IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

120

ORIGINAL DOCUMENTS IN SAFE

Case No. 319

319-120

Date of filing: 23 Mar '94

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Richard M. Mosk

- Date 23 Mar '94

38 pages in English — pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____

_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده



CASE NO. 319
CHAMBER ONE
AWARD NO. 554-319-1



CATHERINE ETEZADI,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

---

DISSENTING OPINION OF RICHARD M. MOSK

---

I dissent from the award because I believe Claimant Catherine Etezadi, by virtue of her agreement with her husband and under applicable law, has a beneficial, and therefore enforceable, interest in certain assets that were held in her husband's name and that were wrongfully taken by Respondent, the Government of the Islamic Republic of Iran (hereinafter sometimes referred to as "Iran").

I agree with the majority that Claimant has not submitted sufficient evidence to establish a taking by Iran of real property or deposits for real property.

Based on the circumstances and Tribunal precedent, I conclude that Iran expropriated Shiraz Plastic Products Corporation ("Shiraz Plastics"), a private entity, in which the Etezadis had an interest. The evidence, however, makes this issue a close one. Because the question concerning

Shiraz Plics is so fact-intensive, and because there are a number of ibunal decisions covering this issue, I do not believe i ecessary to expound upon the point in great detail.

As I all discuss, the Tribunal's decision regarding Mrs. Eteza s rights in property, including the pension, is inconsiste with the modern and emerging view of the role and rights of t woman in the family and in society.

Procedures

The majo ty dwells unnecessarily on its decision to exclude some e idence submitted by Claimant after the deadline for rebuttal m erial. In view of the decision of the majority on the merits, none of this excluded evidence would have affected t e result.

I believe that the decision to exclude this evidence was incorrect. There was no showing that the admission of the evidence was prejudicial to Respondent. Indeed, Respondent was able to reply to the evidence. Generally in judicial and arbitral proceedings, otherwise admissible and material evidence is not rejected on the basis of lack of timeliness unless there is such prejudice.

Throughout the course of this case, time limitations have not been enforced strictly. The Tribunal has granted Respondent numerous extensions that have prolonged this case for a period exceeding a decade. Most of these extensions were granted over the objections of Claimant and without any showing of a need for such extensions. Thus, the Tribunal itself has not complied with Tribunal rules and internal guidelines concerning time limitations.

Under normal practice, rebuttal submissions should only rebut the other party's direct case. In this and many other

former employee could appeal to the "Court of Administrative Justice," which reviews actions of government agencies.

Mr. Etezadi became an American citizen in June of 1981. As that was after the signing of the Algiers Accords, this Tribunal found him to be an exclusive Iranian national at the time of the claims and therefore ineligible to be a claimant at the Tribunal. Hooshang and Catherine Etezadi, supra, para. 13, reprinted in 25 Iran-U.S. C.T.R. at 268-69. The Tribunal held, however, that Catherine Etezadi's dominant and effective nationality was that of the United States, and thus she was entitled to maintain her claims. Id. at para. 18, reprinted in 25 Iran-U.S. C.T.R. at 271. These claims are for compensation for the value of her one-half interest in the following: a plot of land in Iran, allegedly expropriated by the Government of Iran; an unreturned deposit in a condominium in Iran; a ten percent interest in an Iranian corporation, also allegedly expropriated by Iran; and the terminated pension, as determined by an actuary, or for the value of such a pension measured by the cost of replacement.

Applicable Law

The issue of choice-of-law with respect to marital rights in property normally arises in the context of death or divorce or, occasionally, in a claim by a creditor of the marital estate or of one of the spouses. This case is unusual in that the wife, with the husband's backing, is asserting certain beneficial rights in properties vis-à-vis a non-creditor third party. If there were a choice-of-law issue, the laws of several jurisdictions could be invoked.

At the time of marriage, the Etezadis were domiciled in New York; therefore, the law of New York could apply to any pre-marital or immediate post-marital agreements. See Hague Convention on the Law Applicable to Matrimonial Property Regimes (1976), art. 4, in 25 Am. J. of Comp. Law 393, 395

(1977) (applicable law is that of "the State in which both spouses establish their first habitual residence after marriage"); 2 Dicey and Morris on the Conflict of Laws 1058-59 (L. Collins 11th ed. 1987) (Rule 154(2)) (husband's domicile upon marriage); see also, E. Scoles, Choice of Law in Family Transactions, 209 Recueil des Cours 9, 28-30 (1989), and authorities cited therein (discussing "immutability of marital rights").

The situs of the properties in issue are located in Iran, and thus Iran contends that Iranian law applies. See Civil Code of Iran, art. 966; see also id., art. 963 ("If husband and wife are not nationals of the same country, their personal and financial relations with one another will be subject to the laws of the country of the husband").

California has been the marital domicile of the Etezadis since 1974. As such, its laws could be applied. See E. Scoles & P. Hay, Conflict of Laws § 14.4, at 468 (2d ed. 1992) ("In most instances, the state of dominant interest, as in other matters involving family and marital concerns, is the domicile of the parties").

As I shall discuss, the relevant laws of these jurisdictions that can be applied in this case are consistent. See DIC of Delaware, et al. v. Tehran Redevelopment Corp., et al., Award No. 176-255-3, p. 17 (26 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 144, 156-57. The Tribunal is not restricted to applying the law of any specific place, for under Article V of the Claims Settlement Declaration, the Tribunal "shall decide all cases on the basis of respect for law, applying such choice-of-law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

There is not, however, a true conflict of laws, for under the law of the marital domicile at the relevant times -- California -- Mrs. Etezadi effectively obtained a one-half interest in the entire marital estate, including a beneficial interest in any property solely in the name of Mr. Etezadi. Under Tribunal jurisprudence, such beneficial interests are enforceable. See infra.

## Mrs. Etezadi's Interest

### Transmutation

The uncontradicted evidence establishes that the Etezadis had an agreement from the inception of their marriage, reaffirmed it throughout their marriage, and confirmed it before this Tribunal. At the time of the claim and since 1974, California has been, and now is, the marital domicile of the Etezadis. California is a community property state, i.e., its law is based on the "general theory . . . that the husband and wife form a sort of partnership, and that property acquired during the marriage by the labor or skill of either belongs to both." 11 B. Witkin, Summary of California Law, Community Property § 1, at 374 (9th ed. 1990).

California law in effect prior to and in 1981 permitted husbands and wives by contract to agree orally that any and all property -- including property acquired after the marriage -- shall be community property, i.e., to transmute the character of the property. Id. § 125, at 522-23.[2] This law even applied to real property and other property that might otherwise require a writing for a transfer. Id. As the California Supreme Court declared in Beam v. Bank of America, 6 Cal.3d 12, 25 (1971):

---

[2]The law was changed effective 1985, i.e., after this claim arose and was asserted. Cal. Civil Code § 5110.730. As of 1 January 1994, many of these sections appear in the California Family Code.

> We recognize, of course, that a husband or wife may orally transmute separate property into community property, and, even in the absence of an explicit agreement, written or oral, a court may find a transmutation of property if the circumstances clearly demonstrate that one spouse intended to effect a change in the status of his separate property. (Citations omitted.)

California permitted such an agreement to be shown by the testimony of the wife or the husband. Id. Moreover, the transmutation could "be shown by the very nature of the transaction or appear from the surrounding circumstances." Allen v. Samuels, 204 Cal.App.2d 710, 715 (1962).

When summarizing the law of California during the relevant period at greater length, a California court, in Estate of Sears, 182 Cal.App.2d 525, 529-30 (1960), explained:

> There are certain principles of law, now so thoroughly established that we need not fear that we are skating on thin ice if we venture upon them. In Woods v. Security-First Nat. Bank (1956), 46 Cal.2d 697, 701, it is stated, supported by a number of citations: "It is settled that the separate property of husband or wife may be converted into community property or vice versa at any time by oral agreement between the spouses." The change over may be made although the title to the property may remain of record in joint tenancy (Socol v. King (1950), 36 Cal.2d 342, 345, and cases cited), or, in the case of an automobile, in the name of one or other of the spouses. (Estate of Raphael (1953), 115 Cal.App.2d 525, 534.) Nor is it necessary, to convert separate property into community property, that the magic words "community property" be used. As revealed in Kenney v. Kenney (1934), 220 Cal. 134, 136, it was sufficient that the parties had orally agreed ". . . that all property then owned by them or subsequently acquired was to belong to them equally or, as respondent put it, 'fifty-fifty.'" Similarly, in Estate of Raphael (1949), 91 Cal.App.2d 931, 936-937, the husband's statement as related by his wife that ". . . everything he had was mine, and everything I had was his; that we were partners in everything, and everything was fifty-fifty" was sufficient to alter the status of their property. See further Estate of Raphael, supra, 115 Cal.App.2d 525. An even broader declaration appears

> in Long v. Long (1948), 88 Cal.App.2d 544, 549: "It is not essential to show an express oral agreement, but the status of the property may be shown 'by the very nature of the transaction or appear from the surrounding circumstances.' (Marvin v. Marvin, 46 Cal.App.2d 551, 556.)" . . .
>
> In several of the cases cited it has been said that the status of property could be changed to that of community property by "an executed oral contract." We know of none that requires that the agreement be executed, and we read in Estate of Raphael, supra, 91 Cal.App.2d 931, 939: "The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done." (Unofficial citations omitted.)[3]

The Etezadis' conduct and agreement specifically conformed to this precedent. Thus, under California law -- the law of their marital domicile -- all of their property and investments were transmuted to community property. It does not matter whether the agreement between the Etezadis was enforceable under New York law or Iranian law because the Etezadis effectively transmuted all of their property -- to the extent it was not already community property -- to community property under the law applicable at the time. It is just as if there were an effective assignment of property rights.

Commingling

In addition, any properties acquired by the Etezadis prior to moving to California in 1968 and again in 1974 were commingled (so as not to be traceable) with funds accumulated by them while their marital domicile was in California. Thus,

---

[3]Under California law, even if the agreement had to be "executed," this only means that "after the oral agreement, the acts or declarations of the parties must confirm and be consistent with the change in character of the property." 11 B. Witkin, supra, § 125, at 523.

all such properties that might not already be considered community property became community property. 11 B. Witkin, supra, § 82, at 475. That property retained its community property character even though later invested in Iran, for newly acquired property assumes the status of that which it replaces. R. Leflar , L. McDougal & R. Felix, American Conflicts Law § 233, at 645 (4th ed. 1986); E. Scoles & P. Hay, supra, § 14.6, at 472.

Recognition of Community Property

Generally, property of California domiciliaries that would, if in California, be considered community property, is treated by California as community property even if it is located outside of California. Cal. Civil Code § 5110; Rozan v. Rozan, 49 Cal.2d 322, 327-28 (1957); Ford v. Ford, 276 Cal.App.2d 9, 11 (1969). Although California law cannot directly determine title to all properties -- e.g., real property in another jurisdiction -- Mrs. Etezadi's interests should be recognized, especially under Tribunal jurisprudence regarding beneficial interests, as discussed infra.

The consequence of the transmutation and the commingling doctrines under California law is clear: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests." Cal. Civil Code § 5105. By virtue of the law where Mr. and Mrs. Etezadi have been domiciled, Mrs. Etezadi has a one-half interest in all of the marital assets, wherever they are located.

Effectiveness of the Marital Agreement Under Other Law

As noted, it is not necessary to determine the validity or effect of the agreement between the Etezadis under any other law because Mrs. Etezadi obtained her interest by

operation of California law. Nevertheless, the laws of other relevant jurisdictions are not inconsistent with this result.

In the absence of an agreement, there could be controversy over which law to apply to "movables" and "immovables" in connection with marital property. See J.H.C. Morris, The Conflict of Laws 410-13 (3d ed. 1984); E. Scoles & P. Hay, supra, §§ 14.5-14.10, at 470-81. It is widely recognized, however, that when there is an agreement between the husband and wife, it governs their respective rights. J.H.C. Morris, supra, at 413; E. Scoles & P. Hay, supra, § 14.15, at 489-91. "There seems no doubt but [t]hat the contract may and normally would control the marital property regime between the parties." Id. § 14.15, at 491.[4]

As long ago as the 13th century in Spain, in Las Siete Partidas 941-52 (S. Scott trans. 1931) (quoted in Juenger, Marital Property and the Conflict of Laws: A Tale of Two Countries, 81 Colum. L. Rev. 1061, 1065 (1981)), it was stated:

> It happens frequently that, when a husband and wife marry, they agree in what way they may hold the property which they gained together; and, after they are married, they go to dwell in some other country, where a custom, opposed to said agreement or contract which they have entered into, is practiced. . . . We decree that the contract which they made with one another shall be valid in the way which they agree upon, before or at the time when they married, and shall not be interfered with, by any contrary custom existing in the country where they went to reside.

---

[4]Although not universally accepted, it has been stated that the "essential validity, interpretation and effect of the marriage contract or settlement are governed by its proper law. The search for the proper law of a marriage contract or settlement is generally similar to the search for the proper law of an ordinary commercial contract." J.H.C. Morris, supra, at 414.

More recently, in 2 Dicey and Morris on the Conflict of Laws, supra, at 1053 (Rule 153), it is stated:

> Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all property within its terms which are then possessed or are afterwards acquired, notwithstanding any subsequent change of domicile.

Another authority, E. Scoles, supra, at 30, has noted that

> unless a State pursues the view of immutability without exception, it would seem that fully informed and consenting parties should be permitted by agreement to modify their marital property régime to meet the changing circumstances of life. Fortunately, in more and more States, married couples are being permitted to adjust their property interests after marriage as well as before. This reduces conflicts issues in most instances. (Footnotes omitted.)

American legal principles are generally in accord with these authorities, see 2 Restatement (Second) of Conflict of Laws § 258 comment d (1971); 41 Am. Jur. 2d, Husband and Wife § 316, at 257-58 (1968), as are recent international authorities. See Hague Convention on the Law Applicable to Matrimonial Property Regimes (1976), art. 3, in 25 Am. J. Comp. Law 393, 394 (1977).

Marital agreements are recognized in Iran. Dr. Hussein Mehrpour, one of Iran's legal advisors on Iranian law, in his opinion submitted to the Tribunal, asserted, in effect, that there can be an enforceable marriage contract in Iran. He declared:

> Pursuant to the Judicial High Council's approval in 1362 (1983), a circular was issued by the State Organization for Registration of Deeds to Marriage and Divorce Registries requiring them to inform the spouses, at the time of concluding the marriage

> contract, [of] certain conditions that they could stipulate under the marriage contract. If they accepted those conditions, they would be binding. These conditions mostly bind and commit the husband. One of those proposed conditions is that should the husband divorce his wife without any reason and without any fault on part of the wife, he would be required to transfer to his wife, gratis, half of the assets acquired by him during the matrimony, at the court order. This condition is brought to the attention of husband and wife at the time of con[cl]usion of [the] marriage contract. If the husband accepts it, it creates an obligation for him under the marriage contract. If he does not accept [t]his condition, the marriage contract may be concluded without including this condition, and no obligation in that respect would attach to the husband. If this condition is accepted and included in the marriage contract, should the husband divorce the wife subsequently without any fault on her part, half of the property acquired by the husband during the matrimonial ties would be transferred to the wife at the court's order. In any event, there are no provisions of law in this respect. The Judicial High Council's approval mentioned in the marriage deeds is meant only to remind the spouses that they may stipulate such conditions, including the above condition, in the marriage contract. And should they accept such conditions at their own free will, they could be bound to perform it. (Emphasis added.)

That any pre-nuptial or post-nuptial agreement could be considered oral should not matter as to its applicability in this proceeding. Iran did not raise the lack of a writing as a defense.[5] Normally the failure to assert such a defense is a waiver of it. The fact that in this proceeding both of the parties to the agreement acknowledged the agreement should preclude the application of any Statute of Frauds. Iran has not pointed to any specific statute that requires a writing for this type of agreement, and the only relevant Statute of Frauds provisions do not seem applicable. Thus, there is no indication that the agreement between the Etezadis was in

---

[5]Iran argued that there was no documentary evidence concerning the agreement, but did not assert that any such agreement was unenforceable by virtue of a legal requirement for a writing.

consideration of marriage; the agreement is not being used in a matrimonial action; and because of the possibility of death or divorce, the agreement could have been performed within one year or, because of the possibility of divorce, within the lifetime of the parties. See generally 48 N.Y. Jur. 2d, Domestic Relations § 1251, at 60 (1985); 61 N.Y. Jur. 2d, Statute of Frauds § 21, at 50-51 (1987); § 40, at 95-97; § 87 at 165; 1 B. Witkin, Summary of California Law, Contracts § 284, at 275; § 290, at 279; § 315, at 297 (9th ed. 1987); 1 Restatement (Second) of Contracts § 124 comment b; § 130 comment a (1981); see also M. Sabi, The Commercial Code of Iran, in IV Digest of Commercial Laws of the World 11 (1982) ("Generally speaking a contract need not be reduced to a writing").

Even if the agreement had to be in writing, in view of the fact that the parties had relied upon it, and it has continued to be performed, it should be enforced under the part performance theory. See 45 N.Y. Jur. 2d, Domestic Relations § 141, at 461-62 (1985) (oral antenuptial agreements "became enforceable where they have been partially performed"); 1 Restatement (Second) of Contracts, supra, § 124 comment d; 1 B. Witkin, supra, §§ 312-28, at 298-309. Indeed, the Tribunal itself has recognized such a principle. DIC of Delaware, supra, at p. 28, reprinted in 8 Iran-U.S. C.T.R. at 161.

Ordinarily, a Statute of Frauds can be invoked only by a party to the agreement or a transferee or successor to the agreement. See 1 B. Witkin, supra, § 267, at 262; 61 N.Y. Jur. 2d, supra, § 233, at 363; 3 S. Williston, A Treatise on the Law of Contracts § 530, at 746-48 (W. Jaeger 3d ed. 1960); 2 A. Corbin, Corbin on Contracts § 289, at 54 (1950); 1 Restatement (Second) of Contracts, supra, § 144 comment d ("Only parties to a contract and their transferees and successors can take advantage of the Statute of Frauds. As against others the unenforceable contract creates the same

rights, powers, privileges and immunities as if it were enforceable").[6] Although in some instances it has been said that one party cannot invoke an invalid oral contract against a third party, such a concept generally applies only when one party sues a third party for inducing a breach of the oral contract. Here both parties to the contract have affirmed it. The claims against Iran are not based on an alleged breach of the oral agreement between the Etezadis; rather, the agreement only serves to establish who has certain property interests that were affected by Iran's acts. There is no good reason why Iran, as a third party, should be able to invoke in this case a Statute of Frauds or other requirement for a writing.

It is generally recognized that the Statute of Frauds does not invalidate a contract, but rather renders the contract voidable at the election of the party to the contract against whom enforcement is sought. 61 N.Y. Jur. 2d, supra, § 224, at 352-53; 1 B. Witkin, supra, § 263, at 259-60. In Iran, to the extent there was any requirement for a writing, it was evidentiary only. See Civil Code of Iran, art. 1310 (repealed in 1982). This Tribunal has suggested that "each forum applies its own procedural and evidentiary rules to the disputes before it, and it is arguable that the type of evidence admissible to establish a contract is a procedural or evidentiary matter." DIC of Delaware, supra, at p. 23, reprinted in 8 Iran-U.S. C.T.R. at 161. The Tribunal received and admitted evidence of the oral agreement between the Etezadis. The Tribunal was correct in doing so. See 1 Restatement (Second) of Contracts, supra, § 143 ("The Statute of Frauds does not make an unenforceable contract inadmissible in evidence for any purpose other than its enforcement in violation of the Statute").

---

[6] An exception sometimes applied to post-nuptial agreements involves the rights of creditors, see 2 A.Corbin, supra, § 291, at 60-62, and thus would not apply here.

It has been said that "[t]he commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition." Sunset-Sternau Food Co. v. Bonzi, 60 Cal.2d 834, 838 n.3 (1964) (Tobriner, J.). It has been largely repealed in England. In France the application of the doctrine of commencement de preuve has eroded various requirements of a writing. The requirement of a writing to prove a contract is generally declining in significance. II K. Zweigert and H. Kötz, An Introduction to Comparative Law 59-60 (2d ed. 1987). Even "American courts have given restrictive interpretations to statute-of-fraud provisions." A. von Mehren & J. Gordley, The Civil Law System 935 (1977).

For these many reasons, even if the Tribunal were to ignore the rights obtained by Claimant under California law, the agreement between the Etezadis should be given effect so as to confirm Mrs. Etezadi's rights in the marital property.

Beneficial Interest

The fact that property may be in the name of only one of the spouses does not per se eliminate the other spouse's interest. As Professor Scoles stated in his lecture to The Hague Academy of International Law:

> Frequently, either incident to a move of the family home from a marital [community] property State to a separate property State or simply incident to convenient investment or business purposes, assets may be moved from a marital property State to a separate property State and placed in the individual name of one spouse. This may be done in good faith and with full consent of both spouses. Even so, the presumption is most likely to be that no gift of the marital interest in the asset is intended by the non-title-holding spouse. In other words, any interspousal gift of marital property must be proven by clear and convincing evidence. Consequently, absent evidence showing a gift by one spouse to the other, taking title in the name of one spouse, even when done in an individual property State, does not

> destroy the previously existing rights of the parties under the matrimonial régime.

E. Scoles, supra, at 36-37.

Iran contends it would recognize only an interest reflected by legal title. The Tribunal, however, has recognized the beneficial interest of a claimant in property in Iran in which legal title was in another. In International Technical Products Corp., et al. v. The Islamic Republic of Iran, et al., Award No. 196-302-3, pp. 38-39 and n.19 (24 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 206, 232-33 and n.32, Bank Tejarat argued that "under Iranian law, the real owner of [a] building is the one who holds the title deed and that the title deed to the building in question was held by [an Iranian private joint stock company], not Claimants." The Tribunal concluded, however, that the nominal owner was beneficially owned by the claimants, who could bring their own claim under Article VII(2) of the Claims Settlement Declaration. "Bank Tejarat's argument regarding ownership of the building under Iranian law simply is irrelevant to the jurisdictional considerations dictated by the Claims Settlement Declaration." See also Zaman Azar Nourafchan, et al. v. The Islamic Republic of Iran, Award No. 550-412/415-3, para. 50 (19 Oct. 1993) (when claimant obtains merely a claim to land, instead of title, "interference with such a claim may constitute a proper cause of action before this Tribunal").

In James M. Saghi v. The Islamic Republic of Iran, Award No. 544-298-2, paras. 18-26 (22 Jan. 1993), this Tribunal recently set forth the precedent providing for the protection of beneficial ownership interests and concluded as follows:

> 24. The Tribunal's concern for beneficial interests flows naturally from the terms of the Algiers Accords, in particular, General Principle B which states the purpose of both Parties "to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims

> through binding arbitration." Articles II, paragraph 1, and VII, paragraphs 1 and 2, of the CSD [Claims Settlement Declaration] give the Tribunal jurisdiction over claims arising out of debts, contracts, expropriations or other measures affecting property rights and define the terms "national" and "claims of nationals" by reference to persons who hold "ownership interests," whether directly or indirectly. The evident purpose of these claims settlement arrangements could not be fully implemented unless the Tribunal's jurisdiction were broad enough to permit the beneficial owners of affected property interests to present their claims and have them decided on their merits by the Tribunal.
>
> 25. The Respondent has argued that Article 40 of the Commercial Code of Iran bars the alleged beneficial ownership. However, the issue here is not the validity vel non under Iranian law of beneficial ownership interests vis-à-vis the company or third parties. Rather, it is whether the Government of Iran is responsible, under international law, to beneficial owners for "expropriations and other measures affecting property rights." (Footnote omitted.)
>
> 26. The Tribunal's awards have recognized that beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right. . . . The Tribunal concludes that the Claimants are entitled to claim compensation for the deprivation of their beneficial ownership interests . . . .

Iranian law would recognize the marital agreement. That it might not recognize the beneficial ownership in property located in Iran in the name of another is irrelevant because this Tribunal has determined that Iran agreed under the Algiers Accords that such rights are enforceable here.

## Real Property and Deposit

I agree with the majority that Claimant has not been able to supply sufficient evidence to establish that the plot of

land was expropriated by Iran.[7] Although Mr. and Mrs. Etezadi are entitled to the deposits on the condominium, the majority properly concludes that the evidence is not sufficient to show that the obligor is Iran or an entity controlled by Iran.

Shiraz Plastics

Whether Shiraz Plastics was expropriated is a closer question. Tribunal decisions on taking of a business are varied and have depended on the facts. The replacement of the owner's management or directors with representatives appointed by Iran generally has been a conclusive factor resulting in a holding of an expropriation as of the time when the former managers or directors were no longer able to participate in the management of the enterprise. See Starrett Housing Corp., et al. v. The Islamic Republic of Iran, et al., Award No. ITL 32-24-1, pp. 51-52 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 155-56; Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2, pp. 8-12 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 224-26; Phelps Dodge Corp., et al. v. The Islamic Republic of Iran, Award No. 217-99-2, paras. 21-23 (19 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 121, 129-131; Thomas Earl Payne v. The Islamic Republic of Iran, Award No. 245-335-2, paras. 20-24 (8 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 3, 9-11; Sedco, Inc., et al. v. National Iranian Oil Co., et al., Award No. ITL 55-129-3, pp. 39-43 (28 Oct. 1986), reprinted in 9 Iran-U.S. C.T.R. 248, 276-79. In some cases, however, the appointment of such managers has not resulted in a decision that there was a taking. Otis Elevator Co. v. The Islamic Republic of Iran, et al., Award No. 304-284-2, para. 40 (29 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 283, 297; Motorola Inc. v. Iranian National Airlines Corp., et al.,

---

[7]Although one can be sympathetic to Mrs. Etezadi's purported difficulty in obtaining evidence in Iran, she neglected to request Tribunal assistance in the production of evidence. See Tribunal Rules, art. 24(3).

Award No. 373-481-3, para. 59 (28 June 1988), reprinted in 19 Iran-U.S. C.T.R. 73, 85-86. In still other decisions the Tribunal has found that there was not sufficient evidence to conclude that a governmental manager was appointed during the period necessary for Tribunal jurisdiction. See, e.g., Vernie Rodney Pointon, et al. v. The Islamic Republic of Iran, Award No. 516-322-1, paras. 34-35 (23 July 1991), reprinted in 27 Iran-U.S. C.T.R. 49, 60-61.

Mrs. Etezadi's argument that Shiraz Plastics was expropriated is supported primarily by inference from a number of suggestive facts. Iran took inconsistent positions in its pleadings and failed to produce evidence to which it presumably had access. See Concurring Opinion of Richard M. Mosk, Ultrasystems, Inc. v. The Islamic Republic of Iran, et al., Award No. 27-84-3, p. 2 (4 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 114, 115 (access to and failure to produce relevant evidence authorizes drawing of adverse inference); R.N. Pomeroy, et al. v. The Islamic Republic of Iran, Award No. 50-40-3, p. 25 (8 June 1983), reprinted in 2 Iran-U.S. C.T.R. 372, 384 (Tribunal to draw inferences from gaps in evidence and pleadings). Moreover, one of Iran's witnesses testified at the Hearing that a governmental manager had been appointed to run the company in September of 1980.

Determining whether sufficient evidence supports Mrs. Etezadi's claim as to Shiraz Plastics should be based on a detailed analysis of the facts in light of inferences to be drawn from the evidence before the Tribunal. I do not believe the majority has sufficiently undertaken such an analysis; nevertheless, further discourse here on these facts regarding the expropriation of Shiraz Plastics would not add to Tribunal or international jurisprudence. The choice not to engage in such a discussion should not be viewed as acquiescence in the majority's reasoning, factual statements or conclusion on this issue. Based on the record, Mrs. Etezadi is entitled to her share of the 10 percent interest in Shiraz Plastics.

Pension

The majority declares that the pensioner was Mr. Etezadi, and when Iran took away those pension rights for whatever reason, Mrs. Etezadi had no remaining rights in the pension. As I shall discuss, however, the fact remains that Iran took "measures affecting property rights" belonging to Mrs. Etezadi, and it therefore is required to compensate her. See Claims Settlement Declaration, Art. II(1).

As noted above, by contract the Etezadis agreed that all of their property was, in effect, community property. This agreement was reaffirmed when they moved back to California in 1974. Thus, at that time any separate property was transmuted to community property. Also, as discussed above, there were other grounds for treating their assets as community property. The California Supreme Court has stated that it has "always recognized that the community owns all pension rights attributable to employment during the marriage." In re Marriage of Brown, 15 Cal.3d 838, 844 (1976). Both vested and non-vested pension rights are community property. Id. at 844-45.

The California Supreme Court explained, id. at 845:

> Although some jurisdictions classify retirement pensions as gratuities, it has long been settled that under California law such benefits "do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee." (In re Marriage of Fithian (1974) 10 Cal.3d 592, 596.) Since pension benefits represent a form of deferred compensation for services rendered (In re Marriage of Jones (1975) 13 Cal.3d 457, 461), the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of property (see Civ. Code, § 953; Everts v. Will S. Fawcett Co. (1937) 24 Cal.App.2d 213, 215), we held in Dryden v. Board of Pension Commrs. (1936) 6 Cal.2d 575, 579, that an employee acquires a

> property right to pension benefits when he enters upon the performance of his employment contract. (Unofficial citations omitted.)[8]

This reasoning is widely recognized, for "[s]ince that decision, both community property and common-law property states have adopted the Brown reasoning." H. Foster, D. Freed and J. Brandes, Law and the Family New York § 17:1, at 686 (2d ed. 1986) (footnotes omitted). As one authority wrote:

> Pension (and retirement rights) are viewed as deferred compensation which will have community or separate character depending upon marital status during the period in which they accrued. The deferred compensation idea is readily applicable to pension payments dependent upon the accumulation of contributions to a pension fund of a percentage of an employee's salary either by the employer or by the employee through withholding from the salary, or by both, plus the earnings of those contributions in the fund.

W.S. McClanahan, Community Property in the United States § 6:21, at 365 (1982).[9]

There is no reason why Mr. Etezadi could not assign the proceeds of his pension -- as any other asset -- to another person who would then have rights in it. "Except where prohibited by statute, a pension granted for past services may

---

[8]Pre-marital employment would reduce the community in the pension. See 11 B. Witkin, supra, § 41, at 420-22; J. Stein & J. Zuckerman, California Community Property § 2.45, at 2-75 (1993). Here the transmutation makes such an allocation unnecessary.

[9]The issue raised by Iran concerning federal preemption of state laws in the United States is not relevant, for the pension in question is not covered by the Federal Employee Retirement Income Security Act of 1974, Title 29 U.S.C. §§ 1001-1461 ("ERISA"), or any other law related to military pensions. Moreover, federal preemption is based on the Supremacy Clause of the United States Constitution, Article VI, and has no relevance to any choice-of-law or other issue addressed here.

be assigned." 70 Corpus Juris Secundum, Pensions § 5, at 127 (1987) (footnotes omitted).[10] Neither the majority nor Iran has pointed to any provision of law to the contrary. Thus, either by virtue of law or as an assignee, Mrs. Etezadi has enforceable rights before this Tribunal as a beneficial owner of the required pension payments. See James M. Saghi, supra, at paras. 24-26.

Mr. Etezadi had a vested and matured interest in the pension, i.e., "a nonforfeitable right to immediate payment." W.S. McClanahan, supra, § 6:21, at 366. The Iranian Retirement and Pension Law provided to the Tribunal appears to make the government obligations mandatory, with certain exceptions discussed above. See n.1, supra. There is no indication that under Iranian law the Government of Iran could terminate all pension rights at will. Here, the pension was offered by Iran as an employer. It was accepted by the employee by remaining in the employment and contributing to the pension fund. The pension is, in effect, deferred compensation. Accordingly, the pension appears to be a contractual obligation of Iran and thus not terminable at will. That a pension should be so regarded is indicated by Professor O'Connell's work on international law, in which he noted that when there is a change in sovereignty in the administration of a territory, the successor, in order to "satisfy the equities," must provide "for payment of pensions and superannuation. . . . [I]t may be suggested that the fate of pensions generally is that of debts generally." 1 D.P. O'Connell, International Law 391 (1970). Even if the pension were not considered a contractual obligation, Iran should not be able arbitrarily and unilaterally to deprive a former employee of all of the pension benefits after they have been

---

[10]In order to qualify for certain tax and debtor rights in the United States, a pension may not be assignable under ERISA, but that law does not apply here.

earned. Surely under these circumstances, the pensioner has been denied basic rights.

Iran claims that a renunciation of Iranian citizenship causes a forfeiture of the pension. See Iranian Retirement and Pension Law, art. 97. Mr. Etezadi, however, has never renounced his Iranian citizenship.[11] Moreover, when the pension was terminated, Mr. Etezadi was not then even a dual national. Clearly, renunciation of citizenship was not the reason for terminating his pension. For a number of years after his retirement, Iran paid and confirmed the pension. There was no indication that Mr. Etezadi, who had left his government position years earlier, had committed any offense. No legitimate or rational reason has been provided for the termination of this vested pension. The advent of a new government does not provide justification for termination of pension rights any more than it would for the termination of any other contract or property rights. Simply passing a law authorizing the termination of vested pensions cannot validate the action. See INA Corp. v. The Islamic Republic of Iran, Award No. 184-161-1, pp. 7-8 (12 Aug. 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 378 (lawful nationalization still imposes obligation to pay compensation); Sedco, Inc. v. National Iranian Oil Co., et al., Award No. 309-129-3, para. 30 (2 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23,

---

[11]In his Concurring Opinion in James M. Saghi, supra, Judge Aldrich notes: "While abandonment of Iranian nationality is not, in theory, impossible under Iranian law for persons who are more than 24 years old, it requires the consent of the Iranian Council of Ministers, involves restrictions upon visits to Iran and the ownership of real property in Iran, and evidently rarely occurs in practice. See Article 976 of the Iranian Civil Code." See also Concurring Opinion of Richard M. Mosk, Case No. A/18, Decision No. DEC 32-A18-FT, p. 7 n.7 (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 269, 272 n.1. A change, if any, in Mr. Etezadi's status after 19 January 1981 would not affect the claim. See Gruen Associates, Inc. v. Iran Housing Co., et al., Award No. 61-188-2, p. 12 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97, 103.

34 (claimant entitled to "full value of its expropriated interest . . . regardless of whether or not the expropriation was otherwise lawful"); see also infra.

Although for purposes of Tribunal jurisdiction Mr. Etezadi was a national solely of Iran, and thus the Tribunal cannot decide his claim regarding the pension, the Tribunal does have jurisdiction over Mrs. Etezadi's claim to her interest in the pension and proceeds thereof. She not only has a beneficial interest in the pension by virtue of her agreement with Mr. Etezadi and by law, she also has an existing, contingent interest in the pension -- i.e., a right as a spouse to payments upon Mr. Etezadi's death or loss of civil rights. See n. 1, supra. Although for some purposes this interest might be considered as a mere expectancy rather than as a legally enforceable right, it may still be viewed as a property right that has a present value, which value can be determined by an actuary. See In re Marriage of Shattuck, 134 Cal.App.3d 683 (1982). The conclusion is inescapable that the termination of the pension was wrongful. Thus, when Iran terminated the pension, it wrongfully took Mrs. Etezadi's rights and interests in that pension.

It is true that if a husband forfeits his pension rights under the law, his wife's rights in the pension necessarily disappear regardless of any agreement between them and regardless of any contingent rights of the wife. In such an instance, the husband's acts or omissions are as a "partner" in the marriage and therefore affect the marital property. But here, it was Iran -- a third party -- that committed a wrongful act damaging Claimant's property rights. As a result, Iran is responsible to her under the Algiers Accords. That her right may be derivative does not make it any less a property right subject to compensation under the terms of the Algiers Accords.

Iran has also argued that Mr. Etezadi (or perhaps Mrs. Etezadi) should have pursued legal remedies in Iran, i.e., they should have exhausted local or administrative remedies as a condition precedent to the right to bring a claim here. Tribunal decisions, however, have held that such exhaustion of local remedies is not a prerequisite for recovery at this Tribunal. See, e.g., American Int'l Group, Inc., et al. v. The Islamic Republic of Iran, et al., Award No. 93-2-3, p. 9 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 101-02; Amoco Iran Oil Co. v. The Islamic Republic of Iran, et al., Award No. ITL 12-55-2, pp. 3-4 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 493, 495; Rexnord Inc. v. The Islamic Republic of Iran, et al., Award No. 21-132-3, pp. 8-9 (10 Jan. 1983), reprinted in 2 Iran-U.S. C.T.R. 6, 10; Amoco Int'l Finance Corp. v. The Islamic Republic of Iran, Award No. 310-56-3, para. 21 (14 July 1987), reprinted in 15 Iran-U.S. C.T.R. 189, 197. These Tribunal decisions confirm the generally accepted principle that when a State agrees to arbitrate, the other party need not exhaust any administrative remedy. See Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. Reports 12 (1988); Schwebel, Arbitration and the Exhaustion of Local Remedies Revisited, 23 The International Lawyer 951, 952-55 (1989). Moreover, even though Mrs. Etezadi has her own rights, Iran has presented no evidence that she had an Iranian administrative remedy.

The majority suggests that an internal decision of the Iranian Government concerning a pension of an Iranian citizen is governed by municipal law and therefore is immune from scrutiny under international law and by this Tribunal. The majority's reference to "general principles of international law" to justify its conclusion lacks any supporting authority.

Paragraph 14 of the General Declaration specifically provides that claims are not barred by the act of state

doctrine. This case is no different than one involving any other measure directed at an Iranian national that gives rise to a claim beneficially or indirectly owned by an American national. For example, Iran may, under its law, confiscate the property of one of its own nationals, but if an American national has a beneficial interest in that property, under Tribunal law the American national may recover for that interest.

This Tribunal has rendered awards against Iran on the ground that an Iranian law breached an obligation to a claimant. Iran itself has stated that "a State cannot plead its own law as an excuse for non-compliance with international law." Reply of the Ministry of Defense of the Islamic Republic of Iran in Case B1, at 9 (filed 29 Nov. 1982); see also Concurring Opinion of Charles N. Brower, Component Builders, Inc., et al. v. The Islamic Republic of Iran, Order in Case No. 395 (10 Jan. 1985), reprinted in 8 Iran-U.S. C.T.R. 3, 9; Dissenting Opinion of Hamid Bahrami & Mohsen Mostafavi, Case No. A-15, Decision No. DEC 52-A15-FT, at p. 1 (24 Nov. 1986), reprinted in 13 Iran-U.S. C.T.R. 177, 177-78; Draft Articles of Part Two on State Responsibility, art. 6(3), Provisionally Adopted by the International Law Commission, in Report of the International Law Commission on the Work of Its 45th Session, U.N. Doc. A/48/10, at 130 (1993).

Although the majority restricts its holding to pensions, there is nothing peculiar about the pension laws that would preclude this claim under international law. Here, the issue involves the termination of pension rights under an enactment and procedure that were neither part of nor pursuant to the pension law. Thus, the claim is not to enforce a provision of the pension law, but to assert rights based on the allegation that the "purging" action under another enactment gave rise to a claim for a measure affecting property rights. Pension rights are property rights. A beneficial interest in pension rights, including pension proceeds, is no different than such

an interest in any other property and should not be treated differently.

The international law principle of the unenforceability of certain claims by a foreign state to enforce extraterritorially its laws, such as penal or revenue legislation, has no application to the instant case. See F.A. Mann, Prerogative Rights of Foreign States and the Conflict of Laws, 40 Transactions of the Grotius Society 25-28 (1955); 1 Dicey and Morris On The Conflict of Laws 101 (L. Collins 11th ed. 1987). This is not a case involving a state acting jus imperii for the purpose of enforcing certain laws extraterritorially. See Computer Sciences Corp. v. The Islamic Republic of Iran, et al., Award No. 221-65-1, at pp. 55-56 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 312-13. As one authority has written, "if the plaintiff is a private person who enforces his own private right in his own interest, the rule does not apply, even though the claim arises in consequence of a foreign State's public laws." F.A. Mann, Conflict of Laws and Public Law, 132 Recueil des Cours 107, 180 (1971). Thus the majority has no basis for asserting that in this case, under international law, municipal law cannot be questioned.

Iran at the Hearing, but nowhere in its briefs, also argued that each month's pension payment was an independent obligation, and that, even assuming Mrs. Etezadi has some rights in the pension payments, the Tribunal has no jurisdiction to consider payments due after 19 January 1981 because they were not "outstanding" on that date -- the date of the Algiers Accords. Claims Settlement Declaration, art. II, para. 1. Iran cites Schering Corp. v. The Islamic Republic of Iran, Award No. 122-38-3, p. 23 (13 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 361, 372-73. In that decision, involving a promissory note that did not mature until after 19 January 1981, the Tribunal concluded that no claim was outstanding at the time of the Claims Settlement

Declaration. See also Harnischfeger Corp. v. Ministry of Roads and Transportation, et al., Award No. 144-180-3, pp. 44-45 (13 July 1984), reprinted in 7 Iran-U.S. C.T.R. 90, 115; J.I. Case Co. v. The Islamic Republic of Iran, et al., Award No. 57-244-1, pp. 5-6 (15 June 1983), reprinted in 3 Iran-U.S. C.T.R. 62, 65 (no jurisdiction over installment but no discussion of anticipatory breach); cf. PepsiCo, Inc. v. The Islamic Republic of Iran, et al., Award No. 260-18-1, pp. 24-31 (11 Oct. 1986), reprinted in 13 Iran-U.S. C.T.R. 3, 21-27 (jurisdiction over notes accelerated pursuant to acceleration clause); Concurring Opinion of Howard M. Holtzmann, Shipside Packing Co. Inc. v. The Islamic Republic of Iran, Award No. 102-11875-1, pp. 2-4 (12 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 80, 82-84 (storage fees due after 19 January 1981 within Tribunal jurisdiction because of storage lien).

Here, for the wrongful termination of the pension, Claimant claimed the discounted value of the pension based on life expectancy or, in the alternative, the value of a comparable retirement plan or annuity. The latter theory does not involve any payments due after 19 January 1981. But even under the former theory, Iran's reliance on Schering overlooks the fact that the renunciation of the pension constituted an anticipatory breach of the entire pension agreement, which agreement required payments over time, including those due at the time of the renunciation. Therefore, the whole amount of the anticipated pension, discounted to present value as of the date of the breach, becomes payable. See Rockwell Int'l Systems, Inc. v. The Islamic Republic of Iran, Award No. 438-430-1, para. 199 (5 Sept. 1989), reprinted in 23 Iran-U.S. C.T.R. 150, 202; Kimberly-Clark Corp. v. Bank Markazi Iran, et al., Award No. 46-57-2, p. 14 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 341 (anticipatory breach not shown, but theory recognized); Kaysons International Corp. v. The Islamic Republic of Iran, et al., Award No. 548-367-2, para. 38 (28 June 1993) (anticipatory breach not alleged, but theory

recognized); cf. Harnischfeger Corp., supra, p. 30, reprinted in 7 Iran-U.S. C.T.R. at 107 (no anticipatory breach because claimant did not treat agreement as breached).[12]

Under either one or both of Claimant's theories, the Tribunal has jurisdiction to award damages. Even if Iran's contentions were accepted, this Tribunal should still award compensation, however small, for the cessation of payments until the jurisdictional ending date, see Foremost Tehran, Inc., et al. v. The Islamic Republic of Iran, et al., Award No. 220-37/231-1, pp. 31-35 (11 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 228, 250-53, or for the return of the amounts contributed by Mr. Etezadi, which return is required by the very law under which Iran terminated the payments.

The majority refers to that portion of the "Legal Bill on Purging" (which presumably was the basis for Iran's termination of the pension) that provides that the person whose pension has been terminated is entitled to receive the amount he or she contributed to the pension fund. As Mrs. Etezadi had a one-half interest in funds contributed to the pension, she would still have such an interest in such funds if and when returned and in a claim for such funds. This is another factor showing Mrs. Etezadi's interest in the pension.

Iran did not account for such contributed funds. In order to avoid the implications of Iran's failure to comply even with the terms of the "Legal Bill on Purging," the majority points to the failure by Mr. Etezadi to make a demand

---

[12]It is sometimes said that there can be no anticipatory breach of a contract that was or became unilateral. This exception has been criticized. See 4 A. Corbin, Corbin on Contracts § 962, at 864-65 (1950). Even if the Tribunal were to accept such an exception, it would not apply here because Mr. Etezadi still had certain requirements under the pension law to maintain his eligibility for the pension -- e.g., Iranian nationality -- even though the pension had vested.

for those contributed funds. No such demand was necessary. Iran took an affirmative act to terminate what had been ongoing pension payments and failed to tender the amount contributed by Mr. Etezadi to the pension fund. Iran did not attempt to justify its failure to comply with terms of the "Legal Bill." Under these circumstances, and under the clear terminology of the "Legal Bill" itself, the obligation arose irrespective of whether a demand was made. See Sedco, Inc. v. Iran Marine Industrial Co., et al., Award No. 419-128/129-2, para. 31 (30 Mar. 1989), reprinted in 21 Iran-U.S. C.T.R. 31, 45, and citations therein (demand for payment of outstanding debt unnecessary for Tribunal jurisdiction); Mobil Oil Iran Inc., et al. v. The Islamic Republic of Iran, et al., Award No. 311-74/76/81/150-3, para. 46 (14 July 1987), reprinted in 16 Iran-U.S. C.T.R. 3, 17 ("It suffices that a claim is ripe, so that a cause of action does exist . . ."); Merrill Lynch & Co. Inc., et al., v. The Islamic Republic of Iran, et al., Award No. 519-394-1, para. 36 (19 Aug. 1991), reprinted in 27 Iran-U.S. C.T.R. 122, 137 ("a debt owed and payable prior to 19 January 1981 constitutes an outstanding claim, even though payment of the debt had not been demanded prior to that date").

Although the majority, without analysis, simply concludes that Mr. Etezadi is the "real owner of these pension benefits," it did not and cannot overcome the fact that Mrs. Etezadi is the beneficial owner of one-half of the pension benefits and therefore, under Tribunal law, entitled to an award for that interest.

The "Caveat"

Iran contends that the decision establishing the rights of dual nationals with dominant and effective United States nationality to maintain a claim, Case No. A/18, Decision No. DEC 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251, contained a "caveat" that would, in effect, bar any recovery by Mrs. Etezadi. The "caveat" is that "where the

Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim." Id. at p. 26, reprinted in 5 Iran-U.S. C.T.R. at 265-66 (emphasis added). I pointed out at that time in a concurring opinion that the Tribunal merely implied that the "use by a United States citizen of his or her Iranian nationality in a fraudulent or other inappropriate manner might adversely affect the claim by that person." Concurring Opinion of Richard M. Mosk, supra, at p. 7, reprinted in 5 Iran-U.S. C.T.R. at 272.

Iran argues that, but for Mr. Etezadi's Iranian nationality, he would not have been able to obtain his pension, and thus Mrs. Etezadi's claims are dependent on Iranian nationality. The claim is by Mrs. Etezadi based on her interest -- not by Mr. Etezadi.

Iran also suggests that not having a foreign spouse was a prerequisite for government employment, but Iran has presented no Iranian law, rule, or regulation supporting this contention. The only relevant section is Article 1061 of the Civil Code of Iran, which provides that "the government can make the marriage of certain government servants and officials and students supported by the government with a female foreign national dependent upon special permission." (Emphasis added.) There is no indication that such permission was required here or that it was not granted or would not have been granted. Based on the materials before us, a spouse has interests in the pension, and the pension in no way requires that a spouse have exclusive Iranian nationality.

Mr. Etezadi originally relinquished his United States citizenship because he was required to do so by United States law. See Hooshang and Catherine Etezadi, supra, para. 6, reprinted in 25 Iran-U.S. C.T.R. at 266. What is of more importance here is the fact that Mrs. Etezadi did not obtain Iranian citizenship in order that her husband obtain his

position and a pension or acquire property in Iran. Iranian citizenship automatically devolved upon her by virtue of her marriage. She did nothing that could be viewed as subterfuge or anything else requiring Iran's protection under the "caveat." Nor is there evidence that she did anything inappropriate in order to avoid the application of Iranian law. See James M. Saghi, supra, at paras. 58-60 (claimant affirmatively sought Iranian nationality to avoid limitations of Iranian law). Moreover, even if relevant to the "caveat," there is no evidence that Claimant intentionally used dual nationality to obtain benefits otherwise precluded or limited by relevant Iranian law concerning the subject matter of the claim. See Concurring Opinion of George H. Aldrich, James M. Saghi, supra, para. 3; Concurring Opinion of Richard M. Mosk, Case No. A/18, supra, at pp. 7-8, reprinted in 5 Iran-U.S. C.T.R. at 272-73.

The argument of Iran that Mrs. Etezadi's use of her Iranian passport to enter Iran is alone enough to invoke the "caveat" would, if accepted, in effect nullify the dual nationality decision. Mrs. Etezadi obtained Iranian nationality through no voluntary act of her own. By marrying an Iranian national she automatically became an Iranian national under Iranian law, and Iranian law then compelled her to travel on that passport when entering or leaving Iran. See Nasser Esphahanian v. Bank Tejarat, Award No. 31-157-2, at pp. 17-18 (29 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 157, 167-68. If, as suggested by Iran, the marriage itself was the kind of act contemplated by the "caveat," then the Tribunal, by enforcing the "caveat" on such a basis, would itself be a party to a principle which on its face appears to contravene international public policy.

If, as Iran asserts, the application of the "caveat" involves equitable considerations, clearly it would be inequitable to deny pension rights when, as here, over twenty years of service have been rendered in reliance on earning a pension; contributions were made to the pension -- one-half of

which contributions belonged to Mrs. Etezadi; and there was no evidence of a valid or rational reason for the termination of the pension.

Conclusion

What has happened to Mr. Etezadi is unjust, but he has no recourse to this Tribunal. Mrs. Etezadi does have a right to make a claim before this Tribunal, and the law should be applied so as to be just and to recognize her rights as a woman and a wife. It has been said that "[i]n the law relating to spousal property, the policies supportive of equality of the sexes and policies promoting justness and fairness among the family participants and beneficiaries of the assets accumulated by the family unit, have particular influence on the courts, although this influence is often inarticulated." E. Scoles & P. Hay, supra, § 14.1, at 465.

It is widely recognized in community or marital property regimes that marriage is in part an economic and social partnership, and that after marriage anything produced by the industry of either spouse is the product of that partnership in which each has equal rights. See E. Scoles, supra, at 17-19. Here, the Etezadis exercised their rights to agree to such a partnership even before their move to California. They each contributed to their marriage partnership, and thus they each had rights in its product. When Iran wrongfully terminated the pension, it wrongfully took Mrs. Etezadi's rights in that pension. Moreover, when Iran in effect expropriated Shiraz Plastics, it deprived Mrs. Etezadi of her beneficial interest in that company.

The majority opinion basically relegates the role of the wife to an inferior position before this Tribunal, for under that opinion, unlike other claimants, she cannot obtain enforceable, beneficial rights by contracting with her husband, and her own property rights vis-à-vis third parties are necessarily dependent on her husband's rights.

Although theoretically the majority's opinion would apply if it were an Iranian wife who had the pension and the American husband who claimed as the beneficial owner, in reality such a situation is highly unlikely. Under Iranian law, an Iranian Moslem woman cannot marry a non-Moslem. Civil Code of Iran, art. 1059. Moreover, an Iranian woman cannot marry a foreign national without government permission. Id., art. 1060. There are no such requirements imposed upon Iranian males. Iranian nationality is only imposed on a non-Iranian wife, not on a non-Iranian husband. Id., art. 976(6). Thus, the situation presented in the instant case generally would arise so as to detrimentally affect a woman, but not a man.

Article II, paragraph 1, of the Claims Settlement Declaration gives the Tribunal jurisdiction over claims arising out of "expropriations or other measures affecting property rights." (Emphasis added.) This phrase "has broad meaning under international law." Harza Engineering Co. v. The Islamic Republic of Iran, Award No. 19-98-2, p. 9 n.2 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504 n.2. It does not exclude the property rights of wives. A wife's beneficial rights are no less subject to protection than those of any other beneficial owner of rights that have been protected by this Tribunal. As the applicable law validates Mrs. Etezadi's agreement with her husband, she had rights in the marital property. Because of this, she had a beneficial right in any property solely in her husband's name. Having established such a beneficial right, under Tribunal jurisprudence she is entitled to compensation for measures taken by Iran affecting these rights.

To deny Claimant her rights is contrary to the applicable law and public policy. This Tribunal should not place its imprimatur on a result not only wholly inconsistent with

Tribunal precedent, but also so unjust and so contrary to the rights of women.

For the foregoing reasons, I dissent from the award.

Richard M. Mosk