CASES NOS. A15 (IV) AND A24
FULL TRIBUNAL
AWARD NO. 602-A15 (IV) / A24-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,
and
THE UNITED STATES OF AMERICA,
Respondent.

JOINT SEPARATE OPINION[1] OF JUDGES MIR-HOSSEIN ABEDIAN, HAMID REZA NIKBAKHT FINI, JAMAL SEIFI

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1. The present Award (the Award) decides certain complicated issues of law and fact in categories of claims at issue in these consolidated Cases. Some categories consist of several claims. The Award, as delineated in its operative part (Paragraph 294), is in many instances the product of a majority opinion in each category or each claim. It is thus natural that individual members of the Tribunal entertain different views and judgments on each of those categories or claims. Therefore, and in line with the

[1] The final version of this Joint Separate Opinion (subject to minor editorial modifications) had been submitted to the Tribunal before 23 June 2014.

Tribunal's established practice over the past thirty years, we register this Opinion to express our separate views concerning certain claims and issues in these Cases.

2. Notably, all Members have agreed that there has been a breach of General Principle B by the United States. We share the Award's findings and conclusions in relation to a variety of claims that are categorized as Claims A, D, G and H. Furthermore, we agree that the United States should, in principle, be held liable for expenses that Iran has reasonably incurred in monitoring the "suspended" litigation. However, we have observations and differences of approach concerning the evidentiary stance of the Award in the determination and quantification of damages due. In particular, we concur in the findings set out in Paragraph 294, sections (a) through (f) and (h) through (j), while we have reservations as to certain other claims as discussed in the present Separate Opinion. This Separate Opinion will thus elaborate upon our views and observations in two distinct sections: (**A**) where we join the majority, but would like to articulate our separate observations as to how the Award could have been further improved. This section includes only one instance, *i.e.,* the Award's treatment of "the Shack & Kimball General and Monitoring Expenses"; and (**B**) where, with all due respect to the views of the majority and with regret, we are unable to subscribe to their conclusions and thus elaborate on the reasons as to our inability to join the majority. This section consists of four headings as described below under Section **B**.

A. The Award's Treatment of the Shack & Kimball General and Monitoring Expenses

3. As it is explained in the body of the Award,[2] Iran has claimed that its general and monitoring losses with respect to the law firm of Shack & Kimball amounts to a total of U.S.$807,705.81. It is true that Iran has not specifically separated the amounts paid to the law firm in terms of monitoring and general expenses. Also, it is true that Iran has not provided certain original billing statements such as specific invoices (the so called "primary documentation") for the amounts paid. Thus, subject to a necessary explanation as to the definition of the so called "absence of primary documentation",[3]

[2] Para. 225 of the Award.

[3] The Award, Para. 153.

one could concur with the Award's resort to approximation, in line with the Tribunal's precedent in similar instances, as well as the practice prevalent in international arbitration. However, we believe that the circumstances surrounding this item of Iran's claim, as explained below, required not only a less strict standard of proof but a less strict method of approximation, leading to a more realistic and equitable result. The Tribunal awards $70,000 out of the total amount claimed by Iran. This is less than 10% of the claim.

4. Before turning to the question of approximation, one important point needs to be emphasized: the lack of the so-called "primary documentation" has never been considered as a hindrance to proving damages in international arbitration. Nor could it justify approximation in an unreasonably reduced level. Indeed, few cases may be found where one party appears before a court or tribunal with impeccable evidence. Courts and tribunals the world over deal with circumstantial evidence every day. In the words of one celebrated commentator:

> "If the only evidence which could be adduced were that directly of facts in issue, or direct evidence, many claims would fail for lack of adequate proof. At some stage, resort *almost always* has to be had to '*circumstantial evidence*' which may be defined as any fact (sometimes called an 'evidentiary fact', 'factum probans' or 'fact relevant to the issue') from the existence of which the judge or jury may infer the existence of a fact in issue (sometimes called 'principal fact' or 'factum probandum')"[4]

5. In the present Case, although the Claimant has not produced what the Award terms as "primary documentation",[5] the Claimant has been able to compensate that undefined expectation with a series of other evidence. Foremost among such evidence is the testimony of Mr. Thomas Shack, which curiously has, to a large extent, been disregarded. Mr. Shack is the author of the same instruments which the Award calls "primary documentation". He has submitted two affidavits in the present Cases. The Claimant's figures and claims correspond with the content of those affidavits. In particular, he appeared before the Tribunal in person and under oath verified his affidavits. He was cross examined by the Respondent and was questioned by the

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[4] *Cross on Evidence*, 9th ed., London (1999), p. 23 (italics supplied).

[5] The notion of primary documentation appears in no portion of the Partial Award 590, and the Award does not offer a clear meaning or significance for such a notion.

Members of the Tribunal. There is no suggestion of bad faith or false testimony on his part at all. Indeed, even Members who dissent from the Final Award make clear reference to Mr. Shack's Testimony in support of their opinions.

6. Mr. Shack, who is now in retirement, had for many years been working in the United States as an AV-rated attorney. He was the *only* witness with first-hand knowledge of the issues at stake in this Case. His testimony was so pivotal for the Tribunal that the Tribunal once postponed the hearing of these Cases for one year because Mr. Shack was unable to travel to The Hague on account of his wife's serious illness.[6]

7. During the relevant period (early 1980s), Mr. Shack was Iran's general counsel. His knowledge of the Iranian lawsuits before U.S. courts in that period is unique and unparalleled. We believe his written and oral testimony, corroborated with other contemporaneous evidence supplied by Iran, as described in Paragraph 149 of the present Award, sufficiently compensate the lack of original billing documentation.

8. Accordingly, we believe the documentary evidence adduced by the Claimant accompanied by Mr. Shack's testimony obviated any need to resort to approximation. In particular, there seems no need to insist on the presentation of the so called "primary documentation". Because the notion of "primary documentation" resembles certain strict evidentiary rules applied in some domestic jurisdictions, not applicable to litigation between States. As Judge Fitzmaurice has put it:

> "Of course the Trust Deeds would, if produced, constitute what is known in Common Law parlance as the 'best' evidence, and unless they could be shown to have been lost or destroyed, it is unlikely that a municipal court would admit secondary evidence of their contents. International tribunals are not tied by such firm rules, however, many of which are not appropriate to litigation between governments."[7]

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[6] In its request to postpone the Hearing (Doc 1843, at p. 2), the Claimant stated: "… Mr. Shack is Iran's single most important witness for its case-in-chief. In addition to providing testimony regarding his representation of Iran in United States litigation and the legal fees associated with that representation, Mr. Shack's credibility has been challenged by the United States, making Mr. Shack's live testimony all the more necessary." The fact that the Tribunal was convinced to postpone the previously scheduled Hearing based on, *inter alia*, this argument clearly shows that the Tribunal *itself* considered Mr. Shack's testimony pivotal for the purpose of this Hearing. Thus, any possible contrary inference by an individual Member of the Tribunal is only based on pure speculation and lacks credibility.

[7] *Barcelona Traction* Case, Separate Opinion of Judge Gerald Fitzmaurice, I.C.J. Reports, 1970, at 99.

9. In view of the above observations, one should not be blamed for the suggestion that as to the handling of evidence for Shack & Kimball expenses, the Tribunal has perhaps unwittingly applied what in common law jurisdictions is known as the rule of "best evidence." This is unprecedented and obviously unwarranted in this Tribunal.

10. As to the approximation, a few points are in order: **First** and as a primary matter, it is important to note that the Tribunal has found that the United States was in breach of its treaty obligation in not bringing the relevant US court litigation to a complete halt by 19 July 1981 and, additionally, in not prohibiting further litigation against Iran after 19 January 1981. This being so, the Tribunal has also concluded that under such circumstances, it was reasonable for Iran, or any sovereign State in the same circumstances, to engage in a reasonable amount of monitoring activities, and that, in reality Iran did engage in such activities and did incur losses as a result. Thus, all three elements of breach, loss and causation are, in the view of the Tribunal, present in the instant case. As to the quantum, the Tribunal was provided with the Shack evidence, as corroborated with the contemporaneous documentary evidence, litigation documents and docket sheets. Although this evidence could, as described above, have provided a basis for the evaluation of Iran's losses, at the very least, it could be a reliable basis for the approximation of Iran's damages flowing from the US breach of its treaty obligation.

11. **Second**, it is widely accepted that the approximation principle covers a variety of damage assessment situations and thus it is not limited to a situation where "valuation" of a certain property is at stake. It must be noted that in no doctrinal authority has the power to approximate been limited to such a situation, for the simple reason that once breach and occurrence of loss have been proven, the adjudicating body should not refuse compensation for the mere reason of imperfection of evidence on quantum.[8] Neither is such the case in domestic laws touching upon the issue.[9] Nor

[8] See, *e.g.*, Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* (2008), where the authors state that "[i]t has been established in international law that difficulties of calculating damages must not deprive a claimant whose interests have been injured from obtaining compensation. The contrary approach would reward the party in breach by denying compensation to the injured party, merely because there is no precise basis for determining the amount of damages." (at p. 121) They, then, conclude that in such cases, the approach should be as follows: "In circumstances in which the precise calculation is difficult or impossible, for example, due to inconclusive evidence, tribunals may exercise discretion and resort to 'approximation.' Approximations are based on arbitrators' collective sense of what is reasonable and equitable in the circumstances of the case." (at pp. 121-122).

[9] See, for instance, Article 42(2) of the Swiss Code of Obligations, which provides that "[…] damages which cannot be established in amounts shall be assessed by the judge in his discretion." In the same

do international instruments suggest such a limited approach. For instance, Article 7.4.3 (3) of the 2010 UNIDROIT Principles on International Commercial Contracts provides as follows: "Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court."[10]

12. Further, a review of the Tribunal's jurisprudence clearly shows that the exercise of the Tribunal's power to approximate is not limited to situations where the "valuation" of an expropriated property is at stake: it obviously includes these situations, but it is not limited to such scenarios. *Economy Forms*[11] is a clear example: this case relates to the calculation of damages arising out of a breach of contract. The evidence on the calculation of actual loss resulting from the breach of contract being insufficient and "unsatisfactory", the Tribunal resorted to its authority to "determine equitably" the amount of damages.[12] *William Levitt*[13] is another example where again the Tribunal

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vein, Article 1226 of the Italian Civil Code empowers the judge to fix the amount of damages resulting from breach of an obligation where the precise amount cannot be fixed. See, also, Section 287 of the German ZPO; Furthermore, in Belgium, damages must be certain in existence, but not in amount: see, e.g., Lucien Simont et al., Belgium, in TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE, at BEL-63 (John Fellas ed., 2003) at BEL-64; With respect to English Law, the authoritative statement of Vaughan Williams L.J., as early as 1911, in *Chaplin v. Hicks* deserves mention: "I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable…. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.... There were, as there are now, many cases in which it was difficult to apply definite rules.... In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract." *Chaplin v. Hicks* [1911] 2 K.B. 786, at pp. 791-792. See, also, the Canadian case of *Wood v. Grand Valley Railway Company* [1915] 51 S.C.R. 283, 289, and the US cases of *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc*., 299 F.3d 769, 790 (9th Cir. 2002); *Bagwell Coatings, Inc. v. Middle S. Energy, Inc*., 797 F.2d 1298, 1307-09 (5th Cir. 1986); *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960); *Kozlowski v. Kozlowski*, 403 A.2d 902, 908 (N.J. 1979).

[10] The commentary also confirms that in such circumstances "rather than refuse any compensation, the court is empowered to make an equitable quantification of the harm sustained." UNIDROIT Commentary on the 2010 PICC, at p. 270.

[11] *Economy Forms Corporation* v. *The Government of the Islamic Republic of Iran et al.*, Award No. 55-165-1 (13 June 1983) *reprinted in* 3 Iran-U.S. C.T.R. 42.

[12] In this case, the Tribunal first noted that to determine the residual value of the goods manufactured under the contract that remained unsold partly because of metric specifications, it "would have required of the Claimant evidence of possible resale prices and resale opportunities in the near future, potential scrap value, costs of resale efforts, etc.", but that the Claimant "produced only general testimony on these questions which was unsatisfactory for precise computation of damages." Having found the evidence produced by the Claimant on the computation of damages as unsatisfactory to allow a precise calculation and in ultimately awarding a round figure of U.S.$1,500,000, the Tribunal went on to hold that: "The Tribunal must accordingly *determine equitably* the damages to be awarded, taking into account the potential differences in resale value of metric and nonmetric materials, and reasonable storage charges." *Ibid*., at p. 52 (Emphasis added).

[13] *William J. Levitt* v. *The Government of the Islamic Republic of Iran et al.,* Award No. 297-209-1 (22 April 1987), *reprinted in* 14 Iran-U.S. C.T.R. 191.

exercised its authority to approximate losses in the process of the assessment of damages resulting from a breach of contract.[14] More importantly, for our present purposes, as to the head of damages claimed for legal fees incurred in preparation for the project, the Tribunal, despite the Claimant's failure to provide evidence allowing precise attribution of losses to the project or to explain why such evidence could not have been produced, in the exercise of its power to approximate the loss, allocated one-third of the claimed fees to the project and awarded damages accordingly.[15] Even in *Starrett Housing*[16], though the case related to the valuation of an expropriated property, the Tribunal went on to pronounce a general principle to be followed in cases of calculation of damages: "[…] the practice of the Tribunal supports the principle that when the circumstances militate against calculation of a precise figure, the Tribunal is obliged to exercise its discretion to 'determine equitably' the amount involved […] It is generally recognized that international tribunals have a wide margin of appreciation to make reasonable approximations in such circumstances."[17]

13. Therefore, one could not find support for any possible proposition that approximation is *only* limited to certain cases of valuation. To the contrary, both doctrinal authorities and case law support the proposition that approximation is to be exercised in cases where breach and occurrence of loss are certain, but the amount of damages cannot be proven with an adequate degree of certainty. The rationale for such a proposition is the fact that a certainly-incurred loss should not remain

[14] In this case, the Tribunal held: "The Tribunal is satisfied that an appreciable amount of work was done in clearing and grading the site, and that considerable incidental expenses must have been incurred by ICC, though there is no specific evidence to support the amount now claimed [$1,775,342.25]. The fairest estimate the Tribunal can make of the cost of the work performed in Iran is to give equal weight to the tax return figures and the total transferred and award $1 million." *Ibid*., at pp. 208-9, para. 53.

[15] Mr. Levitt had sought a total of U.S.$45,613.97 as legal fees he allegedly incurred in preparation for the project. The Tribunal noting that "[h]ere, the evidence does not permit the Tribunal to attribute all of this amount to the [project]" and that some of the evidence does not permit specific attribution or precise allocation, went on to hold as follows: "Given the Claimant's failure to produce evidence detailing the legal services for which these sums were paid or even specifying the matters in connection with which they were expended- specifically, *the Claimant's failure to produce the relevant invoices or to explain why they could not have been produced*- the Tribunal attributes approximately one- third of the legal fees to the housing project and therefore awards $15,000 under this head." *Ibid.*, p. 205, para. 46. (Emphasis added.)

[16] *Starrett Housing Corporation et al. v. The Government of the Islamic Republic of Iran et al.*, Award No. 314-24-1 (14 August 1987), *reprinted in* 16 Iran-U.S. C.T.R. 112.

[17] *Ibid.*, para. 339. (Citations omitted.)

uncompensated, and further a wrongdoer should not be allowed to gain from its own wrong.

14. **Third**, as to the level of approximation, we believe the Award should have followed the Tribunal's and other arbitral bodies' approach to reach a more realistic level of compensation. A study of the case law of this Tribunal and other international arbitrations demonstrate that where a tribunal has resorted to approximation on account of lack of sufficient documentation, the awarded amount has retained some measure of meaning and realism, *i.e.*, it has been between 25 and 75 percent of the claim. The lower end had been awarded where the claim suffered from multiple deficiencies in substantiating its elements. For example, in *Hakim v. Iran*, before the present Tribunal,[18] the Claimant sought U.S.$2,708,375 as his share in a company in Iran. The company's assets included lands and buildings, plus a number of machinery. The Tribunal noted that claimant's estimations were "vague", "devoid of detail' and "unsupported by credible data".[19] Yet, the Tribunal in a process of approximation awarded the Claimant the amount of U.S.$691,611.[20] This amount was slightly more than 25% of what the claimant had requested from the Tribunal.[21]

15. In *Eastman Kodak v. Iran*, the Tribunal determined that the damage suffered by the claimant can only be quantified by way of a reasonable and equitable adjustment to the total value of the promissory notes which had been made by the claimant to its Iranian subsidiary. After taking into account the fact that it was uncertain as to whether the business of the Iranian subsidiary would have ever become lucrative to be able to repay the debt, the Tribunal concluded that an adjustment of 50% of the total value of the promissory notes is equitable in all the circumstances.[22]

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[18] *Hakim v. Iran*, Award No. 587-953-2 (27 June 1998), *reprinted in* 34 Iran-U.S. C.T.R. 67.

[19] As to the lands, the Tribunal mentioned that the claimant's expert had measured the land, almost 2.5 times more than the real width (*Ibid.*, para. 125). As to the valuation of equipment and machinery, the Tribunal pointed out several deficiencies in expert's valuation, specially the inappropriate method used by him to appraise those properties (*Ibid.*, para. 129).

[20] *Ibid*., paras. 136-137.

[21] It is to be noted that apart from flaws in the Claimant's valuation, the claim itself was based on an estimation of value and not real and established value.

[22] *Eastman Kodak v. Iran*, Award No. 514-227-3 (1 July 1991), *reprinted in* 27 Iran-U.S. C.T.R. 3, at 21, paras. 51-54.

16. The same pattern may be traced with respect to other arbitral tribunals. In *Sedelmayer v. Russia*,[23] as to one head of damages, the arbitral tribunal found that Mr. Sedelmayer's evidence had several shortcomings and thus the tribunal was unable to precisely quantify his claimed damages.[24] Yet, while the arbitral tribunal decided to assess the claimant's losses in this respect with "great caution", an amount of U.S.$400,000 was awarded as compensation for this head of damage, which is slightly more than 23% of what the claimant was looking for.

17. Similarly, in *Petrobart v. Kyrgyzstan,* the arbitral tribunal having recognized that "… the figures relating to KGM's insolvency, the transactions with Kyrgyzgaz and Munai and the creditors' claims are too uncertain to allow the Arbitral Tribunal to make precise mathematical calculations of the damage resulting from the transfer and lease of assets", it decided to "… make a more general assessment of these matters based on probabilities and reasonable appreciations." Against this background, the tribunal held the Kyrgyz Republic shall compensate Petrobart for damage which the Arbitral Tribunal estimated at 75% of its claims against KGM.[25]

18. In the same vein, in *Santa Elena v. Costa Rica*, the arbitrators were not provided with evidence permitting a calculation of value in which all could concur. Thus, they awarded compensation in an amount of half way between the valuations of the parties' opposing experts, *i.e*. 50% of the requested damages.[26] In *Vivendi v.*

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[23] *Franz Sedelmayer v. The Russian Federation*, SCC, Award rendered on 7 July 1998.

[24] For instance, the tribunal remarked that: (i) KOC's accounting books have not been presented to the tribunal and it is not clear whether these documents were inside KOC premises when the premise was sealed; (ii) it is not proved by invoices and transportation documents that the goods were actually delivered to KOC; (iii) even if the goods mentioned in the invoices and transport documents were delivered to KOC, it is unclear to what extent the goods were kept at the premises when the sealing took place, as; (a) a number of materials, for instance office equipment, were meant to be used permanently by KOC and that these materials, consequently, stayed at the premises; (b) according to two witnesses of the claimant himself, KOC employees were allowed to take with them at least part of their personal belongings including computers and safes. It also followed from one testimony from the claimant and one from the respondent that certain pieces of office equipment were evacuated when the sealing took place, they first saw a truck where office equipment was loaded and that, later on, they saw people loading two trucks; (c) the Certificates from the St. Petersburg City Court indicated that people from KOC were allowed to remove certain property from the premises, not only on 24 January 1996, when the second sealing took place, but also during the following days; (iv) there is nothing in the documents submitted, including the Presidential Directive of December 1994, which indicated that the measures taken by the Russian authorities aimed at confiscating any movable assets from KOC.

[25] *Petrobart Limited v. The Kyrgyz Republic*, SCC, Arbitral Award rendered in Stockholm on 29 March 2005, pp. 77-84.

[26] *Compania Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica*, 15 ICSID Rev. FILJ 167 (2000) paras. 93-95. It is noteworthy that the claimant's valuation was U.S.$6,389,991; the

Argentina, while the arbitration body had refuted the claimants' methodology and calculation of their alleged lost profits for almost U.S.$300 million, the tribunal looked at the "invested amounts" as a proper basis and awarded U.S.$105 million in favour of the claimants (35% of what they were pursuing).[27] In *SPP v. Egypt*, the arbitral tribunal rejected the claimant's analysis and made an award as follows: *"Taking into account all the various factors placed before us, we have come to the conclusion that a fair sum to award would be $ 12.5 million."*[28] This amount was very close to 30% of what the claimant had been seeking. Finally, in *Sapphire v. NIOC*, the sole arbitrator, who was not briefed with sufficient documentation in this respect, found it reasonable and equitable to fix the amount of compensation for the loss of profit at U.S.$2,000,000, *i.e.* 25% of the claimed sum.[29]

19. The facts of the present Case warranted a more realistic and meaningful approach to the approximation of damages. This is because the Claimant has been able to prove the fact that Shack & Kimball provided services to it, and moreover it has been able to prove its losses.[30] Further, the Claimant has proved that it has paid the Shack & Kimball invoices. Indeed, the following excerpts from the findings and conclusions of the Tribunal on this subject are noteworthy:

i. It is well-established in international law that difficulties in calculating damages should not deprive a claimant whose interests have been injured from obtaining compensation. (Para. 230)

ii. It is also well-established in the jurisprudence of this Tribunal that, when circumstances make it difficult or impossible to precisely quantify compensation, the Tribunal may exercise its discretion to determine equitably the amount involved. (Para. 231)

iii. The Tribunal has a wide margin of appreciation to make reasonable approximations. (*Ibid*.)

iv. It is undisputed that at a certain point the Shack & Kimball invoices and billing documents were in the possession of, or at least available to, Iran. (Para. 154)

v. Iran has proven the *fact* that Shack & Kimball provided monitoring services to it. (Para. 232)

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respondent's was U.S.$1,919,492. Rounding to the nearest U.S.$10,000, the award of U.S.$4,150,000 exactly split the difference between the two valuations.

[27] *Compañía De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 AWARD dated 20 August 2007, paras 8.1.1- 8.4.5.

[28] *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, 22 ILM 752, 783.

[29] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award. March 15, 1963. (Cavin, Sole Arbitrator) ILR 1963, 188.

[30] Paragraph 228 of the Award.

vi. Iran has not proven the precise *extent* and *value* of those services. (*Ibid.*)

vii. Given that Iran has proven the fact of its losses, its failure to prove their exact extent should not preclude it from recovering damages altogether. (*Ibid.*)

viii. The Tribunal is persuaded that Shack & Kimball spent a significant amount of time on the monitoring of suspended claims before as well as after 19 July 1981. (Para. 235)

ix. Contemporaneous evidence shows that, between July and November 1981, Shack & Kimball had billed Iran a total of U.S.$427,397.47 for services rendered as general counsel. (*Ibid.*)

x. Shack & Kimball continued to provide legal services to Iran after that date. (*Ibid.*)

xi. It is further undisputed that that Iran paid Shack & Kimball invoices for services rendered. (*Ibid.*)

20. The above holdings of the Award, with which we are in agreement, are significant findings. They illustrate a situation that a Party has been able to prove important elements of its claim, including:

- The performance of the services,
- The necessity of such performance,
- The payment of the amounts due,
- The existence of the direct documentation,
- Direct link between the loss and the breach of obligation.

What are lacking are the precise extent of the services[31] and the submission of the so-called "primary documentation."[32] However, these shortcomings should be seen in light of the fact that the person who had performed those services and had produced the documentation in the first place, submitted two detailed affidavits, a detailed settlement agreement concerning the very services at issue here, has appeared before the Tribunal and has undergone cross-examination and questioning under oath. In view of all those findings and conclusions, and in view of the Tribunal's precedent as well as the jurisprudence of other arbitral bodies, we believe the figure awarded here as a result of the approximation does not do justice to the Claim.

21. It is true that Claimant sought its monitoring expenses under the heading of "general expenses" which comprised of monitoring expenses and unallocated general expenses. It is also true that the claim for unallocated expenses has been dismissed by

[31] Para. 232 of the Award.

[32] Para. 153 of the Award.

the Tribunal. However, the fact that the unallocated litigation expenses were not compensable should not be considered as a bar for an equitable and meaningful approximation of the Claimant's compensable damages, *i.e*., the monitoring expenses. In so doing, the figure of U.S. $806,857.33 sought as an aggregate of general litigation and monitoring expenses would still be the relevant monetary basis for the Tribunal's approximation methodology. Thus, the Tribunal, in our view, could have acted in a more realistic and equitable manner towards the issue of approximation. The evidence in this Case and the above findings are, in terms of strengths of the claim, far more superior to many of the mentioned cases where at least 25% of the claim has been awarded

B. Our reasons as to the parts where we are unable to join the majority

B.1. Behring Other Losses

22. The Award correctly pronounces the rule that as long as losses meet the requirements of international law and are not precluded by the Partial Award, they are compensable.[33] Moreover, the Award finds that the loss is attributable to the United States' failure to terminate legal proceedings.[34] In view of these clear legal and factual findings, denying compensation on the ground that Chamber Three has already provided Iran with a remedy is not comprehensible. When Chamber Three awarded that amount, Behring Company was insolvent and it was obvious that the remedy was not enforceable. However, Chamber Three was not in a position to do anything about it, because the Chamber was dealing with a private claim and the United States was not a party to that Case. Nor was the dispute before Chamber Three in relation to the violation of General Principle B. On the other hand, now the question is properly before the Full Tribunal and the Full Tribunal is in a position to render justice in this unfortunate affair. If the majority believes, as it does, that 1) the loss has occurred, 2) it is attributable to the United States, and 3) reparation is not prohibited either by international law or by the Partial Award, then law and justice dictates compensation in this Case.

[33] Para. 266 of the Award.

[34] Para. 265 of the Award.

23. The Tribunal in Case A27 acknowledged that "it is important to ensure the "effectiveness" of the Algiers Declarations"[35] The Tribunal's award in the contractual case against Behring, which was admittedly "defunct" and "bankrupt" at the time, is not an effective redress for Iran as to the losses incurred as a result of the breach of treaty obligation. It was the failure to terminate the relevant legal proceedings in U.S. courts and to subsequently enjoin Behring from the sale of the Iranian property, (authorized by the Treasury Department in 1983), that effectively led to the "unadjudicated satisfaction" of Behring's claims, which in turn resulted in the Tribunal's proceedings becoming redundant and causing Iran to incur the loss of U.S.$146,000. In these circumstances, the refusal to award Iran's other losses will effectively result in imposing the consequences of Behring's bankruptcy upon Iran, the injured party in a case of proven treaty violation, and will allow the party in breach to benefit from its own wrong.

24. The principle of full reparation does not allow a portion of loss to remain uncompensated with recourse to a merely hypothetical scenario of a phantom remedy being rendered in a private litigation. Accordingly, the impossibility to enforce the remedy awarded to Iran in contractual Case No. 382, taken together with a good faith interpretation of the Algiers Declarations would require that, in light of multiple breaches of General Principle B attributable to the United States in this Case, Iran be awarded an adequate and effective remedy for a clear case of a breach of a treaty obligation, in line with the principle of full reparation.[36]

B.2. McDonnell Douglas claim

25. The single reason for dismissing this claim in the Award is that the claim filed in the United States was not an outstanding claim on 19 January 1981.[37] However, under

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[35] *The Islamic Republic of Iran v. The United States of America*, Award No. 586-A27-FT (5 June 1998), *reprinted in* 34 Iran-U.S. C.T.R. 39, at 56.

[36] The situation can also be seen as analogous with the "refusal" or "undue delay" to enforce the Tribunal's awards by United States courts, thereby engaging the International responsibility of the United States. See, Paragraph 60 of the Tribunal's Award in Case A27: "In paragraph 15 of its Decision in Case A21, the Tribunal also stated that If recourse to [a municipal enforcement] procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations under the Algiers Declarations."

[37] The reference to the existence of a forum selection clause in Paragraph 56 of the Award seems redundant. Because if a U.S. claimant decided to bring such a claim before the Tribunal, it would fall under the ruling of Paragraph 158 of the present Award (the United States had to deal with it in accordance with Article VII(2) of the Claims Settlement Declaration). If such U.S. claimant decided not to bring its claim before the Tribunal, then it would fall under the ruling of Paragraph 114 of the

Article II of the Claims Settlement Declaration, it is obvious that the criterion for a claim being outstanding is not a subjective one in the mind of one party. Rather, it is the facts giving rise to a cause of action, which is determinative in this regard. The grounds on which both parties relied in Tehran and U.S. litigations were the pre-1981 transactions and contracts. Under the express ruling of the Partial Award, no American party may bring an action against Iran after 19 January 1981, whether in the form of a direct claim or in the form of a counterclaim, set-off and the like.[38] This ruling admits no reservation and the Tribunal at the moment is not in a position to create such a reservation.

26. Further, according to the record, the remedy sought by McDonnell Douglas before the U.S. court was not limited to a declaratory judgment that it had fulfilled its contractual obligations before 1981. McDonnell Douglas contended that it was owed U.S.$500,000 for work performed for the IIAF Iranian Air Force under the Agreement. Therefore, a positive claim by McDonnell Douglas existed, but for some reason (perhaps for the fear of a counterclaim by Iran) it decided not to pursue it before the Tribunal. This is the exact situation referred to in the Partial Award 590:

> "It is clear from General Principle B and from Articles I and II of the Claims Settlement Declaration that claims that would have been within the jurisdiction of the Tribunal and were not settled by negotiation were to be presented to the Tribunal, and that if a claimant chose not to present such a claim to the Tribunal, he was not to be permitted thereafter to raise it in United States courts. Although the existence of the Security Account ensured that the vast majority of claims deemed meritorious by claimants would be presented to the Tribunal, the Tribunal does not doubt that there were some claims not filed with the Tribunal because of concern by the claimants about possible counterclaims by Iran. By including Section 6 in the Executive Order, the United States, in effect, encouraged such claimants not to come to the Tribunal, and thus failed to comply with its obligations under General Principle B and Article I of the Claims Settlement Declaration."[39]

Partial Award 590 (such U.S. person "was not to be permitted thereafter to raise it in United States courts.")

[38] Paragraph 114 of the Partial Award No. 590.

[39] *Ibid*.

27. Under the provisions of Article II(1) of the Claims Settlement Declaration, Iran was not allowed to bring a direct claim against McDonnell Douglas before the Tribunal, and could only bring its claim in the form of a counterclaim. When McDonnell Douglas decided not to come before the Tribunal, and the deadline of 19 January 1982 to file a claim before the Tribunal passed, then Iran began legal action before Tehran Court on 16 March 1982. By this time McDonnell Douglas was prohibited to initiate any legal action against Iran before U.S. courts, as quoted above.

28. It should be added that when Iran filed a claim against McDonnell Douglas in the Tehran Court, it was within Iran's legal rights under Algiers Declarations to do so. Under the clear ruling of this Tribunal in *E-Systems*, Iran was under no obligation to refrain from filing lawsuits against U.S. parties.[40] On the other hand, under the provisions of the Algiers Declarations (General Principle B), as well as the Tribunal's findings in Partial Award 590, the United States was under a clear obligation to prohibit its nationals from bringing any new lawsuit against Iran. Thus, the filing of the lawsuit in Tehran cannot justify any action contrary to the provisions of General Principle B.

B.3. BILS expenses

29. Iran claims U.S.$250,000 in this part of the claim. The majority has dismissed the claim mainly on the ground that they concern in-house lawyers, not compensable under Partial Award No. 590. We do not find any such limitation in the Partial Award. More importantly, the Tribunal in the present Cases is dealing with the consequences of an internationally wrongful act.

30. As the Award correctly puts it, if there is no express preclusion in the Partial Award 590 to grant certain kind of damages, the Tribunal is empowered to compensate Iran's losses with due regard to the requirements of international law.[41] The rules of international law on the question of reparation as a consequence of an internationally wrongful act are clear enough. These rules are embodied in the

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[40] *E-Systems Inc.* v. *The Islamic Republic of Iran et al.*, ITM 13-388-FT (4 February 1983), *reprinted in* 2 Iran-US C.T.R. 51, at 57: "Tribunal concludes that the Algiers Declarations leave the Government of Iran free to initiate claims before Iranian courts even where the claims had been admissible as counterclaims before the Tribunal."

[41] Para. 191 of the Award. Under Article V of the Claims Settlement Declaration, the Tribunal is supposed to decide all cases on the basis of respect for law and applying, among other things, principles of international law as determined by the Tribunal to be applicable.

International Law Commission's Articles,[42] based on the celebrated dictum of the World Court in the *Chorzów Factory* Case.[43]

31. Applying the rules on the consequences of an internationally wrongful act, as explained before, does not allow exclusion of such expenses. Because the expenses would not have been accrued "but for" the non-termination of legal proceedings in the United States in violation of the Algiers Declarations. In other words, all the three elements that require reparation under international law (*i.e.*, breach, causation, damage) are present in this instance.

32. Based on Mr. Bijani's affidavit, the characterization of BILS expenses as a "part of the State's internal operating costs"[44] does not seem correct and in any event is beside the point. The BILS' role in monitoring activities was the direct consequence of the United States' failure in terminating the legal proceedings. It is reasonable to assume that the U.S. law firms active in overseeing and monitoring of the prohibited lawsuits inside the United States needed a point of contact with Iran to be able to perform their duties. The section of the BILS dealing with those law firms was, according to the Claimant, created out of such necessity. If there had been no prohibited legal proceedings before U.S. courts, obviously there would have been no need for monitoring and consequently no BILS activity on the subject.

33. The figure of U.S.$250,000 in Mr. Bijani's affidavit, is part of a larger sum (U.S.$1,475,000) paid to the Iranian lawyers working for BILS and dealing with Iranian open cases before U.S. courts after 19 July 1981. Based on the affidavit, Mr. Bijani gives an estimate of U.S.$250,000 representing monitoring activities subject to the present Cases between 1981 and 1995, excluding overhead charges. He gives this estimate with due regard to the compensability criteria set out by Partial Award 590.

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[42] See, Article 31 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, which is in the following terms:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." (*Yearbook of the International Law Commission*, 2001, vol. II (Part Two).

[43] "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." Permanent Court of Arbitration, *Chorzow Factory* Case (1928) P.C.I.J., Series A, No.17 at 29.

[44] Para. 244 of the present Award.

34. It should be added that awarding cost for in-house counsel is not alien to this or other international tribunals. In *Harris v. Iran*, this Tribunal held:

> "The Tribunal is satisfied on the basis of the Claimant's presentation at the Hearing that in seeking injunctive relief in the United States courts the Claimant incurred damages in the amount of $50,000 for corporate legal expenses claimed as part of the $193,000 for 'legal support' under the heading 'termination expenses,' and $510,550.13 for outside legal costs totaling $560,550.13."[45]

Moreover, during the hearings of the present Cases, the Claimant referred to NAFTA arbitration procedure under UNCITRAL Rules where the United States demanded costs incurred by the legal staff of the State Department.[46] The situation is very much similar to what exists here in these Cases.

35. Therefore, we see no ground to exclude BILS expenses. The claim seems very reasonable. It is the direct consequence of the breach by the United States of its treaty obligations, as found by the present Award as well as the Partial Award. Under international law such a claim should be admitted. Obviously, if the majority was troubled with the lack of enough evidence on the amount of the claim, it could have engaged in the process of approximation along the lines discussed above for the Shack & Kimball monitoring expenses.

B.4. Shack & Kimball specific expenses

36. In this part, the Claimant claims U.S.$128,071 for services provided by the law firm of Shack & Kimball. The majority is admittedly "persuaded that Shack & Kimball has made appearances and filings on behalf of Iran in court proceedings that the United States should have terminated or halted pursuant to the Algiers Declarations."[47] However, unlike the "general and monitoring expenses" discussed above, the majority declines even to make an approximation of this amount, which relates to *specific* litigation expenses incurred by Claimant as a result of the United

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[45] *Harris International Communications Inc., v. Iran*, Award No. 323-409-1 (2 November 1987), *reprinted in* 17 Iran-U.S. C.T.R. 31, at 77-78, para. 156.

[46] *Grand River Enterprises Six Nations, Ltd., v. United States of America*.

[47] Paragraph 207 of the present Award.

States' breach of her treaty obligation. The reason for that is the so called "strict standard of proof set by Partial Award No. 590."[48]

37. **First**, the parties agree and the Award, too, so registers that the standard of proof applicable in these Cases is the usual standard of proof, that is "preponderance of the evidence" or "more likely than not".[49] Therefore, the reference to and reliance on a new and ambiguous notion like "strict standard of proof" is unwarranted. **Second**, where it is certain that services have been rendered and losses have been suffered, it is fair, and in line with the principle of full reparation, to rely on the secondary evidence provided by the Claimant, or at least make an approximation. **Third**, the "strict standard of proof" (whatever it means), even if applicable, would apply in awarding the full compensation as claimed. It has nothing to do with the question of approximation. We believe the Tribunal should at least have made an approximation along the line adopted for general and monitoring expenses, as discussed above.

38. Indeed, for a considerable portion of the amount claimed in this part, *i.e.*, U.S.$63,634.00 for Behring specific litigation costs, the secondary evidence convincingly and with a high degree of accuracy, point to the conclusion that specific services were rendered. First, the specific items in the Shack Settlement faithfully correspond to the items in the relevant docket sheet of the U.S. Court and generally confirm the itemized legal services rendered by Shack & Kimball during the period under review. Second, the record of the proceedings in the United States as supplied by the Parties, provide detailed information regarding the involvement of Shack & Kimball in this lawsuit.[50] Third, and as a point of comparison, the record contains the invoices issued by Behring's attorneys for services rendered on the same subject which Shack & Kimball services are rendered. The invoices show that Behring claimed U.S.$193,541.80 plus an unspecified portion of U.S.$183,500.00 for legal services rendered in this respect. This corroborating evidence reinforces the evidence mentioned above, *i.e.*, the itemization and the docket entries.

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[48] *Ibid*.

[49] Paragraph 144 of the present Award.

[50] Such record includes the full text of Behring's Appellate Brief submitted by Shack & Kimball on 1 September 1982; the Third Circuit appellate decision; and Behring's opposition memorandum to Defendants' request for preliminary injunction, providing a detailed procedural history relating to the parties' petitions for rehearing.

39. Therefore, by any degree of reasonableness, the claim for Shack & Kimball specific expenses, or at least for a considerable portion of it, is established and there is no justification to deny it.

40. Having made the above observations, we take satisfaction in the fact that the Award has finally disposed of this old and longstanding dispute between Iran and the United States.

Dated,
The Hague,

In the Name of God	In the Name of God	In the Name of God
_____	_____	_____
M. H. Abedian Kalkhoran	Hamid Reza Nikbakht Fini	Seyed Jamal Seifi