

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

Full Tribunal

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

The Islamic Republic of Iran

Claimant

And

The United States of America

Respondent

IRAN-UNITED STATES CLAIMS TRIBUNAL دیوان داوری دعاوی ایران ایالات متحده	
CASE NO: A15 (II:A)	پرونده شماره:
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SEPARATE OPINION OF JUDGE ROSEMARY BARKETT  
CONCURRING IN PART, DISSENTING IN PART

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1. I concur with the results reached by the Tribunal Majority (the "Majority") except as discussed herein.

**STATE RESPONSIBILITY AND DAMAGES IN CLAIM G-18 (STRADIVARIUS VIOLIN (THE "VIOLIN") HELD BY MR. ALI FOROUGH)**

2. As the Majority recognizes, there are two fundamental questions to be answered in each of the Claims in this case: whether the property at issue falls within the provisions of Paragraph 9, triggering a U.S. obligation, and, if so, whether the United States breached such obligation.

3. Regarding the first question, the Majority correctly concludes that the meaning of "Iranian properties" in Paragraph 9 of the General Declaration of the Algiers Accords (the "Accords") is governed by Partial Award 529, which held that the term "Iranian properties" encompasses only tangible properties solely owned by Iran and does not include properties in which Iran has only a partial or contingent interest.<sup>1</sup> Moreover, as the Majority explains,

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<sup>1</sup> *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶¶ 97-100 (hereinafter, "Partial Award"); see also Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter, "General Declaration"), 19 Jan. 1981, 1 IRAN-U.S. C.T.R. 3; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the

whether Iran owns property is determined by whether Iran holds title to that property according to the law of the jurisdiction where the property is located, the *lex situs*.<sup>2</sup>

4. However, because the Majority fails to apply the principles it has correctly articulated, it erroneously finds State responsibility in Claim G-18—the only Claim before us in which a possessor claims an ownership interest.

5. In Paragraph 320, the Majority states: “The Tribunal finds that the fact that a holder of an item asserts that it, and not Iran, owned the item on 19 January 1981 does not deprive the Tribunal of jurisdiction to decide whether the United States has performed its obligations under Paragraph 9 and, more generally, under the Algiers Declarations – thus, to decide, whenever necessary, whether an item of property is “Iranian” within the meaning of Paragraph 9.”<sup>3</sup> But that begs the question of whether that was the intent of the Parties. The issue in this case is not whether the U.S. has performed its obligations under the Algiers Declarations, but whether it

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Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter, “Claims Settlement Declaration”), 19 Jan. 1981, 1 IRAN-U.S. C.T.R. 9 (collectively, “the Algiers Declarations”); *The Islamic Republic of Iran and The United States of America*, Partial Award No. 529-A15-FT (6 May 1992), *reprinted in* 28 IRAN-U.S. C.T.R. 112 (hereinafter, “Partial Award 529”).

<sup>2</sup> Partial Award, *supra* note 1, ¶¶ 142-164. Judge Simma’s Partially Dissenting Opinion on the Interpretation of the Term “Iranian Properties”, errs in at least two regards. First, it fails to adequately assess the language of Executive Order 12281. Judge Simma, at paragraphs 53 and 54, suggests that Executive Order 12281, which required U.S. holders to transfer property to Iran, covered the same properties that had been blocked by Executive Order 12170. That is incorrect. While Executive Order 12170 blocked “*all properties and interests in property of . . . Iran*,” Executive Order 12281 expressly limited the property to be transferred to Iran only to “*properties . . . owned by Iran . . .*” (emphasis added). Judge Simma’s opinion, in paragraph 51, itself notes that Executive Order 12281 (which limited the property to be transferred to properties “owned by Iran”) had been “shared between the parties . . . and not opposed” by Iran. Thus, Judge Simma states, this “Order [12281] will have to be given greater probative value than any other piece of domestic law-making when it comes to assessing the real intention of the Parties . . .”. However, Judge Simma’s opinion fails to do that. The specific limitation to “ownership” of property in Executive Order 12281, of necessity, requires the property to be titled in order to be “owned”. As the Majority thoroughly explains, “properties . . . owned by Iran” encompasses only properties to which Iran holds title. Second, Judge Simma also errs by failing to defer to Partial Award 529. For the reasons explained by the Majority and in Judge Brower’s separate opinion, the Tribunal’s interpretation of the term “Iranian properties” was totally relevant and inter-related to the questions before the Tribunal in that case. As Judge Simma notes, the Tribunal has an obligation to consider prior decisions before it in order to ensure coherence “or else its legitimacy and credibility will suffer.” The application of Partial Award 529 and the language of Executive Order 12281 requires the determination of title in the property, which must in turn be determined according to the *lex situs*.

<sup>3</sup> Partial Award, *supra* note 1, ¶ 320.

had such an obligation in the first place with reference to this Violin. I submit that it did not because a property subject to disputed ownership is not within the definition of “Iranian property” under Paragraph 9. It is not “Iranian property” because both Iran and Mr. Forough have laid claim to the Violin and no resolution of ownership has designated it as Iranian. As explained below and based on the evidence before us and on Partial Award 529, which has already defined “Iranian property” as property *solely* owned by Iran, the Parties could not have intended Paragraph 9 to include property subject to *disputed ownership*, and the United States, thus, had no obligation to arrange for its transfer.

6. This Tribunal has jurisdiction to determine the United States’ obligation relative to a particular Iranian property pursuant to Paragraph 9, but this determination does not encompass adjudicating competing claims of ownership. Deciding whether title has been transferred in order to be deemed Iranian property is very different from deciding a factually-contested claim of ownership between the possessor and Iran. The latter scenario entails a legal matter outside the realm of State responsibility. The property for which the United States has a responsibility to transfer had to have been Iranian property as of January 1981. Iran must have had title as of that date. In this case, ownership has never been determined until this Tribunal has attempted to do so in this Award. Therefore, it could not have been Iranian property in January 1981. Thus, there is no United States responsibility for the transfer of this Violin.

7. Indeed, Iran itself explicitly acknowledged that the United States’ Paragraph 9 obligation did not encompass properties in which the possessor claims ownership. In a letter to the U.S. Treasury Department dated 29 September 1981, Iran’s counsel stated:

Our position has been that no one within the jurisdiction of the United States can hold an Iranian asset, consistent with ¶ 9, ***unless the claim under which the person or entity holding the Iranian asset is based on a disputed property interest in the property held.***<sup>4</sup>

8. Thus, Iran conceded in 1981, the time closest to the Accords, that when a possessor retains property because the possessor claims to own it, that property does not fall under Paragraph 9. The Violin at issue here fits precisely within Iran’s defined exception. Mr. Forough expressly claimed to be the owner of the Violin, at least during his lifetime, and refused to transfer the Violin to Iran claiming it belonged to him. This concession is not only

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<sup>4</sup> Letter from Shack & Kimball, P.C. to John M. Walker, US Department of Treasury, 29 Sept. 1981 (emphasis added). Claimant’s Brief and Evidence in Rebuttal, Volume 33, Supp. (2)-11 & 12, IRI Radio and TV (17 May 2006), Ex. 13.

straightforward but also logical: to conclude that this contested property falls within the ambit of Paragraph 9 would require a finding that the United States intended to accept without question Iran's unproven claim of ownership over the ownership claims of its own citizen. It would only be reasonable for the United States to accept Iran's claim of ownership had the contest been resolved pursuant to a judicial determination. Thus, it is illogical to assume that the United States would have agreed to arrange for the transfer of contested property in light of the possessor's asserted ownership claim.

9. It is even more unreasonable to suggest that the United States would have undertaken such an obligation when one considers that there were no obvious mechanisms by which the United States could have resolved the issue of ownership. The United States obviously could not represent Iran in a quiet title suit against Mr. Forough. Nor, in the absence of a prior judicial declaration of ownership, could the United States file an eminent domain "takings" case pursuant to the United States' Constitution. Such a suit would have to assume that Mr. Forough owned the Violin in the first place and should be compensated for it,<sup>5</sup> which, by definition, would have excluded the Violin from Paragraph 9. Rather, it was Iran's responsibility to obtain a judicial determination of ownership, as between Iran and Mr. Forough, before the United States had any obligation to act in obtaining or returning the Violin.

10. Inexplicably, the Majority never analyses the issue of whether disputed properties fall within Paragraph 9, or Iran's concession that they do not. Instead, the Majority relieves Iran of this responsibility by deciding the conflicting ownership claims between Iran and Mr. Forough when Mr. Forough was not, nor could have been, a party before this Tribunal.<sup>6</sup> This is not the appropriate forum for such a dispute between Mr. Forough and Iran. The Parties here are Iran and the United States and the threshold question is whether property subject to conflicting ownership claims is encompassed within the Parties' agreement.

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<sup>5</sup> U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

<sup>6</sup> Claims Settlement Declaration, *supra* note 1, art. III (4) ("No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. . . ."); Hearing Transcript, Cluster 2 – Day 3 (16 October 2013) at 33-34 (statement of Mr. Lerman) (explaining that Mr. Forough was not a U.S. citizen until 1984, which was after the deadline for U.S. nationals to file claims before the Tribunal).

11. In addition to erroneously asserting that the Violin falls within Paragraph 9, the Majority's analysis of State responsibility is plainly wrong. The Majority opinion asserts that:

The United States never disputed that the Ministry purchased the Stradivarius, which constituted an "Iranian propert[y]" on 19 January 1981; however, upon learning of its existence and Iran's attempts to have it returned, the United States failed to take all reasonable steps to ensure that Mr. Forough transferred the Stradivarius to Iran.<sup>7</sup>

It is true that the Ministry paid for the Violin in 1976 however, the United States did dispute sole ownership of the Violin at the time of the Accords from the inception of Iran's claim in 1983, when Mr. Forough told the United States that the Violin was given to him as a lifetime gift. Given that lifetime interest, Iran was not a sole owner of the Violin. Moreover, for 12 years, Mr. Forough's assertion of at least a lifetime interest in the Violin was unrebutted. Iran simply alleged in its Statement of Claim that Mr. Forough had "no right to the violin."<sup>8</sup> It was not until 1995 that Iran specifically asserted that Mr. Forough only held the Violin in trust and provided evidence for its competing claim of ownership.<sup>9</sup> Indeed, all of the facts asserted by the Majority in Paragraphs 302 through 310 were unknown to the United States until at least 1995. Thus, the United States did not fail to take any reasonable steps as it was not under an obligation to transfer the Stradivarius to Iran until the ownership interest was resolved.

12. The Majority does not explain how a United States obligation could possibly have arisen when the United States had been told by Mr. Forough that the Violin was his, and for 12 years thereafter, Iran provided no evidence to contradict Mr. Forough's claim. It is unclear on what basis the United States was required to question Mr. Forough's assertion of ownership nor does the Majority explain. Mr. Forough's testimony constitutes evidence, and, as noted above, the United States was completely unaware that this evidence was rebuttable until 1995.

13. With ownership unresolved, the United States encouraged Mr. Forough and Iran to resolve the conflict themselves by, for example, emphasizing that although Mr. Forough claimed a life estate in the Violin, he was willing to make some payment to Iran, *as Iran had*

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<sup>7</sup> Partial Award, *supra* note 1, ¶ 331.

<sup>8</sup> *See e.g.*, Report of the Islamic Republic of Iran on the Iranian Properties in the United States (17 Dec. 1984); Consolidated Report of the Government of the Islamic Republic of Iran in Compliance with the Tribunal Orders Dated 10 Nov. 1987 & 4 Sept. 1985 (13 Nov. 1987).

<sup>9</sup> Claimant's Brief and Evidence, Claim App G-18 related to the Ministry of Islamic Guidance, Roudaki Hall (controlled by the Ministry of Islamic Guidance, previously known as Ministry of Culture and Arts, Ministry of Culture and Higher Education) (22 Sept. 1995).

*originally suggested*, to settle the claim.<sup>10</sup> These actions of the United States cannot be deemed unreasonable under these circumstances, especially in light of Article I of the Claims Settlement Declaration commanding that Iran and the United States “*will* promote the settlement of the claims . . . by the parties directly concerned.”<sup>11</sup>

14. The Majority also suggests that “the United States [] assumed the risk that the Tribunal . . . [would] ultimately conclude that the item is ‘Iranian’ . . . and, therefore, find the United States responsible for a violation of that provision.”<sup>12</sup> However, this again puts the cart before the horse. We must first ask whether Iran and the United States could have intended to undertake this particular risk when they signed the Accords. For the foregoing reasons, I submit that the only reasonable conclusion is that the Parties could not have intended to include within the definition of “Iranian properties” property in which the possessor claims ownership of the property.

15. Furthermore, although the Majority applies the interpretative principles of Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”)<sup>13</sup> to other Claims, it ignores them when confronted with the question here of whether the Parties intended to include property in

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<sup>10</sup> Consolidated Report of the United States (30 Oct. 1985) and Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990) (both reports noting that Mr. Forough believes the Violin was lifetime gift and suggesting he be contacted directly by Iran).

<sup>11</sup> Claims Settlement Declaration, *supra* note 1, art. I; *see also* Separate Opinion of Judge Charles N. Brower, Concurring in Part, Dissenting in Part in *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶ 18 (emphasis added) (hereinafter, “Separate Opinion of Judge Charles N. Brower”).

<sup>12</sup> Partial Award, *supra* note 1, ¶ 320.

<sup>13</sup> U.N. Doc. A/CONF. 39/27, 23 May 1969; *reprinted in* 8 I.L.M. 679 (1969) (“Vienna Convention” or “VCLT”).

(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 . . .

(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:

. . .

(b) Any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation; . . .) (emphasis added).

which the possessor claims ownership within Paragraph 9. Applying Article 31 to this question yields the conclusion that the Parties did not intend to do so.

16. First, when considering the plain language of the phrase “Iranian properties,” the addition of the modifier “Iranian” before the word “properties” would lead a reasonable person to conclude that the properties must have been owned by Iran and not anyone else. As the Majority correctly holds in Paragraph 104 “that the text of Paragraph 9 is clear and unambiguous . . . [and] 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 . . . .”<sup>14</sup> As a result, the Majority reaffirms that “the term ‘all Iranian properties’ in Paragraph 9 . . . mean[s] properties that ‘were solely owned by Iran.’”<sup>15</sup> Thus, by requiring the property to be solely owned by Iran, (i.e. “Iranian properties”), the United States could not have intended to take responsibility for property that might be Iranian or might belong to the possessor.

17. The context of the Accords further informs the conclusion that “Iranian properties” cannot include properties that the possessor claims to own. For the reasons discussed in Judge Brower’s opinion on this Claim, Executive Order No. 12281 forms part of the relevant context of the Accords as it was provided to the Iranian delegation during the negotiation of the Accords.<sup>16</sup> This Executive Order, which the United States implemented to effectuate its Paragraph 9 obligations, expressly limited the properties that were subject to Paragraph 9 to “properties . . . *owned by Iran.*”<sup>17</sup> As the Majority recognizes, this language emphasizes that “Iranian properties” is limited to only tangible properties owned solely by Iran.<sup>18</sup> Given Mr. Forough’s claim of at least a life estate, it could not be said that the Violin was “solely owned by Iran” on 19 January 1981.

18. Additionally, the preamble to the General Declaration recalls the obvious point that the Accords were intended to resolve a hostage crisis, and General Principle A then provides:

*. . . the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.* In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

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<sup>14</sup> Partial Award, *supra* note 1, ¶ 104.

<sup>15</sup> *Id.* ¶ 98.

<sup>16</sup> See Separate Opinion of Judge Charles N. Brower, *supra* note 11, ¶ 20.

<sup>17</sup> Executive Order No. 12281, ¶ 1-101 (emphasis added).

<sup>18</sup> Partial Award, *supra* note 1, ¶¶ 99, 100.

Iran’s relevant financial position prior to November 1979 regarding the Violin was that Iran possessed only a legal cause of action against Mr. Forough for the Violin. That position was restored when the United States’ government lifted the economic freeze and enabled Iran to bring suit. The Majority thus turns Iran’s cause of action into a Final Judgment without the requisite process in between. Although Mr. Forough testified before this Tribunal on behalf of the United States, he could not mount his own case or call any witnesses to defend against Iran’s ownership claim as against his claim of, at the very least, a lifetime interest in the Violin. We cannot presume how Mr. Forough would have defended this claim. Similarly, we cannot assume the case presented by the United States was equivalent to the defense that Mr. Forough might have mounted, since, before this Tribunal, the United States was defending the case from a different perspective. To turn a cause of action into a Final Judgment of ownership under these circumstances places Iran in a better position than it enjoyed prior to November 1979. This financial improvement, as Judge Brower explains in his opinion, also directly contradicts the Parties’ commitment during the negotiation of the Accords that no ransom payment would be made to Iran for the return of the 52 American hostages.<sup>19</sup> It was this shared commitment that motivated the Parties to include General Principle A’s limitation on Iran’s financial recovery.<sup>20</sup> Accordingly, General Principle A reinforces the conclusion—and Iran’s own stated understanding—that the Parties never intended to include in Paragraph 9 property in which the United States possessor asserted an unresolved ownership interest against Iran.

19. Finally, as discussed more fully in Judge Brower’s opinion, the subsequent practice of the Parties indicates that Iran knew it had to quiet title to the Violin in a competent court before the United States’ Paragraph 9 obligation could be triggered.<sup>21</sup> In a letter dated 30 December 1983, the Director of the Iranian Interests Section of the Algerian Embassy requested a U.S. law firm to “take the necessary legal action to retrieve [the Stradivarius violin] for us” and to estimate the cost of litigating the matter in U.S. courts.<sup>22</sup> Iran’s subsequent decision not to pursue this lawsuit does not diminish the interpretive significance of Iran’s early acknowledgment of the need for quieting title. Iran’s conduct after the Accords underscores

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<sup>19</sup> See Separate Opinion of Judge Charles N. Brower, *supra* note 11, ¶ 37.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.*, ¶ 30.

<sup>22</sup> Letter from Ali Sabzalian, Director of Interests Section of the Islamic Republic of Iran, to Kevin Lyons of Cook & Franke S.C., 30 Dec. 1983. Claimant’s Brief and Evidence in Rebuttal, Volume 8, Claim G-18, Ministry of Islamic Guidance (17 May 2006), Ex. 21, Att. 25.

the ordinary meaning and context of Paragraph 9 that the Parties intended “Iranian properties” to encompass only property in which Iran’s ownership was not disputed by the possessor.

20. I therefore believe that the plain language of Paragraph 9, the object and purpose of the Accords, and the subsequent practice of Iran and the United States all indicate that the Parties never intended for the Violin, or any property in which the possessor claimed an ownership interest, to constitute “Iranian properties.” The claim before us requires a finding of ownership before any obligation on the part of the United States is triggered but that is not a matter to be adjudicated before this Tribunal. Accordingly, I cannot join the Majority in holding that the United States either had or breached a Paragraph 9 obligation with respect to the Violin. Thus, absent any responsibility, no damages should be awarded in this claim. Moreover, because ownership of the Violin has only been determined by this Award, any Award of damages is subject to interest only from the date of this Award.

21. Furthermore, even if Iran were entitled to damages, it is premature to determine the amount at this time. First, the Majority has ordered the return of the Violin. If the United States does so, then no award of damages is necessary. The Majority has conceded the inadequacy of the evidence provided by Iran’s expert witness, Mr. Keane, nevertheless it awards an amount based on the average of six sales when only two of the sales referenced are actually comparable and the United States never had the opportunity to respond on the issue of value. Thus, I agree with the reasoning in Judge Johnson’s separate opinion as to the inadequacy of support for the Majority’s valuation.

**STATE RESPONSIBILITY AND DAMAGES CLAIM SUPP. (2)-12  
(MUSICAL INSTRUMENTS HELD BY MR. MASHAYEKHI)**

*State Responsibility in Claim Supp. (2)-12*

22. I also dissent from the Majority’s conclusion that the United States breached Paragraph 9 with respect to Claim Supp. (2)-12, the musical instruments held by Kamran and Claudia Mashayekhi.

23. At its core, this claim concerns the application of the Small Claims Settlement Agreement (“SCSA”),<sup>23</sup> which the Tribunal issued as an award of agreed terms on

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<sup>23</sup> *The United States of America, on behalf and for the benefit of certain of its nationals and The Islamic Republic of Iran, Award on Agreed Terms No. 483-CLAIMS OF LESS THAN US \$250,000/86/B38/B76/B77-FT (22 June 1990), reprinted in 25 IRAN-U.S. C.T.R. 327, 331-332 (hereinafter, “Small Claims Settlement Agreement”).*

22 June 1990. The SCSA binds the Parties, by their own agreement, to “settle definitively, forever and with prejudice *all* disputes, differences, claims, *counterclaims* and matters outstanding or *capable of arising in relation* to the Claims of less than \$250,000 and/or Case No. 86.”<sup>24</sup>

24. The record, without dispute, establishes Iran’s recognition that its current claim for the instruments was a counterclaim “capable of arising in relation to” Claudia Mashayekhi’s claim settled by the SCSA. Most notably, in an open United States’ court proceeding, wherein Iran sought to dismiss the counterclaim it had brought for the return of the instruments in question, Iran’s counsel stated:

[T]he first option we would pursue with respect to the counterclaim [for the instruments involving Kamran Mashayekhi] is to assert it in front of the Iran-United States Arbitral Tribunal. *It is properly maintained as a counterclaim to the Claudia Mashayekhi proceeding there.* Although the government from Iran is precluded from bringing claims of an affirmative nature, it can bring counterclaims in front of the Tribunal.”<sup>25</sup>

25. Based thereupon, the United States Court dismissed the case. As noted by Judge Brower, this representation of Iran’s counsel was necessarily premised on Iran’s belief that Claudia Mashayekhi jointly held the instruments with her husband Kamran Mashayekhi.<sup>26</sup> In fact, Iran relied on the Mashayekhi’s joint control over the instruments and gathered evidence of this joint control as early as 1979, when Iran filed its counterclaim for the instruments against the Mashayekhis jointly in the United States Court.<sup>27</sup> Nonetheless, the Majority simply ignores the representation of Iran’s counsel in that proceeding.

26. Although the Majority finds that “the release by Iran in the Small Claims Settlement Agreement did not encompass actions against individuals who were not (and could not be)

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<sup>24</sup> *Id.* preamble (emphasis added).

<sup>25</sup> Hearing on Defendant’s Motion to Dismiss, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 6 July 1981) (emphasis added) (hereinafter “Hearing on Defendant’s Motion to Dismiss”). Response of the United States to Claimant’s Brief and Evidence: Brief of the United States on Issues Common to Multiple Claims, Part 2 (Appendices) (26 Sept. 2001), Ex. 11 (hereinafter “Brief of the United States on Issues Common to Multiple Claims”).

<sup>26</sup> See Separate Opinion of Judge Charles N. Brower, *supra* note 11, ¶¶ 49-50.

<sup>27</sup> Answer of Defendant Iran, Kamran Mashayekhi and Claudia Mashayekhi v. Iran, No. 79-2039 (D.D.C. 3 Dec. 1979). Brief of the United States on Issues Common to Multiple Claims, Ex. 14.

part[y] to the relevant underlying proceedings (e.g., Kamran Mashayekhi),”<sup>28</sup> it must recognize that the only two parties against whom Iran could have maintained a claim or counterclaim for the instruments at this Tribunal were Claudia Mashayekhi and the United States. Before us is a claim against the United States for these instruments. However, in the SCSA, Iran agreed to release both Claudia Mashayekhi and the United States from any responsibility related to the instruments:

. . . the Islamic Republic of Iran shall ***release and forever and definitively discharge*** the ***United States*** from ***any and all*** claims, causes of action, rights, interests and demands, whether in rem or in personam, ***past, present or future***, which have been raised, may in the future be raised, or ***could have been raised in connection with disputes, differences, claims, counterclaims and matters*** stated in, related to, arising, or ***capable or arising from the Claims of less than \$250,000*** and/or Case No. 86 and/or Case No. B38.<sup>29</sup>

It is hard to imagine language more clearly prohibiting Iran from bringing any action against the United States that was related to one of the settled small claims. As Iran’s counsel admitted, Iran’s “claims, causes of actions, rights, interests and demands” for the instruments “*could have been raised in connection with*” Mrs. Mashayekhi’s small claim.<sup>30</sup> As a result, the United States and Mrs. Mashayekhi are “forever and definitively discharge[d]” from any responsibility with respect to the instruments. The Majority subverts the intention and agreement of the Parties “to forever and definitively” discharge each other from any related action that was, will, or could be raised, by permitting Iran to now bring a claim concerning precisely the same “rights, interests and demands” it indisputably could have brought as a counterclaim against Mrs. Mashayekhi’s claim. This Claim should therefore be dismissed.

#### *Damages in Claim Supp. (2)-12*

27. Although Claim Supp. (2)-12 should be dismissed in its totality for the reasons discussed above, the Majority also errs by basing its valuation of the instruments on insufficient evidence.

28. Mr. Keane’s testimony does not constitute a sufficient evidentiary basis for an award of damages. Mr. Keane based his analysis on photographs taken in approximately 1978, some

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<sup>28</sup> Partial Award, *supra* note 1, ¶ 375.

<sup>29</sup> Small Claims Settlement Agreement, *supra* note 23, art. VI(iii) (emphasis added).

<sup>30</sup> See Hearing on Defendant’s Motion to Dismiss, *supra* note 25.

35 years before the date of valuation.<sup>31</sup> But by Mr. Keane's own admission, any valuation should have been based on the *current* condition of the instruments.<sup>32</sup> Tribunal precedent has noted that "[o]ne of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. . . . It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain."<sup>33</sup> Thus, while Iran may have suffered some loss, that alone does not permit the Tribunal to award damages without a reliable basis by which to determine the actual amount of those damages.

29. In addition, no proof has been adduced as to *which* two bows, in particular, are at issue let alone their value. Indeed, the Majority concedes that Iran "state[d] that it is unclear which four of the six bows were returned [to Iran], such that it is unclear which two bows are the subject of this Claim."<sup>34</sup> The Majority also acknowledges that it "is not in a position to be able to specify" which two bows remained in the United States, since no evidence was presented to the Tribunal on their identity or value.<sup>35</sup> Nevertheless, the Majority inexplicably gives the United States four months to return the bows that neither the Tribunal nor Iran can identify or locate and, should the United States fail to achieve this impossible task, the Majority requires the United States to compensate Iran for the unidentified bows, which Mr. Keane himself stated could not be properly valued, "given that he had not seen any photographs of the bows and was thus unaware of their condition and unable to identify [their] model."<sup>36</sup>

30. Since Iran has not been able to identify the bows at issue, it has not sustained its burden of proof with respect to them. It is unfortunate that, in a given case, proof might not be available. However, the integrity of the judicial or arbitral process cannot allow the substitution of guesses or speculation for actual, ascertainable proof of liability, causation, and damage.

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<sup>31</sup> Hearing Transcript, Cluster 2 – Day 2 (15 October 2013) at 20–21 (cross-examination of Mr. Keane).

<sup>32</sup> Mr. Keane testified that he uses five criteria to estimate the value of an instrument: (1) attribution, (2) tonal quality, (3) condition, (4) provenance, and (5) freshness to the market. *See* Hearing Transcript, Cluster 2 – Day 1 (14 October 2013) at 123–24 (examination of Mr. Keane).

<sup>33</sup> Amoco International Finance Corporation and The Government of the Islamic Republic of Iran, et al., Partial Award No. 310-56-3, ¶ 238 (14 July 1987), reprinted in 15 IRAN-U.S. C.T.R. 189.

<sup>34</sup> Partial Award, *supra* note 1, ¶ 1876.

<sup>35</sup> *Id.* ¶ 1915.

<sup>36</sup> *Id.* ¶¶ 1901, 1914-1916.

Although the Tribunal has some discretion in the matter of assessing damages, due process requires that discretion be based upon some proof in order to maintain credibility and integrity. To permit an award of damages in the absence of any legitimate evidence invites arbitrariness and capriciousness into the arbitral or judicial process. No damages should thus be awarded in this claim.

**STATE RESPONSIBILITY AND DAMAGES IN CLAIMS G-7, G-8, AND G-13  
(EQUIPMENT HELD BY PORT OF VANCOUVER, GULF PORTS AND SHIPSIDE)**

*State Responsibility in Claim G-7*

31. The Majority also errs in finding State responsibility in Claim G-7. Claim G-7 in this case involved the same Parties, the same legal obligation, the same properties, and the same requested relief as in Case No. B67, which was settled on Agreed Terms.<sup>37</sup> Accordingly, the Award on Agreed Terms settling Case No. B67 also resolved the Claim in G-7.

32. First, the Parties are the same. MORT was the Claimant in Case No. B67 and is the Claimant in this case. Likewise, as defined by the Claims Settlement Declaration, the Respondent in Case No. B67 had to have been the “United States” in order for the Tribunal to have jurisdiction over the Case, and the United States is also the Respondent in this case.<sup>38</sup> The Tribunal affirmed this conclusion in Case No. B67 when it stated: “[t]he Tribunal has satisfied itself that it has jurisdiction in this matter within the terms of the Declaration of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims *by the Government of the United States of America* and the Islamic Republic of Iran of 19 January 1981.”<sup>39</sup> Judge George H. Aldrich likewise expressly noted as much in his concurring opinion, when he said that Case No. B67 “is a claim . . . between a United States governmental entity and an

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<sup>37</sup> See *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award on Agreed Terms No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 338, 338-39 (hereinafter, “Award on Agreed Terms No. 79-B-67-2”).

<sup>38</sup> See *id.* The Claims Settlement Declaration gives the Tribunal jurisdiction to decide only (1) claims of nationals of the United States against Iran and claims of nationals of Iran against the United States as well as certain counterclaims (art. II(1)); (2) official claims of the United States and Iran against each other arising out of contractual arrangements (art. II(2)); and (3) claims involving interpretive disputes or performance of the Accords (art. II(3)). The Respondent in B67 thus had to be the “United States,” as defined by the Claims Settlement Declaration, in order for the Tribunal to have jurisdiction over the Case.

<sup>39</sup> Award on Agreed Terms No. 79-B-67-2, *supra* note 37, at pp. 338-39 (emphasis added).

Iranian governmental entity.”<sup>40</sup> Thus, by issuing the Award of Agreed Terms in Case No. B67 rather than dismissing the case for lack of jurisdiction as would have been necessary if the United States had not been deemed a party, the Tribunal recognized that the Port of Vancouver was a United States entity.

33. Iran and the United States also both recognized and represented that the Port of Vancouver was the “United States” in Case No. B67. Iran did so in its Statement of Claim for Case No. B67, alleging that the Port was “a political sub-division of, and affiliated to, the United States of America.”<sup>41</sup> The United States agreed, noting that “[t]he Port of Vancouver . . . comes within the definition of ‘United States’ laid down in Article VII of the Claims Settlement Declaration.”<sup>42</sup> Thus, the Award for Case No. B67 and the settlement and release that it incorporated, were binding on and between Iran and the United States, as the two Parties to Case No. B67.

34. Despite the fact that the Respondent in Case No. B67 must have been the United States, the Majority declares that “even if the Port of Vancouver was an entity controlled by the government of the United States for purposes of jurisdiction in Case No. B67, the 1983 Settlement Agreement did not dispose of Claim G-7 in the present Cases.”<sup>43</sup> The Majority does not provide sufficient explanation or support for its proposition that the United States could be a party to a settlement agreement for purposes of jurisdiction, and yet not be bound by the same agreement. The Award in Case No. B67, including the settlement and release that it incorporated, was binding on Iran and the United States as the two Parties to Case No. B67. It is disingenuous to now say that the United States was not a party to the settlement, such that it is responsible for the very same claims it previously settled, and from which it was already released in Case No. B67.

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<sup>40</sup> Concurring Opinion of George H. Aldrich in *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Award No. 79-B-67-2 (12 Sept. 1983), reprinted in 3 IRAN-U.S. C.T.R. 348, 348.

<sup>41</sup> Statement of Claim of the Ministry of Roads and Transport (19 Jan. 1982) in Ministry of Roads and Transportation and Port of Vancouver, Washington in Case No. B-67 ¶ B.2. Claimant’s Brief and Evidence in Rebuttal, Volume 2, Claim G-7, The Ministry of Road and Transportation (17 May 2006), Ex. 13, (hereinafter “Claimant’s Brief and Evidence in Rebuttal, Volume 2”).

<sup>42</sup> Memorial of the United States in Opposition to Claimant’s Request for Interim Measures in *Ministry of Roads and Transportation and Port of Vancouver, Washington*, Case No. B-67, 1–2 & n.1 (20 Aug. 1982). *Id.*, Ex. 15.

<sup>43</sup> Partial Award, *supra* note 1, ¶ 481.

35. The Majority Opinion also plainly mischaracterizes the legal claims that the settlement agreement in Case No. B67 resolved. There is no support for the Majority’s assertions that the settlement agreement resolved only contractual claims between the Parties. Indeed, the pleadings refute any such assertion, as Iran never raised any contractual claims in Case No. B67. The only legal basis for the claim asserted in Case No. B67 was the alleged breach of Paragraph 9 of the Accords,<sup>44</sup> and the Settlement Agreement for Case No. B67 addresses and resolves the claim of treaty breach in no uncertain terms, stating:

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

WHEREAS, MRTR *contests the legality of the laws of the State of Washington and the U.S. Department of the Treasury regulations under the Algerian Declarations* and by entering this Agreement does not concede their validity, and

WHEREAS, the parties to this Settlement Agreement wish to compromise on the basis of the Algerian Declarations, provided that, based on this Settlement Agreement, the Port and MRTR *agree to dispense with all of their claims* against each other, whether before the Tribunal, legal courts or any other judicial or non-judicial authorities, when the Port has delivered the MRTR properties to MRTR and the Tribunal has authorized all payments as provided in this Agreement.

...

Article One: MRTR and the Port agree to settle *all of their disputes* . . . .

...

Article Seven: Once the terms and conditions of this Settlement Agreement have been fully discharged by both MRTR and the Port, the parties hereto will promptly *dismiss all litigation and claims against each other* before any court, arbitration body or judicial or nonjudicial body and will immediately execute mutual releases in favor of each other.<sup>45</sup>

The legal claims raised and resolved in Case No. B67 are thus precisely the same legal obligations at issue in Claim G-7 here.

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<sup>44</sup> See Award on Agreed Terms No. 79-B-67-2, *supra* note 37, at p. 341 (quoting the Parties’ settlement agreement as stating that MORT had “filed a claim before the Tribunal against the Port of Vancouver . . . [claiming] that the property should have been returned to [MORT] *based upon points 2 and 3 [of] paragraph 9 of the Algerian General Declaration . . . .*” (emphasis added)).

<sup>45</sup> Award on Agreed Terms No. 79-B-67-2, *supra* note 37, at pp. 341-43 (emphasis added).

36. In addition to identical Parties and legal claims, the property in Case No. B67, to wit, the rock crushers and portable housing units, are the same rock crushers and portable housing units for which a claim is made in Claim G-7.<sup>46</sup> Likewise, Iran, through MORT, sought the same relief in Case No. B67 as Iran is currently seeking before this Tribunal: delivery of the equipment, damages for any deterioration to the equipment, and damages for loss of use.<sup>47</sup>

37. Accordingly, because this Claim involves the same Parties, the same property, the same damages, and the same legal obligation that were settled in Case No. B67, the release of the United States from any liability in Case No. B67 also applies to this claim, and Claim G-7 should be dismissed.

*Damages in Claims G-7, G-8, and G-13*

38. I also disagree with the award of damages in Claims G-7, G-8, and G-13 as the Majority first errs by refusing to apply the doctrine of mitigation.

39. The Majority correctly explains that the doctrine of mitigation applies when (a) there is an agreement, and (b) one party breaches the agreement, and (c) the breach causes damage to the non-breaching or “aggrieved” party, (d) for which the aggrieved party is not responsible.<sup>48</sup> If those circumstances exist, the doctrine of mitigation requires that the “aggrieved party” take “reasonable steps” to reduce or eliminate the damages caused by the breach when it has no obligation at all to do so under the agreement.<sup>49</sup>

40. The obligation of mitigation arises, not by the terms of the treaty or contract, but by operation of law *after* the contract has been breached.

41. The doctrine of mitigation does not jeopardize the Parties’ rights and obligations under the Accords because the principle of mitigation would still require the United States to compensate Iran for the reasonable costs of mitigation, and Iran would have received the property at issue earlier and less damaged.

42. Moreover, the Majority errs by concluding, on the one hand, that mitigation requires the aggrieved party to take *reasonable steps*, but, on the other hand, declaring that it was reasonable for Iran to take *no steps*. The Majority says that the objective of the mitigation

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<sup>46</sup> Claimant’s Brief and Evidence in Rebuttal, Volume 2, Ex. 13, ¶¶ F.1-F.5.

<sup>47</sup> *Id.* ¶¶ G.1-G.3.

<sup>48</sup> Partial Award, *supra* note 1, ¶ 1797.

<sup>49</sup> *Id.*

principle is clear: “to avoid the aggrieved party sitting back and waiting to be compensated for harm which it could have avoided and reduced.”<sup>50</sup> Yet that is precisely what Iran was doing here. Taking Gulf Ports as an example, by paying the storage charges, a debt Iran agreed was owed, Iran would have avoided most of the USD 2.95 million which the Majority has erroneously awarded. Surely, paying the undisputed storage fees in order to avoid approximately USD 2.95 million awarded by the Tribunal in damages would have been a “reasonable” step that Iran could have taken, even in the midst of “strife” or “political tension.”<sup>51</sup>

43. Furthermore, none of the reasons suggested by the Majority exempt Iran from making any efforts whatsoever to mitigate its damages. To say that a party is exempt from the application of its legal obligation to mitigate because it must consider “its own Government’s policies” or because the parties to the original agreement are in “crisis” with one another would excuse virtually everyone from the obligation to mitigate.<sup>52</sup> Moreover, even if relevant, not one shred of evidence was presented to support the assertion that the “strife” in Iran somehow prevented Iran from making any attempt at mitigation.

44. In addition to the Majority’s erroneous treatment of mitigation, the Majority also errs by concluding that all the damage Iran sustained between 1 March 1981 and the delivery of the equipment was caused by the actions of the United States in passing the Unlawful Treasury Regulations.<sup>53</sup> This conclusion contravenes the principles of causation, and is irreconcilable with the Majority’s acknowledgement that MORT could not locate this equipment until 17 August 1981 due to MORT’s own disorganization, which had nothing to do with the Treasury Regulations.<sup>54</sup> The Majority does not explain how the Treasury Regulations could have caused any delay when Mort did not even know where the equipment was located. And even after MORT finally learned where its property was located, MORT would then be required to prepare the equipment for onward shipment to Iran, which included finding and

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<sup>50</sup> *Id.* ¶ 1797.

<sup>51</sup> Partial Award, *supra* note 1, ¶ 2070.

<sup>52</sup> *Id.*

<sup>53</sup> *See e.g. id.*, ¶¶ 1949, 2090, 2173.

<sup>54</sup> *Id.* ¶ 436; Claimant’s Brief and Evidence in Rebuttal, Volume 3, Claim G-8, The Ministry of Road and Transportation (17 May 2006) at 35 (admitting that “after the Hostage Crisis the MORT did not have the slightest idea regarding the company to which Morrison Knudsen had sent its properties.”).

chartering a ship, inspecting the equipment, and supervising its re-crating, and loading.<sup>55</sup> Based on the timeline agreed to by Gulf Ports and MORT itself, this process would have taken approximately six months from the time MORT located its equipment.<sup>56</sup> Thus, regardless of the Unlawful Treasury Regulations, the earliest MORT could have shipped the equipment was February 1982, not March 1981. As a result, any damage that occurred prior to February 1982, including physical deterioration and storage fees, was neither caused by nor attributable to the Unlawful Treasury Regulations, but, rather, was caused by and attributable to the actions and omissions of Iran.

45. Then, as Judge Johnson notes in Paragraph 24 of his separate opinion, the United States could not be “responsible for damages that Iran accrued after 30 March 1982, the date by which MORT’s properties were to be shipped under the November 1981 settlement agreement.”<sup>57</sup> And, even if the U.S. *were* responsible for damages beyond 30 March 1982, which it could not have been, the Majority critically overlooks the fact that MORT was also required to remove all the equipment from Gulf Ports by 30 June 1983 according to the Award settling the dispute

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<sup>55</sup> Hearing Transcript, Cluster 6 – Day 3 (15 May 2014) at 36 (statement of Mr. Bigge) (“Whatever services these companies provided, what is clear and undisputed is that they were not responsible for then shipping them to Iran. Rather, the US companies were to store the equipment temporarily and await further instruction from Iran or its agents with respect to onward shipment.”); *id.* at 39; *id.* at 12 (statement of Ms. Grosh) (“As we heard from Mr. Mousavi, there had to be some MORT representative on the ground to see the chartering of the ships, the loading of the vessels and so on.”); *id.* at 46 (statement of Mr. Bigge) (“The US equipment holders could not simply put mailing labels on portable housing units, rock crushers and cranes, and drop them into the post . . . coordination from MORT on shipping logistics was crucial before any of this property could be shipped to Iran. Without any contact from Iran, the equipment simply could not be shipped.”); Cluster 6 – Day 2 (14 May 2014) at 41, 46 (examination of Mr. Mousavi) (stating that his job was to inspect the equipment, prepare the shipment of the properties by contacting packers or crating companies and that the main office in Iran organized shipping companies).

<sup>56</sup> Settlement Agreement between MORT and Gulf Ports, 17 Nov. 1981 (requiring that MORT remove the properties by 31 March 1982, 4.5 months from the date of the Settlement Agreement), Response of the United States to Claimant’s Brief and Evidence: Claim G-008 (Gulf Ports Crating Company) (26 Sept. 2001), Ex. 7; Letter from Gulf Ports Crating Company to Office of Foreign Assets Control, 30 Sept. 1982, at 2 (noting MORT had requested an additional three months (until 30 June 1983) to remove the equipment, to which Gulf Ports agreed), Claimant’s Brief and Evidence in Rebuttal, Claim G-13, Ex. 12.

<sup>57</sup> See Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part in *Islamic Republic of Iran and United States of America*, Partial Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, ¶ 24 (hereinafter, “Separate Opinion of Judge O. Thomas Johnson”).

between MORT and Gulf Ports.<sup>58</sup> MORT, however, did not remove the equipment until February 1984, seven months after the deadline. MORT's failure to remove the properties by the Award's deadline was not caused by the Unlawful Treasury Regulations, as the Settlement Agreement also extinguished any effect the Unlawful Treasury Regulations might have had on the transfer of the equipment. Therefore, any damage that occurred after 30 June 1983 and prior to delivery (February 1984), including deterioration, storage and leasing fees, and security fees, should be attributed to Iran, not the United States.

46. In short, had Iran paid its undisputed debt by 30 March 1982, a reasonable and required step to have taken, the damages would have been greatly reduced.

47. I also dissent as to the travel costs awarded to Iran regarding the equipment held by Gulf Ports (Claim G-8) and the Port of Vancouver (Claim G-7). As noted above, Tribunal precedent acknowledges that "one of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."<sup>59</sup> Here, the Majority acknowledges that "[t]he amount that Iran seeks on this head of claim, USD 100,000, is not supported by any evidence."<sup>60</sup> Although the Majority concludes that speculative evidence required it to deny Iran's claims for loss of use in these Claims<sup>61</sup> and Iran's claim for legal fees in Claim G-7,<sup>62</sup> the Majority nevertheless determines "it fair and reasonable to award Iran the conservative amount of USD 50,000 on this head of claim" in the conceded absence of any evidence.<sup>63</sup> Pursuant to the precedent of this Tribunal and international law, no damage—and certainly not USD 50,000—should be awarded for travel costs for which absolutely no evidence has been presented.

48. Finally, regarding Gulf Ports (Claim G-8), the Majority also errs in its award of legal fees. While the Majority admits that Iran has only substantiated USD 11,411.55 of the legal

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<sup>58</sup> Gulf Ports Crating Company and Ministry of Roads and Transportation of the Islamic Republic of Iran, Award on Agreed Terms No. 28-307-3 (9 Mar. 1983), reprinted in 2 IRAN-U.S. C.T.R. 126.

<sup>59</sup> Amoco International Finance Corporation and The Government of the Islamic Republic of Iran, Award No. 310-56-3 (14 July 1987), reprinted in 15 IRAN-US CTR 189, 262.

<sup>60</sup> Partial Award, *supra* note 1, ¶ 2052.

<sup>61</sup> *Id.* ¶¶ 2039, 2161, 2198 (dismissing Iran's claim for loss of use for lack of evidence).

<sup>62</sup> *Id.* ¶ 2166 (limiting Iran's award of legal fees to the amount stated in an invoice and on a check.)

<sup>63</sup> *Id.* ¶ 2053.

fees it claims, it nonetheless awards USD 21,411.55.<sup>64</sup> There is no evidentiary support whatsoever for the award of this additional USD 10,000 and the Majority provides no explanation for awarding this sum in particular. The Majority is not permitted to simply guess as to what the legal fees might be, but rather, according to Tribunal precedent, should have limited the award to what was proven by Iran.

49. For all the reasons explained above and the reasons expressed in Judge Johnson's separate opinion to the Award for Claims G-7, G-8, and G-13,<sup>65</sup> with which I concur, I dissent from the Majority's award of damages in Claims G-7, G-8, and G-13.

#### **STATE RESPONSIBILITY IN CLAIM G-105 (BATTERIES HELD BY EXIDE)**

50. The Majority also errs in finding State responsibility in Claim G-105 because there is insufficient evidence that the batteries at issue in this claim existed in the United States on 31 August 1983.

51. The Majority agrees that the earliest the United States could have had a Paragraph 9 obligation with respect to the batteries is on 31 August 1983, when the United States learned of this Claim.<sup>66</sup> However, the Majority's assertion in Paragraph 870 that the United States did not take sufficient action with respect to these batteries relies only on speculation that the batteries existed in the United States on 31 August 1983.

52. The record first reflects that the batteries were returned to the holder in April 1980 in a "wet and damaged" condition.<sup>67</sup>

53. The United States learned of this claim three years later, in August 1983, and inquired about the batteries. Exide responded that: "the goods sold were delivered for shipment as per the terms of the sale; . . . the goods were shipped to Iran; but because of the then existing situation were not off-loaded and were returned to the U.S.; we subsequently retrieved the

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<sup>64</sup> *See id.*, ¶¶ 2054-2058.

<sup>65</sup> *See* Separate Opinion of Judge O. Thomas Johnson, *supra* note 57, ¶¶ 1-26.

<sup>66</sup> It is undisputed that the United States learned of this claim when Iran included it within A15 (II:A) on 31 August 1983. Partial Award, *supra* note 1, ¶ 868. *See also* Reply of the Islamic Republic of Iran to the Statement of Defense of the United States, *The Islamic Republic of Iran and The United States of America*, Cases Nos. A15 (II:A), A26 (IV) and B43, App'x G at 10 (31 Aug. 1983) (listing Claim G-105 for the first time and describing the property as "[b]atteries and battery charging units" with a value of \$29,115.57).

<sup>67</sup> Cargo Receipt, 1 Apr. 1980, United States' Brief and Evidence in Rebuttal, Claim G-105 (Exide) (17 Jan. 2011), Ex 5.

goods and then disposed of them.”<sup>68</sup> In subsequent reports to Iran, the United States apparently translated “disposed of” as “returned to inventory” in some reports, and as “either returned to inventory or disposed of” in others.<sup>69</sup> The reports do not say that the items were still in inventory as of the date of the report, nor do they give any indication as to how long the batteries might have stayed in inventory. However, Mr. Rossi, the representative of Exide and author of the letter advising that Exide had “disposed” of the batteries, also testified that after the batteries were returned they would not have been kept in storage or inventory for very long.<sup>70</sup>

54. Despite the direct evidence of Mr. Rossi’s letter and testimony, the Majority instead relies on the United States’ notation that the goods were “returned to inventory” at some unspecified time to speculate that the goods remained in inventory for three years until 31 August 1983.<sup>71</sup> Speculation is an improper basis upon which to base an award in any case, but here it is particularly illogical. Based on the direct evidence from Mr. Rossi’s letter, his testimony, and common sense, it is more reasonable that, rather than allowing “wet and damaged” materials to collect dust and take up storage space, a company would instead sell or destroy them. If, as the Majority implies, the batteries themselves were not damaged, notwithstanding the notation on the shipping label that they were, why would they not have been sold instead of being kept on the shelf? In either event, we cannot know what happened between April 1980 when they were returned, and three years later in August 1983. Because the Majority’s conclusion in this claim is not supported by sufficient evidence, but rather is based on mere speculation, I dissent as to this claim.

**DAMAGES IN CLAIM G-32  
(CHOGHA MISH ARTIFACTS HELD BY THE ORIENTAL INSTITUTE)**

55. I also dissent from the Majority’s award of legal fees in Claim G-32 and concur with the separate opinion of Judge Johnson regarding the damages awarded in this claim.<sup>72</sup> In

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<sup>68</sup> Letter from Mr. Rossi to U.S. State Department, 13 Apr. 1984, Claimant’s Brief and Evidence in Rebuttal, Volume 16, Claims: G-104 & 105, Khuzestan Water & Power Authority (17 May 2006), Ex. 10.

<sup>69</sup> Report of the United States Government (17 Sept. 1984) (noting for Claim G-105 “goods returned to inventory”); Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990) (noting for Claim G-105 “goods returned to inventory or disposed of.”).

<sup>70</sup> Hearing Transcript, Cluster 8 – Day 3 (25 Sept. 2014) at 83 (redirect of Mr. Rossi) (stating he was “pretty confident they would have been destroyed after 1 April 1980 . . . [and] close to that date.”).

<sup>71</sup> Partial Award, *supra* note 1, ¶¶ 863, 869.

<sup>72</sup> See Separate Opinion of Judge O. Thomas Johnson, *supra* note 57, ¶¶ 48-61.

addition to the reasons expressed by Judge Johnson, I would also reiterate that the plaintiffs in the *Rubin* proceedings were attempting to satisfy a judgment of USD 71.5 million against Iran.<sup>73</sup> They sought to attach the Persepolis Artifacts because they believed that, if sold, “the proceeds would be sufficient to satisfy most or all of plaintiff’s judgment against Iran.”<sup>74</sup> The Chogha Mish Artifacts, which the Rubin plaintiffs did not learn about until sometime after learning of the Persepolis Artifacts, were, at most, worth USD 15,000.<sup>75</sup> It is ludicrous to suggest that any law firm or client would have spent USD 852,709.75 in legal fees in order to attach something that effectively had no monetary value. Particularly under these facts, it is not sufficient to simply divide the legal fees in half, as the Majority has done. Rather, a proper causation analysis would require the Majority to evaluate each of the invoices and award the fees that were incurred due solely to the attachment of the Chogha Mish Artifacts. Such an evaluation would require dismissal of the vast majority of legal fees claimed by Iran, as almost all of the relevant legal fees were incurred in the hope that the Persepolis Artifacts would be able to satisfy the USD 71.5 million judgment, which the Chogha Mish Artifacts would clearly have been unable to do.

**STATE RESPONSIBILITY AND DAMAGES IN CLAIMS G-172, G-174, AND G-1996 E/F  
(MATERIALS ORDERED BY KHARG)**

*State Responsibility in Claims G-172, G-174 & G-1996 E/F*

56. The Majority also errs in its finding of State responsibility in Claims G-172, G-174, and G-1996E/F, given the lack of adequate proof upon which to base a finding of treaty breach.

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<sup>73</sup> *Campuzano v. Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003).

<sup>74</sup> Hearing Transcript, Cluster 9 – Day 5 (14 Nov. 2014) at 66 (statement of Ms. Swingle); Memorandum in Support of Plaintiff’s Urgent Motion of Contempt Sanctions Against Citation Third Party Respondents, filed 17 June 2004 (US Judges Folder at p. 433); *see also* Hearing Transcript, Cluster 9 – Day 2 (11 Nov. 2014) at 196-97 (Tribunal questions of Dr. Danti).

<sup>75</sup> Hearing Transcript, Cluster 9 – Day 2 (11 Nov. 2014) at 180-82 (direct examination of Dr. Danti) (noting that someone “might be willing to pay somewhere between \$15,000 and \$16,000, as a maximum estimate, in today’s dollars” but that in 1980 or 1981, their value was “perhaps somewhere between \$6,000 and \$8,000.”); Statement of Dr. Young (31 Aug. 2001) at ¶¶ 6, 8, Response of the United States to Claimant’s Brief and Evidence: Claim G-032 (Oriental Institute) (26 Sept. 2001), Ex. J (stating “[t]he value for museum display purposes of these objects is minimal or nil. . . . I can also assert that none of the 109 objects I examined has any significant commercial value on the antiquities on the market.”); Statement of Dr. Javadi (6 Nov. 2004) at ¶ 8, Claimant’s Brief and Evidence in Rebuttal, Volume 11, Claim G-32, Iranian Cultural Heritage Organization (17 May 2008) (agreeing with Dr. Young’s statement that the Chogha Mish artifacts have “no value except for purposes of archaeological analysis and study.”).

57. Iran's case for Claims G-172 and G-174 rests on a tangle of confusing records that are inconsistent, incomplete, and often incoherent. It is not clear to me from the documents in this record *whether* these properties remained in the United States as of the date of the Accords, let alone *which* of the properties remained or *where* they were located.<sup>76</sup> In addition, the amount Kharg paid for its order is unknown, as it is inconsistently labeled on invoices, which are sometimes also illegible.<sup>77</sup> The evidence cited by the Majority does not adequately establish even a *prima facie* claim. As noted throughout, findings of responsibility and damages must be based on actual, ascertainable proof. The Majority's finding does not meet this standard of international law and Tribunal precedent.

58. Based on the lack of evidentiary support, these Claims should be dismissed. However, even if these Claims were to be considered, the evidence indicates that the United States tried to make sense of the tangled documents by contacting the alleged holder and AIOC, Kharg's purchasing agent, to obtain additional information on the status of the properties.<sup>78</sup> The United States could not take any additional steps to arrange for the transfer of the properties unless Iran contacted the relevant holders, established where each of the disputed items had been sent, established whether the items still existed (and if so, their location), and provided shipping instructions to the holders, some of whom had never been in contact with Iran.

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<sup>76</sup> See e.g., Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990) (noting for Claim G-172 that "Amoco's records show discrepancy between purchase orders and invoices. Some items were returned to vendor, incurring cancellation charges; some held by Amoco exporting and packing company; some sent inter-company at fair value; some held in Amoco warehouse; and some sold to Sagebrush Corp.").

<sup>77</sup> See e.g., Report of the United States (17 Sept. 1984) (noting the confusing and inconsistent information provided by Iran for Claim G-172 Iran, stating, "Claim is for \$14,069.08. Documents provided by Iran indicate transaction for \$14,141.71. Is this transaction as G-176?").

<sup>78</sup> E.g., Consolidated Report of the United States (30 Oct. 1985) (noting for G-174 that Sagebrush responded to the United States' inquiry and informed the United States' government that it had shipped the properties as required by the purchase order); Report of the United States: Update on Tangible Properties Claimed by Iran (5 July 1990) (noting for Claim G-172 that, based on the United States' contact with AIOC, "Amoco's records show discrepancy between purchase orders and invoices. Some items were returned to vendor, incurring cancellation charges; some held by Amoco exporting and packing company; some sent inter-company at fair value; some held in Amoco warehouse; and some sold to Sagebrush Corp"; noting for Claim G-174 that Company sold goods to Amoco; shipped to Kharg via World in 1979. U.S furnished documents in 1985. Amoco returned entire order to Sagebrush and received refund."; and attaching as exhibits documents it obtained from AIOC and the seller); Letter from Ms. Cummins, US State Department, to Process Sales (7 October 1985) (inquiring about the materials at issue in Claim G-174).

59. Claim G-1996 E/F suffers from the same evidentiary deficiencies as Claims G-172 and G-174: to wit, a failure by Iran to submit evidence establishing an adequate *prima facie* case of responsibility. However, the deficiencies in this Claim are even more egregious than those in claims G-172 and G-174 because Iran, without explanation, waited to file this Claim until 26 December 1996, approximately *sixteen* (16) years after the Accords were executed, and approximately *eighteen* (18) years after the properties at issue had been ordered from the vendor. Thus, by the time the United States even heard about this claim, neither Kharg's freight forwarder nor the vendors in the United States possessed any documents concerning the claim and could not provide the United States with any information.<sup>79</sup> The Majority's conclusion that "the United States has had the full opportunity to present its case," such that "admission of Iran's 1996 Claims does not prejudice [it]" is thus disingenuous, as the United States was clearly prejudiced by Iran's failure to timely file its claim.<sup>80</sup>

60. As a direct result of Iran's inordinate delay, neither Party was able to present any evidence about the location or status of the items in 1996 when the United States learned of the claim. Moreover, Iran's failure to raise the claim until 1996 precluded any possibility that the United States could arrange for the property's transfer. Not even Iran's own submissions explain what steps the United States could have taken to arrange for the transfer of these items either before or after it learned of this claim in 1996, when there was no adequate information available as to the location of the property at that time. The Majority cannot simply overlook the immensely prejudicial impact that Iran's delayed filing had on the United States' ability to defend against this claim merely because it had the opportunity to file a responsive pleading.<sup>81</sup> The Majority's finding of State responsibility under the circumstances of Claim G-1996 E/F with regard to purchase orders KC-780456, KC-790054, and KC-790123 therefore constitutes a complete denial of due process.

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<sup>79</sup> See Letter from World Trade Group to Kharg (24 October 1983) Volume II, Attachments Referred to in Appendix G of Iran's Response to the United States' Request for Additional Information On Iranian Properties in the United States (27 Jan. 1984), Ex. 167 (stating World Trade Group could not locate the records of orders dated five years earlier because "Normally, our records of closed purchase orders are kept for three years and then discarded."); Letter from Metrix-PMC to Mr. Fry (2 Jan. 2001) Response of the United States to Claimant's Brief and Evidence: Claims G-165- G-190 . . . , Volume III of II (Appendix Volume II of II), New Claim 1996-D, PMC/Beta, Ex. 3 (stating "I have looked into retrieving the documentation you requested, but regret to inform you that we only keep our records for 7 years, therefore we are unable to provide you with the documents you wanted.").

<sup>80</sup> See Partial Award, *supra* note 1, ¶ 1685.

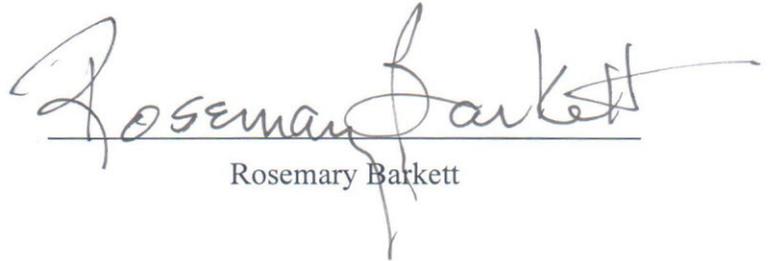
<sup>81</sup> *Id.*

*Damages in Claims G-172, G-174 and G-1996 E/F*

61. Just as the incoherent, incomplete, and inconsistent documents in each of these claims fail to establish a finding of State responsibility, they also fail to support Iran's damages claims. Thus, no damages should be awarded in any of these claims.

Dated, The Hague

10 March 2020



Rosemary Barkett