

2010

DECISIONS OF THE APPOINTING  
AUTHORITY AND RELATED  
SUBMISSIONS

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**1. NOTICE OF CHALLENGE BY IRAN TO PRESIDENT KRZYSTOF  
SKUBISZEWSKI AND JUDGE GAETANO-ARANGIO RUIZ<sup>[1]</sup>**

Dear Judge Haak

1. The Government of the Islamic Republic of Iran (hereinafter Iran), hereby submits this Notice of Challenge against arbitrators Krzysztof Skubiszewski and Gaetano Arangio Ruiz pursuant to Article 10 of the Tribunal Rules. Iran requests that you as the Appointing Authority of the Iran-United States Claims Tribunal, decide upon this Challenge and, in case the two challenged arbitrators or the Government of the United States do not agree with it, sustain the Challenge.

2. On 21 July 2009, Iran received Partial Award No. 601 in Cases A3, A8, A9, A14, and B61 (hereinafter collectively referred to as Case B61). The Partial Award (Exhibit 1) contains fundamental legal flaws in its Section VI.C. While Iran is quite aware that disagreements with legal conclusions in an award do not furnish legitimate grounds for challenging an arbitrator, Iran believes that the present circumstances have gone beyond a simple difference of opinion over legal arguments and findings in an award. As will be outlined below and elaborated upon later in my future brief, it has now become clear to Iran that from the time Mr. Skubiszewski took office in this Tribunal, he has led a calculated scheme to covertly and illegally revise the Tribunal's Partial Award No. 529-A15 (II:A & II:B)-FT (Exhibit 2). This Partial Award, for the past 17 years, has been the sole basis of Iran's written and oral presentations before the Tribunal in Case No. B61 as far as the issue of losses were concerned, Iran obviously has done so upon the direct and express instructions of the Tribunal. During this time, Iran has spent tremendous amount of energy and millions of dollars into proving its damages in accordance with clear and express instructions of the Tribunal in Partial Award No. 529 and subsequent Orders. But now, and after all these years, Iran is faced with a decision that has nothing to do with Partial Award 529, and in which the findings are admittedly not based on any of the hundreds of documents filed over that period. The legal ground that forms the basis of the decision, too, comes as a total surprise. Under the representations made in Partial Award No. 529-A15 (II:A & II:B)-FT, which were never modified by the Tribunal, Iran was under the correct impression that the present legal ground was already dealt with in the latter mentioned Partial Award. Moreover, Iran has not been given an opportunity to present its

[<sup>1</sup> Letter dated 5 August 2009.]

arguments and evidence on the issues that have formed the basis of Partial Award No. 601.

3. We are thus in an unprecedented situation. It is not a simple issue of disagreeing with the reasoning of an award. Nor is it a simple error of law case. The proper course of action in such cases in international arbitration is a request for revision or an annulment procedure. Here, on the other hand, we are facing with the case of willfully misleading a party to arbitration and wasting that party's resources for no less than seventeen years. Iran believes that such a conduct by the narrow majority of the Tribunal, casts serious and justifiable doubts over their independence or impartiality. The two challenged arbitrators, having decisive role in forming that narrow majority, must bear the bigger share of those serious doubts. The extent to which these two arbitrators have gone to bring about the present result in Case B61 proves that Iran can never expect an impartial or independent judgment from them, either in the remaining issues in Case B61 or in any other case before the Tribunal.

4. Two days ago, Iran filed a Request for the revision of Partial Award 601 in Case B61, a copy of which was lodged with the office of the Appointing Authority. In there, Iran invited arbitrators Skubiszewski and Arangio Ruiz to recuse themselves from considering Iran's Request. This would allow a fair and just consideration of the Request. Moreover, by recusing themselves, arbitrators Skubiszewski and Arangio Ruiz could to some extent alleviate the serious doubts created by their conduct in handling Iran's Case. So far, they have not informed Iran of their decision. Insisting to sit on the bench to hear Iran's Request for revision and thereby barring a fair consideration of the Request, creates further doubts on the part of Iran as to their impartiality or independence. Therefore, if they decline to recuse, such conduct forms an independent source of justifiable doubts over their impartiality or independence, sanctionable under Article 10 of the Tribunal Rules.

5. As you are aware, arbitrator Skubiszewski was challenged by Iran in December 2007 for violating the legitimate rights of Iranian arbitrator Judge Oloumi Yazdi. Although the challenge was not sustained, his conduct there, as well as Iran's doubts arising therefrom, remains. Thus, drawing on the second paragraph of Article 9 of the Tribunal Rules, he must realize that in this particular case, justifiable doubts on the part of Iran exist as to his impartiality or independence to consider Iran's Request. He has a duty to disqualify himself. Refraining to do so, could only add to Iran's justifiable doubts.

6. As to arbitrator Arangio Ruiz, Iran's doubts as to his impartiality or independence is compounded by the fact that he was part of a clear majority in Partial Award No. 529-A15 (II:A & II:B)-FT, where the Tribunal found the United States liable, and invited the Parties to submit evidence of Iran's losses. Now, he is part of the majority that has dismissed Iran's claim for losses

because (in the words of the majority), Iran never had any right in the first place. As stated before, he does that without looking to a single evidence of Iran's losses, the same evidence he himself (as part of the earlier majority) ordered Iran to submit. Such behaviour not only proves that he has joined the scheme of arbitrator Skubiszewski to illegally overrule that Partial Award and to deprive Iran of its rights, but calls for serious questioning of his fitness to act as an arbitrator.

7. For the foregoing reasons, which are discussed in more detail in the Request for Revision, Iran requests the Appointing Authority to consider this challenge against arbitrators Krzysztof Skubiszewski and Gaetano Arangio Ruiz. In case they do not voluntarily withdraw, or the United States' Government does not agree with the Challenge, Iran requests the Appointing Authority to sustain the Challenge and remove them from the Tribunal.

8. Iran reserves its rights to submit further and detailed arguments in support of this Challenge.

2. LETTER FROM THE U.S. AGENT TO THE APPOINTING AUTHORITY<sup>[1]</sup>

Dear Judge Haak:

In response to your invitation of August 10, 2009, and, pursuant to Articles 11 and 12 of the Rules of Procedure of the Iran-United States Claims Tribunal, the United States hereby provides notice that it does not agree to Iran's August 4, 2009 challenge<sup>2</sup> to President Krzysztof Skubiszewski and Arbitrator Gaetano Arangio-Ruiz. First, Iran's challenge is unacceptably vague and therefore inadmissible. Second, Iran's supposed justifications – to the extent that they are articulated at all – are not a proper basis for a challenge. Finally, Iran has not met its burden of demonstrating that it has justifiable doubts regarding the independence or impartiality of these Tribunal members. For these reasons, Iran's challenge should be denied with respect to both President Skubiszewski and Arbitrator Arangio-Ruiz.

Iran's challenge arises out of its displeasure with a portion of a recent Tribunal Partial Award in Case B61<sup>3</sup> and apparently is based on how President Skubiszewski and Arbitrator Arangio-Ruiz voted in that award. On August 3, 2009, Iran filed a request for Tribunal review and reconsideration of that portion of the Partial Award, and included a further request that President Skubiszewski and Arbitrator Arangio-Ruiz recuse themselves from participating in the consideration of its requests.<sup>4</sup> Within 24 hours of filing its requests, Iran filed this formal challenge to the impartiality of these two Members. Iran filed its challenge – which apparently is based on how the two challenged Members voted on the Partial Award – without any indication how the third non-party-appointed Arbitrator, Bengt Broms, voted on the Partial Award.<sup>5</sup>

**Iran's challenge is so vague that it should be denied immediately.** Article 11(2) of the Tribunal Rules of Procedure requires a challenging

[<sup>1</sup> Letter dated 16 September 2009.]

<sup>2</sup> Hereinafter Iran's Challenge.

<sup>3</sup> Partial Award, No. 601-A3/A8/A9/A34/B6I-FT, July 17, 2009 (Doc. 915) at 170 [hereinafter B61 Partial Award].

<sup>4</sup> Iran's Request for Revision of the Partial Award No. 603 dated Aug. 3, 2009 (Doc. 922) [hereinafter Iran's Request for Revision]. A copy of Iran's request is attached hereto, together with the United States' opposition, filed on August 17, 2009.

<sup>5</sup> Judge Broms signed the award as "Concurring in part, Dissenting in part," but did not indicate those sections of the Award with which he concurred and those sections on which he dissented. If Iran is aware of Judge Broms' position on the Partial Award, that knowledge was not gained through a joint communication from Judge Broms to the Parties.

party to “state the reasons for the challenge.” As you explained in a prior decision, article 11(2) means:

There needs to be a sufficiently clear description of the circumstances that allegedly give rise to justifiable doubts. . . There also needs to be an indication of the dates on which the actual event on which the above referred justifiable doubts are allegedly based took place and on which this event came to the knowledge of the party alleging that those justifiable doubts exist.<sup>6</sup>

Challenging parties must provide “a degree of specificity” so that the other party and challenged arbitrator can determine how to react.<sup>7</sup> This level of detail is also necessary so that the Appointing Authority can resolve questions of timeliness and whether the allegations are of the sort that could be considered under the challenge procedure.<sup>8</sup> In previously stating that “[a] challenge cannot be allowed to be vague,”<sup>9</sup> you noted:

[F]iling a notice of challenge is not an initiative that should be taken lightly. Challenge proceedings disrupt the normal activities of the Tribunal. The reasons why it is made must therefore readily and clearly appear to the recipients of the notices of challenge.<sup>10</sup>

Iran has failed to heed these prior decisions, and has put forward a challenge that is impermissibly vague. Iran accuses President Skubiszewski and Arbitrator Arangio-Ruiz of participating in a “scheme” to “illegally overrule [the A15] Partial Award and to deprive Iran of its rights.”<sup>11</sup> Iran claims that this scheme came to fruition when these members of the Tribunal joined the majority in the B61 Partial Award.<sup>12</sup> Iran has not identified when this scheme was created or, more generally, when or how these challenged members acted to harm Iran, or how their conduct was in any way “illegal.” Nor has Iran explained how the actions of these two members differed from those of other members who also joined in the B61 Partial Award by the full Tribunal. Because Iran has not explained in clear terms who did what and when, its challenge is vague and should be denied.<sup>13</sup>

**To the extent that Iran articulates any basis for its challenge, its justifications are improper.** Iran appears to be challenging President

<sup>6</sup> April 2, 2008 Joint Decision at IV(B)(i).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Iran’s Challenge at 6.

<sup>12</sup> *See id.* at 2, 3 & 6.

<sup>13</sup> The Appointing Authority has denied challenges on this basis since the early days of the Tribunal. *See* Decision on the Objections to Mr. N. Mangård, March 5, 1982 at 4.8.



Skubiszewski and Arbitrator Arangio-Ruiz because those members formed part of the majority in the Tribunal's recent B61 Partial Award.<sup>14</sup> Indeed, the only event cited by Iran in its challenge that occurred within the 15 days required under Article 11 of the Tribunal Rules is the July 17 issuance of the Partial Award. This is not an appropriate basis for a challenge.

Iran asserts that the challenged Members did not properly apply Tribunal precedent in the Partial Award, but in your April 2, 2008, decision denying a previous Iranian challenge to President Skubiszewski you explained that even erroneous decisions are “not enough to give rise to justifiable doubts as to the impartiality and independence of any individual arbitrator, including the President of the Tribunal.”<sup>15</sup> Iran admits this, stating that “disagreements with legal conclusions in an award do not furnish legitimate grounds for challenging an arbitrator.”<sup>16</sup> In a 2004 filing with respect to a challenge of Arbitrator Broms, Iran wrote:

Applicant's request is basically founded on what she subjectively considers as unfair or unjust findings. The whole rhetoric in the Application, far from pinning down any concrete instance of miscarriage of justice, does no more than expressing preference for the way she would have liked her case to be decided.<sup>17</sup>

This description is equally applicable to Iran's current challenge. Because this challenge is premised on a disagreement over a holding and the legal reasoning of an award, it is fundamentally improper.

Iran's challenge is also improper because it targets two members based on a decision taken by a majority of the Tribunal. Iran states, “The two challenged arbitrators, having [a] decisive role in forming that narrow majority, must bear the bigger share of those serious doubts [about independence and impartiality].”<sup>18</sup> The Appointing Authority has addressed this question in the past, and stated clearly that “[n]o individual member can be challenged for a decision of the Tribunal.”<sup>19</sup> Voting on decisions is a way for the full Tribunal “to protect the decision-making process from the flaws of a one-sided view.”<sup>20</sup> As Iran explained in responding to a challenge in 2004 to one Member who

<sup>14</sup> See *id.* at 2, 3 & 6.

<sup>15</sup> At IV(B)(ii).

<sup>16</sup> Iran's Challenge at 2.

<sup>17</sup> Iran's Disagreement with Notice of Challenge, Feb. 24, 2004 [hereinafter Iran's 2004 Notice] at B.

<sup>18</sup> Iran's Challenge at 3. Iran does not go on to explain what this “decisive role” was or how these two members differ from Judges Aldrich, Brower, and McDonald, who participated fully in the opinion of the Tribunal, or Judge Broms, who participated in all but an undefined part of the Partial Award.

<sup>19</sup> April 2, 2008 Joint Decision at IV(B)(i).

<sup>20</sup> *Id.*

participated in the award of a three-Member Chamber, “The Award is a fabric interwoven by the whole Tribunal, i.e. the three-member arbitral panel. It is simply impossible to differentiate among the three arbitrators, as far as their contribution to the final outcome of their deliberations is concerned.”<sup>21</sup> Because Iran’s current challenge singles out two members for an action taken by the entire Tribunal, it is improper and must be denied.

Aside from its disagreement with the legal conclusions of the Tribunal in the B61 Partial Award, Iran cites two additional bases for this challenge. Both are improper and irrelevant.

First. Iran points to the fact that President Skubiszewski and Arbitrator Arangio-Ruiz have so far not recused themselves from further consideration of case B61.<sup>22</sup> In the 2004 challenge to Arbitrator Broms, the challenging party made a similar argument. Iran objected, arguing that the recusal process “gives no right to a party to bring a challenge on that basis.”<sup>23</sup> The Appointing Authority agreed, stating “Judge Broms’ failure to disqualify himself from participating in the review of the application, and his refusal even to respond to the recusal request do not constitute new or independent circumstances giving rise to justifiable doubts.”<sup>24</sup> Whether or not President Skubiszewski and Arbitrator Arangio-Ruiz recuse themselves in case B61 is therefore irrelevant to this challenge.

Second. Iran cites its previous (rejected) challenge to President Skubiszewski as support for this current challenge.<sup>25</sup> This attempt to re-argue a previous decision of the Appointing Authority is clearly improper. Under Article 11 of the Tribunal Rules, challenges must be filed within 15 days of the date of the incident giving rise to the challenge. Iran cannot cite a previous challenge decision, decided 15 *months* previously, as a ground for bringing a new challenge. Nor can Iran be seeking reconsideration of that previous decision rejecting its challenge of President Skubiszewski. The Tribunal Rules do not provide for reconsideration of challenges. There is therefore no basis upon which Iran may attempt to ground its current challenge on the fact of its earlier challenge.

**Iran has failed to meet its burden to demonstrate justifiable doubts as to the impartiality of the challenged members.** As you stated in your April 2, 2008, decision regarding Iran’s earlier challenge of

<sup>21</sup> Iran’s 2004 Notice at C.

<sup>22</sup> Iran’s Challenge at 4.

<sup>23</sup> Iran’s 2004 Notice at D; *see also* Conclusion (“Nor is she legally entitled to challenge Judge Broms for his refusal to recuse himself”).

<sup>24</sup> Decision on the Challenge Against Judge Bengt Broms, Sept. 30, 2004 at 30. [The Decision is reprinted in 38 IRAN-U.S. C.T.R. 398.]

<sup>25</sup> Iran’s Challenge at 5.