IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASE NO. 222
CHAMBER ONE
AWARD NO. ITM 38-222-1

THE BOEING COMPANY and its subsidiaries, LOGISTICS SUPPORT CORPORATION, BOEING TECHNOLOGY INTERNATIONAL, INCORPORATED, BOEING CONSTRUCTION EQUIPMENT COMPANY,
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE IRANIAN AIR FORCE,
Respondents.

CONCURRING OPINION OF HOWARD M. HOLTZMANN TO INTERIM AWARD

I concur that the interim relief requested by the Government of the Islamic Republic of Iran and the Iranian Air Force (herein referred to collectively as "Iran") should be denied.

Iran has twice in this case requested the Tribunal to stay the execution of a judgment rendered against Iran by the United States District Court for the Western District of Washington. The judgment arose out of counterclaims made by The Boeing Company and its subsidiary Logistics Supply Corporation (herein referred to collective as "Boeing") in a suit commenced by Iran against Boeing. This Chamber first

denied Iran's request in an Interim Award filed 17 February 1984. The Chamber held:

> A stay of execution of [the United States District Court's] judgment in the present case is not necessary either to protect a party from irreparable harm or to avoid prejudice to the jurisdiction of this Tribunal.... Given the unusual history of this case, it cannot be said that the jurisdiction of the Tribunal and its ability to make that jurisdiction effective would be prejudiced by the act of execution of the judgment. 1

Iran renewed its request, and the Chamber denied it again in a second Interim Award, filed 25 May 1984, with which I now concur. The main ground for the second denial is that "[n]o new relevant facts have come to the Tribunal's attention since 17 February 1984 which would warrant reconsideration of the Interim Award of that date."[2]

In my view, it should be emphasized that the key element requiring denial of the stay of execution sought by Iran is what the first Interim Award correctly called the "unusual history of this case." For it is that unusual history which distinguishes this case from those in which the Tribunal, in order to conserve the respective rights of the parties and to protect its jurisdiction, has ordered stays in connection with suits brought in other fora by

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1 The Boeing Company and The Government of the Islamic Republic of Iran, Case No. 222, Award No. ITM 34-222-1 (Chamber One, 17 February 1984)(emphasis added). Pursuant to Presidential Order No. 24 (16 February 1984), Judge Aldrich acted in my absence as a member of Chamber One in the February Interim Award.

2 The Boeing Company and The Government of the Islamic Republic of Iran, Case No. 222, Award No. ITM 38-222-1 (Chamber One, 25 May 1984).

parties before the Tribunal.[3] In such cases, when a party before the Tribunal has sought relief from duplicative or overlapping proceedings commenced in another forum by its opposing party, the Tribunal has ordered the latter to seek a stay of those proceedings.

The unusual history that distinguishes the present case from previous requests for interim relief includes three especially striking circumstances. First, Iran--the party which now asks the Tribunal to relieve it from the U.S. District Court's judgment--itself initiated the suit in the United States. Second, Iran continued to press that suit until mid-1983, long after the Algiers Declarations of 19 January 1981. Third, Iran made its request to the Tribunal for interim relief from the proceedings in the United States in December 1983, only after it had finally lost the suit it

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[3] For example, the Tribunal ordered an Iranian party to stay of proceedings in an Iranian court in E-Systems, Inc. and The Government of the Islamic Republic of Iran, Case No. 388, Award No. ITM 13-388-FT (Full Tribunal, 4 February 1983), 2 Iran-U.S. C.T.R. 51. Numerous similar orders to Iranian parties have followed E-Systems. See, e.g., Questech, Inc. and The Islamic Republic of Iran, Case No. 59, Award No. ITM 15-59-1 (Chamber One, 1 March 1983), 2 Iran-U.S. C.T.R. 96; Ford Aerospace & Communications Corp. and The Government of Iran, Case No. 93, Award No. ITM 16-93-2 (Chamber Two, 27 April 1983), 2 Iran-U.S. C.T.R. 281; Watkins-Johnson Co. and Islamic Republic of Iran, Case No. 370, Award No. ITM 19-370-2 (Chamber Two, 26 May 1983), 2 Iran-U.S. C.T.R. 362; Rockwell International Systems, Inc. and The Government of the Islamic Republic of Iran, Case No. 430, Award No. ITM 20-430-1 (Chamber One, 6 June 1983), 2 Iran-U.S. C.T.R. 369; Ford Aerospace & Communications Corp. and The Air Force of the Islamic Republic of Iran, Case No. 159, Award No. ITM 28-159-3 (Chamber Three, 20 October 1983). Similarly, the Tribunal has ordered a U.S. party to stay arbitration proceedings before the International Chamber of Commerce. Reading & Bates Corp. and The Islamic Republic of Iran, Case No. 28, Award No. ITM 21-28-1 (Chamber One, 9 June 1983), 2 Iran-U.S. C.T.R. 401.

had brought in the United States and Boeing had finally won its counterclaims in that suit. It is evident that for four years -- through mid-1983 -- Iran chose actively and consistently to pursue both its own claims against Boeing and its defenses against Boeing's counterclaims in the U.S. court. [4]

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[4] Iran brought suit against Boeing in the United States in May 1979. Boeing denied liability and filed a number of counterclaims. In February 1982 Iran moved in the U.S. court for the dismissal of Boeing's counterclaims, asserting that the Algiers Declarations required such dismissals. On 14 July 1982 the U.S. court ruled that Boeing's counterclaims could go forward, relying on U.S. Executive Order 12294 (providing for the continuation of counterclaims in suits brought by Iran itself). Iran's own claims against Boeing had previously been dismissed on their merits; on 28 January 1983 Iran attempted to revive its claims against Boeing by appealing from this dismissal. During the months that Iran's appeal was pending, Boeing's counterclaims moved forward. On 8 July 1983 counsel for both sides filed with the U.S. court an agreed-upon Pretrial Order covering the remaining issues in the case. On 5 August 1983 the U.S. court conducted a hearing on the issues outlined in the Pretrial Order.

Iran's filings in Case No. 222 before the Tribunal during this period were fully consistent with its evident choice to continue to litigate in the United States. Boeing had filed a "contingent" Statement of Claim in this case with the Tribunal on 12 January 1982. That Statement of Claim explicitly informed the Tribunal and Iran that it covered the same matters as six of Boeing's U.S. counterclaims; it further explained that Boeing believed the U.S. court to be the proper forum for its counterclaims, that Boeing intended to pursue the proceedings in the United States, and that it did not wish to proceed before the Tribunal unless it were determined that the U.S. court lacked jurisdiction. Iran had more than one year to respond to the Statement of Claim. Its Statement of Defense, filed on 7 February 1983, addressed the issue of Boeing's continued prosecution of the U.S. counterclaims, but it did not request the Tribunal to stay the U.S. proceedings. To the contrary, Iran requested the dismissal of Boeing's claims before this Tribunal. That was entirely consistent with Iran's actions in the litigation in the United States: it will be recalled that only a short time before, on 28 January, Iran had appealed the dismissal of its claims against Boeing, indicating its continued resolution to pursue the litigation it had initiated in the United States.

On 16 August 1983 Iran lost that appeal, when the U.S. Court of Appeals affirmed the dismissal of Iran's original

(footnote continued on next page)

The facts of this case thus stand in marked contrast to previous cases in which the Tribunal has granted interim relief to parties summoned to appear as unwilling defendants before other fora. When, as in this case, both parties voluntarily proceed in another forum, and this Tribunal's jurisdiction is invoked against such proceedings by the losing party only after their conclusion, it cannot be said that this Tribunal is required to order a stay of execution of the judgment obtained in order to preserve its jurisdiction and its ability to make that jurisdiction effective.

Nor, on these facts, can Iran invoke the second purpose of interim relief, that of conserving the respective rights of the parties. It is established that a State may waive its rights[5] or be estopped from asserting them[6] in particular cases. The history of the Iran-Boeing litigation in the United States, sketched briefly above, dictates the

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[4] (continued) claims against Boeing. On 1 November 1983 the U.S court entered final judgment for Boeing in six of its counterclaims against Iran. Only after these definitive losses in the U.S. court did Iran, on 14 December 1983, file a motion requesting that the Tribunal grant it interim relief from the proceedings in the United States.

[5] See, e.g., B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 146, 157 (1953); Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, [1957] Brit. Y.B. Int'l L. 176, 197-99; MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468, 501 (1958).

[6] See, e.g., B. Cheng, supra, at 141-44; Bowett, supra, at 186 ("Many of the cases on estoppel by conduct illustrate the simple principle that the law will demand consistency in conduct where the result of inconsistency would be to prejudice another party"), 187 (rule of election of remedies), 188 (rule precluding inconsistent positions); MacGibbon, supra.

conclusion that in this case Iran has waived, or is estopped from asserting, any rights which it may have under the Algiers Declarations to be free of litigation in the United States.[7]

The Governments of Iran and the United States entered into the Algiers Declarations on 19 January 1981. The Iran-Boeing litigation was ongoing then, and continued thereafter with Iran's active participation.[8] If Iran

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[7] On 25 October 1982 the Government of the Islamic Republic of Iran filed with this Tribunal Case No. A-15 against the United States of America. Part IV:A of that case raised inter alia, the issue of whether the provisions of the Algiers Declarations relating to the termination of litigation against Iran in U.S. courts also prohibit the assertion of counterclaims by U.S. nationals in judicial proceedings commenced by Iran; Boeing's U.S. counterclaims were mentioned as an example of such counterclaims. As part of the ultimate relief sought by it in Case No. A-15, Iran asked that the Government of the United States be compelled to terminate such litigation; however, Iran did not request at that time, nor has it since requested, interim relief prior to the Tribunal's final resolution of Case No. A-15. As noted above, in its subsequent filings both here and the United States Iran manifested its consistent choice to litigate in the U.S. court. Case No. A-15, and thus the general issue of U.S. counterclaims, is still pending before the Full Tribunal. I do not reach that general issue in this Concurring Opinion because, in my view, even if Iran has a right under the Algiers Declarations to be relieved of counterclaims in U.S. courts, it has by its conduct waived that right, or is estopped from asserting it, in this case.

[8] Iran asserts that the counsel acting for it in the U.S. litigation were unauthorized to do so, or were insufficiently instructed by Iran. However, documents submitted both by Boeing and Iran demonstrate that Iran's counsel in the United States were authorized to act on its behalf and were in repeated contact with it.

seriously desired to be protected from the litigation, it had ample opportunity to seek interim relief as the proceeding advanced through its various stages. Iran's tardiness in seeking such relief -- until 3 years after the Algiers Declarations and after final judgment was already entered -- must be considered a waiver of any rights which Iran might have had to such relief in this case.

In addition to having waived its rights by its long inaction, Iran's positive actions now estop it from demanding the enforcement of such rights. Iran initiated the U.S. litigation. In January 1983 -- two years after the Algiers Declarations -- Iran was still attempting to maintain its suit. That behavior must be deemed to estop Iran from now asserting that the Algiers Declarations entitle it to a stay of execution of a judgment on counterclaims in that very suit.

Finally, I would note that, in my view, both the February Interim Award and the May Interim Award place undue emphasis upon the finding that execution of the judgment would not cause grave or irreparable monetary harm to Iran. While I agree that there has been no showing that execution of judgment would cause grave or irreparable monetary harm to Iran, that is not the only test. The loss of a treaty right to be free of litigation in another forum may itself be irreparable. Thus, a stay of execution might be warranted against a judgment obtained in violation of such treaty rights created by the Algiers Declarations, even

if no irreparable monetary harm could be shown. However, by its actions in this case Iran has both waived, and is estopped from asserting, any treaty rights it might have.

I therefore concur in the Interim Award denying the relief requested in this case by the Government of the Islamic Republic of Iran and the Iranian Air Force.

Dated, The Hague
27 August 1984

Howard M. Holtzmann