurisdiction."[127]

VII. The Interpretive Significance of the Consolidated Reports

131. The Partial Award summarizes in Paragraph 119 the debate as to the interpretive significance to be given to several Consolidated Reports submitted by the United States to the Tribunal identifying a number of properties as "GOI-owned" property. However, the Partial Award does not frame the debate accurately, by "inventing" an argument for the United States as follows:

> "On the other hand, despite having identified Iran's title as the criterion for establishing whether an item of property is "Iranian," in the United States Reports, as well as in its Hearing Memorial of 5 July 1990, the United States, rather incongruously, classified items that had been fully paid for by, but not delivered to, Iran as "GOI-owned tangible properties," which is at odds with the applicable United States law governing the passage of title to tangible property."[128]

132. I would note that the phrase "the United States, rather incongruously, classified items … as "GOI-owned tangible properties," which is at odds with the applicable United States law" would amount to advancing an argument by the majority on behalf of the United States. In particular, since what is at issue here is the interpretive significance of the Reports submitted by the United States in establishing its understanding of the scope of its Paragraph 9 obligation, the majority's reasoning gives rise to serious due process concerns. Moreover, Leaving that issue aside for the moment, next, the Partial Award goes on to summarily dismiss the interpretive significance of the Consolidated Reports as follows:

> "Importantly, moreover, the disclaimer that the United States included in its 1985 Report makes clear that the Reports were "not intended to address fully the various legal issues that form the basis of Iran's

[127] Partially Dissenting Opinion on the Interpretation of the Term "Iranian Properties", Judge Bruno Simma, Para. 35.
[128] Partial Award, Para. 119.

> claim." In these circumstances, the Tribunal is not prepared to consider the United States Reports as adequate evidence of a contemporaneous understanding of the United States that the term "Iranian properties" in Paragraph 9 also covers properties that had been fully paid for by, but not delivered to, Iran, when, under the applicable law, legal title to such properties remained with a third party – the seller. Nor do they provide an adequate basis for the Tribunal to presume a framework from which to infer any such understanding."[129]

133. It is important to recognize that the submission of several Consolidated Reports was specifically ordered by the Tribunal to identify the properties at issue in a matter-of-fact way. More precisely, the Parties were asked by the Tribunal to "describe each item and indicate its owner".[130] Thus, this was a Tribunal-ordered exercise. The full text of Paragraphs 4 and 5 of the Tribunal Order reads as follows:

> "Representatives of the Parties shall meet in The Hague or any other place the Parties may agree upon, on 2 March 1984 in order to seek to identify the Iranian property items which are located in the United States and which are at issue in this case.
>
> The Parties shall file by 5 April 1984 a joint report arrived at pursuant to the meeting mentioned under 4 above. The report shall state to what extent an agreement has been reached with regard to the property. In so far as possible the report shall describe each item and indicate its owner and the present location of the item."[131]

134. As indicated in Paragraph 5 of the Order, the original format envisaged for the reports was to submit a joint report. The original deadline was subsequently extended to 17 September 1984.[132] However, due to the fact that prior to this deadline, Iran indicated that it needed more time, the United States submitted its first Report on 17 September 1984, explaining that:

---

[129] Partial Award, Para. 121.
[130] Tribunal Order, 16 December 1983, Doc. 223, Para. 5 (emphasis added). Also, the Tribunal issued an Order dated 30 March 1989 whereby it informed the Parties of its intention to hold a hearing and required the Parties to submit 'Hearing Memorials' and directed them to include in their Hearing Memorials, inter alia, "updates of previously filed information regarding Iranian properties in the United States, describing in so far as possible, each item and indicating its owner and location"" (emphasis added, See Para. 30 of Partial Award 529).
[131] Ibid., Paras. 4 and 5.
[132] Tribunal Order, 21 August 1984, Doc. 506.

> "This report is submitted pursuant to the Tribunal's Order of August 21, 1984 in the above-captioned case. We note that by letter of September 10, 1984, Iran has requested a further extension of time for filing the joint report scheduled by that Tribunal order to be filed September 17, 1984. Recognizing that the Tribunal may not be able to rule on Iran's request prior to that date, the United States hereby submits this status report."[133]

135. As is apparent from the passage quoted above, the unilateral submission of the first report by the United States was not a departure from the joint reporting exercise as originally envisaged by the Tribunal. More importantly, Iran adopted the same Legend contained in the U.S. first Report when preparing its own successive reports. It merely commented as to the points where the Parties differed. This makes the successive unilateral and Consolidated Reports submitted by the Parties, to the extent that they reflect a meeting of minds as to the interpretive positions adopted by the Parties, "two or more related instruments" within the meaning of Article 2 of the Vienna Convention. It will be recalled that Article 2 (a) of the Vienna Convention defines treaty as follows:

> ""treaty" means an international agreement concluded between States in written form and governed by international law, *whether embodied in a single instrument or in two or more related instruments* and whatever its particular designation; …"[134]

136. Thus, a chain of related instruments, namely the individual reports submitted to the Tribunal following a common format, to the extent that they confirm that a meeting of minds has taken place, squarely fall within the language of Article 31 (3) (a) of the Vienna Convention as a "subsequent agreement between the parties regarding the interpretation of the treaty *or the application of its provisions*".[135]

137. It is important to recognize that although the Legend contained in the Consolidated Reports submitted by the United States only refers to the category of "GOI-owned" property in the abstract, this interpretive position has been applied throughout the Consolidated Reports to classify properties in concrete cases. For

[133] U.S. First Report, 17 September 1984, p. 1.
[134] Vienna Convention on the Law of Treaties, Article 2, Para 1 (a) (emphasis added).
[135] Vienna Convention on the Law of Treaties, Article 31, Para 3 (a) (emphasis added).

example, the U.S. Consolidated Reports consistently classify the properties at issue in Claim G-14 (Mr. Robert Stern) and Claim G-16 (Mr. Peter Eisenman) as "GOI-owned" properties.[136] Moreover, as to the reason why the properties would not be covered by the transfer directive, the same Consolidated Reports consistently indicated that the properties are contested properties. Of course, Iran consistently objected to the contested property argument advanced by the United States. However, leaving aside for the moment the merits or demerits of the U.S. position as to the issue of contested properties, it is readily apparent that to the extent the properties are classified by the United States as "GOI-owned" property, a meeting of minds with a decisive legal significance has taken place. This debate may be summarized in Table 3, below:

[136] See, for example, U.S. First Report, 17 September 1984, Doc. 550, Claims G-14 and G-16; U.S. Second Report, 30 October 1985, Doc. 757, Claims G-14 and G-16; Iran's First Report, 17 December 1984, Claims G-14 and G-16, Iran's Consolidated Report, 13 November 1987, Claims G-14 and G-16. The disclaimer contained in the U.S. Legend's footnote contemplating the possibility of a change in categorization as a result of gathering additional factual information is totally irrelevant as far as establishing the interpretive position of the United States is concerned. All instances of reclassification occurred as a result of additional **"factual"** information.

Table 3. Interpretive Positions of the Parties as contained in the Consolidated Reports

U.S. Categorization	Iran's Categorization	Scope of Meeting of Minds
App. G-14 (Stern) GOI-owned property	**App. G-14 (Stern)** GOI-owned property	GOI-owned property
Comment: D. Right to possession of tangible property contested	Response to U.S. Comment D: Museum has demanded the art work. Copy of the letter to the artist is attached.	
App. G-16 (Eisenman) GOI-owned property	**App. G-16 (Eisenman)** GOI-owned property	GOI-owned property
Comment: D. Right to possession of tangible property contested	Response to U.S. Comment D: Museum has demanded the art work. Copy of the letter to the artist is attached.	

138. Thus, the Parties' common interpretive position as consistently expressed in successive Consolidated Reports throughout a considerable period of time indicated that the term "Iranian properties" under Paragraph 9 of the General Declaration does include the properties which remained undelivered. In fact, this point has been specifically acknowledged by the United States. Commenting on the Tribunal's Order of August 1, 1985, the United States acknowledged that, as a result of using the same format by the Parties, the individual reports could effectively replace the joint reports originally envisaged by the Tribunal. The United States thus indicated that it "agrees with Iran that the format adopted by the parties in exchanging factual data in this case

makes preparation of a joint report less necessary than might otherwise be the case."[137] More importantly, as to the issue of ownership, the United States acknowledged that,

> "The status of the ownership question will be apparent from these submissions. Inclusion of an item in its claim constitutes Iran's contention that the item is owned by the Government of Iran. ***The United States has conceded Iran's ownership*** *(although not necessarily its right to possession) in all properties classified in sub-categories A - D of category I: "Government of Iran (GOI)--owned tangible property in U.S. on January 19, 1981."* See Legend attached. In fact, the United States has challenged Iran's claim of ownership only in category II.A. That category, "No GOI-owned tangible property" contains items which the United States believes should be deleted from Claim IIA/IIB…"[138]

139. Simply put, consistently with other components of the general rule of interpretation previously discussed, we are now able to see the full picture. This clear acknowledgment by the United States as to the conclusiveness of its interpretive position conceding Iran's ownership as contained in successive Consolidated Reports should be the end of the matter. The Parties' subsequent agreement regarding "the interpretation of the treaty or the application of its provisions" within the meaning of Article 31 (3) (a) of the Vienna Convention, thus, provides us with an additional piece of evidence establishing that "delivery" as such could have no bearing whatsoever in the interpretation of the meaning of the term "Iranian properties". I would further note that, in particular in light of the passage quoted above in which the United States acknowledged that it had "conceded Iran's ownership," the same observations as to the interpretive significance of the positions contained in the Consolidated Reports are also applicable in the context of the discussion of subsequent practice as defined in Article 31 (3) (b) of the Vienna Convention, namely "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[137] Comments of the United States, Doc. 749, 16 August 1985, p. 2.
[138] Ibid., p. 4 (emphasis added).

140. In my view, this concession or unreserved admission by the United States should have been dispositive of the issue of ownership in relation to the properties conceded by the United States, regardless of whether a domestic law or autonomous treaty law applied to determination of ownership of or title to "Iranian properties". That is because with such an unreserved concession by the Respondent- which also enjoys the status of a fully sovereign State- there is simply no issue or dispute over the ownership of the properties so conceded to be left for determination of the Tribunal. In other words, any further examination and determination on the ownership of or title to the properties so conceded would be tantamount to an excess of jurisdiction. If the United States had **"conceded Iran's ownership** (although not necessarily its right to possession) **in all properties classified in sub-categories A - D of category I**: "Government of Iran (GOI)--owned tangible property in U.S.",[139] by necessary implication, as far as the properties classified in sub-categories A-D were concerned (for example, where the entire purchase price was paid) the meaning of the term "Iranian properties" **ceased to remain a live issue** (even assuming, *arguendo*, that it was at some point a live issue as apparently is argued by the majority).

141. The second point upon which I wish to comment is the way the U.S. admission as to the meaning of the term "Iranian properties" has been treated in the Partial Award. In considering this vital piece of evidence by which the U.S. had **"conceded Iran's ownership"** as to a number of properties as contained in the Consolidated Reports, one would expect this compelling evidence to be treated as an integral part of the whole interpretive exercise, or in the words of the ILC as part of the "crucible" approach,[140] and not as an isolated episode. Quite to the contrary, the majority has completely ignored the United States' admission within the various stages and elements of interpretation and has addressed this issue superficially and in strict isolation from its whole interpretive exercise, and when it had already completed the process of interpretation and had formed a firm view as to the meaning of Iranian properties without any regard to this piece of evidence. This is not methodologically

[139] Comments of the United States, Doc. 749, 16 August 1985, p. 4.
[140] "All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation." [1966] Yearbook of the ILC, vol II, pp. 219-20, Para. 8.

viable. At any rate, the Partial Award, treating the U.S. admission in isolation, has this to say as to the effect of an admission:

> "As a general matter, concerning the legal consequences of an admission, Bin Cheng writes that, unlike estoppel, "an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the "principle of contradiction." An admission is not necessarily conclusive as regards the facts admitted. Its force may vary according to the circumstances.""[141]

The majority goes on to conclude that an admission, "while not having binding effect,"[142] still must be given appropriate weight, further stating that it will consider admissions made by the United States in these proceedings "in light of the principles delineated above."[143] I cannot avoid concluding that the passage quoted above has been taken out of context. For example, as to the effect of admissions of a State in the particular context of ownership, even outside the notion of equitable estoppel, Bin Cheng explains that:

> "if a **State,** having been fully informed of the circumstances, has **accepted a person's claim to the ownership of certain property** and entered into negotiation with him for its purchase, it becomes **"very difficult, if not impossible"** for that State subsequently to allege that he had no title at the time."[144]

142. I would note that Black's Law Dictionary defines concession as "a voluntary grant, or a **yielding to a claim or demand**".[145] Accordingly, when a party has **yielded** to a claim or demand that claim or demand becomes undisputed and ceases to remain a live issue for determination. In the same vein, "a judicial admission is a formal stipulation by a party or counsel that **concedes** any element of a claim or defense. Its effect is to determine the issue conclusively, to dispense entirely with the

[141] Partial Award, Para. 123.
[142] Ibid.
[143] Partial Award, Para. 124.
[144] Bin Cheng, op. cit., p. 144.
[145] Black's Law Dictionary, 1990, p. 289 (emphasis added).

need for further evidence."[146] In these circumstances, it would be highly problematic and inexplicable not to recognize the effects of a concession made by a party not to mention branding *proprio motu* such a concession as an exercise exhibiting "a significant degree of incongruity".[147]

143. It is important to note that the U.S. admission was a voluntary admission. Additionally, in making the above admission, the United States was not responding to a previously formulated text proposed by Iran; the United States had full control over the formulation of the text.

144. It is worth repeating that discussing the effect of a judicial admission, commentators have noted that:

> "A judicial admission is a formal stipulation by party or counsel that **concedes** any element of a claim or defense. Its effect is to determine the issue conclusively, to dispense entirely with the need for further evidence."[148]

145. Likewise, Professor Allan Farnsworth (Reporter, Restatement (Second) of Contracts), discussing the effect of admission in respect of satisfying the writing requirement as contained in UCC 2-201 (the writing show that a contract of sale has been made) explains that:

> "Courts agree that a writing is not insufficient as a memorandum merely because it has been made in a court proceeding, at least if the writing was made voluntarily. To the extent that the statute's function is viewed as evidentiary, it is difficult to see why the statute should not be satisfied by a written admission in a pleading, stipulation, or deposition, […]. The Code goes beyond this and gives effect to oral admissions. Under 2-201 (3)(b), the statute is satisfied if a party "admits in his pleading, testimony or otherwise in court that a contract for sale was made," even if admission is not in writing."[149]

146. With respect to content, Professor Farnsworth further explains that depending on the facts and surrounding circumstances, the courts have determined the proper

[146] Judicial Admissions, 64 *Columbia Law Review* 1121.
[147] Partial Award, Para. 121.
[148] Judicial Admissions, *64 Columbia Law Review* 1121.
[149] Allan Farnsworth, *Contracts*, 3rd edition, 1999, p. 396.

weight to be given to an admission. In any event, an admission may also be read together with writings.[150]

147. Moreover, the United States concession cannot be undermined by categorizing it as an erroneous application of United States property law, being "at odds with the applicable United States law governing the passage of title to tangible property."[151] The statement by the International Court of Justice as to the primacy of interpretations of States and their national authorities concerning their laws over that of international courts and tribunals is very illuminating and conclusive:

> "**The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities,** especially when that interpretation is given by the highest national courts (see, for this latter case, Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, p. 46 and Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation."[152]

148. There is nothing in the Consolidated Reports and statements filed by the United States, consistently through a long period of time until the issuance of Partial Award 529, or any other circumstance, to suggest that making any exception to the rule outlined by the International Court of Justice above would be justified.

VIII. Concluding Remarks

149. Partial Award 529, by confirming the unlawfulness of subsections (b) and (c) of Treasury Regulations Section 535.333, simply "restored" the broad meaning of the term "properties" as defined in Sections 535.333 (a) and 535.215 of the Treasury Regulations. In particular, as became apparent by the review of the interpretive

[150] Ibid., p. 397.
[151] Partial Award, Para. 119.
[152] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, Para. 70 (emphasis added).

positions adopted by the United States prior to the issuance of Partial Award 529, the broad meaning of the term "Iranian properties" has long been firmly entrenched. While it is understandable that the Respondent, in the face of an unfavourable ruling in Partial Award 529 as to the scope of the U.S. law clause, and as a pleading strategy, may have resorted to a material change of position regarding the meaning of the term "Iranian properties," the Tribunal would be ill-advised to simply ignore this broad, non-technical, autonomous meaning.

150. The interpretive position adopted by the United States in the first phase of these proceedings may be summarized as follows: Iran's entitlement to recover its properties under Paragraph 9 of the General Declaration (and correspondingly, the United States' transfer obligation) would only be triggered and materialized if Iran can establish its contractual entitlement to delivery. Thus, the United States took issue with Iran's position that there is no identity between contractual and treaty-based entitlement:

> "Iran asserts in A/15 (II:A) (Memorial at 11, 22) that the United States, pursuant to the terms of the Algiers Accords, committed to arrange for the transfer of "all" Iranian property within its jurisdiction even though Iran is not "legally entitled to possession of the properties" under United States law."[153]

151. Basing its argument on the U.S. law clause as contained in Paragraph 9, the United States further explained that the insertion of the phrase "subject to the provisions of U.S. law applicable prior to November 14, 1979," in Paragraph 9, was intended to guarantee the operation of ordinary rules of United States property law:

> "The phrase "subject to" has a very clear meaning in international agreements. Black's Law Dictionary defines "subject to" as "governed or affected by." Such language is commonly used in international agreements to permit a state to apply its laws in various respects without breach of its obligations under the agreement in question. Such language is designed to permit a state to comply with provisions of its domestic laws that it is unable or unwilling to waive or modify."[154]

[153] U.S. Hearing Memorial, Doc. 969, p. 30.
[154] Ibid., p. 31.

152. The Tribunal in Partial Award 529 clearly rejected the expansive reach of the U.S. law clause, beyond protecting the operation of the export control laws, as argued by the United States. It thus concluded that, "the redefinition in the Treasury Regulations of the term "properties" to exclude properties on which liens existed cannot be justified on the grounds of the U.S. law clause in paragraph 9 of the General Declaration."[155] Thus, a faithful application of Partial Award 529 requires that, at a minimum, where "the entire contract price" has been paid, we recognize Iran's treaty-based entitlement to recover its property under Paragraph 9 of the General Declaration.

153. Furthermore, by necessary implication, it would also follow that the Tribunal rejected the argument that United States property law controls the question whether or not Iran is entitled to recover the property in question. The main effect of the 1992 Partial Award's finding, therefore, is the dissociation of Iran's contract-based and treaty-based entitlement to recover its properties. It follows that Iran's treaty-based entitlement to recover its property, as in effect acknowledged by Partial Award 529, is an independent and stand-alone entitlement and thus, it would also cover the properties where the entire contract price is not paid. I am fully aware of the fact that Judge Simma in his separate opinion does not recognize Iran's entitlement to delivery beyond the situation where the entire contract price has been paid. However, in my view, it would seem that the Tribunal also had in its contemplation the situations where the entire contract price was not paid. The latter part of Paragraph 152 of Partial Award 601 provides further support for the proposition that Partial Award 529 recognized that the Security Account payment mechanism was intended to operate as a substitute payment mechanism. This, in turn, would prevent receiving a windfall by an Iranian purchaser where the item is not fully paid for:

> "As long as this was the case, it was simply irrelevant whether the properties had been (fully) paid for or not, or whether Iran might have breached its contracts with the United States private companies. This does not mean that Iran would necessarily receive a windfall where properties were transferred to it that, for example, had not been fully

[155] Partial Award 529, Para. 51.

> paid for. Article II, paragraph 1, of the Claims Settlement Declaration provided the legal avenue for private United States companies to bring, among other things, claims against Iran for breach of contract before this Tribunal to seek redress, and many companies in fact availed themselves of this mechanism."[156]

154. At any rate, restoring the broad meaning of the term "properties" as defined in Sections 535.333 (a) and 535.215 of the Treasury Regulations will have implications beyond the entitlement to the recovery of the properties purchased by Iran. It will be recalled that the above-mentioned provisions refer to "property interests of the Government of Iran," as well as "properties in which Iran or an Iranian entity has an interest". It is axiomatic that a broad conception of property encompasses such components. In sum, while I agree with most of the majority's reasoning and conclusions, as discussed above, I disagree with the Partial Award's analysis and conclusion in interpreting the meaning of the term "Iranian properties".

Dated, The Hague,
10 March 2020

Seyed Jamal Seifi

[156] Partial Award 601, Para. 152.