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

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران ایالات متحده
CASE NO: A15(IV) پرونده شماره:
FILING DATE: - 2 JUL 2014
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۱۳۹۳/۴/۱۱ تاریخ ثبت:
شماره سند:

THE ISLAMIC REPUBLIC OF IRAN,
Claimant

and

THE UNITED STATES OF AMERICA,
Respondent

SEPARATE OPINION OF JUDGE O. THOMAS JOHNSON

CONCURRING IN PART, DISSENTING IN PART

I. INTRODUCTION

1. This is a case in which little money was at stake. Nonetheless, it is a case that presented a large number of discrete questions, many of which were not easy to answer. I in fact agree with most of the Award's answers to those questions, including its answers to some of the more important and difficult questions presented. I disagree, however, with seven decisions stated in the Award, two of which alone increase the amount of the award to almost three times what I believe can be justified. I will turn to all of these disagreements presently. First, however, in order to keep the extent of my disagreement with the Majority in

perspective, it will help for me to summarize at least the important parts of the Award with which I am in full, or very substantial, agreement.[1]

II. POINTS OF AGREEMENT

2. I essentially agree that the effect of Article VII, Paragraph 2, of the Claims Settlement Declaration is to bring within the termination obligation of the United States any legal proceeding in U.S. courts based on a claim that also is the subject of a claim filed with the Tribunal.[2] This holding by itself brings the large majority of suspended cases within the United States' obligation to terminate litigation. *See* Award at para. 35.

3. With regard to the "A" claims, I concur in the Award's construction of the "reasonably compelled" standard. In particular, I agree that "the Tribunal cannot conclude as a general matter that it would be unreasonable for any defendant in a case suspended pursuant to an order such as Executive Order 12294 to feel compelled to respond to submissions by plaintiffs, to respond to requests for information from courts, and, in some circumstances, to initiate action in the suspended case." Award at para. 78.

4. With regard to both the "A" and "D" claims, I generally concur in the Award's construction of the phrases "making appearances" and "filing documents," as set forth in Paragraph 83 and note 75 of the Award.[3]

5. With regard to the "D" claims, I note that the Award contains no discussion of the "prudent defense of its interests" standard, applicable to "D" claims, other than what is implicit in the Award's discussion of the standard applicable to "A" claims – "reasonably compelled in the prudent defense of its interests." Be that as it may, I agree with the Award's application of the "prudent defense" standard in all but two of the "D" claims (discussed in the next paragraph).

6. Further with regard to the "A" and "D" claims, I agree that the Tribunal has done a careful, indeed meticulous, job of reviewing the relevant evidence of appearances and filings, including all relevant invoices (*see* Award at paras. 247-48). I join the Concurring and

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[1] Footnote 26 of the Award states that the Tribunal has considered the content of this Separate Opinion "as known to it as of 24 June 2014." The draft of this opinion that was known to the Tribunal on 24 June was the penultimate draft, and it was circulated on 13 June.

[2] I do not agree with the Majority's application of this generally correct conclusion in the *Jafari* case. *See* ¶¶ 84-93 below.

[3] I join the Concurring and Dissenting Opinion of Judge Charles N. Brower, and like Judge Brower, I dissent to the Tribunal's decision to consider that settlement negotiations occur "as a result of" appearances and filings.

Dissenting Opinion of Judge Charles N. Brower concerning specific expenses in the "A" cases listed in Annex A and the "D" Cases listed in Annex B, however, because I disagree with certain decisions made regarding the compensability of expenses within the framework of "appearances and filings." In addition, for the reasons stated below, I disagree with the Award's conclusions with respect to *Raji* and *Hoffman* ("A" cases) and *Saghi* and *Jafari* ("D" cases). These four cases are discussed at Paragraphs 46-98 below. Thus, I would have awarded $71,531.73 in specific expenses for "A" and "D" cases.[4]

7. With regard to the "H" claims, I agree with the Award's conclusions with respect to *Dames and Moore* and *Marriott* regarding appearances and filings. Accordingly, I agree with the Majority's award of $7,152.34 for appearances and filings for "H" claims. I disagree, however, with the Majority's conclusions with respect other issues in the *Marriott* case. *See* Paragraphs 33-45, below.

8. I concur in the Award's conclusion that monitoring expenses are compensable (Award at paras. 220-223), and in its description of compensable monitoring activities (Award at para. 222). I also concur in the Award's estimate of monitoring expenses incurred by seven law firms based on non-case-specific portions of invoices (Award at paras. 238-239) and in its identification of specific compensable monitoring activities in the invoices that were case-specific. I join the Concurring and Dissenting Opinion of Judge Charles N. Brower, however, because I disagree with certain decisions made regarding the compensability of expenses within the framework of "monitoring." Thus I would have awarded $13,508.33 in monitoring expenses.[5]

9. I concur in the Award's dismissal of Iran's claim for B.I.L.S. expenses, for the reasons stated at Paragraphs 242-46 of the Award.

10. I concur in the Award's conclusion that Iran is not entitled to compensation for the "other losses" that it claimed in respect of the *Behring* case, but I disagree with certain statements made in that portion of the Award, as described at Paragraphs 103-105 below.

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[4] Iran is awarded $70,144.39 for appearances and filings in respect of the "A" cases and $56,070.32 in respect of the "D" cases, for a total of $126,214.71. Award at ¶¶ 195 & 196. From these amounts I have subtracted the specific expenses awarded in respect of the *Raji* and *Hoffman* "A" cases ($25,930.19) and the *Saghi* and *Jafari* "D" cases ($20,579.62). *See* Award at ¶ 54, note 61; ¶ 94, note 87; ¶ 201, note 199; and ¶ 104, note 99. I have also subtracted the additional $8,173.17 that Judge Brower finds objectionable for the reasons stated in his Concurring and Dissenting Opinion.

[5] This amount is $7,338.12 awarded to Iran for the work of seven law firms, plus $7,456.60 awarded to Iran based on monitoring activities in the case-specific invoices, Award at ¶¶ 238-41, minus the $1,286.39 that Judge Brower finds objectionable for the reasons stated in his Concurring and Dissenting Opinion.

11. Thus, I would award Iran a total of $92,192.40, plus interest. The Majority, however, has seen its way to almost tripling this principle amount. As I have already indicated, most of that increase is accounted for by two decisions with which I strongly disagree: the decision to award Iran $70,000 as an approximation of the losses incurred by Iran as a result of monitoring services performed by the law firm of Shack & Kimball, and the decision to award Iran $50,000 representing the amount held in escrow in the *Marriott* case. The first of these decisions is very difficult to justify because Iran's evidence does not provide a basis for *any* approximation of Iran's losses resulting from Shack & Kimball monitoring activities, and the Majority wholly fails in its attempt to articulate a basis for its approximation. The second decision is simply, and plainly, wrong, for multiple independent reasons.

III. POINTS OF DISAGREEMENT

A. "APPROXIMATION" OF MONITORING EXPENSES FOR SHACK & KIMBALL

12. I disagree with the Majority's decision to award Iran $70,000 as an approximation of the compensable monitoring expenses incurred by the law firm of Shack & Kimball. There simply is nothing in the record of this case to support such an approximation, or *any* approximation.

13. After concluding (correctly, in my view) that monitoring expenses were in principle compensable,[6] the Award proceeds in the next paragraph to discuss "proof of monitoring expenses." That paragraph reads, in its entirety, as follows:

> As noted, Iran did not specify how much of the total U.S.$860,857.33 sought on its claims for monitoring expenses and unallocated litigation costs relates to monitoring expenses. Nor did it specify which aspects of its evidence support its claim for monitoring expenses.[7]

I cannot understand why this accurate observation is not the end of the matter. Completely apart from questions of proof, Iran has not seen fit to put a value on its claim for monitoring expenses. Instead, Iran has made a claim for what it calls "general litigation expenses," which are expenses that cannot be allocated to specific cases and are to be distinguished from specific expenses, which can be so allocated (discussed at Paragraphs 194-96 of the Award). Iran describes these "general litigation expenses" in its General Brief as follows:

> In addition to the expenses specifically charged in cases litigated before U.S. courts, there are also some general litigation costs paid to U.S. law firms for

[6] Award at ¶ 223.

[7] Award at ¶ 224 (footnote omitted).

> the post-19 July 1981 period. These expenses, being of general nature, cannot naturally be specifically allocated to the cases at issue. *The general costs comprise of costs of U.S. court participation, as referred to in the IDs, and monitoring.*[8]

14. Nowhere does Iran offer its own approximation of how much of the $860,857.33 it claims as "general litigation expenses" ($807,705.81 of which is based on the alleged services of Shack & Kimball) consists of monitoring expenses, and nowhere does Iran offer even a suggestion of how this Tribunal should go about making such an approximation. This cannot be an oversight, for it has been plain since the issuance of Partial Award No. 590 that the only expenses for which Iran even *might* be compensated were expenses incurred as a result of appearances and filings, and monitoring expenses. General litigation expenses are not compensable, yet that is what Iran's claim is for. Iran either is unable to estimate the amount of its claim that is attributable to monitoring activities or is unwilling to make such an estimate. I do not understand why the Majority has rushed in where Claimant feared to tread.

15. Three paragraphs after noting that Iran did not specify an amount for its monitoring claim, the Majority begins to piece together its rationale for both constructing and valuing a monitoring claim that has not been presented to the Tribunal. This construction project begins in Paragraph 227 (footnotes omitted):

> As an initial matter, unlike with respect to the substantiation of Iran's specific litigation expenses, Partial Award No. 590 has established no rigorous standard of proof with respect to the substantiation of Iran's monitoring expenses.

To be sure, Partial Award 590 established a different standard of proof for monitoring expenses than it did for specific litigation expenses, and the Majority quotes that standard in Paragraph 214. It will be useful to have that standard in mind as this discussion proceeds: "The Tribunal . . . expects Iran to produce factual evidence of the losses it suffered as a result of the monitoring of the suspended claims."[9] So, what we need to see in the Majority's explanation of this part the Award is *factual evidence* of losses suffered by Iran as a result of the *monitoring* of *suspended claims.*

16. In the next paragraph (Paragraph 228), the Majority describes the evidence submitted by Iran on which the Majority later relies in "approximating" Shack & Kimball monitoring expenses (footnotes omitted):

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[8] Iran's Brief & Factual Support for Compensable Losses Vol. 1, Doc. 1548, at 38 (emphasis added).

[9] *Islamic Republic of Iran* and *United States of America*, Award No. 590-A15(IV)/A24-FT, paras. 102 & 214 A (a)(4) (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 138 & 165-66.

> Iran has submitted contemporaneous evidence showing that, during the period here relevant, Shack & Kimball provided to Iran, among others, services relating to: (i) United States court litigation that was the subject of the United States' termination obligation, including monitoring of suspended claims; (ii) United States court litigation that was not the subject of the United States' termination obligation; (iii) litigation before the Tribunal; and (iv) the return to Iran of Iranian assets located in the United States. Further, it is undisputed that Iran made payments to Shack & Kimball for services rendered.

The only authority cited for the four categories of evidence described in this paragraph appears at footnote 226, which reads as follows:

> For example, in a telex Mr. Shack sent to Iran on 4 November 1981, itemizing "the amounts due to Shack and Kimball for legal services rendered to the Islamic Republic of Iran as general counsel in matters of litigation, return of assets, and general representat[i]on," he advised Iran that, during the period July-November 1981, Shack & Kimball billed Iran a total of U.S.$427,397.47 for services rendered as general counsel.[10]

17. The problem with this telex from Mr. Shack is that it does not in any respect "show" that he provided services "including monitoring of suspended claims." Its first – and only pertinent paragraph – reads as follows (capital letters in original):

> PURSUANT TO YOUR TLX OF NOVEMBER 1, 1981, THE FOLLOWING IS AN ITEMIZATION OF THE AMOUNTS DUE TO SHACK AND KIMBALL FOR LEGAL SERVICES RENDERED TO THE ISLAMIC REPUBLIC OF IRAN AS GENERAL COUNSEL IN MATTERS OF LITIGATION, RETURN OF ASSETS, AND GENERAL REPRESENTATION.[11]

There then follows a list, by month, of fees billed and paid. Nothing in the telex refers to monitoring services, and nothing in the telex refers to any specific case or cases, be they suspended or otherwise. Thus nothing in the telex provides any basis for concluding either that Shack & Kimball performed monitoring services or, if it did, that any such services related to suspended cases. It plainly does not constitute "factual evidence of the losses [Iran] suffered as a result of the monitoring of suspended claims," which is the evidence required by Partial Award 590.[12]

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[10] This telex is in the record at Iran's Brief & Factual Support for Compensable Losses Vol. I, Doc. 1548, Annex 11 (Telex dated 4 Nov. 1981, Exhibit No. 3 to Affidavit of Homayoun Rouh-Afzay).

[11] Iran's Brief & Factual Support for Compensable Losses Vol. I, Doc. 1548, Annex 11 (Telex dated 4 Nov. 1981, Exhibit No. 3 to Affidavit of Homayoun Rouh-Afzay).

[12] Apart from this footnote, and the deletion of a short paragraph at the end of this part III.A., this part of my Separate Opinion reads as it read on 13 June. I add this footnote to reply to the Majority's comment at the end of its footnote 226 noting that the term "monitoring" was not used at the time by the parties to describe any legal services and "does not appear in the contemporaneous evidence considered by the Tribunal, including Mr. Shack's 4 November 1981 telex to Iran . . . ." The Majority then parenthetically takes me to task for considering

18. The Majority proceeds in the next paragraph (Paragraph 229) to offer the following assessment of Iran's evidence:

> Iran, however, has not submitted any contemporaneous or other adequate evidence that would allow the Tribunal to determine the precise extent of Shack & Kimball's monitoring activities or, even less, how much Iran paid Shack & Kimball specifically for monitoring activities rather than other activities performed by the firm.

This statement may fairly be characterized as a misleading description of Iran's evidence because the Majority has described no evidence whatsoever that says anything about even whether, much less to what extent, Shack & Kimball provided monitoring services to Iran with respect to suspended cases.

19. In the next two paragraphs, the Majority discusses various cases in which tribunals arrived at approximations of damages when presented with evidence that did not permit them to "precisely quantify compensation" (but in all of which the claimant presented evidence that might form the basis of some approximation).[13] The Majority then makes the following, very surprising, statement in the next paragraph (Paragraph 232; italics in original, footnotes omitted):

> As noted, in the present Cases, while Iran has proven the *fact* that Shack & Kimball provided monitoring services to it, it has not proven the precise *extent* and *value* of those services. The lack of conclusive evidence on these points therefore makes it impossible for the Tribunal to determine the precise extent of the losses that Iran has suffered. Consistent with the principles set forth above, however, given that Iran has proven the fact of its losses, its failure to prove their exact extent should not preclude it from recovering damages altogether.

One is left to wonder just where it is that "Iran has proven the *fact* that Shack & Kimball provided monitoring services," and just why the Majority takes it as "given that Iran has proven the fact of its losses." No authority is offered for either statement, so one is left to

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this telex to be insufficient evidence because nothing in the telex refers to "monitoring services." It appears that even with the language of the telex quoted in my Separate Opinion, my description of that language was too cryptic for the Majority. I should have said that the telex contains no description whatsoever of the sorts of services provided and thus contains no information that we might use to determine whether, much less to what extent, Mr. Shack provided services that this Tribunal includes within its definition of "monitoring." But at least footnote 269, in its last sentence, clarifies for the reader the Majority's thought process: "The words 'general representation' as employed in Mr. Shack's 4 November 1981 telex are taken by the Tribunal to encompass relevant monitoring activities carried out by Shack & Kimball." In other words, the Majority's award of $70,000 for Shack & Kimball monitoring activities is based solely on an assumption ("the words 'general representation' . . . are taken . . . to encompass"), not on any "factual evidence of the losses [Iran] suffered as a result of the monitoring of the suspended claims."

[13] Award at ¶ 231.

refer back to the paragraphs just discussed, where one is reminded that the only evidence cited by the Majority is a telex from Mr. Shack that says nothing whatsoever about monitoring activities. The Majority refers to not the slightest "factual evidence of the losses [Iran] suffered as a result of the monitoring of suspended claims" yet takes it as "given that Iran has proved the fact of its losses."

20. The position of the Majority in this regard might be compared with that of a person (call him "J" for judge) who is asked by the owner of an orchard of mixed types of fruit trees to pay him $1 for each pear in the orchard. All the owner tells J about the orchard is that its trees now bear 807,705 pieces of fruit. The owner does not tell J how many pears are in the orchard; the owner does not tell J how many *pear trees* are in the orchard; indeed, the owner does not tell J whether there are *any* pear trees in the orchard. Finally, J is only permitted to pay the owner an amount that is supported by factual evidence, *supplied by the owner*, of the number of pears in the orchard. Does anyone really think that, in these circumstances, J would believe that he had a basis for paying the owner anything? Would that view change if, contrary to the evidence cited by the Majority, the owner told J that there were *some* pear trees in the orchard? Would anyone think that the mere statement of the owner that the orchard contained *some* pear trees constituted sufficient "factual evidence" to form the basis of any "approximation" of the number of pears in the orchard? These questions answer themselves. The Majority, however, prefers to pretend that the owner of the orchard has provided factual evidence that there are some pear trees in the orchard and then to further pretend that this pretend fact, by itself, is sufficient "factual evidence" of the number of pears in the orchard to support an "approximation" of 70,000.

21. It has to be obvious to anyone that the $70,000 awarded to Iran in respect of Shack & Kimball monitoring activities does not represent any approximation of the extent of those activities. Instead that figure represents a decision of this Tribunal to award Iran rather substantial compensation in recognition of the fact that the Majority believes, in the absence of the required "factual evidence," that Shack & Kimball in fact did some compensable monitoring work. I share that belief, but I do not see where this Tribunal finds the authority to award damages based on that belief, given that Iran was required by Partial Award 590 to supply the Tribunal with factual evidence of its monitoring costs and has failed to do so. Because there is literally no evidence upon which to base an approximation of compensable monitoring costs, this part of the Award makes no sense on its own terms. It might make sense as an award *ex aequo et bono,* but we do not have the authority to render such an

award. Even if we had such authority, however, I would not use it in these circumstances because Iran chose not to provide this Tribunal with its own estimate of its compensable monitoring costs, choosing instead to seek compensation for a larger amount that included other "general litigation expenses." Iran also chose not to provide this Tribunal with the invoices and billing records that would allow us to determine – or at least reasonably estimate – Shack & Kimball's monitoring expenses.[14] Under these circumstances, an award of no compensation would not be "grossly unfair," as the Majority states,[15] but rather the proper and logical consequence of Iran's choices, as Claimant, not to provide the Tribunal with evidence, or argument, or even a claim, that might help the Tribunal to approximate Shack & Kimball monitoring expenses. Choices have consequences, and in my view the consequence here should be an award of no compensation.[16]

B. "ARGUABLY" WITHIN THE TRIBUNAL'S JURISDICTION

22. The phrase "arguably fall[s] within" did not appear in the Algiers Declarations or even in Executive Order 12294.[17] The language first appeared in the Statements of Interest submitted, unilaterally, by the United States on 26 February 1981 in cases pending against Iran in American courts.[18] Partial Award No. 590 picked up this language in certain paragraphs describing the obligation of the United States to terminate litigation. For example Paragraph 214 A (a)(2), echoing Paragraph 89, begins as follows:

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[14] Award at ¶¶ 149-56.

[15] Award at ¶ 232.

[16] I also could support an award of truly nominal compensation – which is to say, compensation of no more than $100 – provided that it is labeled as such. There is ample precedent for awarding such compensation in breach-of-contract cases where the plaintiff has failed to prove damages. *See* Restatement (Second) of Contracts § 346 (1981) ("If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages.")

[17] Exec. Order No. 12294, 46 Fed. Reg. 14,111 (Feb. 24, 1981). The Executive Order states "[a]ll claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II [of the Claims Settlement Declaration] . . . and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal."

[18] *E.g.*, Statement of Interest of the United States, *Crocker Nat'l Bank v. The Government of Iran*, No. 79cv6493 (S.D.N.Y., Statement filed Feb 26, 1981), *reprinted in* 20 I.L.M. 363 (1981). In this statement, the United States "requests that this court (1) stay litigation of those claims against Iran arguably within the Tribunal's jurisdiction, and (2) vacate the attachments against Iranian assets." This model Statement of Interest is quoted in the U.S. Statement of Defense to Claim Nos. IVA-E and G-H, Doc. 87, at 21. I note with approval the fact that, while the Award often cites statements of interest filed by the United States in various of the cases here at issue, and while it often attaches (correctly, in my view) relevance to those statements, it never actually bases a conclusion on them. These statements are best viewed as part of a United States effort to comply with, rather than to define, its obligations. In any event, those obligations are what they are.

> The Algiers Declarations oblige the United States to terminate all legal proceedings initiated by United States nationals against Iran in United States courts involving claims that arguably fall within the Tribunal's jurisdiction.[19]

23. In the very next subparagraph of the *dispositif*, echoing Paragraph 101, the Partial Award states the relevant criteria for distinguishing claims that did and did not "arguably fall" within the Tribunal's jurisdiction:

> If . . . the Tribunal concludes that Iran was reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981 in any litigation *in respect of claims described in Article II, paragraph 1, of the Claims Settlement Declaration* or in respect of claims filed with the Tribunal until such time as those claims are dismissed by the Tribunal for lack of jurisdiction, then the Tribunal will find that the United States has not complied with its obligations under General Principle B of the General Declaration and Article I and Article VII, paragraph 2, of the Claims Settlement Declaration.[20]

"[C]laims described in Article II, paragraph 1 the Claims Settlement Declaration," of course, are claims over which this Tribunal *actually* has jurisdiction. Thus, I would have read Paragraphs 214 A (a)(2) and (3) together and applied a standard that is based on the Algiers Declarations and that does not expand the obligations imposed on the United States by those Declarations.

24. It is regrettable that the Majority rejects my preferred approach and instead concludes that "if, at the time that termination obligation arose, there was *any possibility* that a claim could have fallen within the Tribunal's jurisdiction, as defined in Article II, Paragraph 1, of the Claims Settlement Declaration, the United States should have terminated the related legal proceedings in United States court."[21] This conclusion is wholly unsupported by the language of the Algiers Declarations and impermissibly broadens the obligations actually undertaken by the United States.

25. The Majority correctly observes that the Partial Award states five times "in the context of Claim A, that the Algiers Declarations oblige the United States 'to terminate all legal proceedings . . . against Iran in United States courts involving claims that *arguably* [emphasis added by Majority] fall within the Tribunal's jurisdiction.'"[22] The Majority also

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[19] *Islamic Republic of Iran* and *United States of America*, Award No. 590-A15(IV)/A24-FT, para. 214 A (a)(2) (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 165-66.

[20] *Islamic Republic of Iran* and *United States of America*, Award No. 590-A15(IV)/A24-FT, para. 214 A (a)(3) (28 Dec. 1998) (emphasis added), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 166.

[21] Award at ¶ 45 (emphasis added) (footnote omitted).

[22] Award at ¶ 41 (omission in original).

correctly observes that "[i]n Partial Award No. 590, the Tribunal did not clarify the meaning of the phrase 'claims that arguably fall within the Tribunal's jurisdiction.'"[23] The Majority also could have observed, with equal accuracy, that, in the Partial Award, the Tribunal did not indicate why it chose to use language found nowhere in the Algiers Declarations, much less that it thought the "arguably" language was

> an essential element of [its] decision of Claim A and reflects the fact that (i) only the Tribunal has the power to determine whether it has jurisdiction over a claims; and (ii) the United States, when implementing its obligation to terminate litigation, could not know in advance the claims over which the Tribunal ultimately would take jurisdiction.[24]

26. The fact is that the Partial Award contains not the slightest hint that our predecessors employed the "arguably" language because the United States could not know in advance how the Tribunal would rule on jurisdictional questions. This is an *ex post* rationale created by the Majority to justify adoption of one of two plausible constructions of Partial Award No. 590. One of these constructions – the one favored by the Majority – rather obviously goes beyond the plain meaning of the language of the Algiers Declarations, the other – which I favor – does not.

27. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." One must strain to reconcile with Article 31(1) a construction of the Algiers Declarations that obliges the United States to terminate litigation involving claims over which this Tribunal only "arguably" (or only "possibly") has jurisdiction. That our predecessors did not even attempt such a reconciliation, that they saw no need to articulate the Majority's *ex post* rationale, strikes me as rather substantial evidence that they did not intend their language to require the rationale offered by the Majority, and that they did not think they were in any sense going beyond the plain meaning of the relevant provisions of the Algiers Declarations.

28. Thus there is wisdom in the Majority's admonition that the two holdings found in Paragraphs 214 A (a)(2) and (3) of the Partial Award must be read together.[25] By reading these paragraphs of the *dispositif* together one finds a construction of the Partial Award that easily fits within Article 31(1) of the Vienna Convention and does not require the rationale

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[23] Award at ¶ 36.

[24] Award at ¶ 42.

[25] Award at ¶ 41.

offered by the Majority that apparently never occurred to our predecessors. The Majority prefers to read the "arguably" language in Paragraph 214 A (a)(2) alone and label it "*res judicata.*"[26] As indicated above, I would prefer that we read Paragraphs 214 A (a)(2) and (3) together and not attribute to our predecessors an intention to construe General Principle B in a manner that expands the obligations assumed by the United States in the Algiers Declarations. I would feel differently had our predecessors offered the rationale now offered by the Majority. I would think it was wrong to so rule in the Partial Award, but I would accept that it was the intended ruling.

29. I would think it wrong to so rule in the Partial Award, and think it wrong to so rule in this Award, because the Majority's rationale does not support, much less compel, the conclusion that the Majority draws from it. To say that "[t]he term 'arguably' is an essential element of the Tribunal's holding"[27] because the United States could not itself determine whether the Tribunal had jurisdiction over any particular claim is, quite simply, a *non sequitur*. The fact that a State cannot itself definitively determine just what conduct on its part will comply with an international obligation – that is, that no State can be the judge in its own case – is not a justification for broadening an obligation. Every day States make judgments about what they must do to comply with international obligations; if they judge wrongly, their responsibility is engaged.

30. The issue here is no different. The only question is: What judgment was the United States required to make, a judgment whether this Tribunal had jurisdiction over a claim, or a judgment whether "there was any possibility" that a claim might fall within the Tribunal's jurisdiction? It is not clear that one judgment is easier to make than the other. What is clear is that the Majority has taken a treaty obligation to terminate litigation concerning claims that fell within the Tribunal's jurisdiction, combined it with unnecessary and unfortunate language in Partial Award No. 590 that introduced the word "arguably," assigned no weight to other language in the Partial Award that also defined the termination obligation of the United States in terms of claims over which the Tribunal *in fact* had jurisdiction, and created a new, obviously broader, obligation to terminate litigation "if . . . there was *any possibility* that a claim could have fallen within the Tribunal's jurisdiction."[28] And all based on the rationale that the United States cannot be the judge in its own case.

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[26] Award at ¶ 41.

[27] Award at ¶ 42.

[28] Award at ¶ 45 (emphasis added) (footnote omitted).

31. If the Majority had resisted the temptation to find new treaty obligations in the Partial Award and ruled simply that the United States was obliged to do what is stated in the Claims Settlement Declaration, and in Paragraphs 101 and 214 A (a)(3) of Partial Award No. 590, the Majority could then have proceeded to find the United States in violation of its obligations wherever it failed to terminate litigation related to a claim over which this Tribunal actually had jurisdiction. Instead, the Majority applies its new "any possibility" obligation to the 23 cases subject to this standard that did not have Tribunal counterparts and concludes that, of these cases, 13 could not possibly fall within the Tribunal's jurisdiction and 10 could.[29] First, as a matter of logic, a conclusion that there was not "any possibility" that a claim would fall within the Tribunal's jurisdiction necessarily reflects a judgment that the claim *did not actually* fall within the Tribunal's jurisdiction. Second, it is a fact that, of the 10 cases that the Majority finds "arguably," or possibly, fell within the Tribunal's jurisdiction, eight are cases in which the existence of Tribunal jurisdiction was so plain that the United States did not even argue to the contrary in the A15(IV) proceedings.[30]

32. Having implicitly found that 13 cases did not *in fact* fall within the Tribunal's jurisdiction, and presented with a *de facto* admission by the United States that eight of the remaining cases *in fact did* fall within the Tribunal's jurisdiction, it is regrettable that the Majority felt it necessary both to construe the Partial Award as creating a new treaty obligation and to expand that new obligation by adding a new "any possibility" standard that in the end would be applied in only two cases. It would have been so easy, not to mention correct, to apply the language of the Claims Settlement Declaration, and of Paragraphs 101 and 214 A (a)(3) of the Partial Award, and decide whether the claims in those two cases *in fact* fell within the Tribunal's jurisdiction.

C. *MARRIOTT CORP. V. ROGERS & WELLS*

33. *Marriott Corp. v. Rogers & Wells* was based on a series of contracts concluded in the late 1970s, and proceeded in American court with an American plaintiff, an American defendant, and an Iranian party as a subsequent "interpleader defendant." On 13 December 1977, Marriott and the Pahlavi/Alavi Foundation signed a contract to modify their pre-

[29] As stated in note 47 of the Award, the final United States case that lacks a Tribunal counterpart is *Marriott*, which the Tribunal finds was *actually* within its jurisdiction.

[30] These cases are *Brown & Williamson v. Iranian Tobacco Corp.*, 81-0283 (S.D.N.Y.); *Int'l Harvester Co. v. Iran*, 80-1714 (S.D. Cal.); *Itek Corp*., *v. Iran* 79-1492 (N.D. Tex.); *Itek Corp. v, Iran*, 79-2383 (D. Mass); *Itek Corp. v. Iran*, 79-6468 (S.D.N.Y.); *Pullman Swindell v. Nat'l Iranian Steel Co.*, 81-0081 (S.D.N.Y.); *U.S. Filter Corp. v. Iran*, 79-3449 (D.D.C.); and *R.L. Pritchard & Co. v. Oregon Rainbow, Iran Express Lines*, 81-0886 (S.D.N.Y.).

existing relationship. Paragraph 1 of this 13 December 1977 contract set out the payments to Marriott as follows:

> (a) $1,150,000 shall be paid upon the execution of this Agreement; and
> (b) $50,000 shall be placed in escrow (pursuant to an escrow agreement to be executed) with the firm of Rogers & Wells, New York, New York, *and shall be remitted to Marriott upon the satisfactory performance of their obligations pursuant to Paragraph 6*.[31]

34. Paragraph 6 of the 13 December 1977 contract, in turn, sets out particular obligations that Marriott must perform, if Marriott received notice – within a defined time period – from the Pahlavi/Alavi Foundation:

> Marriott will correct or cause to be corrected, at no additional cost to Owner [the Pahlavi/Alavi Foundation], any errors or omissions in the plans and specifications . . . if written notice of such errors and omissions is given by Owner to Marriott *within one hundred and fifty (150) days from the date of this Agreement*.[32]

35. The separate escrow agreement contemplated in Paragraph 1 of the 13 December 1977 contract was concluded between Rogers & Wells, Marriott, and the Foundation on 27 December 1977.[33] The separate escrow agreement provided in relevant part that:

> If you [Rogers & Wells] have been advised by the [Pahlavi/Alavi] Foundation and Marriott, that Marriott has not fulfilled its obligations in accordance with paragraph 6 of the Agreement [the 13 December 1977 contract] you shall deliver said funds to the Foundation. If Marriott performs its obligations in accordance with the terms of paragraph 6, you shall, upon written notice from Marriott and the [Pahlavi/Alavi] Foundation, deliver said funds to Marriott.[34]

36. The time period for the Foundation to provide notice of errors or omissions expired[35] without notice of error from the Foundation,[36] but Rogers & Wells refused to deliver the

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[31] Iran's Brief & Factual Support for Compensable Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (13 Dec. 1977 Contract, Exhibit A to Complaint at 3) (emphasis added).

[32] Iran's Brief & Factual Support for Compensable Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (13 Dec. 1977 Contract, Exhibit A to Complaint at 8) (emphasis added).

[33] Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (Escrow Agreement, Exhibit B to Complaint).

[34] Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (Escrow Agreement, Exhibit B to Complaint).

[35] According to the *Marriott* complaint, the expiration date was 26 May 1978 – Marriott and the Pahlavi/Alavi Foundation agreed that the 150 day period would begin to run on 27 December 1977, the date of the escrow agreement. *See* Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (Complaint at ¶ 11).

[36] Marriott states in its complaint that it received no notice of non-performance within the 150-day period. *See* Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (Complaint at ¶ 11). The parties to A15(IV) have submitted only portions of the Alavi Foundation's filings in *Marriott*, and from those submitted portions, it does not appear that the Foundation contended it had objected to

funds to Marriott. Marriott filed suit against Rogers & Wells in New York court in November 1979 alleging that Rogers & Wells' reasons for withholding the escrow funds were without basis.[37] Rogers & Wells sought to involve the Foundation as an interpleader defendant in the case because the Pahlavi/Alavi Foundation "ha[d] refused . . . to authorize" the funds' release and, under the escrow agreement, Rogers & Wells "c[ould] not determine without hazard to itself whether the said sum of fifty thousand dollars rightfully belongs to [Marriott or the Foundation]."[38] The New York court permitted Rogers & Wells to serve an interpleading complaint on the Foundation,[39] and held on 28 April 1981 that Marriott was entitled to the funds in question by virtue of the expiration of the specified time period within which the Foundation was to provide notice of omissions or errors.[40] This decision was implemented on 5 May 1981. It is these judgments that the Majority says the United States should have nullified.

37. The Majority concludes – correctly, in my view – that the claim underlying the Marriott lawsuit, to the extent it involved the Foundation as a defendant, was a claim described in Article II, Paragraph 1 of the Claims Settlement Declaration.[41] The Majority errs, however, when it awards Iran the $50,000 in escrow funds at issue in *Marriott*. To appreciate fully the errors in the reasoning of the Majority as to the award of these escrow funds, it helps to read their reasoning in full, which follows:

> 280. Under the applicable New York law, title remains in the person depositing the property into escrow (the depositor) until the conditions of the escrow agreement are fulfilled. [Citing four cases.] Where there is a dispute, until a competent forum determines, with retroactive effect, whether the conditions of the escrow agreement have been met, title to the property in escrow must be presumed to have remained with the depositor. With respect to the dispute between Marriott and the Foundation underlying the Marriott

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Marriott's performance within the 150-day period. *See* Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 10 (Alavi Foundation's Memorandum in Support of the Application for an Order Vacating and Setting Aside the Judgment), Exhibit No. 13 (Appellant's Brief and Supplemental Appendix) & Exhibit No. 14 (Letter from Gadsby & Hannah to BILS); United States Rebuttal to Claimant's Brief & Factual Support for Compensable Losses Vol. III, Doc. 1653, Tab 16 Attachment 1 (DeSousa Affidavit).

[37] Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 2 (Complaint at ¶ 18).

[38] Iran's Brief & Factual Support for Factual Losses Vol. XVII, Doc. 1564, *Marriott* Case ID, Exhibit No. 3 (Interpleader Complaint).

[39] Iran's Brief & Factual Support for Compensable Losses Vol. XVII, Doc. 1564 *Marriott* Case ID, Exhibit No. 4 (13 February 1980 Order).

[40] *Marriott v. Rogers & Wells*, 433 N.Y.S.2d 330 (N.Y. App. 1981), *aff'd* N.Y.S.2d 926 (N.Y. Special Term 1981); 61 N.Y.2d 626 (N.Y. 1983); 459 N.Y.S.2d 407 (N.Y. 1983) (Silverman, concurring).

[41] Award at ¶ 139.

> lawsuit, however, by 19 January 1982, the Tribunal, the only forum competent under the Algiers Declarations to resolve that dispute and, in that context, to determine whether the conditions in the Escrow Agreement for the release of the U.S.$50,000 to Marriott had been satisfied, was no longer available. In this situation, but for the 1981 decision of the Appellate Division, the escrow funds would have remained the property of the Foundation, the original depositor of the fund. The 28 April 1981 decision of the Appellate Division and the 5 May 1981 Order, which directed Rogers & Wells to release the escrow funds to Marriott, effectively deprived the Foundation of the money to which, in the circumstances, but for these decisions, it would have continued to hold title. The Tribunal awards Iran compensation for the Foundation's loss of title to those funds, which title, had the United States vacated the 28 April 1981 decision of the Appellate Division and the 5 May 1981 Order, the Foundation would have retained. [Footnote 303, noted here, follows.] The Tribunal thus does not conclude that the Foundation was entitled to receive the escrow funds.

Simply put, the Majority's award of $50,000 to Iran in this case rests entirely on a glaring *non-sequitur.* I outline below the Majority's chain of logic, sentence-by-sentence, as set forth in Paragraph 280 (all italics in quotations are added).

> A. Under New York law, "*title to escrow property remains in the person depositing the property* into escrow (the depositor) until the conditions of the escrow agreement are fulfilled." (I believe this to be an accurate statement of the law.)
>
> B. "Where there is a dispute, until a competent forum determines, with retroactive effect, whether the conditions of the escrow agreement have been met, *title to the property in escrow must be presumed to have remained with the depositor*." (I believe that this statement is incorrect, but assume that it is correct for purposes of this discussion.)
>
> C. "With respect to the dispute between Marriott and the Foundation underlying the Marriott lawsuit, however, by 19 January 1982, the Tribunal, the only forum competent under the Algiers Declarations to resolve that dispute and, in that context, to determine whether the conditions in the Escrow Agreement for the release of the U.S.$50,000 to Marriott had been satisfied, was no longer available. (This statement is not true. Iran could have invoked the aid of this Tribunal after 19 January 1982 by bringing a claim for the return of the escrow funds under Paragraph 8 of the General Declaration. Moreover, the Majority all but admits that this statement is false in footnote 302 of the Award, but the untruth of this statement does not matter for purposes of the present analysis.)
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> D. "In this situation, but for the 1981 decision of the Appellate Division, the escrow funds would have remained the property of the Foundation, the original depositor of the fund. The 28 April 1981 decision of the Appellate Division and the 5 May 1981 Order, which directed Rogers & Wells to release the escrow funds to Marriott, effectively deprived the Foundation of the money to which, in the circumstances, but for these decisions, it would have continued to hold title. The Tribunal awards Iran compensation for the

> Foundation's loss of title to those funds, which title, had the United States vacated the 28 April 1981 decision of the Appellate Division and the 5 May 1981 Order, the Foundation would have retained." (My analysis is below.)
>
> E. "The Tribunal thus does not conclude that the Foundation was entitled to receive the escrow funds."

38. The conclusion stated in Point D is worse than a *non sequitur*. It is not so much that the conclusion does not follow from what precedes it, but rather that the conclusion in Point D is wholly contradicted by what precedes it. The Majority begins with the proposition that the Foundation held title to the escrow funds when those funds were deposited (Point A). It then states that "until a competent forum determines, with retroactive effect, whether the conditions of the escrow agreement have been met," the Foundation continues to hold title (Point B). The Majority then makes an unexplained (and, I am afraid, inexplicable) leap, stating that, "but for" the decisions of the New York courts that the United States should have nullified, the Foundation "would have continued to hold title" and proceeds to award "Iran compensation for the Foundation's loss of title to those funds" (Point D). (That the Majority is awarding compensation only for the loss of title to the escrow funds, and not for the Foundation's being deprived of those funds, is made plain in Point E, in which the Majority states that it "does not conclude that the Foundation was entitled to receive the escrow funds.")

39. The question that the Majority leaves begging for an answer is: Just how did the decisions of the New York courts deprive the Foundation of title? According to the Majority, under New York law title to escrow funds stays with the depositor until a competent forum decides that the escrow conditions have been met (Point B), and we know that the Majority does not view the courts of New York as a competent forum (Point C). So how can decisions of those courts effect a transfer of title to the escrow funds? Points A, B, and C of the Majority's reasoning lead to the inescapable conclusion that those decisions cannot. How the Majority has come to the opposite conclusion is a mystery. And, just to be completely clear, it is on the basis of this mysterious loss of title, and on this basis alone, that the Majority awards Iran $50,000 in damages.

40. Next, I must address footnote 302, which I have already mentioned. The first two sentences of that footnote read as follows:

> The Tribunal has considered the argument that Iran could have chosen to bring a claim against the United States before the Tribunal under Paragraph 8 of the General Declaration. While it may be correct that Iran could have chosen to

> do so, Iran's actual choice to bring this Claim H under General Principle B was an equally legitimate course of action: a breach of the General Principle B obligation had occurred and a loss had been caused.

This footnote does nothing more than enable the Majority to say that they did not ignore the single most important factual (as opposed to logical) error in this part of the Award, which is their assertion in Paragraph 280 that, after 19 January 1982, this Tribunal "was no longer available" "to determine whether the conditions in the Escrow Agreement for the release of the U.S.$50,000 to Marriott had been satisfied." Footnote 302 says, almost in so many words, that the statement in Paragraph 280 is untrue, that Iran could have brought a claim against the United States in this Tribunal under Paragraph 8, but that this fact does not matter, and it does not matter because it was "equally legitimate" for Iran to choose to bring a claim against the United States under General Principle B rather than a claim against the United States under Paragraph 8.

41. The present claim might be an equally legitimate way for Iran to assert its claim to the escrow funds, but that could be true only if the Majority required Iran to make the same showing that it would have to make in a Paragraph 8 claim. To prevail in a claim under Paragraph 8, Iran would have to show that the escrow funds were Iranian financial assets – that Iran was entitled to the funds. But that is exactly what the Majority refuses to decide in the present case. It deprives the word "legitimate" of meaning to equate an action in which Iran would have to prove that it was entitled to the funds in question with an action in which Iran is given the funds without need of proving any right to them. It simply cannot be the law that Iran has a "legitimate" choice between two such actions.[42]

42. Finally, consider what would have happened if the United States *had* nullified the judgment in question by 19 July 1981. Nothing would have happened, unless Marriott filed a claim in the Tribunal. What if Marriott had chosen not to file such a claim – perhaps because there was too little at stake for it to be worth the trouble? Under what theory would the United States then be under an obligation to pay Iran $50,000? Because an American

[42] Language has been added to the end of the Award's footnote 302 (its last two sentences) that is expressly responsive to this point. In that language the Majority finds some unspecified significance in the difference between a claim by Iran against the United States and a claim by a private corporation (Marriott) against Iran. This new language presumes the answer to the question at issue by presuming that Iran has suffered a loss by virtue of the failure of the United States to nullify the judgments in question. Iran certainly suffered a loss if it was entitled to the escrow funds, but the Majority refuses to decide that question. Instead, the Majority asserts a loss of title to the escrow funds the possibility of which is denied by its own logic and then says that it is legitimate for Iran to seek compensation for this mysterious loss of title without need of making any showing of entitlement to the funds, even though it is open to Iran to bring a claim under Paragraph 8 that would turn on its entitlement to the funds.

corporation failed to file a claim? Iran, of course, could have filed suit against Rogers & Wells in the United States, or it might have filed a claim in this Tribunal under Paragraph 8. But absent some such action, that money probably would still be with Rogers & Wells; it would not be in Iran's pocket.

43. That the Majority strains to reach its conclusion in *Marriott* becomes apparent if one steps back to gain a little perspective. The issue decided by the New York courts was not hard to decide. The Foundation had 150 days in which to notify Marriott of "errors and omissions." That time had expired without any such notice being given, and the court, on that basis, ordered Rogers & Wells to deliver the escrow funds to Marriott. That the New York courts lacked jurisdiction to decide this issue says nothing about whether they reached the correct decision. That they did seems certain. Yet the Majority refuses to address this issue, for unstated reasons. (The relevant filings in the New York case are on the record of this case. *See* notes 31-40, *supra.*) Instead, the Majority finds that courts without jurisdiction somehow were able to deprive the Foundation of title to the escrow funds, and then proceeds to hold that this deprivation of title damaged Iran in the exact amount of the escrow funds.

44. Just why "title" to $50,000 unaccompanied by any right to possess the $50,000 is worth $50,000 seems to be a fine point discussion of which struck the Majority as unnecessary. It is obvious that the Foundation could not have sold its "title" to these funds for anything approaching $50,000; most likely, it could not have sold that title for any amount. What the Foundation had to sell that arguably had value was its claim that, under the relevant agreements, it, not Marriott, was entitled to receive the escrow funds. Given the evidence on the record of this case, one might reasonably suspect that the market value of this claim would not greatly exceed zero. But, whatever its value, Iran has not lost that claim. As already noted, that claim can still be adjudicated in the context of a Paragraph 8 claim against the United States.

45. So, presented with a case in which it is clear that the Foundation is not entitled to the escrow funds under the relevant agreements, the Majority finds a way to give Iran the money anyway, by refusing to address the underlying dispute, by imagining an impossible loss of title, and by assigning an impossible value to that title.

D. *RAJI*

46. *Raji* concerns a claim for pension benefits that was originally asserted in U.S. court by a U.S. national, Mrs. Raji, and later transferred to her husband, an Iranian national. The

Majority does not dispute the fact that, if the U.S. had terminated Mrs. Raji's litigation promptly, she still could have transferred her claim to her husband, in which case the litigation would have continued in U.S. court.[43] Thus the Majority seems to object only to the method by which this claim was asserted.

47. The Majority, to its credit, recognizes that this case presents a question of causation. The Majority goes astray in its analysis, however, by misconstruing the nature of the conduct at issue and by drawing lessons from inapposite analogies.

48. Causation analysis is not always easy. But all seem to agree that it must begin with the question whether the wrongful conduct at issue was the "factual" cause, or the "but for" cause, or the "*condicio sine qua non*" of claimant's injury. All of these formulations refer to the proposition that specified wrongful conduct did not cause the injury in question if that injury still would have occurred had the defendant not acted wrongfully.[44]

49. The Majority's causation analysis begins well enough by acknowledging the necessity of determining whether "the United States' breach caused 'factually' the harm (*i.e.*, the expenses for legal fees and costs) . . . ."[45] The Award continues in the same paragraph to correctly describe the nature and necessity of "counterfactual inquiry" and "hypothetical alternative causation":

> Only if one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (or obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.[46]

The Majority goes astray, however, in the next sentence of Paragraph 52:

> Conversely, if a third party's conduct (here the Rajis' subsequent proceeding on the basis of an amendment of claim) in an alternative and hypothetical scenario had caused Iran to incur the same expenses, this would be a different

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[43] *See* Award at ¶ 51.

[44] H.L.A. Hart & Tony Honoré, CAUSATION IN THE LAW 110-11 (2d ed. 1985) (describing this test as responding to the question, "[w]ould *Y* [harm] have occurred if *X* [act or omission] had not occurred?"); SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW 218 (7th ed. 2013) ("This 'but-for' test consists of posing the question: would the loss have been sustained but for the relevant act or omission of the defendant?"); Dan B. Dobbs, THE LAW OF TORTS § 168 (2d ed. 2000) (stating that the negative form of the but-for test is that "[i]f the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm.")

[45] Award at ¶ 52.

[46] Award at ¶ 52.

> scenario, distinguishable in point of time, mode, detail of occurrence, and, importantly, the acting person.[47]

In this sentence the Majority makes two analytical mistakes which then lead them to rely on three inapposite examples and thus to the wrong conclusion.

50. The first mistake is to view the "acting person" in the actual scenario as the United States and the "acting person" in the "alternative and hypothetical scenario" to be a different party, the Rajis. Actually, the "acting person" in both scenarios is the same third party – the Rajis. It is their actions, not any action of the United States, that in both the actual and the hypothetical scenario impose the litigation costs on Iran. The breach of the United States is one of omission, not commission, in that it failed to prevent Mrs. Raji's lawsuit from continuing beyond July 1981, which lawsuit imposed the costs at issue on Iran.

51. The preceding statement is incomplete, however, because the United States also is an "acting person" in both scenarios. The "action" of the United States in the actual scenario is an omission: it omits to terminate Mrs. Raji's litigation in 1981; the Rajis' action is to pursue Mrs. Raji's litigation. In the "hypothetical alternative scenario," the United States acts by supplying its omission and terminating Mrs. Raji's litigation, and the Rajis act by Mrs. Raji assigning her claim to her husband who then pursues the litigation, in 1981, just as they did in 1983. The Majority fails to appreciate that the actors in both the actual and the alternative scenarios are the same, and this analytical mistake seems to form an important part of the foundation for their mistaken conclusion. The Majority also fails to appreciate the importance of the fact that the breach of the United States is one of omission, not commission. Thus, the alternative scenario that must be considered in the causation analysis is the scenario in which the United States supplies its omission by terminating Mrs. Raji's lawsuit in 1981, which lawsuit imposed the costs at issue on Iran.

52. The Majority's second analytical mistake is to view "the Rajis' subsequent proceeding on the basis of an amendment of claim" as identical with the relevant "alternative and hypothetical scenario."[48] The only relevance of Mrs. Raji's decision, in 1983, to actually transfer her claim to her husband (who then actually amended his complaint) is as evidence of what would have happened *in 1981* if the United States had *then* terminated litigation concerning Mrs. Raji's claim. Thus, the necessary counterfactual inquiry is: what would the

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[47] *See* A.M. Honoré, *Causation and Remoteness of Damage*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, TORTS, ch. 7, ¶ 126 (André Tunc ed., Tübingen/The Hague/Boston/London, 1969).

[48] Award at ¶ 52.

Rajis have done *in 1981* if the United States had *then* prevented Mrs. Raji's lawsuit from going forward as originally filed? We know the answer because we know what the Rajis did *in 1983* when Mrs. Raji in fact no longer was permitted to bring her claim in a United States court – she transferred her claim to her husband who amended his complaint. The examples that the Majority uses to arrive at its conclusion demonstrate that the Majority does not appreciate the nature of the proper counterfactual inquiry in this case.

53. As I have already noted, the Majority seems to agree that for the United States to be liable for the costs incurred by Iran as a result of the Raji litigation, it must be true that those costs would not have been incurred "but for" the failure of the United States to terminate that litigation. That is, it must be true that if the United States had terminated the litigation, the costs would not have been incurred – that is the counter-factual, and hypothetical, scenario that must be considered.[49]

54. It is, of course, commonly accepted that a defendant cannot escape liability because a subsequently occurring event would have produced the same injury as did the act of the defendant. The examples given in Paragraph 52 of the Award – the second shot from another hunter that would have killed the hiker had the defendant's shot not killed him first; the subsequent garage fire that would have destroyed the plaintiff's car even if the defendant had not first damaged it through his negligent driving – are typical of the examples used to illustrate the point that an act or omission cannot be the cause of an outcome that has already occurred. But we are not here considering whether an actual subsequent event would have produced the same injury as was suffered, thus making the initial injury irrelevant. No one is arguing that, because the same costs were incurred after 1983 as a result of Mr. Raji's amended complaint, the costs incurred by Iran in the *Raji* litigation between 1981 and 1983 do not matter. Yet that is the argument to which the Majority's examples respond. All of those examples are perfectly good illustrations of why actual subsequently occurring events that produce the same injury as the initial wrongful act do not relieve the actor of responsibility. But those examples are all aimed at a straw man because – to repeat myself – the relevance of the Rajis' actions in 1983 is not that those actions duplicated the injury suffered by Iran in 1981, it is that those *1983* actions are compelling evidence of what would have happened *in 1981* had the United States *then* terminated Mrs. Raji's lawsuit.

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[49] *See* Award at ¶ 52. That the Majority accepts this much also is demonstrated by the sources it cites at notes 53-58.

55. The evidence from 1983 makes it clear that Mrs. Raji always had the option of assigning her claim to her husband and litigating it through him. This suggests an example that is far more consistent with the actual case presented by the breach of the United States in *Raji* than any of the Majority's examples.

56. The position of the United States in *Raji* was like that of a person (A) who was obligated to lock one door, and only one door, of a house that had a second door within a few centimeters of the first door that granted equal access to the house. Assume that A failed to lock the one door that he was obligated to lock, that the second door was left unlocked, and that an intruder entered the house through the first door and did damage to the interior of the house. Could anyone reasonably conclude that the intruder would not have entered the house if A had locked the first door, given that the second adjacent door was unlocked? In the *Raji* case, the first door of course is the door through which Mrs. Raji pursues her pending suit that the United States was obligated to terminate in 1981 and the second door is the door through which she assigns her claim to her husband for him to pursue (a door that rightfully remained open in 1981 as well as in 1983). In the *Hoffman* case (to be discussed more fully below), the first door is the door through which Hoffman re-opens the case that was dismissed without prejudice and the second door is the door through which Hoffman files a new claim.

57. It should now be obvious that the examples relied upon by the Majority are beside the point. Neither *Raji* nor *Hoffman* involves anything like subsequent gunshots, or subsequent fires or subsequent airplane crashes that would have caused the same damage as was caused by the defendant's action had the defendant not acted first. Both *Raji* and *Hoffman* instead involve an omission by the United States, a failure to take an action that it was obligated to take. It is as clear as it can be that, had the United States fulfilled its obligation to terminate the *Raji* and *Hoffman* litigation as the Award has defined that obligation – that is, had the United States locked the first door – Mrs. Raji and Hoffman each would have walked through the second door, which the United States had no obligation to lock. Just as the omission of A in the house example did not cause the intruder to enter the house, but only provided an additional point of entry, so the omission of the United States did not cause either Mrs. Raji

or Hoffman to initiate or to continue their litigation against Iran; it only left open one door to a courthouse that had at least two open doors.[50]

58. One might object that in the alternative hypothetical scenario in which the United States supplies its omission, it is likely that the injury would not have been the same, that the legal fees incurred by Iran in this hypothetical case would have been somewhat different from those actually incurred. In considering this possible objection, it is useful to refer to "The Test of Factual Causation in Negligence and Strict Liability Cases," by Becht and Miller.[51] In their discussion of omissions, they use the term "hypothetical cause" to refer to an omission as a cause, because what one does not do "did not happen, and what did not happen cannot be a cause of anything that did happen, at least not in the sense in which something that did happen can be a cause."[52] They explain that "inquiries about causation in the law of torts are of two kinds: (1) inquiries into the effects of acts – simple causation, and (2) inquiries into hypothetical cases set up by supplying omissions – hypothetical causation."[53] Inquiries into "hypothetical causation" require "the construction of a parallel series of events which is compared to the events that actually happened."[54]

59. Throughout their discussion of omissions, Becht and Miller use the example of a driver who, while negligently watching his children beside him rather than observing traffic, hits a pedestrian; the driver's omission was failing to observe traffic.[55] They posit alternatively that the pedestrian was crossing the street, or that he dropped into the driver's path from a tree. Becht and Miller observe that, in their example, it is "easy to conclude that if the driver, with a good lookout, could have avoided the accident, his omission was a clear cause of the harm, and equally easy to conclude that it was not a cause if the plaintiff dropped into his path from a tree leaving him no time to swerve his car."[56] Becht and Miller then consider a hard case:

> But suppose that the pedestrian ran into the path of the car suddenly, and that the driver, if he had kept a lookout could have swerved, but not enough to

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[50] *Raji* and *Hoffman* are distinguishable from the other cases in which the Award finds the United States liable for Iranian legal expenses in that there does not appear to have been any other avenue open to the plaintiffs in those other cases that the United States would not have been obligated to block.

[51] ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961).

[52] *Id.* at 22.

[53] *Id.* at 24.

[54] *Id.*

[55] *Id.* at 22.

[56] *Id.* at 28.

> avoid impact with serious injuries . . . . If the parallel series in this case is constructed in minute detail, it shows that the injuries would have been at least slightly different and would have been inflicted by different parts of the car if the driver had swerved . . . . Hence, the conclusion from a rigorous and detailed application of our assumptions must be that the omission was a cause of the injuries actually suffered, even though the driver could not have avoided a substantial impact by keeping a lookout.[57]

60. Becht and Miller, however, find this conclusion unsatisfactory. They continue in their next paragraph: "In spite of this conclusion, we do not believe that the driver should be liable in a case like this, or that a court would hold him liable." They offer two lines of reasoning that lead to this conclusion:

> (a) Operating within our usual assumptions, one could hold that the omission of lookout was a hypothetical cause of the harm, but could limit liability on the ground that the defendant could not have avoided substantial harm by supplying his omission . . . . [or] (b) By holding the injuries that happened to be substantially the same as those that would have happened, one could conclude that the omission of lookout was not a cause.[58]

After noting that they prefer the second line of reasoning to the first, because it conforms with"[p]opular opinion, both of laymen and lawyers," they state the following conclusion:

> We would, accordingly, compare as carefully as possible the injuries that happened with those that would have happened, and if we found enough similarity or enough chance of similarity, would disregard minor differences, and conclude that the omission was not a cause.[59]

61. There can be no doubt that, in the hypothetical alternative scenario in which the United States supplies its omission, the costs incurred by Iran in both the *Raji* and *Hoffman* cases would have been "substantially the same." The claims pursued in the hypothetical *Raji* 1981 amendment or the *Hoffman* new claim would have been factually the same as the claims actually pursued – the only difference would have been the procedural mechanism through which those claims were pursued.

62. In Paragraph 53 of the Award, the Majority again betrays its refusal to think carefully about the causation issue. For example, they acknowledge the fact that the breach of the United States was one of omission, not commission, but dismiss that fact as a "non sequitur for purposes of our analysis," without bothering to explain from what that fact does not follow or why they deem the fact to be irrelevant, if that is what they mean.

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[57] *Id.*

[58] *Id.* at 29

[59] *Id.*

63. Paragraph 53 then goes on to discuss the distinction between acts that produce duplicative costs and those that produce additive costs. The examples already discussed are examples of acts that produce duplicative costs; the irrelevance of these examples has already been explained. Cases of additive costs, as is explained in Paragraph 53 of the Award, are those in which a second wrongdoer imposes a cost on the victim that adds to the costs already imposed by the first wrongdoer. That the Majority sees the treatment of additive costs as relevant to the situation of the Rajis is further evidence of their refusal to see this case for what it is. At the risk of boring the reader, I will repeat that the issue here is: What would have happened if, in 1981, the United States had supplied its omission and terminated Mrs. Raji's lawsuit as required? The answer is not that the costs Iran actually incurred in and after 1983 would have been added to those incurred from 1981 to 1983, and no one has ever suggested that this is the answer. The answer is that, if her lawsuit had been terminated in 1981 – that is, if the United States had supplied its omission – Mrs. Raji would lawfully have assigned her claim to her husband in 1981, just as she did in 1983, and he would lawfully have pursued that claim in the U.S. court in 1981, just as he did in 1983.

64. Finally, the Majority addresses the example given above of a house with two doors, noting that the example suggests that the United States was not obliged "to lock the second door." The Majority then proceeds to state that they "fail[] to see how that can be maintained on the basis of a straightforward interpretation of General Principle B." The Majority must intend to suggest by this statement that the United States was obliged not only to terminate Mrs. Raji's original lawsuit, but also to prevent her husband's subsequent lawsuit from going forward. Why that should be the case must be added to the list of the Award's mysteries. If this is the belief of the Majority, one would expect them to explain and defend it, for if this belief were correct, it would render unnecessary the entire Raji causation debate that has been rehearsed both in the Award and in this Separate Opinion. If this indeed is the considered view of the Majority, it is simply irresponsible for them to have left it to a mere suggestion at the end of this section of the Award, leaving the reader to wonder just why one might hold this view. If it is not the considered view of the Majority, the reader is left to wonder just why the suggestion was made at all.

65. The Award's discussion of causation is limited to concepts drawn from tort law, which of course are relevant to the question under consideration. But the obligation breached by the United States is found in a treaty – an international contract between two states. One

therefore might also usefully look to principles of contract law in considering how best to deal with the situations presented in *Raji* and *Hoffman.*

66. The conclusion dictated by principles of tort law in *Raji* and *Hoffman* is that the United States did nothing wrongful in those cases because its failure to terminate litigation caused no harm. In the tort context, one can drive a car negligently, but if the negligent driving causes no harm, no tort – no "wrong" – is committed. That would strike me and, I expect, others, as a troublesome result in *Raji* and *Hoffman* because, under the Algiers Declarations, the United States owed a duty to Iran in both those cases that this Tribunal has determined was violated. Principles of contract law show the way out of this problem: where a breach of contract causes no loss it is appropriate to find the breaching party liable for nominal damages only.[60]

67. This is an outcome that I could have supported. The $15,509.80 awarded by the Majority for this case, while perhaps a small sum in other contexts, is substantial sum in the context of this case, and is certainly more than nominal damages.[61]

E. *HOFFMAN*

68. Similar questions of causation and damages arise in *Hoffman*. The Majority awards Iran $10,420.39 for responding to a motion to re-open *Hoffman*, a case that was initially dismissed without prejudice by the American court, a status in which it remained possible to reopen the case. Both the American case and its companion Tribunal case were based on a contract that called for pre- and post-1981 payments.[62] The American case was initiated in February 1980, and dismissed without prejudice on 30 April 1981.[63] The parties proceeded before the Tribunal, and in its jurisdictional ruling of 27 July 1983, the Tribunal assumed

[60] Restatement (Second) of Contracts § 346 and cmt. B (1981) ("If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages"**)**; Corbin on Contracts (2005) Sec. 55.10 ("[A] breach of contract that causes no injury is still a wrong to the other contracting party. If the aggrieved party has suffered no compensable damages, a judgment of nominal damages will be entered.").

[61] In addition, the Award does not even mention the problems with Iran's proof of damages in *Raji*. Iran claims $58,525.00 in specific expenses for *Raji* based on (1) a letter from its counsel estimating that seven percent of total expenses from the case could be attributed to Mrs. Raji's claim, and (2) a letter from Bank Sepah Iran, the defendant in *Raji*, stating that its total legal costs were $836,077.27. Iran also presents a smattering of invoices from counsel, which show total charges of $310,195.05 (not $836,077.27), about half of which can be gleaned only from balances carried forward from invoices not provided, and some of which are marked as "under discussion." The Majority does not reveal how it has determined that $15,509.80 of this amount is compensable.

[62] The original contract contained, at article IV, a schedule of payments by due-date and amount. The contract is attached to Hoffman's Statement of Claim in Tribunal Case No. 49, Doc. 1.

[63] Docket, *Hoffman Export v. Iran*, Case No. 80-0524 (C.D. Cal.). The docket sheet is in the A15(IV) record at Iran's Brief and & Factual Support for Compensable Losses Vol. VII, Doc. 1554, Exhibit No. 1.

jurisdiction over the pre-1981 claims, dismissed the post-January 1981 claims for lack of jurisdiction, and held that the underlying contract had been frustrated in mid-1979.[64] Thereafter, on 29 June 1984, the Tribunal entered a Final Award in Iran's favor.[65] Iran enforced this award in an American court,[66] and thereafter the plaintiff moved to re-open its original American case to litigate the post-January 1981 claims that the Tribunal had dismissed for lack of jurisdiction.[67] Iran filed an opposition to this motion to re-open, changed counsel,[68] and – after new counsel spent considerable time reviewing the case – Iran ultimately settled the case.[69] I do not believe these expenses are compensable under the framework of the Declarations or Partial Award No. 590 for two reasons: (1) the initial U.S. case was dismissed on 30 April 1981, and (2) the "suspension" of claims did not cause Iran's losses in *Hoffman*.

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[64] *Gould Marketing, Inc.* and *Ministry of National Defense of Iran*, Interlocutory Award No. ITL-24-49-2 (27 July 1983), *reprinted in* 3 IRAN-U.S. C.T.R. 147, 151.

[65] *Gould Marketing, Inc.* and *Ministry of National Defense of Iran*, Award No. 136-49/50-2 (29 June 1984), *reprinted in* 6 IRAN-U.S. C.T.R. 272, 287-88.

[66] *Iran v. Gould Marketing*, Civil Action No. 87-03673 (C.D. Cal.). The enforcement action is discussed in Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 2 (Motion to Reopen, at 6-7). According to the plaintiff's motion to re-open, the plaintiff attempted to assert its remaining claims against Iran – those dismissed by the Tribunal for lack of jurisdiction – as counterclaims in Iran's enforcement suit in American courts, but the American court held that the New York Convention did not permit it to exercise jurisdiction over counterclaims in an enforcement proceeding. Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554 *Hoffman Export* Case ID, Exhibit No. 2 (Motion to Reopen, at 6-7).

[67] Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 2 (Motion to Reopen).

[68] Iran's opposition to the motion to re-open was filed on 21 December 1990 by attorneys from the law firm Crosby, Heafey, Roach & May. Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 3 (Defendant's memorandum opposing plaintiff's motion to reopen and to amend complaint). Thereafter, on 3 January 1991, Iran requested representation by Steven K. Atkinson of the law firm Atkinson, Andelson, Loya, Ruud and Romo, because – as Iran wrote – "our attorney of record, Messrs. Crosby, Heafey, Roach & May are not prepared to continue representing Iran's interest in the dismissed case." Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 5 (Letter dated 3 Jan. 1991 from BILS to Atkinson Andelson). Iran's new counsel spent considerable time and money reviewing the case because, as Steven K. Atkinson wrote to Iran, "[t]his is a very complex matter which involves volumes of pleadings developed to date, as well as greater volumes of materials references in Plaintiff's motion and reply to Iran's opposition to Plaintiff's motion." Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 7 (Letter dated 21 Feb. 1991 from Atkinson Andelson to BILS). As the Majority acknowledges at footnote 75, expenses for new counsel's review of the case are neither appearances and filings nor monitoring, as these terms are defined in the Award, thus these expenses would not be compensable even if related to claims (arguably) within the Tribunal's jurisdiction.

[69] Iran's attorney received the notice of withdrawal of the motion to re-open on 5 March 1991, and the next day wrote to BILS that "[w]hen I previously inquired regarding representations made by plaintiff's counsel regarding settlement negotiations, you directed my office to be concerned only with the plaintiff's motion to reopen." Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 8 (Letter dated 6 Mar. 1991, from Atkinson, Andelson to BILS with attachments).

The Dismissal of the Initial Case

69. Paragraph 90 of the Award states the Majority's reasons for holding that the United States violated its termination obligation with respect to the Hoffman case. The first three sentences of that paragraph read as follows (footnotes omitted, italics in original):

> The Tribunal accepts that the District Court acted in conformity with the United States' international obligations by dismissing the Hoffman lawsuit *without* prejudice in 1981, pending the decision by the Tribunal. However, the United States breached its international obligations by not causing the Hoffman lawsuit to be dismissed *with* prejudice after the Tribunal's decision of 27 July 1983. In accordance with its conclusion in Partial Award No. 590, the Tribunal holds that, by failing to terminate the Hoffman lawsuit within a reasonable time after 27 July 1983, the date of the Tribunal's interlocutory award in *Gould Marketing* assuming jurisdiction over certain claims by Gould Marketing, the United States violated its obligation to terminate litigation in United States courts related to claims resolved by the Tribunal on the merits.

70. As the Majority well understands, in United States practice the difference between dismissing a case with prejudice and dismissing a case without prejudice is that the former terminates a claim while the latter terminates litigation concerning a claim but allows the claim to be reasserted at a later date, often under the same docket number. Thus, in holding that the United States was obliged to dismiss the Hoffman lawsuit with prejudice "after the Tribunal's decision of 27 July 1983," the Majority holds that the United States was obliged to extinguish the Hoffman claims asserted in that lawsuit. This holding rests on one mistake and one unwarranted presumption.

71. The mistake is found in the very language of the Majority's conclusion: "[B]y failing to terminate the Hoffman lawsuit within a reasonable time after 27 July 1983, the date of the Tribunal's interlocutory award in Gould Marketing assuming jurisdiction over certain claims by Gould Marketing, the United States violated its obligation to terminate litigation in United States courts related to claims resolved by the Tribunal on the merits." The mistake is rather obvious: as the Majority's own description makes clear, the Tribunal's interlocutory award of 27 July 1983 did not resolve any claims on the merits, it only dismissed some claims for lack of jurisdiction (those for post-January 1981 damages) and assumed jurisdiction over others (those for pre-January 1981 damages).

72. But even if one assumes that the Tribunal had decided Hoffman/Gould's pre-1981 claims on the merits in the interlocutory award, it does not follow that the Hoffman/Gould lawsuit should have been dismissed with prejudice. The Majority bases the contrary

conclusion on the following presumption, stated in the remainder of paragraph 90:

> The claim underlying the original Hoffman lawsuit in the District Court, which was filed on 13 February 1980 . . . did not, and could not, cover matters to arise after 19 January 1981, as those matters had not materialized yet; thus, the claim pending before the District Court at that time was entirely within the Tribunal's jurisdiction and should have been terminated in its entirety.

That the original Hoffman/Gould lawsuit did not cover post-January 1981 matters can only be a presumption because the original Hoffman/Gould complaint is not in the record. The only support cited for this presumption is language from Hoffman's motion to amend its complaint[70] (quoted by the Majority in Paragraph 90) stating that the original complaint did not "reflect the continued breaches of the radio contract by Iran that have occurred since the original complaint was filed."

73. A less-selective quotation from Hoffman's motion makes it clear, however, that that motion provides no support for the Majority's presumption:

> Here, plaintiff seeks to amend to reflect the parties' name changes, to reflect the relevant proceedings involving the parties that have occurred since the original complaint was filed, and to reflect the continued breaches of the radio contract by Iran that have occurred since the original complaint was filed.
>
> All of the claims in the amended complaint arise from the same contract as the claims in the original complaint. There are no new factual allegations or causes of action in the amended complaint that plaintiff has not already served on Iran, and that Iran has not already answered, either in this proceeding or in the enforcement action.[71]

Betraying an awareness that they did not know what the original complaint actually covered, the Majority's statement also asserts that the original complaint "*could not*[] cover matters to arise after 19 January 1981" (italics added). This assertion is plainly wishful thinking rather than any exercise in logic.

74. As the Majority acknowledges in Paragraph 88, the Tribunal's interlocutory award issued on 27 July 1983 "determin[ed] that certain claims under the radio contract for payments due after 19 January 1981 were not within its jurisdiction," thus rather clearly confirming that the Majority is aware of what the record shows – that Hoffman/Gould in fact

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[70] Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 2 (Motion to Reopen).

[71] Iran's Brief & Factual Support for Compensable Losses Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 2 (Motion to Reopen).

had filed with the Tribunal a claim for payments due after 19 January 1981.[72] If Hoffman/Gould could and did file a claim with this Tribunal for payments due after 19 January 1981, Hoffman/Gould certainly "could" have done so in its original complaint filed in the District Court. That it in fact did so is the only presumption in which one can engage with even a pretense of logic or evidentiary support: Why would Hoffman/Gould file a broader claim in this Tribunal than the claim it had filed in the District Court, the dismissal of which (without prejudice) had sent it to this Tribunal? But the Majority must make the contrary unsupported and illogical presumption because, without it, the Majority has no basis for concluding that the Tribunal's 27 July 1983 interlocutory award placed the United States under an obligation to dismiss the Hoffman/Gould case with prejudice, and this would be true even if that Tribunal decision were a decision on the merits, rather than the interlocutory jurisdictional decision that it purported to be.

Assuming that The United States did not "Terminate" the Hoffman Litigation, That Failure did not cause Iran's losses in *Hoffman.*

75. The Majority acknowledges that the United States was under no obligation to dismiss the original Hoffman lawsuit so as to preclude the later filing of "a new claim" in American court for post-1981 payments.[73] One would think that this acknowledgement would lead the Majority to the conclusion that the dismissal of the lawsuit in a manner that permitted the submission of a claim for post-1981 payments in the form of an amended complaint re-opening the old case could not be the cause of any injury to Iran since essentially identical litigation would have ensued if an amended complaint were precluded, albeit in the form of a "new claim" rather than a motion to re-open an old claim.

76. The Majority rejects this analysis by asserting (in Paragraph 91) that "in making its determination, the Tribunal must consider actual events, not irrelevant hypothetical scenarios," as if calling a "hypothetical scenario" irrelevant made it so. The Majority continues in this vein – much as it did in *Raji* – in Paragraph 93 (footnotes omitted):

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[72] As stated above at note 62, the original contract contained, at article IV, a schedule of payments by due-date and amount; therefore, Hoffman would have known in 1980, when instituting its U.S. case, the amounts and due-dates of future payments, and Hoffman could have easily asserted claims for all these scheduled payments in this 1980 U.S. case. (The contract is attached to Hoffman's Statement of Claim in Tribunal Case No. 49, Doc. 1.) In fact, that is precisely the course that Hoffman followed in Tribunal Case No. 49. In that case, filed on 16 November 1981, Hoffman sought payments from June 1979 and June 1981, as well as payments of "$766,976 due May 1983 and $1,000,000 due May 1984." *Gould Marketing, Inc.* and *Ministry of National Defense of Iran*, Interlocutory Award No. ITL 24-49-2 (27 June 1983), *reprinted in* 3 IRAN-U.S. C.T.R. 147, 150.

[73] Award at ¶ 91.

> The issue at stake is whether the United States was in breach of its international obligations and not whether Hoffman/Gould amended an existing claim or could have started a new claim. If Hoffman/Gould had brought a new lawsuit, that action would – as in the Raji case – fall into the category of the examples mentioned above (garage burning down, airplane crash …) in that the same result followed from a non-tortious act or obligation-compliant conduct. As has been acknowledged by authoritative commentators, one may categorize these examples as illustrations of disapplying the *sine qua non* formula. Yet, the reasons underlying the distinction between "factual" and "legal" cause, "proximate" and "remote" damages, and the development of the theory of "adequacy" show that courts and legal theory universally strive to avoid mechanical application of the relevant tests in favor of normative approaches. That is why focusing on the defendant and its obligation-compliant, as opposed to its non-compliant, conduct is crucial. Hoffman/Gould (as was Mrs. Raji in the Raji case) is a third party. What is at stake here, however, is the omission of the United States in relation to Hoffman/Gould's (or in the Raji case, Mrs. Raji's) procedural maneuvers. To refer to the example from the Separate Opinion, relevant is, not whether the court house had two doors, but whether the United States breached its international obligations by allowing Hoffman/Gould to use the "amended complaint" door. Further, that Hoffman/Gould *could* have filed a new claim does not mean that it certainly *would* have done so. The latter scenario is conjecture, no matter how strongly one believes that it likely would have materialized. Had the United States caused the Hoffman lawsuit to be dismissed with prejudice, Hoffman/Gould could just as well have decided not to pursue the matter further.

77. The Majority's reasoning in relation to *Hoffman* is, frankly, harder to follow than its reasoning in *Raji*, although there are many similarities. To begin at the beginning, of course "the issue at stake is whether the United States was in breach of its international obligations," or at least that is the most important issue. But the Majority has ruled that the United States was in breach of its obligations and, in any event, the fact of a breach is taken as given for purposes of a causation discussion. So the relevance of this initial statement escapes me. To say next that "whether Hoffman/Gould amended an existing claim or could have started a new claim" is not the issue also is odd, for it is undisputed that Hoffman/Gould in fact filed an amended claim and could have filed a new claim, so of course it is not the issue; it is not even *an* issue.

78. These statements can only be understood as a preface to the sentence that follows, which simply repeats in the context of *Hoffman* the misunderstanding of causation issues that was apparent in the Majority's discussion of *Raji.* The examples of the garage burning down after a car accident and a subsequent airplane crash all address a situation not presented in

Hoffman. Like *Raji, Hoffman* is not a case of a duplicative second cause.[74] Indeed, the inaptness of the Majority's examples is even more apparent in *Hoffman* because, in *Raji* – to return to my example of the house with two doors – Mrs. Raji actually walked through the second unlocked door to the house in 1983 by assigning her claim to her husband, whereas Hoffman never filed a new complaint. Thus, there is no later event in *Hoffman* the significance of which can be misconstrued so as to make the subsequent airplane crash and other examples of subsequent conduct even appear to be relevant. Even if Hoffman had brought a new lawsuit, this new lawsuit would not have been a subsequent duplicative cause like the airplane crash; it rather would have been the substitution of the alternative hypothetical scenario for the actual scenario.

79. The Majority's reasoning in *Hoffman,* not surprisingly, repeats a mistake that caused them trouble in *Raji*: that is, the mistake of seeing any significance in the fact that Hoffman/Gould is a "third party" (the United States and Iran being the first and second parties). As in Raji, the United States also is an "acting person" in both the actual scenario and the hypothetical alternative scenario. The "action" of the United States in the actual scenario" is an omission: the United States omitted to dismiss the original Hoffman/Gould lawsuit with prejudice (which would have precluded the filing of an amended complaint); Hoffman/Gould's action is to file an amended complaint. In the "hypothetical alternative scenario," the United States acts by supplying its omission and dismissing the original Hoffman/Gould suit with prejudice and Hoffman/Gould acts by filing a new, rather than an amended, complaint. The Majority fails to appreciate that the actors in both the actual and the alternative scenarios are the same, and this analytical mistake seems to form an important part of the foundation for their mistaken conclusion here as it did in *Raji*.

80. The Majority also fails to appreciate the importance of the fact that the breach of the United States is one of omission, not commission. The fault of the United States is one of omission in that the United States did not prevent Hoffman from filing an amended complaint. The question at issue, therefore, is whether Iran would have incurred substantially the same harm if the United States had supplied the omission, that is, if the United States had not permitted Hoffman to amend its complaint while at the same time leaving Hoffman at liberty to file a new complaint.

81. The Majority's second reason for rejecting the notion that essentially identical

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[74] *See supra* paragraphs 54-66.

litigation would have ensued if *Hoffman* had not been allowed to amend its complaint is that the fact that Hoffman could have filed a new complaint "does not mean that it certainly *would* have done so. The latter scenario is conjecture . . . ."[75] This statement reflects a failure to think about this case as one of omission. Imagining what would have happened if the defendant had supplied the omission often involves some conjecture. In Becht and Miller's example of the inattentive motorist striking a pedestrian, exactly what would have happened if he had been observing traffic will be a matter of conjecture in all but the clearest cases.[76] But that does not mean that the alternative scenario may be ignored. In such cases, one must ask the question: would substantially the same harm have occurred if the omission was supplied? In *Hoffman,* the level of conjecture is strikingly low.[77]

82. To use a variation on an old omission example, if a chemist neglects to put a warning label on a box of poisonous tablets sold to a man for use in creating a photographic developing solution and the man's wife ingests the tablets, mistaking them for non-poisonous tablets of her own and dies, the chemist will be held liable. But if you add to that hypothetical the fact that the wife was illiterate and would not have understood the warning had it been there, the chemist's supplying of his omission would not have mattered and he therefore will not be held liable.[78]

83. A similar result should be reached in my earlier example of a house – let us here call it a courthouse – with two adjacent doors of equal size giving equal access to the courthouse. Hoffman's lawyer approaches the courthouse for the purpose of renewing Hoffman's litigation against Iran concerning post-1981 claims. Over one door to the courthouse is a sign that reads "Amended Complaint." Over the other door is a sign that reads "New Complaint." The United States, by hypothesis, should have locked the "Amended Complaint" door but did not, and that is the door through which Hoffman's lawyer enters the courthouse. But

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[75] Award at ¶ 93 (italics in original).

[76] Perhaps he would have had time to miss the pedestrian completely; perhaps the collision would have been such as to inflict less-severe injuries; perhaps there would have been no material difference in the injuries.

[77] To the extent the alternative scenario involves conjecture, it is in fact supported by Hoffman's actions – before seeking to re-open its original lawsuit in American court, Hoffman had already attempted to assert its claims for post-1981 payments in the proceeding that Iran brought in American court to enforce the Tribunal award against Hoffman. (*See supra* note 66.) Thus, Hoffman was determined to assert these claims in U.S. court – and Iran would have thereby incurred legal fees – one way or another. The fact that these fees came in defending a motion to re-open, rather than an entirely new claim, is immaterial because Iran's opposition to the motion to re-open was primarily based on the merits of the claim (or lack thereof), not the procedural technicality of whether Hoffman was permitted to re-open its original case. Iran's opposition to the motion to re-open is in the record at Iran's Brief & Factual Support for Compensable Losses, Vol. VII, Doc. 1554, *Hoffman Export* Case ID, Exhibit No. 3.

[78] Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 64-65 (1961).

Hoffman's lawyer, unlike the unfortunate woman in my poison example, can read, so in our alternative scenario in which the United States supplies its omission and locks the door for "Amended Complaints" we must assume that he reads the sign over the second door and walks through it, just as we assumed in the poison example that the illiterate wife would have gone ahead and ingested the poison even if the chemist had supplied his omission. The comparison really is this simple: the chemist's supplying his omission would not have mattered to the outcome because the wife could not read; the United States' supplying its omission in my courthouse example would not have mattered to the outcome because Hoffman's lawyer *could* read.[79]

F. *JAFARI*

84. The Majority treats *Jafari* as a normal D case and grants Iran all post-19 January 1982 expenses ($13,267.25),[80] a holding that ignores the difficult and unique issues presented in this case.

85. Kianoosh Jafari – an Iranian national at birth who became a U.S. citizen on 17 March 1981 – filed a claim against Iran in United States court on 20 July 1981.[81] The Majority

[79] It is revealing that the Majority's only reply to this example is the following from paragraph 93: "relevant is, not whether the courthouse had two doors, but whether the United States breached its international obligations by allowing Hoffman/Gould to use the 'amended complaint'-door." Of course the second question is relevant, but its affirmative answer is a given in the causation analysis, so the observation is pointless. And in labeling the first question irrelevant the Majority again indulges in the sloppy practice of dismissing an issue as irrelevant without taking the trouble to explain why it is irrelevant. *See* paragraph 76, *supra.*

That said, I must admit that one encounters a problem in trying to think through causation in the *Raji* and *Hoffman* cases, and that problem is that the obligation of the United States to terminate litigation does not make sense in the context of a claim that, while prohibited if brought via one procedural mechanism, can be brought just as easily in another, permitted, way. My house example seems strange because it is almost impossible to imagine a situation in which two parties know that a house has two adjacent doors, one of which must remain unlocked at all times, but nonetheless enter into a contract obligating one party to lock the other door. Such an obligation serves no apparent purpose. But that is precisely the sort obligation the United States is under with respect to Mrs. Raji's claim and the Hoffman post-1981 claims, at least as this Tribunal has construed General Principle B and Article VII of the Claims Settlement Declaration. The United States cannot let those claims proceed attached to other claims over which the Tribunal has jurisdiction, but the claimants are perfectly free at any time to bring them as separate claims (through assignment in Mrs. Raji's case). The question presented to this Tribunal is: just what damage is caused by the failure of the United States to comply with an obligation that – in the Raji and Hoffman contexts – seems pointless since the claims at issue could have been brought separately? What damage flows from failing to lock the first door when the second door always was open and rightfully open? I come back to the answer supplied by contract principles: The fact that the breach of a contractual obligation cannot be seen as causing damage does not make it any less a wrong to the other contracting party. As in *Raji,* nominal damages strike me as the correct answer here. *See* Restatement (Second) of Contracts § 346 & cmt. B (1981) ("If the breach caused no loss . . . a small sum fixed without regard to the amount of loss will be awarded as nominal damages"); Joseph M. Perillo, Corbin on Contracts (rev. ed. 2005) § 55.10 ("[A] breach of contract that causes no injury is still a wrong to the other contracting party. If the aggrieved party has suffered no compensable damages, a judgment of nominal damages will be entered.").

[80] Award at ¶ 104, note 99.

[81] Iran's Brief & Factual Support for Compensable Losses Vol. XIV, Doc. 1561, *Jafari* Case ID, Exhibit No. 2 (Complaint).

acknowledges that this filing triggered no U.S. obligation under General Principle B because, due to Mr. Jafari's nationality, this claim was manifestly outside this Tribunal's jurisdiction.[82] The Majority summarily holds, however, that the United States was obligated to halt all legal proceedings in the *Jafari* lawsuit from 19 January 1982 pursuant to Article VII, Paragraph 2, of the Claims Settlement Declaration, the date on which Mr. Jafari filed his Tribunal claim.[83]

86. Mr. Jafari's filing of a Tribunal claim, however, was prompted by Iran's motion to dismiss Jafari's United States case and particularly Iran's argument in U.S. court that Mr. Jafari was required to present his claim to the Tribunal. As stated in Iran's 2 November 1981 motion to dismiss the U.S. case, "[a]ll U.S. citizens are required by the Algerian Accords to submit their claims against Iran to the International Arbitral Tribunal, and consequently, all U.S. courts are deprived of jurisdiction over such claims."[84] On 19 January 1982, the deadline for filing private claims, Mr. Jafari filed a Tribunal claim in which he cited and quoted Iran's motion to dismiss the U.S. case for lack of jurisdiction.[85] On 23 April 1982, three months after Mr. Jafari filed his claim in this Tribunal, the United States, acting through its court, dismissed Mr. Jafari's suit against Iran for lack of jurisdiction due to his filing of a Tribunal claim.[86] Six years later, this Tribunal dismissed Mr. Jafari's claim, on Iran's urging, for lack of jurisdiction because Mr. Jafari was not a U.S. national on 19 January 1981.[87]

87. *Jafari* thus presents two unusual issues. The first is whether Iran is permitted to impose a previously nonexistent obligation on the United States by taking positions in United States courts that cause plaintiffs who have correctly filed claims there to file Tribunal claims. To state the same point differently, is there not a principle of good faith that would

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[82] Award at ¶ 102.

[83] Award at ¶ 103.

[84] Iran's Brief & Factual Support for Compensable Losses Vol. XIV, Doc. 1561, *Jafari* Case ID, Exhibit No. 4 (Motion to Dismiss).

[85] Case No. 420, Statement of Claim, Doc. 1, at 3-4.

[86] As the U.S. court noted "[o]n January 18, 1982, Kianoosh [Jafari] filed his claim with the United States-Iran Claims Tribunal at The Hague. Consequently the precise language of the Accords 'excludes' Kianoosh's claims from this Court's jurisdiction." Iran's Brief & Factual Support for Compensable Losses Vol. XIV, Doc. 1561, *Jafari* Case ID, Exhibit No. 9 (District Court's Memorandum Opinion & Order). The U.S. court noted that, based on Jafari's change in citizenship, "the application of the Accords to Kianoosh's claims may be open to question," but ultimately dismissed Jafari's claim because "consistent with the general concept of 'jurisdiction to decide jurisdiction,' Section 3 of the Order leaves it to the Tribunal to decide whether a particular claim is within its jurisdiction. Once Kianoosh has invoked its power, he must await its decision of that question before he can pursue his claim elsewhere" Iran's Brief & Factual Support for Compensable Losses Vol. XIV, Doc. 1561, *Jafari* Case ID, Exhibit No. 9 (District Court's Memorandum Opinion & Order).

[87] *See Jafari* and *Islamic Republic of Iran*, Award No. 349-420-3 (25 Feb. 1988), *reprinted in* 18 IRAN-U.S. C.T.R. 90, 90-91 ("On 18 February 1988 Iran submitted a 'Statement of Defence on the Claimant's Nationality' . . . Iran asserted that the Claimant was exclusively a national of Iran on 19 January 1981 . . . and that therefore he has no locus standi to assert his claim before the Tribunal.").

caution the Tribunal against compensating Iran when its own inconsistent positions have caused the losses it alleges?[88] The second issue that the Majority fails to confront is: If we are to permit Iran to impose an obligation on the United States in this manner, should we not find that the United States has complied with that obligation by terminating the relevant U.S. litigation within three months of the obligation's arising?

88. The Majority addresses the first of these issues by accurately summarizing the litigation choices made by Mr. Jafari and Iran.[89] The Majority then proceeds to dismiss the issue by saying that "Mr. Jafari's ability to choose his litigation strategy was not impinged upon by Iran's jurisdictional argument" in the district court that Mr. Jafari should have presented his claim to this Tribunal.[90] That, of course, is not the point. Iran's jurisdictional argument could not and did not "impinge upon" Mr. Jafari's ability to choose whether to file a claim with this Tribunal. It did, however, create the need for Mr. Jafari to make that choice, and the choice he made – to file a claim with this Tribunal – was the only prudent choice he could have made under the circumstances. But the issue here is not whether one should feel sorry for Mr. Jafari; the issue is whether the United States should have to pay Iran's legal bills because of a litigation strategy that Iran pursued in its own interests. It is plain that there was no U.S. obligation to terminate Mr. Jafari's district court lawsuit until Mr. Jafari filed his claim with this Tribunal, and it is equally plain that the only reason Mr. Jafari filed that claim with this Tribunal was because Iran chose to challenge the jurisdiction of the district court, even though Iran then also challenged the jurisdiction of the Tribunal. It thus strikes me as odd for the Majority to say that "the argument . . . that Iran, by its actions, imposed a 'previously nonexistent obligation on the United States' is unpersuasive."[91] This is a question of fact; it is either true or untrue that Iran's action imposed a previously nonexistent obligation on the United States. If the United States was under an obligation, that obligation

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[88] *See* United States Rebuttal to Claimant's Brief & Factual Support for Compensable Losses Vol. III, Doc. 1653 Tab 8, at 3 ("Having [argued in the Tribunal that Jafari was exclusively an Iranian national when his claim arose], Iran cannot now argue in good faith that the litigation should have proceeded before the Tribunal."); United States Rebuttal to Claimant's Brief & Factual Support for Compensable Losses Vol. I, Doc. 1651, at 94-95 ("Iran is not entitled to compensation where its own inconsistent posturing dragged out U.S. court proceedings."); Iran's Brief & Factual Support for Compensable Losses Vol. I, Doc. 1548, at 21-22 (arguing that "there is a minimum of four requisite elements" of estoppel, and that these elements are not satisfied here); United States Brief and Evidence on all Remaining Issues, Doc. 1518, at 48-49 ("Under international law, a party may not 'blow hot and cold' by arguing a position in one case, and then turning around and arguing the opposite position in another case.").

[89] Award at ¶ 105.

[90] Award at ¶ 105.

[91] Award at ¶ 105.

clearly did not exist before Mr. Jafari filed his Tribunal claim, and Mr. Jafari filed that claim only because Iran challenged the jurisdiction of the U.S. district court.

89. I will not quarrel with the Majority's conclusion that there is no principle it could have applied to prevent Iran from "blowing hot and cold," which is to say no principle that prohibits inconsistent behavior by litigants in the Tribunal.[92] But that is not quite the point at issue. No one is suggesting that the Tribunal now sanction Iran for taking inconsistent positions. The issue raised by the fact of those inconsistent positions is more subtle; the issue is whether the Tribunal may and should take into account why Mr. Jafari filed his Tribunal claim in determining whether that filing should be viewed as creating an obligation on the part of the United States. To state the same point differently, do considerations of good faith justify this Tribunal's refusing to order the United States to pay the costs of Iran's defending itself in Mr. Jafari's district court case when no such obligation existed when that case was filed and could not have existed until Mr. Jafari filed his Tribunal claim, which claim was filed only because of Iran's jurisdictional argument in the district court? If the Majority has addressed that question, it has done so very obliquely.

90. The second issue that I mentioned above is more troubling, that is: if we are to permit Iran to impose an obligation on the United States in this manner, should we not find that the United States has complied with that obligation by terminating the relevant U.S. litigation within three months of the obligation's arising? The Majority barely acknowledges the existence of this obvious issue and then dismisses it with one sentence: "This, however, is not an argument that the United States has made, nor is it self-evident that, had it been made, the Tribunal could have been persuaded that, in addition to the grace periods granted by our predecessors, additional margins of flexibility in time ought to be added on a case-by-case basis."[93] In this case this Tribunal is enforcing an obligation of the United States to terminate litigation of U.S. nationals against Iran if that litigation is based on a claim that the same U.S. national has filed with this Tribunal. Most such U.S. lawsuits predated the Algiers

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[92] I note, however, that the Majority's reasoning at Paragraph 106 of the Award – particularly its finding that there is no authority in customary law for a doctrine of judicial estoppel (or similar) – is difficult to reconcile with the Tribunal's previous acknowledgement that,

> [t]he principle of preclusion has a long history in international arbitration. It has been recognized as a 'general principle of law recognized by civilized nations,' . . . and is grounded on considerations of good faith and consistency. The principle of preclusion has been used [*inter alia*] to bar a party's contradictory and self-serving jurisdictional statements . . . ."

Phillips Petroleum and *Iran*, Award No. 425-39-2, para. 198 (29 June 1989), *reprinted in* 21 IRAN-U.S. C.T.R 79, 155 (citations and footnotes omitted).

[93] Award at ¶ 103.

Declarations and the filing of related Tribunal claims by at least many months. In Partial Award 590, this Tribunal ruled that termination of these pre-existing lawsuits within six months of the date of the Declarations constituted compliance with the termination obligation of the United States. The *Jafari* case is not such a pre-existing lawsuit. That case was filed in U.S. district court six months after the Algiers Declarations went into effect and the U.S. case had no companion Tribunal claim until another six months had passed. Three months after Mr. Jafari filed his Tribunal claim, his district court lawsuit was dismissed – which is to say it was terminated. For the Majority to say that it will not even consider whether this dismissal constituted compliance with the United States' termination obligation, and will not do so because the United States did not argue this obvious issue, represents, to my mind, a combination of opportunism and irresponsibility that reflects very badly on this Tribunal.

91. For the Majority also to say that, had the United States made the argument, it might not "have been persuaded that, in addition to the grace periods granted by our predecessors, additional margins of flexibility in time ought to be added on a case-by-case basis" is an example of facile reasoning employed in defense of an irresponsible decision. The reasoning is facile because there is no question here of granting any "grace periods" that add to the grace period granted in Partial Award 590. As I have just explained (and had explained in the draft of this Separate Opinion that was in the hands of my colleagues on June 13), the United States did not benefit in Mr. Jafari's case from the six-month grace period "granted by our predecessors" because Mr. Jafari's lawsuit did not exist until six-months *after* the Algiers Declarations went into effect and *after* the six-month grace period had expired. Moreover, the United States was under no obligation to do anything with respect to Mr. Jafari's lawsuit until another six months had passed and Mr. Jafari filed a claim with this Tribunal. Thus, there is no suggestion that the United States be given any "additional margin of flexibility." The only question is whether the United States should be granted three months to terminate a lawsuit of which the United States had no advance notice, instead of the six months granted in Partial Award No. 590 to terminate lawsuits of which the United States had ample notice prior to January 1981; indeed, lawsuits in many of which the United States had filed statements of interest well before January 1981. This ought to be an easy question to answer in the affirmative. Yet the Majority insists not only on avoiding this question, but also on mischaracterizing it.

92. That the Majority relies on the fact that the United States did not argue this issue is doubly revealing, because in many parts of the Award the failure of Claimant to assert a certain position on an issue has not prevented the Majority from adopting that position.

93. A few examples will be adequate to illustrate this last point.

> A. The Majority awards Iran $70,000 for Shack & Kimball monitoring costs even though Iran never even made a claim for monitoring costs, as opposed to "general litigation expenses," labeling it "grossly unfair" to deny Iran any recovery for monitoring costs.[94]
>
> B. The Majority reclassified as "monitoring costs" costs classified by Iran as specific litigation expenses even though Iran never asked that this be done, observing that "it would be inequitable for the Tribunal, on that ground, outright to dismiss Iran's claim for such costs."[95]
>
> C. The Majority bases its conclusions with respect to the Marriott escrow funds, in part, on its conclusions concerning New York law relating to escrows even though neither party ever mentioned New York escrow law. Indeed, I believe one will search the Parties' briefs in vain for any mention of any part of the reasoning that appears in Paragraph 279 concerning the Marriott escrow funds.

It is more than a little disturbing that the Majority is comfortable holding the United States liable for the *Jafari* litigation costs even though it is clear that in this case the United States did everything that it was required to do, and did it promptly.

G. *SAGHI*

94. *Saghi*, for which the Majority awards Iran $7,312.37,[96] demonstrates that the Majority has ignored the prudent defense standard set out in Partial Award No. 590, literally refusing to consider any action taken by Iran in a D case as imprudent.

95. The Saghis filed a Tribunal claim against Iran, and Iran asserted that the plaintiffs could not present their claims before the Tribunal because the Saghis were Iranian nationals.[97] Thereafter, the Saghis filed a complaint in U.S. court asserting the same claims presented in their Tribunal claim.[98] Neither the U.S. court nor the Saghis requested any

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[94] Award at ¶¶ 227-36. Moreover, this "approximation" is based on a distinction proving the *fact* of loss and the *amount* of loss that was not put forth by Iran in this case.

[95] Award at ¶¶ 240-41.

[96] Award at ¶ 201 & note 199.

[97] *Saghi* and *Islamic Republic of Iran*, Interlocutory Award No. ITL 66-298-2 ¶ 1 (17 Jan. 1987), *reprinted in* 14 IRAN-U.S. C.T.R. 3, 3.

[98] Neither Iran's Case ID nor the U.S. response contains a copy of the complaint. Iran notes in a later-filed motion to dismiss, however, that plaintiffs acknowledged at paragraphs 7 and 39 of this complaint that they had

particular action by Iran, and Iran was free to respond (or not) as it saw fit.[99] Nevertheless, Iran moved to dismiss the U.S. suit.[100] Thereafter, the United States Department of Justice filed a Statement of Interest requesting that the case in U.S. court be stayed pending the Tribunal's resolution of Iran's motion to dismiss the Saghis' pre-existing Tribunal claim.[101] Less than one month after the U.S. Statement of Interest, and without any prompting from the U.S. court or the plaintiffs, Iran chose to file a second, separate motion to dismiss the Saghis' U.S. case.[102] The U.S. court stayed the case,[103] the Tribunal ultimately decided the Saghis' claims on the merits,[104] and the Saghis agreed to dismiss their U.S. case after the Tribunal's Final Award.[105]

96. Given the passiveness of the plaintiffs and the U.S. court, Iran's decision to move for dismissal of the *Saghi* case – particularly its decision to file a second, separate motion to dismiss – could not have been based on reasonable considerations of prudence. A prudent course of action would have been to act in the U.S. court proceeding only as necessary to respond to court inquiries or the plaintiffs' pursuance of the action beyond filing of the claim, while allowing the Tribunal time to rule on the Saghis' companion Tribunal claim. Indeed, this is the course of action that Iran took in most tolling suits, and particularly those filed before *Saghi*.

97. The Majority states that Iran's inconsistent "assertiveness" across tolling suits does not "per se" indicate imprudence, and attributes this inconsistency to the fact that "Iran engaged different lawyers on different cases and it is not surprising that they did not act in a strictly uniform way."[106] It may not be surprising that different counsel "did not act in a

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also filed "a claim based on identical allegations with the Iran US Claims Tribunal" Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 3.

[99] In fact, the *Saghi* docket from U.S. court shows that the plaintiffs had "no plans to resolve [the] matter in this Court." Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 1 (Docket, 12 Dec. 1983 Entry).

[100] Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 1 (Docket, 19 Dec. 1983 Entry).

[101] Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 1 (Docket, 16 Feb. 1983 Entry) and Exhibit No. 3 (Suggestion of Interest).

[102] Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 1 (Docket, 12 Mar. 1983 Entry).

[103] Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibit No. 1 (Docket, 15 Aug. 1984 Entry).

[104] *Saghi* and *Islamic Republic of Iran*, Award No. 544-298-2 (22 Jan. 1993), *reprinted in* 29 IRAN-U.S. C.T.R. 20.

[105] Iran's Brief & Factual Support for Compensable Losses Vol. XVI, Doc. 1563, *Saghi* Case ID, Exhibits Nos. 10 & 11 (Letters dated 8 Feb. 1993 & 23 April 1993 regarding plaintiffs' stipulated dismissal of their U.S. case).

[106] Award at ¶ 201.

strictly uniform way," but the fact that most of Iran's counsel saw no reason to move to dismiss tolling suits is rather substantial evidence that the prudent defense of Iran's interests did not require such actions.

98. The fundamental basis for the Majority's conclusion that *Saghi* expenses are compensable, however, is found at the end of Paragraph 201 of the Award:

> [T]he circumstances surrounding Iran's actions are important. Viewed in light of the fact that the suspension mechanism established by Executive Order 12294 did not purport to do exactly what the Algiers Declarations required – "terminate" legal proceedings – Iran's actions in seeking to have the Saghi lawsuit dismissed cannot be seen as imprudent.

This rationale cannot support the weight that the Majority places on it. This Tribunal, when drafting Partial Award No. 590, knew that the suspension mechanism did not purport to do exactly what the Algiers Declarations required – and it was on that basis that the Tribunal found the U.S. had violated its termination obligation by permitting the filing of tolling suits. Nevertheless, Partial Award No. 590 states that Iran may be compensated only for losses suffered in such suits "as a result of its making appearances or filing documents in United States courts subsequent to 19 January 1981 in the prudent defense of its interests."[107] If Iran's actions in *Saghi* were "prudent," it cannot be for the reason given in the Award.

H. INTEREST

99. The Majority acknowledges that, even though the 10 percent rate of interest requested by Iran has been awarded in the past, that rate "would not be reasonable today in light of the steady decline in interest rates since 1990 as well as the dramatic fall in interest rates as a result of the world financial crisis of 2008."[108] The Majority also acknowledges that there is precedent in Tribunal practice for awarding interest based on the United States six-month certificates of deposit.[109] The Majority then proceeds to award interest equal to the United States prime rate as it varied over time. The rationale for using this (in Tribunal practice) unprecedented rate is twofold: "First, it is unrealistic to assume that an Iranian party, had it been paid in time, would have invested the funds in the United States in a form of commercial investment in common use there, such as certificates of deposit. Second, it is

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[107] *Islamic Republic of Iran* and *United States of America*, Partial Award No. 590-A15(IV)/A24-FT, ¶ 214 A (d)(2) (28 Dec. 1998), *reprinted in* 34 IRAN-U.S. C.T.R. 105, 167.

[108] Award at ¶ 284.

[109] *See* Award at ¶ 286.

more likely that, in order to bridge the period without the money withheld, a public entity such as Iran would need to borrow money."[110]

100. The first part of this rationale is rather plainly unpersuasive. The six-month CD rate is a reasonable proxy for a risk-free (or almost-risk-free) interest rate, while the U.S. prime rate is at all relevant times materially higher than any proxy for a risk-free rate. If one does not wish to use a United States proxy for a risk-free rate, there are plenty of other proxies available. The question that the Tribunal should have considered, but did not, is whether we should continue in the present case the precedent of applying a risk-free rate, such as the six-month CD rate, in State-to-State cases. Further, the fact that the Federal Reserve stopped publishing the six-month CD rate at the end of last year is neither here nor there. The rates for six-month CDs in fact are available from the Federal Reserve for all of the relevant period except the last seven months. One may quickly determine from other sources whether that rate has changed materially over that short period of time and, if it has, apply that different rate over the last seven months.[111]

101. The second part of the rationale is sheer speculation. States, like enterprises and individuals, both borrow money and place money in interest-bearing accounts. They also may choose to cover a shortage of revenue by increasing taxes rather than borrowing, and they may choose to spend additional revenue rather than save it or use it to reduce debt. All of which is to say that it is pointless to speculate as to what Iran did when it did not receive the amount of this award in 1982 or what it would have done if it had received that amount then.

102. I would not use this case to establish a new Tribunal precedent, and certainly not for the reasons given. Instead, I would follow the Tribunal precedent that allows for the steep decline in interest rates over the last 20 years and apply the rate for United States six-month certificates of deposit, as it varied over the relevant time period, using alternative sources of information for the last seven months.

IV. BEHRING "OTHER EXPENSES"

103. I agree with the Majority's decision not to Award Iran $146,267.86 for *Behring* "other losses" because "[i]t is not for this Tribunal to address a situation that . . . is properly subject

[110] Award at ¶ 286.

[111] To keep it simple, one might just apply the highest rate quoted for each month by any of the five largest United States banks.

of an enforcement regime separate to these proceedings."[112] I write separately because, in reaching this conclusion, the Majority makes at least one possibly important statement concerning the scope of the United States' obligation that is both incorrect and unnecessary.

104. The U.S. court proceedings at issue in *Behring* consisted essentially of Iran's effort to persuade a U.S. court to prevent Behring from selling certain Iranian property in its possession for the purpose of recovering unpaid storage charges. Behring did not seek, and apparently did not need, the permission of any U.S. court to proceed with the sale. The Award describes these U.S. proceedings accurately as follows:

> Iran also unsuccessfully attempted to stop the sale in the context of the litigation instituted by Behring against it in the District Court. On 5 August 1983, Iran petitioned the District Court for a temporary restraining order and preliminary injunction against Behring's proposed sale. The District Court denied Iran's motion on 10 August 1983.[113]

The Tribunal then proceeds to make the following finding and holding:

> The Tribunal finds that the United States court proceedings before the District Court, to the extent they involved pre-19 January 1981 storage costs, were subject to the United States termination of litigation obligation under the Algiers Declarations. The subject matter of the claim meets the relevant temporal jurisdiction requirements, and proceedings had been instituted at the Tribunal in respect of the claim. *Thus, the Tribunal holds that the District Court was obliged to halt the preliminary injunction proceedings in the Behring lawsuit, and put the sale on hold, while parallel interim order proceedings were pending before the Tribunal.* By failing to do so, the District Court failed to respect the primacy of the Tribunal's jurisdiction and the Tribunal's interim award of 10 August 1983.[114]

105. This is an extraordinary statement. It amounts to saying that the United States was both obliged to halt the injunction proceedings *initiated by Iran* the purpose of which was to stop Behring's sale of Iranian property pending the outcome of proceedings in the Tribunal, and also obliged then, somehow, to do exactly what the Iranian injunction action was attempting to do. The notion that the United States was obliged to stop Iranian actions in U.S. courts the purpose of which was to protect Iranian interests is simply absurd. Why the Majority felt the need to make this statement, given that it has nothing to do with their conclusion in this case, is puzzling.

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[112] Award at ¶ 267.

[113] Award at ¶ 260.

[114] Award at ¶ 265 (emphasis added).

V. CONCLUSION

106. For the reasons stated above, I would award Iran $92,192.40, plus interest equal to the United States rate on six-month certificates of deposit, calculated in the same manner as is described at Paragraphs 289 and 290 of the Award.

Dated, The Hague
2 July 2014

O. Thomas Johnson