Cases Nos. A15 (II:A), A26 (IV) and B43
Full Tribunal
Award No.: 604-A15 (II:A), A26 (IV) and B43

The Islamic Republic of Iran
Claimant

And

The United States of America
Respondent

SEPARATE OPINION OF JUDGE O. THOMAS JOHNSON
CONCURRING IN PART, DISSENTING IN PART

INTRODUCTION

I find myself in complete, or at least substantial, agreement with all of the holdings in the Partial Award that concern liability. I cannot, however, agree with the reasoning and conclusions the Majority with respect to damages (or reparation) in five claims: the three MORT claims (G-7, G-8, and G-13), the claim concerning the Stradivarius violin (G-15), and the claim concerning legal fees incurred by Iran in connection with the attachment of the Chogha Mish artifacts (G-32). The amounts awarded in these five claims that, in my view, are unjustifiable account for well over half the total amount awarded to Iran in this case.

I. THE MORT CLAIMS (CLAIMS G-7, G-8 AND G-13)

1. I write with respect to reparation in the MORT claims primarily to address one issue: the Majority's application of the principle of mitigation. The Majority finds that Iran's failure to take mitigating action was reasonable in the circumstances present in all of the MORT claims. I disagree.

2. The Partial Award begins its discussion of the MORT claims with Claim G-8 – the Gulf Ports claim. It is in the context of this claim that the Majority fully sets forth its reasoning with respect to mitigation. The discussions of mitigation in connection with Claims G-7 and G-13 are very short and rely almost entirely on the discussion of mitigation in Claim G-8. Following the model of the Partial Award, I also will discuss mitigation in the context of Claim G-8.

A. The Obligation to Mitigate

3. The principle of mitigation requires a claimant ("the aggrieved party") to reduce the harm suffered due to the conduct of the defendant (e.g., a tortfeasor or a "non-performing party" in a contractual relationship). It is not only recognized in the domestic law of torts and contracts of many legal systems, but also in transnational commercial law.[1] Both the Commentary to the ILC Articles and several international tribunals have recognized it.[2] And the Majority recognizes the applicability of the mitigation principle in this case:

> [U]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided. In the present claim, the Tribunal must therefore determine whether MORT, in the circumstances, took all reasonable steps to limit the losses for which it claims.[3]

4. In this case, MORT had the ability to reduce the damages suffered due to the conduct of the United States by paying the storage charges that MORT owed to Gulf Ports and arranging for shipment of the G-8 Materials. Indeed, on 17 November 1981 MORT entered into a settlement agreement with Gulf Ports to do just that: MORT agreed to pay Gulf Ports USD 886,135 to settle all storage charges.[4] However, this settlement agreement was not implemented. The question for the Tribunal, with respect to mitigation, is whether MORT's failure to pay its debt to Gulf Ports and arrange for shipment – a lack of action that led to

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[1] *See* Article 7.4.8 of the UNIDROIT Principles of International Commercial Contracts (UPICC), 2016, which reads:

> (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
>
> (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

This principle was already enshrined in the 2010, 2004, and 1994 versions of the UPICC. *See also* the United Nations Convention on the International Sale of Goods (CISG), which provides in article 77:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the amount by which the loss should have been mitigated.

[2] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Rep. of the Int'l Law Comm'n, 53rd Sess., 23 Apr.-1 Jun., 2 Jul.-10 Aug. 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No 10 (2001), art. 31, para. 11. In the context of investor-State arbitrations, tribunals have consistently stated that the principle constitutes a general principle of law.

[3] *Islamic Republic of Iran* and *United States of America*, Partial Award No. 604-A15(II:A), A26(IV) and B43-FT, ¶ 2065 (footnote omitted) (hereinafter "Partial Award").

[4] *See* MORT-Gulf Ports Settlement Agreement, 17 Nov. 1981, Claimant's Brief and Evidence in Rebuttal, Volume 3, Claim G-8, The Ministry of Road and Transportation (17 May 2006), Ex. 13 (hereinafter "Claimant's Brief and Evidence in Rebuttal, Claim G-8"); Partial Award, ¶¶ 501-502.

increased damages to MORT – was reasonable under the circumstances. If the lack of action was reasonable, then MORT did not violate its obligation to mitigate damages. Conversely, if MORT could reasonably have been expected to pay the debt and remove the G-8 Materials, MORT must bear the consequences of its failure to take such mitigating action.

B. Damages Comparison and MORT's Mitigation Decision

5. To determine whether MORT's lack of action was reasonable, the Tribunal must, among other things, compare the damages accruing while MORT failed to take action with the cost of resolving MORT's debt to Gulf Ports and arranging shipment. It is, to me, inexplicable that the Majority has not done this; indeed, the Partial Award nowhere even states the cost to MORT of itself arranging for the transfer of its properties. A comparison of that cost with the damage suffered by MORT reveals that the settlement cost to MORT was far lower than the foreseeable damages from inaction.

6. As a preliminary matter, it is appropriate to observe that MORT was not in the position of the typical claimant with respect to the cost of mitigating action. In the typical mitigation scenario, the question is whether the injured party could reasonably have been expected to make additional expenditures, with the prospect of recovering those expenditures subsequently from the defendant. In contrast, the essential decision facing MORT was not whether to incur additional expenditures, but whether to pay an existing debt, the amount of which was not disputed.[5] In these circumstances, it would be reasonable to expect MORT to pay its debt expeditiously if MORT was accruing any significant damages while the debt remained unpaid.

7. Even apart from the fact that liquidating a debt is not the same as incurring a new cost, the cost of liquidating MORT's debt was substantially less than the damages suffered while the debt went unpaid. Iran claims damages in Claim G-8 of USD 15,273,656.[6] More than 85

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[5] In fact, the 17 November 1981 settlement agreement was an opportunity for MORT to settle the existing storage charges at a discount. Gulf Ports informed MORT on 12 November 1981 that MORT owed accumulated storage charges of USD 1,143,065.37 as of 30 November 1981. Telex from Gulf Ports to MORT, 12 Nov. 1981, Response of the United States to Claimant's Brief and Evidence: Claim G-008 (Gulf Port Crating Company) (26 Sept. 2001), Ex. 6 (hereinafter "US Response to Claimant's Brief and Evidence: Claim G-008"). Mr. Rahmati indicated at the hearing that the amount of the storage charges claimed by Gulf Ports and the holders of the G-7 and G-13 materials was not disputed at the time of the Vienna negotiations. *See* Hearing Transcript, Cluster 6 – Day 1 (13 May 2014), at 175-76 (Question from Judge Johnson).

To be sure, Iran's position was then that the United States was responsible for storage charges both before and after January 19, 1981. *See* Partial Award, ¶ 2070. But this fact is neither here nor there in considering MORT's position with respect to mitigation. If the United States in fact was responsible for any or all of the storage charges in question, Iran could recover its payment of those charges, with interest, in a claim such as this one. If the United States was not responsible for storage charges, they were debts of MORT. In neither case would MORT be incurring any additional cost by paying the amount agreed in the settlement agreement.

[6] Partial Award, ¶ 1952.

percent of these claimed damages pertains to physical deterioration (USD 6,890,020) or loss of use (USD 6,205,083).[7] Most of the remainder pertains to storage charges paid to Gulf Ports for the period after 19 January 1981 (USD 1,338,693).[8]

8. Iran's damages claim of USD 15,273,656 implies a monthly accrual rate of USD 436,390.[9] Thus, it is Iran's claim that in only two months it suffered damages approximately equal to the USD 886,135 that Gulf Ports had agreed to accept in payment of its accumulated storage charges, payment of which would have resulted in the release of MORT's equipment. In these circumstances, any reasonable manager with knowledge of the accumulating damages would have paid the storage debt instead of permitting damages to accrue further. Unless we are to presume that Iran's damages claims in G-8 were made in bad faith – and the Tribunal of course should make the opposite assumption – the comparison of damages with mitigation costs should end here. To be sure, the Partial Award concludes that Iran's evidence is inadequate to prove all of the damages sought in this claim, and on this basis awards Iran only USD 2,946,902.55 in respect of Claim G-8.[10] But the fact that Iran has not proven to the Tribunal's satisfaction all of the damages that it claims has little bearing on the question of whether MORT acted reasonably in choosing not to take mitigating action. Moreover, even if damages were accruing at only the rate implied by the amount awarded (USD 84,197 per month), by the time MORT effected delivery in February of 1984, those damages would still have greatly exceeded the storage charges agreed in 1981. And one must always keep in mind that MORT's payment of accrued storage charges would not have represented a true "cost" of mitigation because this amount represented a debt already owed.

C. What MORT Knew and When

9. Whether MORT had a duty to mitigate depends in part on its knowledge of the extent of the accruing damages. Thus, the Tribunal should have determined what MORT knew about the location and condition of its properties and when it became aware of that information. The Partial Award considers this question almost not at all.[11]

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[7] *Id.*

[8] *Id.* ¶ 1981. Of the total claimed damages of USD 15,273,656, just USD 839,860 pertains to costs outside of these three categories – costs that largely were incurred late in the period being considered and that would have been avoided in their entirety had MORT taken appropriate mitigating action.

[9] The period in question is approximately 35 months (March 1981 until January or February 1984, depending on the specific equipment at issue). 15,273,656/35 = 436,390 per month.

[10] Partial Award, ¶ 2084.

[11] *See id.* ¶¶ 2065-83.

10. It appears that MORT's management did not know the location or status of MORT's properties in early 1981. In its 17 May 2005 filing in relation to Claim G-8, Iran asserted that by 19 January 1981 "MORT did not have the slightest idea regarding the company to which Morrison Knudsen [MORT's purchasing agent in the United States] had sent its properties" and that "with the change of MORT's management after the Islamic Revolution, the new authorities spent considerable time on tracing the MORT's properties."[12] Indeed, there is nothing in the record indicating that MORT was aware of the location of the G-8 materials prior to 17 August 1981.[13] On that date, engineering consulting firm HNTB, responding to a 25 July 1981 telex from MORT,[14] informed MORT of the holders and locations of various MORT properties, including the G-8 materials.[15] It is unclear whether MORT was aware at that time of how the properties were being stored.

11. I interrupt my mitigation discussion here to note that the facts just described call into question whether the unlawful Treasury Regulations were the "but for" cause of any injury suffered by Iran prior to 17 August 1981, since Iran appears to have been unable to arrange shipping for the properties any earlier. The Partial Award considers the effect of this situation on its causation analysis, in paragraph 1947, and reaches the following conclusion:

> As regards the legal analysis of the facts before it, the Tribunal feels unable to conclude that, what was caused by MORT's initial uncertainty in assessing the situation and the rather slow and hesitant manner of addressing it, cannot have been caused by the Unlawful Treasury Regulations.

12. That the Majority is "unable to conclude" that MORT's failure to arrange shipping prior to August 1981 "cannot have been caused by the Unlawful Treasury Regulations" may be interesting to some, but it has nothing to do with reasoned causation analysis. I will not repeat the discussion of this point in Judge Barkett's separate opinion,[16] I will simply note that the relevant question is not whether the Unlawful Treasury Regulations could not have caused this

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[12] Claimant's Brief and Evidence in Rebuttal (Claim G-8), (17 May 2005), at 35.

[13] There is evidence that MORT had earlier warning with respect to the G-7 materials. The record indicates that on 21 March 1980, MORT stated in its litigation against Trans World Housing Inc., one of the manufacturers of the housing units at issue, that "after taking delivery it was discovered that the paint was flaking off of the exterior of the units and [...] the Panels were delaminating". Complaint, *MORT v. Trans World Housing, Inc.*, No. 80-2-00632-4 (Clark County Super. Ct.), 21 Mar. 1980, United States Brief and Evidence in Rebuttal, Claim G-7 (Port of Vancouver), Volume II (17 Jan. 2007), Ex. 6, at 2. Nevertheless, it is not clear that such knowledge was transmitted to the new MORT management.

[14] Telex from MORT to HNTB, 25 Jul. 1981, Judges' Folder of the Islamic Republic of Iran – Documents Relating to Claim G-7 (13 May 2014), at 20.

[15] Telex from HNTB to MORT, 17 Aug. 1981, Judges' Folder of the Islamic Republic of Iran – Background Documents Relating to Claims G-7, G-8 and G-13 (13 May 2014), at 145.

[16] Separate Opinion of Judge Rosemary Barkett, Concurring in Part, Dissenting in Part in the Partial Award, ¶ 44.

delay in shipment, it is whether MORT's lack of knowledge concerning the whereabouts of its property was by itself a sufficient cause of that delay. If it was, then the Unlawful Treasury Regulations could not have been the but-for cause of MORT's failure to ship its property before 17 August.[17]

13. Returning to mitigation, MORT conducted negotiations with Gulf Ports in the fall of 1981.[18] Gulf Ports informed MORT on 12 November 1981 that MORT owed accumulated storage charges of USD 1,143,065.37 as of 30 November 1981.[19] MORT entered into a settlement agreement with Gulf Ports on 17 November 1981, in which MORT agreed to pay Gulf Ports USD 886,135 to settle all storage charges.[20] The agreement established a 31 March 1982 deadline for MORT to arrange shipping of the properties without incurring further storage fees. MORT agreed to pay USD 36,500 for each month of storage after 31 March 1982.[21] This agreement was not implemented.

14. In late December 1981, MORT representatives traveled to the United States and visited Gulf Ports and other storage sites.[22] On this visit, the representatives observed the conditions in which the G-8 Materials were stored: "In the open space, they were kept and there were no covers."[23]

15. Thus, MORT's development of relevant knowledge may be summarized as follows:

(i) MORT knew the approximate rate at which it was accruing loss-of-use damages from some date well before 19 January 1981, for it had been doing without the G-8 materials since 1979;

(ii) MORT learned on 26 February 1981 that the United States was not going to instruct Gulf Ports or any other lienholders to transfer properties owned by Iran

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[17] For a fuller discussion of the Partial Award's difficulty with causation analysis, see paragraphs 48-61, below, concerning Claim G-32.

[18] Rahmati Affidavit, Claimant's Brief and Evidence in Rebuttal, Volume 2, Claim G-7, The Ministry of Road and Transportation (17 May 2006), Ex. 6, ¶ 4 (hereinafter "Claimant's Brief and Evidence in Rebuttal, Claim G-7").

[19] Telex from Gulf Ports to MORT, 12 Nov. 1981, US Response to Claimant's Brief and Evidence: Claim G-008, Ex. 6. Mr. Rahmati indicated at the hearing that the amount of the storage charges claimed by Gulf Ports and the holders of the G-7 and G-13 materials was not disputed at the time of the Vienna negotiations. *See* Hearing Transcript, Cluster 6 – Day 1 (13 May 2014) at 175-76 (Question from Judge Johnson).

[20] *See* MORT-Gulf Ports Settlement Agreement, 17 Nov. 1981, Claimant's Brief and Evidence in Rebuttal, Claim G-8, Ex. 13.

[21] The USD 36,500 rate was guaranteed only through the end of 1982. The settlement agreement provided for a rate adjustment to be determined based on market conditions if the items remained in storage beyond 1982. *Id.*

[22] Rahmati Affidavit, Claimant's Brief and Evidence in Rebuttal, Claim G-7, Ex. 6, ¶ 9.

[23] Hearing Transcript, Cluster 6 – Day 1 (13 May 2014) at 161 (statement of Mr. Rahmati).

and, therefore, that it would have to arrange for the transfer itself if it wanted to minimize its damages;

(iii) MORT learned on 17 August 1981 who held the G-8 materials and where they were located;

(iv) MORT learned on 12 November 1981 the amount of storage charges claimed by Gulf Ports, the rate at which those charges were accumulating, and, later that month, that it could settle the accrued charges at a discount; and

(v) MORT learned in late December of 1981 just how its properties were being stored, including the fact that the G-8 materials were being left outdoors exposed to the elements.

D. The Implications of MORT's Knowledge

16. The Tribunal should accept that, given the uncertainty about precisely what MORT knew prior to the visit by MORT officials to view Gulf Ports properties in late December 1981, it would be unreasonable to hold MORT responsible for being slow to act prior to that time. By no later than the end of 1981, however, MORT was aware that leaving its property at the Gulf Ports facility involved substantial costs. MORT knew not only the rate at which it was suffering loss-of-use-damages, the amount of storage charges owed, and the rate at which storage charges were accumulating, it also knew how its properties were being stored. MORT therefore knew, or should have known, the gradual deterioration to which its properties would be subject if they were left in place.

17. Moreover, MORT knew that resolving the matter with Gulf Ports would cost USD 886,135 – the amount specified in the settlement agreement of 17 November 1981 – and it knew that the negotiated settlement payment was a discount to what it actually owed.[24] MORT was thus in a position to compare the costs to MORT of leaving the G-8 materials in the United States – including deterioration cost, loss-of-use cost, and storage cost – with the cost of extracting the property. Had the settlement agreement of 17 November 1981 been implemented, MORT's damages related to the G-8 materials would have stopped accumulating no later than the end of March 1982.[25] However, MORT took no effective action to obtain the

[24] Mr. Rahmati indicated at the hearing that the amount of the storage charges claimed by Gulf Ports and the holders of the G-7 and G-13 materials was not disputed at the time of the Vienna negotiations. *See* Hearing Transcript, Cluster 6 – Day 1 (13 May 2014) at 175-76 (Question from Judge Johnson).

[25] It must be noted that there is no basis in the record for holding the United States responsible for damages in the first three months of 1982, notwithstanding that the fact that the 17 November 1981 settlement agreement contemplated shipment in March 1982 or later. Such delay in executing shipping would presumably have occurred

G-8 materials until February of 1983, when MORT entered into its final settlement agreement with Gulf Ports.[26] MORT did not actually ship the G-8 materials until February of 1984.[27] In the 23 months that passed from March 1982 to February 1984, MORT accrued damages of USD 10,036,970 (assuming accrual at the rate claimed by Iran) or USD 1,907,022 (assuming accrual at the rate awarded by the Tribunal).

E. Purported Justifications for Failure to Mitigate

18. The Partial Award advances various justifications to excuse MORT's failure to mitigate its losses. These include (i) uncertainty as to whether Gulf Ports would promptly release the MORT properties even after MORT paid the accrued storage charges;[28] (ii) uncertainty as to whether payment for storage charges accrued after January 19, 1981, could be drawn from the Security Account;[29] (iii) complications arising from OFAC's issuance of a sales license authorizing the sale of MORT properties at Gulf Ports facilities;[30] and (iv) the declaration of insolvency and ceasing of business operations by Gulf Ports as of 1 July 1983.[31] None of these arguments adequately rebuts the conclusion that MORT acted unreasonably in failing to transfer its properties in accordance with the November 1981 settlement.

(i) Release of Properties Following Payment

19. MORT could have resolved any uncertainty concerning Gulf Ports' willingness to promptly release the properties upon payment by establishing a letter of credit in favor of Gulf Ports payable upon release of the property to MORT's designated shipper. Any uncertainty concerning the willingness of Gulf Ports to release the properties, therefore, cannot justify a refusal to act on the part of MORT.

(ii) The Security Account

20. The alleged complications arising from uncertainty about whether payment to Gulf Ports and the possessors of other MORT properties for post-January 1981 storage charges could

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regardless of when an agreement to ship was concluded – even if such agreement had been reached prior to the issuance of the Treasury Regulations.

[26] MORT-Gulf Ports Settlement Agreement, 24 Feb. 1983, Claimant's Brief and Evidence in Rebuttal, Claim G-8, Ex. 18.

[27] *See* Claimant's Brief and Evidence in Rebuttal, Claim G-8, Ex. 27 (Mahmoudi affidavit), para. 13; Ex. 28 (Mousavi affidavit), para. 5; Hearing Transcript, Cluster 6 – Day 1 (13 May 2014) at 53.

[28] Partial Award, ¶ 2070.

[29] *Id*. ¶ 2073.

[30] *Id*. ¶ 2075.

[31] *Id*. ¶ 2076.

be drawn from the Security Account also cannot excuse MORT's failure to mitigate its damages. MORT could have paid the accrued charges immediately and then recovered its payment from the Security Account following the issuance of an award on agreed terms. Indeed, it actually structured an agreement with Port of Vancouver, with respect to the G-7 materials, in just such a way.[32] But MORT let an additional 15 months pass after it entered into its initial settlement agreement before it signed a final settlement with Gulf Ports.

21. To be sure, there was, until 1983, some uncertainty concerning the extent to which the Security Account would be available to pay a settlement with Gulf Ports,[33] and it is understandable that Iran would have preferred to pay Gulf Ports from the Security Account, rather than from other sources. Assume, however, contrary to fact, that it was clear that no storage charges could be paid from the Security Account. Would Iran's failure to implement the November 1981 settlement seem reasonable? If not, then uncertainty over the availability of the Security Account is irrelevant.[34] It is difficult to see how one could view as reasonable a decision to incur damages at a rate of USD 436,000 per month for 23 months to avoid paying the agreed settlement amount of USD 886,000 from new funds. And, of course, reimbursement of this amount from the Security Account was more than just a possibility in late 1981.

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[32] Hearing Transcript, Cluster 6 – Day 3 (15 May 2014) at 151-53 (statement of Mr. Bergman) ("MORT's US-based counsel, for instance, was advising MORT in June 1982 that due to the jurisdictional concern regarding post January 19, 1981 storage charges, MORT should consider modifying the settlements to: '[...] provide for bank guarantees callable whenever MORT moves its equipment or the expiration of up to nine months, whichever is sooner.' [...] This made sense because if MORT was concerned about the security account as a mechanism for payment, then it could have used another mechanism. MORT prepared a solution along these lines which you can see at tab 9 of the US judges' binder, in connection with an amendment to the agreement with Port of Vancouver, agreeing on July 20th 1982 to an upfront payment for certain storage charges accrued by the Port of Vancouver. In exchange, the Port agreed to post a documentary letter of credit in favor of MORT from which MORT could draw any amount which, following an award by the Tribunal in case B67, would amount to duplicate payment for those storage charges. But MORT never made that upfront payment"). The communication to which Mr. Bergman refers is Mr. Shack's telex of 18 Jun. 1982 to MORT, Claimant's Brief and Evidence in Rebuttal, Claim G-7, Ex. 6, Att. 9.

[33] The real uncertainty concerned whether the Security Account would be available to pay storage charges that accrued after 19 January 1981. Even Iran's lawyer, Thomas Shack saw this as the real issue, not whether any settlement could be paid from the Security Account. To quote from paragraph 2073 of the Partial Award: "Mr. Shack also identified potential problems, such as the possibility that the Tribunal would 'not authorize payment from the Security [Account] for amounts which represent[] storage charges which accrued after January 19, 1981.'" (Brackets are as they appear in paragraph 2073.)

[34] Concern over the availability of the Security Account is a make-weight argument in any event. Even if none of the storage charges owed to Gulf Ports could have come from the Security Account, that would amount only to a timing difference in the use of funds. Given that money in the Security Account earns market-rate interest, Iran should have been financially indifferent as to whether money for the settlement came from the Security Account or from some other Iranian funds. It is all Iranian money and it is all capable of earning a market rate of interest.

(iii) The Sales License

22. Gulf Ports applied for a sales license application on 30 September 1982, pursuant to Section 535.540 of the Treasury Regulations, which permitted the public sale of certain Iranian tangible properties. OFAC granted the license on 21 January 1983. Given that the application was not filed until 11 months after MORT entered into the 17 November 1981 settlement agreement, it is difficult to see what impact the sales license could have had on MORT's decision not to implement that agreement or take other mitigating action.

(iv) Gulf Ports Insolvency

23. Similarly, the insolvency of Gulf Ports occurred too late to serve as a justification for MORT's failure to act. As of 1 July 1983, Gulf Ports management declared the company insolvent, and it ceased business operations, leaving the G-8 Materials abandoned in warehouses. This complication has no bearing on MORT's lack of action in the preceding 18 months, during which time it was obliged to mitigate its losses.

24. In summary, none of the circumstances tendered by the Majority as justifications for MORT's failure to take mitigating action even comes close to excusing that failure. The Partial Award should find that the United States is not responsible for damages that Iran accrued after 30 March 1982, the date by which MORT's properties were to be shipped under the November 1981 settlement agreement. One cannot consider both the magnitude of the damages being accrued and the comparatively modest cost of ceasing this accrual and reach any other conclusion. That the Majority has held the United States responsible for post-March 1982 damages can be explained only by their failure to compare the damages claimed – or even the damages awarded – with the cost of mitigation, which, one must recall, was zero: that "cost" was only the payment of a debt, and that at a discount.

25. That all four of these purported justifications for inaction are but make-weight excuses latched onto by the Majority is revealed in paragraph 2078 of the Partial Award, in which the Majority concludes its discussion of the November 1981 settlement agreement:

> The fact that MORT entered into settlement negotiations in late 1981 is of little importance for determining the answer to these questions. MORT did not appear to have a choice but to enter into settlement negotiations, and ultimately conclude settlement agreements, with Gulf Ports in order to recover the G-8 Materials because Section 535.333 of the Treasury Regulations excluded them from the transfer directive of Executive Order No. 12281, in violation of the Algiers Declarations. The Tribunal is unable to conclude that in such circumstances MORT could have been reasonably expected to act differently than it did.

26. In this paragraph the Majority reveals that it does not understand the principle of mitigation. First, it is irrelevant that the United States violated the Algiers Accords by excluding the MORT properties from the transfer directive of Executive Order No. 12281 because the question of mitigation can arise only if one party to an agreement violates the agreement. Second, to say that MORT had to settle with Gulf Ports if it was to recover the G-8 property only describes the mitigating action at issue; it says nothing about whether it was reasonable to expect MORT to take that action. Finally, to end by saying that "[t]he Tribunal is unable to conclude that in such circumstances MORT could have been reasonably expected to act differently than it did" is a *non sequitur*. One might as well say that no party to an agreement can reasonably be expected to mitigate damages whenever that party is presented with both a breach by its counterparty and an opportunity to mitigate.

F. Effect of Iran's Failure To Mitigate on the Assessment of Damages

27. Iran claims nine categories of damages in Claim G-8: (1) physical deterioration of items; (2) loss-of-use; (3) storage costs; (4) repackaging costs; (5) cost of disposing of unsalvageable housing units; (6) MORT travel costs; (7) MORT's U.S. legal fees and expenses associated with the recovery of the items at issue; (8) costs for extending warehouse leases; and (9) costs for warehouse security. Each of these is considered briefly below.

28. *Physical Deterioration – Rock-Crushing Equipment*: The Majority awards Iran USD 1,148,300 in respect of deterioration of the rock crushing equipment.[35] This amount represents deterioration at a constant rate from 1 March 1981 (the earliest date on which the MORT could have arranged for the transfer of all of the MORT items absent the United States breach) to mid-January 1984 (the date selected in the Partial Award as the average date of shipment of the rock-crushing equipment), or a period of 34 ½ months.[36] Because Iran reasonably could have avoided deterioration after 30 March, 1982, the Tribunal should award damages for only the 13 months from 1 March 1981 to 30 March 1982. Iran therefore should be awarded only 38 percent of the amount stated in paragraph 2032 of the Partial Award for deterioration of the rock-crushing equipment, or USD 436,354.[37]

29. *Physical Deterioration – Porta Kamp Housing Units*: The Majority awards Iran USD 658,600 in respect of deterioration of the Porta Kamp housing units.[38] This amount represents

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[35] Partial Award, ¶ 2032.

[36] *Id*.

[37] 13/34.5 ≈ 38%; (0.38)(1,148,300) = 436,354.

[38] Partial Award, ¶ 2023

deterioration at a constant rate from 1 March 1981 (the earliest date on which the United States could have arranged for the transfer of all of the MORT items) to February 1984 (the date on which they were shipped to Iran), or a period of 35 ½ months.[39] Because Iran reasonably could have avoided deterioration after 30 March 1982, the Tribunal should award damages for only the 13 months from 1 March 1981 to 30 March 1982. Iran therefore should be awarded only 37 percent of the amount stated in paragraph 2023 of the Partial Award for deterioration of the housing units, or USD 243,682.[40]

30. *Loss of Use*: The Majority awards no damages for loss of use because of a lack of supporting evidence, a conclusion with which I agree.[41]

31. *Storage Costs*: The Majority awards Iran USD 648,600 in respect of storage costs. This amount represents accrual of storage costs at a constant rate from 1 March 1981 (the earliest date on which the United States could have arranged for the transfer of all of the MORT items) to February 1984 (the date on which they were shipped to Iran), or a period of 35 ½ months.[42] Because Iran reasonably could have avoided storage costs after 30 March 1982, the Tribunal should award storage costs for only the 13 months from 1 March 1981 to 30 March 1982. Iran therefore should be awarded only 37 percent of the amount stated in paragraph 2040 of the Partial Award for storage costs, or USD 239,982.[43]

32. *Repackaging Costs*: The Majority awards Iran a total of USD 274,051 for the cost of repackaging items for shipment to Iran.[44] Because no repackaging costs were included in the November 1981 settlement, no such costs would have been incurred had Iran paid the agreed discounted storage charges and arranged for the delivery of its property by March 1982, as provided in the settlement. Accordingly, the United States should not be required to compensate Iran for these avoidable storage costs.

33. *Cost of Disposing of Unsalvageable Housing Units*: The Majority awards Iran USD 16,440 for the amount charged for disposing of unsalvageable housing units.[45] If these units had been shipped by March 1982 as provided in the settlement agreement there would have

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[39] *Id*.
[40] 13/35.5 ≈ 37%; (0.37)(658,600) = 243,682.
[41] Partial Award, ¶ 2039.
[42] *Id.* ¶ 2040.
[43] 13/35.5 ≈ 37%; (0.37)(648,600) = 239,982.
[44] Partial Award, ¶ 2049.
[45] *Id.* ¶ 2050.

been no disposal charges. Accordingly, the United States should not be required to compensate Iran for these costs.

34. *MORT Travel Costs*: The Majority awards Iran USD 50,000 for travel costs.[46] The only travel that would have occurred during the period for which I would hold the United States responsible for damages were the inspection trips that occurred in December of 1981. None of the later, vaguely defined, travel would have been necessary had Iran arranged for shipment of its property by March 1982. Accordingly, I would award Iran only USD 25,000 for travel costs.

35. *MORT's United States Legal Fees and Expenses*: The Majority awards Iran USD 11,411.55 for fees charge for legal work done in Houston from August 1983 to February 1984.[47] None of this work would have been necessary had MORT arranged for the transfer of its property by March July 1983 1982, as provided in the settlement agreement. The United States therefore should not be required to compensate Iran for these expenses. The Majority also would award Iran USD 10,000 in respect of other unspecified legal work done for Iran to assist in achieving the release of MORT's properties.[48] Since MORT no doubt incurred some legal fees in connection with the November 1981 settlement, I too would award this USD 10,000 to Iran.

36. *Costs for Extending Warehouse Leases and Costs for Security*: The Majority awards Iran USD 108,500 for the extension of a warehouse lease in late 1983 and USD 21,000 for security services that began in November 1983.[49] I would award nothing to Iran in either category because all of these costs would have been avoided had MORT arranged for the shipment of its property in March 1982 as provided in the settlement agreement.

G. Conclusion with Respect to the MORT Claims

37. The Majority awards Iran a total of USD 2,946,902.55 in Claim G-8.[50] Holding Iran, and not the United States, responsible for damages that MORT could have avoided by taking reasonable steps to mitigate its damages reduces this amount to USD 955,018. A similar analysis performed in respect of Claims G-7 and G-13 produces similar results.

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[46] *Id.* ¶ 2053.
[47] *Id.* ¶ 2056.
[48] *Id.* ¶ 2057.
[49] *Id.* ¶¶ 2060, 2063.
[50] *Id.* ¶ 2084.

II. REPARATION – CLAIM G-18

38. I of course agree with the Majority that reparation in this case should take the form of the return of the ex-Wilmotte Stradivarius violin to Iran. I also agree that the Tribunal should not simply adopt the value given by Claimant's expert witness, Mr. Keane, due to concerns with certain aspects of his evidence. And I further agree that averaging the prices realized in comparable sales is the most sensible approach that can be taken. I disagree, however, with the Majority's decision to base its valuation on the average of six of the sales brought to our attention either by Iran's expert, Mr. Keane, or by counsel for the United States in Mr. Keane's cross-examination because only two of those sales are fairly comparable to the ex-Wilmotte. In part because we have only two reasonably comparable sales before us, I also have concluded that the most appropriate course of action for the Tribunal at this point would be to seek further evidence from the Parties concerning the value of the ex-Wilmotte should the United States not arrange for the return of the violin within the four months allowed in the Partial Award.

39. Mr. Keane placed before us four past sales of Stradivarius violins: the Lady Blunt, a Stradivarius violin from 1721, sold in a charity auction in June of 2010 for almost USD 14.4 million; the General Kyd-Perlman, a Stradivarius violin from 1714, sold in a private sale in September of 2009 for USD 5.5 million; La Pucelle, a Stradivarius violin from 1709, sold in a private sale in 2001 for USD 6 million; and the Dolphin, a Stradivarius violin from 1714, sold privately in a private sale 2000 for USD 5.5 million.[51] On cross-examination, counsel for the United States placed four additional sales before Mr. Keane, and thus before the Tribunal: the Penny, a Stradivarius violin from the golden period sold by Mr. Keane himself in 2008 for USD 1.3 million; the Molitor, a Stradivarius violin allegedly owned by Napoléon Bonaparte from the pre-golden period, sold at auction sold in 2009 for USD 3.6 million; the Hammer, a Stradivarius violin from the golden period sold by Mr. Keane in 2006 for USD 3,544,000; and the Baron von der Leyen, a Stradivarius violin from the golden period sold at auction by Tarisio in 2012 for USD 2.6 million.[52] The Majority discarded the two sales that brought the highest and lowest prices, brought each of the remaining six sales to a 2013 level by applying an annual price-increase factor of four percent, and then calculated the average 2013 price of these six sales. I have two difficulties with the reasoning of the Majority. First, in spite of the opinion of Mr. Keane, quoted in the Partial Award, the Majority gives the same weight to prices realized

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[51] *Id.* ¶ 1824.

[52] *Id.* ¶ 1839.

in private sales as it does to auction prices. Second, the Majority ignores the fact that Mr. Keane's opinion of the value of the ex-Wilmotte was based in part on several sales about which we know nothing other than that Mr. Keane says that they happened recently, some at prices of USD 10 million or 11 million, and some at prices "well south" of USD 5 million.

A. Private Sales and Auction Sales

40. Of the four sales that Mr. Keane discussed in his direct testimony, three were private sales and one was sold at a charity auction. Two of these sales occurred twelve or more years prior to our valuation date. All four of the sales presented to Mr. Keane in cross-examination were auction sales, the oldest of which was seven years prior to our valuation date. The Majority recognizes that there are many reasons why one might view auction sales as more reliable indicators of an item's market value than private sales:

> For the reasons explained by Mr. Keane and Mr. Martens (namely, lack of transparency of price-building, lack of reliable information, ignorance of underlying motives for the sale, etc.), one could exclude the allegedly comparable violins that were sold in private sales and consider only those sold at auctions.[53]

41. One might ask why, given the shortcomings of private sales that it acknowledges, the Majority proceeds to calculate an average of three auction sales and three private sales. The Majority's answer to this question follows immediately after the language just quoted:

> However, while the Stradivarius was purchased by Iran in a private sale in 1976, the Tribunal is not in the position to judge whether Iran, today, would need to enter into a private transaction if it was looking for a replacement instrument, or whether it would have to purchase it at an auction. Therefore, the Tribunal finds it appropriate to take into account both the private sales and the auctions.[54]

This rationale is odd. If the question is one of fair market value, and if, as the Majority seems to acknowledge, auction sales are a better indicator of fair market value than are private sales, of what conceivable relevance is the possibility that Iran might "need to" purchase a replacement for the ex-Wilmott in a private sale? It is of no relevance, but inclusion of the private sales does serve to increase the calculated average price significantly.

42. If we were to consider only the auction sales that are before us, we would calculate the average of the 2006 sale of the Hammer (USD 4.66 million, after escalation to 2013 value using the four percent factor employed by the Majority), the 2008 sale of the Penny (USD 1.58

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[53] *Id.* ¶ 1859.

[54] *Id.*

million escalated), the 2009 sale of the Molitor (USD 4.21 million escalated), the 2010 sale of the Lady Blunt (USD 16.2 million escalated), and the 2012 sale of the Baron von der Leyen (USD 2.7 million escalated). The Majority discarded from its average the highest and lowest of these prices – the Penny and the Lady Blunt. There were good reasons for doing this beyond just discarding outliers because we have unrefuted testimony that the Penny and the Lady Blunt were not comparable to the ex-Wilmotte. Mr. Keane testified that the Penny "had a lot of condition issues" and did not have its original scroll.[55] With respect to the Lady Blunt, Mr. Keane explained that, of the 600 Stradivarius violins still in existence, the Lady Blunt is "the most celebrated" "right behind the "Messiah."[56] The "ex-Wilmotte," in comparison, is a "good, solid Strad." And the witness for the United States, Mr. Martens, pointed to the possibly distorting effect on bidding of the fact that all proceeds of the Lady Blunt auction were to be donated to relief organizations aiding victims of the Japanese tsunami.[57] The average escalated price of the three remaining auction violins (the Molitor, the Hammer, and the Baron von der Leyen) is USD 3.86 million. Subtracting the buyer's premium in the same manner employed by the Majority produces an average value of USD 3.23 million.[58]

43. We also should exclude from our comparison the Molitor because, while the ex-Wilmott is from the Stradivari "golden age," the Molitor is not.[59] Excluding the Molitor would bring the average value down slightly to USD 3.68 (or USD 3.06 after subtraction of the buyer's premium). Excluding the Molitor, however, leaves us with a price based on only two sales, the 2012 Baron von der Leyen and the 2006 Hammer.

B. The Other Sales Relied on by Mr. Keane

44. There may be only two auction sales on the record of violins that are comparable to the ex-Wilmott, but we have testimony from Mr. Keane that there were more, perhaps many more. When asked by counsel for Iran how he arrived at his estimated value of USD 6.5 million for the ex-Wilmotte, Mr. Keane said that his estimate was based on recent sales of USD10 million or 11 million, and sales of instruments in worse condition for "well south" of $5 million – but

[55] Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013) pp. 25-26.

[56] Hearing Transcript, Cluster 2 – Day 1 (14 Oct. 2013) p. 126; Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013) pp. 12-13.

[57] Hearing Transcript, Cluster 2 – Day 3 (16 Oct. 2013) p. 162.

[58] *See* Partial Award, ¶¶ 1861, 1862.

[59] Hearing Transcript, Cluster 2 – Day 2 (15 Oct. 2013) p. 25.

he provided no names, dates or other information about any of these sales.[60] Those sales had to be sales in addition to those that he cited in his testimony because none of the cited sales was for USD 10 or 11 million, and none was for "well south" of USD 5 million.[61] It is noteworthy that counsel for Iran did not ask Mr. Keane to describe the sales he had in mind when he made this statement on direct examination. I will speculate that, like the Tribunal, counsel examining Mr. Keane had no idea what sales Mr. Keane had in mind.

45. Had the Claimant submitted a written report by Mr. Keane, it is likely that that report would have more fully explained the basis upon which Mr. Keane reached his estimate; it almost certainly would have identified the sales to which Mr. Keane referred in his oral testimony. In any event, a written report would have been much more useful to us. In addition, had Iran presented a written report from Mr. Keane with its rebuttal, the United States might well have presented a responding written expert report; it at least would have been in a position to prepare for a serious cross-examination of Mr. Keane.

46. Given the state of the record before us, I find it impossible to defend awarding Iran over USD 5 million should the United States be unable to return the ex-Wilmotte. We know there are more sales that we should have considered – perhaps many more – and we know this because Mr. Keane has testified that there are. We know that auction sales are better indicators of market value than are private sales, and we know this because the Partial Award concludes that they are. Yet we rush to a judgment knowing nothing of the other sales that Iran's witness has told us exist and basing our conclusion in part on evidence that we know is inferior to other evidence we have available.

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[60] Hearing Transcript, Cluster 2 – Day 1 (14 Oct. 2013) p. 132. The relevant passage of Mr. Keane's testimony reads:

> With the work of Stradivari there are sales that have gone out in the recent past where golden period Strads have sold for $10 million and $11 million. And there are some of golden period that suffer from very serious condition issues that are going to sell for well south, I think, of 5 million.
>
> So I kind of put this right in the middle, in that sort of very sweet spot of works for Antonio Stradivari. It's not the very, very finest. It does not suffer from serious condition issues. If $6.5 million is affordable to anyone, it's affordable, and I think it's a relatively solid sale and valuation for this instrument.

[61] The sales mentioned by Mr. Keane, rather than by counsel for the United States on cross-examination, were: the Lady Blunt (USD 14.4 million unescalated), the private sale of the General Kyd-Perlman (USD 5.5 million unescalated), the La Pucelle (USD 6 million unescalated), and the Dolphin (USD 5.5 million unescalated). Partial Award, ¶ 1824.

C. Conclusion with Respect to Claim G-18

47. We find ourselves without a satisfactory basis for placing a value on the ex-Wilmotte principally because Iran did not settle on a valuation date, much less a value, until the hearing, and because Iran did not present any real expert testimony, or any evidence of prior comparable sales, until the hearing.[62] On the question of value, Iran's conduct left the respondent with no opportunity to respond. We do not have to accept the resulting unsatisfactory situation because we do not have to address the value of the ex-Wilmotte at this stage. The United States has been ordered to arrange for the transfer of the ex-Wilmotte to Iran and has been given four months in which to effect this transfer. It is only if the violin is not transferred to Iran that its value becomes relevant. Given the unacceptable state of our record, the Partial Award should state that, if the ex-Wilmotte is not returned to Iran, both Parties will be invited to submit, on an expedited schedule, expert reports and short memorials addressing *only* the fair market value of the ex-Wilmotte. A short hearing could then be held for the Parties and the Tribunal to question the experts. Some such course of action is the only way that this Tribunal could fairly and defensibly estimate the value of the ex-Wilmotte. And such a course is justified, given the amount of money at stake.

III. CLAIM G-32 (BASTAN MUSEUM/ORIENTAL INSTITUTE: CHOGHA MISH ARITFACTS) – REPRARATION

48. I agree with the Majority's conclusion that the damages claimed by Iran for loss of use of the Chogha Mish artifacts are "unduly speculative" and should be dismissed.[63] However, I disagree with the Majority's award for legal fees because Iran would have incurred the large majority of the fees awarded absent the United States' violation of its Paragraph 9 obligation in respect of the Chogha Mish artifacts.

49. The legal fees at issue in this claim are largely attributable to work undertaken for the simultaneous defense of both the Persepolis and Chogha Mish collections. The United States admits that, if it breached its paragraph 9 obligation, any legal fees which arose solely in respect

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[62] In its 1995 and 1996 submissions Iran sought the value of the violin as of 18 January 1981, and claimed that value to be 300,000 British pounds. *See* Claimant's Brief and Evidence: Claim App G-18 related to the Ministry of Islamic Guidance, Roudaki Hall (controlled by the Ministry of Islamic Guidance, previously known as Ministry of Culture and Arts, Ministry of Culture and Higher Education), p.4 (22 Sept. 1995), and Claimant's Brief and Evidence: Ministry of Islamic Guidance; Tehran Museum of Contemporary Art [Claims G-14, G-15, G-16 & G-17] – Rudaki Opera Hall [Claim G-18] and Iran Bastan Museum [Claim G-32], pp.15-16 and Ex. E-6 (letter from Sotheby's) (20 Dec. 1996). In its 2006 Rebuttal Iran sought the value of the violin on the date of the award and claimed that value to be USD 2,000,000. *See* Claimant's Brief and Evidence in Rebuttal, Volume 8, Claim G-18, Ministry of Islamic Guidance, pp. 37-38 (17 May 2006); *see Id.*, Ex. 28 (Affidavit of Mohammed Biglari Pour).

[63] Partial Award, ¶ 2455.

of the defense of the Chogha Mish artifacts would be recoverable,[64] and the evidence submitted from Iran's attorneys shows that some of the fees were solely caused by the attachment of the Persepolis artifacts.[65] It is only the joint fees – that is, those fees that cannot be allocated to one attachment or the other and that represent over eighty percent of the legal fees incurred by Iran in the *Rubin* litigation – that are really at issue in this claim, and it is only those fees that I discuss in this part of my separate opinion.[66]

50. The Majority correctly describes the position of the United States with respect to these joint legal fees as follows in paragraph 2435:

> For the United States, the legal fees and expenses properly considered to be related to the Chogha Mish Artifacts are far less than Iran claims, because a substantial portion of the legal fees and expenses would have been the same even if the action had been brought only against the Persepolis collection, as opposed to being brought against both the Persepolis and Chogha Mish collections.

51. The Majority continues, in paragraph 2438:

> [T]he United States contends that, even if the Chogha Mish Artifacts had been returned to Iran in 1981, the *Rubin* Litigation would have proceeded and the *Rubin* plaintiffs would have sought to execute their judgment against the Persepolis collection in May 2004." Based on these arguments, the United States submits that the Tribunal should not conclude that half the legal fees and expenses incurred by Iran in the *Rubin* Litigation are attributable to a United

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[64] The United States agreed during the hearing that any costs which related solely to the defense of the Chogha Mish artifacts would be recoverable, if the Tribunal was to find a breach of Paragraph 9 obligations in this claim. *See* Hearing Transcript, Cluster 9 – Day 3 (12 Nov. 2014), at pp. 192, 206. The United States did, however, submit that the billing statements provided by Iran's attorneys did not clearly identify which costs fell within this category, and thus the Tribunal should not award any amounts to Iran on this basis until "Iran provides some indication as to the real cost of the work performed during that entry on the Chogha Mish issues." *Id.* at p. 207.

[65] *See* Judges' Folder of the Islamic Republic of Iran, Documents relating to Claim G-32 (10 Nov. 2014), p. 136, note 1 (Letter from Berliner, Corcoran and Rowe LLP to Dr. Karamzadeh, July 12, 2012) (hereinafter "Judges' Folder of Islamic Republic of Iran, Claim G-32").

[66] The value of legal fees sought by Iran and awarded by the Majority in this claim is $852,709.79. *See* Partial Award, ¶ 2463. That amount is half of the total legal fees incurred by Iran in the *Rubin* litigation – the total legal fees were approximately $1.7 million. Without having reviewed the individual bills in detail to arrive at definitive conclusions about the value of the legal fees which can be attributed solely to the defense of either the Chogha Mish or Persepolis collections, we can establish approximate amounts from the letters provided by Iran's attorneys which explain their allocation of legal fees to each collection. Taking these letters at face value, the only amount which either law firm seeks to attribute solely to the Chogha Mish collection is $147,392.67 of costs incurred by Berliner, Corcoran & Rowe between July 2006 and July 2008 (this amount appears to have been calculated by the firm on the basis that it was thirty-five percent of their work during this period. The same total amount of costs is linked directly to the Persepolis (thirty percent) and Herzfeld (five percent) collections). *See* Judges' Folder of Islamic Republic of Iran, Claim G-32, p. 136 (Letter from Berliner, Corcoran and Rowe LLP to Dr. Karamzadeh, July 12, 2012.) Hence, of the total of roughly $1.7 million in legal fees, based on the information of Iran's attorneys $147,393 is directly attributable to the defense of the Chogha Mish collection, while another $147,393 has no connection to the Chogha Mish artifacts and related solely to other collections. The remaining $1.433 million – or approximately eighty-three percent – of the fees therefore reflects joint and common costs of defending the Chogha Mish and Persepolis artifact collections.

> States breach of its Paragraph 9 obligations with regard to the Chogha Mish Artifacts.

52. And in paragraph 2460 the Majority makes it clear that it understands the fundamental argument of the United States to be one of causation:

> In essence, the Tribunal understands the United States' argument to be that, applying the but-for test, the fees and expenses charged for the legal work performed in relation to the Chogha Mish Artifacts had already been incurred for the work done on the Persepolis collection and that, *even without any wrongful act on the part of the United States, the legal fees and expenses would still have been incurred by Iran*. (Emphasis added.)

53. Plainly, the Majority understands that the principal defense of the United States to Iran's claim for half of the joint legal fees is causation, yet the Majority never really discusses causation; indeed, in the sentences following immediately from those just quoted, it seems to say that it will not even think about causation:

> In the Tribunal's view, this analysis is incorrect. Rather the Tribunal finds that the conduct unrelated to any United States' breach of Paragraph 9, including any damage caused, remains outside the purview of the Tribunal's considerations. Only the legal fees and expenses caused by the United States' wrongful exposure of the Chogha Mish Artifacts (which constituted "Iranian properties" and fell within the scope of Paragraph 9) to the risk of an attachment, are relevant for the purposes of this Tribunal.[67]

54. It is of course correct that the Tribunal should concern itself with "[o]nly the legal costs caused by the United States' wrongful exposure of the Chogha Mish artifacts . . . to the risk of an attachment." But how is the Tribunal to determine if a particular legal cost was "caused" by the United States' breach if it excludes from "the purview of the Tribunal's considerations" conduct unrelated to the United States' breach, when it is the position of the United States that just such conduct would have caused the very damage at issue in the absence of the United States' breach? The Tribunal cannot make the necessary causation determination if it so constrains its thinking. If the damage at issue was caused by "conduct unrelated to the United States' breach," then the United States' breach was not the "but for" cause of that damage.

55. The closest the Majority comes to addressing causation is in paragraph 2461:

> It cannot be said that either an attachment on the Chogha Mish Artifacts, or an attachment on the Persepolis collection, would have been sufficient to cause the total of the legal fees and expenses that Iran incurred. In the circumstances of this Claim, there are no "hypothetical causation" or "multiple joint causes" issues that would have caused the Tribunal to decide otherwise. The fact that

[67] Partial Award, ¶ 2460.

> the fees for the legal work done appear in the same invoices cannot obscure the distinctness of the causes and their respective effects.

56. This paragraph begs a different question with each sentence. Why can it not be said that either attachment would have been sufficient to cause the total of the legal fees that Iran incurred? How can the Majority say that there are no "'multiple joint causes' issues" in Claim G-32 when just such issues are the foundation of the United States' causation argument? And how can the Majority say that the two causes involved in the joint legal fees have their own distinct effects when counsel for Iran described these effects as being the same, that is, the generation of "joint and common costs" of defending both sets of artifacts?[68] This paragraph leaves one with the impression that it says something until one reads it with a little care, at which point it becomes clear that the paragraph actually says nothing, at least nothing that reveals any reasoning behind the Majority's conclusion.[69]

57. Whatever the Majority's reasoning might have been, I shall apply some reasoning of my own to the conclusion stated at the beginning of paragraph 2461 – that neither an attachment of the Chogha Mish artifacts nor an attachment of the Persepolis collection "would have been sufficient to cause the total of the legal fees and expenses that Iran incurred." At one level this is true: some of the fees were solely caused by one attachment or the other. If this is what the Majority means, however, it is a trivial statement that does not go to the real issue, which is the

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[68] Iran's attorneys handling the work described the fees here at issue as "joint and common" costs of defending the two sets of artifacts. For example, a letter from MoloLamken LLP states that:

> Iran was forced to appear in this litigation in the first instance to assert the immunities of *two artifact collections*, the Persepolis and Chogha Mish Collections. As a result of Iran's appearance to defend *these two collections*, it was subjected to a general assets discovery order and the ensuing litigation in the Seventh Circuit and the U.S. Supreme Court. Accordingly, the fees and costs incurred in analyzing and defending the Seventh Circuit's judgment are *joint and common costs of defending the Persepolis and Chogha Mish Collections that should be allocated evenly*.
>
> After the Supreme Court denied certiorari on June 25, 2012, we have continued to defend against Plaintiff's attempt to attach and execute upon *both* the Persepolis and Chogha Mish Collections. Once again, the fees and costs incurred in defending against both collections' attachment and execution *are joint and common costs that should be allocated evenly*. (Emphasis added.)

Judges' Folder of Islamic Republic of Iran, Claim G-32, p. 203 (Letter from Jeffrey A. Lamken to M. H. Zahedin, October 20, 2014). *See also* id., pp. 138-39 (Letter from Jeffrey A. Lamken to Dr. Siamak Karamzadeh, August 14, 2012); Claim G-32 – Claimant's Additional New Documents – Exhibits: 1-7 (2 June 2016), Ex. No. 7, (Letter from Jeffrey A. Lamken to M. H. Zahedin, May 26, 2016).

[69] It is no answer to refer the reader to the Partial Award's general discussion of causation at paragraphs 1791-1795. That discussion describes many of the standard concepts used in causation analysis, including the requirement that a cause be the *conditio sine qua non*, or the "but-for" cause. It would have been useful for the Majority to make some effort to explain why this requirement does not operate to preclude an award to Iran in respect of the joint legal fees, since this is the argument of the United States. General concepts are of no help in any particular case if one does not apply those concepts to the particular case.

joint fees. If, on the other hand, the Majority means that neither the Chogha Mish nor the Persepolis attachments would have been sufficient to cause the joint fees, this statement is demonstrably false, which likely would have become apparent to the Majority had they made any attempt to deal with the evidence that was before them.

58. The *Rubin* plaintiffs were pursuing Iranian assets in order to satisfy a judgment in their favor against Iran and other defendants in the amount of $71.5 million.[70] They pursued Iranian objects held by the Oriental Institute in response to a publication which mentioned only the Persepolis artifacts.[71] They also filed an urgent motion for failure to comply with citations to discover assets that referred only to the Persepolis artifacts.[72] It was not until the Oriental Institute mentioned the Chogha Mish artifacts (along with the Persepolis artifacts) in their response to this motion that this collection was even mentioned in the litigation.[73] Moreover, the motivation of the *Rubin* plaintiffs was clearly the monetary value of the Persepolis collection, which they described in the following terms:

> Plaintiffs believe the value of the Iranian artifacts which remain in the possession and/or control of Respondents [referring only to the Persepolis artifacts] to be many tens of millions of dollars, or more.
>
> These Iranian assets are subject to execution in satisfaction of plaintiff's judgment whether they are owned by Iran or by an agency or instrumentality of Iran.[74]
>
> . . .
>
> Plaintiffs anticipate that numerous museums and research institutes (possibly including the University of Chicago itself) would be interested in purchasing

[70] Campuzano v. Iran, 281 F. Supp.2d 258 (D.D.C. 2003).

[71] An article from a University of Chicago publication announcing the return of artifacts from Persepolis was provided by the Rubin plaintiffs as evidence in support of an urgent motion for contempt sanctions against the University of Chicago, the Oriental Institute and Gil Stein (Director of the Oriental Institute). *See* Judges' Folder of the United States of America, Cluster 9 (14 Nov. 2014) at pp. 439-40 (Plaintiffs' Urgent Motion for Contempt Sanctions Against Citation Third Party Respondents, Jenny Rubin et. al. v. The Islamic Republic of Iran, No. 03-cv-09370 (N.D.III), 17 June 2004) (hereinafter Judges Folder of the United States of America, Cluster 9). *See also* Hearing Transcript, Cluster 9 – Day 5 (14 Nov. 2014) at p. 66 (statement of Ms. Swingle).

[72] Judges Folder of the United States of America, Cluster 9, at pp. 425ff (Plaintiffs' Urgent Motion for Contempt Sanctions Against Citation Third Party Respondents, Jenny Rubin et. al. v. The Islamic Republic of Iran, No. 03-cv-09370 (N.D.Ill), 17 June 2004).

[73] Judges' Folder of the United States of America, Cluster 9 – G-31, G-32, G-115, and G-116 (11 Nov. 2014) at p. 170 (Brief for the United States as Amicus Curiae Supporting Appellees, Jenny Rubin et. al. v. The Islamic Republic of Iran, No. 14-1935 (7th Cir. 2009), 3 November 2014).

[74] Judges' Folder of the United States of America, Cluster 9, at p. 435 (Plaintiffs' Urgent Motion for Contempt Sanctions Against Citation Third Party Respondents, Jenny Rubin et. al. v. The Islamic Republic of Iran, No. 03-cv-09370 (N.D.Ill), 17 June 2004) (citations omitted).

> the Iranian artifact collection, and that the proceeds would be sufficient to satisfy most or all of plaintiffs' judgment against Iran.[75]

59. From this brief review of the key facts it is clear that the *Rubin* plaintiffs were taking action to pursue the Persepolis artifacts even before they knew of the existence of the Chogha Mish artifacts, and that their motivation was the potential resale value of the Persepolis artifacts, which they believed could potentially satisfy the judgment in their favor. The only logical conclusion that can be drawn from these facts is that, even if the United States had not breached its Paragraph 9 obligation and the Chogha Mish artifacts had not been attached, the *Rubin* plaintiffs would still have pursued their litigation against the Persepolis collection and incurred all of the joint legal fees. It is therefore appropriate to deny Iran relief for the joint legal fees because this injury would still have arisen absent the wrongful conduct of the United States. This was the argument of the United States, it is correct, and the Majority makes no genuine attempt to explain why they reject it.

60. One final observation may be helpful, and that has to do with the fact that Iran's lawyers in the *Rubin* litigation, responding to a question from their client, have written that the joint fees "are joint and common costs of defending the Persepolis and Chogha Mish collections that should be allocated evenly."[76] The pertinent observation is that Iran's lawyers were not addressing the causation issue present in this claim. Whenever two matters are being litigated together any costs that can fairly be characterized as "joint and common" should of course be allocated evenly between the two matters. Iran's lawyers, however, were not asked the question that we must answer, which is whether the work represented by the joint fees would have been done if only the Persepolis artifacts had been attached. Plainly that work would have been done, and nothing in the letters from Iran's lawyers even remotely supports a contrary conclusion.

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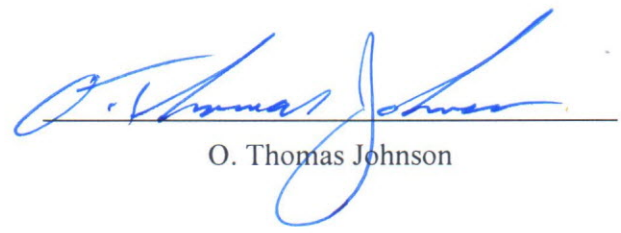
[75] *Id.*

[76] Judges' Folder of Islamic Republic of Iran, Claim G-32, p. 203 (Letter from Jeffrey A. Lamken to M. H. Zahedin, October 20, 2014).

61. The only real question in this claim is that of causation with respect to the joint fees. The Partial Award's treatment of this question leaves one with the impression that the Majority has given it no serious thought. The Parties deserve better.

Dated, The Hague

10 March 2020



O. Thomas Johnson