

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعوی ایران - ایالات متحدہ

CASE NO. A11

FULL TRIBUNAL

AWARD NO. 597-A11-FT

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA

Respondent

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	7 APR 2000
	تاریخ 1379 / 1 / 19

## SEPARATE OPINION OF

RICHARD M. MOSK

1. I concur in the Tribunal's Partial Award in order to form a majority so that an Award can be rendered. Consistent with Tribunal practice,<sup>1</sup> I discuss below my analysis of certain issues that differs from the reasoning expressed in the Partial Award. My points had been raised by at least one of the parties, but inexplicably, receive little, if any, discussion by the Tribunal in its lengthy opinion. Although I have a different point of view on certain issues, do not join in some of the reasoning, and regret the form of the award, under the circumstances, I join in the Partial Award as set forth in the dispositif in order to form a majority. There is one

<sup>1</sup> See, e.g., Separate Opinion of Members Aldrich, Holtzmann and Mosk on the Issue of the Disposition of Interest Earned on the Security Account in *Iran-United States, Case A/1 (Issues I, III and IV)*, Decision No. DEC 12-A1-FT (3 Aug. 1982), reprinted in 1 *Iran-U.S. C.T.R.* 200; Concurring Opinion of Richard M. Mosk in *Ultrasytems Incorporated and The Islamic Republic of Iran, et al.*, Partial Award No. 27-84-3 (4 Mar. 1983), reprinted in 2 *Iran-U.S. C.T.R.* 114). See also *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* 1991 I.C.J. 53 (views inconsistent with an arbitral award in a declaration of a concurring arbitrator appended to the award did not nullify the majority and render the award invalid); Stephen Schwebel, *May the Majority Vote of an International Arbitral Tribunal be Impeached?*, 13 *ARB. INT'L* 145 (1997); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 397 (3d ed. 1999).

Partial Award that requires a majority of members of the Tribunal. Tribunal Rules, Article 31(1). Four Members purport to dissent from, and concur with, the Partial Award. I do not believe that there can be different majorities for the different issues that comprise this Partial Award, especially when there was no actual division of the issues into segments.<sup>2</sup> I have noted at one time that I was disturbed “by the potential consequences of unnecessarily separating a case into segments and then deciding it piecemeal at different times and with different majorities.” Dissenting Opinion of Richard M. Mosk to Final Award in *Ultrasystems Incorporated and The Islamic Republic of Iran, et al.*, Final Award No. 89-84-3 (7 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 80, 82. Here the issues were not even separated into segments. To have separate majorities for various issues in a case “conflicts with the spirit, if not the letter, of the rule requiring an award to be made by a majority of the arbitrators.” *Id.* Such a practice is inconsistent with the development of a consensus in decision-making. The majority requirement in the UNCITRAL and Tribunal rules has a long history in intergovernmental dispute resolution<sup>3</sup> and has received widespread support.<sup>4</sup> Accordingly, notwithstanding any Tribunal practice to the contrary, I believe that my concurrence is necessary for a true majority for this Partial Award.

## Service

2. The Tribunal finds that the United States obligations to freeze and require information<sup>5</sup> on assets of a close relative of the former Shah arise when the United States Office of Foreign Assets Control (“OFAC”) is notified by Iran that such a close relative was served in a manner that “reasonably appears to comply with the applicable law of the forum.” Partial Award, paras. 228, 313.B.b. The Tribunal suggests that what is required for such “service” is that which “is reasonably calculated to give the defendant actual notice of the

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<sup>2</sup> REDFERN & HUNTER, *supra* note 1, at 377 (“In general it is unusual for an arbitral tribunal to split its award into a number of different parts, in which the operative directions in the award have been reached by different processes. If there is lack of unanimity in relation to one of many issues, the award as a whole will usually be issued by a majority. If there is no majority in relation to a number of issues, the award as a whole should be that of the presiding arbitrator if the relevant rules permit; otherwise, the arbitrators will have to continue, in one way or another, to try to reach a majority decision.”).

<sup>3</sup> See JACKSON RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 109-10 (rev. ed. 1926); *Republic of Columbia v. Cauca Company* 190 U.S. 524 (1903), J.L. SIMPSON AND HAZEL FOX, *INTERNATIONAL ARBITRATION* 222-23 (1959).

<sup>4</sup> See HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 808-11 (1989).

<sup>5</sup> By referring to “freeze” and “information” obligations, I mean the obligations to freeze and prohibit the transfer of assets, to require reporting by persons within United States jurisdiction of assets, and to transmit such information to Iran.

lawsuit.” *Id.* The Tribunal adds that the term “served” as a defendant in Paragraph 12 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (“General Declaration”) does not mean uncontested service or legally valid service, but rather means whatever Iran did to serve process so long as it was “in apparent accordance with the applicable law of the forum.” *Id.* The Tribunal fails to appreciate that apparently valid service is not necessarily calculated to give the required actual, valid notice to a defendant and does not render one as “served as a defendant,” as that term is used in Paragraph 12 of the General Declaration.

3. In Paragraph 12 of the General Declaration, the Parties used the term “served” when referring to and identifying the relatives of the former Shah against whom Iran might bring United States litigation.<sup>6</sup> The Governments contracted with respect to litigation in the United States. In this context, the term “served” must, as recognized by the Tribunal, be presumed to refer to the applicable United States laws and procedures concerned with service, because the subject was United States litigation. Service by definition means legally proper service. Without legally valid service, there is no service. Service is defined as “the formal delivery of a legal document to the addressee in such a manner as *legally* to charge him with notice of receiving it.” 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 123 (1984) (emphasis added), cited in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S. Ct. 2104, 2108, 100 L. Ed. 2d 722, 731 (1988); see also WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1076 (1985) (“service” defined as “the act of bringing a legal writ, process, or summons to notice *as prescribed by law*” (emphasis added)).

4. Had the parties intended that the freeze and information obligations set forth in Paragraphs 12 and 13 of the General Declaration would arise upon notice of a lawsuit or apparent service, whether there was legally valid service or not, they could have expressly provided that the United States obligations commence, for example, when a defendant has notice of United States litigation brought by Iran to recover property and assets belonging to Iran or when a defendant appears to have been served. The parties did not do so even though they knew prior to the signing of the Algiers Declarations about the possibility of a

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<sup>6</sup> Although not decided by the Tribunal, it appears that the United States obligations with respect to the Estate of the former Shah would arise when the Estate was constituted and when it (through a personal representative) was served in, or appeared in, or by law was deemed to have appeared in, a judicial proceeding against it.

defendant contesting service because service had already been challenged in the *Farah Diba Pahlavi* case.

5. In the United States, if service is defective – that is, if service fails to satisfy the legal requirements of the forum – it may be quashed or the action is dismissed by a court. The United States Supreme Court recently stated that “[s]ervice of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.” *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S. Ct. 1322, 1326, 143 L. Ed. 2d 448, 456 (1999). In that case, the Court held that the time period within which a defendant could “remove” a case from a state court to a federal court begins with “official” service. The Court pointed out that an improperly served or unserved defendant continues to retain the right to move to remand the case to state court. Just as one “who has not yet lawfully been made a party to an action should [not] be required to decide in which court system the case should be heard,” 526 U.S. at 355, one who has not lawfully been made a party to an action has not been “served as a defendant” as required by the General Declaration and therefore should not be subjected to an asset freeze.

6. By using the legal term “service,” the Parties required legally valid service as determined by a court if challenged. As noted, invalid service is not service. When service is contested, the consequences of valid service generally do not begin to occur until a court makes a final determination that there was valid service. Thus, when service is disputed, the defendant appears in the proceeding specially, rather than generally, and the case normally does not otherwise proceed until there is a decision that there was valid service. If there is a challenge to “service” by a defendant, that defendant should not, without a court order, suffer the consequences of a freeze of his or her assets until the validity of service is determined.

7. This interpretation of Paragraphs 12 and 13 of the General Declaration is not unreasonable. Normally, issues as to service are determined in United States courts promptly upon a motion procedure, and any appeals often can be expedited or determined by an extraordinary writ procedure, which procedure is generally faster than the appeal process. Defects in service generally may be corrected promptly. In addition, Iran had available to it

procedures for judicial freezes – *i.e.* attachments and other provisional remedies<sup>7</sup> – and both judicial and non-judicial means for obtaining information about assets.

8. Even at the time the parties were negotiating the Algiers Declarations, they had to know that the former Shah and his family had notice that Iran intended to try to recover their property in the United States. Indeed, legal actions were already pending. *See Islamic Republic of Iran v. Mohammed Reza Pahlavi and Farah Diba Pahlavi*, No. 22013/79 (N.Y. Sup. Ct.), *Islamic Republic of Iran v. Fatemah Pahlavi and 59 others*, No. 81 Civ. 086 (S.D.N.Y.), *Islamic Republic of Iran v. Ashraf Pahlavi*, No. 4432/80 (N.Y. Sup. Ct.). Prior to the Algiers Declarations, there were public reports of the negotiations of that agreement, including the communications concerning a possible freeze and return of the former Shah's assets. *See, e.g., Text of the Iranian Response to the U.S. on Terms for Release of the Hostages*, NEW YORK TIMES, Dec. 22, 1980; *Statement of The Honorable Ronald Reagan Re: Hostage Crisis*, Sept. 13, 1980. Iran had already attempted to recover assets in other countries. *See Iran Urges that Swiss Freeze Assets of Shah*, NEW YORK TIMES, Feb. 24, 1979 and *Swiss Refuse a Request to Block Shah's Assets*, NEW YORK TIMES, Mar. 6, 1979. In addition, as discussed *infra*, Iran itself delayed bringing actions, serving process, giving notices to OFAC and using available court procedures to accomplish the equivalent of the freeze and information provisions. The likelihood that any assets that were subject to being frozen would have already been removed (see Ronald Sullivan, *Shah's Treatment is Said not to Hinder Departure*, NEW YORK TIMES, Nov. 16, 1979 (Shah's spokesman stating there were no remaining assets in the United States)), and the lack of any urgency exhibited by Iran to freeze assets in the United States, indicate that when the parties used the term "served" they contemplated the possibility that the freeze and information obligations would not necessarily arise immediately after a complaint was filed with a court and notice of a purported service given.

9. Under the Tribunal's theory, if Iran purports to serve a defendant in a defective or improper manner not calculated to give actual notice, but nevertheless indicates to OFAC that service or apparent service has taken place, the freezing and information obligations

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<sup>7</sup> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct 1961, 144 L. Ed. 2d 319 (1999) held that a federal court may not, under certain circumstances, preliminarily enjoin a debtor from disposing of unencumbered assets. Subsequent cases have interpreted the holding narrowly. *See, e.g., U.S. ex rel. Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999). The *Grupo Mexicano* Court distinguished cases, as the cases at issue in Case No. A11, in which a party claimed an equitable interest in the property at issue. The Court also left open the question of whether a judicial freeze order by preliminary injunction was available in state courts. The Court acknowledged the availability of other statutory remedies, such as attachments and garnishments. *A lis pendens* is also available under United States law, and Iran utilized this procedure against one of Shams Pahlavi's co-defendants.

arise. Such a theory raises serious due process questions. It would empower Iran to cause the freeze of assets of the former Shah's relatives even when service is defective or did not ever occur. If service is challenged, OFAC has no way to ascertain if valid or apparently valid service was made or even whether it was made on a "close relative" of the former Shah. A court is in a better position than OFAC to make these determinations. Under the Tribunal's formulation, persons who are not relatives of the former Shah or who have not been legally served and may have no notice of a legal action against them could have their assets frozen on the basis of a notice to OFAC of purported service upon them. The Governments – certainly the United States – could not have intended such results.

10. What actually occurred shows that notices to OFAC could contain inaccurate information. Iran wrote to OFAC in September of 1982 claiming that sixty close relatives of the former Shah had been served as defendants in New York litigation (Partial Award, para. 56), even though some of these individuals were not even related to the former Shah. Civil Court Cover Sheet, *Islamic Republic of Iran v. Fatemah Pahlavi and 59 Others*, No. 81 Civ. 0186 (S.D.N.Y. Jan. 13, 1981) (listing as a defendant a publicly known representative who was not a relative of the former Shah). The Los Angeles Superior Court quashed service by publication in Iran's first lawsuit against Shams Pahlavi on the ground that the affidavit in support of service by publication was patently defective in that "jurisdictional facts ... had been missing from the beginning." *Islamic Republic of Iran v. Pahlavi*, 160 Cal. App. 3d 620, 628 (Cal. Ct. App. 1984). Parenthetically, it is curious that Iran would, in that Los Angeles action, serve a resident of Los Angeles by publication when personal service or other means of substituted service calculated to give notice were available. See CAL. CODE OF CIV. PROC. § 415.20. The court did note, without deciding the matter, that there was some question as to whether the required "reasonable diligence" was exercised in the attempted service. *Islamic Republic of Iran v. Pahlavi*, 160 Cal. App. 3d at 627. These instances of service irregularities demonstrate that it is reasonable to interpret Paragraphs 12 and 13 of the General Declaration to mean that the obligations to freeze and require information on assets arise only after legally valid service was made – and if service is challenged in court, only upon a judicial determination that service was valid.

11. At the very least, in cases in which service was challenged, the United States should only be deemed to have not complied with its obligations if it failed to freeze and require reporting on assets when it turned out that there was proper service, as found by a final

judicial determination. Under no circumstances should the United States be held responsible when service ultimately was held judicially to be improper. The problem with the Tribunal's formulation is most apparent in connection with the litigation brought by Iran against Shams Pahlavi. The Tribunal holds that the United States should have frozen assets and required reporting in 1982, when notice of service was given OFAC – one year after the filing of the action – even though this alleged service was later found by a court to be improper. The Tribunal should not hold that the United States failed to carry out its obligations in 1982 when the court held the service to have been improper and dismissed the defendant from the action in 1984. When service ultimately is found to be defective, such a finding validates the United States position not to freeze or require reporting on assets, as there has been no “service.” If the defendant has not been served, there was no obligation to freeze or provide information regarding assets.

12. Accordingly, the United States did not breach any obligation by not freezing or requiring information on assets in 1982 in the Shams Pahlavi case because service was judicially held to have been invalid. The United States did not breach any obligations in the case against Farah Diba Pahlavi by not freezing or requiring information on assets while a judicial challenge to service was pending. In the case against Fatemah Pahlavi and 59 others, the United States did not breach any obligations once service was challenged in December 1992. Although in this case OFAC was notified of service three months prior to that challenge, the fact that OFAC did not freeze or require reporting during that time period was not a breach for reasons discussed *infra* in paragraphs 13-16.

### **Timing of United States Actions**

13. The Tribunal states that the United States obligations to freeze and provide information arise “promptly” after Iran furnishes notice to OFAC that a defendant has been served (*i.e.* apparently served) in United States litigation. Partial Award, paras. 220, 241. There is nothing in the language of the General Declaration that provides that United States obligations arise “promptly” after notification by Iran, as stated by the Tribunal. As the Tribunal acknowledges, what can be implied is that the obligations of the United States arise within a reasonable period of time after notice of service is given. In my view, this assumes that there was legally valid service. The reasonableness of the time taken to perform an obligation must be ascertained in each case based on the facts.

14. In determining what constitutes a reasonable time, the Tribunal should consider the following factors in each situation: the change of administration (*The Islamic Republic of Iran and The United States of America*, Partial Award No. 382-B1-FT (31 Aug. 1988), reprinted in 19 Iran-U.S. C.T.R. 273, 295); the “considerable latitude to the States Parties as to the nature of the procedures and mechanisms’ applied to fulfill their treaty obligations” (*The Islamic Republic of Iran and The United States of America*, Partial Award No. 590-A15(IV)/A24-FT, para. 174 (28 Dec. 1998), reprinted in \_\_\_ Iran-U.S. C.T.R. \_\_\_ (quoting *The Islamic Republic of Iran and The United States of America*, Decision No. DEC 62-A21-FT (4 May 1987), reprinted in 14 Iran-U.S. C.T.R. at 331)); the amount of time taken by Iran to serve process and provide notice to OFAC, which period is an indication of urgency or lack of urgency of the matter; and any prejudice or likelihood of prejudice to Iran caused by the time it took to freeze and provide information concerning assets. “Prompt” may be “reasonable” in some situations, but not in others.

15. To take the most extreme example in this Case, in the action by Iran against Shams Pahlavi discussed *supra* at paragraph 11, it is not reasonable for the Tribunal to hold that the United States failed to fulfill its obligations as a result of a several-month delay in 1990 after service finally was effected properly. Such service occurred long after any assets could have been moved and was over eight years after the action was originally commenced. An administration long removed from the events of the early 1980’s should be given some leeway in examining the matter and acting. Iran’s delays of years to prosecute the action are also relevant to determining what period of time is a reasonable one for OFAC to freeze assets in this case.

16. The Tribunal provides that with respect to two cases that existed at the time of the Algiers Declarations, those against the Farah Diba Pahlavi and Ashraf Pahlavi, the freeze and information requirements arose immediately upon the effective date of the Algiers Declarations with no notice requirements. Iran gave notice to OFAC in those cases, thereby indicating Iran understood it had to do so. The rationale for notice is the same for cases filed before the Algiers Declarations as it is for cases filed thereafter. The various parts of the United States Government cannot be expected to know the existence and status of all cases brought by Iran or its divisions to recover assets of the former Shah and his close relatives. Notice of valid service – even apparently valid service under the Tribunal’s formulation – must be provided to OFAC before any freeze or information obligations arise. In the case

against Farah Diba Pahlavi, service was being contested. As to both cases, the Tribunal's conclusion that the obligations arose immediately upon the date of the Algiers Declarations assumes that there is instantaneous communication between two different organs of the United States Government – the Department of State and OFAC – and that OFAC has knowledge of certain pending litigation in one or more of the courts in the United States. This is a highly dubious proposition. This Tribunal has recognized the difficulties of Iran when two different departments of the Government were involved. For example, Iran's extension requests that have been granted by the Tribunal often rely on problems of obtaining information from different organs of government. *See, e.g.*, Order of 22 November 1998 in *The Islamic Republic of Iran and The United States of America*, Case No. B61, Full Tribunal (granting Iran's request for an extension to survey various ministries for documents). The Tribunal should apply the same principle to the United States that it has to Iran. The requirement of notice should have been applied to cases pending at the time of the Algiers Declarations, as well as to cases filed after the date of the Algiers Declarations.

17. The Tribunal imposes obligations on the United States that are not required by the Algiers Declarations and are unrealistic. I doubt that any other country could be expected to act as efficiently and rapidly as required by the Tribunal. That governments are not always as efficient as contemplated by the Tribunal is shown by the United States failure to remove the freeze on Shams Pahlavi's assets until 1996, two years after the litigation was "finally terminated." It hardly seems "equitable" (Partial Award, para. 215) to expect a government to act with unrealistic efficiency.

18. Thus, the United States did not breach its obligations in connection with the time it took to freeze and require information on assets in Iran's litigation against Ashraf Pahlavi and Shams Pahlavi. The United States did not breach its obligations with respect to Iran's litigation against Fatemah Pahlavi and 59 others by not freezing and requiring information on assets for the period between the notice to OFAC and the challenge to service. That period was not impermissibly long in view of Iran's delay in informing OFAC of the purported service. As noted above in paragraph 12, the United States did not breach its obligations by not freezing and requiring reporting on assets in the case against Farah Diba Pahlavi even though that case was pending at the time of the Algiers Declarations, because service was contested.

## Failure to Show Loss

19. Another reason why the United States should not be held responsible for any breach of the obligations in Paragraphs 12-14 of the General Declaration is that, based on the record now before the Tribunal, Iran thus far has not made a sufficient showing that it has suffered any damage as a result of any such breach. See *Futura Trading Incorporated and The National Iranian Oil Company*, Award No. 263-324-3 (30 Oct. 1986), reprinted in 13 Iran-U.S. C.T.R. 99, 116 (“[the Claimant] has suffered no damage. Pursuant to the principle of *actio non datur non damnificato* the Tribunal therefore finds that [the Claimant] no longer has a cause of action”).

20. The General Declaration expressly provides that Iran can have no claim arising under Paragraphs 12-14 therein unless “the [T]ribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation.” General Declaration, Paragraph 16. Iran has given no evidence of such a “loss.” The bifurcation order in this Case is not inconsistent with this position. The showing of a loss is a requirement for the claim to be proper. The remedial phase would determine the amount of the loss, once it is established that some loss was suffered. Iran has failed to establish the requirement of a “loss” in order to maintain the claim.

21. The purpose of United States obligations under Paragraphs 12-14 of the General Declaration was to secure assets that might be adjudged to belong to Iran in United States litigation. Assets that would be the object of any judgment in United States litigation were to be secured so that if Iran prevailed, these assets would be available to satisfy any judgment. Otherwise, there was no reason to connect the freeze and informational obligations to service in specified United States litigation. The draft of the United States Executive Order of 11 November 1980, provided by the United States to the Algerian Government during the negotiation of the Algiers Declarations, specified that the freeze obligations were “[f]or the purpose of protecting the rights of litigants in the United States courts.” Therefore, a United States breach of the freeze or information obligations could not have had any consequences once the litigation was dismissed. As all of the cases were dismissed, the freeze and information obligations and purported “breaches” vanished *ab initio* because there could be no recovery in the United States litigation.

22. Iran did not require the freeze and the information in order to obtain enough evidence of assets, if they existed, so as to affect the outcome of the American litigation. Iran made no showing that there was any link between any breach of the freeze or information requirements and dismissals of its actions. As noted above (*supra* at para. 7), Iran had the opportunity to obtain judicial freezes of assets. Moreover, anyone with the slightest contact with American legal procedures would know how simple it is to obtain information regarding assets by other means, including discovery procedures, provisional remedies, public records and investigative resources. Furthermore, Iran itself was able to obtain information on the former Shah's assets, for it possessed lists of worldwide assets of the former Shah. *Islamic Republic of Iran v. Pahlavi*, 494 N.Y. 2d 488, 490 (N.Y. Sup. Ct. 1983); *Islamic Republic of Iran v. Pahlavi*, No. 349, slip op. at 5 (N.Y. Ct. App. 1983) and *Petition for Letters of Administration for Estate of Mohammed Reza Pahlavi* at 4-6, No. 6790/81 (N.Y. 1981). If Iran was able to obtain this information without the help of the United States Government, it surely could have obtained information on enough assets located in the United States, if they existed, to present to the courts so as to attempt to avoid dismissals. As mentioned *supra* at paragraph 8, there is some indication in the record that the former Shah had no assets in the United States as of November 1979.

23. Any information the United States would have provided to Iran would have been inadmissible in any court as unauthenticated hearsay. The information the United States would have obtained could only have come from reports supplied by others. In order to affect the outcome of any of the judicial decisions, Iran would have had to supply admissible evidence, and this evidence generally would have to have been obtained from sworn or certified evidence, including through discovery. Although the record indicates that Iran's attorneys knew of and expected to utilize the discovery process in its litigation, see *Petition for Letters of Administration for Estate of Mohammed Reza Pahlavi* at 4, No. 6790/81 (N.Y. 1981), *Memorandum in Further Opposition to Defendant's Motion to Dismiss* at 23, *Islamic Republic of Iran v. Mohamed Reza Pahlavi and Farah Diba Pahlavi*, No. 22013/1979 (N.Y. Sup. Ct. Mar. 13, 1981), there is no indication of any such discovery in the record. Even had Iran conducted discovery, it is unlikely, based on the rulings, that a showing of some property, if there was any, would have affected the outcome of any of the decisions. From the record before the Tribunal, Iran's filings appear to have been deficient (see *infra* at paras. 26-31), and the actions involved disputes between non-United States nationals concerning acts that took place over decades in a foreign country. Foreign law applied. In most instances, the disputes

involved assets all over the world. Few, if any, of the possible witnesses were in any of the American jurisdictions. In short, there was no showing of any significant connections between the parties or the disputes and any of the United States fora. Also, there was no showing that there were no alternative, available fora. Such available jurisdictions could have included Egypt, Switzerland, Panama and Iran. In view of these circumstances, dismissals on *forum non conveniens* grounds were appropriate under the laws applicable in California and New York.

24. There is no indication that Iran even argued to any United States court in connection with the *forum non conveniens* motions that Iran needed information or a freeze from the United States. Had Iran so requested or argued in a judicial proceeding, before dismissing the case, a court may well have given Iran the opportunity to obtain the information, either through discovery or procedures against the United States.

25. The dismissals of all of the actions cannot be attributed to any act or omission of the United States. Rather, such dismissals were based on the facts before each court, the applicable law, and the acts and omissions of Iran itself.

26. There are many examples in the record of the acts and omissions of Iran that appear to have caused or contributed to the dismissals of its cases. Iran filed its actions in state courts when it could have obtained federal jurisdiction. See *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1358-59 (9th Cir. 1988) (en banc); *Bank Melli Iran v. Shams Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995). Had Iran filed its actions in federal courts, it would have been unlikely that the cases would have been dismissed under a *forum non conveniens* theory. In federal courts, a dismissal on the basis of *forum non conveniens* requires the existence of an alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947); *Tramp Oil and Marine, Ltd. v. M/V Mermaid I*, 743 F.2d 48, 50-51 (1st Cir. 1984); 1 FEDERAL PROCEDURE, LAWYERS EDITION § 1:936, at 710-11 (1995). State courts do not necessarily have such a requirement. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 481 (N.Y. 1984) (“we have never held that [an alternative forum] was a pre-requisite for applying the *conveniens* doctrine and in *Varkonyi* [22 N.Y.2d 333, 338 (1968)] we expressly described the availability of an alternative forum as a ‘pertinent factor,’ not as a precondition to dismissal.”). See also Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*,

29 COLUM. L. REV. 1 (1929); *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 ALR 4<sup>th</sup> 976, 978 (1988); *Agyenkwa v. American Motors Corp.*, 622 F. Supp. 242, 244 n.4 (E.D.N.Y. 1985) (noting that federal and state law have “diverged” on this issue). In addition, it is important to recognize that the state courts found that there was insufficient evidence presented by Iran to establish that there was no alternative forum. Therefore, the decisions to dismiss the actions were made without a finding that such an alternative forum did not exist.

27. Iran has complained that a New York court refused to appoint an administrator with regard to the assets of the former Shah, thereby precluding a continuation of the case to recover the former Shah’s assets. A court will not normally open a probate proceeding by appointing an administrator or other representative unless the decedent was domiciled in, or had assets in, the jurisdiction of that court. *See Roughan v. Chenango Valley Savings Bank*, 144 N.Y.S. 508 (N.Y. App. Div. 1913); *In re Estate of Perno*, 294 N.Y.S.2d 853 (N.Y. App. Div. 1968); UNIF. PROBATE CODE § 3-201(a). In petitioning for Letters of Administration in New York County in connection with the former Shah, counsel for Iran stated that the former Shah had died in Egypt; that five of the six distributees were domiciled in Egypt and the sixth in Switzerland; that the former Shah had had a beneficial interest in a Netherlands Antilles Corporation, which entity may have owned property in the United States; and that the extent of the former Shah’s property “within the confines of New York County ... will be more clearly defined as the discovery processes of the Court become utilized.” *Petition for Letters of Administration for Mohammed Reza Pahlavi* at 4, No. 6790/81 (N.Y. 1981). The former Shah was not domiciled in New York County, and there was no showing that he had assets there. There is no indication in the record before the Tribunal that Iran utilized the “discovery processes of the Court” to identify such assets. Accordingly, Iran’s complaint about the court’s ruling is misplaced.

28. United States courts, in dismissing Iran’s cases and affirming such rulings, pointed to significant evidentiary and procedural defects in Iran’s pleadings. Some of Iran’s papers failed to follow routine requirements. One example is found in the case of *Islamic Republic of Iran v. Pahlavi*, 160 Cal. App. 3d 620, 627-28 (1984) (which is the first *Shams* case), in which the court stated as follows:

... the Sadeghi verification of the complaint would seem clearly insufficient. The Notary Public area is blank. There has been no compliance with Code of

Civil Procedure section 2015.5, subdivision (b). The rubber stamp mark of the Embassy of Algeria in Washington, purports to authenticate nothing in particular. Probably because of the verification shortcomings, the words in the order for publication, "verified complaint or petition" have been lined out and a superscription "Declaration of Mohammed T. Sadeghi" inserted, followed by the initials T. W. K. (presumably one of plaintiff's counsel). The "Affidavit" of Mohammed T. Sadeghi, probably qualifies as a declaration under Code of Civil Procedure section 2015.5, subdivision (b). However, its contents are a medley of conclusions and political declamation and certainly fails to formulate a comprehensible cause of action. It is dubious whether it would qualify for its expressed purpose if the true test of sufficiency "is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false." (Tri-State Mfg. Co. v. Superior Court (1964) 224 Cal. App. 2d 442, 445.)

....

It is rather apparent that jurisdictional facts were missing from this case on December 3, 1981, and by May 24, 1983, it was pellucidly clear that they had been missing from the beginning. It is not enough that the verifying and declaring witness' familiarity with the facts in an application for a substituted service order be based upon what is termed "common knowledge of the Iranian people." Even the translated documents from Iran appear to give no support to a cause of action.

Iran cannot reasonably expect United States courts to overlook Iran's lack of compliance with procedural and evidentiary rules that must be followed by all litigants in those courts.

29. As discussed, the record before the Tribunal indicates that Iran filed its cases in courts in which success was less likely than in other courts, failed to conduct discovery, failed to seek provisional remedies, failed to seek ancillary relief against the United States for its alleged omissions, made filings in United States courts that appear to have been procedurally and substantively deficient, and gave no evidence that another forum was not available.

30. Iran's apparent deficiencies are illustrated by the contrasting approach taken by the Republic of the Philippines in pursuing the United States assets of its former leader, Ferdinand Marcos. *Republic of Philippines v. Marcos*, 862 F.2d 1355 (9<sup>th</sup> Cir. 1988); *Republic of Philippines v. Marcos*, 806 F.2d 344 (2<sup>nd</sup> Cir. 1986). Unlike Iran, the Philippines filed in Federal Court, thus avoiding dismissals on the ground of *forum non conveniens*. It engaged in discovery procedures and was able to identify assets in the jurisdiction. 806 F.2d at 347. It obtained injunctions against the Marcos assets, *N.Y. Land Co. v. Republic of Philippines*, 634 F. Supp. 279, 281 (S.D.N.Y. 1986), *Republic of Philippines v. Marcos*, 862 F.2d at 1358, and ultimately

recovered substantial assets through a settlement agreement. See *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 542 (9<sup>th</sup> Cir. 1995).

31. The applicable law and Iran's ostensible failure to take appropriate and available steps to protect its own interests in United States courts resulted in the legally appropriate dismissals of its cases. The dismissals of Iran's actions and the failure of Iran to obtain any relief in United States courts cannot be deemed attributable to any acts or omissions of the United States, but rather are based on other circumstances, including the seeming failure of Iran to take reasonably required actions in United States courts.

32. Any suggestion by Iran that American court decisions were the result of some agenda directed at Iran reflects a misunderstanding of the American judicial system. That system is composed of many different courts in numerous jurisdictions – federal, state, and local. The courts and judges are independent of the other branches of governments. Those judges often rule in favor of unpopular parties, including governments hostile to the United States (see *Banco Nacional de Cuba v. Sabbatino Receiver*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 804 (1964) (Cuban expropriation an unreviewable act of state)), as well as against the United States Government. There are a number of reported American judicial decisions in favor of the Islamic Republic of Iran. See, e.g., *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) (enforcing arbitration award in favor of Iran); *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9<sup>th</sup> Cir. 1992) (enforcing Tribunal award in favor of Iran); *KMW International v. Chase Manhattan Bank, N.A.*, 606 F.2d 10 (2d Cir. 1979) (vacating injunction that had prevented Iran from calling letter of credit); *American Bell International, Inc. v. Islamic Republic of Iran*, 474 F. Supp. 420 (S.D.N.Y. 1979) (denying request for injunction to prevent bank from paying Iran under letter of credit); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) (Iran enjoys sovereign immunity with respect to claim by former hostage for injuries); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9<sup>th</sup> Cir. 1983) (same); *Soudaver v. Islamic Republic of Iran*, 186 F.3d 671 (5<sup>th</sup> Cir. 1999) (dismissing expropriation claim against Iran); *Ciappio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994) (sovereign immunity prevents suit by kidnapping victims against Iran); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9<sup>th</sup> Cir. 1984) (sovereign immunity prevents suit by wife and children of American citizen murdered in Iran). In the one instance in which a trial judge expressed some personal opinions critical of Iran – the Shams Pahlavi case – that judge ruled in favor

of Iran. In response to a suggestion by Iran's counsel of prejudice by a trial judge, an appellate court stated, "[o]n the contrary, the record demonstrated the trial court's desire to fairly and justly apply the applicable laws to this case." *Islamic Republic of Iran v. Shams Pahlavi*, No. B072484 at 21 (Cal. Ct. App. Mar. 9, 1994).

33. As I have pointed out, the decisions to dismiss the cases brought by Iran were appropriate, based on the evidence submitted by the parties, the record and the applicable law. The Tribunal correctly determined that there was no justification under the Algiers Declarations to consider assertions that the judicial decisions constituted a breach of an obligation of the United States. There was no language in the Algiers Declarations requiring the United States to insure that its judicial system ignore any applicable laws or procedures in connection with Iranian claims or make any determination with respect to the assets of the former Shah or his relatives. At most, one could simply imply from references in the General Declaration to civil actions in the United States by Iran to recover such assets that Iran would not be barred from proceeding with such actions in United States courts, as it had been prior to the Algiers Declarations. As recognized by the Tribunal, the General Declaration did not, either expressly or impliedly, impose on the American judicial system the obligation to reach the merits of any of Iran's claims.

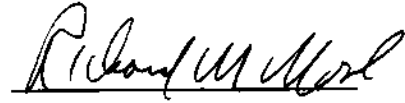
34. In almost two decades and with all of the technological and informational advances and available resources, Iran has not presented to this Tribunal any probative evidence of assets that it believes it would have recovered but for the alleged breaches by the United States. Even if it identified assets that existed in the United States, Iran would have to establish that the failure to recover such assets was attributable to the purported breaches by the United States. Iran has thus far failed to do so.

35. Accordingly, based on the record presently before the Tribunal, Iran has not satisfied the requirement of Paragraph 16 of the General Declaration to show a loss in order to maintain a claim based on any purported breach of Paragraphs 12-14 of the General Declaration.

**Conclusion**

36. Based on the foregoing, I would not have come to the same conclusions as the Tribunal did on some of the issues. Notwithstanding my views expressed above, in order to form a majority I concur in the Award.

Dated, The Hague  
07 April 2000

A handwritten signature in cursive script, appearing to read "Richard M. Mosk", written over a horizontal line.

Richard M. Mosk