IUSCT (IRAN-US CLAIMS TRIBUNAL)

IUSCT Case Nos. A15(IV) and A24

THE ISLAMIC REPUBLIC OF IRAN V. THE UNITED STATES OF AMERICA

CONCURRING AND DISSENTING OPINION OF JUDGE CHARLES N. BROWER

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24 June 2014

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Concurring and Dissenting Opinion of Judge Charles N. Brower

I. STATEMENT OF DIFFERENCES

1. I concur with the Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part, in which Judge Johnson concurs in the present Concurring and Dissenting Opinion, as does Judge Gabrielle Kirk McDonald. I would have reduced the amounts awarded for Specific Litigation Expenses and Monitoring Expenses as follows:

   A. I would have reduced the amount awarded in paragraph 294(a) of the Award by a total of $34,103.36.

   B. I would have reduced the amount awarded in paragraph 294(b) of the Award by a total of $20,579.62.

   C. I would have reduced the amount awarded in paragraph 294(e)(iii) of the Award by a total of $1,286.39.

2. The specific items as to which I differ with the majority and the extent of each such difference are recorded in the annexed "Schedule of Differences," the accuracy of the first three columns of which is attested by the Award in paragraph 251. I differ with the majority as thus set out because to the extent of such differences I do not believe that the majority has correctly applied the ruling of the Partial Award, or its own holdings in the Award. Additionally, as indicated in the "Schedule of Differences," I dissent to the Tribunal's decision to consider that settlement negotiations occur "as a result of" appearances and filings. [2]

II. THE TRIBUNAL'S *EX AEQUO ET BONO* GRANT OF $405,304.29, A WINDFALL CONSTITUTING 48 PERCENT OF THE AWARD

3. As Judge Johnson has explained well in his Separate Opinion, Concurring in Part, Dissenting in Part, I cannot accept that there is any colorable legal basis on which to grant the Claimant $70,000 in monitoring expenses related to Shack & Kimball plus $50,000 in "other losses" related to the Marriott matter. Individually and collectively, those two grants simply constitute a "giveaway." Granting Claimant the $50,000 is simply not sustainable as a legal proposition. Regarding the $70,000 "gift," as I perceive it, to Claimant for Shack & Kimball monitoring expenses, there is no evidence whatsoever of such expenses that requires an "equitable" adjustment. It cannot be true that it "would be grossly unfair," [3] or even just plain "unfair," were Claimant not awarded anything

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[2] Award at note 76.

[3] Award at ¶ 232.

on this account. Claimant did not even itself estimate an amount for such monitoring.[4] It produced no records that would support charges for monitoring.[5] Stated simply, there was no proof of any kind. The award of $70,000, or 8.6665 percent of Shack & Kimball's relevant overall billing (of $807,705.81), is simply baseless.[6] Moreover, each dollar granted in respect of $50,000 for *Marriott* actually constitutes a gift of at least $3.47, given the pre-judgment interest it carries,[7] and each dollar granted in respect of $70,000 for Shack & Kimball monitoring expenses constitutes a gift of $3.31 given the pre-judgment interest it carries.[8] As a result, the principal and pre-award interest for these two items total $405,304.29, or fully 48 percent of the $842,468.14 granted by the Award. Both items cannot be seen as anything other than an unauthorized decision *ex aequo et bono*.[9]

4. In respect particularly to the $70,000 just discussed, the Tribunal incorrectly relies for its claimed authority to estimate damages, or to make an equitable adjustment, on cases involving contested issues of valuation in expropriation and breach of contract cases, an entirely different genre of cases in which there often is endless expert proof of damages, most frequently conflicting, but giving a tribunal a basis on which to work out actual damages in what necessarily is an imprecise process. The numerous authorities the Award cites in paragraphs 230-231 and their appended footnotes in support of its claimed power to do what it has done fall into that category.[10] One would

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[4] Award at ¶¶ 229, 237.

[5] Id. See also Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part at ¶ 12.

[6] The statement in the Joint Separate Opinion of Judges Hossein Abedian, H.R. Nikbakht and Jamal Seifi at paragraph 6 that Mr. Shack's "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" is grossly misleading (emphasis added). The fact is that it was at the Claimant's insistence that the Tribunal postponed the hearing in this case from 14-17 November 2011 to 24-27 September 2012, based on the Claimant's plea that "permitting the hearing to close without Mr. Shack's testimony will cause irreparable harm to Iran's case" and that in order for the Tribunal to hear "Iran's single most important witness for its case-in-chief... a further delay... is appropriate under the circumstances." Letter from the Agent of The Islamic Republic of Iran, filed 3 Nov. 2011. Any inference that the Tribunal itself foresaw Mr. Shack's testimony as "so pivotal for the Tribunal" is pure fantasy. As is now evident both from the Award and from the aforementioned Joint Separate Opinion, the Claimant was desperate, and understandably so, to be able to present Mr. Shack. In the end, of course, Claimant's hopes invested in his appearance were largely disappointed.

[7] See Award at ¶ 291 (awarding pre-judgment interest of $123,530.41 on the award of $50,000 "awarded as 'other losses' related to the Marriott lawsuit").

[8] See Award at ¶ 290 (awarding pre-judgment interest of $161,773.88 on the award of $70,000 "in expenses for monitoring services performed by Shack & Kimball").

[9] Article 33(2) of the Tribunal Rules of Procedure indicates that "[t]he arbitral tribunal shall decide ex aequo et bono only if the arbitrating parties have expressly and in writing authorized it to do so." 1 IRAN-U.S. C.T.R. 87. Neither condition has been met in this case.

[10] Award at ¶¶ 230-31 & notes 229-39. Even in William J. Levitt and Islamic Republic of Iran, et al., where the claimant failed to provide all available documentary evidence establishing the actual expenditures of the sums claimed, the Tribunal at least had the benefit of a summary of different categories of operating expenses for the relevant period, and could use these submissions to "determine equitably the damages to be awarded." William J. Levitt and Islamic Republic of Iran, et al., Award No. 297-209-1, para. 48 (22 Apr. 1987), reprinted in 14 IRAN-U.S. C.T.R. 191, 206; Award at note 235. Furthermore, my Iranian colleagues, in support of the Award's decision to approximate Iran's losses in lieu of its failure to submit "contemporaneous or other adequate evidence" write in their Joint Separate Opinion, "breach and occurrence of loss having been proven, the adjudicating body should not refuse compensation for the mere reason of imperfection of evidence on quantum." Joint Separate Opinion of Judges Hossein Abedian, H.R. Nikbakht, Jamal Seifi at ¶ 11. They note further that this is also "the case in domestic laws touching upon the issue," and cite six breach of contract cases—one English, one Canadian, and four from the United States—in support of their argument. In these domestic breach of contract cases, my colleagues correctly note, courts granted, or upheld a granting of, damages to a plaintiff or claimant where a precise calculation of damages was unavailable. Many of the cases concerned the calculation of potential lost profits, and the "approximation" conducted by the courts in this regard was made in consideration of expected future earnings under the contracts. However, the inexact task of determining future lost profits is distinct from our own, which was to determine "how much Iran paid Shack & Kimball specifically for monitoring activities rather than other activities performed by the firm." Award at ¶ 229. The imprecision of our task is not due to the difficulty in calculating future lost profits, but, as the Award correctly notes, Iran's failure to indicate "which aspects of its evidence support its claim for monitoring expenses" and its failure to submit "contemporaneous or other adequate evidence that would allow the Tribunal to determine the precise extent of Shack & Kimball's monitoring activities." Award at ¶¶ 224, 229.

have thought our colleagues in the majority would have known better than to resort to an inapposite line of cases to justify giving Claimant what can only be characterized as a windfall. One would have expected this to be particularly the case when implementing a Partial Award in which our predecessors made it clear that "The Tribunal... *expects Iran to produce factual evidence* of the losses it suffered as a result of monitoring of the suspended claims," a mandate which the Award has totally ignored.[11] Moreover, the Award expressly concedes that "the issue for this Tribunal [is]... whether the monitoring... was compensable as a matter of principle and *supported by the evidence submitted*."[12]

5. The Award's attempt to draw strength from the incontestable proposition that equity is a constituent element of some rules of law[13] is not persuasive. As the *MTD* ad hoc Committee Decision cited by the Award made clear:

> ... [I]ndividual rules of law will often require fairness or a balancing of interests to be taken into account. This is the case with the fair and equitable treatment standard itself, the standard the Tribunal was required to apply.[14]

This Award's decision to grant the $120,000 (plus interest of $285,304.29) in question does not apply equity as an aspect of a legal principle, but rather, in the words of that same ad hoc Committee, makes a "determination *ex aequo et bono* of *disputes,* i.e., of the substantial matter referred to the tribunal."[15]

III. CONCLUSION

6. For the reasons stated above, I have no alternative but to dissent from the Award insofar as it grants the sums indicated above and in the annexed "Schedule of Differences," in addition to otherwise joining the Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part.

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[11] Partial Award at ¶ 214 (A)(a)(4) (emphasis added). See also Partial Award at ¶ 214 (A)(d)(2) (requiring Iran to "produce factual evidence of the losses it suffered as a result of its making appearances or filing documents in United States courts...."). The Islamic Republic of Iran and The United States of America, Partial Award No. 590-A15(IV)/A24, reprinted in 34 IRAN-U.S. C.T.R. 105, 166, 167.

[12] Award at ¶ 214 (emphasis added). In this context the Tribunal dissembles when it commences its discussion of this issue by stating that "[a]s an initial matter, unlike with respect to the substantiation of Iran's specific litigation expenses, Partial Award No. 590 has established no rigorous standard of proof with respect to the substantiation of Iran's monitoring expenses." Award at ¶ 227. Indeed, how could the Partial Award "establish[]... [a] rigorous standard of proof" for a liability it had not determined, but had left to this Tribunal to consider whether or not monitoring should be compensable at all?

[13] Award at ¶¶ 230-31, 236, notes 232, 236, 244.

[14] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Decision on Annulment (ICSID Case No. ARB /01/7), para. 48 (21 Mar. 2007).

[15] Id. (emphasis in original).