IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

Case No. 51

Date 5 November 1982

51-67

۵۱-۶۷

ORIGINAL DOCUMENTS IN SAFE

- Award; No. of pages_____ Date of Award_____

- Decision; No. of pages_____ Date of Decision_____

- Order; No. of pages_____ Date of Order_____

✓ - Other : Concurring and dissenting opinion of Howard M. Holtzman with respect to interlocutory awards on jurisdiction.
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Case Nos.
6, 51, 68, 121, 140,
159, 254, 293 and 466

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CONCURRING AND DISSENTING OPINIONS OF HOWARD M. HOLTZMANN WITH RESPECT TO INTERLOCUTORY AWARDS ON JURISDICTION IN NINE CASES CONTAINING VARIOUS FORUM SELECTION CLAUSES

Introduction

These nine Cases include some nineteen separate claims arising under contracts which contain forum selection clauses. All of these claims raise issues requiring the interpretation and application of Article II, paragraph 1 of the Claims Settlement Declaration[1/] which excludes from the jurisdiction of the Tribunal:

> ...claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position. (Emphasis added).

The Full Tribunal holds in nine Interlocutory Awards that the above-quoted provision does not exclude its jurisdiction as to thirteen of the claims in these Cases, but that

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1/ "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran" dated January 19, 1981. There is also a separate "Declaration of the Government of the Democratic and Popular Republic of Algeria," dated January 19, 1981 (herein called the "General Declaration"). The Claims Settlement Declaration and the General Declaration are sometimes referred to collectively herein as the "Algiers Declarations."

jurisdiction is excluded with respect to six other claims. I write separately in order to dissent from the holdings as to the six claims in which the Tribunal majority finds no jurisdiction, and to state my separate views with respect to the thirteen claims in which I voted with the majority in upholding the jurisdiction of the Tribunal, but where I would have stated the reasons somewhat differently. Because of the common and inter-related issues in these cases, the Full Tribunal heard them together. For the same reason, my views concerning these cases can be expressed more cohesively in a single, coordinated opinion rather than in nine separate ones.

It is to be noted at the outset that, while these nine Cases relate to nineteen claims, similar questions with respect to the application of Article II, paragraph I, of the Claims Settlement Declaration arise in a substantial number of other claims pending before the Tribunal. The Tribunal determined to consider and decide this threshold issue in accordance with the procedure contemplated in the Provisionally Adopted Tribunal Rules which provides that "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question." Article 21, paragraph 4. In view of the variety of forum selection clauses found in contracts underlying different claims, it was decided that the Chambers would relinquish to the Full Tribunal the jurisdictional question in a number of cases chosen to present a representative

spectrum of contract wording.[2] This was designed not only to illuminate analysis of the cases chosen for initial consideration, but also to facilitate and expedite the determination of similar issues in other cases. See Tribunal Procedural Guideline 1.[3]

In presenting these cases to the Tribunal, counsel for the two Governments each addressed the overarching questions of the meaning of the Algiers Declarations which they had negotiated, while counsel for the nine claimants and respondents each dealt primarily with the particular terms of their own contracts and commercial transactions. This coordinated procedure not only avoided much repetition, but also permitted the Tribunal to have the benefit of

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[2] In accordance with the Tribunal's usual practice, promptly after a Statement of Claim is filed in the Tribunal's Registry the case is assigned by lot to one of the three Chambers. Cases which present important issues may be relinquished by the Chamber to the Full Tribunal.

[3] That Guideline states:

> The arbitral tribunal may make such orders as it considers appropriate to coordinate and expedite cases which raise important issues, including, but not limited to, relinquishing cases to the Plenary Tribunal in accordance with Presidential Order No. 1, providing that such issues be heard separately and prior to hearing of the remaining issues, and coordinating scheduling of hearings. The arbitral tribunal may authorize arbitrating parties to give through a single designated representative, common explanations on similar issues arising out of different cases, without resulting in consolidation or joinder.

the views of those most closely connected with the various negotiations and documents.[4/]

The Claims Settlement Agreement requires that several tests be met before the Tribunal's jurisdiction can be excluded. First, there must be a binding contract between the parties. Second, the contract must contain a specific forum selection clause relating to any disputes. Third, that specific all-encompassing forum selection clause must provide for the sole jurisdiction of competent Iranian courts. Article II, paragraph 1.

I would hold that in view of changed conditions in Iran there is no "binding" contract in any of these nine Cases which excludes the Tribunal's jurisdiction. As more fully explained below, I reach that conclusion based on the plain meaning, object and purpose of the Claims Settlement Declaration, particularly when read in light of its negotiating history, and on the basis of well-established principles of international law which this Tribunal is required by Treaty to respect in deciding all cases. For those reasons, I would dispose of the jurisdictional challenge in all nine of these Cases by holding that there is no binding contract which deprives a claimant in any of these cases from its right to a determination of the merits of its claims by this Tribunal.

[4/] The orders and procedures in these cases are described in detail in the Dissent From Procedural Decision in Nine Forum Selection Clause Cases by Tribunal Members Holtzmann, Aldrich and Mosk, dated June 30, 1982. While the actions of the Iranian parties, as described in that dissent, are to be regretted, my views with respect thereto are fully set forth in the dissent and need not be repeated.

That would be the most direct and definitive way of handling these nine Cases as well as the many other similar cases before the Tribunal. However, the majority of the Tribunal does not adopt that approach.

Instead, the majority of the Tribunal, unwilling to conclude that all of the forum selection clauses in these cases are not binding, proceeds to analyze and base its decisions on the particular wording of each contract. While I consider that to be an unnecessary exercise, I concur in the decisions as to the interpretation of the forum selection clauses relating to the thirteen claims in these Cases in which the Tribunal found that it has jurisdiction.

In order to view the detailed decisions in these nine Cases in perspective, it may be helpful to summarize broadly the holdings in the nine Interlocutory Awards.

The decisions as to those thirteen claims in which I concur establish certain clear principles:

1. The Tribunal has jurisdiction when the forum selection clause provides for determination by Iranian courts of some, but not all, disputes which might arise out of or be related to the contract or transaction. In such instances, the Claims Settlement Declaration supersedes the parties' forum selection clause, and, consequently, the Tribunal has jurisdiction over all disputes related to the claim, including

those which might otherwise have been referred to other fora by the contract of the parties.[5/]

2. The Tribunal has jurisdiction when the forum selection clause provides that all disputes shall be determined by competent courts but does not specify that these shall be Iranian courts.[6/]

3. The Tribunal has jurisdiction when the forum selection clause provides for arbitration,[7/] even when there is agreement by the parties that an Iranian judge is to appoint the arbitrators.[8/]

4. A contractual clause that disputes shall be settled according to Iranian law is merely a governing law clause, and is not a forum selection clause providing for sole jurisdiction of Iranian courts. Accordingly, such clauses do not exclude the jurisdiction of the Tribunal.[9/] Nor is the jurisdiction of the Tribunal excluded by a mere assertion that Iranian courts have jurisdiction because the contract was

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[5/] See, e.g., Case No. 51, Part II (maker of a promissory note submits to jurisdiction of Iranian courts, but lender does not); Case No. 159, and Case No. 254 (only certain disputes to be determined by Iranian courts).

[6/] See, e.g., Case No. 6, Part II; Case No. 68.

[7/] See, e.g., Case No. 6, Part III; Case No. 121, Part V(1), Case No. 140, Part II; Case No. 293, Part III.

[8/] See, e.g., Case No. 466.

[9/] See, e.g., Case No. 6, Part II; Case No. 68; Case No. 140, Part II; Case No. 159; Case No. 254; Case No. 466.

signed in Iran and the respondent resides there.[10/]

The only Cases in which the majority holds that the jurisdiction of the Tribunal is excluded by Article II, paragraph 1 of the Claims Settlement Agreement are those where they find what they consider to be a broad forum selection clause providing for determination of all disputes solely by competent Iranian courts.[11/] In this connection, it is to be noted, however, that the Interlocutory Award in each of the Cases denying jurisdiction is properly limited in its scope and holds only that the Tribunal "has no jurisdiction over claims to the extent that they are based on [the contract which contains the forum selection clause]." The majority makes clear in each Interlocutory Award denying jurisdiction that "the extent to which [claims] are based on other contracts, or are not based on contract, and thus within the Tribunal's jurisdiction, remains to be determined by ... the Chamber to which this claim is assigned."[12/] Thus, claimants are free to assert claims arising out of other contracts, if any, or based on non-contractual grounds such as unjust enrichment, in quantum meruit, restitution or expropriation. Moreover, each Interlocutory Award denying jurisdiction is limited to a holding that the Tribunal lacks

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[10/] See, e.g., Case No. 121, Part IV

[11/] See, e.g., Case No. 51, Part III; Case No. 121, Parts II, III(1), III(2); Case No. 140, Part III; Case No. 293, Part II.

[12/] See, e.g., Holding in Case No. 51, Part III.

jurisdiction solely because its powers are restricted by the particular words of the Claims Settlement Declaration. The Tribunal does not hold that Iranian courts have jurisdiction. Thus, these awards do not provide a basis for pleas of res judicata or collateral estoppel on this issue, nor do they have value as precedent in any court of general jurisdiction which might be called upon to determine the effect of these forum selection clauses on its own jurisdiction.

Finally, it is to be observed that, since these nine Cases were relinquished to the Full Tribunal by the respective Chambers only for the purpose of deciding the application of Article II, paragraph 1, of the Claims Settlement Declaration,[13/] the Interlocutory Awards properly remand the claims to the original Chambers for further proceedings.

My conviction that no forum selection clauses are binding in view of the changed conditions in the Iranian judicial system is the ground for my dissents in those cases where the majority holds that jurisdiction of the Tribunal is excluded. The same conviction is also the primary reason for my concurring opinions in those cases in which I agree with the majority that the Tribunal has jurisdiction but where I would have based the holding

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13/ Order of the President, issued April 16, 1982. The full text of the Order is reproduced in the Dissent From Procedural Decision in Nine Forum Selection Clause Cases, supra n.4.

primarily on the ground that the forum selection clauses are not binding, rather than solely on the particular wording of those clauses. I will, therefore, first explain the reasons for that conviction. Then I will comment more briefly on my dissents and concurrences as to the claims referred to in the nine Interlocutory Awards.

No Forum Selection Clauses are Binding.

These nine Cases present examples of nineteen forum selection clauses. The common question now arises as to whether those clauses, all written in different circumstances at various times between 1974 and 1978, are enforceable to bar consideration by the Tribunal of the merits of claims under the contracts which contain those clauses.

I would hold that none of the forum selection clauses in these Cases are "binding" within the meaning of the Claims Settlement Declaration. The majority of the Tribunal disagrees, based on the following incorrect conclusions: [14]

> First, the majority is wrong when it concludes that the word "binding" in the term "binding contract" is "redundant" and must be ignored in interpreting the Claims Settlement Declaration;[15] and

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[14] The majority's views on this issue are most completely set forth in the Interlocutory Award in Case No. 51, Part III. The same majority views are either repeated or incorporated by reference in Case No. 121, Parts II, III(1), and III(2); Case No. 140, Part III; and Case No. 293, Part II. References herein to the majority's views are to the Interlocutory Award in Case No. 51, Part III, unless otherwise stated.

[15] Interlocutory Award, Case No. 51, Part III.

> Second, the majority ignores the record before it when it states that "there is not sufficient evidence that the two Governments came to an agreement as to the meaning of the word 'binding'".[16]

As shown below, there are no sound grounds for those conclusions.

In order to reach its holding the majority has, literally, had to delete the word "binding" from Article II of the Claims Settlement Declaration. The majority says that it cannot "give any sensible meaning to the word 'binding' in the present context" and that, therefore, "this word is redundant."[17] However, the key word "binding" cannot be dropped in such a cavalier fashion and with such drastic results. On the contrary, according to Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties of 1969 -- which both Iran and the United States have repeatedly agreed applies to the interpretation of the Algiers Declarations -- the word "binding" must "be interpreted in good faith in accordance with [its] ordinary meaning ... in [its] context and in the light of [the treaty's] object and purpose." As was noted in connection with an earlier decision of the Tribunal, the Algiers Declarations are treaties within the meaning of the Vienna Convention.[18] In the

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[16] Id.

[17] Id.

[18] Case A/1, Separate Concurring Opinion of Tribunal Members Aldrich, Holtzmann and Mosk on the Issue of the Disposition of Interest Earned on the Security Account.

light of the Vienna Convention, the word "binding" cannot be ignored, especially where, as here, its purpose is rooted in well-known principles of international law and where there is also uncontested evidence that its insertion was a vital element in the bargain agreed to by the two Governments.

A "binding contract" is one which is enforceable. That is the ordinary meaning of the term. Moreover, the word "binding" is not surplusage, because not every contract is enforceable at all times. A contract, or one or more clauses therein, may be, or may become, unenforceable for various reasons. One pertinent example of a contract provision which becomes unenforceable is that a contractual choice of forum is no longer binding if conditions have changed so fundamentally since the contract was written that the forum chosen in the contract is no longer the same kind of forum as the parties expected when they signed the contract. That is a recognized principle of international law based on considerations of fairness.

International tribunals and courts of many countries have repreatedly held that forum selection clauses are no longer binding when revolutionary changes have fundamentally altered the court system which existed when the forum was chosen. Thus in Carvalho v. Hull, Blythe (Angola) Ltd. [1979] All E.R. 280, the English Court of Appeal considered a situation very much like the one which exists in this case. A contract executed while

Angola was a colony of Portugal contained a forum selection clause providing that in the event of disputes the District Court of Luanda "should be considered the sole court competent to adjudicate to the exclusion of all others." By the time a dispute between the parties arose a revolutionary civil war had occurred, Angola had become independent, and a new Constitution had been adopted which -- with remarkable similarity to the revolutionary Constitution of Iran -- required that previous law could not be applied by Angolan courts if it is in "conflict with the spirit of ... the Angolan revolutionary process." The English Court held that the clause of the contract selecting the courts of Angola as the forum was no longer binding. Lord Justice Browne synthesized the controlling international law principle with straightforward common sense:

> One can perhaps test it in this way. If the parties had known in December 1973 what the situation would be in Angola now, would they have agreed to include [the clause] in the contract?

Id. at 285.

The Carvalho case followed a principle which had earlier been enunciated by the International Court of Justice. In the Fisheries Jurisdiction Case Judge Fitzmaurice, in a separate opinion, stated that a reference to the Court would not be enforceable "if the character of the International Court itself had changed in the meantime so that it was no longer the entity the Parties had

had in mind...." [1973] I.C.J. Reports 1, 33 and 77 n.16. French and German courts have adopted the same principle. In cases involving contractual clauses designating tribunals in Tunisia and Guinea prior to their independence, French courts held that in the light of the changes in the judicial system after independence the parties would be permitted to bring suit in France.[19/] Similarly, German courts after World War II did not enforce pre-war contractual clauses selecting forums in areas administered by the Soviet Union or Poland after the war, but rather permitted the plaintiffs to sue in Germany.[20/]

When one considers the Carvalho case and the other cases cited above it becomes clear why the word "binding" is so significant and cannot be ignored when interpreting Article II of the Claims Settlement Declaration: The term "binding contract" was written into the Claims Settlement Declaration in the light of the principles of international law reflected in those cases. Iran, as well as the United States, knew, or should have known, that under those principles a contractual forum selection ceases to be binding when later revolutionary developments result in fundamental changes in the legal and judicial system.

19/ See, e.g., Dequara v. S.A.R.L. Fermetures Mischler Tunisie, Cass. Civ. Jan. 23, 1962 R.C.D.I.P. 1964, p. 529; Société Comptoir commercial fabroafricain v. Carabiber, Cass. Civ. Mar. 4, 1963 R.C.D.I.P. 1964, p. 530.

20/ See, e.g., Oberlandesgericht Duesseldorf, Deutsche Rechtszeitschrift 1949, p. 308; Amtsgericht Elmshorn, Schleswig-Holstein Anzeiger 1948, p. 271; cf. Oberster Gerichtshof fuer die britische Zone, Betriebsberater 1949, p. 236.

The revolutionary changes which have occurred in Iran since the forum selection clauses in these cases were written are demonstrated by extensive evidence before the Tribunal. Iran is proud of those changes and does not contest that they have occurred. I need not reach, characterize, or discuss the nature of those changes, it being sufficient for purposes of applying the term "binding contract" simply to recognize that there have been fundamental changes not contemplated by the parties when they originally wrote the forum selection clause.[21/]

The requirement to consider changed circumstances in deciding whether a forum selection clause is binding is derived not only from the principles of international law which I have described, but finds further support in the express wording of Article V of the Claims Settlement Declaration. That provision mandates the Tribunal when deciding "all cases" not only to apply principles of international law but also to take into account "changed circumstances." (Emphasis added) The inclusion of the term "changed circumstances" in Article V evidences the agreement of the two Governments that fair implementation of the Algiers Declarations cannot be accomplished without recognizing and giving effect to changes which are an inherent part of the Iranian revolutionary process.

[21/] Because the occurrence of an intervening fundamental change in the legal system is a sufficient and independent ground for holding that a contractual forum selection is no longer binding, I do not reach or comment upon the issue of whether the United States claimants can obtain effective relief in the courts of Iran, which under international law is a separate ground for holding that a forum selection clause is not binding.

In cases in which courts have held that forum selection clauses are not binding because of fundamental changes in circumstance, the decision has been reached by comparing the conditions which existed when the forum selection clause was written with those prevailing when the forum selection is sought to be enforced. There is no wording in the Algiers Declarations and no judicial precedent has been cited to support any other basis of comparison. However, even if one were to say that only changes since January 19, 1981 -- the date of the Algiers Declaration -- should be taken into account because the United States knew the conditions which then existed in Iran and reached agreement in the light of them, nevertheless there have been sufficient major changes in the Iranian legal system since that date to support the conclusion that the forum selection clause is not binding. Evidence before the Tribunal shows that the revolution in Iran has been a far-reaching and developing process and that many significant changes in the courts and the laws have taken place since January 19, 1981. Suffice it to mention but one example of continuing revolutionary change: Uncontradicted evidence before the Tribunal shows that as recently as August, 1982 the High Judicial Council of Iran announced the cancellation of various laws, including the Civil Procedure Code and the Commercial Code, although new laws in substitution had not yet been enacted by the Islamic Consultative Assembly (the Majlis).[22/]

[22/] Translation of article from "International Iran Times," Vol. XII, No. 24, August 27, 1982.

This new development was contrary to an earlier opinion of the head of the National Inspection Organization that "in order to prevent chaos, the body of laws of the former regime which had not been repealed must be implemented."[23/] Surely, major change and continuing uncertainty concerning both the Civil Procedure Code and the Commercial Code seriously effect litigation in Iran of commercial claims such as those in these Cases.

In a strained attempt to justify its refusal to give any effect to the word "binding," the majority raises the question of whether "binding" refers to the entire contract or only to the forum selection clause contained in it. I agree with the majority when it says that it is not sensible to conclude that "binding" in this context refers to the entire contract. I disagree, however, when the majority ignores the ordinary and judicially-recognized principles by refusing to interpret "binding" as referring to the forum selection clause.

The enforceability of the forum selection clause is typically determined separately from the contract in which it is contained. That, for example, is what was done in the Carvalho case where the court held the forum selection clause in the contract to be no longer binding because of changed circumstances, but nevertheless permitted the plaintiff to sue on the other provisions of

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[23/] Id.

the contract to be valid and binding. That is a practical and necessary rule which is very widely followed. For example, arbitration clauses -- which are one kind of forum selection clause -- are recognized in international law to be separate from the contract in which they are included. This international principle is reflected in the UNCITRAL Arbitration Rules whose provision on "Pleas to the Jurisdiction of the Arbitral Tribunal" states that "an arbitration clause which forms part of a contract ... shall be treated as an agreement independent of the other terms of the contract." Article 21, paragraph 2. That provision of the UNCITRAL Arbitration Rules reiterates a doctrine developed and adopted by courts in many countries with respect to forum clauses generally. So widespread is the doctrine of the independence of forum selection clauses that Sanders refers to it as "this famous question of separability" and notes that it "has given rise to many decisions in several countries" supporting this concept.[24/] See, e.g., Prima Paint Corporation v. Flood and Conklin Manufacturing Co. 388 U.S. 395 (1967).

In view of the extensive recognition that forum clauses are separate from the contract in which they are contained, the phrase "binding contract" must, in the context of the forum exclusion clause of Article II, paragraph 2, refer to a binding forum selection clause. That

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[24/] P. Sanders, "Commentary on UNCITRAL Arbitration Rules," II Yearbook Commercial Arbitration 200 (1977). Sanders also notes that the doctrine of separability is included in Article V, para. 3 of the Geneva Convention of 1961 and in Article 18, para. 2 of the Strasbourg Uniform Law of 1966.

is the only interpretation consistent with international law and the only meaning which follows the established principle that the words of treaties must be interpreted so as to give them a useful effect.[25] There is thus no basis for the majority position that it is not "sensible" to interpret "binding contract" to refer to a binding forum selection clause, and there is even less basis to leap from that false premise to the incorrect conclusion that the word "binding" is therefore "redundant" and should be ignored. Key words cannot be written out of treaties on such shallow pretexts.

The majority does not cite any legal authority whatsoever in support of its quite astonishing proposition that the word "binding" -- a word expressly negotiated into a treaty -- is "redundant" and to be given no effect. In sharp contrast, the International Court of Justice emphasizes that when interpreting treaties a reason and meaning should "be attributed to every word in the text." Anglo-Iranian Oil Co. Case [1952] I.C.J. Rpts. 93, 105 (emphasis added). In a separate opinion in the same case, Lord McNair disposed of an argument that a key word in a treaty was superfluous by saying that "Some meaning must be given to the word." Id. at 122. Commenting on the approach of the International Court of Justice to this canon of interpretation, Judge Fitzmaurice has observed that "... the Court pronounced itself in general terms in a manner unfavorable to a

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[25] The well-recognized principle of effectiveness (ut res magis valeat quam pereat) requires that "particular provisions [of treaties] are to be interpreted so as to give them their fullest weight and effect." Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54 [1957] Brit.Y.B. Int'l Law 203, 211.

method of interpretation that would, so to speak, leave certain words in the air." Supra, n. 25, at p. 222.

Not only must words in a treaty not be left hanging in the air, to use Judge Fitzmaurice's apt phrase, but they must also, in accordance with the principle of integration, "be interpreted as a whole." Id. at 211. Thus, in interpreting the meaning of the words "binding contract" in the Claims Settlement Declaration one must also consider the objectives set forth in the companion General Declaration, particularly General Principle B thereof which states that:

> It is the purpose of both parties within the framework and pursuant to the provisions of the two Declarations ... to terminate all litigation as between the Governments of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.

By refusing to give proper weight and meaning to the word "binding," the majority violates the principle of integration and the purpose set forth in the General Declaration.

When one considers the historical circumstances that existed at the time of the Algiers Declarations, it becomes clear why the two Governments needed to include the word "binding" in their Treaty. When the Claims Settlement Declaration was agreed to in January 1981 no one could be sure what the circumstances of the Iranian legal system would be when cases came before the new Tribunal at some yet undetermined future time. For example, although Iran had in 1979 adopted a Constitution providing in general terms for a system of Islamic law, no one could have predicted in January 1981 that in August 1982 both the Civil Procedure Code and the Commercial Code would be cancelled with no substitute laws yet enacted in their

place. Even as this is written, the Tribunal has no evidence before it as to whether or when there will be an operative Civil Procedure Code or Commercial Code and what their provisions will be. In a highly uncertain situation, a practical solution was adopted by the two Governments. They agreed in the Claims Settlement Declaration that forum selection clauses providing for sole jurisdiction of Iranian courts would be effective only if they were "binding." The two Governments have entrusted to the Tribunal the task of interpreting and applying the Claims Settlement Declaration. Cf. Article VI, paragraph 4. They thus left it to the Tribunal to decide when the issue arose in the future whether or not forum selection clauses in contracts are "binding."[26/] However, the two Governments did not give the Tribunal unlimited discretion in

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26/ I am simply unable to understand the statement of the majority that:

> It is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts.

Interlocutory Award, Case 51, Part III. In the context of these Cases, a determination of whether the forum selection clauses are enforceable, i.e., binding, is necessary in order to determine the Tribunal's jurisdiction. Arbitral tribunals typically rule on whether they have jurisdiction. Indeed, this Tribunal's own rules -- and the UNCITRAL Arbitration Rules on which they are based in accordance with the Claims Settlement Declaration -- provide that the Tribunal shall have power to rule on the question of its own jurisdiction. Article 21, paragraph 1.

fulfilling its function of interpreting and applying the Claims Settlement Declaration. Rather, they provided that the Tribunal must make its decisions on the basis of respect for law, applying principles of international law and taking into account changed circumstances. Article V. Both Governments must be charged with knowing that under governing international law the forum selection clauses would not be "binding" if in the future fundamentally changed circumstances were found to exist. Furthermore, that is the only interpretation which effectuates the objective of General Principle B of the General Declaration that litigation be terminated and claims be settled by binding arbitration.

Finally, the majority decision states that there is not sufficient evidence that the two Governments came to an agreement concerning the meaning of the word "binding." Any such doubt is entirely dispelled by written evidence before the Tribunal. That evidence is in the form of a declaration by Warren Christopher who was Deputy Secretary of State of the United States and headed the United States negotiating team in Algiers. Neither the Government of Iran, nor any other respondent in these cases, has in any way contested the accuracy of the facts stated in Mr. Christopher's declaration, or submitted any evidence to contradict it.

In his written declaration, Mr. Christopher explained that the representatives of the United States and Iran did not

meet directly, but that negotiations were conducted entirely through high-ranking Algerian officials who acted as intermediaries transmitting to each party the positions of the other. Christopher, paragraph 4.

With respect to the forum exclusion provisions of Article II, Mr. Christopher testified that:

> From time to time during the ensuing negotiations .... [w]e strongly urged [through the Algerian intermediaries] that the only fair approach would be to allow the new tribunal to decide, as a matter of its own jurisdiction, under general principles of international and commercial law, whether a particular contract required under all the circumstances that a given claim should be adjudicated by an Iranian court rather than by the tribunal itself .... The Algerian delegation expressed their understanding of our position....

Id., paragraph 9.

It will be noted that Mr. Christopher is not testifying as to the unexpressed intent of one party. He is stating what he said ("strongly urged") to the Algerian intermediaries and what they said to him in reply ("The Algerian delegation expressed their understanding of our position"). Iran does not challenge that these statements were made or deny that they were relayed to them by the Algerian intermediaries. The majority, however, ignores this statement of Mr. Christopher.

Mr. Christopher's declaration goes on to give a further detailed description of the negotiation of Article II:

> On January 17, 1981, I delivered to the Algerian Foreign Minister Ben Yahia an

> addition to Article II of the Claims Settlement Agreement as follows:
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> > ... excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian or U.S. courts. (Emphasis added).
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> When I reviewed this proposal with Mr. Ben Yahia, he appeared immediately to recognize the importance of the new term included in this provision in that it would leave it open to the Tribunal to decide whether a given contractual provision was "binding" on the parties and the Tribunal, and he specifically asked whether the United States would insist on the word "binding." I replied that we would, that it was essential, and Mr. Ben Yahia made no objection.

Id., paragraph 16.

Again, the record before the Tribunal provides concrete evidence of what was actually said and done by the negotiators, not mere statements of unilateral intent. And, again, Iran does not challenge the accuracy of the account or that the information was relayed to and understood by the negotiators.

The above-quoted testimony of Mr. Christopher makes clear that the late Mr. Ben Yahia recognized the importance of the word "binding," and even inquired if the United States would insist on it. Nevertheless, the majority quibbles that Mr. Christopher did not expressly state that the purpose of that word "was understood and conveyed to the Iranian negotiators."

There is no reason to suppose that Mr. Ben Yahia, a highly experienced diplomat, having been told that the word "binding" was "essential" did not fully inform himself and understand the meaning of that word in its context. Nor is there any reason to believe that he might not have fulfilled his duty of conveying this point to the Iranian negotiators, or that they failed to consider and understand its meaning. The long and detailed terms of the Algiers Declarations stand as strong proof of the ability of the Algerian intermediaries to understand and convey the meaning of many complex provisions, and of the skill of the negotiators of both Governments in understanding and responding to the messages which they received. There is no basis whatsoever for speculating that there was any less care and comprehension with respect to Article II, paragraph 1.

Furthermore, Mr. Christopher's declaration concerning the detailed give-and-take bargaining on this matter is additional evidence that those involved on all sides paid careful attention to every word and nuance of this provision. Thus, Mr. Christopher testifies that Mr. Ben Yahia reported that the Iranian negotiators considered the U.S. proposal and objected to the reference to "U.S. courts" but had no objection to the word "binding" in the same sentence, or to any other part of the proposal. Id., paragraph 18. Mr. Ben Yahia himself proposed on January 18 that it would be helpful to insert a phrase

that the new clause was "in compliance" with the Majlis position. However, Mr. Christopher objected to that and, as an alternative, proposed that the final phrase be "in response to the Majlis position," thus indicating that it was less than full compliance. Mr. Christopher states that "Mr. Ben Yahia agreed that mine was the more accurate approach. The final agreement reads in those terms." Id. Mr. Christopher concludes his declaration by stating that "The Iranian negotiators accepted the amended proposal about noon on January 18 .... The final texts of the Declaration were finalized and adhered to on January 19, and the hostages were released the next day." Id., paragraph 19.

This detailed and uncontested evidence firmly establishes that the United States and Iranian negotiators, acting through the Algerian intermediary, focused attention on, carefully negotiated, and fully understood the words and meaning of Article II, paragraph 1, including the word "binding." In the light of that evidence, there is no basis for the majority's conclusion that there was not a meeting of the minds between the two Governments on this matter.

For all of the foregoing reasons, I would hold that in the prevailing circumstances no forum selection clauses are binding and that, therefore, Article II, paragraph 1 of the Claims Settlement Declaration does not exclude the jurisdiction of the Tribunal to determine the merits of any of the claims in these Cases.

Forum Selection Clauses Which Do Not Cover All Disputes

The Tribunal holds that it has jurisdiction with respect to three claims in which the forum selection clauses cover some, but not all, disputes which might arise between the parties with respect to their contract. As noted above, I would decide the jurisdictional issue as to these claims primarily on the ground that the forum selection clauses are not binding. I consider that the particular wording of the clauses provides only additional reasons for upholding the Tribunal's jurisdiction. Nevertheless, I concur in the holdings reached by the Tribunal as to these claims.

In connection with these three claims, the Tribunal's holdings are based primarily on the provision of Article II, paragraph 1 that the Tribunal's jurisdiction is excluded only if there is a specific forum selection clause which covers any dispute which might arise. The majority correctly proceeds on the premise that in this context the ordinary meaning of "any" is "all." Webster's Third New International Dictionary, at 97. This provision of the Claims Settlement Declaration recognizes that, in the interest of the economy of judicial proceedings and to avoid overlapping and potentially inconsistent results, all disputes related to the same contract should be determined in one forum.

The first of these claims arises out of the Loan Agreement in the Halliburton Case.[27] It is a claim for payment of a loan by Halliburton Company to an Iranian company in which it had a minority interest at the time the loan was made but which is now allegedly controlled by the Ministry of Industry and Mines of the Government of the Islamic Republic of Iran. Promissory notes were issued by the Iranian borrower which include the following provision:

> For all matters concerning the interpretation, compliance or judicial request for payment the maker of this Promissory Note expressly submits to the jurisdiction of the competent Courts of Iran.

The Tribunal holds, by a vote of 5-4, that the above-quoted clause in the promissory notes does not exclude the jurisdiction of the Tribunal. The principal reason for that conclusion is that while the maker of the notes submits to the jurisdiction of the courts of Iran, the lender does not. Therefore, there is not sole jurisdiction in Iranian courts because claims could be pursued by the lender in courts outside Iran were it to choose to do so. It is clear that a lender, in the exercise of prudent business judgment, might wish to

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[27] Case No. 51, Part II. Halliburton Company, IMCO Services (U.K.) Ltd. and Doreen/IMCO, The Islamic Republic of Iran (hereinafter referred to as "Halliburton"). Each Interlocutory Award is divided into separate Parts. Part I in each award is designated as an Introduction; each succeeding Part relates to a particular contract or closely-related group of contracts.

make sure in a promissory note that there is at least one court to whose jurisdiction the borrower must submit without challenge, while at the same time preserving the lender's own flexibility to sue in a competent court elsewhere should it prefer to do so.

Another of these claims arises out of the Peace Sceptre Contract in the Ford Aerospace Case.[28/] That contract, by which a claimant was to provide equipment and services in connection with installation of certain facilities at two air bases in Iran, includes the following forum selection clause:

> All disputes and differences between the two parties arising out of interpretation of the Contract or execution of the Works which can not be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian laws, via referring to the competent Iranian courts.

The Tribunal holds, by a vote of 6-3, that the above-quoted clause does not cover all disputes which might arise under the contract. Disputes relating to "interpretation of the Contract" do not include all contractual disputes. Further, in construction and similar contracts the term "Works" is typically used to mean that which is to be constructed or supplied pursuant to the contract, and phrases such as "execution of the Works" refer only to the proper construction or supplying of the Works and do not include other aspects of performance of the Contract.

[28/] Case No. 159, Part II. Ford Aerospace and Communications Corporation, Aeronutronic Overseas Services, Inc. and the Air Force of the Islamic Republic of Iran, The Ground Forces of the Islamic Republic of Iran, The Ministry of National Defence of the Islamic Republic of Iran, Bank Markazi and the Government of Iran (hereinafter referred to as "Ford Aerospace").

A forum selection clause with quite similar limited scope appears in the contract on which the claim in the Zokor International Case[29/] is based. That 1978 contract, relating to machinery for subway construction, includes the following provision:

> Should a dispute arise between the Manufacturer and the Employer, whether related to the execution of the contractual works or about the interpretation of the Articles of the contract, general conditions of the contract and other contractual documents, and if the dispute is not resolved in an amicable way, the same shall be referred to competent judicial authorities and courts and shall be resolved in accordance with the laws in force in Iran unless there is a convention between the Imperial Government and the Government of the country of the Manufacturer.

The Tribunal holds, by a vote of 6-3, that this clause does not exclude its jurisdiction. As in the Ford Aerospace Case, only disputes concerning the interpretation of the contract and contract documents and the execution of the works are covered by the clause, thus not including a range of other possible contract disputes as to contract performance or other contract-related matters. Moreover, this clause refers only to competent judicial authorities and courts, without specifying that these shall be Iranian.

[29/] Case No. 254. Zokor International Inc. and the Government of the Islamic Republic of Iran, Société du Chemin de Fer Urbain de Tehran et de sa Banlieue (Metro) (hereinafter referred to as "Zokor International").

Forum Selection Clauses Which Refer to Competent Courts But Do Not Specify Iranian Courts

The Tribunal holds that it has jurisdiction with respect to three claims arising under contracts in which the forum selection clauses provide that disputes shall be referred to competent courts, but do not state that these must be Iranian courts. The Tribunal's holdings in these Cases are based mainly on the requirement of Article II, paragraph 1 that the Tribunal's jurisdiction is excluded only when the forum selection clause specifically provides for the sole jurisdiction of Iranian Courts. I concur in the holdings in these three cases although, as stated above, I would have based these awards primarily on the ground that the forum selection clauses are not binding.

One of these claims arises out of the Tavanir Contract in the Gibbs & Hill Case.[30/] This relates to a 1977 contract for engineering, consulting and construction monitoring services in connection with electrical transmission systems in Iran. The contract contains the following forum selection clause:

> Settlement of Disputes
> All the disputes that may arise between the parties hereto over this Contract or the interpretation of its contents, that cannot be settled

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30/ Case No. 6, Part II. Gibbs & Hill, Inc. and Iran Power Generation and Transmission Company (Tavanir), Atomic Energy Organization of Iran (AEOI) (hereinafter referred to as "Gibbs & Hill").

> through negotiation or correspondence in an amicable manner, shall first be referred to a committee consisting of the highest authority of the Client (or his Deputy) and the Consulting Engineer for settlement, and in case they fail to settle the dispute in accordance with this Contract and current regulations, the dispute shall be settled through competent courts according to Iranian law.

In addition, the contract has a separate governing law clause stating that it is "in all respects subject to the laws and resolutions of the Imperial Government of Iran."

The Tribunal holds, by a majority vote of 5-4, that the above quoted clause does not exclude the jurisdiction of the Tribunal primarily because the reference therein to "competent courts" does not specifically provide for sole jurisdiction of Iranian courts.

The purpose of the above-quoted clause clearly is to set forth a quite detailed procedure for settling any disputes through negotiation or, if needed, by reference to a specially-constituted committee and to provide that, if this fails, the dispute is to be referred to a competent court which has jurisdiction, without specifying that this must be an Iranian court. The words in the clause referring to Iranian law constitute a choice of law, not a choice of forum. This mention of Iranian law, not inappropriate in a comprehensive dispute resolution clause, complements and is not inconsistent with the somewhat more detailed governing law clause which follows. Such a clause does not meet the requirement of Article

II, paragraph 1 which requires that in order to exclude jurisdiction of the Tribunal there must be a specific and unambiguous reference to Iranian courts, not merely to Iranian law.

The second of these claims arises out of a 1976 contract in the Howard Needles Case[31] which relates to engineering services in connection with road construction in Iran. The forum selection clause in the contract is strikingly similar to that in the Tavanir Contract in Gibbs & Hill:

> Settlement of Disputes
> Any disputes which may arise between the two parties in connection with the present contract or change or interpretation of its stipulations and context, which cannot be settled amicably by negotiations or correspondence, shall first be presented for settlement to a committee composed of the Employer's highest authority (or his deputy) and the Consulting Engineer party to the Contract. In case they cannot settle the dispute based on the Contract and the relevant Articles or regulations the case should be settled according to the Iranian Laws by having recourse to the competent courts.

As in Gibbs & Hill, this is followed by a further governing law provision specifying "the legislation of the Imperial Government of Iran." The same reasoning stated

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[31] Case No. 68, Part II. Howard Needles Tammen and Bergendorff ("HNTB"), and the Government of the Islamic Republic of Iran, the Ministry of Roads and Transportation, the International Bank of Iran and Japan (hereinafter referred to as "Howard Needles").

above with respect to the Tavanir Contract also applies here. It is interesting to note that, in comparison with Tavanir, a slight transposition of the order of words in the Howard Needles clause ("should be settled according to Iranian laws by having recourse to the competent courts.") makes it even clearer that this is a choice of law clause. This demonstrates even more clearly than in Tavanir that the reference to Iranian law is a choice of law, not forum. The fact that the reference to Iranian law comes before "competent courts," not after it as in the Tavanir Contract, is too minor a difference to distinguish the two cases, but it does serve further to clarify the meaning of both clauses.

Forum Selection Clauses Which Provide For Arbitration

The Tribunal holds that it has jurisdiction as to seven claims in contracts which provide for arbitration. The Tribunal's holdings in these instances are based primarily on the conclusion that arbitration is a process different from litigation in courts and, therefore does not fall within the ambit of Article II, paragraph 1. I concur in the holdings as to these seven claims, although, again, I would have based them primarily on the non-binding character of the forum selection clauses rather than solely upon textual analyses.

The AEOI Contract in the Gibbs & Hill case relates to the design and review of construction of a nuclear power plant. A forum selection clause in the contract states:

> Any and all disputes, disagreements or questions which might arise between the parties in connection with interpretation of any provision of this Agreement or the compliance or non-compliance therewith, which cannot amicably be settled by the parties shall be settled by arbitration laws of Iran.

Also, there is a governing law clause in the contract which requires that it "shall be governed by and construed in accordance with the applicable laws of Iran."

The Tribunal holds, by a majority vote of 6-3, that this forum selection clause which provides for arbitration is not a provision for sole jurisdiction of Iranian courts, or, indeed, of any courts. Case No. 6, Part III. This forum selection clause is interesting for another reason. Comparing its comprehensive scope with the narrow clauses in the Ford Aerospace and Zokor International Cases, discussed above, helps to emphasize the limited coverage of the latter two clauses.

Similarly, in the Wheat Contract in the Drucker Case[32/] the Tribunal, by a vote of 6-3, upheld its jurisdiction because the forum selection clause provided for arbitration. Case No. 121, Part V(1). The same

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[32/] Case No. 121, Part V(1). George W. Drucker, Jr., and Foreign Transaction Co., Insurance Company of Iran, National Grain, Sugar and Tea Organisation (hereinafter referred to as "Drucker").

result was reached, also by a 6-3 vote, in the Dresser Case,[33/] where the arbitration clause provides that if the parties do not appoint an arbitrator or if they do not agree on the third arbitrator, the appointment shall be made by the President of the Supreme Court of Iran.

In the Mali Abad Contract in the T.C.S.B. Case,[34/] the Tribunal, by a 6-3 vote, found that its jurisdiction was not excluded by a clause which provided for a committee to settle disputes, and further stated that:

> In case no agreement can be reached or if one of the parties to the contract does not submit to the judgment of the majority of the committee, the dispute will be settled according to the laws of Iran and if necessary by arbitration or by reference to competent courts.

It has recognized that such a clause clearly did not provide for sole jurisdiction of the courts of Iran.

In the Insurance Policy claim in the Drucker Case, the existence of a forum selection clause providing for arbitration was alleged by the respondent, but no written evidence of the terms of the clause was presented to the Tribunal. Case 121, Part V(2). In those circumstances, the Tribunal, by a vote of 9-0, found no

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[33/] Case No. 466. Dresser Industries, Inc., and The Government of the Islamic Republic of Iran; The National Iranian Oil Company (hereinafter referred to as "Dresser").

[34/] Case No. 140, Part II. T.C.S.B., and Iran (hereinafter referred to as "T.C.S.B.").

grounds at this stage for excluding its jurisdiction. Even if the existence of an arbitration clause were later to be proven, in my view, this claim would, on the basis of the foregoing precedents, be held to be within the Tribunal's jurisdiction.

In the Stone & Webster Case, both the FOB contract and the Services Agreement contain forum selection clauses providing for arbitration outside Iran.[35/] The Tribunal, by votes of 9-0, held that it has jurisdiction as to both claims.

Claims As to Which the Majority Denies Jurisdiction

The majority, by votes of 7-2, holds that the jurisdiction of the Tribunal is excluded as to six claims. I dissent from those holdings on the ground that none of the clauses are binding within the meaning of Article II, paragraph 1.

Those Claims relate to the Purchase Agreement in the Halliburton Case (Case No. 51, Part III), the Rice Contract, the Cement Contract and the Cement Offer in the Drucker Case (Case No. 121, Parts II, III(1) and III(2)), the BHRC Contract in the T.C.S.B. Case (Case No. 140, Part III) and the Construction Contract in the Stone & Webster Case (Case No. 293, Part II).

35/ Case No. 293, Part III. (Both the FOB Contract and the Services Agreement are covered in Part III of the Interlocutory Award in this case). Stone & Webster Overseas Group, Inc., and National Petrochemical Company, Razi Chemical Company (formerly Shahpur Chemical Company Limited), (hereinafter referred to as "Stone & Webster").

Conclusions

For the reasons stated hereinabove, I reach the following conclusions with respect to the holdings in the Parts of the nine Interlocutory Awards of the Tribunal listed below:

Case No. 6, Gibbs & Hill

Part II -- I concur

Part III -- I concur

Case No. 51, Halliburton

Part II -- I concur

Part III -- I dissent

Case No. 68, Howard Needles

I concur

Case No. 121 -- Drucker

Part II -- I dissent

Part III(1) -- I dissent

Part III(2) -- I dissent

Part IV -- I concur

Part V(1) -- I concur

Part V(2) -- I concur

Case No. 140, TCSB

Part II -- I concur

Part III -- I dissent

Case No. 159, Ford Aerospace

I concur

Case No. 254, Zokor International

I concur

Case No. 293, Stone & Webster

Part II -- I dissent

Part III (two claims) -- I concur

Case No. 466, Dresser Industries

I concur

Dated: The Hague

November 5, 1983

/s/

Howard M. Holtzmann