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** AWARD - Type of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

DISSENTING OPINION of mr Khalilian

- Date ✓

5 pages in English ✓ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

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CASE NO. 131
CHAMBER TWO
DECISION NO. DEC101-131-2

PETROLANE, INC.,
EASTMAN WHIPSTOCK MANUFACTURING, INC.,
and SEAHORSE FLEET, INC.,
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,
IRANIAN PAN AMERICAN OIL COMPANY,
NATIONAL IRANIAN OIL COMPANY, and
OIL SERVICES COMPANY OF IRAN,
Respondents.

DISSENTING OPINION OF SEYED KHALIL KHALILIAN

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1. I believe that the appellation "Award" given to the document filed under No. 425-39-2 in the Phillips Case is a misnomer. I also hold that the said document should not retain its enigmatic and precarious existence in the case history of the Iran-U.S. Claims Tribunal, given the general knowledge of the significant events surrounding its formulation and nullification.

2. Long before the Agent of the Islamic Republic of Iran (hereinafter, "the Agent") submitted his Motion of 12

September 1991 wherein he set forth his objection to the citation appearing in paragraph 50 of the Award in Petrolane (Award No. 518-131-2), I had expressed my clear-cut position on the legal nature of the aforementioned "Award" in Phillips.[1] In that Case, the Tribunal signed only the English version of the said text, which was labelled Award No. 425-39-2, because before the Persian text could be issued, the Parties reached a negotiated settlement of their disputes and requested the Tribunal to issue an award on agreed terms on the basis thereof. Responding favorably to this request, the Tribunal rendered Award on Agreed Terms No. 461-39-2.[2] A Statement[3] subsequently issued by my colleague, Mr. Aldrich, then raised the question whether "Award" No. 425-39-2 was indeed an award in terms of the Tribunal Rules[4] or whether , as the Parties had requested, it should be deemed "null and void," i.e., as a text devoid of any legal significance.[5] Mr. Aldrich's observations in his Statement do not differ

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1 Phillips Petroleum Company Iran v. Iran (Khalilian Separate Opinion dated 6 February 1990), 21 Iran-U.S. C.T.R. 294. In his above-cited submission, the Agent erroneously gives the date of this Opinion as 23 February.

2 Phillips Petroleum Company Iran v. Iran, Award No. 461-39-2, 21 Iran-U.S. C.T.R. 285.

3 Ibid, at 293.

4 Pursuant to the Tribunal Rules (Note 2 to Article 17), the awards and decisions of the Tribunal must be rendered in both official languages of the Tribunal -- viz. Persian and English. Moreover, the Tribunal's practice has always been predicated upon the rule that the Escrow Agent is not sent a notification to enforce and make payment of an award until after the Persian text thereof has been signed. Therefore, once the award is issued in both Persian and English it becomes final and binding; it is only then that a res judicata situation is created.

5 See the Award, supra note 2, at 290.

materially from the majority's reasoning in the above-captioned Decision. However, the arguments I made at that time in a separate Opinion demonstrate the degree to which I part company with both his observations and the findings reached by the majority in this connection. That is to say, if the name "Award" given to Document No. 425-39-2 were not merely an empty label and instead signified that the said document fulfilled the conditions for an award as required under the Tribunal Rules, it should have given the Case in question the status of a res judicata. Then, if this were the case, the Parties would have had no means of initiating an amicable settlement afterwards, since in the presence of a "final and binding" award, they would actually no longer have had a res litigiosae between them.

3. To elaborate further upon this point, I refer to Article 34 of the Tribunal Rules which provides, without any ambiguity whatsoever, that:

> If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms... (emphasis added)

In light of this Article, and the fact that the Tribunal recognizes as an award only one that is "final and binding," the remarks in paragraph 4 of the Decision, namely that:

> While the parties in their subsequent settlement agreed that they would deem that Award null and void upon the issuance of an Award on Agreed Terms giving effect to their Settlement Agreement, that cannot alter the fact that Award 425 was rendered in English and stated the conclusions and reasoning of the Tribunal,

seem to be either self-contradictory or an indication that the majority has invented some new form of "award" whose

meaning is different from that formally recognized by the Tribunal in its Rules and practice. In this connection, it must be emphasized that the parties in Case No. 39 did not have the right to request the Tribunal to issue an award on agreed terms, unless such request was submitted "before the award [was] made." They did, however, so request, and despite the existence of a text labelled "Award No. 425-39-2," the Tribunal proceeded to grant their request and thus issued the Award on Agreed Terms on the basis of their Settlement Agreement;[6] incidentally, the majority in that Award was the same as that formed in the present Decision. By its own action, then, the majority seems to recognize that the initial "award," i.e., No. 425-39-2, did not and does not constitute an award as described and recognized under the Tribunal Rules; for had a proper award been rendered initially in Case No. 39, it would have been counter to the Tribunal Rules for the majority to issue a second award, namely Award on Agreed Terms No. 461-39-2.

4. It is my opinion that the Agent's request should have been granted since his argument in paragraph 5 of his Submission seems plausible, with the exception of his suggestion that "this matter should be dealt with as purely clerical error [sic] pursuant to Article 36." I make this minor exception because the citation appearing in paragraph 50 of the Award in the above-captioned Case is obviously not a clerical error. He might therefore have formulated his motion in other terms which comported more clearly with the Rules.

5. Article 36 of the Tribunal Rules provides that a party may request the Tribunal to correct an award where there

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6 Supra, note 2.

have been 1) errors in computation, 2) clerical or typographical errors, or 3) any errors of similar nature.[7] To elaborate, I put the quoted Article 36 otherwise. The Tribunal Rules make provision for a correction of award on the basis of two main categories of errors: **a)** material or substantive errors (ex. errors in computation), and **b)** textual errors (such as those made in typing or printing the text, or which are of a grammatical nature). As regards the passage or any errors of similar nature, it unquestionably embraces any conceivable errors which could be categorized as either substantive or textual. Thus, the Rules have never prevented the Tribunal from correcting errors which were not of a strictly computational or clerical nature.

6. I therefore conclude that Award No. 425-39-2 cannot be cited as precedent in any case, and furthermore that a reliance on a text, actually devoid of any legal authority, giving the impression that it has been formed as a part of the Tribunal case-law is certainly a judicial error which has appeared in the reasoning of the Petrolane Award. Accordingly, the majority could have granted the Agent's request had it wished to avail itself of its discretionary power as well as the flexibility afforded it by the phrase "or any errors of similar nature" inserted in Article 36 of the Tribunal Rules.

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[7] "Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after communication of the award make such corrections on its own initiative." Art. 36(1).