

Ronald Reagan Presidential Library  
Digital Library Collections

---

This is a PDF of a folder from our textual collections.

---

**WHORM Subject File Code:** CO071

(Countries: Iran)

**Case file Number(s):** 518000-519999

**Box Number:** 93

---

To see more digitized collections visit:

<https://www.reaganlibrary.gov/archives/digitized-textual-material>

To see all Ronald Reagan Presidential Library inventories visit:

<https://www.reaganlibrary.gov/archives/white-house-inventories>

Contact a reference archivist at: **reagan.library@nara.gov**

Citation Guidelines: <https://reaganlibrary.gov/archives/research-support/citation-guide>

National Archives Catalogue: <https://catalog.archives.gov/>

*Last Updated: 11/06/2023*

89

7, 18  
ID # 518117 CU  
C0071

# WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET



- O - OUTGOING
  - H - INTERNAL
  - I - INCOMING
- Date Correspondence Received (YY/MM/DD)   1  /  1  /

Name of Correspondent: Mike Matheson

MI Mail Report      User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Draft Brief for Iran - U.S.  
Claims Tribunal in The Hague

ROUTE TO:		ACTION	DISPOSITION
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD
<u>cehall</u>		ORIGINATOR	<u>8710729</u>
		Referral Note:	<u>for ABC signature</u>
<u>cust 27</u>		D	<u>8710729</u>
		Referral Note:	<u>8710731</u>
<u>cculw</u>		S	<u>8710731</u>
		Referral Note:	<u>July 31 87 APC memo to Mike Matheson</u>
			<u>1 1</u>
		Referral Note:	
			<u>1 1</u>
		Referral Note:	

- ACTION CODES:**
- A - Appropriate Action
  - C - Comment/Recommendation
  - D - Draft Response
  - F - Furnish Fact Sheet to be used as Enclosure
  - I - Info Copy Only/No Action Necessary
  - R - Direct Reply w/Copy
  - S - For Signature
  - X - Interim Reply
- DISPOSITION CODES:**
- A - Answered
  - B - Non-Special Referral
  - C - Completed
  - S - Suspended
- FOR OUTGOING CORRESPONDENCE:**
- Type of Response = Initials of Signer
  - Code = "A"
  - Completion Date = Date of Outgoing

Comments: \_\_\_\_\_

Keep this worksheet attached to the original incoming letter.  
Send all routing updates to Central Reference (Room 75, OEOB).  
Always return completed correspondence record to Central Files.  
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

# RECORDS MANAGEMENT ONLY

## CLASSIFICATION SECTION

No. of Additional Correspondents: \_\_\_\_\_ Media: 0 Individual Codes: \_\_\_\_\_

Prime Subject Code: C0071 Secondary Subject Codes: IT 014  
 \_\_\_\_\_  
 \_\_\_\_\_

## PRESIDENTIAL REPLY

Code	Date	Comment	Form
C	_____	Time: _____	P-
DSP	_____	Time: _____	Media: _____

**SIGNATURE CODES:**

- CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 - Ron Reagan
- n - 6 - Ronald
- n - 7 - Ronnie

CLn - First Lady's Correspondence

- n - 0 - Unknown
- n - 1 - Nancy Reagan
- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence

- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

**MEDIA CODES:**

- B - Box/package
- C - Copy
- D - Official document
- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

CORRESPONDENCE INVOLVING WORKSHEET  
WHILE WORKING



THE WHITE HOUSE

WASHINGTON.

July 31, 1987

ABC:ACR:nge  
ABCulvahouse  
ACRaul  
Chron

MEMORANDUM FOR MIKE MATHESON  
DEPUTY LEGAL ADVISER  
OFFICE OF THE LEGAL ADVISER  
U.S. DEPARTMENT OF STATE

FROM: ARTHUR B. CULVAHOUSE, JR.  
COUNSEL TO THE PRESIDENT

*Original Signed by ABC*

SUBJECT: Draft Brief for Iran-U.S. Claims Tribunal in  
The Hague

We have reviewed the above-referenced draft brief from the perspective of the Iran/Contra matter. We have the following suggestions:

1. On page 7, in the last sentence of the last paragraph, the brief argues that arms exports to Iran "would be prohibited by U.S. law. . . ." It would be preferable to spell out which U.S. law is involved here in order to take account of lawful arms sales to Iran under the National Security Act (as noted in footnote 11 on page 18). Accordingly, we suggest the sentence be revised to read ". . . such exports would be prohibited by the Arms Export Control Act. . . ."
2. On page 18, in footnote 11, the discussion of the sale of arms to Iran pursuant to a covert action finding should be refined. First, the statement that "President Reagan has made clear that these transfers only met that standard in the particular circumstances then prevailing, that those circumstances no longer obtain, and that no further transfers of such military items to Iran would be consistent with U.S. national security" must be carefully verified against actual Presidential statements. The next statement, to the effect that the use of covert intelligence authorities would "require findings that could not be made under present circumstances with respect to the properties in question," may be broader than appropriate. Perhaps this footnote could be revised as follows:

11/ These conclusions are not affected by recent disclosures that certain military items were provided by the United States to Iran during 1985-86. . . .

The Tribunal obviously may not order arms transfers pursuant to a covert U.S. intelligence operation. Such transfers may occur under U.S. law only if the President has found that each such operation "is

important to the national security of the United States." 22 U.S.C. 2422. The President has made no such finding with respect to the properties in question. To the contrary, the President said on November 19, 1986 that "I have directed that no further sales of arms of any kind be sent to Iran." News Conference by the President, November 19, 1986. Accordingly, any award requiring such transfers would be inconsistent with U.S. law.

THE WHITE HOUSE

WASHINGTON

July 31, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: ALAN CHARLES RAUL 

SUBJECT: Draft Brief for Iran-U.S. Claims Tribunal in  
The Hague

The attached brief involves mostly technical issues regarding various old foreign military sales cases where Iran argues that the Iran-U.S. Claims Tribunal should compel the United States to sell certain military items to Iran. I have reviewed the draft from our Iran/Contra perspective and have suggested some minor comments in the attached memorandum for your review and signature.

Mike Smith has also reviewed the draft brief and communicated his comments to me.

Attachment



United States Department of State

Washington, D.C. 20520

518117CU

July 29, 1987

TO: WH Counsel - Mr. Culvahouse ✓  
NSC - Mr. Stevens  
DOD - Mr. Garrett  
Justice - Mr. Cooper  
CIA - Mr. Doherty

FROM: State/L - Mike Matheson w>w

Judge Sofaer asked that I circulate for your comment the attached, which is a draft brief that we have prepared for one of the Government-to-Government claims to be heard this fall by the Iran-U.S. Claims Tribunal in The Hague. For the most part, it involves technical issues regarding various old FMS cases, and we are working these with the appropriate people in DOD (including DOD/GC). Some parts of the brief may be of interest to you, however, in particular the material on our dealings with Iran on the FMS program, our posture on the Iran-Iraq war, our policy on arms sales, our explanation of the Iran/contra transfers, and Iranian violations of use assurances and human rights, contained in the first 25 pages.

We will need to complete our revisions of this brief by the end of the week, so I would appreciate any comments you might have by COB Thursday. We will decide at that time whether any meeting will be necessary to discuss any of these issues further. Thanks for your help.

1 7 5 . 02

1987 JUL 29 PM 6:51



DRAFT  
7/27/87

BEFORE THE  
IRAN-UNITED STATES CLAIMS TRIBUNAL  
The Hague  
The Netherlands

_____	)	
The Islamic Republic of Iran,	)	
	)	
Claimant,	)	
	)	Case No. B/1
v.	)	(Claim 4)
	)	Full Tribunal
The United States of America,	)	
	)	
Respondent.	)	
_____	)	

HEARING MEMORIAL

In response to the Order of the Tribunal dated March 4, 1987 (Doc. No. 526), the United States hereby submits this Hearing Memorial in response to Iran's Request for a Partial Award in Claim 4 of this case. Specifically, this Memorial addresses Iran's entitlement to certain defense articles identified in Exhibits III and V (Doc. Nos. 479 and 481) to the parties' Final Joint Report in Claim 4 (Doc. No. 476). In accordance with the Tribunal's Order, additional evidence supporting the United States position is attached as Exhibits \_\_\_\_\_, and a list of documentary evidence previously submitted by the United States in Claim 4 is attached at Exhibit \_\_\_\_.

STATEMENT OF THE CASE

Case No. B/1 concerns several claims by the Government of the Islamic Republic of Iran (hereinafter "Iran") arising out of the United States Foreign Military Sales ("FMS") Program. In Claim 4, Iran alleges that the United States has unjustifiably retained certain defense articles purchased by Iran pursuant to contracts between the two governments. A detailed history of the Iran FMS Program and the facts relevant to Case B/1 are set forth in full in the United States Rejoinder (Doc. No. \_\_\_\_), at pp. 7-42. That recitation will not be repeated here. However, several developments in the history of the Iran FMS Program are directly relevant to Claim 4 and are set forth below.

The Iran FMS Program began in 1964 and grew steadily until 1979. At its culmination, the program was comprised of 2827 separate contracts, commonly known as Letters of Offer and Acceptance ("LOAs"), with an aggregate value of nearly \$21 billion dollars. These LOAs defined the terms and conditions of each FMS sale, including specific obligations with respect to use, security, and other contractual obligations on the part of both parties. In signing each LOA, Iran agreed that the Arms Export Control Act would be applicable to the sale and delivery of all defense articles contracted for thereunder. Further, Iran specifically assumed the responsibility to secure the appropriate export licenses and assumed the risk that such licenses might be denied or revoked consistent with that Act, even after sales had been made.

In late 1978, Iran's cessation of quarterly payments called into question the viability of the Iran FMS Program. Because of Iran's default, the net value of the Iran Trust Fund was in a deficit position as of October 31, 1978. Payments to the various U.S. military services for articles and services already delivered were already \$33 million overdue, and estimated termination liability was \$421.2 million. Rejoinder at 23-24. Although Iran made some partial payments in late 1978 and early 1979, Iran was still in serious default in January of 1979 on its payment obligations and the Iran FMS Trust Fund was rapidly approaching insolvency.

The United States suspended deliveries to Iran pursuant to General Condition A.10. of each LOA in January 1979. United States Rejoinder at 22-24. In a good faith attempt to resolve Iran's default under the contracts, representatives of the United States Department of Defense met with Iran's Deputy Minister of War. The result was a February 3, 1979 Memorandum of Understanding (MOU). See United States Rejoinder at 24-28. The MOU provided, among other things, for termination, reduction, and restructuring of a number of specific LOAs, but it did not relieve Iran of its obligation to continue to make quarterly payments to the FMS Program under the remaining LOAs.

Nevertheless, from February 3 through November 4, 1979, Iran made no further payments on its FMS obligations. Iran was informed on repeated occasions that until the solvency of the

---

Trust Fund could be assured, further shipments of defense articles could not be made. Statement of Defense at 18; Rejoinder at 34. The United States continued in good faith to sell Iranian-procured equipment to other purchasers, in order to maintain the solvency of the Trust Fund. Id. at 35-36.

Following the United States Government's purchase of certain Spruance class destroyers in July 1979, the Trust Fund again became solvent and the United States resumed delivery of non-sensitive defense articles to Iran.

Shipments of sensitive items, however, remained suspended. In 1979 when the government of the Islamic Republic assumed control, it repudiated all of its obligations to the United States. The United States asked Iran on several occasions to reaffirm its obligations under the LOAs and a 1974 Agreement for the Safeguarding of Classified Information; Iran refused.

Further, Iran refused to allow United States security experts to visit Iran to ensure that classified information was adequately protected. Under these circumstances, the United States had reason to believe that Iran was not adequately protecting classified information and thus did not resume shipments of sensitive articles to Iran.

The seizure of the American Embassy on November 4, 1979 disrupted relations between the two governments. Because the United States had no expectation that Iran would resume its quarterly payments to the Trust Fund, it again suspended all

security assistance shipments to Iran. In fact, Iran made no further payments to the Trust Fund, and by March 31, 1980 the net value of the Trust Fund was in a deficit. Shortly thereafter, the United States closed most of Iran's LOAs, with the exception of those that it determined would be to Iran's financial benefit to continue.

President Carter, in response to the seizure of the Embassy and the taking of American hostages, issued Executive Order 12170 on November 14, 1979, blocking the transfer of all Iranian property located in the United States. This order was lifted on January 19, 1981, with the signing of the Algiers Accords and the release of the American hostages. In the meantime, however, the outbreak of the Iran-Iraq war in September of 1980 had a substantial impact on the relationship between the United States and Iran. The United States immediately assumed a position of neutrality in that war. Under these circumstances, and in view of the breach of Iran's obligations with respect to the security of such property, FMS military property could not be exported to Iran consistent with United States law. As a result, a substantial amount of Iranian-owned military property remains in the custody of the United States Government.

Iran's Request for a Partial Award in Claim 4 (Doc. No. 515), to which this Hearing Memorial responds, concerns such property. Iran's Request is limited, however, to only that property identified in Exhibits III and V of the the parties'



Joint Report. Exhibit III consists of Iranian-owned property that was sent by Iran to the United States for repair, modification, or calibration (commonly referred to as "repair and return" property) under the FMS Program and that is currently held by the United States Government. Exhibit V identifies five major items and related parts purchased by Iran under the FMS Program and in the custody of the United States Government for use on behalf of Iran, including an F-14 aircraft, a submarine, a Hawk system, and two helicopters.<sup>1/</sup> Exhibits I, II, and IV concern other FMS items in dispute between the parties.

#### SUMMARY OF ARGUMENT

Iran has first asked that the Tribunal order the United States to return the items identified in Exhibits III and V.

[REDACTED] Iran is not entitled to the return of these items. The United States has no obligation under the Algiers Accords to export military property to Iran under the conditions at the time of the signing of the Algiers Accords or at the present time. As discussed in further detail in part I.A., below,

---

<sup>1/</sup> The United States does not dispute that the items identified in Exhibit V are located in the United States. The Tribunal should be aware, however, that Exhibit V does not represent all of the Iranian-titled property held in the United States, in addition to the so-called "repair-and-return" property identified in Exhibit III. All Iranian-titled property located in the United States is identified in Updated Exhibit 5 to the United States Statement of Defense, Doc. No. \_\_\_\_\_ (attached and revised by Diana Blundell?).

paragraph 9 of the General Declaration specifically provides that the obligation of the United States to arrange for the transfer of Iranian property to Iran is "subject to the provisions of U.S. law applicable prior to November 14, 1979. . . ." This proviso clearly allows the United States to continue to apply provisions of U.S. law that were in effect prior to November 14, 1979 even if they might restrict or prevent the return of particular classes of Iranian property. The Arms Export Control Act, a law applicable to all sales to Iran under the FMS Program both before and after November 14, 1979, governs all exports from the United States of defense articles and services. This Act requires the Secretary of State to deny permission to export military items when not in "furtherance of world peace or the security and foreign policy of the United States," and precludes exports to Iran under circumstances such as those which have prevailed since the outbreak of the war between Iran and Iraq.

It would be manifestly inappropriate for the Tribunal to order the United States, a neutral in the Iran-Iraq war, to supply arms to Iran, a belligerent nation, and would wrongly interfere with decisions fundamental to the national sovereignty. In addition, such exports would be prohibited by U.S. law and contravene recent demands by the United Nations Security Council that all states "exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict."

Arms Export Control Act

Compelled

In its Replication, Iran also appears to assert that the United States has an independent obligation under the FMS Program or international law to export the subject property to Iran. This argument is incorrect. As set forth in greater detail in part I.B., below, Iran had materially breached its FMS contracts with the United States with respect to payments to the Trust Fund, with respect to permitted use of the property, and with respect to measures to protect the security of military items. These acts of material breach relieved the United States from any delivery obligations under the FMS contracts.

In the alternative to the return of this property, Iran has requested that the Tribunal assess monetary damages in favor of Iran equal to the replacement value of the property. Iran also seeks damages to compensate it for losses resulting from the deprivation of the use of the property. However, as discussed in part II, below, Iran is not entitled to any sum for monetary damages in excess of the current market value of the property.

Iran has consistently refused offers by the United States to sell the subject property in order to conserve its value and avoid future costs to Iran. Furthermore, Iran has grossly overstated the fair value of these various items, and has included in its calculations a number of unjustified and duplicative cost elements. Finally, the fair value of Iran's property should not be directly refunded to Iran, but placed in Iran's FMS Trust Fund, as provided in the applicable FMS

contracts, pending resolution of the issues relating to the FMS contracts and the United States counterclaim in Case B/1.

For these reasons, the Tribunal should (1) deny Iran's Request for a Partial Award and (2) issue an order directing the United States to offer the Iran's FMS property for sale and to place the proceeds in the Iran FMS Trust Fund.

### ARGUMENT

#### I. THE UNITED STATES IS NOT OBLIGATED TO RETURN IRANIAN MILITARY EQUIPMENT.

The United States has no obligation under Paragraph 9 of the General Declaration, the LOAs, or international agreements to return military equipment to Iran.

A. Paragraph 9 of the General Declaration does not obligate the United States to return military equipment to Iran.

1. The United States may, consistent with Paragraph 9, apply controls on exports to Iran which were part of U.S. law before November 14, 1979.

Paragraph 9 of the General Declaration provides that the obligation of the United States to arrange for the transfer of Iranian properties to Iran is "subject to the provisions of U.S. law applicable prior to November 14, 1979 . . . ." This proviso is clear: it expressly permits the United States to continue to apply provisions of U.S. law that were in effect prior to November 14, 1979, even if they might restrict or prevent the return of particular classes of Iranian property.

Language similar to this proviso 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.<sup>2/</sup> The proviso was added to Paragraph 9 at the United States insistence for precisely this purpose: to ensure that it could

---

<sup>2/</sup> For example, a standard clause in U.S. military assistance agreements states that "[t]he defense articles and defense services to be furnished pursuant to this agreement shall be furnished in accordance with, and subject to, the United States laws . . . and such successor legislation as may be hereafter enacted." See, e.g., Military Assistance: Defense Articles and Services, Aug. 30, 1979, United States-Greece, 30 U.S.T. 7267, 7268-69, T.I.A.S. No. 9583, at \_\_\_\_; Military Assistance; Defense Articles and Services, Aug. 23-Aug. 30, 1979, United States-Phillipines, 30 U.S.T. 7274, 7275, T.I.A.S. No. 9584, at \_\_\_\_; Military Assistance: Defense Articles and Services, Aug. 30, 1979, United States-Spain, 30 U.S.T. 7238, 7239-40, T.I.A.S. No. 9581, at \_\_\_\_\_. In the Mutual Defense Assistance Agreement with Iran, it states: "the furnishing of any such assistance . . . shall be subject to all of the applicable terms and conditions and termination provisions of the Mutual Defense Assistance Act of 1949 and such other applicable laws of the United States of America relating to the transfer of military assistance." Mutual Defense Assistance, May 23, 1950, United States-Iran, 1 U.S.T. 420, T.I.A.S. No. 2071, at \_\_\_\_\_. Similarly, United States agreements for peaceful nuclear cooperation state: "subject to the provisions of . . . the applicable laws, regulations, and license requirements in force in their respective countries." See, e.g., Atomic Energy: Cooperation for Civil Uses, June 25, 1969, United States-Argentina, art. III(A), 20 U.S.T. 2587, 2590, T.I.A.S. No. 6721, at \_\_\_\_; Atomic Energy: Cooperation for Civil Uses, July 17, 1972, United States-Brazil, art. II(A), 23 U.S.T. 2477, 2481, T.I.A.S. No. 7439, at \_\_\_\_; Atomic Energy: Cooperation for Civil Uses, July 5, 1979, United States-Australia, art. I(1), \_\_\_\_ U.S.T. \_\_\_\_, T.I.A.S. No. 9897, at \_\_\_\_\_. Such provisions have entitled the United States, subject to U.S. law, to suspend or terminate exports without violating its obligations under the international agreement.



continue to apply controls under U.S. law on the export of military items, and in particular to ensure that it would not be obligated to return such items to Iran at a time when Iran had become a belligerent in the Gulf war.

The purpose and effect of Paragraph 9 in this regard was described by Warren Christopher, Deputy Secretary of State and chief U.S. negotiator of the Algiers Accords, to the Senate Committee on Foreign Relations almost immediately after the conclusion of the Accords:

Since the outbreak of the Iran-Iraq war on September 22, 1980, fears have been expressed that, in connection with the release of the hostages, the United States might agree to undertake a new military supply arrangement with Iran or to deliver a large amount of war material to Iran.

To have done so would have brought charges and concerns that the United States had taken sides in the war and compromised its position of non-involvement.

I am glad to say that the declarations permit the United States to maintain its position of non-involvement in the war.

The United States is neither committed to undertake a new military supply relationship with Iran nor to turn over large amounts of war materials. Indeed, the declarations contain absolutely no reference to military supplies or war materials.

In connection with the requirement that the United States transfer properties in the United States to Iran, the non-involvement of the United States is fully protected by the provision that the transfer is, and I quote, "subject to the provisions of U.S. law applicable prior to November 14, 1979."

This means that the usual export and munitions controls will apply to transfers of property to Iran. This will enable the United States to insure that any transfers do not result in our "taking sides" or otherwise becoming involved in the conflict.

The Iran Agreements, Hearings before the Senate Comm. on Foreign Relations, February 17, 1981, 97th Cong., 1st Sess. 29-30. Mr. Christopher gave the same explanation to the House of Representatives Committee on Foreign Affairs. See Iran's Seizure of the United States Embassy, Hearings before the House Comm. on Foreign Affairs, February 19, 1981, 97th Cong., 1st Sess. 140-41.<sup>3/</sup>

Further, it was the intent of the negotiators of the Accords that Iranian military property would be exportable to Iran only to the extent that such export was consistent with U.S. export control laws. As indicated in Mr. Christopher's affidavit (Exhibit 1):

During discussions relating to Paragraph 9, the United States negotiators explained to the Algerian delegation that the United States had strict export control laws and that pursuant to Paragraph 9 the United States intended to enforce these laws with respect to exports of munitions and other items to Iran.

---

<sup>3/</sup> On the date the Accords were signed, President Carter submitted a message to the U.S. Congress in which he stated:

In revoking these sanctions I have no intention of superseding other existing controls relating to exports including the Arms Export Control Act and the Export Administration Act.

President's Message to Congress Transmitting A Report on Actions He Has Taken or Proposes to Take with Respect to Iran, Pursuant to Section 204(b) of the International Emergency Economic Powers Act, \_\_\_ Weekly Comp. Pres. Doc. \_\_\_\_ (insert date).

Roberts Owen, then Legal Adviser to the United States Department of State and a member of the United States negotiating team, states in his affidavit (Exhibit 2):

[B]efore the crisis the right of Iran (and all other countries to export and take possession of military properties had been subject to U.S. legal restrictions, and Mr. Christopher took the position from the outset that, if the U.S. were going to agree to "release" military property owned by Iran, it would have to be subject to the same legal authorities that were applicable before the crisis.

It is therefore clear from the language of the Accords, as well as the record of their negotiations, that Iranian property in the United States (particularly military equipment) would be exportable to Iran only to the extent consistent with U.S. law then in effect. The United States entered into the Accords with this express understanding, and would otherwise have found the Accords unacceptable.

2. The United States may, consistent with the Accords, apply the Arms Export Control Act, and regulations, contracts and licenses thereunder, to continue to prevent the export of Iranian military equipment.

The Arms Export Control Act (hereinafter the "Act"), 22

U.S.C. 2751 et seq., was enacted on October 22, 1968.<sup>4/</sup> The Act is the principal statute governing exports from the United States of defense articles and services, as enumerated in the United States Munitions List.<sup>5/</sup> (The Munitions List includes all the items in Exhibits III and V, and hence all the items at issue in this proceeding.) Regulations issued pursuant to the Act -- the International Traffic in Arms Regulations (ITAR)<sup>6/</sup>

---

<sup>4/</sup> Prior to 1954 the export of defense articles and services was primarily regulated pursuant to the Neutrality Act of 1939, 54 Stat. 11. In 1954, more comprehensive authority to regulate the export of such articles and services was provided in The Mutual Security Act of 1954 . 68 Stat. 848. Section 414 of that Act authorized the President to control the export and import of arms, ammunition, and implements of war in furtherance of world peace and the security and foreign policy of the United States. Other relevant authorities and limitations were enacted in The Foreign Assistance Act of 1961, 75 Stat. 424, which was subsequently amended on numerous occasions. Specific authority governing sales of military articles and services to foreign governments was enacted in The Foreign Military Sales Act of 1968, 82 Stat. 1320, reaffirming the authority of the President to control arms sales. Congress amended the Foreign Military Sales Act by Public Law 94-329 of June 30, 1976 (22 U.S.C. § 2751 note), at which time the Act was designated the Arms Export Control Act. 90 Stat. 729. Section 38 again reaffirmed the authority of the President to control arms sales. References herein to specific provisions of the Arms Export Control Act should be deemed to include reference to comparable provisions of prior law.

<sup>5/</sup> The United States Munitions List enumerates the types of articles, technical data, and services that are subject to the Act. It consists of items determined to be military in nature, including firearms, munitions and rockets; military aircraft, vehicles and electronics; and equipment, spares and technical data for such systems. 22 C.F.R. Part 121.

<sup>6/</sup> The ITAR regulations are currently embodied in the United States Code of Federal Regulations at 22 C.F.R. Parts 121-130.

-- have the force of U.S. law.<sup>7/</sup> (Copies of the relevant provisions of the Act are set forth at Exhibit 1 to the United States Rejoinder, Doc. No. \_\_\_\_.) The Act and the regulations fall within the scope of the exception in Paragraph 9 of the General Declaration, in that they all constituted U.S. law applicable prior to November 14, 1979. Accordingly, they may be applied without violating the Accords, even if the result is to restrict or preclude the export of particular classes of Iranian property.

The purpose of this discussion of these provisions is not to introduce political issues into this proceeding, or to ask the Tribunal to pronounce on the application of these provisions of U.S. law to Iran. U.S. law requires that the President and the Secretary of State permit the export of arms only in accordance with these provisions, and delegates to those officials the authority and responsibility to apply those provisions. The purpose of this discussion is to show the Tribunal the basis in U.S. law for the judgment of the responsible U.S. authorities that the export of FMS military items to Iran has been and is precluded.

The Act requires the President of the United States or his designee, the Secretary of State, to supervise all FMS sales, as well as deliveries of military items pursuant to those sales. Section 2 requires the Secretary of State to supervise

---

<sup>7/</sup> See, e.g., *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920).



all sales of FMS military equipment, and section 3 defines the conditions under which sales may be made. Section 38 of the Act vests the Secretary of State with the authority to control exports of defense articles and services in furtherance of world peace and the security, and foreign policy of the United States.<sup>8/</sup>

The Act prohibits the export of designated defense articles and services (i.e., Munitions List items) without a license issued in accordance with the Act and the regulations issued under the Act. Further, the Act, the regulations, and the export license all clearly establish that such license maybe "revoked, suspended, or amended by the Secretary of State, without prior notice, whenever the Secretary deems such action to be advisable." A sample export license is attached at Exhibit 3.

The Secretary of State, in considering whether to approve, deny, or revoke an export license under the Act, is guided by the criteria set forth in section 38 and other provisions of the Act. Section 3(a) of the Arms Export Control Act provides that no defense article shall be sold to any country unless:

- (1) the President finds that this "will strengthen the security of the United States and promote world peace";
- (2) the country agrees not, without U.S. consent, to transfer such articles to any other party or to use them for purposes not authorized;
- (3)

---

<sup>8/</sup> For the full text of section 38, see United States Rejoinder (Doc. No. \_\_\_\_), Exhibit 1, at 5.

the country agrees to maintain the security of such articles; and (4) the country is otherwise eligible to purchase or lease defense articles or defense services.<sup>9/</sup> Section 3(c)(1)(B) of the Act provides that no FMS cash sales or deliveries pursuant to previous sales may be made to any foreign country which uses FMS articles in substantial violation of any agreement with that country.<sup>10/</sup>

Section 4 limits the purpose for which FMS sales may only be made to the following: internal security, legitimate self-defense, collective measures consistent with the United

---

<sup>9/</sup> Although Iran was found to meet the conditions of paragraph 3(a) by a Presidential finding in 1973 [DOD: insert cite], that finding is no longer operative following the outbreak of the Iran-Iraq war in September 1980 and Iran's continued support for international terrorism. It is not U.S. practice to officially revoke such Presidential findings following disqualification of the country under the section 3 of the Arms Export Control Act. Accordingly, Presidential findings under section 3 still exist for countries such as Iran, Vietnam, and Cambodia which have not been eligible for arms shipments for many years. The absence of a formal revocation, however, in no way suggests that the President recognizes that country as eligible for sales of military articles under the Act.

<sup>10/</sup> Section 3(c)(1)(B) provides:

No cash sales or deliveries pursuant to previous sales may be made with respect to any foreign country under this Act as hereinafter provided, if such country uses defense articles or defense services furnished under this Act, or any predecessor Act, in substantial violation (either in terms of quantity or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act by using such articles or services for a purpose not authorized under section 4 or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 4, for a purpose not authorized under such agreement.

Nations Charter, and civic action projects. For the full text of sections 3(a) and 4, see United States Rejoinder (Doc. No. \_\_\_\_), Exhibit 1, at 2-3. The provisions of the Act, incorporated in the LOAs and the licenses, precluded the export to Iran of military items at the time of the Algiers Accords, and would preclude such export under present circumstances.<sup>11/</sup> In entering into the LOAs, Iran agreed to be bound by the

<sup>11/</sup> These conclusions are not affected by recent disclosures that certain military items were provided by the United States to Iran during 1985-86. These were transfers of items in the stocks of the Department of Defense as part of a covert intelligence operation authorized under separate statutory authorities. See The Tower Commission Report (Report of the President's Special Review Board), p. \_\_\_\_\_. Under U.S. law, such transfers may be undertaken, without reference to the terms and conditions of the Arms Export Control Act, if conducted in accordance with the requirements of the National Security Act and other relevant statutory provisions. [Appropriate citations.]

*judicially compelled pursuant to a judicial order*

It would clearly be inappropriate for the Tribunal to order the United States to carry out an award by means of a covert intelligence operation. Such transfers may, under U.S. law, only occur if the President finds that each such operation "is important to the national security of the United States." 22 U.S.C. 2422. However, President Reagan has made clear that these transfers only met that standard in the particular circumstances then prevailing, that those circumstances no longer obtain, and that no further transfers of such military items to Iran would be consistent with U.S. national security. [Appropriate citations.] The use of covert intelligence authorities would, under U.S. law, require findings that could not be made under present circumstances with respect to the properties in question.

*has no jurisdiction to carry out such a finding that*

Equally important, the covert transfers in question were part of an attempt to bring the war and terrorist actions to an end. That attempt failed. The Tribunal should not, however, allow this attempt to be used to justify, to Iran's advantage, the return of military equipment to Iran, a result which could only facilitate the continuation of the war and support for terrorism.

Arms Export Control Act and specifically agreed to be responsible for obtaining the requisite export license. Accordingly, Iran specifically agreed that the United States had the right to revoke or suspend the export license, in accordance with the Act, with respect to the items in question.

Before the signing of the Accords, President Carter decided,<sup>12/</sup> and President Reagan thereafter repeatedly decided,<sup>13/</sup> that the export of FMS items to Iran would not be consistent with world peace or the security of the United States.

Moreover, the responsible authorities of the United States Government have determined that, contrary to the Act and the LOAs, Iran has used military equipment supplied by the United States not for purposes of self-defense, but to occupy foreign territory and to seek the replacement of the government of another state.<sup>14/</sup> As set forth above, section 4 limits the purposes for which defense articles and defense services may be sold to internal security, legitimate self-defense, or certain other peaceful

---

<sup>12/</sup> On September 24, 1980 President Carter stated:

[W]e have not been and we will not become involved in the conflict between Iran and Iraq.

Remarks by the President (Carter) to Reporters at the White House, \_\_\_ Weekly Compilation of Presidential Documents, Sept. 29, 1980, pp. 192\_. [Insert additional statements.]

<sup>13/</sup> [Insert statements.]

<sup>14/</sup> [Insert statements.]

activities. This is implemented by paragraph B.8.<sup>15/</sup> of the LOA which limits the use of items sold thereunder to those purposes specified in the Mutual Defense Assistance Agreement between the United States and Iran<sup>16/</sup> or for internal security, individual self-defense, and/or civic action, if the Mutual Defense Assistance Agreement is otherwise inapplicable. Under conditions currently prevailing in the Persian Gulf, the Act precludes exports of military equipment to Iran.

Further, Iran has not carried out its obligations to maintain security and control over military items previously transferred to it and is therefore no longer eligible for purchases or deliveries of defense articles and services. Section 3(a) of the Act authorizes FMS sales only to those countries who agree to maintain the security of such articles. Section 3(a) is implemented by paragraph B.9. of the

---

<sup>15/</sup> Paragraph B.8. provides that the purchaser:

Shall, except as may otherwise be mutually agreed in writing, use the items sold hereunder only:

a. For the purposes specified in the Mutual Defense Assistance Agreement, if any, between the USG and the Purchaser;

b. For the purposes specified in any bilateral or regional defense treaty to which the USG and the Purchaser are both parties, if subparagraph a. of this paragraph is inapplicable; or

c. For internal security, individual self-defense, and/or civic action, if subparagraphs a. and b. of this paragraph are inapplicable.

<sup>16/</sup> [Cite.] A copy of this Agreement is attached as Exhibit 4.

LOAs.<sup>17/</sup> In addition, the 1974 Agreement for the Safeguarding of Classified Information (1974 Agreement)<sup>18/</sup> required Iran to take certain safeguards to ensure that classified information received by it from the United States would not be compromised. A copy of the 1974 Agreement is attached as Exhibit 18 to the United States Rejoinder (Doc. No. \_\_\_\_). In addition, the 1974 Agreement required Iran to

---

<sup>17/</sup> Paragraph B.9. provides in relevant part:

To the extent that any items, plans, specifications, or information furnished in connection with this Offer and Acceptance may be classified by the USG for security purposes, the Purchaser shall maintain a similar classification and employ all measures necessary to preserve such security, equivalent to those employed by the USG, throughout the period during which the USG may maintain such classification. The USG will use its best efforts to notify the Purchaser if the classification is changed. The Purchaser will ensure, by all means available to it, respect for proprietary rights in any defense article and any plans, specifications, or information furnished, whether patented or not.

<sup>18/</sup> [Cite.] In the 1974 Agreement Iran committed:

- (1) not to release the information to a third government without the consent of the United States;
- (2) to accord the information the degree of protection provided it by the United States; and
- (3) not to use the information for any purpose other than that for which it was furnished by the United States.

"Information" for the purposes of the 1974 Agreement includes information in any form, including that communicated through the transfer of equipment or materials.

Iran also agreed in the 1974 Agreement to permit United States security experts to visit Iran periodically in order to determine, inter alia, whether classified information received from the United States was being adequately protected.

permit U.S. security experts to visit Iran to determine that such classified information was being adequately protected. In [early 1979], the Revolutionary Government publicly repudiated all obligations to the United States. [It was widely reported that military installations and equipment in Iran had come under the control of undisciplined elements that were not necessarily under the control of the Iranian armed forces.] Under these circumstances, the United States had reason to suspect that Iran was not adequately protecting classified information as set forth in the LOAs. The United States accordingly requested that Iran affirm its obligations under General Condition B.9 and the 1974 Agreement. Iran refused to make such affirmation. Further, Iran refused to make assurances that it had taken the specified safeguards with respect to such information and refused to allow United States security experts to visit Iran to ensure that classified information was being adequately protected. United States Rejoinder, Exhibit 18. Under these circumstances, export of military equipment to Iran would be inconsistent with the Act



and Iran's international obligations.<sup>19/</sup>

3. It would be inappropriate under present circumstances to order the United States to return military items to Iran, which is currently a belligerent in a major armed conflict, particularly in light of the repeated call of the UN Security Council for termination of hostilities.

The United States has been neutral in the Gulf war since its inception, and this neutrality is a fundamental premise of U.S. policy towards Iran and Iraq. (A sample of official U.S. statements to this effect between 1980 and the present is at Exhibit 4.) A direction by the Tribunal that the United States return to Iran substantial quantities of military items (including a submarine and F-14 fighter aircraft) would

---

<sup>19/</sup><

In this regard, it should also be noted that Section 502B of the Foreign Assistance Act of 1961 provides, in pertinent part, that "no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." ("Security assistance" is defined for the purpose of this provision to include sales and licenses for military items under the Arms Export Control Act.) 22 U.S.C. 23045. The official Reports from the Department of State to the Congress pursuant to this provision have consistently concluded throughout the period in question that serious human rights abuses have occurred in Iran under the current government. For example, the Report for 1981 concluded that:

Widespread disregard for human rights, already serious in previous years, became more pronounced in 1981. Instances of arbitrary arrests and summary executions increased dramatically. Religious persecution, particularly of the Baha'i community, became more severe. Civil liberties were further restricted, and interference of the regime and its supporters in the fundamental aspects of the lives of the population became increasingly pervasive and arbitrary.

interfere with decisions fundamental to the national sovereignty and would be highly inappropriate in light of U.S. neutrality in this war. It could, moreover, have a significant effect on the military situation in the Gulf, and compromise the diplomatic efforts of the United States to bring about a peaceful resolution of the conflict.

In particular, the return of these military items would be inconsistent with the purposes of recent resolutions of the Security Council, particularly Resolution 598 of July 20, 1987, which called for an immediate cease-fire and withdrawal of forces, and for all states to "exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict." The Resolution deplored in particular the bombing of civilian population centers, and attacks on neutral shipping and civilian aircraft, actions for which items of the types Iran seeks to recover from the United States could have particular utility.

In its adoption of Resolution 598, the Security Council exercised its authority under Chapters VII of the UN Charter to deal with threats or breaches of the peace and to decide on measures to restore international peace and security. An order by the Tribunal for the return of these military items to one of the belligerents would be in disregard of the Security Council's authority and responsibility, and would undercut the effectiveness of its decisions.

Furthermore, it would be wholly unreasonable for the Tribunal to order the United States to return military items to Iran at a time when Iran has publicly threatened to attack U.S. vessels engaged in peaceful commerce in the Persian Gulf. As recently as July 15, Majlis Speaker Rafsanjani stated that if U.S. vessels entered the Gulf Iran would "point our guns at the Yankees" and "take American captives"; and if other Gulf states allowed U.S. vessels to use their ports, Iran would "capture them". On the same day the Deputy Commander of the Revolutionary Guards announced that Iran was "eagerly waiting" for the arrival of U.S. vessels in the Gulf so that Iran could "seize them intact to strengthen Iran's naval potential." (Copies of these statements are at Exhibit 5.) On August 27, 1986 the Act was amended to add a prohibition on the export of defense articles "to any country which the Secretary of State has determined . . . has repeatedly provided support for acts of international terrorism." On January 20, 1984 the Secretary of State had determined that Iran was such a country. (A copy of this determination is at Exhibit \_\_\_\_.) Under these circumstances, the United States could not be expected to return military items to Iran.

Accordingly, the Tribunal should not order the return of military properties under present circumstances, whatever it may conclude about the other issues presented.

B. The Governing Contracts And Licenses Do Not Obligate the United States to Export Military Property Iran.

Notwithstanding the fact that paragraph 9 of the General Declaration clearly permits the application of U.S. law to prevent export of Iranian military property, Iran in its Replication appears to argue that it was nonetheless entitled under the terms of the LOAs and under international law to the exportation of the subject property. The United States emphatically disagrees. The recognition of U.S. law in paragraph 9 is dispositive of the parties' rights and obligations with respect to the transfer of Iranian military property in the custody of the United States. Thus, Iran's contention with respect to the status of the underlying LOAs is not germane to the question of transfer.

However, the United States cannot let Iran's assertions with respect to the LOAs go by without comment. Iran repudiated all of its legal obligations with the United States in early 1979 when the Revolutionary Government assumed control. Moreover, Iran is in material breach of the LOAs, thereby entitling the United States to suspend performance of its delivery obligations under the contracts. Finally, the LOAs and the relevant export licenses expressly recognize the right of the United States to suspend exports by revocation of any outstanding export licenses. The United States thus has no obligation under the governing LOAs or export licenses to export the subject property to Iran.

1. Iran Has No Absolute Entitlement to Export of Defense Articles under the Applicable Export Licenses.

The United States was under no legal obligation to provide export licenses for the subject property. Even where such licenses were issued for a number of items, they were subject to suspension or revocation and do not create an obligation on the part of the United States to actually permit the exports or vest any rights in the licensee. Under Paragraph B.5. of the LOAs, Iran assumed the responsibility for obtaining appropriate export licenses required by U.S. law. Paragraph B.5., however, did not confer an entitlement on Iran that such export licenses would be approved or that approved licenses would not be suspended or revoked under U.S. law.

As discussed in part I.A. above, both the Arms Export Control Act and the corresponding export licenses specifically provide that those licenses may be revoked, suspended, or amended by the Secretary of State, without prior notice, whenever the Secretary deems such action to be advisable. Thus, Iran cannot contend that the applicable export licenses create in it an absolute right to delivery of defense articles. Where Iran has breached the LOAs, as shown below, this is particularly true.

2. Iran's Material Breach of Its Obligations Under the LOAs Relieved the United States From Specifically Performing Its Delivery Obligations Under the Contracts.

a. Breach of Obligation to Safeguard Security of Military Property.

As discussed in Part I.A., above, Iran also breached its

obligations under paragraph B.9. of the LOAs which required Iran to take all measures necessary to preserve the security of all defense items, plans, specifications, or other information furnished in connection with the LOAs; and Iran breached the parties' 1974 Agreement for the Safeguarding of Classified Information ("1974 Agreement) which required Iran to safeguard classified information received by it from the United States and to permit United States security experts to visit Iran in order to determine that such classified information was being adequately protected.

In this case, Iran seeks the export to it of repair and return equipment [can we tie any of the repair and return equipment into these systems?] and several complete items which were clearly sensitive in character and of considerable military importance, including an F-14 aircraft and a Hawk missile system. In view of Iran's actions in breach of material terms of the LOAs and the 1974 Agreement, which seriously threatened impairment of the national security of the United States, the United States was entitled to, and did, suspend exports of defense articles to Iran.

b. Iran Refused to Make Requisite Payments.

In mid-1978 Iran defaulted on its payment obligations to the Iran FMS Trust Fund, placing the net value of the Trust Fund in a deficit position on October 31, 1978. In an attempt to resolve Iran's default under the contracts, the United States

agreed to a February 3, 1979 Memorandum of Understanding (MOU) which, among other things, called for the restructuring of a number of specific LOAs. See United States Rejoinder at 24-28. The MOU did not, however, relieve Iran of its obligation to continue to make quarterly payments to the FMS Program under the remaining LOAs, and to cover termination costs of others.

From February 3 through November 4, 1979, however, Iran made no further payments on its FMS obligations in spite of the fact that it was repeatedly informed that until the solvency of the Trust Fund could be assured, further shipments of defense articles could not be made. Statement of Defense at 18; Rejoinder at 34. Only because the United States continued to sell Iranian-procured equipment to other purchasers, and even purchased Spruance class destroyers itself, was the solvency of the Trust Fund maintained.

The seizure of the American Embassy on November 4, 1979 disrupted all normal communications between the two governments. By directive dated November 28, 1979 [Tim Ramish believes it is an earlier date -- November 12] all security assistance shipments to Iran were suspended. Following Iran's seizure of the U.S. Embassy and public repudiation of its obligations to the United States, the United States did not reasonably expect any further payments from Iran, and in fact none were received. Although the United States made every effort to limit or terminate Iran's liabilities under the FMS



Program, the net value of Iran's FMS Trust Fund fell into a deficit by March 31, 1980. The United States accordingly closed most open FMS cases with Iran in April of 1980, [except for those where it would be economically advantageous to Iran for the United States to continue to close down the case.] That subsequent sales by the U.S. of Iranian-procured FMS articles to alternative purchasers once again made the fund solvent cannot cure or reverse Iran's actions which lead to the April 1980 cessation of deliveries.

c. Iran Used The Property In Contravention of the LOAs and the 1974 Agreement.

As discussed above, paragraph B.8. limits the use of items sold under the LOAs to internal security, individual self-defense, and certain other peaceful activities. The United States has determined that, contrary to this limitation, Iran has used military equipment supplied by the United States not for these purposes, but to occupy foreign territory and to seek the replacement of the government of another state. This action by Iran, in direct violation of the its obligations under the LOAs, entitles the United States to cease further deliveries of military equipment to Iran.

C. International Law Does Not Obligate the United States To Export Defense Articles to Iran.

Iran appears to argue throughout its Reply that international law confers upon a state an unequivocal obligation to transfer property to another state irrespective of the

contractual relationship between the two states. Reply at 92-94. This argument is untenable. Iran agreed to be bound by explicit terms and conditions for the export of such articles and was fully aware that failure to meet these terms and conditions would end its contractual right to export of the military property. Further, Iran contractually assumed the responsibility for obtaining the necessary export licenses and was fully aware that such licenses might be suspended or revoked without notice in the discretion of the U.S. Secretary of State. Under these circumstances, international law cannot be interpreted to abrogate these specific contractual agreements. [cite?]

Moreover, Iran has effectively repudiated its obligation to the United States under its 1974 Agreement for the Safeguarding of Classified Information. The wholesale violation of this agreement by Iran gives the United States the right under international law to suspend deliveries to Iran. Article 60 of the Vienna Convention on the Law of Treaties provides:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

. . . .

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Iran's refusal to reaffirm its commitments under the 1974 Agreement following its public repudiation of its legal obligations towards the United States clearly constitutes a material breach of the 1974 Agreement within the meaning of the Vienna Convention. Accordingly, the United States was entitled under the terms of the Convention to suspend deliveries under the LOAs.<sup>20/</sup>

II. REGARDLESS OF THE POSITION THE TRIBUNAL MAY TAKE WITH RESPECT TO PARAGRAPH 9, IRAN IS NOT ENTITLED TO THE RELIEF REQUESTED.

Iran has requested that the Tribunal order the United States to export to Iran the military property identified in Exhibits III and V of the parties' Joint Report. In the alternative, Iran appears to request that the Tribunal order the United States to pay to Iran an amount equal to the current replacement value of the identified articles. (Doc. No. \_\_\_\_ at 6-7.) Under either alternative remedy, Iran seeks monetary damages for losses resulting from its deprivation of the use of the property. Id.

Although, for the reasons set forth above, the United States is not obligated, under present circumstances, to return military properties to Iran, the United States does not dispute Iran's right to the fair market value of its properties to the

---

<sup>20/</sup> The LOAs are not themselves international agreements. However, Iran's adherence to the 1974 Agreement was a precondition to the United States willingness to enter into LOAs with Iran.

extent that it is possible to dispose of them to other purchasers. The United States is therefore willing to offer the subject property for sale and to place the proceeds in the Iran FMS Trust Fund.

A. Iran's Request for Recovery of Amounts in Excess of Current Value Should be Denied.

1. Iran is Barred from Recovering any Decline in Value of its Property from November 14, 1979 Through January 1981.

Implicit in Iran's request for the replacement value of its property is a claim for the decline in value of its property during the period November 1979 through January 1981, during the period of economic sanctions against Iran. However, the right of a state aggrieved by another state's breach of its international obligation to protect its interests by taking reasonable and proportionate countermeasures has been recognized under international law. See, e.g., Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France), 54 I.L.R. 304, 337 (1978).

The International Court of Justice clearly established that the U.S. sanctions were in response to the hostage taking. Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 200, 244-45, reprinted in 19 Int'l Legal Materials 553, 566 (1980). Therefore, the freeze was not in violation of international law. Under these circumstances, the United States cannot be required to bear the losses associated with the decline in value of Iran's property during this period

and thereby permit Iran to benefit from its unlawful conduct. See also United States Rejoinder at 65, n.33. Furthermore, Article II(1) of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction claims arising out of such acts. The only issue, therefore, is whether Iran or the United States should bear any losses associated with the decline in value of the property from January 1981 to the present. As will be demonstrated below it is Iran who, both as a legal and equitable matter, bears this loss. [Any Tribunal precedent?]

2. Iran Should Bear the Loss Associated with Any Decline in the Value of the Property.

The FMS contract system is expressly based on the fundamental premise that the United States is procuring items for the purchaser on a non-profit, non-loss basis, giving the purchaser the considerable benefit of obtaining military equipment on the same advantageous terms as the U.S. Government is able to secure from defense contractors. This is clearly reflected in the terms of the standard LOA: for example, General Condition B.1. requires the purchaser to pay "the total cost to the USG of the items."<sup>21/</sup> General Condition C.1. states that "it is understood by the purchaser that the USG in procuring and furnishing the items so specified in this Offer and Acceptance does so on a nonprofit

---

<sup>21/</sup> [Cite.]

basis for the benefit of the Purchaser."<sup>22/</sup> Thus, in the FMS relationship, it is the purchaser, and not the United States, who bears the risk of any loss associated with the purchase of military property. Iran is responsible for the change in conditions which caused its military property to be non-exportable at the signing of the Algiers Accords and continuously to the present. Iran alone, therefore, should bear the loss of any decline in value of its property due to that non-exportability.

Iran has consistently refused offers by the USG to sell Iran's property in order to conserve its value for the benefit of Iran. Although it had no legal obligation to do so, the United States has repeatedly offered to sell the subject property expressly to preserve its value and to minimize any financial loss to Iran. Iran has consistently opposed such offers.<sup>23/</sup> Thus, Iran cannot now be permitted to require the United States to reimburse it for any decline in value of the property since the signing of the Algiers Accords.

---

<sup>22/</sup> [Cite.] This concept of indemnification by the United States Government by the purchaser is contained in each LOA as General Condition C.1.

<sup>23/</sup> On April 17, 1980, the President of the United States directed that all undelivered military equipment and spare parts purchased by Iran be sold to the U.S. Armed Forces or transferred to other buyers. The President's directive, however, did not affect items which had been "delivered" (either actually or constructively) to Iran, and to which Iran had thereby acquired title, but which had not been exported from the United States.

Shortly after the signing of the Accords in 1981 the United States advised Iran of its willingness to arrange for the sale of Iran's property to conserve its value and avoid future costs. On March 26, 1981 the United States requested the Embassy of the Democratic and Popular Republic of Algeria to inform Iran that the United States was unable to license the export of Iranian-owned military supplies and equipment in the United States. The United States offered to assist in disposing of the Iranian-owned property, specifically including that in the United States for repair and return and to remit the proceeds to Iran. The United States Government repeated this offer on September 23, 1981 in another Note to the Embassy of the Democratic and Popular Republic of Algeria. United States Statement of Defense (Doc. No. \_\_\_\_ ) at Exhibit H. Iran rejected these offers. Id. On [March 31, 1982] the United States filed in this case a "Notice of Intent of the United States to Sell Non-Exportable Military Property Purchased by Iran Under the FMS Program and Located Within the United States" (Doc. No. \_\_\_\_ ). In this Notice the United States that it would provide an accounting of these sales to Iran and would credit Iran's FMS Trust Fund with the net proceeds. By letter dated April 17, 1982 (Doc. No. \_\_\_\_ ), Iran informed the Tribunal that it objected to the United States notice of the intended sale of military equipment. At a meeting of the Tribunal, also on April 17, Iran orally requested that the Tribunal order interim measures



restraining the United States from proceeding with the sale of the equipment at issue. The parties filed written memorials (Doc. Nos. \_\_\_\_\_) and a hearing on the issue was scheduled for May 4. [Iran withdrew its request prior to the hearing.] However, Iran again objected in writing to the proposed sale in a letter to the Tribunal dated May 4, 1982 (Doc. No. \_\_\_\_). The United States renewed its offer to sell the property in a letter to the Tribunal dated June 1, 1982 (Doc. No. \_\_\_\_). Because of Iran's objections, however, the United States never proceeded with a sale.

Having prevented the United States from taking reasonable actions to minimize loss to Iran, Iran cannot now claim to recover such losses from the United States. As demonstrated above, Iran was not entitled to immediate possession of these items (because of the operation of U.S. law, consistent with the General Declaration and the FMS contract documents); and therefore of necessity had to choose between allowing the United States to minimize loss by disposing of the property, or retaining its title and ultimate expectation of possession at the risk of diminution in the value of the items in the meantime. Iran chose the latter course, and now must accept whatever decrease has occurred in the value of its property.

3. Iran's Request For Recovery Is, In Any Event, Excessive.

In requesting, as the first alternative, restitution of the subject property, Iran implicitly concedes that any claim to the

property is limited to the current actual value of the property. In any event, Iran's request for the replacement value of its property seeks remuneration in an amount greater than the value it would have realized had it received of the property. This should not be allowed. All property identified in Exhibit III was purchased by Iran well before 1979 and used by Iran for before it was sent to the United States for repair. Iran cannot now claim that it is entitled to any value greater than the value of this used property, as modified or repaired, less the cost to the United States of work performed on the items and other relevant U.S. expenses.

Similarly, with the exception of the INS Kousseh submarine, property identified in Exhibit V was retained in the United States at the request of Iran for various purposes, including training and development. [Diana: true of Hawk system and helicopters?] This property, too, had declined in value through use to Iran's benefit prior to January 1981. The INS Kousseh submarine was a refurbished vessel transferred by Iran to the United States for sale to a third party. Prior to its transfer to the United States Iran had enjoyed the benefits of the submarine and cannot now be heard to demand a new vessel.

Finally, in any event it is untenable for Iran to request both replacement value and additional damages for loss of use of the property. If permitted, this would be tantamount to a double recovery for Iran in that would, at the end of the day,

have the value of totally new military equipment and compensation for the use of that equipment from 1981 through the present.

4. Iran's Request for Damages for the Loss of Use of its Property Is Contrary to the LOAs and Customary International Law.

Notwithstanding the above, Iran is not entitled under the terms of the LOAs or customary international law for damages for losses incurred for the deprivation of the use of its property from January 1981 to the present. As set forth above, Iran assumed the risk of loss under the LOAs for the non-exportability of its property.

Iran has failed to provide a single piece of evidence supporting a claim for the deprivation of the use of its property or quantifying such amount. Iran's claim, therefore, is mere unsupported speculation and should therefore be denied. As this Tribunal has recognized, to prevail with a claim for damages Iran must (1) establish that it suffered a compensable loss and (2) quantify that loss. See, e.g., Sedco, Inc., AWD 309-129-3, at 202-03 (July 7, 1987). See also Training Systems Corp., AWD 283-448-1, at 14 (December 19, 1986)(claimant provided no evidence showing that it either overpaid taxes or suffered any damage as a result of the respondent's failure to provide the claimant with an appropriate receipt); Cosmos Engineering, AWD 271-334-2, at 14 (November 24, 1986)(while recognizing that some of the claimed costs were clearly of the

type to which claimant was entitled under the contract, the Tribunal dismissed the claim for failure to submit documentary proof). Iran's claims for damages for the loss of its property should be treated accordingly and summarily denied.

5. Iran Has Overstated the Value of the Subject Items.

In its Statement of Claim and supporting documents, Iran has claimed substantial values for the property identified in Exhibits III and V. In no instance, however, has Iran provided any substantiation for these value, nor has it set forth the theory on which these values are based, i.e., current value, replacement value, or whether they include the consequential damages sought by Iran. In its request for a Partial Award, Iran requests replacement value, but does not explain whether this is the basis on which its original claim was calculated. Until Iran is able to support its allegations, the Tribunal must reject Iran's figures. Moreover, as is shown below, values assigned by Iran grossly inflate the true value of the subject property.

a. Repair and Return Property (Exhibit III).

The property identified in Exhibit III consists of thousands of items sent by Iran to the United States under the FMS Program for repair, calibration, or modification. The only value Iran

has provided for repair and return property<sup>24/</sup> in this claim is stated to be \$290 million dollars (Iran's Replication, Doc. No. \_\_\_\_ at 47). This figure provides no basis for a computation of damages, if any were available, for two reasons. First, Iran has never provided any evidence to substantiate this computation. Furthermore, this figure was provided before the parties began a series of meetings on the repair and return property in 1984 through 1986. During the course of these meetings, many properties originally claimed by Iran were withdrawn because they were duplicates or documentation provided by Iran indicated they had been sent directly to a private contractor for servicing. In addition, a few new claims were added. See Joint Report in Claim 4 (Doc. No. \_\_\_\_). Most notably, the remaining repair and return properties at issue have now been divided by the parties into four exhibits, only one of which (Exhibit III) constitutes property which the United States holds and is at issue here. Id. Iran has made no effort to revise its original figure to identify what portion of the value originally asserted is attributable to Exhibit III.

b. Exhibit V.

Exhibit V identifies several items that were purchased by

---

<sup>24/</sup>In the most recent "Description of the Six Claims" submitted by Iran in Case B/1, Iran values the defense articles in issue in Claim 4 at \$528,970,828. [Cite.] Although Iran does not further elaborate on the derivation of this value, it presumably includes repair and return property identified in Exhibits I through IV as well as the remaining items identified in Exhibit V.

Iran under the FMS Program but retained in the United States at the request of Iran. As with Exhibit III, the values that Iran has assigned to these items are arbitrarily inflated. [Ron & Wynne: Depending what Diana has come up with, we may need to resort strictly to standard depreciation schedules here.]

INS Kousseh. In its Statement of Claim (Doc. No. \_\_\_\_ ) at p. 13 Iran claimed \$30 million for one submarine known as the INS KOUSSEH. Iran had initially purchased the submarine from the United States Government under the FMS Program for incorporation into its own fleet. In 1979, however, Iran decided that it no longer needed the vessel and pursuant to a Memorandum of Understanding dated May 16, 1979 (a copy of the MOU is attached as Exhibit \_ to the United States Rejoinder (Doc. No. \_\_\_\_ ) placed the vessel in the custody of the United States, and the United States undertook to attempt to find another purchaser for it. Because the vessel was acquired under the FMS Program, the proceeds of the sale of the vessel were to be placed in the Iran FMS Trust Fund.

Although the United States made several attempts to find a buyer for the vessel, it could not do so, and the vessel remains in the custody of the United States Government in water storage. Because Iran and the United States had no agreement that the United States fully maintain the vessel, it is not seaworthy in its current condition. The United States estimates that if a buyer could be found the current market value of the

vessel would be approximately \$50,000. [What is the depreciated value of a submarine this age?]

F-14 Aircraft. Iran claims "over" \$50 million for the value of one F-14 aircraft. This aircraft was purchased by Iran under the FMS Program and retained by the United States Navy pursuant to agreement with Iran for the development and testing of an in-flight fueling receptacle. Iran purchased the aircraft in \_\_\_\_ at a price of \$15.3 million dollars. In 1979 the United States estimated the market value of the aircraft to be approximately \$\_\_\_\_\_ [based on a standard depreciation rate of \_\_\_\_\_. In the experience of the United States Department of Defense, an aircraft of this type generally depreciates 8 percent per year assuming that funds are expended on the aircraft for annual upkeep. Thus, at most, an F-14 aircraft purchased in \_\_\_\_ would be worth only \_\_\_\_\_ today.

Iran, of course, must bear any losses associated with the decline in value of the aircraft from the date of purchase in \_\_\_\_\_ to November 1979 when it enjoyed the benefits of the use of the aircraft for in-flight testing.

Hawk Battery, Firing Control, and Spares. Iran claims \_\_\_\_\_ million for these items. This value must be rejected for several reasons. First, it includes Iran's original claim for 390 Hawk Missiles, a claim withdrawn by Iran in its Replication (Doc. No. \_\_\_\_\_) at p. 51. Iran never supplied a revised value for its claims with respect to the Hawk System. [Diana is this



latter statement correct?] Moreover, Iran's figure for the current value of the remaining Hawk items does not take into account that the original Hawk system is no longer produced by the United States and is therefore no longer utilized by the United States and many FMS purchasers. As a result, apart from normal depreciation of a system of this type, the current market value of the remaining items would be quite low.

The United States estimates that if a buyer were to be found, the current value of the Hawk Battery would be less than \$3 million dollars. Iran purchased the battery in \_\_\_\_\_ for \$6 million dollars. As the United States no longer makes the original Hawk system, this battery would not be operable in the more advanced Hawk systems utilized by the United States and most other FMS purchasers. The United States estimates the current market value of 3 firing control systems purchased in \_\_\_\_\_ at price of \_\_\_\_\_ to be worth approximately \_\_\_\_\_ today. [Like the Hawk Battery, the firing control systems would not be operable in more advanced Hawk systems.][Diana: What's the reason these were never shipped? Were they caught up in the suspension of shipment of sensitive items? Were they in the pipeline to be sent? Were we using them on Iran's behalf?]

AH-1J Helicopter. Iran claims \$4 million for the value of one AH-1J helicopter. This helicopter was purchased by Iran under the FMS at a price of \$ \_\_\_\_\_ and delivered to Iran in the United States in 1974 for use in various testing and development

programs undertaken by the United States on behalf of Iran under the FMS Program. The United States estimated the value of the helicopter in 1979 to be approximately \$1 million. Based on its experience with the depreciation of these and similar helicopters, the United States estimates that a helicopter purchased in \_\_\_\_ would depreciate at a rate of \_\_\_\_, and would thus be worth approximately \$ \_\_\_\_\_ today, if a buyer could be found.

214 Helicopter. Iran claims "over" \$3 million for the value of one 214 helicopter. This helicopter was purchased by Iran under the FMS Program for \$1.1 million and delivered to Iran in the United States [between March 1974 and December 1976] for use in various test and development programs undertaken on behalf of Iran. The United States estimated the value of the helicopter in 1979 to be approximately \$600,000. As this particular helicopter has little to no resale value [Diana: why? I know we won't buy it, but won't somebody else?], the United States estimates that the current market value of a helicopter of this type and age would be approximately \$50,000.

B. The Value of Iran's Property Should Be Credited to the Iran FMS Trust Fund.

The Tribunal should deny Iran's request that the United States transfer any amount directly to it. Under the terms of the LOAs between the United States and Iran, the value of the subject property should be credited to Iran's FMS Trust Fund pending a full and final accounting of all Iranian FMS

transactions.

All of the property identified in Exhibits III and V is military property that was sent to the United States for servicing under the FMS Program or property that was purchased by Iran under the FMS Program. All property subject to this proceeding, therefore, was contracted for under a Letter of Offer and Acceptance. In each LOA Iran agreed that payments under a LOA in excess of the final total cost of delivery and performance under the LOA were refundable to Iran only if "not required to cover arrearages on other open Offers and Acceptances of the Purchaser."<sup>25/</sup>

Iran's debts and obligations under the FMS Program have not yet been resolved. Until they are, all monies associated with the Iran FMS Program must be retained in the Iran FMS Trust Fund. Iran's obligations under the FMS Program and the United States accounting of the Trust Fund are currently the subject of dispute in Claims 2 and 3 of Case B/1. Further, no payment of FMS funds should be made to Iran until the resolution of the United States' counterclaim in Case B/1. In this counterclaim, the United States seeks \$816 million dollars in damages arising

---

<sup>25/</sup> All LOAs included the following General Condition A.7.:

[The United States shall] refund to the Purchaser any payments received hereunder which prove to be in excess of the final total cost of delivery and performance of this Offer and Acceptance, and are not required to cover arrearages on other open Offers and Acceptance of the Purchaser. [Emphasis added.]

from the breach by Iran of its obligation to maintain the security of classified componentry in defense articles sold to Iran. Until the Tribunal and the parties have completed a full and final analysis of the FMS Trust Fund and all related issues in Case B/1, and have conclusively determined that Iran is not in arrears, no payments are permissible to Iran out of the Trust Fund.

Accordingly, any proceeds equivalent to the current value of Iran's property must be made to the Trust Fund, and not as a direct transfer to Iran. Such action is fully consistent with U.S. sales of non-titled articles under the Iran FMS Program and offers made by the United States for treatment of the titled property since the signing of the Accords. In every instance the United States has placed the proceeds of any such sales into the Iran FMS Trust Fund pending a full and final accounting of the Trust Fund and resolution of the United States counterclaim in Case B/1.

CONCLUSION

[To be inserted]

52

