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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
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CASE NO. 39
CHAMBER TWO
AWARD NO. 425-39-2

PHILLIPS PETROLEUM COMPANY IRAN,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE NATIONAL IRANIAN OIL COMPANY,
Respondents.

SUPPLEMENTAL STATEMENT OF GEORGE H. ALDRICH

Introduction

1. I write this statement with regret, for I believe that the Award in this Case and my Concurring Opinion adequately express my views, and I find post-award exchanges among the Members of the Tribunal unseemly, particularly when they violate, as do Judge Khalilian's comments, Article 31, Note 2 of the Tribunal Rules which requires all Tribunal Members and Staff to maintain the privacy of deliberations. Nevertheless, in light of Judge Khalilian's comments and in view of the importance of this Case, I feel compelled to set the record straight on several of his assertions. While it is tempting to respond on many points, I shall limit myself to a few key assertions about which there should be no misunderstanding.

(a) The scope of the deliberations

2. Judge Khalilian is simply wrong in asserting that no deliberations were held with respect to the key elements of

valuation -- the quantities of oil available for recovery, prices, costs, and risks. In accordance with a deliberation schedule to which all Members of the Chamber agreed, those deliberations began in February 1989 and involved exchanges of written notes, oral discussions, and ultimately, written and oral comments on the draft Award circulated by the President.

3. With respect to the scope of the Chamber's deliberations on discount rates, I need only point out that the Award plainly reflects the reasons that the Tribunal decided not to recalculate the discounted cash flow ("DCF") formula already in evidence, and therefore did not need to select a new discount rate. Rather, as the Award shows, the Tribunal decided to subtract from the claimed value (which had been determined by the DCF analysis submitted by the Claimant) amounts the Tribunal considered appropriate in light of its conclusions with respect to the estimates that a buyer in late 1979 would reasonably have made of the quantities of crude oil available for recovery, the prices, the costs, and the risks to be faced during the remaining years of the JSA. The Tribunal's decision to follow this approach is clearly mentioned in Paragraph 114 of the Award, as follows:

> In this connection, the Tribunal does not intend to make its own DCF analysis with revised components, but rather to determine and identify the extent to which it agrees or disagrees with the estimates of both Parties and their experts concerning all of these elements of valuation.

In Paragraph 138 of the Award, the Tribunal reiterated its decision to follow such an approach, specifically stating that "[s]ince the Tribunal has decided to refrain from performing an alternative DCF calculation, . . . it does not substitute the Claimant's discount rate with its own . . . ." Put simply, the valuation technique followed in the Award, although based on the DCF method, eliminated the need to substitute a different discount rate in the DCF formula

and thereby made unnecessary any deliberation of the amount of such a rate. Thus, Judge Khalilian is quite wrong in his assertions and in the implications of improper practice that he seeks to draw. It should be noted that the Tribunal's approach resulted in a recovery by the Claimant about two-thirds less than the amount it had sought -- a very substantial reduction, albeit not as large a reduction as Judge Khalilian wished.

(b) The innuendos concerning alleged "secret" calculations

4. The reasoning of the Award described above should be borne in mind when considering Judge Khalilian's rather desperate statements that he was "kept in the dark" concerning the existence of a memorandum that he mistakenly asserts I sent the President, and that he incorrectly concludes was the basis of the amount awarded. What happened is quite simple and totally innocuous. While we were each studying the Case, the President, in an informal conversation at which one of my legal assistants was present, expressed curiosity as to the mechanics of the DCF formula, particularly the effect of changing various assumptions within it. That led my legal assistant, on his own initiative, to prepare a number of hypothetical calculations to explore how the DCF formula worked. In doing so, I understand he used several discount rates and other assumptions that he himself chose solely for the purpose of the exercise. Sometime later he brought several pages of hand-written calculations into my office. When he began to show them to me, I told him I felt it unnecessary to examine them because I firmly believed that we should use the valuation technique described above -- a technique in which such calculations were unnecessary. I told my legal assistant that I had no objection, however, to his showing the calculations to the President in view of the President's earlier expressions of interest in the mathematical mechanics of the DCF formula, and I understand that he did so. It is obvious from a

reading of the Award that the President likewise reached the conclusion that the calculations were irrelevant to the method of valuation that the Tribunal should use.

5. Judge Khalilian asserts that the calculations were attached to a memorandum that I communicated to the President, which he says he obtained "from a source which [he] do[es] not feel obliged to disclose." Judge Khalilian is misinformed. There never was a memorandum from me to the President on this subject; there were merely my legal assistant's hand-written calculations made in the circumstances described and a one-sentence transmittal memo from him to the President. I might add that even if I had written that memorandum to the President -- which I did not -- it would not have been improper. Thus it is not uncommon, or incorrect, for a judge, or a member of his staff, to communicate comments and information, orally or in writing, to the President or one or more other judges, without making a general distribution to all judges. I understand that such practices have been followed within the Tribunal, including by Judge Khalilian, as they have been among the judges of the International Court of Justice.

6. As I have explained above, and as the Award clearly shows, the calculations made by my legal assistant were not used in arriving at the amount awarded in the Case, a fact of which Judge Khalilian is undoubtedly aware, and it is therefore quite unnecessary to discuss their contents here. I would note, however, that it was only on the eve of signature of the Award and soon after my legal assistant informed me that his one copy of those hand-written calculations had disappeared from his office that Judge Khalilian first raised the question with the President.

7. I must emphasize that, contrary to Judge Khalilian's assertions, all elements of the Tribunal's analysis and conclusions were examined in the deliberations. Judge

Khalilian's alternative proposals were also examined. The Award and my Concurring Opinion (which, as Judge Khalilian states, closely followed one of the notes I circulated to my colleagues for comment during the deliberations) fully explain the reasons for the Award. There was no "secret understanding" on the amount of compensation; the range in which that amount had to lie was determined by the analysis contained in the Award.

(c) The Chase Econometrics forecast

8. Judge Khalilian criticizes the Award's reference to an oil price forecast prepared by Chase Econometrics in 1979. He notes that the forecast is also referred to by the Claimant in Case 55, and he implies that because of that, the Award's use of this forecast was inappropriate, or even prejudicial, and that it demonstrates bias in favor of the Claimant in this Case. These criticisms are particularly misplaced because it was the Respondents who introduced that forecast in this Case in an effort to criticize a higher forecast presented by the Claimant's expert, Dr. Robinson. Moreover, it was the Respondents, not the President or myself, who pointed out that the Chase forecast could be found in Case 55. Thus, in their Hearing Memorial the Respondents wrote:

> Moreover, comparing Dr. Robinson's forecasted crude oil prices with another forecast made by Chase Econometrics (presented to the Tribunal by AMOCO, the Claimant of Case No. 55, Chamber No. 2) for the same period shows a divergence of as much as 40%. While Dr. Robinson puts the forecasted price of crude oil at $51.6 per barrel for 1999, Chase Econometrics forecasted the price of the same quality crude at $36.5 per barrel for the same year.

The Chase forecast was also referred to by the Respondents' expert, Dr. Stevens, in rebuttal to Dr. Robinson's forecast. Although he criticized the reliability of the Chase forecast

as well as that of the "general consensus" of oil price forecasts made around 1979 because of what he saw as uncertainty in the market, he clearly considered it a representative forecast based on the information available at that time. Thus, he states in his written testimony, "Alternative price forecasts to those used by Phillips Iran in its DCF exercise are available. A possible alternative is provided by Chase Econometrics (presented to the Tribunal by AMOCO, the Claimant of Case No. 55, Chamber No. 2)." He then proceeded to use that forecast in preparing a scenario of likely future revenues of the Claimant.

9. Thus, it is ironic that Judge Khalilian believes either that the Tribunal was not justified in referring to that forecast in this Case, or that in doing so the Tribunal acted in a biased manner to the advantage of the Claimant. Indeed, the Chase oil price forecast showed far lower price increases than the Claimant sought. Thus, the Award's inclusion of the Chase forecast in its determination of the range of oil prices considered likely in 1979 to prevail over the coming years worked only to the advantage of the Respondents. Judge Khalilian's suggestion to the contrary is not only incorrect, it is also somewhat baffling.

(d) The SEC Report

10. Judge Khalilian criticizes the Award for not giving effect to a 1979 annual report (10-K) filed by the Claimant with the United States Securities and Exchange Commission ("the SEC") that he argues contradicts the amount of oil reserves reflected in the Award. Judge Khalilian neglects, however, to mention that the report was not cited in any of the memorials of the Parties, was not discussed at the Hearing, and was submitted by one of the Respondents for the first time more than two years after the Hearing -- and only a week before the Award was scheduled to be signed. The Respondent gave no explanation of why it waited so long to

present a document that had been publicly available to it at least six years before the Hearing. The Award points out that in these circumstances the Tribunal could not admit in evidence a document filed so late. Judge Khalilian nevertheless argues that the Tribunal should have taken "judicial notice" of the report. Yet, the interpretation and relevance of the reserve figure in the report is far from clear. Indeed, the excerpt from the report that Judge Khalilian annexes to his Supplemental Statement, filed 30 June 1987, contains the following strongly-worded caveat concerning the reserve figure:

> The SEC views the Summary of Oil and Gas Producing Activities prepared on the basis of Reserve Recognition Accounting (Summary) as a document under development and recognizes that there are numerous conceptual and implementation issues with respect to [Reserve Recognition Accounting] that must be resolved.

Thus, the meaning, reliability and applicability to this Case of the figure in the 1979 report that Judge Khalilian says the Tribunal should have accepted is uncertain, to say the least. Moreover, considering the lateness of the submission and the obscure nature of the reserve figure it contains (a figure not repeated in the 1980 report also submitted), it is difficult to avoid an inference that the submission was merely a last-minute attempt to delay still further the issuance of the Award.

(e) The range of valuations considered

11. It should be obvious that determinations of the value of expropriated property frequently, if not invariably, involve the exercise of judgment by the arbitral tribunal charged with determining compensation. In the end, a range of probable values is more likely to command a majority than a single amount, but arbitration must, of course, award a specific amount. That was the situation in this Case. The

analysis set forth in the Award would justify compensation in an approximate range from U.S.$55 million to U.S.$70 million, or perhaps a bit more. President Briner and I agreed on that. Judge Khalilian did not agree with the analysis and therefore, not surprisingly, could not agree to compensation falling within that range. Conversely, the President and I could not agree that the much lower level of compensation for which Judge Khalilian argued would be justifiable. By deciding in the end to award compensation at the low end of the justifiable range, the President went as far as possible toward Judge Khalilian's position. I joined to form a majority, although as expressed in my Concurring Opinion, I believe that the amount chosen should have been somewhat higher in the range.

(f) The efforts to delay the Award

12. Finally, I deeply regret Judge Khalilian's statement that President Briner and I reached our conclusions in this Case in ways that he believes lacked "arbitral ethics and moral principles". There is, of course, no basis whatsoever for such a charge. Throughout the prolonged deliberations in this Case, utmost efforts were made to give Judge Khalilian adequate time to prepare himself, and the President, Judge Khalilian and I all spent considerable time explaining our respective viewpoints as clearly as possible. Both the President and I listened to Judge Khalilian's views and responded to them, and the President gave both Judge Khalilian and me adequate opportunity to comment on the drafts he circulated. Nevertheless, Judge Khalilian's obvious desire for delay could not be fully satisfied. Thus, while it was agreed that the Tribunal would deliberate certain issues during specific months, for example, valuation in February 1989 and counterclaims and any remaining issues in March 1989, and we did so, Judge Khalilian tended to characterize his views as preliminary and imply that he would say more at a "later stage" of the deliberations.

Yet, when the later stage of comments on the draft Award arrived in May and June, he submitted only certain comments and continued to assert that he would make further comments in the relatively distant future. The sixty-one page paper he circulated on 27 June, two days before the Award was to be signed, should have been circulated in February or soon thereafter, and I have little doubt that it was prepared long before it was circulated and was held back in the hope -- perhaps even the expectation -- that it could be circulated in the autumn. In any event, it was read by the President and myself before deliberations ended, and we were each of the view that it contained nothing that warranted changing the conclusions reached during the long process of deliberating the Case.

13. Given all the efforts the Chamber had made to provide Judge Khalilian ample time to study the Case, the schedule he had agreed to for the deliberations, and the time provided by the President for comments on the draft Award, Judge Khalilian's requests in late June for more time for further deliberations were unreasonable and appeared designed simply to delay the issuance of the Award. To have agreed to his demands would, in my view, have been inconsistent with fair and orderly procedures and would, predictably, have simply led to more delay in a case where more than two years had already passed since the Hearing.

Dated, The Hague
30 August 1989

George H. Aldrich