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** CONCURRING OPINION of _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 486 [illegible]110
CHAMBER THREE
AWARD NO. 351-486-3

INTERNATIONAL ORE & FERTILIZER CORPORATION, INTERORE CORPORATION OF SAUDI ARABIA and INTERORE TRADING LTD.,

Claimants,

and

RAZI CHEMICAL COMPANY LTD. (formerly known as SHAHPUR CHEMICAL COMPANY LTD.), GOVERNMENT TRADING CORPORATION, NATIONAL PETROCHEMICAL COMPANY, and FERTILIZER DISTRIBUTION COMPANY,

Respondents.

DISSENTING OPINION OF JUDGE BROWER

1. The brevity of this Award obscures the fact that it constitutes the first Tribunal ruling that a publicly held corporation has failed to establish the nationality of its claims notwithstanding that (1) the credibility of the evidence submitted by Claimants is not in dispute; (2) in fact no rebutting evidence whatsoever has been introduced even though (3) contrary evidence, if any, is available in public records readily accessible to Respondents; (4) the Tribunal itself has never expressed any doubts as to the

truth of the allegations of nationality; and (5) the Tribunal has never held a Hearing in this Case. Such failure of the Tribunal either to exercise undoubted jurisdiction which, as I see it, has been established prima facie,[1] or, should there be latent doubt, to call for an airing of the facts that would allow us to make an informed decision as to our jurisdiction, is incompatible with the Claims Settlement Declaration, which committed, absolutely, defined categories of disputes to our resolution. It compels vigorous dissent.

I.

2. It is critical to recall exactly what it is that these Claimants are required to demonstrate in support of our jurisdiction. They allege that at all relevant times Claimant International Ore & Fertilizer Corporation ("IOFC")[2] was incorporated in the State of Delaware in the United States and was wholly owned, through a chain of other

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[1] "Prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive." A "prima facie case" is "a case sufficient to call for an answer." D.M. Walker, The Oxford Companion to Law, at 987 (1980).

[2] In the Statement of Claim Claimants state that IOFC is the successor in interest to a corporation formerly known as Interore Corporation, Inc. ("ICI"). ICI was the original party to two of the contracts at issue in this Case. Respondents have questioned the relationship between IOFC and ICI but have raised no grounds to discredit Claimants' statement that IOFC is the legal successor to ICI and therefore the owner of the claims in this Case. Thus while Claimants did not specify whether the succession was by name change, reincorporation, or acquisition of assets, the Tribunal should have been satisfied that IOFC owns the claims at issue within the meaning of Article VII(2) of the Claims Settlement Declaration. The Award in any event makes no mention of this issue.

wholly owned subsidiaries,[3] by Occidental Petroleum Corporation ("Occidental Petroleum"), a publicly held California corporation more than fifty percent of the capital stock of which in turn was owned by United States citizens. IOFC claims on two contracts to which it was itself a party, i.e., one with Respondent Razi Chemical Company Ltd. ("Razi") and one with Respondent Government Trading Corporation ("GTC"). IOFC also claims, however, on two other contracts, one between Claimant Interore Corporation of Saudi Arabia ("Interore SA") and Respondent Fertilizer Distribution Company ("FDC") and the other between Interore Trading Ltd. ("Interore Trading") and Respondent National Petrochemical Company ("NPC"), alleging that the two Interore entities, both of them Liberian corporations, have been wholly owned by IOFC since October 1977[4] and hence that IOFC may assert their rights as "indirect claims" pursuant to Article VII(2) of the Claims Settlement Declaration.

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[3]Claimants explain that IOFC is wholly owned by Occidental Chemical Corporation, a New York corporation which is wholly owned by Oxy CH Corporation, which is wholly owned by Oxy Chemical Corporation, which is wholly owned by Occidental Chemical Holding Corporation, which is wholly owned by Occidental Petroleum Investment Co., which is wholly owned by Occidental Petroleum Corporation, all of which are California corporations.

[4]The dispute involving Interore Trading clearly arose after 1 October 1977, as the contract at issue was dated 16 February 1978. The date on which the dispute involving Interore SA arose is not as clear, as the contract was dated 7 January 1977, and conceivably some of the charges at issue could have arisen prior to 1 October 1977. No Respondent has objected to the claim on this basis, however, and it appears in any case that prior to 1 October 1977 Interore SA was wholly owned by another wholly owned subsidiary of Occidental, Oxy Chemical Corporation. Thus whether the claim arose before or after 1 October 1977 it appears that Interore SA was at all times owned and controlled by Occidental Petroleum.

3. Thus to invoke our jurisdiction as pleaded Claimants are required to demonstrate that at the relevant times

(a) Occidental Petroleum was incorporated in the United States;

(b) At least fifty percent of the capital stock of Occidental Petroleum was owned by United States citizens;

(c) IOFC was incorporated in the United States;

(d) Occidental Petroleum wholly owned IOFC;

(e) The Interore entities were not incorporated in the United States; and

(f) IOFC wholly owned both Interore entities.

4. Given that the Tribunal's landmark Order of 20 December 1982 in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36, Chamber One, reprinted in 1 Iran-U.S. C.T.R. 455, and its amplifying Order of 21 January 1983 in General Motors Corporation and Islamic Republic of Iran, Case No. 94, Chamber One, reprinted in 3 Iran-U.S. C.T.R. 1, were both issued before any of Claimants' pleadings (except their Statement of Claim) were filed, it would have been natural for Claimants to have satisfied their carefully delineated guidelines regarding the evidence to be offered in support of any claim of a publicly held company to United States nationality. As the Full Tribunal stated in Islamic Republic of Iran and United States of America, Decision No. DEC 45-A20-FT at para. 13 (10 July 1986):

> Chambers Two and Three have not adopted the practice of [Chamber One of] requiring publicly-held corporate Claimants to file evidence in accordance with the Flexi-Van and General Motors Orders. Even without such orders, however, many such claimants have submitted such evidence, and the Tribunal has accepted it as the basis for determining jurisdiction.

5. On the other hand, as the Full Tribunal also stated in the same case:

> The type of evidence that has been found to be acceptable, however, has varied from case to case. See, e.g., American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3, p. 7 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 100.
>
> . . . .
>
> In this Case, as in the unanimous decision on the settlement issue in Case No. A1, "it would be neither appropriate nor feasible to establish, in abstracto, without reference to the situation in any particular case, a general rule concerning the extent of the examination as to jurisdiction that may be needed, given the large variety of situations in which matters of jurisdiction may arise and the detailed nature and complexity of the provisions on jurisdiction in the Algiers Declaration." Case No. A1 (Issue II), Decision No. DEC 8-A1-FT, p. 12 (17 May 1982), reprinted in 1 Iran-U.S. C.T.R. 144, 152.

Id. at paras. 13, 15. Hence, as the Award acknowledges (paras. 9 and 10), neither Claimants nor the Tribunal were bound to follow specific guidelines for proof in the instant case.

6. Ultimately the rule to guide us is inherited from comparable predecessor tribunals, as noted in Flexi-Van itself. There the Tribunal quoted what the Mexican-United States General Claims Commission held in the Parker Case, 4 R. Int'l Arb. Awards 39 (1926):

> [W]hen the claimant has established a prima facie case and the Respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting.

Flexi-Van, supra, at 6 (quoting Parker Case), reprinted in 1 Iran-U.S. C.T.R. at 457. The Tribunal went on:

> The same principle was followed by the French-Mexican Claims Commission which determined that an international arbitral tribunal in determining nationality may apply "less strict requirements where it does not appear to be reasonably necessary to set in motion the entire process of formal proofs." Pinson Case, 5 R. Int'l Arb. Awards 327 (1928).

Id., reprinted in 1 Iran-U.S. C.T.R. at 457.

7. Thus even though under Article 24(1) of the Tribunal Rules the Claimant has "the burden of proving the facts relied on to support his claim," including the claim that we have jurisdiction, we must not too readily consider that a claimant has failed to meet the burden of proving its nationality. We are duty bound as much to assert our jurisdiction when it is objectively present as to reject a claim when it is not. The States Parties declared their mutual purpose, in establishing this Tribunal, "to bring about the settlement and termination of all such claims ['between the government of each party and the nationals of the other'] through binding arbitration," General Declaration, General Principle B, and in the Claims Settlement Declaration further defined such claims. We exist to ensure that this goal of the States Parties is met.

8. Referring to points (a)-(f) above (para. 3), it appears that Claimants have satisfied the Tribunal as to (a), (b), (c) and (e), i.e., the United States nationality of Occidental Petroleum, the incorporation of IOFC in the State of Delaware and the incorporation of the two Interore entities in Liberia. See, e.g., Award, paras. 6-8, 11.[5]

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[5]The Award is mistaken in stating (para. 9) that "the Claimants followed these guidelines [of Flexi-Van and General Motors] when establishing to the Tribunal's satisfaction Occidental's nationality." For example, as to IOFC a certificate of good standing as of 20 November 1984 (Footnote Continued)

Where the Award finds Claimants' proof lacking is in (d) and (f), i.e., substantiating the alleged chain of sole ownership running from Occidental Petroleum down to IOFC and through it to the two Liberian Interore entities.[6] It is thus necessary to scrutinize the record on that point.

9. A careful gleaning of the record reveals sparse but internally consistent evidence of the alleged chain of ownership. The Statement of Claim contains a Power of Attorney to counsel in this case signed on 7 January 1982 on behalf of IOFC by Marc J. Kennedy as IOFC's Vice President

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(Footnote Continued)
was submitted but no certificate attesting to its corporate existence as of the time the claims arose (see Flexi-Van, supra, at 8-9, 15-16, reprinted in Iran-U.S. C.T.R. at 458-59, 462), notwithstanding Claimants' undertaking in their Reply filed 21 February 1983 to do so (item 1.(a)). The fuller certificate was provided in respect of Occidental Petroleum, however, as was an affidavit of a corporate officer stating that 98.9 percent of its stock as of the company's annual meeting of 21 May 1981 was held by shareholders having addresses in the United States (see General Motors, supra, at 1, reprinted in 1 Iran-U.S. C.T.R. at 1). (The same percentage was given also as of 27 December 1976.) Also no proxy statement materials whatsoever were submitted pertaining to block shareholdings. (Although General Motors continued this requirement of Flexi-Van, the utility of such submissions in assessing the likelihood of large non-American shareholdings is questionable considering the aforementioned affidavit, the requirement for which was first introduced by General Motors.)

In one respect Claimants did more, however, than either Flexi-Van or General Motors required. They produced certificates of good standing (which also confirm the original dates of incorporation, one in 1966 and the other in 1974) for both of the Liberian Interore entities even though General Motors, which also involved non-American corporations in the chain joining an indirect claim to the corporate parent ("General Motors of Canada, Ltd." and "General Motors Continental, N.V."), required no certificate at all regarding foreign subsidiaries.

[6] In their Reply Claimants had undertaken at "the appropriate time during the proceeding" to "submit proof" of this chain (items 1.(a) and (b)).

and Assistant Secretary and by Herbert Tesser as its Vice-President-Finance. Certificates in the record of the two Liberian entities dated 11 December 1984 are executed in each case by Marc J. Kennedy as Secretary. Powers of Attorney of the same two entities in the record dated 7 January 1982 empowering counsel in this case are each signed by Marc J. Kennedy as Secretary and by Herbert Tesser as Treasurer. The record further contains two letters by Liberian Corporation Services, Inc., dated 29 November and 6 December 1984, respectively, concerning the status of those Liberian entities, the first of which is directed to Mr. Kennedy at Occidental Petroleum and the other of which is directed to him at "Occidental Chemical Agricultural Products."[7] The Statement of Defense of FDC annexes as Exhibit C what appears to be the executed contract it is claimed to have had with Interore SA dated 7 January 1977; it recites the latter's address as

> HAMILTON, BERMUDA
> C/O INTERNATIONAL ORE
> AND FERTILIZER CORPORATION
> 1320 AVE. OF THE AMERICAS
> NEW YORK, N.Y.
> U.S.A.

It further records a New York City telephone number as being that of Interore SA.[8]

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[7]Various "Occidental Chemical" companies are alleged to be in the chain of ownership between Occidental Petroleum and IOFC. See n. 3, supra.

[8]Under Flexi-Van, supra, at 17, reprinted in 1 Iran-U.S. C.T.R. at 463, and General Motors, supra, at 2-3, reprinted in 3 Iran-U.S. C.T.R. at 2, the corporate chain of ownership at about the time the claim arose should be evidenced by a certificate by a firm of certified public accountants.

10. The Award acknowledges (para. 10) that "the Respondents have not offered any evidence" to rebut Claimant's allegations of United States nationality.

11. Although the evidence thus presented by Claimants regarding the chain of ownership is sparse, I believe that in the Tribunal context all the relevant evidence taken together suffices to establish the American nationality of Claimant's claims prima facie, i.e., "sufficient[ly] to call for an answer."

12. I believe that an international tribunal such as this one must exercise jurisdiction where, as here, (1) such jurisdiction is established prima facie; (2) the credibility of Claimants' evidence of jurisdiction is not in issue; (3) Respondents, while formally denying Claimants' allegation of jurisdiction, have not offered even one scintilla of rebutting evidence; and (4) such tribunal does not otherwise entertain any doubts regarding the Claimants' evidence. Under the precedents previously cited (para. 6, supra) once a proposition is established prima facie it "call[s] for an answer" and to be rejected requires "evidence to the contrary." See n. 1, supra. At that point it is the Respondents who have the burden of coming forward with something. In the total absence of any substantive response from them, and if no question of credibility or other reason to doubt Claimants' evidence has arisen, Claimants are not required to "pile up evidence" and further "formal proofs." See para. 6, supra. A tribunal is required then to accept the Claimants' proof as conclusive.

II.

13. In justification of its dismissal the Award concludes (para. 9) that "[t]he proof required to establish whether or not a corporation is wholly owned by another corporation . . . is quite a different issue" then that of proving the nationality of a publicly held corporation. It is asserted

(para. 10) that as to the former issue "documents officially filed with governmental agencies or emanating from independent certified public accountants" and "other publicly available documents and reference sources recording such ownership are . . . accessible." The Award implies that the same are not available as to the latter issue, and concludes that it is "not justifiable to apply as flexible a standard of evidence" where information is publicly available.

14. In so arguing, however, the Award first misapprehends the facts and then reasons wrongly from them. Much of the information bearing on the nationality of a publicly held corporation, and required by Flexi-Van and General Motors, is by definition publicly recorded, e.g., certificates of incorporation and proxy statements "in the form filed with the [United States Securities and Exchange Commission]." Thus the comparative accessibility of evidence alleged to distinguish the two issues does not exist. In fact, by their terms Flexi-Van and General Motors apply to both issues. See n.8 supra. In any event, the fact that relevant information is equally accessible to Claimants and Respondents alike should encourage greater flexibility in evidentiary standards, rather than less, for the chance that a Claimant could successfully mislead us is then at a minimum.

15. The error committed in the instant case is revealed by just such public documents and works. The publicly available 1979 Form 10-K of Occidental Petroleum on file pursuant to United States legal regulatory requirements at the Securities and Exchange Commission[9] in Washington, D.C.

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[9] In at least one Tribunal case Iranian parties have made extensive filings with the Tribunal of materials obtained from the public records of this Commission and thus
(Footnote Continued)

lists (at page 48) IOFC as a wholly owned subsidiary.[10] This is confirmed by two standard reference works:

> 1982 Directory of Corporate Affiliations ("Who Owns Whom"), published by National Register Publishing Co., Inc. (A Macmillan, Inc. Company), 5201 Old Orchard Rd., Skokie Ill. 60077, at page 649
>
> 1986 Who Owns Whom (North America), published by Dun & Bradstreet Limited, 26-32 Clifton Street, London EC2P 2LY, at page 289 (confirming the identical chain asserted by Claimants)

In addition, IOFC's sole ownership of Interore Trading is confirmed by both the aforementioned 1979 Form 10-K entry and the cited 1986 Who Owns Whom.[11]

16. This public evidence supporting Claimants' allegations suggests the Tribunal has erred in declining to exercise its jurisdiction.[12] I wish to make it clear that in citing from

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(Footnote Continued)
have demonstrated their familiarity with it. See International Systems and Controls Corporation and Industrial Development and Renovation Organization of Iran, Award No. 256-439-2 at paras. 32, 33, 37 (26 September 1986); see also Dissenting Opinion of Judge Brower at paras. 3 n.3, 6.

[10]This holding is traced through four intervening corporations, which, however, are somewhat different from those alleged by Claimants in their submission to us in 1985. Occidental Petroleum's Form 10-K for the years 1981, 1982, 1983, 1984 and 1985 also show IOFC as a wholly owned subsidiary. The 1983 and 1984 Forms 10-K trace the ownership of IOFC as alleged by Claimants. In 1985 IOFC's name was changed to Interore Corporation.

[11]The 1982 Directory of Corporate Affiliations is generally less detailed and extensive in its listing of subsidiaries. This ownership is confirmed further by the 1981, 1982, 1983, 1984 and 1985 Forms 10-K of Occidental Petroleum.

[12]None of these sources refers to Interore SA. I therefore am less disturbed by the Tribunal's failure to
(Footnote Continued)

these records I do not suggest that the Tribunal must be required to do a Claimant's work for it. I have proceeded as I have only to demonstrate the reasonableness of concluding that where a claimant has supplied minimum but credible evidence of its alleged nationality, and the further evidence regarding any contested point is equally available to both parties, the failure of a respondent to introduce any rebutting evidence whatsoever should lead us to rest secure in exercising our jurisdiction.[13]

III.

17. What is perhaps most unsettling about the Award is that it reaches its result after separate written jurisdictional proceedings which focused entirely on a wholly different issue, one never addressed in the Award, i.e., forum selection clauses, and in which nationality for the most part was not even formally disputed. Against that background it behooved the Tribunal to order further proceedings, possibly including a Hearing, if it indeed entertained any as yet unspoken doubts as to the nationality of Claimants' claims.

(Footnote Continued)
exercise jurisdiction in respect of the one claim for $26,854.60 based on that entity's contract with Respondent FDC. The other three contract claims here total $1,055,237.78.

[13] Respondents raised one other issue. They alleged that certain portions of the claims, which themselves are for less than $250,000, should have been brought separately as claims for less than $250,000 rather than being consolidated into one case. However, as the Tribunal has found in other cases, consolidation of smaller claims by a claimant into a single case is not inappropriate and in fact contributes to the orderly disposition of the Tribunal's task. See International Technical Products Corporation and Islamic Republic of Iran, Award No. 186-302-3 at 10-11 (19 Aug 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 16.

18. Although Respondents initially made ritual pleas generally denying that Claimants and their claims have United States nationality, they never pursued that issue during the jurisdictional phase of this bifurcated Case. That phase was prompted by the request of Respondent GTC for a separate consideration of its jurisdictional defense based on an alleged forum selection clause. Claimants consented to such a separate phase and on 1 November 1984 the Tribunal issued an Order requiring the Parties to submit Memorials on "all jurisdictional aspects related to this case."

19. After the filing of Claimants' Memorial (including evidence) two of the Respondents, Razi and NPC, defending against claims totalling $908,321, filed no Memorials whatsoever on any jurisdictional issue. Only two Respondents, i.e., GTC, which had requested the separate consideration of jurisdiction, and FDC, which also was defending a claim on grounds of a forum selection clause, submitted Memorials. Those Memorials offered no evidence regarding nationality and FDC did not even allude to it as an issue. The entire exchange of Memorials thus dwelt on the forum selection issues which had given rise to the separate jurisdictional phase; nationality was never thought to be seriously in dispute.

20. Under these particular circumstances the Claimants should not have been excluded from the Tribunal without the Tribunal further exploring nationality, either through calling for further written submissions by Claimants, see Article 24(3), Tribunal Rules, or even through ordering a Hearing, see Article 15(2), Tribunal Rules.[14] The

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[14]Evidentiary gaps as to nationality have been filled to the Tribunal's satisfaction at such Hearings. See, e.g., Cosmos Engineering, Inc. and Ministry of Roads and Transportation, Award No. 271-334-2 para. 4 (24 November

(Footnote Continued)

Tribunal's duty to act in an informed way to fulfill its jurisdictional mandate, see para. 7, supra, required as much.[15]

IV.

21. The result of our failing to exercise jurisdiction in this Case is that seven years after the Tribunal was established to hear "all such claims" as the bulk of those presented here, General Declaration, General Principle B, it is requiring the Parties nevertheless to start anew and arbitrate them in Switzerland.

22. Had the Tribunal accepted Claimants' plea of United States nationality it doubtless would have heard at least the two claims totalling $908,321 arising out of the contracts between IOFC and Razi and between Interore Trading and NPC. Neither such Respondent denied being controlled by Iran as required by Article VII(3) of the Claims Settlement Declaration.[16] Likewise neither contended that the

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(Footnote Continued)
1986):

> The Claimant has satisfied the Tribunal that it is a national of the United States . . . . While the documentary evidence it filed in this Case was inadequate in several respects, statements by the Claimant's President and Counsel at the Hearing resolved the remaining uncertainties.

See also International Technical Products Corporation and Islamic Republic of Iran, Award No. 186-302-3 at 9 (19 August 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 15 ("Mr. Bakst testified at the Hearing . . . that he has 'been a United States citizen all my life'").

[15] Presumably such further proceedings would have elicited information such as that discussed at II., supra.

[16] In Amoco International Finance Corporation and Islamic Republic of Iran, Award No. 310-56-3 at para. 25 (14 July 1987), the Tribunal found it "undisputed" that NPC is "controlled by Iran."

provision in its contract for resolution of all disputes by arbitration in Switzerland ousted us of jurisdiction.[17] Our decision in Stone and Webster Overseas Group, Inc. and National Petrochemical Company, Award No. ITL 8-293-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 274, clearly would have foredoomed any such contention.[18]

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[17]The IOFC-Razi and Interore Trading-NPC contracts provide, respectively:

> All disputes will be settled by arbitration in Geneva, Switzerland by three arbitrators in accordance with the rules and regulations of the International Chamber of Commerce. The arbitrators will be governed by the substantive law (excluding any rules relating to conflicts of law) of the Swiss Federal Code of Obligations. The arbitration will be conducted in the English language.
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> . . . .
>
> Governing Law: Swiss "Code des Obligations".
>
> Arbitration: Any dispute arising in connection with this agreement to be settled by arbitration in Geneva, Switzerland, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

[18]The claim in the amount of $146,916.78 based on IOFC's contract with GTC would with equal certainty have been foreclosed by the contract's provision that "[e]ventual disputes must be finally and exclusively settled in Iranian courts." See Technology Enterprises Inc. and Foreign Transaction Company, Award No. 109-328-2 (31 January 1984), reprinted in 5 Iran-U.S. C.T.R. 118; World Farmers Trading, Inc. and Government Trading Corp, Award No. 66-769-1 (16 August 1983), reprinted in 3 Iran-U.S. C.T.R. 197; George W. Drucker and Foreign Transaction Co., Award No. ITL 4-121-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 252. Based on these precedents the outlook would have been less certain in respect of the $26,854.60 claim based on Interore SA's contract with FDC. It provided:

> ARBITRATION: Any dispute which is not settled in a

(Footnote Continued)

23. For the reasons stated, I believe that in this Award the Tribunal has failed to act as the States Parties required it to and thus I dissent.

Dated, The Hague
25 February 1988

Charles N. Brower

Charles N. Brower

(Footnote Continued)
friendly manner will be referred to the Iranian legal authorities.

See Cosmos Engineering, Inc. and Ministry of Roads and Transportation, supra, at para. 9 ("This usage [of the word 'arbitration'] suggests that 'arbitration,' which is an alternative to judicial settlement, was clearly intended").