IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

Case No. 140

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ORIGINAL DOCUMENTS IN SAFE

- Award; No. of pages____ Date of Award_____

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DISSENTING AND CONCURRING OPINION OF

RICHARD M. MOSK ON THE ISSUES OF JURISDICTION

Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466



## Introduction

I dissent from the Tribunal's decisions holding that it lacks jurisdiction over certain claims in case Nos. 51, 121, 140 and 293. I concur in each of the Tribunal's decisions to retain jurisdiction over claims, not only for the reasons set forth in the majority opinions, but also for the reasons I discuss in this opinion.



Article II, paragraph 1, of the Declaration Of The Government Of The Democratic And Popular Republic Of Algeria Concerning The Settlement Of Claims By The Government Of The United States Of America And The Government Of The Islamic Republic Of Iran ("the Claims Settlement Declaration")[1/] provides as follows:

> An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or



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[1/] The Claims Settlement Declaration and the Declaration Of The Government Of The Democratic And Popular Republic Of Algeria ("General Declaration") shall collectively be referred to as the "Algiers Declarations" or "Treaty." The Algiers Declarations constitute a treaty under international law. Weinberger v. Rossi ___ U.S. ___, 71 L.Ed. 715 (March 31, 1982).

majority has overlooked, in certain respects, that in order to do so, the clause must "specifically" provide that all disputes be within the "sole jurisdiction" of "competent Iranian courts."[2/]

It is important to recognize at the outset, that the Claimants and the United States submitted evidence concerning the negotiating history of the treaty in question and relevant conditions in Iran. International tribunals apply liberal standards in accepting and considering evidence. Indeed, one authority has written: "In international procedure . . . evidence is always admitted upon being duly presented in accordance with the time limits fixed by the tribunal; it will only be excluded upon a showing by the party challenging it of a specific ground requiring such action." Sandifer, Evidence Before International Tribunals 179 (rev. ed. 1975). In the instant cases, Respondents did not raise any evidentiary objections to the evidence submitted by Claimants and the United States and submitted virtually no evidence of their own.[3/] The Tribunal did not reject any of the evidence submitted by the Claimants and the United States. As I shall discuss, however, the Tribunal did not act on the record before it.

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[2/] It should be noted that many claims do not arise under an express contract and are thus not affected by the ruling of the majority. See also infra at n. 9.

[3/] The Respondents offered only unauthenticated documents concerning "the Majlis position."

The majority not only gave no weight to the evidence submitted, but did not even take into account Respondents' failure to produce evidence, which failure should have resulted in the drawing of inferences adverse to Respondents.[4/]

Moreover, the majority's legal conclusions are unsupported by any legal citations. It is disappointing that the majority opinions are so devoid of factual and legal support.

## The Treaty Requires the Tribunal to Determine the Enforceability of the Forum-Selection Clauses

The language of the Treaty and the evidence before the Tribunal establish that the Parties gave the Tribunal the task of determining whether a forum-selection clause in an agreement is enforceable.

In referring to contracts containing Iranian courts clauses, the parties inserted the word "binding" to modify the word "contract." By virtue of Article 31, paragraph 1, the 1969 Vienna Convention on the Law of Treaties (entered into force January 27, 1980, reprinted at 8 Int'l Leg Mat'ls 679 (1969); referred to hereafter as "Vienna Convention on the Law of Treaties (1969)") -- which convention both Iran and

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[4/] Ralston, The Law and Procedure of International Tribunals 225 (rev. ed. 1926); Sandifer, Evidence before International Tribunals 115, 147-154 (rev. ed. 1975). The procedures utilized by the Tribunal in the determination of this case were, I believe, incorrect and prejudicial to the Claimants. The Respondents failed to file their briefs in the time specified by the Tribunal and did not appear at the hearing. Despite this flagrant violation of Tribunal orders, the Tribunal permitted Respondents to file briefs after the hearing. Thus, the Claimants, at the hearing, were unable to deal with points raised by the Respondents. Although Claimants were able to reply in writing, their lack of an adequate opportunity to rebut Respondents' contentions at the oral hearing deprived Claimants of a right to a meaningful hearing, which should be provided pursuant to Tribunal rules and orders. See Provisionally Adopted Tribunal Rules (hereafter "Tribunal Rule(s)") 15(2) and 25.

the United States agree can be utilized in connection with the interpretation of the Algiers Declarations -- the word "binding" should "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."

The word "binding" should be given meaning. To say that the word has no significance suggests that the parties inserted a word for no reason and with no intent. This approach would conflict with a basic principle of treaty interpretation. In the Anglo-Iranian Oil Co. Case (Jurisdiction) [1952] I.C.J. Rpts. 93, 105, The International Court of Justice enunciated the general principle that "a treaty text resulting from negotiations between two or more States" should in general be "interpreted in such a way that a reason and a meaning can be attributed to every word in the text."[5/] See also Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54, [1957] Brit. Y.B. Int'l Law 203, 222.[6/] The word "binding" can and therefore should be interpreted reasonably so as to have a meaning.

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[5/] The Court had no occasion to apply this general principle in the Anglo-Iranian Oil Co. Case itself, since the text the Court was interpreting was "not a treaty text," but "the result of unilateral drafting by the Government of Iran" which "inserted, ex abundanti cautela, words which, strictly speaking, may seem to have been superfluous." Id. In contrast, the language of the Algiers Declarations was the result of negotiations between the two States.

[6/] "[No] word in a contract is to be rejected or treated as a redundancy, or as meaningless, or as surplusage, if any meaning which is reasonable and consistent with the other parts can be given to it, or if the contract is capable of being construed with the word left in." 17A Corpus Juris Secundum §308 at p. 162 (emphasis added).

The word "binding", in its context, must have been meant to refer to forum-selection clauses. Applying "binding" to the whole contract, as opposed to a particular clause therein, would lead to absurd results. In many cases, Iranian respondents have asserted that the contracts in issue are illegal, forged, invalid or terminated. Hence, if the word "binding" referred only to the entire contract, before the Tribunal could find it had no jurisdiction, it would have to consider substantive issues in order to determine if the contract is "binding."[7/] Thus, the majority is correct in rejecting this interpretation of the word, for such an interpretation would lead to "a result which in the context is objectively and manifestly absurd or unreasonable." Waldock, Law of Treaties, II Yearbook of the International Law Commission 57 (1964); see Vienna Convention on the Law of Treaties (1969) Art. 32(b).

In contrast, interpreting "binding" to refer to a forum-selection clause, would provide a sensible and logical meaning of the term. Forum-selection clauses and analogous provisions are agreements that are separable from the contracts in which they are found. Courts often refuse to enforce a forum-selection clause while not invalidating the entire contract, since the clause only deals with the proper court to consider disputes over the contract. Indeed, the Tribunal Rules themselves provide that an arbitration clause, which is a type of forum-selection clause, remains "binding" after the contract obligations have been breached or found invalid, Tribunal Rule 21, paragraph 2,

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7/ It has been contended that under Iranian law a binding contract is one that cannot be terminated. See Civil Code of Iran §§184-189 (Sabi trans., 1973).

thus, in effect, rendering such a clause separable from the contract. See Restatement (Second) of Foreign Relations Law of the United States §153(3) (1965).

That "binding contract" refers to forum-selection clauses is further confirmed by observing the relationship between Article II, paragraph 1, and Article V of the Claims Settlement Declaration. Article V, which guides the Tribunal in its choice-of-law decisions, instructs the Tribunal to take into account, inter alia, changed circumstances."[7a/] The doctrine of changed circumstances is often invoked in connection with judicial determinations of whether to give effect to contractual provisions relating to the choice of forum. See, e.g., Carvalho v. Hull Blyth (Angola), Ltd [1979] 3 All E.R. 280; Fisheries Jurisdiction Case [1973] I.C.J. Rpts. 1, 33 (sep. op. Fitzmaurice).

That the parties to the Treaty gave the Tribunal the task of determining the effect of forum-selection clauses upon its own jurisdiction is consistent with the "object and purpose" of the Treaty, which was to give broad jurisdiction to the Tribunal in order to bring about "the settlement" and "termination" of claims

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[7a/] Article V provides that "[t]he 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."

"through binding arbitration." General Declaration, General Principle B.[8/]

An interpretation of the Claims Settlement Declaration which results in the automatic exclusion of claims based on contracts containing Iranian courts clauses, thereby requiring municipal courts to determine the enforceability of those clauses, would not only be contrary to the general principles set forth in the Treaty, but would result in an unwieldy process for the resolution of claims. Under such a process, the Tribunal would first have to decide if the contract containing the forum-selection clause is "binding," for if "binding" does

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[8/] General Principle B of the General Declaration provides as follows:

> It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, 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. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

The language obviates the necessity of determining whether the Tribunal should use a restrictive, neutral or liberal standard in determining its own jurisdiction. See Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission, U.N. Doc A/CN 4/92 45-47 (1955); Simpson and Fox, International Arbitration 72-74 (1959).

not refer to the forum-selection clause, then it must refer to the whole contract. If the contract is "binding" and it specifically provides that disputes are to be resolved solely in the courts of Iran, then that portion of the claim arising under the contract would have to be asserted in other courts, and those courts would have to decide if the choice-of-forum clause is enforceable. Those portions of claims or alternative claims not arising under the contract containing the Iran courts clause would remain with this Tribunal.[9/] Since various portions of claims could then be heard both in national courts and the Tribunal, there would be a significant possibility of conflicting rulings and later problems concerning enforcement of judgments. In short, to refer to other courts the issue of the enforceability of the forum-selection clauses will not result in the hoped for termination of all claims through binding arbitration, but rather in interminable, costly and duplicative litigation in various fora.

The application of the word "binding" to forum-selection clauses rather than to the whole contract is the only reasonable interpretation that leads to a result

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[9/] Claims not arising under a contract and claims based on such theories as quasi-contract, quantum meruit, restitution and unjust enrichment, even though related to or alternative to a claim or possible claim for breach of a written contract are not affected by any choice-of-forum clause nor, therefore, by the decision of the majority of the Tribunal. 12 Williston on Contracts §1459, pp. 77-84 (3d ed. 1970). Claimants are entitled to amend their Statements of Claim to allege non-contractual claims arising out of the same transactions already set forth in their Statements of Claim unless the Tribunal considers such amendments inappropriate. Tribunal Rule 20; see 5A Corbin on Contracts §1219, p. 459 (1964).

consistent with General Principle B of the General Declaration, common sense and legal principles.

The majority position that "neither of the two possible interpretations gives any sensible meaning" to the word "binding" and therefore the word is simply "redundant," is indefensible. The majority itself concedes elsewhere in its opinion that "the word 'contract' can be interpreted as referring solely to a clause in a contract...." Having made that concession, the majority inexplicably rejects such an interpretation so as to render the term meaningless.

Even if the language could be considered ambiguous, under the Vienna Convention, there should be recourse to "the preparatory work of the treaty and the circumstances of its conclusion" in order to derive the meaning of the language. Vienna Convention on the Law of Treaties (1969), Article 32.

The uncontradicted evidence before the Tribunal of the "circumstances" surrounding the insertion of the term "binding" to modify "contract" consists of a declaration of Warren Christopher, the Chief United States negotiator of the Algiers Declarations and the then United States Deputy Secretary of State. His account of the negotiating history of the Claims Settlement Declaration is unchallenged.

According to Mr. Christopher, the United States refused to agree to proposals to exclude from the jurisdiction of the proposed Tribunal claims based on contracts with Iranian courts clauses, unless Iran would also agree "to allow the new tribunal to decide . . . whether a particular contract required <u>under all the circumstances</u> that a given claim should be

adjudicated by an Iranian court rather than by the tribunal itself." (Emphasis added). This United States position was communicated to the Algerian intermediaries who, acting on behalf of both Governments in these negotiations, presumably communicated it in turn to the Iranians.[10/]

Iran then formally proposed to exclude from the jurisdiction of the Tribunal claims based on contracts with Iranian courts clauses, thereby apparently reflecting a recent promulgation of the Iranian Majlis.

The United States unqualifiedly rejected such a proposal. Instead, the United States suggested amending Art. II, paragraph 1, by adding the following language, which is similar to that now found there: "and excluding claims arising under contracts specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian or U.S. courts." The United States further proposed modifying the General Declaration in such a way as to leave in effect the attachments in United States courts of those claimants whose claims were excluded from the Tribunal's jurisdiction. Iran rejected the latter proposal. The United States agreed to drop its demand for the maintenance of the attachments when

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10/ We cannot presume that the Algerians failed in their responsibilities to communicate accurately the positions of each of the Governments to the other. There is no suggestion of such a failure. Iran never asserted it was unaware of the intent of the United States.

Iran agreed to the addition of the word "binding" before "contract." The word "binding" was inserted, and insisted upon by the United States, in order for the Tribunal to be "free to rule" on the enforceability of the Iranian courts clauses. Mr. Christopher, in his declaration, also asserts that the "changed circumstances" language in Article V was included at the request of the United States to further insure that the Tribunal would determine the enforceability of the forum-selection clauses in the light of post-contract conditions.

Iran having accepted the United States proposal to add the word "binding," objected to the reference to "U.S." courts. The United States then accepted the deletion of "or U.S." Finally, a phrase was added to indicate that the provision was "in response to," though not necessarily in accordance with, "the Majlis position."

These aspects of the negotiation by themselves show that there was a constant exchange of positions, in which both sides bargained in their successful efforts to consummate a treaty leading to a release of American hostages, the return of certain Iranian assets, and the establishment of a claims settlement mechanism. As a part of the bargaining, Iran agreed to the word "binding." In view of the negotiations and the insertion of the word "binding" by the Parties in return for a major concession by the United States, it is unrealistic to assume that Iran was oblivious to the word's significance. Indeed, the majority somehow assumes Iran's ignorance of the intent of the United States in adding the word "binding," without any evidence submitted by Iran suggesting such ignorance. Thus, the evidence demonstrates that Iran's

agreement must have been on the basis of the understanding of the United States of the meaning and significance of the term "binding."[11/] Any other conclusion would mean that the United States gave up an important position for a word that had no meaning -- a totally unreasonable assumption. Moreover where, as here, the intent of one party to an agreement is known, or should have been known, by the other, who then raises no objection, the agreement is to be construed in light of the first party's intent. See, 1 Corbin on Contracts §106 p. 476 (1963) (A party may be bound in accordance with the understanding of the other party if he "'knew or had reason to know'" the latter's intention and understanding.)[12/] Certainly, in light of the evidence, Iran knew or had reason to know the significance the United States attached to the word "binding."

Accordingly, the uncontradicted evidence of the negotiating history of the Treaty clause in question, as well as the other applicable interpretative criteria,

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[11/] The majority's view that the intent of the United States should have been expressed more precisely simply ignores the conditions under which the Treaty was negotiated. The around-the-clock negotiations involving incredibly complicated financial transactions, huge sums of money and many banks, in addition to the Governments, had to be conducted among a number of distant cities through an intermediary, under severe time constraints and under the glare of widespread public attention.

[12/] Even if Mr. Christopher's statement is considered the unexpressed intent of one party that is not dispositive, the understanding of one of the parties of the meaning of contract terms is relevant, VII Wigmore, Evidence §1971 p. 111 (1940), especially when no contrary evidence is submitted.

compel an interpretation which gives to the Tribunal the task of determining the enforceability of a choice-of-forum clause in connection with a resolution of the Tribunal's jurisdiction over a claim.

The majority asserts, without legal citation, that it is not the function of international tribunals to determine the validity of choice-of-forum clauses. Of course, as the majority's own opinions demonstrate, this Tribunal must determine its own jurisdiction. Moreover, international tribunals have considered issues involving the validity of clauses concerning jurisdiction. See Simpson and Fox, International Arbitration 117-122 (1959) (discussion of decisions concerning Calvo clauses); cf. Chorzow Factory Case P.C.I.J., Ser. A, No. 8 at p. 30 (1927).

Giving the Tribunal the right to determine the validity of forum-selection clauses in light of changed circumstances or conditions in Iran does not render the exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration nugatory. At the time of the Treaty, no one could know what Iran's position would be as to whether there were sufficient changed circumstances or conditions such as to render the forum-selection clauses unenforceable. Indeed, Iran has yet to express to the Tribunal a position on these issues. Moreover, at the time of the Treaty, no one could know what the situation would be with regard to the Iranian legal system

at the time the Tribunal would consider the validity of the forum-selection clauses. Thus, by allowing the Tribunal to determine at a future date the validity of the forum-selection clauses, the parties to the Treaty acknowledged the dual possibility that such clauses would or would not be given effect. That is the whole purpose, I submit, of the insertion of the word "binding."

The Choice-of-Forum Clause is Unenforceable

The choice-of-forum clauses in issue are unenforceable because of the application of two related but independent principles -- there were "changed circumstances" and the designated forum does not provide claimants a meaningful opportunity for effective relief.[13/] See Carvalho v. Hull Blyth (Angola) Ltd [1979] 3 All E.R. 280, 285; Fisheries Jurisdiction Cases [1973] I.C.J. Repts. 1, 33 (sep. op. Fitzmaurice); Law v. Garrett 8 Ch.D. 26, 38 (1878); Ellinger v. Guinness, Mahon & Co. [Ch.D. 1939] 4 All E.R. 16, 23-24; The Bremen v. Zapata Off-Shore Co.,

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13/ Moreover, a proper analysis would require examination of a third issue, at least if raised, --"whether the parties have effectively agreed upon a choice of forum clause." See I Delaume, Transnational Contracts §6.13 (1981); 11 Colum. J. Transnat'l L. 449, 455 (1972). This latter issue can only be resolved after examining the facts of each case in order to determine if there was free consent to the clause or whether it was adhesive or unconscionable or the product of fraud or mistake. I will not discuss this third principle, but mention it because the Tribunal would have to resolve it in each case in which such an issue is raised before deciding the issue of jurisdiction based on a forum-selection clause.

407 U.S. 1 (1972)(no enforcement if "unreasonable and unjust"); I Delaume, Transnational Contracts §6.17 (1981); 11 Colum. J. Transnat'l L. 448, 454 (1972); 8 Halsbury's Laws of England §§792-793, pp. 509-511 (1974).

With regard to the doctrine of changed circumstances, the claimants and the United States submitted evidence showing that the Iranian judicial system is fundamentally different from that which was in existence when the contracts in issue were entered into. This evidence is uncontradicted. As the English Court of Appeal noted in Carvalho v. Hull Blyth (Angola) Ltd [1979] 3 All E.R. 280, 285 (Browne, L.J.), the test to determine whether a choice-of-forum provision is enforceable is whether the parties would have agreed to include such a clause had they known at the time they entered into the contract of the changes that would be made in the judicial system by the time the clause was sought to be enforced.

It seems unlikely that United States nationals would have agreed to submit disputes to Iranian courts under today's conditions. At the time claimants entered into their contracts (prior to the 1979 Revolution in Iran), claimants were protected by the 1955 Treaty of Amity, Economic Relations, and Consular Rights, 8 U.S.T. 899, 284 U.N.T.S. 93, between Iran and the United States which guaranteed United States Nationals certain rights in Iran, including equal access to courts. That treaty, although not terminated, is no longer being observed.

Case Concerning United States Diplomatic and Consular Staff in Tehran, (Judgment) [1980] I.C.J. Rpts. 3, 32, 36. The evidence shows that the laws and the judiciary of Iran have changed substantially since the contracts in issue were entered into. Moreover, there is some question as to whether persons may freely enter Iran in connection with cases. Iran has not submitted any evidence disputing allegations concerning changes in its laws and system. Thus, the uncontradicted evidence shows the kind of change of circumstances which should require invalidation of the choice of forum clauses.

The change of circumstances must be measured from the date of the contracts in issue, not from the date of the Treaty. There is nothing in the Treaty to suggest that the United States did or could impose on a claimant a date from which to measure the change of circumstances other than the date of the claimant's contract. Indeed, the doctrine of changed circumstances is premised on a judicial inquiry viewing the change from the time the contracting parties entered into the contract which is at issue. See e.g. Carvalho v. Hull Blyth (Angola) Ltd [1979] 3 All E.R. 280, 285; see also Restatement (Second) of Foreign Relations Law of the United States, §153.

The doctrine of changed circumstances as to the enforceability of a Treaty provision against one of the two Governments would likely run from the date of the

Treaty. See Vienna Convention on the Law of Treaties (1969) Art. 62. But here we deal with provisions of contracts with private claimants who are not parties to the Treaty. Thus, the doctrine of changed circumstances as applied to the claimants could only run from the date of their contracts. Had the Governments intended such an unusual concept as limiting the doctrine of changed circumstances so that it would begin to run from a date later than the normal date, they would have so provided. They did not. Accordingly, the changed circumstances doctrine must be measured from the date of the "binding contract" in issue.

Even if one measured the change of circumstances from the date of the Treaty, however, the uncontradicted evidence suggests new and significant developments in the Iranian legal system from that date. Evidence submitted to the Tribunal shows that in August of 1982 it was announced in Iran that laws contrary to religious laws are deemed repealed and that judges were to issue judgments on the basis of Islamic standards. Judges were also authorized to refer matters to non-judicial religious bodies. International Iran Times, Vol. XII, No. 24 (August 27, 1982); see also Tehran Domestic Service, Aug. 23, 1982, as reported in Foreign Broadcast Information Service, Aug. 24, 1982 at I4-5.; Official Gazette, Vol. 14, No. 445 pp. 128-29, Decision No. 1/1143-25-1-1360 (similar announcement by the Council of the Guardians of the Constitution in March, 1981 -- after the date of the Treaty.)[14/] Certainly, after the revolution

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[14/] There has been no objection to or challenge to the accuracy of these documents and citations submitted by Claimants and the United States.

in 1979, Iranian law and legal institutions changed. But the evidence suggests that a number of such changes took place after the date of the Treaty. Moreover, at the time of the Treaty, the very fact of a treaty whereby the two governments made commitments in order to resolve "the crisis" between them suggested some type of reconciliation. But thereafter a resumption of relations that might be expected from the consummation of such a treaty has not yet materialized. Thus developments after the date of the Treaty appear to constitute a change of circumstances sufficient to render unenforceable any forum-selection clauses.

The uncontradicted evidence shows that by virtue of changed circumstances from the date of the contracts, and even from the date of the Treaty, the forum-selection clauses are unenforceable.

The choice-of-forum clauses are presently unenforceable also because, as the uncontradicted evidence further shows, United States claimants have no reasonable opportunity to obtain effective relief in Iran. The well known principle of the availablity of effective relief to test the validity of forum-selection clauses includes various criteria: "(1) inability of the chosen forum to entertain jurisdiction, (2) absence of certainty that the defendant would appear in the foreign forum, (3) probability that the plaintiff would be denied a remedy, and (4) possible unenforceability of any judgment upon the defendant in the foreign forum." 11 Colum. J. Transnat'l L. 448, 454 (1972). Related criteria

include whether the forum is "seriously inconvenient," id. at 455, and whether a fair hearing can be assured. Ellinger v. Guinness, Mahon and Co. [Ch.D. 1939] 4 All E.R. 16, 23-24. Because of the deterioration of relations between Iran and the United States and because of internal and external difficulties faced by Iran, it cannot be disputed that claimants, their attorneys and their witnesses would not have meaningful access to or the opportunity for effective relief in Iranian courts.[15/] Such an observation is not intended to cast any aspersions on Iran's civil law system. Iran has not only failed to challenge the evidence on this issue, it has itself pointed to these difficulties and its lack of legal resources in connection with its work before this Tribunal.

For all of the foregoing reasons I dissent from any Tribunal decision dismissing a case for lack of jurisdiction based on a forum-selection clause in an agreement. In those cases in which the Tribunal retains jurisdiction, I would assert as a reason therefor the grounds set forth above.

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15/ Cases in which Iran or Iranian entities have appeared have held "that the present domestic situation [in Iran] has rendered access to Iranian Courts futile." Itek v. First Nat. Bank of Boston 511 F. Supp. 1341, 1349 (D. Mass. 1981); American International Group Inc. v. Islamic Republic of Iran 493 F. Supp. 522, 525 (D.D.C. 1980), remanded on other grounds, 657 F.2d 430 (D.C. Cir. 1981). It is arguable that some of such rulings could collaterally estop Iran with respect to the issue. See Stoll v. Gottlieb 305 U.S. 165, 177 (1938) (court determination of jurisdiction is res judicata on issue); Davis v. Chevy-Chase Financial, Ltd., 667 F. 2d 160, 172 (D.C. Cir. 1981) (res judicata and collateral estoppel apply to arbitration decisions); H. Lauterpacht, Private Law Sources and Analogies of International Law 207 (1927); Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, [1957] Brit. Y.B. Int'l L. 177; Pious Fund Case (U.S. v. Mexico) Scott's Hague Ct. Rpts. 1, 6 (Perm. Ct. Arb. 1902).

The Choice-of-Forum Clause Must "Specifically" Provide That The Dispute Be Within the "Sole" Jurisdiction of "Competent Iranian Courts"

The majority opinion is premised on the view that the Parties in the Claims Settlement Declaration automatically excluded claims arising under contracts which contained the specific provision that disputes arising under such contracts be within the sole jurisdiction of competent Iranian courts. According to the majority, the validity of the provision does not matter so long as the specific words are in the contract. Under the majority's theory, the words could have been any words. Thus, to be consistent with this theory, the majority must find the precise provision in the contract in issue before relinquishing jurisdiction over a claim arising under that contract. In some cases, the majority acknowledges the requirement that the clause "specifically" provide for "sole" jurisdiction of Iranian courts. But in other cases, the majority ignores its own logic and reasoning.

Even if, as the majority holds, the Tribunal may have no jurisdiction over a claim involving a contract with a forum-selection clause regardless of whether such clause is enforceable, unless the contract provides "specifically" and without any ambiguity that all disputes arising out of the contract in issue are to be submitted solely to competent Iranian courts, the Tribunal must retain jurisdiction.

Thus, if the forum-selection clause refers only to some disputes relating to the contract or provides for dispute mechanisms other than or in addition to competent Iranian courts or is otherwise ambiguous, the Tribunal should not relinquish jurisdiction over the claim.

Case 121

In Case 121, the so called "Rice Contract" provides "any dispute arising from the execution of this agreement, if not settled amicably, shall be resolved through the Iranian legal authorities." This clause does not provide that all disputes be directed to Iranian courts; it only refers to Iranian courts disputes "arising from the execution of this agreement."

In order for a claim to be excluded from Tribunal jurisdiction, the treaty requires that all disputes under the contract specifically be within the sole jurisdiction of Iranian courts; hence, referring to Iranian courts only issues of performance or only issues of validity or only issues of interpretation is not sufficient to exclude the claim from jurisdiction. Issues of interpretation, validity and performance are distinct. That is why the authors of the Model Arbitration Clause referred to in the UNCITRAL Arbitration Rules (United Nations 1977) were careful to cover "[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach termination or invalidity thereof...." (emphasis added). Such a clause suggests recognition of the risk that a narrowly drafted arbitration clause would not constitute a referral to arbitration of all possible issues arising under a contract.

If "execution" means signing or validity, the clause may not cover disputes involving interpretation or performance of the agreement. If "execution" means performance, as suggested by the majority without discussion, then the

clause does not necessarily cover questions concerning the validity or interpretation of the contract. The fact that the issues may often overlap does not mean they always do. If, as is sometimes the case, the issue is solely one of interpretation or validity, then all disputes under the contract are not within the sole jurisdiction of Iranian courts. The majority defies law and reason when it asserts that questions of interpretation or validity not arising from performance are not disputes under the contract. Any dispute about the contract, whether submitted by a request for declaratory relief or otherwise is a dispute arising under the contract. Under what else would the dispute arise? Thus, since the clause omits various types of disputes that could arise under the contract, the clause lacks the breadth required by the Treaty to divest the Tribunal of jurisdiction over the claim. See Majority Decision in Case 159.

The clause in Case 121 does not "specifically" provide that all disputes shall be within the sole jurisdiction of competent Iranian courts. Rather, it refers to resolution "through Iranian legal authorities." The term "legal authorities" is ambiguous. One might assume that it means courts. Yet, recent reports of Iranian law submitted by Claimants suggest that cases may be referred to "religious juridical experts of the Council of Guardians who are the legal authorities for such determinations" or "to the office of Ayatollah Khomeini." International Iran Times, Vol XII No. 24, (August 27, 1982) (emphasis added).

Thus, "legal authorities" is a term sufficiently broad to include administrative procedures or other non-judicial mechanisms. It does not necessarily mean "competent courts."16/

The jurisdictional issues as to the so called "Cement Contract" are the same as those applicable to the "Rice Contract." Although the English version of the Cement Contract uses the words "Iranian Judicial courts" for the same Persian words translated into English in the Rice Contract as "legal authorities," the correct translation of the term in the Cement Contract should also be "legal authorities." The term "legal authorities" in Persian, which is contained in both contracts, is different than the Persian term for "courts." B. Keshavarz, English-Persian Law Dictionary 24, 61, 133-34 (1977). Thus, the incorrect translation cannot be the basis for finding a clause sufficient to oust the Tribunal of jurisdiction.

Finally, if there is any ambiguity in a forum-selection clause, courts will often not enforce the clause. See I Delaume, Transnational Contracts §6.14 (1981). Surely the clause in question is an ambiguous one. The

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16/ "There exist several types of commissions which deal with specific matters and their decisions are enforceable but do not fall under the category of courts. The said commissions are as follows: (1) Taxation Commissions [tax disputes involving taxpayers -- including the right of appeal]. . . (2) Municipality Commissions [municipal dues and surcharges]. . . .(3) Customs Commissions. . . (4) Eminent Domain Commissions. . ." Sabi "The Commercial Laws of Iran" p. 39 (1973) in IV Nelson, Digest of Commercial Laws of the World (1982).

Accordingly, I dissent from the decision in Case 140 (Part III of the majority opinion) on this additional ground.[17]

Conclusion

I would hold that the Tribunal retains jurisdiction over each of the claims under review.[18]

I dissent from the following portions of "Interlocutory Award[s]" concerning jurisdiction: Part III of the majority opinion in Case No. 51; Parts II and III of the majority opinion in Case No. 121; Part III of the majority opinion in Case No. 140; and Part II of the majority opinion in Case No. 293. I concur in the results of the decisions in all other portions of the "Interlocutory Award[s]" in Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466 upholding jurisdiction over claims.

Richard M. Mosk

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17/ I cannot understand the majority's willingness to overlook Respondent's apparent assertion to an American court that the Tribunal had jurisdiction over the claim while taking a contrary position before this Tribunal. "'[I]nternational jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold -- allegans contraria non audiendus est.'" Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence [1957] Brit. Y.B. Int'l L. 177, 195. Indeed such inconsistent positions may lead to the application of the doctrine of estoppel. See Cheng, General Principles of Law as Applied by International Courts and Tribunals 141-42 (1953); MacGibbon, Estoppel in International Law, 7 Int'l and Comp. L.Q 468 (1958); see Argentine-Chile Frontier Case, XVI R. Int'l Arb. Awards 115, 164 (1966). Such a principle should be applicable to a contested issue of jurisdiction arising out of the interpretation of a treaty.

18/ I also agree with the reasoning of my colleague, Howard M. Holtzmann.