INTERNATIONAL DECISIONS

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THE LATEST AWARD FROM THE IRAN–UNITED STATES CLAIMS TRIBUNAL: THE LINE BETWEEN APPROXIMATION OF DAMAGES AND RULING *EX AEQUO ET BONO*

The Iran–United States Claims Tribunal (Tribunal) has functioned in The Hague since 1981. To date, the Tribunal has completed its work in over thirty-nine hundred cases, making it one of the most significant claims settlement efforts in history. Remaining on the Tribunal's docket are several very large and complex claims between the Islamic Republic of Iran and the United States of America.[1]

The contributions of the Tribunal to international jurisprudence have been substantial, particularly with respect to treaty interpretation and the application of principles of international law. Its approach to evidence and burden of proof will have a lasting impact on the methods of future claims tribunals established following war, conflict, and nationalizations.

One of the most contentious matters before the Tribunal has involved a dispute about the meaning and implementation of the Algiers Accords, the set of agreements that resolved the hostage crisis and led to the establishment of the Tribunal. This dispute has been pending before the Tribunal for over thirty-two years, during which time Iran and the United States undertook dozens of filings and the Tribunal held two evidentiary hearings. The Tribunal issued a partial award in the dispute in 1998 and its final award in July 2014.[2] These decisions have significant implications for understanding how much (or how little) freedom a state has in choosing its means of implementing an international treaty obligation through its judiciary.

In the final award of July 2014, the members of the Tribunal were unanimous in finding that the United States had failed to abide by its treaty obligations under the Algiers Accords by not terminating claims by U.S. nationals against Iran in U.S. courts. That failure, the Tribunal said, resulted in a loss to Iran that deserved monetary compensation. This report summarizes how the Tribunal interpreted the relevant obligations of the United States, as well as the Tribunal's evidentiary approach to calculating the damages resulting from the failure by the United States to abide by its treaty obligations.

[1] Background information about the Tribunal is available at its website, http://www.iusct.net. Online public access to the Tribunal's awards and decisions is limited to academic users and international organizations.

[2] Iran v. United States, 34 Iran-U.S. Cl. Trib. Rep. 105 (1998), *available in* 1998 WL 930565 [hereinafter Partial Award]; Iran v. United States, AWD No. 602-A15(IV)/A24-FT (Iran-U.S. Cl. Trib. July 2, 2014) [hereinafter Final Award].

https://doi.org/10.5305/amerjintelaw.109.2.0369 Published online by Cambridge University Press

I. BACKGROUND TO THE DISPUTE

The Tribunal's jurisdiction in this case rested on Article II, paragraph 3 of a part of the Algiers Accords known as the Claims Settlement Declaration,[3] which provides the Tribunal with jurisdiction over "any dispute as to the interpretation or performance of any provision of that Declaration." Iran and the United States disagreed, inter alia, over the meaning of another part of the Algiers Accords, specifically General Principle B of the General Declaration,[4] as well as the meaning of Article VII, paragraph 2 of the Claims Settlement Declaration.

General Principle B obliged the United States and Iran "to terminate litigation as between the government of each party and the nationals of the other" and required the United States "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."[5] Article VII, paragraph 2 of the Claims Settlement Declaration provided, in relevant part, that "[c]laims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."[6]

Iran asserted eight separate breaches of these provisions by the United States. On December 28, 1998, the Tribunal issued Partial Award No. 590, dismissing three of those claims completely and a portion of another.[7] This report focuses on Iran's claim that the United States breached its obligation under General Principle B to terminate litigation by U.S. nationals against Iran in U.S. courts and sometimes tolled certain lawsuits instead of terminating them.

Iran contended that the United States had violated General Principle B by merely suspending claims as directed by U.S. Executive Order No. 12,294.[8] The executive order provided, in pertinent part:

> Section 1. All 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. During the period of this suspension*, all such claims shall

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. VII(2), Jan. 19, 1981, 1 Iran-U.S. Cl. Trib. Rep. 9, 11 (1983) [hereinafter Claims Settlement Declaration], 75 AJIL 422 (1981).

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *id.* at 3 [hereinafter General Declaration], 75 AJIL 418 (1981).

[5] General Declaration, 1 Iran-U.S. Cl. Trib. Rep. at 3.

[6] Claims Settlement Declaration, *supra* note 3, Art. VII(2), 1 Iran-U.S. Cl. Trib. at 11.

[7] Partial Award, para. 214. Iran's claims are described in paragraph 2 of the partial award. The remaining docket of the Tribunal consists of claims of the government of the Islamic Republic against the United States government, largely for armaments purchased in the United States by the imperial government of Iran. Delivery of those armaments was interdicted by the United States as a result of the overrunning of the U.S. Embassy in Tehran and the imprisonment of its diplomatic staff as hostages. The claims of the Islamic government for the amounts paid for those undelivered armaments, plus interest accruing since 1979, total many billions of U.S. dollars. Adjudication of these claims has been pending since Iran's presentation of its Statement of Claim on October 25, 1982.

[8] Exec. Order No. 12,294, 3 C.F.R. §139 (1981), *reprinted in* 20 ILM 412 (1981); *see also* Iranian Assets Control Regulations, 31 C.F.R. pt. 535 (1981) (U.S. Treasury regulations issued after January 19, 1981, to implement the United States obligation to terminate litigation).

> have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order. *Nothing in this action precludes the commencement of an action after the effective date of this Order for the purpose of tolling the period of limitations for commencement of such action* . . . .
>
> Section 3. Suspension under this Order of a claim or a portion thereof submitted to the Iran–United States Claims Tribunal for adjudication shall terminate upon a determination by the Tribunal that it does not have jurisdiction over such claim or such portion thereof.
>
> Section 4. A determination by the Iran–United States Claims Tribunal on the merits that a claimant is not entitled to recover on a claim shall operate as a final resolution and discharge of the claim for all purposes. A determination by the Tribunal that a claimant shall have recovery on a claim in a specified amount shall operate as a final resolution and discharge of the claim for all purposes upon payment to the claimant of the full amount of the award, including any interest awarded by the Tribunal.[9]

Iran argued that suspension of claims pursuant to this executive order did not result in their termination and was therefore a breach of the plain meaning of General Principle B. The United States responded that suspension had been the most appropriate method of complying with its obligations under General Principle B because it prevented the nullification of claims that did not fall within the Tribunal's jurisdiction (partial award, paras. 50, 59). The United States emphasized that in the Algiers Declarations it had not agreed "to forfeit nonarbitrable claims" (*id.*, para. 67).

The United States also defended its choice of suspension on the ground that it had to devise some means of preventing claims that would eventually be rejected by the Tribunal on jurisdictional grounds from being barred by the applicable statutes of limitation under U.S. law. The mechanism it chose permitted its nationals to initiate suits to toll the limitations period and then suspend those suits immediately so that the cases would remain inactive on the courts' dockets but could be revived if the Tribunal eventually found that it lacked jurisdiction over the underlying claims (partial award, para. 127).

The United States further argued that under the suspension regime created by Executive Order 12,294, Iran was not required to file any responses to suits initiated to toll the limitations period. According to the United States, in the many instances where Iran had filed no answer at all to a tolling suit, Iran had suffered no adverse consequences. Therefore, the United States contended that Iran's claim for damages resulting from suspended claims and tolling suits should fail for lack of proof (partial award, para. 128).

II. The Partial Award

In its partial award, the Tribunal decided that the United States had acted in good faith by issuing Executive Order 12,294 as long as the practical effect of that order was to terminate the litigation of all claims that "arguably" fell within the Tribunal's jurisdiction (partial award,

[9] Exec. Order No. 12,294, *supra* note 8 (emphasis added).

https://doi.org/10.5305/amerjintelaw.109.2.0369 Published online by Cambridge University Press

para. 214(a)). It also concluded that "[t]olling the limitations period, by itself, would not conflict with those Declarations; it is the particular method chosen by the United States—the initiation of litigation in the United States after the date of the Declarations—that so conflicts" (*id.*, para. 131). As regards suspension, the Tribunal concluded that, at a subsequent stage of the proceedings, it would determine whether suspension had in fact resulted in termination (*id.*, para. 99).

The Tribunal's partial award thus seemed to be of two minds. On the one hand, it emphasized that interpreting the treaty obligations owed by the United States to Iran was fact sensitive and could not be carried out in an interpretive legal vacuum; on the other hand, it effectively determined that the plain language of the executive order fell short of satisfying the obligations of the United States. The Tribunal observed that it could not "ignore the express terms agreed upon by the Parties, nor can it replace those terms with others that would unavoidably change the original meaning" (partial award, para. 91).

Although it recognized that "suspension" was not the same as "termination" according to the plain meaning of those words and that Iran had made appearances and filings in U.S. courts in response to suspended and tolled claims, the Tribunal nevertheless determined in its partial award that whether the United States had breached General Principle B of the Claims Settlement Declaration would depend on whether Iran had been "reasonably compelled" to make appearances or file documents "in the prudent defense of its interests" (partial award, paras. 93, 101).

Implicit in the partial award was the conclusion that the Tribunal would *not* be evaluating the U.S. obligation to carry out the terms of the General Declaration and Claims Settlement Declaration as an "obligation of means," namely, whether the means that the United States had employed, suspension and tolling, were exercised with a sufficient level of due care and diligence so as to give effect to the termination obligation. Rather, the Tribunal prescribed "an obligation of result" that would be measured against specific evidence about whether, as a result of the means employed by the United States, Iran was reasonably compelled to defend its interests in U.S. courts after July 19, 1981.[10]

The Tribunal's interpretation of the U.S. obligation as one of result rather than means is evocative of certain legal questions raised in the *Avena* case.[11] Even though they involve very different rights and facts, both disputes raise the question of what kind of mechanisms states may devise to comply with international obligations while protecting rights and procedures under their domestic legal systems. In rejecting Mexico's request for interpretation of the *Avena* judgment,[12] the International Court of Justice decided not to address whether, for example,

[10] The legal concepts of obligation of means versus obligation of result are concepts of civil law and public international law. *See* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371, 375 (1999) (citing Jean Combacau, *Obligations de résultat et obligations de comportement, quelques questions et pas de réponse*, *in* MÉLANGES OFFERTS À PAUL REUTER: LE DROIT INTERNATIONAL, UNITÉ ET DIVERSITÉ 181 (1981)); *see also* Roberto Ago, *Le délit international*, 68 RECUEIL DES COURS 415 (1939 II).

[11] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 3). In *Avena*, the Court concluded that "the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals." *Id.* at 72, para. 153(9).

[12] The Court rejected Mexico's request for an interpretation of the "means of its own choosing" language and what Mexico argued was an "obligation of result" as opposed to an obligation of means. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mexico* v. *United*

by submitting an amicus brief in the *Medellín* case before the U.S. Supreme Court in support of Medellín and against the decisions of Texas and its courts, the United States had fulfilled its obligations under international law, whether as obligations of means or as obligations of result.[13]

III. THE FINAL AWARD

In its final award, the Iran-U.S. Claims Tribunal focused on the outcome of the efforts by the United States to comply with its obligations through its judiciary as an obligation of result. The Tribunal concluded that determining whether Iran had been "reasonably compelled" to make appearances or file documents would depend on whether Iran perceived a need for it to make appearances or file documents (final award, para. 74). Therefore, the outcome or result depended on Iran's perception, not on a specific legal outcome in a U.S. court.

The United States maintained, inter alia, that the fact that no default judgment was ever entered against Iran was evidence that it had complied with its obligation of result (final award, para. 75). In the end, however, the Tribunal was not interested in whether Iran had suffered actual prejudice in terms of U.S. law. The question it considered was whether Iran reasonably perceived that it had to present documents and make appearances regarding suspended claims against it in the United States. The Tribunal listed various factors that it deemed relevant in determining that Iran's perception was more significant than actual legal prejudice under U.S. law. Those factors included, inter alia, the breakdown in diplomatic relations between Iran and the United States, Iran's lack of familiarity with the United States legal system, and certain aspects of Executive Order 12,294 such as its departure from the language of the Algiers Declarations, its allowance for the filing of new suits, and its creation of a suspension mechanism that was not readily comprehensible to Iran (*id.*, para. 77).

The Tribunal determined that, notwithstanding that in many cases the United States had diligently filed statements of interest in support of Iran and the jurisdiction of the Tribunal and had even sought stays of litigation as well as *vacatur* of attachments,[14] Iran could not have been expected to rely on the United States to fight its battles in U.S. courts in light of the absence of normal diplomatic relations and lack of trust between the two countries (final award, paras. 74, 77).

States of America) (Mex. v. U.S.), 2009 ICJ REP. 3, 6, para. 9 (Jan. 19). Mexico's request for an interpretation was rejected on the ground that it went beyond the scope of issues decided in the earlier 2004 *Avena* judgment. *Id.* at 17, para. 44.

[13] Judge Sepúlveda-Amor, in discussing the judgment of the Court concerning Mexico's request for an interpretation, observed that "[i]n the present Judgment, the Court has clearly established what is meant by an obligation of result: it is 'an obligation which requires a specific outcome.'" *Id.*, Dissenting Opinion of Judge Sepúlveda-Amor, 2009 ICJ REP. at 31, para. 2. He also expressed his dismay that "the Court ha[d] missed a splendid opportunity to settle issues calling for interpretation and to construe the meaning or scope of the *Avena* Judgment in certain respects incontrovertibly characterized by a degree of opacity." *Id.* at 30, para. 1.

[14] *See, e.g.*, Statement of Interest of the United States, Crocker Nat'l Bank v. Iran, No. 79 Civ. 6493 (S.D.N.Y. Feb. 26, 1981), *reprinted in* 20 ILM 363 (1981). In this statement, the United States asked the court to stay litigation of those claims against Iran arguably within the Tribunal's jurisdiction and vacate the attachments against Iranian assets. In addition, in the *Marriott* case, the complex facts of which are explained in the final award, the United States had filed a statement of interest requesting that the appellate court stay the state court litigation, and had then filed a second statement of interest in support of an Iranian foundation before the Court of Appeals of the State of New York, its highest court. *See* Marriott Corp. v. Rogers & Wells, No. 79 Civ. 21884 (N.Y. Sup. Ct. decided Feb. 13, 1980), *rev'd*, 438 N.Y.S.2d 330 (App. Div. 1981), *aff'd*, 459 N.E.2d 1287 (N.Y. 1983); Final Award, paras. 132–38.

As noted, the partial award had reasoned that Executive Order 12,294 was a good faith step in the right direction as long as the effects of suspension met the termination obligation, indicating that the legality of the executive order would depend on the manner of its implementation. The final award, however, concluded that Executive Order 12,294 had been inherently flawed from the outset on the basis of a "plain language" reading, the position that Iran had asserted all along (final award, para. 77).[15]

Although the Tribunal reached that conclusion unanimously (final award, para. 294(a)), some members of the Tribunal differed over the amount of damages awarded and the approach taken by the Tribunal to the burden of proof and approximation.

IV. The Question of Damages

The Tribunal had been directed by the partial award to award damages for specific litigation expenses, or litigation connected to instances where the United States had suspended and/or tolled claims instead of terminating them.[16] As the Tribunal explained in its partial award:

> The extent of Iran's participation in United States courts, and the expenses associated therewith, depended on the circumstances of each case. The Tribunal expects Iran to show in the second phase of these proceedings what expenses it incurred with respect to each specific case and what was the particular justification for the specific sums it spent. Iran will be expected to produce factual evidence of the losses it suffered as a result of its making appearances or filing documents in United States courts subsequent to 19 July 1981 in the prudent defense of its interests with respect to the claims described *supra*, in para. 101. The Tribunal also expects Iran to produce factual evidence of the losses it suffered as a result of the monitoring of the suspended claims and invites both parties to address the question of whether Iran should be compensated for those losses. (Partial award, para. 102)

Iran sought a total of US$1,731,210.24 for these expenses, which included (1) US$620,352.91 for the total expenses that Iran had allegedly incurred in litigating specific United States court cases ("specific litigation expenses"), and (2) US$1,110,857.33 in "general litigation expenses," which Iran defined as litigation costs it had paid attorneys in the United States that could not be allocated to specific cases.

The Tribunal ultimately awarded a total of US$842,468.14 (US$268,161.77 for amounts found due and owing to Iran under the final award and US$574,306.37 for aggregate prejudgment interest on those amounts). The Tribunal also awarded Iran simple postjudgment interest on that total amount at the successive prevailing prime bank lending rates in the United States for the period of nonpayment of the award (final award, para. 293).

[15] Judge McDonald observed in her separate opinion that even though she agreed that the United States had breached its obligation under General Principle B, she would have found that the breach was not due to the suspension mechanism itself but, rather, a failure of the courts to suspend litigation as required by Executive Order 12,294. Final Award, Separate Opinion of Judge Gabrielle Kirk McDonald, Concurring in Part, Dissenting in Part, para. 1 [hereinafter sep. op. McDonald, J.].

[16] Partial Award, para. 102. The composition of the Tribunal in the 2014 award was almost entirely different from that of the 1998 award. The members of the Tribunal that rendered the 1998 award were Krzysztof Skubiszewski (president), Bengt Broms, Gaetano Arangio-Ruiz, Assadollah Noori, George H. Aldrich, Koorosh H. Ameli, Richard C. Allison, Mohsen Aghahosseini, and Charles T. Duncan. The members of the Tribunal that rendered the 2014 award were Hans van Houtte (president), Bengt Broms, Herbert Kronke, Charles N. Brower, Hamid Reza Nikbakht Fini, Mir Hossein Abedian Kalkhoran, Gabrielle Kirk McDonald, Seyed Jamal Seifi, and O. Thomas Johnson.

To prove its specific litigation expenses, Iran submitted a series of documents, including invoices and other documents issued by the law firm of Shack & Kimball, which had served as Iran's general counsel in the United States from February 1979 through early 1983, as well as other U.S. law firms that Iran had retained to represent it in the relevant U.S. litigation. These records consisted of documents evidencing payment, individual statements prepared by Iran for the purposes of the present arbitration in relation to each of the specific U.S. court cases at issue, and portions of a 1992 settlement agreement between Iran and Shack & Kimball to prove litigation expenses in the amount of US$128,071 for services allegedly provided by the firm between June 1982 and March 1983 (final award, para. 192).

In general litigation expenses, Iran had included (1) "costs of U.S. court participation" that could not be allocated to specific cases ("unallocated litigation costs"); (2) the expenses Iran allegedly incurred in monitoring relevant claims pending against it in United States courts ("monitoring expenses"); and (3) US$250,000 allegedly representing "in-house attorney charges and administrative costs" incurred by Iran's Bureau of International Legal Services in supervising the work of Iran's U.S. attorneys (final award, paras. 143, 209). A large portion of the total damages sought by Iran (US$935,776.80) was related to litigation services provided by Shack & Kimball (*id.*, para. 149 & n.154).

Unallocated Litigation Expenses

Under its claim for unallocated litigation expenses and monitoring expenses, Iran sought a total of US$860,857.33, without indicating the amount of relief it was seeking under each head of recovery. The Tribunal held that Iran's claim for unallocated litigation costs did not fulfill the requirement that Iran prove its losses with factual evidence as stipulated by the partial award (final award, para. 213).

Monitoring Expenses

The Tribunal unanimously held, as a matter of principle, that the United States owed damages for Iran's monitoring expenses[17] related to suspended claims and rejected the U.S. position that such expenses were not necessary or not reasonably incurred. The Tribunal concluded that Iran's monitoring of the suspended litigation was "in principle a logical measure" to prevent losses caused by litigation that had not been terminated under the terms of the Algiers Declarations (final award, para. 221).

Whereas the Tribunal unanimously found that the United States was liable for monitoring expenses as a matter of causation, it did not agree about how to evaluate Iran's claim for certain monitoring expenses that, as for unallocated litigation expenses, lacked both case specificity and supporting documentary evidence. Iran sought US$807,705.81 for all legal services provided to it by Shack & Kimball, without submitting a list of monitoring expenses regarding specific suspended cases that arguably fell within the Tribunal's jurisdiction, or invoices for the

[17] Nowhere in the final award was the term "monitoring expense" defined. In a footnote to the award, the Tribunal observed that "the notion of 'monitoring of the suspended claims,'" *see, e.g.*, Partial Award, paras. 102, 214A(a)(4), "or, simply, 'monitoring'—as used and understood in this arbitration, is not one that has been employed contemporaneously by the Parties." Final Award, para. 228 n.226. The Tribunal understood the term "general representation," as employed in the document, to encompass relevant monitoring activities carried out by Shack & Kimball. *Id.*

costs incurred by the law firm in order to monitor those cases. As observed by the Tribunal, "Iran did not specify the amount it seeks in monitoring expenses; it simply put forward an aggregate representing the total relief sought on its claims for monitoring expenses *and* unallocated litigation expenses together—that is, US$860,857.33 . . . ." (final award, para. 237).

Invoking other instances where it had awarded damages of legal fees, even in the absence of specific factual evidence, the majority of the Tribunal determined that it would award Iran a portion of Shack & Kimball's monitoring expenses (final award, para. 236). For example, it compared the circumstances of the present case with those of *William J. Levitt v. Iran*,[18] where the Tribunal had estimated the amount to award on a claim for legal fees incurred in preparation for a certain housing project in Iran. Although the claimant had produced evidence of payment of the total amount of legal fees claimed, it had failed to produce detailed invoices. The Tribunal attributed approximately one-third of the legal fees to the housing project and awarded that amount to the claimant (*id.*, para. 231).

In this case, the majority of the Tribunal concluded that it was fair and reasonable to award Iran US$70,000 in compensation for monitoring services performed by Shack & Kimball. This use of approximation of damages for unallocated litigation expenses was contrary to the partial award's requirement of specific factual evidence to support monitoring claims (partial award, para. 102). Approximation was carried out for monitoring expenses in stark contrast to instances where Iran had submitted specific invoices from seven other law firms that, unlike Shack & Kimball, supplied case identification numbers so that the Tribunal had some means of ascertaining whether the monitoring expenses were causally linked to the United States measures (final award, para. 238).

The decision to award Iran US$70,000 in compensation for monitoring services performed by Shack & Kimball resulted in dissenting opinions by Judges Johnson and Brower, who argued that awarding this amount in the absence of specific factual evidence was "simply baseless" and nothing more than a "giveaway."[19]

Judge Johnson criticized the majority's use of approximation of damages since Iran itself had not offered "even a suggestion of how this Tribunal should go about making such an approximation."[20] Conversely, Judges Mir-Hossein Abedian, Hamid Reza Nikbakht Fini, and Jamal Seifi, in a joint separate opinion, argued that the award of US$70,000, being less than 10 percent of what was claimed, was meager at best.[21] They argued that the Tribunal should have applied a less strict standard of approximation, and should have given greater weight to the affidavits of Thomas Shack, who was found to be a credible witness, was cross-examined by counsel for the United States, and answered all questions from the Tribunal.[22]

[18] William J. Levitt v. Islamic Republic of Iran, 14 Iran-U.S. Cl. Trib. Rep. 191, 205–06 (1987).

[19] Final Award, Concurring and Dissenting Opinion of Judge Charles N. Brower, para. 3 [hereinafter sep. op. Brower, J.]. Judge McDonald joined Judges Brower and Johnson in her opinion. Sep. op. McDonald, J., *supra* note 15, para. 1.

[20] Final Award, Separate Opinion of Judge O. Thomas Johnson, Concurring in Part, Dissenting in Part, para. 14 [hereinafter sep. op. Johnson, J.].

[21] Final Award, Joint Separate Opinion of Judges Mir-Hossein Abedian, Hamid Reza Nikbakht Fini, Jamal Seifi, paras. 3, 14 [hereinafter joint sep. op.].

[22] *Id.*, paras. 3–9.

In disagreeing without specifically addressing Shack's credibility,[23] Judge Brower argued that US$70,000 was anything but meager, particularly in light of the fact that for every dollar of the US$70,000 there was a "gift of $3.31" in prejudgment interest, which resulted in a substantial award of over US$200,000.[24]

It may be said that the reason for the Tribunal's decision to give Iran the benefit of the doubt on the Shack & Kimball damages was a direct consequence of the Tribunal's approach to examining whether a breach of General Principle B had occurred. According to the reasoning of the Tribunal, if Iran was making appearances and filing documents with U.S. courts, it must have been reasonably compelled to do so. The same logic applied to the inclusion of monitoring expenses—if Iran had to engage a U.S. law firm to monitor litigation in the United States, it must have been reasonably compelled to do so because the United States had breached its obligations.

The Tribunal defended its decision to award the Shack & Kimball monitoring damages on the basis that all damages awards involve some speculation and are inherently imprecise. Although that is true, it should be emphasized that this matter did not involve favoring one damages proposal over another, where, for example, a claimant and a respondent are arguing about an enterprise's value absent a taking, an inherently speculative, but necessary, exercise in awarding damages. Nor was this an example of an injury that was impossible to quantify with documentary evidence. Rather, in this situation Iran was the only party in a position to produce basic facts concerning its losses. Those facts were in its exclusive control, and yet it did not produce them. In his separate opinion, Judge Johnson raised serious questions about the reasoning underlying the majority's decision to make an approximation of damages for unallocated monitoring expenses. He observed: "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."[25]

In the absence of a finding of bad faith on the part of the United States, it is questionable what the amount of monitoring damages awarded as a result of Shack's affidavit actually represents under principles of law. The majority of the Tribunal was adamant in concluding that it was not awarding damages for monitoring expenses *ex aequo et bono* or under principles of equity rather than by principles of law (final award, para. 231). Article 33 of the Rules of Procedure of the Iran-U.S. Claims Tribunal, which are based on the UNCITRAL Arbitration Rules of 1976, provides that "[t]he arbitral tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so."[26]

Notwithstanding the majority's insistence that it was not determining damages based on equitable principles, the award of damages for Shack & Kimball's expenses seems akin to what a U.S. judge would award as exemplary damages or what an international judge or arbitrator might award as moral damages under international law. If this outcome is what the majority

[23] Judge Brower criticized the joint separate opinion for describing Shack's testimony as "pivotal" for the Tribunal, which Judge Brower believed was "grossly misleading." Sep. op. Brower, J., *supra* note 19, para. 3 n.6 (quoting joint sep. op., *supra* note 21, para. 6).

[24] *Id.*, para. 3.

[25] Sep. op. Johnson, J., *supra* note 20, para. 14.

[26] Iran–United States Claims Tribunal, Rules of Procedure, Art. 33(2) (May 3, 1983), *reprinted in* CHRISTOPHER R. DRAHAZOL & CHRISTOPHER S. GIBSON, THE IRAN-U.S. CLAIMS TRIBUNAL AT 25, at 391 (2007), *available at* https://www.iusct.net/Pages/Public/A-Documents.aspx.

intended by awarding US$70,000 on the basis of the Shack affidavit, it would have been helpful to have explained as much in light of the importance of this decision for international law and for the instrumental role that the Iran-U.S. Claims Tribunal will continue to have in international dispute settlement.

Despite the criticism of the majority's award of Shack & Kimball's monitoring fees as damages, this decision will likely be relied upon in the future for assertions of damages based on approximation and on general affidavits, particularly where documentary evidence is not available owing to the passage of time, conflicts, or other circumstances.

V. CONCLUSION

How states implement treaty obligations through their judiciary and other government branches remains a thorny problem of international law. These decisions of the Iran-U.S. Claims Tribunal will likely be cited in the future as standing for the proposition that the silence of a treaty as to how a state should implement an obligation under that treaty does not mean that a state has absolute freedom in choosing the means of implementation.

It is also likely that the Tribunal's final award will be relied upon in instances where claimants seek damages in the absence of evidentiary proof. In light of President Obama's announcement that the United States will restore diplomatic relations with Cuba, and the related discussions of a possible resolution process to handle the outstanding expropriation claims of U.S. nationals whose property was nationalized by the Castro regime,[27] the interpretive and evidentiary methods applied by the Iran-U.S. Claims Tribunal will probably attract renewed interest and scrutiny.[28] For this reason, as observed by John Crook, it is paramount that international courts and tribunals "explain[] in their awards and judgments the processes and principles . . . applied in assessing evidence."[29]

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[27] On December 17, 2014, President Obama announced sweeping policy changes that will influence investment and commercial relations with Cuba. *See* Address to the Nation on United States Policy Toward Cuba, DAILY COMP. PRES. DOC. 201400937 (Dec. 17, 2014). In 1964, the U.S. Congress established the Cuban Claims Program, which authorized the Foreign Claims Settlement Commission (FCSC) to hear evidence from U.S. nationals on the value of their confiscated assets. The FCSC has certified nearly six thousand claims as valid, with an aggregate value of close to US$2.0 billion plus interest. *See* U.S. Dep't of Justice, *Completed Programs—Cuba* (Feb. 3, 2015), *at* http://www.justice.gov/fcsc/claims-against-cuba; *see also* Lucy Reed & Nigel Blackaby, *Settlement Prospects for Cuban-Expropriated US Assets*, FRESHFIELDS BRUCKHAUS DERINGER (Dec. 23, 2014), *at* http://www.freshfields.com/en/knowledge/Settlement_prospects_for_Cuban-expropriated_US_assets/?LangId=2057. For a 2007 study concerning the resolution of outstanding claims, see CREIGHTON UNIV. SCH. OF LAW & DEP'T OF POL. SCI. & USAID, REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES (2007), *available at* https://www.american.edu/clals/upload/Creighton-University-Claims-Study.pdf [hereinafter RESOLUTION REPORT].

[28] For a discussion of the work of the Iran-U.S. Claims Tribunal, see RESOLUTION REPORT, *supra* note 27, at 38–49.

[29] John R. Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-state Disputes*, *in* THE FUTURE OF INVESTMENT ARBITRATION 313, 331 (Catherine A. Rogers & Roger P. Alford eds., 2009).

* The author co-wrote this report in her personal capacity only, and the views expressed herein should not be attributed to her law firm.