IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 485
CHAMBER ONE
DECISION NO. DEC 133-485-1

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده

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FREDERICA LINCOLN RIAHI,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

Dissenting Opinion of Judge Charles N. Brower

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I. INTRODUCTION

1. I dissent most vigorously from this Decision because it quite unfortunately first condones the Chairman's further flouting of the most fundamental norms of judicial conduct by sitting "as a judge in his own cause," and then rules, effectively, that no matter how far misconduct within the Tribunal may subvert or corrupt the integrity of its processes, *no power whatsoever* inheres in the Tribunal to rectify any resulting injustice.[1]

II. PROCEDURAL POSTURE

2. Claimant requested that the relief sought in her Application to the Full Tribunal for Relief from the Denial of Due Process, Fairness, and Respect for Law by the Award made in Case No. 485, which the Full Tribunal, by letter of the President to Claimant's counsel of 6 June 2003, rejected on the ground that "[a]ny jurisdiction that remains . . . remains in" Chamber One, be granted by a reconstituted Chamber One, *i.e.*, a Chamber One not including Judge Broms. The relief requested is the opportunity fully to brief and be heard on her request for "a full reconsideration of the merits of the entire Case, and issuance of a supplemental or amended Award."[2]

3. To such end Claimant specifically requested,

> [a]s a preliminary matter, *to be addressed and decided before turning to the Application*, ... that the Chairman of Chamber 1, whose conduct of the proceedings and whose judgment in rendering the Award are the central issues raised by the Application (jurisdiction and merits), recuse himself from consideration of the Application and from any further involvement in this case.[3]

Claimant specifically requested that the "Chairman address and issue a decision concerning the request for recusal as a preliminary matter, before any other action is taken concerning the Application." The Claimant further requested that, once a decision on recusal would be taken and announced, she be afforded an opportunity to make "further submissions," including "additional grounds for the relief being sought and to present additional argument on the matters raised" in the Application.

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[1] In accordance with Tribunal procedure this Dissenting Opinion was provided to the other Members of the Chamber several weeks before the filing of the Decision and this Dissenting Opinion.

[2] Application to the Full Tribunal for Relief from the Denial of Due Process, Fairness, and Respect for Law by the Award Made in Case No. 485 (7 Apr. 2003) ("Application") at 1, 13.

[3] Claimant's Request that the Chairman Recuse Himself and that Chamber I Grant the Relief Sought in her Application of 27 March 2003 (7 July 2003) ("Claimant's Request") at 2-3 (emphasis in original).

4. In response, Chairman Broms, quite wrongly in my view, has chosen to be "a judge in his own cause" by refusing to recuse himself; and quite plainly, and likewise wrongly in my view, also has not seen fit even to issue a separate Decision announcing such refusal as a preliminary matter (thus depriving Claimant of any ability she may have had to deal discretely and in a timely fashion with such refusal). We thus are confronted with the spectacle of a request to a single Judge that he recuse himself being decided for the first time not in a Decision issued by that Judge, but in a majority Decision of Chamber One of the Tribunal itself. In addition, a majority of the Chamber has failed to afford her any opportunity whatsoever for providing written and oral submissions on the jurisdictional and substantive issues raised by the Application. Finally, the same majority has proceeded to endorse the Chairman's decision not to recuse himself, and has compounded that error by proceeding to reject Claimant's Application.

III. THE FACTS

5. On 27 February 2003 the Tribunal rendered Final Award No. 600-485-1 in this Case ("the Award").[4] On 27 March 2003 Claimant submitted to the Full Tribunal her Application, in which she alleged that the Award was arrived at under a procedure that was fundamentally biased and unfair in failing *inter alia* to treat the parties equally; to apportion the burden of proof in accordance with the norms of due process; to deal impartially with what she described as Iran's witness tampering, its reliance on coerced testimony, and its willful disregard of Tribunal Orders to produce key evidence; and to decide disputed issues based on established principles of law.[5] In doing so, the Application raised questions regarding the alleged failure of the Chairman, the presiding Member of the Tribunal that issued the Award, to conduct the proceedings in the even-handed manner required by the Algiers Accords and the Tribunal Rules of Procedure.[6]

6. By letter dated 6 June 2003 the President of the Tribunal informed Claimant that the Full Tribunal had determined that it was without jurisdiction to consider the Application. According to the President, this was because any jurisdiction that remained after Chamber One issued the Award, "whether pursuant to Articles 35-37 of the Tribunal Rules or pursuant to any possible inherent authority of the Tribunal, remain[ed] in the Chamber that rendered

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[4] *Frederica Lincoln Riahi* and *The Government of the Islamic Republic of Iran*, Final Award No. 600-485-1 (27 Feb. 2003), *reprinted in* __ Iran-U.S. C.T.R. ___.

[5] *See* Application, *supra* note 2, at 2-8.

[6] *Id.*

the final award,"[7] *i.e.*, Chamber One. Claimant perforce now formally asks that Chamber One take up her Application instead. Owing to the fact, however, that the Application itself turns on the conduct of proceedings over which the Chairman presided, Claimant also has requested that the Chairman first recuse himself from any further proceedings in this Case, that he first announce his decision on that request before any further proceedings would be undertaken, and that Chamber One as reconstituted with a new Chairman then proceed to receive further written and oral submissions before considering the merits of the Application.

IV. CLAIMANT'S REQUEST REGARDING THE CHAIRMAN'S RECUSAL

7. In the first instance, Claimant has asked that the Chairman recuse himself "[a]s a preliminary matter, *to be addressed and decided before turning to the Application*,"[8] and that the Chairman separately "issue a decision concerning the request for recusal as a preliminary matter, before any other action is taken concerning the Application."[9] Only following such Decision should Chamber One, with a new Chairman, "proceed to consider the merits of the Application, [so] that the relief in the Application [may] be granted."[10]

8. Claimant's recusal request rests on the fact that consideration of the merits of the Application requires a determination as to whether or not the Chairman, in presiding over the prior proceedings, has effectively sanctioned proceedings that resulted in "the Tribunal stretching to achieve an arbitrarily predetermined result" as the Application states. The Chairman, Claimant understandably maintains, should not participate in such a determination.[11] More specifically, Claimant submits, the Chairman should not preside over determinations as to either the jurisdictional or the substantive merits of the Application, or the appropriate relief, if any, because: (1) recusal is appropriate where there is "justifiable doubt" as to the Chairman's capacity to be impartial and independent with respect to proceedings on the Application, as is the case here; (2) the Chairman has a "personal stake in the outcome of this review and in defending the Award," which creates a conflict of interest that disqualifies the Chairman from participating in any further proceedings; (3) the Chairman has an ethical obligation to avoid even the appearance of bias, which would otherwise be present here since the Chairman already has "taken a position as to each of the

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[7] Letter from the President of the Tribunal to Claimant's Counsel of 6 June 2003, para. 4.

[8] Claimant's Request, *supra* note 3, at 2 (emphasis in original).

[9] *Id.* at 8-9.

[10] *Id.* at 9.

[11] Application, *supra* note 2, at 2.

issues raised by the Application" and the central complaint thereof is that "the proceedings conducted by the Chamber, under the direction of the Chairman, were tainted by a fundamental bias that infected the rulings made in the Award;" (4) the Chairman may otherwise be tempted to justify his conduct regarding issues raised in the Application which had been ignored in the Award, making recusal necessary to ensure the fair and objective determination of whether such gaps constitute improprieties warranting the relief sought by the Application; and (5) there is the possibility "that the Chairman harbors animosity toward Claimant" for submitting the Application.[12]

9. Despite Claimant's numerous and facially valid concerns, the Chairman has declined to recuse himself in this Case, a decision supported by a majority of Chamber One with little more than a cursory consideration of Claimant's arguments. As discussed in more detail below, however, these concerns categorically suggest, indeed require, in my view, that the Chairman recuse himself from further proceedings in this Case, all the more so as the Chairman also has refused to issue, as requested by Claimant, a separate Decision recording as a preliminary matter his refusal to recuse himself, depriving Claimant of any opportunity to challenge the recusal decision.

A. Claimant's Grounds Supporting the Recusal of the Chairman

1. "Justifiable doubt" as to Chairman's capacity for impartiality

10. Article 9 of the Tribunal Rules of Procedure provides in relevant part that "[w]hen any member of the arbitral tribunal obtains knowledge that any particular case before the arbitral tribunal involves circumstances likely to give rise to *justifiable doubts as to his impartiality or independence with respect to that case*, he shall disclose such circumstances to the President and, if the President so determines, to the arbitrating parties in the case *and, if appropriate, shall disqualify himself as to that case.*"[13] Although Article 9 Specifically addresses the duties of disclosure of a Member of the Tribunal at the outset of the case, it is plainly premised on the fundamental principle that where there are "justifiable doubts as to his impartiality or independence with respect to [any particular] case," a Member should "disqualify himself as to that case." There being no doubt that the Application itself raised substantial questions concerning the propriety of the Chairman's conduct of the proceedings

[12] Claimant's Request, *supra* note 3, at 5-8.

[13] Tribunal Rules of Procedure ("Tribunal Rules"), Art. 9 (emphasis added).

leading to the Award, it was incumbent upon the Chairman to recuse himself in the face of such "justifiable doubts" during the pendency of Claimant's application.

11. The majority dismisses Article 9 as irrelevant to a situation in which a party brings to the attention of a Member of the Tribunal the existence of circumstances likely to give rise to justifiable doubts as to the Member's impartiality or independence.[14] The majority ignores, however, the principle underlying Article 9 which is the central concept at issue in this case, namely that where a Member of the Tribunal is called upon to undertake a specific judicial task, recusal from such an undertaking is appropriate in the face of allegations that raise "justifiable doubts" about the ability of the Member to do so in an impartial manner. Plainly, the obligation to recuse can arise at any time. For example, in the case of *Amoco Iran Oil Co.* and *Government of the Islamic Republic of Iran* (Case No. 55), Judge Briner withdrew from further proceedings therein in response to a challenge brought against him by Iran even though the challenge was brought three and a half years after Judge Briner first became involved in that case, and more than a year after the completion of two weeks of hearings in the case, which at that time were the longest ever held before the Tribunal.[15]

12. Indeed, "[t]he duty of disclosure [under Article 9] is a continuing obligation; an arbitrator has to inform the parties if new circumstances arise that may bring into question his impartiality and independence."[16] As such, the principle incorporated by Article 9 requires the Chairman to "disqualify himself as to [this] case" at any point during the case when there are "circumstances likely to give rise to justifiable doubts as to his impartiality or independence with respect to that case." "Under Article 9 of its Arbitration Rules . . . [Tribunal] *members can recuse themselves* from cases if there are circumstances 'likely to give rise to justifiable doubts as to [their] impartiality or independence with respect to that

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[14] Decision in *Frederica Lincoln Riahi* and *The Government of the Islamic Republic of Iran*, DEC No.___-485-1, para. 30 (17 Nov. 2004), *reprinted in* __ Iran-U.S. C.T.R. __ ("*Riahi Decision*").

[15] Memorandum of Amoco Iran Oil Co. (2 Nov. 1988), *reprinted in* 20 Iran-U.S. C.T.R. 233, 237. While no Award had yet been issued at the time of Judge Briner's recusal, the principle implicit in that case is equally applicable here: As long as any decision remains to be made in a case, intervening "justifiable doubts" mandate recusal from such further proceedings. To posit that the duty to recuse dies arbitrarily with the issuance of "a final and binding award" would be to prevent justified recusal in respect of a post-award application under Articles 35-37 of the Tribunal Rules of Procedure, notwithstanding that "an interpretation" of such award, let alone "an additional award as to claims presented in the arbitral proceedings but omitted from the award," can present serious issues going to the merits.

[16] S.A. Baker & M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992) at 46.

case. . . ."[17] Thus, given that such doubts have arisen here, the Chairman should have recused himself from participating in further proceedings.

2. The Chairman's "personal stake" in the outcome of the review of the Application and in defending the Award

13. "It is universally accepted doctrine that no one can be judge in his own cause and all systems of law adopt it."[18] The Chairman's failure to recuse himself has left him in that forbidden position since the Application directly questions the manner in which proceedings leading to the Award in this Case were conducted under his supervision. As the Claimant presciently pointed out, the Chairman "has a personal stake in the outcome of this review and in defending the Award."[19] Additionally, Claimant notes that the circumstances in this respect may have been exacerbated by the fact that the Chairman was the subject of two earlier challenges by the United States, likewise based on a far broader alleged partiality and bias, while the Award in this case was under deliberation.[20]

14. In dismissing Claimant's concern regarding the Chairman's "personal stake" in the outcome of the Application, the majority all but ignores Claimant's main assertion that it is the Chairman's authorship of and responsibility for the Award that creates a conflict of interest that could be ameliorated only by his recusal. Instead, the majority simply seizes on (and even then fails to grasp) Claimant's secondary reference to the United States' two challenges to the Chairman, declaring it "untenable" because the Appointing Authority had considered and dismissed those challenges.[21] The majority's response misses the mark,

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[17] C. Brown, *The Evolution and Application of Rules Concerning the Independence of the "International Judiciary,"* 2 The Law and Practice of International Courts and Tribunals 63, 90-91 (2003) (emphasis added).

[18] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987) at 279 (quoting II[e] Conference internationale de la Paix: 1 *Actes et Documents*, 1907, p. 367 (Transl.)).

[19] Claimant's Request, *supra* note 3, at para. 11.

[20] *Id. See generally* Decision of the Appointing Authority regarding the Challenges to Judge Bengt Broms (7 May 2001), *reprinted in* __ Iran-U.S. C.T.R. __. Since Claimant filed her Application and Request, the Chairman has been subject of a third challenge, this time by the Claimant. Claimant's challenge was made following her coincidental discovery that Chamber One was, as she understood it, deliberating the substance of her Application without the Chairman having issued any Decision regarding her request for his recusal and that it be handled as a preliminary matter. Following customary Tribunal practice, consideration of the Application and Request by Chamber One was halted until the Appointing Authority ruled on the challenge, which he did on 30 September 2004, finding that Claimant's challenge was time barred and therefore inadmissible. *See* Decision of the Appointing Authority regarding the Challenge to Judge Bengt Broms (30 September 2004), *reprinted in* ___ Iran-U.S. C.T.R. __; *see infra* note 35. Although Claimant obviously did not discuss the effect of her own challenge on the Chairman's ability impartially to decide the merits of her Application (and I therefore do not address it specifically in the main text of this Dissenting Opinion), it is quite clear to any reasonable observer that given the nature of the Claimant's challenge to the Chairman, the latter's recusal from any further participation in this Case became even more imperative.

[21] *Riahi Decision*, *supra* note 14, at para. 17.

however, in both failing to consider Claimant's primary argument and in failing to recognize that Claimant simply suggested that the United States' earlier challenges, premised on the Chairman's alleged broader partiality and bias, had increased the Chairman's "personal stake" in defending the Award. In other words, the Claimant simply invoked *the fact* of those challenges as being relevant, irrespective of their outcome. Additionally, however, the majority's description of those challenges and their outcome is, at the least, selectively incomplete.

15. The United States challenged the Chairman, *inter alia,* on the grounds that he had revealed the content of deliberations in Case No. A28 in his Concurring and Dissenting Opinion in that case in violation of Article 31 of the Tribunal's Rules of Procedure.[22] In fact, the Appointing Authority, at that time former President of the International Court of Justice Sir Robert Y. Jennings QC, repeatedly found that Judge Broms indeed had violated that Article, and thereby had gone "a step too far." Judge Jennings had "*no doubt* . . . that [there] was a *breach*," and found "*grave breaches* of the secrecy of deliberations" and "*ill-judged breaches* of the secrecy of the deliberations" amounting to a "*most serious error.*"[23] In this he was in accord with the President of the Tribunal, who had issued a Statement on 21 December 2000 "not[ing] with *regret* that Mr. Broms' Opinion in *a number of instances* contravenes the rule of confidentiality of the Tribunal's deliberations, as set forth in Note 2 to Article 31 the Tribunal Rules."[24] Indeed, Judge Jennings expressly found that the President had "properly and correctly dealt with" the matter in issuing that Statement.[25] As a matter of admissibility, however, Judge Jennings found, after thorough examination of the Tribunal Rules of Procedure, that "this confidentiality beach as such is not . . . a matter for the Appointing Authority."[26] He concluded that he could consider only whether or not there were "justifiable doubts" as to Judge Broms' independence and impartiality, trenchantly noting that "A judge may be strictly and correctly impartial and independent *though massively indiscreet and forgetful of the rules.*"[27] Concluding that on the record he could not "infer, *from the evidence of this single Opinion*, that the United States suspicions of partiality

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[22] Decision of the Appointing Authority of 7 May 2001, *supra* note 20, at 1. Article 31 states, in relevant part, that "The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret."

[23] *Id.* at 5, 7, 10, 11 (emphasis added).

[24] Statement of the President of 21 December 2000 at 2 (emphasis added).

[25] Decision of the Appointing Authority of 7 May 2001, *supra* note 20, at 7.

[26] *Id.*

[27] *Id.* (emphasis added).

are justified," Judge Jennings then pointedly gave Judge Broms a "yellow card" (to use a familiar football term):[28] "It seems right to make it clear to Judge Broms that he should now resolve on no account to fall into this error again and to reflect *that any sign of a repetition might change the balance of a decision in respect of any further challenge*."[29] This is the background against which Claimant's reference to the United States' challenges must be seen. In retrospect, it doubtless was too much to expect that someone so blind to the cardinal obligation of deliberative confidentiality would recognize his obligation not to be "a judge in his own cause."[30] Indeed, Judge Jennings' cautionary advice appears to have gone unheeded as in the very Decision that this Dissenting Opinion addresses deliberations of the Full Tribunal once more are disclosed (in paragraph 16):

> While the Rules of the Tribunal were discussed by the Full Tribunal when the First Application was studied, the Chairman's newly alleged personal stake in the outcome of a case, his alleged lack of impartiality because of a previous unsuccessful challenge against him, and his alleged possible animosity were not considered to be grounds on which his recusal could be requested or upheld.

Whither such reckless indiscretion, committed in the face of both the earlier Statement of the President and the "yellow card" issued by Judge Jennings, may ultimately lead remains for another day, but as regards the present case it cannot help but contribute further to the unseemliness of Judge Broms' dogged insistence on sitting in judgment on himself.[31]

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[28] According to the *Laws of the Game*, a football player who is cautioned, or shown a yellow card, for a second time is "sent off." *See Laws of the Game* at 37 (July 2004), *available at* http://www.fifa.com/fifa/handbook/laws/2004.

[29] *Id.* at 10-11 (emphasis added).

[30] It is regrettable that, as successive Appointing Authorities' Decisions on the respective challenges to Judge Broms have ruled, there appears so far to be no remedy admissible under the Tribunal Rules of Procedure for such purposeful and, as we now see, endemic disregard for the minimum standards of judicial conduct.

[31] Judge Broms repeated departure from the mandate of deliberative confidentiality clearly merits a second caution, and he would have done well to send himself off in this Case. Moreover, this is not the only such instance in the Decision to which this Dissenting Opinion is appended. In paragraph 13 it is stated that "[t]he submission [of Claimant] was filed on 19 January 2004, at or slightly after the first draft had been issued and distributed among the Members of the Chamber for comment." It seems clear from the fact that the next paragraph (14) notes that Claimant's challenge of Judge Broms was filed a week thereafter, on 26 January 2004, and that "counsel for the Claimant alleges" that he learned in a "conversation with the legal assistant to the Chairman" that he had not recused himself and was proceeding with deliberations on the merits without notifying the parties of his non-recusal, that the purpose of this further indiscretion is to insinuate that Claimant's counsel was tipped off as to Judge Broms' non-recusal by a Member of the Chamber following circulation of that "first draft" (presumably I am meant). Apart from the fact that Judge Broms would have been better advised, as Judge Jennings had urged him, to eschew further transgression of the rule of deliberative secrecy in an ill-disguised attempt to charge me with the same (which for the avoidance of any doubt I categorically deny), he noticeably fails to deny that it was his own legal assistant who let the cat out of the bag.

16. The majority also states that a general challenge to a Member of the Tribunal arising out of a separate case has never been held by the Tribunal "to amount to a good reason for his recusal from a pending Case. . . ."[32] Yet the contrary is also true, namely that such a challenge has never been rejected as not relevant to a request for recusal. More relevantly here, Claimant did not rely solely, or even principally, on the United States' challenges themselves as establishing a basis for recusal. Rather, it is the Chairman's "personal stake in the outcome of this review and in defending the Award" resulting from his authorship of the Award, *highlighted by the fact* that those challenges were lodged against him, that Claimant asserts "creates a conflict of interest" requiring his recusal.[33]

17. Additionally, the majority observes that Claimant never previously objected to Judge Broms' participation in this case even though the cited challenges by the United States had been made and resolved more that two years before the Award in this case was issued. This point, too, however, overlooks the fact that Claimant's recusal request is not based on those challenges, but simply suggests that they are relevant, a relevance which, in light of Judge Jennings' disposition of those challenges, could have become apparent only upon the issuance of the Award, when for example, the majority's alleged unjustified reliance on coerced evidence first became evident to the Claimant. Claimant could hardly have known that the majority would, as she asserts, improperly rely on coerced evidence to her detriment before the Award demonstrated the same.

18. The majority further takes issue with the fact that Claimant did not request the Chairman's recusal in her initial submission of the Application to the Full Tribunal.[34] Here it must be recognized that this, effectively, is the basis on which Claimant's own more recent challenge to Judge Broms was dismissed as being time barred.[35] Equally it must be

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[32] *Riahi Decision, supra* note 14, at para. 17.

[33] Claimant's Request, *supra* note 3, at para. 11.

[34] *Riahi Decision, supra* note 14, at para. 20.

[35] The Appointing Authority found that as of the date of her formal Request to Chamber One that it consider her Application (2 July 2003) she was "aware . . . of circumstances likely to give rise to justifiable doubts as to Judge Broms' impartiality or independence with respect to consideration of the application," and that since she did not challenge him within fifteen days thereafter, as required by Article 11 of the Tribunal Rules of Procedure, the challenge was inadmissible. Decision of the Appointing Authority of 30 September 2004, *supra* note 20. The Appointing Authority found that neither "Judge Broms' failure to disqualify himself [from consideration of the Application]" nor "his refusal even to respond to the recusal request do not constitute new or independent circumstances" from which a new 15-day period may be measured. Seemingly, the resulting lesson is "When in doubt, challenge; do not depend on judicial discretion." In other words, parties before the Tribunal entertaining "justifiable doubts" are now advised, in the spirit of the American "Wild West," to "shoot first; ask questions later!"

recognized that recusal, unlike a challenge, is not subject to a time limit, and that there is an obvious difference in the degree of influence the Chairman has, as a practical manner, in determining the outcome of a submission made to the Full Tribunal, which turns on nine votes of which the Chairman's is but one, as opposed to Chamber One, where the Chairman's vote, being one of three, is often decisive and over the deliberations of which the Chairman has the responsibility of presiding. Given this contrast, it is not surprising that Claimant would not have requested that the Chairman recuse himself in her initial submission to the Full Tribunal. In the end, however, that prior conduct is not really relevant. What matters is that a judge do recuse himself when the issue is put in circumstances where the request is justified.

3. The Chairman's ethical obligation to avoid even the appearance of bias

19. As the British jurist Lord Hewart famously observed, "It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be *seen to be done*."[36] International tribunals likewise have held that "[i]n international arbitration it is of equal importance that justice *be done* and that *appearances* show clearly to everybody's conviction that justice *was done*."[37] Thus, regardless of whether or not bias in fact exists, the very appearance of bias itself is impermissible.

20. The appearance of bias can arise, for example, where "the arbitrator . . . has already taken a position in relation to [the dispute]."[38] *See also* The Code of Ethics for Arbitrators in Commercial Disputes, American Arbitration Association and American Bar Association, Canon I(D) (2004) (Arbitrators "should avoid conduct and statements that give the appearance of partiality toward or against any party").[39] In seeking reconsideration of the

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[36] *Rex v. Sussex Justices* (1924) 1 K.B. 256, 259 (emphasis added).

[37] *See, e.g., Lehigh Valley Railroad Co. Case*, (U.S. v. F.R.G.), 8 R.I.A.A. 224 (Mixed Claims Comm'n 1936) (emphasis in original).

[38] *See* Ethics for International Arbitrators, International Bar Association, Art. 3.2 (1986), *available at* 26 I.L.M. 583 (1987). The IBA has recently adopted *Guidelines on Conflicts of Interest in International Arbitration*, (22 May 2004) *available at* http://www.ibanet.org/pdg/InternationalArbitrationGuidlelines.pdf, which enunciate clear standards with respect to the requirement that arbitrators must maintain actual, as well as perceived, impartiality and independence. *Id.* at Part I(2)(a)-(d). Interestingly, these Guidelines state that "a fresh round of disclosure may be necessary" if "the dispute is referred back to the same arbitrators" after the rendering of a final award. *Id.* at Explanation to General Standard 1. The Guidelines support the principle "that no one is allowed to be his or her own judge." *Id.* at Explanation to General Standard 2(d).

[39] The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of representatives from the American Bar Association ("ABA") and the American Arbitration Association ("AAA"). The Code was jointly revised in 2003 by an ABA Task Force, a special

Award, Claimant is asking the Tribunal to address issues that have been considered and rejected by the Chairman in the Award. In this respect, it is important to note that it is not simply the fact that the Chairman has taken a position contrary to that of Claimant in the Award that may create the appearance of bias, but that Claimant also has filed a substantial Application alleging that the Award itself is the product of "the Tribunal *'stretching' to achieve an arbitrarily determined result.*"[40] Under these circumstances, the appearance of bias indubitably is implicated when the Chairman chooses to participate in the determination of the Application.

21. Bias on the part of an arbitrator typically is not established by direct evidence. Rather, "[u]sually bias must be imputed on the basis of . . . the conduct of the proceedings."[41] Relevantly, the core complaint of the Application is that "the proceedings conducted by the Chamber, under the direction of the Chairman, were tainted by a fundamental bias that infected the rulings made in the Award."[42] As such, the Chairman's participation in the review of prior proceedings held under his supervision naturally creates an appearance of bias that requires that the Chairman recuse himself.

22. Further, as the Tribunal's own precedents make clear, recusal is appropriate where the semblance of partiality may exist. Notably, "[b]oth Iranian and American party-appointed arbitrators [have] often recused themselves from cases to avoid the appearance of interest or partiality."[43] Concern over the appearance of bias has even been the basis for recusal by the Appointing Authority. For example, Judge Moons recused himself from determining a challenge brought by the United States against Judges Kashani and Shafeiei to avoid any "questions about [his] impartiality" on account of statements directed to Judge Moons regarding a separate earlier challenge by Iran to Judge Mangård in which Judge Moons' impartiality was directly questioned.[44]

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committee of the AAA and the Center for Public Resources Institute for Dispute Resolution. The Code as revised was adopted effective 1 March 2004.

[40] Application, *supra* note 2, at 2 (emphasis in original).

[41] W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 I.C.L.Q. 26, 49 (Jan. 1989).

[42] Claimant's Request, *supra* note 3, at 7.

[43] S.A. Baker & M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* at 54 & 54 n.215 (referring to Presidential Orders Nos. 19 (12 Jan. 1984), 21 (19 Jan. 1984) & 57 (9 Oct. 1987), involving recusals by Judges Shafeiei, Aldrich, Brower and Noori).

[44] *Id.* at 31-32. *See also* Iranian Assets Litigation Reporter (28 Sept. 1984) at 9,271 ("Moons . . . ask[ed] to be recused from ruling on the U.S. challenge because Kashani ha[d] attacked Moons' impartiality and, therefore, it would be inappropriate for him to sit in judgment over Kashani.").

23. The majority's only response with respect to the issue regarding the appearance of bias is selectively to single out and dismiss Claimant's citation to Judge Moons' recusal as "a completely different case without relevance to the present Case."[45] Leaving aside the Tribunal's failure to address Claimant's other arguments concerning the appearance of bias, the example of Judge Moons' recusal makes recusal here, in fact, *a fortiori*. In this case, recusal is premised, not on Claimant's suspicions that the Chairman may be biased, but on the simple proposition that one should not sit in judgment on oneself. There can be no doubt in any reasonable mind that the Chairman was obliged to recuse himself on account of the fact that his insistence on sitting in judgment on himself in this Case, at a minimum, engenders the appearance of bias.

4. Possibility of an attempt by the Chairman to justify those issues raised in the Application but ignored by the Award

24. The Chairman, as the presiding Member of Chamber One responsible for the Award, was required to address all critical issues raised in the proceedings leading thereto. Claimant asserts in her Application, however, that certain issues were not properly addressed in the Award which should have been and that in the present proceeding the Chairman likely will feel compelled to justify those gaps in the Award. The possibility that the Chairman would feel so compelled, Claimant maintains, necessitates his recusal. Claimant's assertion is related to and justified by her observation, discussed above, that the Chairman's "personal stake" in defending the Award creates a conflict of interest that requires the Chairman to recuse himself.[46] Her case is that to ensure an objective determination as to whether such alleged gaps or inconsistencies constitute improprieties warranting the relief sought in the Application, the Chairman must recuse himself.

25. The majority, however, makes no effort to respond to Claimant's argument, flatly dismissing it as "an allegation, unsubstantiated and not supported by any proof."[47] In so dismissing it, however, the majority profoundly misconceives the thrust of Claimant's argument. The question is not whether the majority is of the view that such alleged gaps and inconsistencies in fact exist, but rather whether the Chairman should even be in the position of reviewing the record to determine if any gaps or inconsistencies exist in the Award for which he was responsible. Claimant's argument, which stands unrefuted, is that the

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[45] *Riahi Decision, supra* note 14, at para. 21.

[46] *See supra* at paras. 13-18.

[47] *Riahi Decision, supra* note 14, at para. 22.

Chairman should not be in such a position given that the basis of the Application is the Chairman's allegedly questionable handling of the Case, an allegation underscored by its reference to such gaps and inconsistencies in light of facts in the record.

5. The prospect that the Chairman harbors animosity toward Claimant

26. While Claimant forthrightly acknowledged, as of the time of renewing her Application before this Chamber (and prior to her own time-barred challenge to the Chairman), that she did not then have direct evidence that the Chairman harbored animosity toward Claimant or her counsel for questioning the propriety of the Chairman's conduct of this Case, she asserts that the very prospect that such feelings may come into play is a basis for recusal. The Claimant having directly questioned the propriety of the conduct of the proceedings in this Case under the Chairman, any reasonable observer would conclude that animus may arise under such circumstances. This being the case, the Chairman's failure to recuse himself leads to the appearance of bias, which as explained above, is impermissible regardless of whether or not such bias in fact exists.[48] The majority's response is simply to characterize Claimant's argument regarding animus as "anticipatory and unsubstantiated doubts – subjective at best" which, "as well as unwarranted post-judgment accusations against an arbitrator, can only open the door to frivolous appeals and other allegations aimed at avoiding and undermining the final and binding nature of the awards and decisions rendered."[49] As with Claimant's argument concerning gaps and inconsistencies in the Award, however, the pertinent inquiry is whether or not the prospect of animus itself on the part of the Chairman will create an appearance of bias that disqualifies the Chairman from further proceedings, to which the answer here can only be in the affirmative.

B. Tribunal's Justifications Regarding Non-Recusal

27. After concluding its cursory review of Claimant's asserted grounds for recusal as described above, the majority goes on to offer various reasons why recusal, both generally as well as in this Case specifically, is inappropriate. None of the proffered rationales withstands scrutiny, however.

28. First, the majority suggests that the recusal request should not be granted because it is "linked to a request that after the recusal Chamber One should be reconstituted and the

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[48] *See supra* at paras. 19-23.

[49] Riahi Decision, *supra* note 14, at para. 22.

procedure should be reopened to give the Parties a full opportunity to submit new evidence and to bring new witnesses in a new hearing," this reconsideration request being "tantamount to the opening up" of a final and binding award and which request the "Full Tribunal has already dismissed."[50] This statement is erroneous on multiple levels. To begin with, Claimant did not ask to "submit new evidence," much less "bring new witnesses" on reconsideration of the Award. Claimant merely requested "the right to provide additional grounds for her charges and to present additional written argument on the issue raised [in the Application]," and, following such submissions, for a hearing on the Application to decide "(1) whether to grant the request to reopen and reconsider the Award, (2) [and to decide] the appropriate procedure for performing the task of producing an amended Award."[51] Additionally and more significantly, the majority conflates the issues of recusal and reconsideration. Yet the former deals with the threshold question of whether or not the Chairman initially should be in a position to hear the request for reconsideration, which precedes and is entirely independent of the latter question concerning whether or not the Award can and should be reconsidered. Further, it is not correct to suggest, as the majority does, that the Full Tribunal dismissed the Application. Leaving aside the fact that this issue is irrelevant with respect to recusal, all that is stated in the President's letter of 6 June 2003 is that the Full Tribunal, as opposed to Chamber One, "has *no jurisdiction* over the Application" and cannot even begin to "entertain the Application."[52] It is thus to be left to Chamber One to determine the outcome of the Application.

29. The majority asserts that the recusal request should also be denied because "[t]he involvement of the Chairman or any Member forming the majority in the Award has never been regarded as a good reason for recusal of either the Chairman or the Member in question."[53] However, Claimant's recusal request is not based on the mere participation of the Chairman in the Award. Rather, it is the alleged *improper* participation of the Chairman therein as amply detailed in the Application that is key to her request. The Tribunal has never before had to decide whether an award may be reconsidered on the basis of a gross mishandling by a Chamber Chairman of the proceedings leading thereto. Given these

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[50] *Id.* at para. 24.

[51] Application, *supra* note 2, at 13.

[52] Letter from the President, *supra* note 7, at 2 (emphasis added).

[53] *Riahi Decision*, *supra* note 14, at para. 26.

particular circumstances, it could hardly be routinely open to abuse by parties in the manner suggested.

30. The majority also opines that recusal in the context of the reconsideration of an award is inappropriate because the Tribunal's practice indicates that "as a rule, applications against final awards, on any grounds" are made to the same Chamber in the original composition that decided the relevant award.[54] Naturally, in the absence of any recusal request, a request that an award be reconsidered ordinarily would be considered by the same Chamber that decided the case. There is, however, no Tribunal Rule – and the majority points to none – that *requires* a Chamber in its original composition to decide a request for reconsideration. On the contrary, as discussed above, Article 9 of the Tribunal Rules permits Members of the Tribunal to recuse themselves at any time during a case when "justifiable doubts" surface regarding their impartiality. Also, Tribunal Members routinely have been allowed to withdraw from, and the relevant Chambers reconstituted with their respective replacements to continue the consideration of, cases at various points during their proceedings, including as late as after the conclusion of hearings, as the example discussed above of Judge Briner's recusal from the Case of *Amoco Oil* demonstrates.[55] Even more significantly, in Case No. A28, I myself replaced a resigned member of the Full Tribunal in the consideration of a request made after, and regarding, a decision in which I had not participated.[56] In that case, the United States had instituted proceedings against Iran alleging that it had failed to maintain a minimum balance of U.S.$500 million in the Security Account in violation of its obligation under the Algiers Accords and had asked the Tribunal to order Iran to replenish the Security Account accordingly.[57] On 19 December 2000 the Full Tribunal, of which Judge Charles Duncan was a Member, issued Decision No. DEC 130-A28-FT finding Iran to be in breach of its obligation but declining at that time to order Iran to replenish the Security Account as it "expect[ed] that Iran [would] comply with this obligation."[58] Subsequently, Judge Duncan resigned and I was appointed to replace him, my reappointment as a regular Member taking

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[54] *Id.*

[55] *See supra* notes 15 & 43 and accompanying text.

[56] *See* Separate Opinion of Charles N. Brower to the Order of 17 September 2001 in *The United States of American, et al.* and *The Islamic Republic of Iran, et al.*, Case No. A28, Full Tribunal (21 Sept. 2001), *reprinted in* __ Iran-U.S. C.T.R. __.

[57] *The United States of America* and *The Islamic Republic of Iran, et al.*, Decision No. DEC 130-A28-FT, para. 2 (19 Dec. 2000), *reprinted in* _ Iran-U.S. C.T.R. __.

[58] *Id.* at para. 95.

effect on 1 January 2001.[59] As it turned out, Iran never met the Tribunal's "expect[ations]" of replenishment, and on 30 August 2001 the United States filed another request "pursuant to the Tribunal's Decision of December 19, 2000" asking the Tribunal to order Iran to replenish the Security Account in light of its continued failure to do so. The Full Tribunal considered and dismissed this request by an Order dated 17 September 2001, a decision in which I participated and issued a Separate Opinion notwithstanding that I had not been involved in Decision No. DEC 130-A28-FT.[60] In other words, the second request, which was made squarely on the basis of Decision No. DEC 130-A28-FT and effectively requested relief hitherto denied in that Case, was not in fact decided by the Tribunal in the composition that participated in that original Decision. Similarly, it follows here that reconsideration of the Award may be undertaken by a reconstituted Chamber One having a composition different from that of Chamber One as it decided the original Award.

31. It is further incorrect to state, as the majority does, that the Full Tribunal, in refusing Claimant's initial Application, rejected any possibility "in a case which has been decided by a final award" for the "original Chamber" to be dissolved and its jurisdiction over the case transferred to a different Chamber or alternatively for the case to be heard by another Chamber.[61] The Full Tribunal decided no such thing. Rather, the President's letter of 6 June 2003 merely stated with reference to Presidential Orders No. 1 and 8 that the "Full Tribunal . . . has no jurisdiction over the Application" since a "Chamber cannot relinquish jurisdiction over a case once it has rendered a final and binding award in that case."[62] Relevantly, paragraph 6(a) of Presidential Order No. 1 provides that "[w]here a case pending before a Chamber raises an important issue the Chamber may, at any time prior to the final award relinquish jurisdiction in favor of the Plenary Tribunal, and shall so relinquish jurisdiction when a majority for a decision or an award cannot be found within a Chamber," while paragraph 6(b) thereof states that "[a] Chamber may decide to relinquish jurisdiction to the Plenary Tribunal at any time prior to the final award when the resolution of an issue might result in inconsistent decisions or awards by the tribunal."[63] That a Chamber may not *relinquish* jurisdiction over a case to the *Full Tribunal* subsequent to the issuance of a final

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[59] Separate Opinion of Charles N. Brower in Case No. A28, *supra* note 56, at n.1.

[60] *See id.*

[61] *Riahi Decision, supra* note 14, at para. 26.

[62] Letter from the President, *supra* note 7, at 2.

[63] Presidential Order No. 1, para. 6(a), (b) (19 Oct. 1981), *reprinted in* 1 Iran-U.S. C.T.R. 95, 95-96.

award has no bearing on the question of whether or not upon the recusal of a Member of the Chamber the case may then be decided by the same Chamber as reconstituted or else transferred to another Chamber. Indeed, paragraph 5(b) of Presidential Order No. 1 provides for the latter option in stating that "[t]he President will . . . transfer a particular case from one Chamber to another if a Member withdraws with respect to that case, or if a challenge of a Member with respect to the case is sustained"[64] and notably does so without any limitation regarding when the transfer may occur.[65]

32. Finally, the Tribunal notes that the Award is at least partially upheld by all three Members of Chamber One and that while "Judge Brower prefers to regard himself as the one who was often in a minority, there were a number of important issues on which he formed the majority with the Chairman."[66] As I stated in the introduction to my Concurring and Dissenting Opinion of 27 February 2003 to the Award in this Case, however, while I regarded the Award as "one that uniquely and patently fails to conform to the command of the Claims Settlement Declaration that the Tribunal 'decide on the basis of respect for law' with 'impartiality [and] independence,'" "I [was] compelled nevertheless to concur in the Award lest the Claimant be deprived still further of her due."[67] As such, my concurrence in the Award cannot be interpreted as an unqualified endorsement of the particular conclusions in the Award in which I concurred.

33. In sum, the justifications offered by the Tribunal in respect of the Chairman's refusal to recuse himself are unpersuasive and in no way vitiate the case that Claimant has made in support of the Chairman's recusal from further proceedings in this Case.

C. Separate Decision Concerning Chairman's Recusal

34. Not only has the Chairman refused to recuse himself; he has declined to comply with Claimant's request to issue a separate Decision recording that refusal. In so doing, the Chairman obviously deprived Claimant of whatever opportunity she might have had to challenge his recusal decision. Against the background that is recounted and stated above, it

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[64] *Id.* at para. 5(b).

[65] The practice of the Tribunal under this provision has been simply to replace the withdrawing arbitrator in the Chamber affected and have that same Chamber in the new composition decide the case rather than transfer the case to another Chamber. *See, e.g.*, Presidential Orders Nos. 19 (12 Jan. 1984), 21 (19 Jan. 1984) and 57 (9 Oct. 1987) (ordering in cases involving recusals by Judges Shafeiei, Aldrich, Brower and Noori the placement of other arbitrators as acting Members in those same Chambers).

[66] *Riahi Decision, supra* note 14, at para. 28.

[67] Concurring and Dissenting Opinion of Judge Brower, *supra* note 11, at para. 1 and n.1.

is difficult to avoid the impression that this was done deliberately, and for that purpose, which, if true, itself gives rise to doubts.[68]

V. CLAIMANT'S APPLICATION

35. The failure of the majority properly to explain, much less convincingly justify, its support of the Chairman's refusal to recuse himself in the first part of its Decision necessarily affords little confidence that it can properly adjudicate the Claimant's application. Unfortunately, but by now hardly surprisingly, such lack of confidence has proven to be fully justified.

36. In her Application, Claimant sought the right fully to brief and be heard on the question of whether or not she is entitled to a "full reconsideration of the merits of the entire Case" on the ground that the Award was arrived at under a procedure that was fundamentally biased and unfair in violation of Article V of the Claims Settlement Declaration and Articles 15(1), 20, 24(1), 33, and 40(1) of the Tribunal Rules.[69] More specifically, the Claimant asserted that the Award failed, to Claimant's detriment, (1) to treat the parties equally; (2) to apportion the burden of proof in accordance with the norms of due process; (3) to deal impartially with Iran's witness tampering, its reliance on coerced testimony, and its willful disregard for Tribunal Orders to produce key evidence; and (4) to decide all disputed issues based on established principles of law.[70] Claimant illustrated each of her assertions by pointing to examples of such deficiencies in the Award in the light of the record of the Case.[71] The majority, however, practically ignores the various bases of Claimant's Application and concludes in its Decision that the better view under its jurisprudence is that it may not reopen and reconsider Awards because they are "final and binding" and for that reason alone rejects Claimant's Application.[72] As discussed below, such a conclusion is utterly mistaken.

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[68] Given the Appointing Authority's conclusion that, effectively, Claimant should have challenged Judge Broms within 15 days of filing her renewed Application 2 July 2003 rather than upon later coincidentally learning, as she understood it, that Judge Broms had decided, but had not let it be known outside the Chamber's deliberations, that he would not recuse himself, she may in fact have had no remedy for such a Decision, but neither she nor Judge Broms could have divined this in advance.

[69] Application, *supra* note 2, at 1, 3, 13.

[70] *Id.* at 12.

[71] *Id.* at 3-8.

[72] *Riahi Decision*, *supra* note 14, at para. 58.

37. As an initial matter, given the utterly unique nature of the Application, Claimant, in my view, should have been given the opportunity she requested to make written and oral submissions to the Chamber. To consider and decide such important jurisdictional and substantive issues on the basis only of the original 13-page Application to the Full Tribunal and the 9-page Request submitted to the Chamber neither ensures Claimant's right to be heard nor is consonant with the conscientious discharge of our adjudicative function. Not to have accorded Claimant a full opportunity to present her Application bespeaks the unjudicial treatment she has received at the hands of this same majority.

38. Turning to the substance of the Application, the Tribunal's jurisprudence clearly leaves open the possibility of reconsideration of an award pursuant to its inherent authority in those "exceptional circumstances" where the integrity of its processes has been decidedly compromised.[73] The majority fails, however, even to consider whether or not the infractions alleged in this case, if established, would amount to a subversion of its processes meriting reconsideration. As noted in J.L. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION LAW AND PRACTICE 245 (1959):

> the revision procedure [before international tribunals] is generally in two stages. The first stage is a preliminary hearing on the question whether the petition for revision should be entertained, *i.e.*, whether the tribunal has power to revise its award, and if so, whether there is a prima facie case for revision. . . . The second stage is the hearing on the merits of the question, whether the previous decision should be revised, or whether it should be set aside.

In the circumstances, the majority having failed properly to address the first of these two stages, and in light of the Tribunal's utter failure even to attempt to apply the proper standard in determining whether reconsideration is warranted here, I cannot conclude that the Award may not be reconsidered on the grounds alleged by Claimant, *i.e.*, that the request for reconsideration cannot be entertained, and therefore dissent from the Tribunal's rejection of the Application and Request. In doing so, however, I necessarily refrain from expressing any opinion on the outcome of the second such stage, particularly considering that Claimant had been denied any opportunity to make the written and oral submissions that she requested and that would have been essential to a full and fair exposition of her unique Application.

39. While the ultimate purpose of the Application is to secure a reconsideration of the entire case, the specific relief sought therein is a briefing schedule "established for the

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[73] *Mark Dallal* and *The Islamic Republic of Iran*, Decision No. DEC 30-149-1 (12 Jan. 1984), *reprinted* in 5 Iran-U.S. C.T.R.74, 74-75.

submission of memorials for the purpose of informing the Tribunal more fully on these critical issues . . . [and in which] to provide additional grounds for [Claimant's] charges and to present additional written arguments" and for the Tribunal thereafter to "convene a hearing on this Application, for the purpose of deciding (1) whether to grant the request to open and reconsider the Award, (2) [and] the appropriate procedure for performing the task of producing an amended Award."[74] The Application therefore specifically requests that the Tribunal defer its decision regarding whether or not to reconsider the Award until the parties have had an opportunity to brief in full the issues relating thereto. At this stage of the proceedings, the Application necessarily does not present all the arguments in the detail that the Claimant alleges will support a request for reconsideration of the Award. Since the Application as it stands before the Tribunal is concerned with the first stage of the revision procedure, and because I do not believe it appropriate to consider the merits of the Application without the benefit of a full briefing and hearing on the relevant issues as requested by Claimant, my task here, thus limited, is accordingly accomplished and my duty discharged with the determination that this Tribunal indeed has "the power to revise its award" and that Claimant has established a "prima facie case for revision."

A. The Tribunal's Inherent Authority to Reconsider an Award[75]

40. It is clear that the question as to whether or not the Tribunal has an inherent authority to reconsider an Award under certain circumstances has not been decided and therefore has not been foreclosed. While the majority states that the Tribunal has "turned down"[76] the

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[74] Application, *supra* note 2, at 13.

[75] Although the Application calls plainly for the reconsideration and not technical correction or interpretation of the Award, the majority chooses to preface its consideration thereof with an irrelevant discussion of Articles 35, 36 and 37 of the Tribunal Rules, which permit a party *inter alia* to request within thirty days of the receipt of an award "an interpretation of the award," the "tribunal to correct in the award any errors in computation, any clerical or typographical errors, or errors of a similar nature," or the "tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award." *See Riahi Decision*, *supra* note 14, at paras. 31-32. The majority's prefatory discussion is beside the point since Claimant seeks none of the remedies provided by Articles 35-37, nor is her Application based thereon. For this reason, the majority's assertion that the Application was untimely for having been filed outside the 30-day limit is also irrelevant since such a limit, while applicable to Articles 35-37, has no application to a reconsideration of the Award based on the exercise of the Tribunal's inherent authority, which is the subject of these proceedings. Additionally, the majority appears to suggest that these particular Articles provide the only means available for any modification of an award, and further quote in support of that suggestion my observations in a treatise I co-authored that "[t]he only post-award procedures *expressly* available pursuant to the Tribunal Rules are provided in Articles 35, 36 and 37" and that "[n]o other *express* basis exists for any alteration of an award once it has been rendered." *Id.* at para. 36 (emphasis added). As these quotations show, however, all that these comments affirm – and correctly at that – is that Article 35-37 are the only post-award procedures *expressly* available as set out in the Tribunal Rules, an affirmation entirely consistent with the position that an award may nevertheless be modified on other *implicit* bases – in this Case, the Tribunal's inherent (and thus necessarily implicit) authority to revise an award.

[76] *Id.* at para. 38.

"notion of [such] inherent power," the cases it cites for this proposition merely held that it was unnecessary on the facts thereof to decide whether or not such authority existed, not that it does not exist.[77] On the contrary, the Tribunal has in many cases in fact *expressly reserved* the question of whether such inherent authority exists, including those cases cited by the majority, as the majority itself acknowledges.[78] For instance, in *Dames & Moore* and *The Islamic Republic of Iran et al.*, the Tribunal reviewed the respondent's request for reconsideration and concluded as follows:

> [T]he submissions of Respondent . . . are not such as to justify the exercise of whatever power the Tribunal might possess to reopen and reconsider a case already concluded . . . . In so doing, the Tribunal states no opinion as to the existence of the hypothesized power, but rather *expressly reserves* such question for future decision should the same be required.[79]

41. The majority unwittingly underscores this point in its Decision, noting that the Tribunal has never reached a decision confirming the existence of and the need to apply its "inherent power." Accordingly, the Tribunal fails to cite any cases denying the existence of such inherent authority.

42. Given the absence of any authority for its proposition that such inherent authority does not exist, the majority places special emphasis on the case of *Harold Birnbaum* and *The Islamic Republic of Iran*,[80] which it regards as "a recent precedent which deserves to be given support also in the future."[81] Specifically, the majority points to the statement in *Birnbaum*

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[77] *Id.* at para. 39-41. *See, e.g., Ram International Industries, Inc. et al.* and *The Air Force of the Islamic Republic of Iran*, Decision No. DEC 118-148-1 (28 Dec. 1993), *reprinted* in 29 Iran-U.S. C.T.R. 383 (holding that the question of whether or not the Tribunal has such inherent authority "does not need to be . . . decided for the purpose of the present Case"); *Dames & Moore* and *The Islamic Republic of Iran et al.*, Decision No. DEC 36-54-3 (23 Apr. 1985), *reprinted* in 8 Iran-U.S. C.T.R. 107, 118 (concluding that "the Tribunal states no opinion as to the existence of the hypothesized power [to reconsider awards]").

[78] *See Riahi Decision, supra* note 14, at para. 40 ("[I]n *Gloria Jean Cherafat, et al.*, the Tribunal pointed out that 'the Tribunal practice fails to provide conclusive guidance' on the issue, and . . . found it unnecessary to examine the issue.").

[79] *Dames & Moore, supra* note 77, at 107, 118 (emphasis added). *See also Mark Dallal, supra* note 73 at 74-75 (denying claimant's request for the reconsideration and rescission of the award but reserving the question as to whether or not "the Tribunal has inherent power to review and revise an Award under exceptional circumstances – *e.g.*, when it subsequently transpires that an Award was based on forged documents or perjury"); *Henry Morris* and *The Islamic Republic of Iran*, Decision No. DEC 26-200-1 (16 Sept. 1983), *reprinted in* 3 Iran-U.S. C.T.R. 364, 364-65 (denying request made by claimant *inter alia* for reconsideration of the award but reserving the question as to whether or not the Tribunal has the "inherent power to review and revise an Award under exceptional circumstances – *e.g.*, when an Award was based on forged documents or perjury").

[80] *Harold Birnbaum* and *The Islamic Republic of Iran*, Decision No. DEC 124-967-2 (14 Dec. 1995), *reprinted in* 31 Iran-U.S. C.T.R. 287 ("*Birnbaum*").

[81] *Riahi Decision, supra* note 14, at para. 43 (citing *Harold Birnbaum* and *The Islamic Republic of Iran*, Decision No. DEC 124-967-2 (14 Dec. 1995), *reprinted in* 31 Iran-U.S. C.T.R. 287, 290).

that "the existence of express rules providing that the award is 'final and binding' coupled with the silence of the contracting parties concerning the possibility of revision, makes it difficult to conclude that any inherent power to revise a final award exists."[82] The Tribunal in *Birnbaum* did not rule out such a possibility, however, and indeed specifically stated that it "[did] not exclude that apart from fraud, a similar exceptional and serious ground or grounds might possibly constitute the basis for an application for the revision of its Awards." Additionally, as with the other cases cited by the majority discussed above, this statement is but dictum since the Tribunal in *Birnbaum* ultimately determined that "for the purpose of this Case, the Tribunal need not decide whether it has the authority to revise or correct an award."[83] Finally, any doubt on this score was resolved more recently by the Full Tribunal itself in Case No. A27 when it stated

> that no tribunal can declare itself immune from procedural error or the possibility of fraud, forgery, or perjury that it may not detect. In such hypothetical cases, however, revision of the award could be done only by the Tribunal, if it concluded that it had the authority to do so, not by any other court.[84]

43. Moreover, the practice of other international tribunals indicates that the proper view is that such authority exists notwithstanding any rule that an Award is "final and binding."[85] This is particularly the case if the relevant tribunal, like this Tribunal, sits in judgment on a large number of cases for an extended period of time.[86] As the Tribunal itself stated in *Ram International Industries, Inc. et al.* and *The Air Force of the Islamic Republic of Iran*, one

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[82] *Id.* at para. 42.

[83] *Birnbaum*, *supra* note 80, at 292. The majority amusingly seeks comfort in the fact that the treatise I co-authored and which was published at the beginning of 1998, *see* C.N. BROWER & J.D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998), did not mention *Birnbaum*, which did not appear in the Iran-U.S. Claims Tribunal Reports itself until 2001 (although it was in the public domain immediately following its issuance). Whatever academic demerits such an inadvertent omission might entail, it has no bearing on the result in this case, as *Birnbaum* is of a piece with all other Tribunal cases on this point.

[84] *The Islamic Republic of Iran* and *The United States of America*, Award No. 586-A27-FT (5 June 1998), *reprinted in* 31 Iran-U.S. C.T.R. 39, 58 n.11.

[85] *See, e.g., Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion of 13 July 1954), 1954 I.C.J. 47, 55 (holding that a rule that a judgment is final and without appeal "cannot . . . be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered . . . ").

[86] *See, e.g., Ram International*, *supra* note 77, at 389 n.10 (quoting *Lehigh Valley Railroad (United States) v. Germany* ("*The Sabotage Cases*") (United States-German Mixed Claims Commission of 1922) (Mr. Justice Roberts, Umpire) *reprinted in* 8 U.N. Rep. Int'l Arb. Awards 160, 189-90 ("The Commission is not functus officio. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy [of] its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud.")).

"might possibly" then conclude that "a tribunal, like the present one, which is to adjudicate a large group of cases and for a protracted period of time would by implication, until the adjournment and dissolution of the tribunal have the authority to revise decisions induced by fraud."[87]

44. The majority then goes on to suggest that in any case, even assuming such inherent authority does exist, it need not "investigate any further the possibility of applying the theory of inherent powers" since such inherent powers are not "discussed so far as a general problem related to reconsideration, but especially in relation to possible cases of fraud and perjury" and "[i]n the present Case, there has been no mention of any aspect of fraud or perjury . . . ."[88] Leaving aside the fact that perjured evidence not only is "mention[ed]," but in fact constitutes one of the asserted grounds of the Application, an issue discussed in greater detail below,[89] the majority's suggestion is entirely misconceived since it erroneously assumes that fraud and perjury constitute the *only* "exceptional circumstances" that could bring into play the Tribunal's inherent power to reconsider an award. A careful review of the relevant cases reveals, however, that in raising this question, the Tribunal has spoken of such authority possibly existing where there are "exceptional circumstances," including, but not limited to, fraud or perjury, which are but *examples* of qualifying circumstances. For example, in *Mark Dallal* and *The Islamic Republic of Iran*, the Tribunal expressly reserved the question as to whether or not "the Tribunal has inherent power to review and revise an Award under exceptional circumstances – *e.g.*, when it subsequently transpires that an Award was based on forged documents or perjury."[90] Thus, the Tribunal has never described comprehensively

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[87] *Ram International*, *supra* note 77, at 390. The majority implies, however, that the phrase "might possibly" casts doubt on whether I was correct to conclude that this decision, "despite Judge Holtzmann's reservations, gives a strong indication that at least one Chamber of the Tribunal believes that the Tribunal does possess the necessary inherent powers to reopen and reconsider a final award, at least when 'decisive' evidence has been infected by fraud or perjury." *Riahi Decision*, *supra* note 14, at para. 41 n.34 (quoting C.N. Brower & J.D. Brueschke, The Iran-United States Claims Tribunal (1998) at 259). In considering the question of the Tribunal's inherent authority to reconsider awards based on fraud, the Tribunal in *Ram International* not only undertook a detailed review of the law in support thereof but also went further than prior cases on the issue of what constituted "extraordinary circumstances" justifying reconsideration in this context, specifically stating that the revision of an award must be made upon the discovery of a new fact that is decisive "in the sense that when placed alongside the other facts of the cases, earlier assessed, it seriously upsets the balance, and consequently the conclusions drawn by the tribunal." *Ram International*, *supra* note 77, at 390. That the Tribunal sought at all to define more precisely the content of such inherent authority, even if only in the context of fraud, strongly suggests that the Tribunal did in fact believe it possessed such inherent authority.

[88] *Riahi Decision*, *supra* note 14, at para. 43.

[89] *See infra at* paras. 55-56.

[90] *Mark Dallal*, *supra* note 73, at 74-75. *See also Henry Morris*, *supra* note 79, at 364-65 (reserving the question as to whether or not the Tribunal has the "inherent power to review and revise an Award under exceptional circumstances – *e.g.*, when an Award was based on forged documents or perjury").

what might constitute "exceptional circumstances," much less restricted the potential exercise of such authority to any particular factor.

45. To determine more generally what may amount to "exceptional circumstances" supporting reconsideration of an award, it is necessary to examine the purpose for recognizing such inherent authority, which as articulated by the Tribunal in *Dames & Moore* is to "ascertain the precise balance struck between the finality of Tribunal disposition, on the one hand, and the *integrity of its processes* on the other."[91] Therein lies the key to the proper interpretation of the term "exceptional circumstances." More precisely, the Tribunal's inherent authority must be recognized to exist where there is a distinct compromise of the "integrity of its processes" tilting the balance away from the rule respecting the finality of judgments, which occurs wherever there is "justified concern that the processes of the Tribunal have been subverted."[92] Thus, the Tribunal's posited inherent power is to reopen and reconsider an award in those circumstances where its processes have been subverted.

46. It is worth reflecting a moment on the principle that necessarily underlies this conclusion. To be final an "award" must in fact be an award. The "exceptional circumstances" that would justify a tribunal to review and reconsider an otherwise "final and binding" award must be those that render an award not truly an award as we understand it, *i.e.*, a disposition arrived at without subversion or corruption of the process normally leading to an award. Thus it is only when the fundamental integrity of the arbitral process has been placed in issue that the question of review and reconsideration may arise. Classic examples of such a central assault on the integrity of the arbitral process, as the Tribunal cases have recited, are fraud, particularly in the form of perjured testimony or forged documentary evidence. As these references imply, normally it would be misconduct of parties or witnesses before a tribunal that would be at the root of such an attack. The fact that here, to the contrary, it is asserted misconduct within Chamber One itself that is alleged to have corrupted the Tribunal's processes to a degree mandating vitiation of its Award in no way makes the principle less applicable. To the contrary, misconduct within the Tribunal, should it be found to exist, presents the most compelling case imaginable for revision. I conclude that the Tribunal does have the inherent authority on which the Application is premised.

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[91] *Dames & Moore, supra* note 77, at 115 (emphasis added). *See also Gloria Jean Cherafat, et al.* and *The Islamic Republic of Iran*, Decision No. DEC 106-277-2 (25 June 1992), *reprinted* in 28 Iran-U.S. C.T.R. 216, 221 (quoting with approval the holding in *Dames & Moore*).

[92] *Id.* at 118.

B. The Grounds of the Application

47. Having concluded that the Tribunal has the "the power to revise its award" in those "extraordinary circumstances" where its processes have been subverted, the question that follows is whether or not Claimant has made a "prima facie case for revision." This in turn requires an examination of whether or not the various alleged defects of the Award on which the Application is based raise, if true, "justified concern that the processes of the Tribunal have been subverted." According to Claimant, the Award fails, to Claimant's detriment, (1) to treat the parties equally; (2) to apportion the burden of proof in accordance with the norms of due process; (3) to deal impartially with Iran's alleged witness tampering, reliance on coerced testimony, and willful disregard for Tribunal Orders to produce key evidence; and (4) to decide disputed issues based on established principles of law.[93] It is plain that these alleged defects in the Award, if substantiated, constitute, certainly if taken collectively, and, at least to some extent, individually, such a fundamental departure from due process as to confirm that the processes of the Tribunal have been subverted. The majority, however, has dismissed Claimant's Application with only limited consideration of its various grounds and their extensive supporting allegations, and to the extent it has referred to such allegations, does not properly consider, much less explain, why they cannot be regarded as having validly raised concern that the integrity of the Tribunal's processes as such have been compromised. Yet even a brief review of the grounds upon which the Application is based, and which are discussed below, shows that the Claimant has clearly established a *prima facie* case for her contention that the Award's defects taken together "are compelling evidence of a stunning lack of impartiality and respect for law, an egregious abuse of the arbitral process, and a purposeful, selective disregard for the Tribunal's rules."[94]

48. It is important to note here that all of the Decisions of the Tribunal cited above that left open the question of the Tribunal's inherent authority to reopen and revise awards reviewed thoroughly the grounds on which its presumed authority was invoked and found them not to have been established. In other words, they all were consistent in understanding that in order to dismiss such a request the Tribunal had either to conclude that it did not possess the authority invoked or that, assuming the existence of such authority, its exercise was not warranted. Here the majority, unlike what has happened in every other such case at the Tribunal, has very gingerly avoided addressing the substantive merits of Claimant's

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[93] Application, *supra* note 2, at 12.

[94] *Id.* at 8.

Application to any meaningful extent by, in effect, rendering the first Decision of the Tribunal definitively excluding *any* reconsideration of a Tribunal Award based on misconduct within the Tribunal itself, regardless of how seriously such misconduct might have subverted the integrity of the Tribunal's processes. Apart from the fact that such a breathtaking "door closing" decision should not have been taken by the very majority whose actions were in issue (and that now remain closeted by such decision), it is simply stunning in its implications for the arbitral process.

1. Equal treatment of parties

49. The Claimant alleges that the Tribunal has failed to treat the parties equally in violation of, *inter alia,* Article 15(1) of the Tribunal Rules, which provides that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[95] As a specific example of such failure, Claimant points to the fact that the Tribunal "[u]nfairly reject[ed] a post-hearing submission by Claimant responding to new contentions made for the first time at the hearing, improperly refusing to consider Claimant's reasons for rejecting the new contentions, [and] ignoring evidence already before the Tribunal which supports those reasons."[96] According to the Claimant, while the Tribunal permitted Respondent's witness, Mr. Nabavi, "toward the end of the hearing" "to raise new allegations regarding Claimant's property ownership (such as his alleged signing of a backdated document evidencing a transfer of shares)," which had not once been made during "the 18-year history of proceedings in the Case," the Tribunal "refused to accept" Claimant's "point-by-point" response thereto that "demonstrated that Mr. Nabavi's testimony was neither credible nor relevant for numerous reasons, including: (1) it was contradicted by documents or records whose authenticity was above reproach; (2) Mr. Nabavi admitted at the hearing that he did not know when the share transfer occurred; (3) Respondent's counsel acknowledged in questioning by the Tribunal that the relevant date is when a share transfer takes place, not when a document reflecting the transfer is filed with the Registration Office; and (4) last-minute revelations are inherently untrustworthy, especially when not corroborated and not raised by the witness in prior written testimony on related subjects."[97] In doing so, the Claimant asserts that the Tribunal has "failed to address

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[95] Tribunal Rule, Art. 15(1).

[96] Application, *supra* note 2, at 6.

[97] *Id.*

these serious inconsistencies and contradictions in the evidentiary record, and yet concluded that 'it has no reason to doubt Mr. Nabavi's testimony regarding the date of signing' the document."[98]

50. The majority broadly denies failing to treat the parties equally and, in response to Claimant's specific allegation concerning the Tribunal's rejection of its post-hearing submissions, asserts that in doing so it had in fact "considered the issues . . . in paragraphs 48-54 of its Final Award,"[99] which in turn refer to its Orders in the Case disallowing the submission of evidence any later than two months prior to the hearing, the purpose of which was to prevent the "'unusual step of post-hearing submissions,' unless it is justified under 'exceptional circumstances.'"[100] However, as the Award itself acknowledges, Claimant's post-hearing submission "addressed certain testimonial evidence presented by the Respondent *for the first time at the Hearing.*"[101] The Claimant thus could not have presented prior to the hearing the arguments advanced in its post-hearing submission. This is plainly a situation that involves those "exceptional circumstances" to which the Tribunal refers but which it self-contradictorily fails to apply.[102]

51. Additionally, the majority states that, contrary to Claimant's allegations concerning the unequal treatment of the parties, it in fact has accommodated many demands of the Claimant over the Respondent's objections, but then refers only to one instance of such accommodation, namely its having "allowed a very exceptional filing of surrebuttals and other evidence, thereafter, and postponed a previously scheduled hearing."[103] Even this limited example does not survive closer examination, however. As Claimant made clear in her request for leave to file the surrebuttal evidence, her submission thereof was compelled by the fact that "Respondent presented for the first time numerous arguments and allegations"

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[98] *Id.* (citing Final Award, *supra* note 4, at para. 151).

[99] Application, *supra* note 2, at 19.

[100] *Riahi Decision*, *supra* note 14, at para. 51.

[101] Final Award, *supra* note 4, at para. 38 (emphasis added).

[102] Citing *Dames & Moore*, the majority states further that "there is, if anything, less legal basis for a post-Award review based on [such] procedural decisions, which are 'imbued with judicial discretion, than for a post-Award re-opening of the merits.'" *Riahi Decision*, *supra* note 14, at para. 52. In *Dames & Moore*, however, the Tribunal noted that such "exceptional circumstances" were absent because the facts there suggested that the party submitting post-hearing evidence could have submitted the same prior to the hearing but failed to do so. *Dames & Moore supra*, note 77, at 116 n.9. Here, however, as indicated above, the Claimant could not have presented the arguments in its post-hearing submission prior to the hearing.

[103] *Riahi Decision*, *supra* note 14, at para. 45 (citing Final Award, *supra* note 4, at paras. 25-30).

in its rebuttal evidence.[104] Additionally, the Tribunal had postponed the hearing at the request of and in favor of the *Respondent* over Claimant's objections.[105]

2. Apportionment of burden of proof

52. A second ground for Claimant's Application is the alleged failure of the Tribunal "to apportion the burden of proof in accordance with the norms of due process" and in violation, *inter alia,* of Article 24(1) of the Tribunal Rules, which state that "each party shall have the burden of proving the facts relied on to support his claim or defence."[106] In support thereof, the Claimant refers to the Tribunal's failure to hold Respondent to its burden of proof as to allegations first made at the final hearing in this Case of the fraudulent backdating of ownership documents.[107] According to Claimant, the Respondent had asserted an additional new defense for the first time at that hearing, alleging that certain transfers of shares made pursuant to powers of attorney took place after the deaths of the principals (two of the Claimant's stepsons), and that the documents evidencing the transfers were backdated to make it appear that the shares were transferred before the powers terminated. "Respondent's only 'support' was the coerced testimony of a discredited witness who claimed he was not present when share transfers took place and signed a document (involving one of the disputed share transfers) months after the transfer date shown on the document. The witness had never made such a claim previously in any of the three affidavits he submitted for Respondent on related matters. His testimony did not, and could not, prove Respondent's allegation that the transfer itself took place after the deaths of Claimant's stepsons."[108] The Tribunal, however, not only allowed this new defense, "but also shifted to Claimant the burden of proving that the documents were not backdated: 'Claimant must produce strong evidence to support the fact that the ownership of the shares was transferred to her while the previous owner was alive.'"[109]

53. The majority's primary response to Claimant's allegations regarding the improper apportionment of proof is conveniently to dismiss them (together with all other "remaining

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[104] Claimant's Request for Leave to File Surrebuttal Evidence in Case No. 485 (23 Mar. 1999) (Doc. 184).

[105] *See* Respondent's Comments on Claimant's Doc. 184 (13 Apr. 1999) at 4; Claimant's Opposition to Iran's Request for a Six-Month Postponement to the Hearing (19 Apr. 1999) at 2.

[106] Tribunal Rule, Art. 24(1).

[107] Application, *supra* note 2, at 5-6.

[108] *Id.*

[109] *Id.* (citing Final Award, *supra* note 4, at para. 153).

allegations of the Claimant") as matters related to the "Tribunal's discretion to evaluate written or oral evidence" pursuant to Article 25(6) of the Tribunal Rules, which provides that the "arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." However, while the *standard* of the proof, *i.e.*, the degree or level of proof required to satisfy any burden, may be governed by Article 25(6), the Tribunal has no such discretion with respect to the question of *which party* properly bears the burden of proof, *i.e.*, the allocation of the burden of proof. The latter is governed instead by Article 24(1) of the Tribunal Rules, which provides that "each party shall have the burden of proving the facts relied on to support his claim or defence." Therefore, the majority fails here to account for its alleged improper allocation of the burden of proof in this Case.[110]

54. Additionally, the majority quotes extensively from Case No. A20, apparently in support of the proposition that the Claimant's allegations relate to matters of evidence and therefore cannot be the bases for her request for reconsideration. The Tribunal's citation thereto is utterly inapt. In Case No. A20 Iran asked the Full Tribunal pursuant to Article VI(4) of the Claims Settlement Declaration ("CSD"), which allows any state party to refer to the Tribunal "[a]ny question concerning the interpretation or application of the CSD," effectively to determine the criteria for establishing the nationality of corporations.[111] In rejecting Iran's request, the Tribunal held, *inter alia*, that insofar as Iran's request was interpreted as asking the Tribunal to "lay down a uniform rule of evidence applicable to the establishment of corporate nationality," such a request did not pertain to the interpretation or application of the CSD and the Tribunal therefore had no jurisdiction to consider the request

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[110] While not entirely clear, the majority additionally appears to suggest that any deficiency resulting from the incorrect apportionment of the burden of proof is ameliorated by the fact that "Claimant team had the full opportunity to respond to those arguments presented at the Hearing and they did so." *Riahi Decision, supra* note 14, at para. 53. Regardless of whether or not Claimant in fact had such an opportunity at all times during the hearing, these matters are distinct, and the suggestion begs the question as to why a party should have to discharge a burden that should not be hers to bear even if the opportunity to respond to arguments necessarily allows, which it does not, a party a sufficient opportunity to discharge a burden of proof. The majority then further notes that "Claimant refrained from rebutting certain parts of Mr. Mahvi's and particularly Mr. Nabavi's testimonies at the Hearing, notwithstanding the fact that she had introduced as a [possible] witness, and had available in The Hague, her husband, Mr. Riahi, who had the best factual knowledge of the Case in the Claimant team." *Id.* The majority neglects to mention, however, that Mr. Riahi was eighty-four years old at the time of the hearing, had undergone emergency appendectomy surgery during the proceedings prior to preparing Claimant's Rebuttal Memorial and Evidence in 1996 and whose "health [was] a constant worry for [Claimant]." *See* Claimant's Opposition to Respondent's Request for Additional Time in Case No. 485 (12 Nov. 1997); Claimant's Request for Additional Time in Case No. 485 (26 Jul 1996). Under these circumstances, it is not surprising that Mr. Riahi did not take the stand.

[111] *Islamic Republic of Iran* and *United States of America*, Decision No. DEC 45-A20-FT (10 July 1986), *reprinted* in 11 Iran-U.S. C.T.R. 271, 272.

under Article VI(4).[112] Thus, Case No. A20, which stands for the general proposition that a determination of the contents of rules of evidence is not a question concerning the interpretation of the CSD under Article VI(4), is not remotely relevant here given that Claimant is not pursuing, indeed may not pursue, a request that the Full Tribunal determine any rule of evidence pursuant to Article VI(4).

3. Evidentiary issues

55. Claimant further premises her Application on the Tribunal's asserted failure to "apply sound judgment in dealing with Iran's witness tampering, reliance on coerced testimony and willful disregard for Tribunal orders to produce key evidence."[113] Specifically, Claimant alleges that the Tribunal received and credited testimony from two of Respondent's witnesses, Mr. Mahvi and Mr. Nabavi, despite "overwhelming evidence of witness tampering on the part of the Respondent."[114] According to Claimant, these two witnesses "appeared at the hearing under duress: one admitted he was under a death threat if he returned to Iran and that his daughter and grandson had fled Switzerland because of threats they received; the other had his home and property in Iran confiscated by agents of the Respondent, leaving him and his family destitute, and was pressured by Respondent's agent to sign his name to statements that were 'all lies.'"[115] Additionally, Claimant contends that the Tribunal "arbitrarily refus[ed] to enforce Tribunal orders directing Respondent to produce documents, and then penaliz[ed] Claimant for failure to prove facts the documents would show." Claimant states that with respect to its rejection of the Claimant's proof of her holdings in several companies, the Tribunal had "twice ordered Respondent to produce the share registers and certain other records of these companies, including materials referenced in exhibits submitted by Respondent, all undeniably available to Respondent and highly relevant to the Case." Respondents "refused to comply" but the Tribunal nonetheless declined to draw any adverse inferences from the Respondent's "willful violation" and further ruled in Respondent's favor "rejecting the *prima facie* evidence submitted by Claimant to prove her share ownership and refusing to impose on Respondent the burden of proving facts to rebut that evidence."[116]

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[112] *Id.* at 274.

[113] Application, *supra* note 2, at 12.

[114] *Id.* at 3.

[115] *Id.* at 12.

[116] *Id.*

56. Incredibly, with respect to the issue of coerced evidence, the majority's non-sequitur response is to note that "Mr. Mahvi and Mr. Nabavi were fully available for questions" and then proceed to support this non-issue with inaccurate observations.[117] The fact that Claimant's counsel extensively cross-examined both Mr. Mahvi and Mr. Nabavi during the hearings[118] does not change or excuse the fact that their testimony allegedly was coerced. To this far more pertinent point, the majority has no response.

4. Deciding disputed issues based on the law

57. Finally, Claimant grounds her Application on the alleged failure of the Tribunal to decide disputed issues based on the relevant principles of law in violation of, *inter alia*, Article 33(1) of the Tribunal Rules, which provides that the Tribunal "shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the arbitral tribunal determines to be applicable."[119] Claimant refers in this regard to the Tribunal "improperly disregarding Iranian statutory authority to rule against Claimant's ownership of property conveyed by gift, based on a contrived and unsubstantiated legal theory raised by Respondent for the first time at the final hearing and refuted by Claimant." Claimant had asserted ownership of a significant number of shares given to her pursuant to powers of attorney granted to her husband by his sons (her stepsons) and exercised by her husband in her favor. At the hearing, "the Respondent argued *for the first time* that the share transfers were invalid because the powers of attorney did not expressly provide *in haec verba* for gift transfers."[120] Even though the express authority granted by those powers broadly encompassed, among other things, "'any transaction' and 'any transaction which is conceivable.' . . . the Tribunal not only allowed the Respondent to present this new defense at the hearing but also ruled in the Respondent's favor on that

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[117] *Riahi Decision*, *supra* note 14, at para 50. The majority states incorrectly that I asked Mr. Mahvi twelve questions and Mr. Nabavi thirty questions. *Id.* For the record, in the excepts cited by the majority, I posed nine questions to Mahvi (one question was repeated, another clarified, and the last "question" posed was simply a comment), Hearing Transcript in Case No. 485 on 25 May 2000 at 122-25, and asked Mr. Nabavi twenty-six questions (not counting, again, repeated questions or clarifications). Hearing Transcript in Case No. 485 on 26 May 2000 at 53-61.

[118] *See, e.g.*, Hearing Transcript in Case No. 485 on 26 May 2000 at 4-31, 46-49; Hearing Transcript in Case No. 485 on 25 May 2000 at 92-122, 133-36 and 160-64.

[119] Tribunal Rule, Art. 33(1).

[120] Application, *supra* note 2, at 4

ground, holding that the Claimant could not claim for the shares given to her under the powers of attorney."[121]

58. Another example cited by Claimant is that of the Tribunal "[a]rbitrarily and capriciously applying the A18 caveat to reject Claimant's claim for expropriation of ownership interests in her former residence and another property, absent any 'abuse of right' by Claimant in acquiring those interests."[122] The ownership interests at issue were Claimant's alleged contract rights in two apartment complexes that she owned in Tehran, one of which was a new development then under construction. Claimant asserts that despite Respondent's concession that Claimant did not hold title to real property in either instance as well as the absence of any proof by Respondent that Claimant, a dual national by marriage to an Iranian, was prohibited under Iranian law from owning these rights or abused her Iranian nationality to acquire them, the Tribunal dismissed her claims under the *caveat* in Case No. A18 (concerning ownership of real property by dual nationals). Additionally, with regard to the property under development, "the Tribunal merely assumed without any supporting evidence, that Claimant intended to take title and would not have conveyed her contract rights before the apartments were ready for occupancy."[123]

59. A third and final example adduced by Claimant relates to the Tribunal's refusal to consider the merits of substantial portions of her claim as a result of the misapplication of the "amended claim" jurisprudence under Article 20 of the Tribunal Rules, which provides in relevant part that "[d]uring the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances."[124] Claimant contends that although the Tribunal had found that Respondent expropriated Claimant's property in Iran, "it rejected seven amendments to the Statement of Claim, totaling $1.145 million, on the ground that they were submitted too late to be considered. The amendments were made years before the hearing, and the Respondent, without establishing grounds on which the Tribunal could find prejudice, addressed them at

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[121] *Id.* at 4-5 (citing Final Award, *supra* note 4, at paras. 166, 167 and 172).

[122] *Id.* at 7.

[123] *Id.* (citing Final Award, *supra* note 4, at para. 283).

[124] *Id.*

length in memorials filed well before the hearing and in its presentation at the hearing, as well."[125]

60. Incredibly, the majority makes no effort whatsoever to respond specifically to any of Claimant's contentions regarding the Tribunal's failure to determine disputed issues based on the law as laid out in the three examples discussed above.

C. Conclusion

61. In conclusion, Claimant's assertions regarding the deficiencies of the Award have been thoroughly supported by the many and detailed examples to which she refers. These assertions at the very least amount to, certainly when taken together, a *prima facie* case that the circumstances under which the Tribunal arrived at the Award "justif[y] concerns that the processes of the Tribunal have been subverted," a conclusion that the majority fails meaningfully to address. Accordingly, Claimant has established a *prima facie* case for the reconsideration of the Award and should be afforded the relief sought in her Application, which is the opportunity to more fully make her case that the Award should be reconsidered and, upon such reconsideration, reopened.

D. Final Observations

62. To the extent the majority has expressed reasons for rejecting the Application that can be analyzed in reference to one or more of Claimant's allegations, they have been discussed above. The majority, however, also makes "observations" that are, with respect to the allegations, at once directed to all but applicable to none. These are considered below.

63. The majority disputes any suggestion that there was misconduct with respect to the proceedings leading to the Award and notes, on the contrary, that at the end of the hearing in the Case, Claimant's Counsel thanked the Chairman for having been "patient and kind with us" while the United States' Agent expressed appreciation to the Chamber for having presided over the Case in an "extremely fair and judicious manner."[126] However, such ritual expressions of gratitude on the record at the close of a hearing are little more than formal pleasantries and cannot bear the weight the majority would place on them to support its assertions, particularly in the case of the sentiments expressed by the United States' Agent, which continues with the conditional (not to say ominous) phrase that 'we *trust* that the

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[125] *Id.*

[126] *Riahi Decision, supra* note 14, at paras. 46-47.

deliberations and the swift disposition of the case will be handled in the same fashion.'"[127] The majority additionally quotes from a private letter that I addressed to the Chairman regarding various details of the deliberations that were to follow, which began by thanking him for his "good chairmanship" of the case and congratulating him on the "auspicious" and "successful" conclusion to the case.[128] Quite apart from the fact that the majority again reads far too much into conventional courtesy, it fails critically to note that the quoted words were but prefatory to the main text of the letter, which is omitted from the quotation in the Decision, and which dealt with the deliberations in this Case including their logistics. The majority's omission to quote this letter in full, given that it related to the deliberations to come, doubtless was well advised in light of Judge Jennings' unmistakeable admonition that "Judge Broms . . . should . . . resolve on no account to fall into this error again [of breaching confidentiality of deliberations as] any sign of a repetition might change the balance of a decision in respect to any further challenge."[129] Such belated attention to duty, however, resulted in a portion of the letter being disclosed out of context and hence misleadingly. That the primary concern of the letter was the ongoing business of the Chamber discounts even further the significance of the conventional niceties quoted.

64. Finally, having spent the better part of the Decision avoiding the task of addressing Claimant's allegations in any detail, the majority chooses to conclude by sidestepping their substance entirely. It makes instead the essentially *ad hominem* point that, in its view, "the Claimant's Applications for recusal and reconsideration of the Final Award are based on the Concurring and Dissenting Opinion of Judge Brower,"[130] and then "makes a final observation" as to a completely unrelated case, Case No. A27, and its underlying events.[131] In Case No. A27, the Tribunal considered whether or not the United States had violated its obligations under the Algiers Accords in respect of the refusal by United States courts to enforce the Tribunal's partial award in the case of *Avco Corporation* and *Iran Aircraft Industries, et al.* ("*Avco*").[132]

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[127] *Id.* at para. 47 (emphasis added).

[128] *Id.* at para. 48.

[129] Decision of the Appointing Authority of 7 May 2001, *supra* note 20, at 10-11.

[130] *Riahi Decision*, *supra* note 14, at para. 56.

[131] *Id.* at paras. 56-57 (citing *The Islamic Republic of Iran* and *The United States of America*, Award No. 586-A27-FT (5 June 1998), *reprinted in* 34 Iran-U.S. C.T.R. 39).

[132] *Id.* (citing *Avco Corporation* and *Iran Aircraft Industries, et al*, Partial Award No. 377-261-3 (18 July 1988), *reprinted in* 19 Iran-U.S. C.T.R. 200.

65. In *Avco*, the Claimant, Avco Corporation ("Avco") brought a claim against Iran and certain entities controlled by Iran (collectively "Iran") for, *inter alia,* unpaid invoices, and Iran asserted in turn certain counterclaims against Avco. On 18 July 1988 Chamber Three of the Tribunal, of which I then was a Member, issued a net Partial Award in *Avco* in favor of Iran, and in doing so rejected part of Avco's claims for unpaid invoices on the ground that while Avco had provided the Tribunal "with adequate evidence of the existence of the invoices listed in Avco's accounts receivable ledgers," it did not "include any material allowing the Tribunal to find that the [claimed invoices] were actually payable."[133] (To substantiate its invoice claims, Avco had submitted a verification of the underlying invoices by an independent accountant, but not the invoices themselves.) Disagreeing with this aspect of the Tribunal's decision, I filed a Concurring and Dissenting Opinion in *Avco* noting that with respect to its invoice claims, Avco had in fact been advised by the previous Chairman of Chamber Three at a Pre-Hearing Conference in 1985 that it should *not* submit the copies of the many underlying invoices but should provide independent invoice verification instead.[134] I further noted that "[s]ince Claimant did exactly what it previously was told to do by the Tribunal the denial in the present Award of any of those invoice claims on the ground that more evidence should have been submitted constitutes a denial to Claimant of the ability to present its case to the Tribunal."[135] Iran subsequently petitioned the United States District Court for the District of Connecticut to enforce the Award, and Avco responded by filing a motion for summary judgment in its favor, which latter the District Court granted "after careful review" (and in the absence of any appearance in opposition by Iran). On appeal to the United States Court of Appeals for the Second Circuit, which considered *de novo* the the enforceability of the *Avco* Partial Award, that court first held that the "final and binding" language found in the Claims Settlement Declaration did not bar consideration of the defenses to enforcement provided for in the New York Convention, including Article V(1)(b) thereof, which provides for nonenforcement where "[t]he party against whom the award is invoked . . . [was] unable to present his case."[136] Then, after independently reviewing the record of the case, the Court of Appeals concluded that the then-Chairman of Chamber Three

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[133] *Avco Corporation*, *supra* note 132, at 208.

[134] Concurring and Dissenting Opinion of Judge Brower in *Avco Corporation* and *Iran Aircraft Industries, et al*, Partial Award No. 377-261-3 (18 July 1988), *reprinted in* 19 Iran-U.S. C.T.R. 231, 238. The relevant, transcribed excerpt from the Pre-Hearing Conference was provided with my Opinion.

[135] *Id.*

[136] *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992).

of the Tribunal had specifically "approved the method of proof proposed by Avco, namely the submission of Avco's audited accounts receivable ledgers," and the Tribunal never made Avco aware prior to issuing its Partial Award that "the Tribunal now required the actual invoices to substantiate Avco's claim."[137] As a result, the court affirmed denial of the enforcement of the award on the ground that the Tribunal, "[h]aving thus led Avco to believe it had used a proper method to substantiate its claim," and then rejecting the claim, had deprived Avco of the opportunity of "present[ing its] case" within the meaning of Article V(1)(b) of the New York Convention.[138]

66. Thereupon Iran requested the Full Tribunal in Case No. A27 to rule that this action of the United States through its courts caused it to breach its obligation to provide for enforcement of Tribunal awards. After analyzing the Second Circuit's rationale for affirming the lower court's decision, the Tribunal came to the conclusion that it was erroneous because the Tribunal's partial Award in *Avco* "was based not on the absence of the invoices . . . but on a lack of proof that these invoices were payable."[139] Additionally, the Second Circuit had violated Article IV(1) of the CSD in revisiting the proof-of-invoice issue and thus failing to treat the Tribunal's decision as "final and binding."[140] "Consequently, this erroneous decision by the Second Circuit placed the United States in violation of its obligation to make the Avco award enforceable in the United States."[141]

67. By referring to Case No. A27 and *Avco* without stating why it does so, the majority seems to be wishing to generate an inference that since my Concurring and Dissenting Opinion in *Avco* apparently was "successfully invoked by the Claimant in that Case before the Courts in the United States," whose "adoption" of such opinion served as the "basis for not enforcing a final and binding award in violation of Article IV(1) of the Claims Settlement Declaration," this present Dissenting Opinion somehow should be discounted.[142] In response to this frankly infantile excursion into irrelevancy, and apart from the obvious point that the

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[137] *Id.* at 146.

[138] *Id.*

[139] *The Islamic Republic of Iran* and *The United States of America*, Award No. 586-A27-FT (5 June 1988), *reprinted in* 34 Iran-U.S. C.T.R. 39, 58.

[140] *Id.* at 59.

[141] *Id.* at 59-60.

[142] *Riahi Decision*, *supra* note 14, at paras. 56-57.

American courts, as the record shows and as they are constitutionally bound to do,[143] acted entirely independently, I have only this to say: Had I been a Member of the Tribunal during the pendency of Case No. A27, which I was not,[144] I would immediately upon its filing have recused myself, knowing that no self-respecting and conscientious holder of judicial office would serve as "judge in his own case" (and, incidentally, thereby bring down upon himself enduring public obloquy).

Dated, The Hague
17 November 2004

Charles N. Brower

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[143] Article III of the Constitution of the United States provides that Federal Judges shall retain their position on the bench during their "good Behaviour." Federal Judges are further bound to perform their duties "impartially and diligently" and "hear and decide matters assigned." *See* Code of Conduct for United States Judges at Canon 2, available at http://www.uscourts.gov/guide/vol2/ch1.html.

[144] From 1 April 1988 to 1 January 2001 I served as a Substitute Member of the Tribunal pursuant to Note to Art. 13 of the Tribunal Rules of Procedure.