TABLE OF AUTHORITIES—Continued

Page

Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 Va. J. Int'l L. 259 (1984) 42
Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration (August 15, 1958) 31, 34, 41
Opinion of Attorney General Benjamin R. Civilletti to the President, January 10, 1981 .... 7-8, 18, 23
Restatement (Second) of Agency, §§ 1, 5 (1981) .. 35
Restatement (Third) of the Foreign Relations Law of the United States, § 326, Reporters' Note 2 (1987) 22
Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961) 34
A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 32, 39, 40
9 Wright & Miller, *Federal Practice and Procedure*, Civil § 2446 (1971) 44

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 88-5879 and 88-5881

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner/Appellant,

v.

GOULD INC., GOULD MARKETING, INC.,
HOFFMAN EXPORT CORPORATION and
GOULD INTERNATIONAL, INC.,
Respondents/Cross-Appellants.

On Appeal from the United States District Court for the Central District of California

---

BRIEF FOR RESPONDENTS/CROSS-APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves the subject matter jurisdiction of the federal courts to entertain an action by the Ministry of Defense of the Islamic Republic of Iran to confirm and enforce an award rendered against Gould Marketing, Inc. by the Iran-United States Claims Tribunal at The Hague. The issues presented are:

A. Whether the Claims Settlement Declaration of the Algiers Accords,[1] through which the United States and

---

[1] Declaration of the Government of the Demo[illegible] Popular Republic of Algeria ("General Declaration"); [illegible] 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 ("Claims Set-[illegible]

WWW.NEWYORKCONVENTION.ORG

United States
Page 1 of 39

Iran resolved the crisis resulting from Iran's taking of hostages at the U.S. embassy in Teheran, is self-executing and provides a basis for federal question jurisdiction to enforce such an award pursuant to 28 U.S.C. § 1331 (1982); and

B. Whether the district court has jurisdiction, pursuant to the Federal Arbitration Act, 9 U.S.C. § 203 (1982), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38 (the "New York Convention") (reprinted in Addendum), to confirm and enforce an award rendered by the Iran-United States Claims Tribunal.

STATEMENT OF JURISDICTION

In the "petition" with which Iran attempted to commence the proceedings below, Iran alleged that the district court possessed subject matter jurisdiction under 28 U.S.C. § 1331 (1982) (federal question) by virtue of the Claims Settlement Declaration of the Algiers Accords and also under 9 U.S.C. § 203, the statute implementing the New York Convention. (CR 1.) Respondents contend that the district court lacked subject matter jurisdiction under either of these provisions, and moved for dismissal in the court below. In its Order of January 14, 1988, the district court declined to accept federal question jurisdiction, but determined that it had jurisdiction under 9 U.S.C. § 203. (CR 12.) (Respondents/Cross-Appellants' Supplemental Excerpts of Record ("Supp. ER," Tab. E.) On March 3, 1988, the district court issued an Amended Order certifying an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (1982), of both jurisdictional questions. (CR 22.) This Court issued orders on April 13, 1988, granting both parties permission to appeal. Respondents' Petition for Permission to Appeal was filed in the Court of Appeals on March 4, 1988 and was, therefore, timely filed in accordance with Fed. R.

STATEMENT OF THE CASE

A. The Nature Of The Case

This case, which presents important issues of federal subject matter jurisdiction, was brought by the Ministry of Defense of the Islamic Republic of Iran ("Iran") seeking recognition and enforcement of an award rendered against Gould Marketing, Inc. ("GMI") by the Iran-United States Claims Tribunal ("Claims Tribunal") at The Hague. The award is an anomaly. The Claims Tribunal was formed pursuant to the Algiers Accords as part of the resolution of the hostage crisis. It was established principally "to provide a suitable method for U.S. nationals to pursue their commercial claims against Iran, while at the same time responding to Iran's demand for the return of its frozen assets and a nullification of claims [in U.S. courts] encumbering those assets." [2] Affirmative claims by Iran or its nationals *against* U.S. nationals were not provided for in the Algiers Accords,[3] and it appears neither government contemplated a monetary award against a U.S. national.[4]

---

[2] *Iran's Seizure of the United States Embassy: Hearings Before the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981), at 142 [hereinafter Embassy Seizure Hearings] (statement of Hon. Warren M. Christopher, former Deputy Secretary of State).

[3] *See Iran v. United States*, Case A/2, 1 Iran-U.S. C.T.R. 101, 104 (1982), in which the Claims Tribunal held it had no jurisdiction over claims instituted by Iran against U.S. nationals. (CR 4, App. A, Case A/2 at 104.) The decisions and awards of the Tribunal and certain other material filed with the Tribunal are reported in the Iran-United States Tribunal Reports ("Iran-U.S. C.T.R."), published by Grotius Publications Limited of Cambridge, United Kingdom.

[4] Counterclaims arising out of the same subject matter as claims asserted by U.S. nationals are provided for in the Claims Settlement Declaration, Art. II(1), although, as discussed below, the GMI award was not founded on any of Iran's counterclaims against GMI.

United States
Page 2 of 39
WWW.NEWYORKCONVENTION.ORG

Thus, while the Algiers Accords provide that awards in favor of U.S. nationals are to be paid out of a specially-established Security Account (initially funded from frozen Iranian assets), the Accords provide no mechanism for satisfaction of an award *against* a U.S. national. Iran first sought satisfaction of the GMI award from the U.S. Government, bringing a "Request for Interpretation" of the Algiers Accords at the Claims Tribunal.[5] When this proved unsuccessful,[6] Iran filed the present "Petition for Order Confirming Arbitrial [sic] Award" in the United States District Court for the Central District of California.[7]

Iran asserts two bases for federal subject matter jurisdiction: federal question jurisdiction arising under the terms of the Claims Settlement Declaration of the Algiers Accords, the document which called for the establishment of the Claims Tribunal (28 U.S.C. § 1331), the jurisdiction under the provisions of the New York Convention (9 U.S.C. § 203). In asserting federal question jurisdiction under the terms of the Claims Settlement Declaration, Iran seeks reversal of this Court's holding in *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1284 (9th Cir. 1985), *cert. dismissed*, 107 S. Ct. 450 (1986), that the Algiers Accords "are not

[5] *Islamic Republic of Iran v. United States*, Case A/21, 14 Iran-U.S. C.T.R. 324 (1987) (CR 4, Ex. 6) (Excerpts of Record ("ER") filed by Iran at 32-44). *See* General Declaration ¶ 17, Claims Settlement Declaration, Arts. II(3) and VI(4).

[6] *Islamic Republic of Iran v. United States*, Case A/21, 14 Iran-U.S. C.T.R. 324 (1987) (CR 4, Ex. 6) (ER at 32-44).

[7] (CR 1.) The petition seeks enforcement of the award not only against GMI, but also against Hoffman Export Corporation ("Hoffman"), Gould Inc. ("Gould"), Gould International, Inc. ("Gould International") (hereinafter collectively the "Gould Respondents") and "Does One through Ten." Hoffman, GMI's predecessor, was merged into GMI shortly before the commencement of the proceeding before the Claims Tribunal and thus no longer exists. Gould and Gould International were not participants in the Claims Tribu-

self-executing, either in whole or in part" and, therefore, have no domestic legal effect without implementing legislation. Alternatively, Iran seeks an unprecedented expansion of the scope of the New York Convention, arguing that the Convention provides a basis for recognition and enforcement of an award of an international claims tribunal to which GMI was required to present its claims, which thus did not obtain its jurisdiction pursuant to a written agreement to arbitrate between the parties to the "arbitration," and which operated wholly outside of the mandatory provisions of national arbitration law, in this case the law of the Netherlands. Indeed, Iran has conceded elsewhere that application of the New York Convention to Claims Tribunal awards is "highly doubtful" and "would require a rather ingen[i]ous construction" of the New York Convention. (CR 7, Ex. 1 at 109.) (Supp. ER, Tab C.) The only court previously to consider this issue found that the Convention is not available to enforce Claims Tribunal awards. *Dallal v. Bank Mellat*, [1986] 1 Q.B. 441, 2 W.L.R. 745, 1 All E.R. 239 (CR 4, Ex. 8) (Supp. ER, Tab A.)

The court below declined jurisdiction under the Claims Settlement Declaration, but accepted jurisdiction under the New York Convention. (CR 12 at 4-7.) Pursuant to the parties' requests, both issues of subject matter jurisdiction were certified for interlocutory appeal to this Court and further proceedings stayed pending resolution of the appeal.[8] The Gould Respondents contend that the district court lacks subject matter jurisdiction to entertain Iran's petition on either basis, and that the petition must therefore be dismissed.

[8] (CR 22.) The district court did not reach any of GMI's affirmative defenses, including defenses provided for under Article V of the New York Convention (*see* 9 U.S.C. § 207 (1982)), or address-

WWW.NEWYORKCONVENTION.ORG

B. Prior Proceedings

1. *The Initial Hoffman Claim in the District Court and Its Dismissal Pursuant to Executive Order Following Resolution of the Hostage Crisis*

The dispute between GMI and Iran arises out of two contracts for the supply of military radio systems and equipment to Iran. The first of these contracts was a May 1975 purchase agreement between Hoffman, GMI's predecessor, and the Ministry of War of the Government of Iran for radio communications equipment, primarily for use in military helicopters (the "radio contract"). (CR 1, Ex. 1 at 22-48.) The second agreement was an April 1978 contract between the same parties for installation of an integrated fixed station military communications system in Iran (the "ground station contract"). (CR 1, Ex. 2 at 54-82.)

Performance of both agreements was disrupted by the events surrounding the downfall of the Government of the Shah of Iran and the subsequent taking hostage of United States diplomatic personnel in Teheran. (*See generally* CR 1, Ex. 6 at 236-39.) On November 14, 1979, in response to the hostage crisis and Iran's stated intention to withdraw its assets from the United States and repudiate financial obligations to U.S. nationals, the President declared a national emergency and froze Iranian assets in the United States and abroad worth approximately $12 billion. Exec. Order No. 12170, 44 Fed. Reg. 65,729 (1979).[9] In the case of Hoffman, progress pay-

[9] The President issued the Order pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C.A. §§ 1701 *et seq.* (West Supp. 1988); the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.* (1982); and 3 U.S.C. § 301 (1982). The Treasury Department's implementing Iranian Assets Control regulations provided that any attachment of Iranian assets occurring after the blocking order was invalid without a license from the Treasury. *See* 31 C.F.R. §§ 535.101, 535.201, 535.203(a), 535.310, 535.502 [illegible]

ments under both contracts were suspended and performance disrupted. (CR 1, Ex. 6 at 236-38, Ex. 7 at 261.) In the wake of these events, Hoffman, along with hundreds of other U.S. nationals, sought recourse in the courts of the United States. On February 13, 1980, Hoffman commenced an action for breach of contract against Iran in the United States District Court for the Central District of California and obtained a writ of attachment on Iranian assets.[10]

On or about January 19, 1981, representatives of the United States reached an agreement with Iran, through the Government of Algeria, which provided for the release of the American hostages. This agreement was embodied principally in two declarations to which the United States and Iran formally adhered: the General Declaration and the Claims Settlement Declaration. The General Declaration provided for the release of the American hostages in return for a number of actions and undertakings by the United States, including the termination of legal proceedings in U.S. courts against Iran and its state enterprises, the nullification of attachments of Iranian assets by U.S. claimants and the transfer of certain Iranian assets that had been frozen by Executive Order. The Claims Settlement Declaration provided for the formation of an Iran-United States Claims Tribunal to serve as a forum "for determination of claims by United States nationals or by the United States itself against Iran" as well as "claims against the United States, including both official contract claims and disputes arising under the Declarations."[11] Pursuant to Para-

judgment attachment, with the exception of the "entry of any judgment or of any decree or order of similar or analogous effect. . . ." 31 C.F.R. §§ 535.418, 535.504(a), (b)(1) (1980).

[10] This action, along with similar actions by other U.S. claimants, was assigned to Judge Kelleher. *See Security Pac. Nat'l Bank v. Iran*, 513 F. Supp. 864 (C.D. Cal. 1981).

WWW.NEWYORKCONVENTION.ORG

graph 7 of the General Declaration, one billion dollars of the transferred Iranian assets were to be placed in an Algerian-administered Security Account which was to be "used for the sole purpose of securing payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement" and which Iran was obligated to replenish.

On January 19, 1981, the day the Algiers Accords were issued and the last full day of his term of office, President Carter issued a series of executive orders "in order to implement agreements with the Government of Iran" for the transfer of various categories of Iranian assets to Iran and the establishment of certain escrow accounts.[12] Nonetheless, the Reagan Administration gave careful consideration in its first month of office as to whether the Algiers Accords should be implemented at all. Message to the Congress on Suspension of Litigation Against Iran, 1981 Pub. Papers 159 (Feb. 24, 1981) (reprinted in pertinent part in *Boeing*, 771 F.2d at 1284). Ultimately, President Reagan decided to implement the Algiers Accords, but "as a matter of policy without deciding whether the United States was bound to do so under international law."[13] On February 24,

Civiletti], *reprinted in The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 167, 173 (1981).

[12] Exec. Orders No. 12276-85, 46 Fed. Reg. 7,913-32 (1981). These Executive Orders were later implemented by amendments to the Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101, *et seq.* (1981). *See* 46 Fed. Reg. 14,330-37 (1981).

[13] M.B. Feldman, "Implementation of the Iranian Claims Settlement Agreement—Status, Issues, and Lessons: View From Government's Perspective," *Symposium on Private Investors Abroad: Problems and Solution* (1981) at 78 (CR 17, Ex. 2). Mr. Feldman, a former Deputy Legal Advisor of the U.S. State Department, was involved in the negotiation of the Accords, and was in charge of their implementation by the State Department for the first several

1981, President Reagan issued Executive Order No. 12294, which suspended all claims against Iran in U.S. courts that could be presented to the Claims Tribunal. 46 Fed. Reg. 14,411 (1981).

On April 30, 1981, in accordance with President Reagan's Executive Order, Judge Kelleher vacated Hoffman's attachments and dismissed the Hoffman action "*without prejudice* subject to the right of any party to move to reopen the action at any time prior to the entry and satisfaction of a judgment of the Arbitral Tribunal" if the "settlement failed of its essential purpose." 513 F. Supp. at 884. In July 1981, the Supreme Court sustained the Executive Orders and the Regulations by which the President had nullified attachments and suspended claims. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Court upheld the President's authority to nullify the attachments and order transfer of Iranian assets under the provisions of the IEEPA. 453 U.S. at 669-74. It upheld the suspension of claims pursuant to Executive Order based on the history of congressional acquiescence in Executive claims settlements and the character of the IEEPA and the so-called "Hostage Act," 22 U.S.C. § 1732, which Congress had enacted to allow the President authority to deal with international crises. 453 U.S. at 674-88. The Court, however, emphasized "the narrowness of our decision," was careful to state that it had not decided "that the President possesses plenary power to settle claims, even as against foreign governmental entities," and left open the issue of whether "the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation." 453 U.S. at 688-89 & n.14.

of State for Political Affairs) (no determination made that the

WWW.NEWYORKCONVENTION.ORG

2. *The Proceedings Before the Claims Tribunal*

Barred from the U.S. courts, its chosen forum, and faced with a deadline for filing a claim at The Hague,[14] on November 16, 1981, Hoffman filed two separate claims on the radio (Case No. 49) and ground station (Case No. 50) contracts with the newly-established Claims Tribunal at The Hague.[15] (CR 1, Exs. 1 and 2.) The claims were assigned to Chamber Two of the Tribunal, and shortly thereafter, GMI, Hoffman's successor, was substituted as claimant. (CR 10, Ex. 1 at 14-15) Iran filed counterclaims for breach of contract which far exceeded

---

[14] Claims Settlement Declaration, Art. III(4). Under the terms of the Executive Order No. 12294, if Hoffman had failed to file at the Claims Tribunal, it would have lost its claims forever.

[15] The Claims Settlement Declaration provided that "[t]he seat of the [Claims] Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States," Art. VI(1), and Iran and the United States considered changing the seat of the Tribunal (or one more of its chambers) to some other location. *See* Iranian Assets Lit. Rep. 3,119, 3,435-36, 3,490-91, 3,727-28 (1981). As noted by one of the State Department negotiators of the Algiers Accords, "[u]pon examination of Dutch law, it became apparent that awards rendered pursuant to the Claims Settlement Agreement would not meet certain procedural requirements for valid arbitral awards under the Dutch Civil Code." Feldman, *supra* note 13, at 98 (CR 17, Ex. 2). In an attempt to remedy this problem, it was initially proposed that provision be made for an "agreement among the United States, Iran, and the Netherlands to qualify the awards of the Claims Tribunal as valid awards under Dutch law without meeting those particular requirements." *Id.* When such an agreement failed to materialize, legislation was proposed that would have made Dutch law partially applicable to Claims Tribunal proceedings, while exempting the Tribunal from many Dutch procedural requirements and sharply limiting Dutch Court review. Bill, Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States, *reprinted in* 4 Iran-U.S. C.T.R. 306 (1983). Iran, however, objected to the proposed legislation, informing the Dutch Government that "the Tribunal is an international court in the strict sense and is essentially governed by public international law." (CR 7, Ex. 2 [illegible]

the claims in both cases. (CR 1, Ex. 3 at 106-08.)[16] Iran also sought possession of certain military radio communications equipment that, in accordance with U.S. export restrictions, had remained stored in the United States.[17]

On June 22, 1984, the Tribunal issued a consolidated final award in Cases No. 49-50, which stated in pertinent part:

> The Claimant, Gould Marketing, Inc., is obligated to pay the Respondent, Ministry of Defence of the Islamic Republic of Iran, U.S. $3,640,247.13.
>
> The Counterclaims are dismissed on the merits.
>
> . . . .
>
> The Claimant, Gould Marketing, Inc., is obligated to make available to the Respondent, Ministry of Defence of the Islamic Republic of Iran, the 21 VCS radios, the two ARC radios, the teleprinter, the one

---

would constitute a "violation of established principles of international law." (*Id.* at 132.) As a result, the proposed Dutch legislation was never enacted and the Claims Tribunal continued to act outside of the mandatory requirements of Dutch arbitration law. (*See infra* pp. 43-48.)

[16] Hoffman objected to the Claims Tribunal's jurisdiction over the counterclaims, except as a basis for set off against a claim, asserting that the Tribunal did not have jurisdiction under the Algiers Accords to render a positive award in favor of Iran. On July 27, 1983, the Claims Tribunal issued an interlocutory award in Case No. 49 which found that it had jurisdiction over affirmative counterclaims exceeding the amount of a claim. 3 Iran-U.S. C.T.R. at 151-52 (CR 1, Ex. 6 at 235).

[17] *See* 3 Iran-U.S. C.T.R. at 154 (CR 1, Ex. 6 at 240). Gould's application for a license to export these items to Iran in 1981 was refused by the Office of Munitions Control for the stated reason that "[c]urrent U.S. policy precludes issuance [illegible] for Munitions List items destined for Iran." (CR [illegible] export of these items to Iran from the United States is still prohibited under U.S. export laws. Pursuant to 22 U.S.C.A. § 2780 (Supp. IV 1986), all items on the United States Munitions List (defense articles,

WWW.NEWYORKCONVENTION.ORG

> front panel assembly and the miscellaneous equipment and materials acquired under the contract involved in case number 50 which were not returned for credit or economically disposed of and therefore belong to the Respondent.

6 Iran-U.S. C.T.R. at 288 (CR 1, Ex. 7 at 286-287). As indicated by the award, the Claims Tribunal dismissed in their entirety all of Iran's counterclaims. *Id.* at 282-83, 288 (CR 1, Ex. 7 at 278, 286). Nonetheless, based on an interim award in which, over the objections of both parties, it had found that the radio contract had been terminated,[18] the Claims Tribunal undertook an "equitable accounting" and determined that Iran was entitled to reimbursement of funds on the Tribunal-terminated radio contract, as is reflected in the award.[19]

As noted above, awards in favor of U.S. nationals are paid out of the Security Account. The Algiers Accords, however, are silent as to any mechanism for the enforcement of awards in favor of Iran. On July 19, 1985, Iran filed a "Request for Interpretation" of the Algiers Accords with the Full Tribunal,[20] in which it argued that the United States was required to satisfy awards rendered in favor of Iran against nationals of the United States, including the GMI award.[21] On May 4, 1987, the Full Tribunal concluded that it:

> cannot find that any obligation of the United States to satisfy Tribunal awards against its nationals flows from the "international" character of the Tribunal, or from any principle of customary international law based on the United States having been a party to the treaty that established the Tribunal.[22]

In so holding, the Claims Tribunal rejected Iran's contention that "[t]he terms 'final' and 'binding,' when used in instruments relating to international arbitration . . . mean that an award is self-enforcing." *Id.* at 329 (CR 4, Ex. 6 at 8) (ER at 39). The Claims Tribunal reasoned that "in establishing a Security Account as the source for payment of awards against . . . Iran" while "not imposing an identical obligation . . . upon the United States," the parties to the Algiers Accords "clearly contemplated something other than parity of treatment of the two States Parties as regards enforcement mechanisms." *Id.* (CR 4, Ex. 6 at 9) (ER at 40). Finally, the Claims Tribunal found it had "no authority under the Algiers Declarations to prescribe the means by which each of the States provides for . . . enforcement [of Tribunal Awards]," although it believed it to be "incumbent on each State Party to provide some procedure or mecha-

---

not be exported to any country which the Secretary of State has determined has repeatedly provided support for acts of international terrorism. The Secretary of State made such a determination with regard to Iran on January 23, 1984, 49 Fed. Reg. 2,836 (1984), which is still in effect.

[18] Since both parties represented that the contract was still in force and had not presented a claim of *force majeure* to the Claims Tribunal for decision, the Claims Tribunal clearly exceeded its mandate in finding that the radio contract terminated as a result of the continued existence of *force majeure* conditions in Iran. 3 Iran-U.S. C.T.R. at 152-54 (CR 1, Ex. 6 at 236-40). *See also* Pre-Hearing Brief of Iran with regard to Interlocutory Award in Case No. 49, filed October 27, 1983 (CR 4, Ex. 4 at 37). The Claims Tribunal also found in the interim award that Iran was not responsible for the conditions that gave rise to *force majeure*. 3 Iran-U.S. C.T.R. at 152-53 (CR 1, Ex. 6 at 236-37).

[19] 6 Iran-U.S. C.T.R. at 273-75, 282 (1984) (CR 1, Ex. 7 at 261-64, 277). The Tribunal decided that GMI owed Iran $4,413,593.06 in Case 49 and that Iran owed GMI $773,345.93 in Case 50. The Tribunal combined the awards, resulting in a net amount payable to

[20] The Full Tribunal, consisting of all nine [illegible] so-called "interpretive" claims filed by either Iran or the United States. Claims Settlement Declaration, Art. II(3).

[21] Request of the Islamic Republic of Iran for Interpretation, Iran-U.S. Claims Tribunal, Case A/21, July 1985, *reprinted in* Iranian Assets Lit. Rep. 10,897, 10,901-02 (1985).

United States
Page 7 of 39

WWW.NEWYORKCONVENTION.ORG

nism" for enforcement in its national jurisdiction. *Id.* at 331 (CR 4, Ex. 6 at 11) (ER at 42). To date, the U.S. Congress has not been presented with proposed legislation providing for the enforcement of Claims Tribunal awards against U.S. nationals.

C. The Disposition in the Court Below

On June 9, 1987, Iran filed a "Petition For Order Confirming Arbitrial [sic] Award" in the United States District Court for the Central District of California seeking judicial confirmation of the award rendered by the Claims Tribunal against GMI and in favor of Iran. (CR 1.) The petition names as "respondents" GMI, as well as Gould, Hoffman, Gould International and "Does One through Ten." Iran's petition alleges that Gould and Gould International are *alter egos* of GMI and seeks an order confirming the award "as against each and all of the respondents," including specific performance of the award's requirement that GMI provide certain military communications equipment to Iran.

On July 31, 1987, the Gould Respondents moved for dismissal, contending that the district court lacked subject matter jurisdiction to entertain a proceeding brought by a foreign government which is not recognized by the United States;[23] that the district court lacked subject matter jurisdiction to enforce the award under the Claims Settlement Declaration because the Algiers Accords were not self-executing; and that the award of the Claims Tribunal was not subject to recognition or enforcement under the terms of the New York Convention because there had been no voluntary written agreement

[23] The District Court for the Southern District of New York subsequently dismissed a case brought by Iran on this basis. *National Petrochem. Co. v. The M/T Stolt Sheaf*, 671 F. Supp. 1009 (S.D.N.Y. 1987). The decision is presently on appeal to the U.S. Court of

to arbitrate as required by Article II and the Claims Tribunal proceedings at The Hague were not governed by a national arbitration law, which due to its location would be that of the Netherlands.[24]

On January 14, 1988, the Gould Respondents' motion was denied in part and granted in part by the district court. (CR 12.) On the issue of Iranian access to U.S. courts, the district court held that, despite the nonrecognition by the United States of the present government of Iran, a U.S. Justice Department Statement of Interest requesting that Iran be allowed access to U.S. courts for the purpose of seeking to enforce the Claims Tribunal award (CR 5) was dispositive, and thereby "end[ed] the inquiry." (CR 12 at 3.) With respect to the two alleged bases for federal subject matter jurisdiction, the district court declined to find the Algiers Accords self-executing, determining that this Court's holding in *Boeing* was controlling on the issue. (*Id.* at 4-5.) The district court held that it did have jurisdiction to confirm the Claims Tribunal award under the New York Convention, however, finding that the Algiers Accords themselves constituted the requisite "agreement in writing" and that the "interest in effective arbitral proceedings" should override what it termed a "form v. substance" defense concerning the Claims Tribunal's failure to apply a national arbitration law. (CR 12 at 7.)[25]

[24] Gould also asserted that, even if the award were enforceable, Iran's failure to seek to compel respondents other than Hoffman to participate in the proceedings before the Claims Tribunal barred Iran from attempting to have these parties adjudged liable to Iran on an *alter ego* theory. *See Hidrocarburos y Derivados, C.A. v. Lemos*, 453 F. Supp. 160 (S.D.N.Y. 1977). In addition, Gould raised certain defects in Iran's petition, which did not comply with the requirement that an application under the Federal Arbitration Act be made and heard in the manner provided by law for the making and hearing of motions. *See, e.g., Interior Finish Contractors Ass'n v. Drywall Finishers*, 625 F. Supp. 1233 (E.D. Pa. 1985). These

NEWYORKCONVENTION.ORG

United States
Page 8 of 39

On February 9, 1988, Gould moved for certification of an immediate appeal to this Court, pursuant to 28 U.S.C. § 1292(b) (1982), of that portion of the district court's order of January 14, 1988 which held the award of the Claims Tribunal to be subject to enforcement under the New York Convention. At a status conference held on February 10, 1988, during which the district court stated its intention to certify an appeal, Iran orally moved for certification of the issue of whether the Algiers Accords are self-executing. (Hearing Tr. 2/10/88.) In an amended order issued on March 3, 1988, the district court certified both questions for an immediate appeal. (CR 22.) On April 13, 1988, in separate orders, this Court granted the petitions of both Gould and Iran.

STANDARD OF REVIEW

The issues raised in these appeals are issues of law which this Court reviews de novo. *See Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982).

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1331 TO CONFIRM THE AWARD BECAUSE THE ALGIERS ACCORDS ARE NOT SELF-EXECUTING AND DO NOT PROVIDE FOR FEDERAL JURISDICTION

A. This Court's Decision In *Islamic Republic of Iran v. Boeing Co.* Is Dispositive

Both Iran and the United States concede that, unless the Algiers Accords can be deemed to be self-executing, they cannot provide a basis for federal question subject matter jurisdiction under 28 U.S.C. § 1331.[26] This is because "[i]f the Accords are not self-executing, they are merely executory agreements between two nations and have no effect on domestic law absent additional governmental action." *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985), *cert. dismissed*, 107 S. Ct. 450 (1986). The Court of Appeal's answer to this question, in *Boeing*, is dispositive; it concluded "that the language, purpose, and intention behind the Accords was to make them executory agreements, and that they are not self-executing, either in whole or in part." *Id.* at 1284. The district court, expressly adhering to *Boeing*, therefore properly held that it lacked federal question subject matter jurisdiction to enforce the Claims Tribunal award under 28 U.S.C. § 1331. (CR 12 at 4-5.)

The question before the Court of Appeals in *Boeing* was the domestic effect of the Algiers Accords' provision that questions concerning their interpretation or application were to be decided by the Claims Tribunal. Claims Settlement Declaration, Art. II(3). The Court of Appeals first concluded that the "critical" factor in determining whether an Executive Agreement is self-executing is "the purposes of the [Executive Agreement] and the objectives of its creators," and therefore examined "the language and intent of the Accords" in reaching its decision. 771 F.2d at 1283. *See People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). The Court of Appeals reasoned that the key provisions of the Algiers Accords are "couched in executory language," and their "effectiveness . . . was contingent on the receipt of statements of adherence" from Iran and the United

---

enforced against defendants other than GMI on the theory that they were *alter egos*, and requested a status conference with respect to the determination of which parties are properly bound by the award and GMI's affirmative defenses to enforcement. (*Id.*)

[26] *E.g.*, Brief for the United States as Amicus Curiae ("Amicus Brief") at 13; Appellant's Opening Brief ("Iran Br.") at 17. The

jurisdiction to enforce the award under the diversity statute, 28 U.S.C. § 1332(a)(4) (1982). Amicus Br. at [illegible] Government correctly notes that "this point was no[illegible]an." *Id.* Since Iran did not plead the existence of diversity jurisdiction, the district court had no power to award the relief to which the Government suggests Iran might have been entitled. "Jurisdiction may not be sustained on a theory that the plaintiff [illegible]

WWW.NEWYORKCONVENTION.ORG

States. *Id.* at 1283, *citing* General Declaration ¶ 6. Of equal significance, in the U.S. Statement of Adherence itself, "President Carter did not make the Accords United States law, but only made them legally binding on the United States as a sovereign." *Boeing*, 771 F.2d at 1284. *Accord Electronic Data Sys. Corp. Iran v. Social Sec. Org.*, 651 F.2d 1007, 1009-10 & n.1 (5th Cir. 1981).[27]

The Court of Appeals' analysis in *Boeing* is further supported by the fact that the Reagan Administration conducted a thorough review of the Algiers Accords and, while the President ultimately "decided to implement them," he did so as a matter of policy without determining whether the Executive was bound to do so. *See* Feldman, *supra* note 13, at 75, 78-79; 771 F.2d at 1284. The resulting Executive Order which suspended claims against Iran in U.S. courts "in order to implement Article II of the Declaration of Algeria concerning the Settlement of Claims," 46 Fed. Reg. 14,111 (1981), was "an unnecessary statement if the suspension covenant was self-executing." 771 F.2d at 1284.

Iran's response to this Court's clear holding in *Boeing* is essentially to ignore it, contending that the Algiers Accords "if not initially self-executing . . . might [have] become so over time." Iran Br. at 25. The Government, which also disagrees with *Boeing*, attempts to dismiss the Court's holding as mere *dictum*, arguing that *Boeing* does not preclude a finding that a part of the Accords is self-executing, namely, the specific provision in Article IV(1) of the Claims Settlement Declaration for "final and binding" awards. Apart from the argument's lack of

[27] The Government argues that the Statements of Adherence were delivered to Algeria before it issued the two declarations. Amicus Br. at 27. This representation appears contradicted by the Opinion of Attorney General Civiletti, *supra* note 11, at 168 n.2, but more significantly, such questions of timing are irrelevant. The point is that the "interdependent commitments" (General Declaration, preamble) of the two governments were executory, as confirmed by the

substantive merit (see Part I.C. below), the Government cannot so easily dismiss the Court's holding, which was grounded in the "language, purpose, and intention" of the Algiers Accords taken as a whole.[28] Whether or not this Court could have decided *Boeing* on some narrower or alternative basis, the Court's holding is nonetheless controlling.[29] This Court's holding in *Boeing* on the "self-executing" question was, and remains, the law in this Circuit, and confirms that there is no federal subject matter jurisdiction under the terms of the Claims Settlement Declaration.

B. *Dames & Moore v. Regan* Is Fully Consistent With The *Boeing* Holding That The Accords Are Not Self-Executing

Iran's primary argument, that *Dames & Moore* actually holds that the Algiers Accords *are* self-executing (Iran Br., Part IV.A.), not surprisingly finds no support in the Government's Amicus Brief. As noted above

[28] The district court dismissed the Government's "dictum" argument by observing that "the view of *Iran v. Boeing* is probably quite a bit different from a soft chair in DOJ headquarters than it is from a district bench within the confines of the Ninth Circuit." (CR 12 at 5.) Dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that being peripheral, may not have received the full and careful consideration of the Court that uttered it." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) *quoting Sarnoff v. American Home Prod. Corp.*, 798 F.2d 1075, 1089 (7th Cir. 1986). It is thus, "a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *Crawley*, 837 F.2d at 292, *quoting Stover v. Stover*, 60 Md. App. 470, 476, 483 A.2d 783, 786 (1984); *see Dragor Shipping Corp. v. Union Tank Car Co.*, 371 F.2d 722, 726 (9th Cir. 1967); *United States v. Adamson*, 665 F.2d 649, 656 n.19 (5th Cir. 1982) (en banc), *cert. denied*, 464 U.S. [illegible]. The holding of *Boeing* that "the language, purpose, and intention behind the [Algiers] Accords was to make them executory agreements, and that they are not self-executing, either in whole or in part," simply cannot be termed dictum by this standard.

[29] Only the full Court, sitting *en banc*, may overrule the decision

WWW.NEWYORKCONVENTION.ORG

United States
Page 10 of 39

(*supra*, p. 9), the *Dames & Moore* Court was careful to emphasize the narrowness of its decision (453 U.S. at 688), which nowhere ascribes any domestic effect to the provisions of the Algiers Accords which provided for the suspension of claims and nullification of attachments. Rather, *Dames & Moore* simply upheld the lawfulness of the President's Executive Orders implementing the Algiers Accords, based on a specific grant of Congressional authority and the executive power to compromise and settle claims against a foreign sovereign in response to a foreign crisis. 453 U.S. at 674, 686. As this Court noted in *Boeing*, such orders would have been "unnecessary . . . if the suspension covenant was self-executing." 771 F.2d at 1284. Finally, the Court of Appeals in *Boeing* was, of course, well aware of the *Dames & Moore* decision and obviously considered it in reaching its holding.

C. The Claims Settlement Declaration's Provision That The Awards Of The Claims Tribunal Shall Be "Final And Binding" Does Not Provide A Basis For Federal Question Jurisdiction In The Absence of Implementing Legislation

The Government asserts that the "final and binding" language of Art. IV(1) of the Claims Settlement Declaration is "inherently self-executing" and, indeed, that it is "specifically 'addressed to the judicial branch'" and "directs that branch to establish a private remedy in favor of parties seeking to enforce Tribunal awards." Yet *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976), the only authority cited by the Government for this point, held that "the provisions here in issue [in a resolution of the United Nations Security Council calling upon member states to have no dealings with South Africa] were *not* addressed to the judicial branch of our government" (*id.* at 851) and did "not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation" (*id.* at 850). (Emphasis

where it is not provided for in the treaty." *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976), *citing*, *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971). Moreover, the Government advances no authority supporting its novel assertion that, by means of an Executive Agreement with a foreign state, the President even has the power to "direct" the federal courts to "establish a private remedy" or expand the jurisdiction of the federal courts to entertain such a claim.[30]

1. *The Claims Tribunal Has Ruled That the Phrase "Final and Binding" as Used in the Claims Settlement Declaration is not Self-Enforcing*

Not only does the Claims Settlement Declaration fail to provide for federal jurisdiction, it provides no mechanism whatsoever for the enforcement of awards against U.S. nationals. The only provision of the Algiers Accords which specifically concerns enforcement of Claims Tribunal awards excludes the award in question here, providing that "[a]ny award which the Tribunal may render *against either government shall be enforceable against such government* in the courts of any nation in accordance with its laws." Claims Settlement Declaration, Art. IV(3) (emphasis added). Thus, Iran and the Government are constrained to argue that the Claims Settlement Declaration is made self-executing because it also provides more generally that awards of the Claims Tribunal "shall be final and binding". Article IV(1).[31]

---

[30] Amicus Br. at 19-20. *See* U.S. Const. art. III; *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658-60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955); *cf.*, *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985).

[31] Iran incorrectly cites *United States v. Pink*, 315 U.S. 203 (1942), in support of the proposition that an Executive Agreement requires no legislative implementation to be given legal effect by our courts. Iran Br. at 13-14. In *Pink*, the Court held the United

WWW.NEWYORKCONVENTION.ORG

United States
Page 11 of 39

This argument, however, is directly contrary to the Government's position at the Claims Tribunal, in Case A/21, that Article IV(3) is not self-enforcing. The Government's change of position in this case is also totally inconsistent with its practice with respect to other international agreements providing for the enforcement of foreign arbitral awards.[32]

At the Claims Tribunal, Iran made the same argument as the Government now makes concerning the import of the phrase "final and binding" in the Claims Settlement Declaration. In its response in Case A/21, the United States correctly pointed out that "Iran confuses the relatively simple concept of the 'final and binding' character of an arbitral award with the more complex issue of enforceability."[33] The United States went on to explain that "the ordinary meaning of the phrase 'final and binding' in arbitration practice is unrelated to award

nection with U.S. recognition of the Government of the Soviet Union. Although there is no discussion in *Pink* as to whether the Litvinov Assignment was self-executing, an *assignment* by its very nature is not executory.

[32] In light of the direct inconsistency in the Government's position, its contention that its newly-formed position should be "given great weight," Amicus Br. at 17-18, must be disregarded. According to the Restatement, "[c]ourts are more likely to defer to an Executive interpretation previously made in diplomatic negotiations with other countries, on the ground that the United States should speak with one voice, *than to one adopted by the Executive in relation to a case before the courts. . . .*" *Restatement (Third) of the Foreign Relations Law of the United States*, § 326, Reporters' Note 2 (1987) (emphasis added). The degree of deference due the views of the Government should be especially slight when, as here, the Government has advanced a construction of a treaty that is entirely inconsistent with views it expressed about that same treaty in another judicial forum (the Claims Tribunal), and when the Government has a potential pecuniary stake in the outcome of the litigation (Amicus Br. at 7).

[33] Response Of The United States To The Memorial Of The

enforcement issues. . . ." *id.* at 4; and it elaborated upon the nature of Iran's "confusion" (an attempt at confusion in which the Government joins in this case):

> The provision in Article IV(1) of the Claims Settlement Declaration making Tribunal awards "final and binding" *cannot substitute for specific provisions creating exceptional enforcement mechanisms. The ordinary meaning of this phrase simply does not support Iran's proposed interpretation.*

Id. at 17 (emphasis added).

The United States cited as further evidence to the Claims Tribunal that the term "final and binding" did not provide for enforcement of awards the "exceptional award enforcement mechanisms" contained in the Claims Settlement Declaration: the Iranian-funded Security Account established only to pay awards rendered in favor of U.S. claimants and the Claim Settlement Agreement's specific provision that "[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws."[34] The United States summarized its understanding of the Claims Settlement Declaration in terms highly relevant to this case:

> When read in the context of these many provisions explicitly setting forth exceptional award enforcement mechanisms, Article IV(1) ["final and binding"] cannot support the interpretation put forward by Iran. *These provisions confirm that the entry of*

[34] Claims Settlement Declaration, Art. IV(3). Elsewhere, the United States has recognized that even this provision of the Claims Settlement Declaration, which expressly provides for enforcement of awards against the United States "in the course of execution," is not self-executing, but would require legislative implementation. Thus, Attorney General Civiletti, in the legal opinion on the validity of the Algiers Accords prepared for President Carter, stated: "Any award made by the [Claims] Tribunal against the United States would create an obligation under international law. Such obligations

WWW.NEWYORKCONVENTION.ORG

United States
Page 12 of 39

> *a "final and binding" award does not by itself ensure satisfaction of that award* or relieve the successful party from having to pursue enforcement proceedings in national courts: if a 'final and binding' award carried such security with it, there would have been no need for Iran and the United States to enact exceptional award enforcement mechanisms. Furthermore, they demonstrate that Iran and the United States knew how to and did provide for exceptional enforcement mechanisms in the Algiers Declarations. Under the principle of *expressio unius est exclusio alterius, one must conclude that the absence in the Declarations of an exceptional enforcement mechanism for counterclaim and costs awards against U.S. nationals*—such as guaranteed satisfaction by the United States—*was intentional.*

Response of the United States, Case A/21, *supra* note 33, at 19-20 (Latin emphasized in original; other emphasis added).

The Government was correct: the "ordinary meaning" of the phrase "final and binding" simply does not support the meaning with which Iran and the Government now seek to invest it.[35] In light of the specific provisions in the Algiers Accords for enforcement of awards against Iran and the United States, it can only be concluded that Iran and the United States lacked any intent to provide for the enforceability of Tribunal awards rendered against U.S. claimants and, indeed, that they intentionally chose to omit such a provision.[36] The "final and

[35] The clear language of an international agreement controls, as it does in any contract, unless it results in an interpretation which is inconsistent with the intent of the parties. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). *See Tucker v. Alexandroff*, 183 U.S. 424, 436-37 (1902).

[36] If a written instrument "names the parties who come within its provisions, other unnamed parties are excluded." *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1035 (9th Cir.), *cert. denied*, 108 S. Ct. 503 (1987). *See Ford v. United States*, 273 U.S. 593, 611 (1927) (treaty interpretation permits "inference that that which

binding" language of Article IV(1) of the Claims Settlement Declaration, as the United States argued in Case A/21, cannot be stretched to embody within the Accords a remedy which Iran and the United States did not intend.

Finally, this issue has been laid to rest by the Claims Tribunal itself, which accepted the United States' construction of the "final and binding" language of Article IV(1) of the Claims Settlement Declaration. The Claims Tribunal's decision in Case A/21 states:

> The terms 'final' and 'binding', when used in instruments relating to international arbitration, *do not ordinarily mean that an award is self-enforcing. Rather, as is generally recognized, a 'final' and 'binding' award is one with which the parties must comply and which is ripe for enforcement.* Thus, when a party fails to comply voluntarily with a final and binding arbitral award, the other party is free to seek enforcement of the award through municipal court procedures. The Tribunal considers that *these terms as used in the Algiers Declarations should be given this ordinary and generally recognized meaning.*[37]

That the Claims Settlement Agreement provision for "final and binding awards" is not self-executing is conclusively demonstrated by the Claims Tribunal's concession that it "has no authority under the Algiers Declarations to prescribe the means by which each of the States provides for such enforcement." *Id.* at 331 (CR 4, Ex. 6 at 11) (ER at 42). If the means for enforcement of awards against U.S. nationals is not prescribed by the Algiers Accords, quite obviously the Accords are

narily implies that no other means of enfor[illegible] ...nded . . . ." *Securities Investor Protection Corp. v.* [illegible] U.S. 419 (1975); *Keaukaha-Panaewa Com. Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1221, 1223 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979).

WWW.NEWYORKCONVENTION.ORG

not self-executing in U.S. courts for purposes of the enforcement of such awards.[38]

2. *The Claims Tribunal's Ruling That the Provision for "Final and Binding" Awards Is Not Self-Enforcing Is Fully Consistent with Other International Agreements*

As recognized by the Claims Tribunal, the phrase "final and binding" in the arbitration context is hardly novel. Identical or similar language is employed in several treaties to which the United States is a party, and the consistent practice of the United States has been to view such agreements as *not* self-executing. Thus, for example, Article III of the New York Convention provides that "[e]ach Contracting State *shall recognize arbitral awards as binding and enforce them* in accordance with the rules of procedure of the territory where the award is relied upon. . . ." (Emphasis added.) The United States evidently did not view this provision as "self-executing", for it felt compelled to enact implementing legislation in the form of Chapter 2 to the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.* (1982).

The United States is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"),[39] another multilateral treaty providing for arbitration of international commercial disputes. Article 53(1) of the ICSID treaty provides:

[38] *See also Merrell Dow*, 106 S. Ct. at 3233 (suit "arises under the law that creates the cause of action" for purposes of Art. III). The inconsistency in the Government's current position is starkly revealed by its contention at the Claims Tribunal that the Accords do not even *obligate the United States* to provide a mechanism for enforcement, for example, by implementing legislation. U.S. Response, Case A/21, *supra* note 33, at 16. The United States noted that "[t]he Declarations do not create a United States-funded security account, do not provide special enforcement mechanisms for awards entered against U.S. or Iranian nationals, and do not require Iran or the United States to pass domestic legislation guaranteeing access to their courts for award enforcement purposes." *Id.*

> The award *shall be binding on the parties* and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. *Each party shall abide by and comply with* the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(Emphasis added.) The travaux préparatoires reveal a concern that, while Article 53 would ensure compliance by the contracting *states*, private parties would not be so bound.[40] For this reason, Article 54 provides:

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and *enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*

(Emphasis added.)

Nonetheless the United States again found it necessary to enact implementing legislation which provides that "[an] award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a

[40] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Vol. 2), Documents Concerning the Origin and the Formulation of the Convention, pt. 1, doc. 33, ¶ 74, at 574:

> Article IV, Section 14 of the Working Paper *provides that the award shall be final and binding on the parties* and that each party shall abide by the award and comply with it. *If the Convention had dealt with disputes between States, no further provision on enforceability of the award would have been necessary, since the parties to a dispute would be directly bound by the Convention and* could be expected to comply with their obligations thereunder. In any event, the relationships established would be entirely in the sphere of public international law. *However, the proposed Convention* [illegible] *between States, or State agencies, on the one hand, and investors on the other. It was therefore felt essential to include in the Working Paper a provision regarding the binding force and enforceability of awards in the municipal sphere.*

WWW.NEWYORKCONVENTION.ORG

right arising under a treaty of the United States . . . [and] shall be enforced . . . as if the award were a final judgment of court of general jurisdiction of one of the several States." 22 U.S.C. § 1650(a) (1982). The legislation further provides for exclusive federal jurisdiction regardless of the amount in controversy. *Id.* at § 1650(b) (1982).[41]

The United States has ratified yet a third multilateral arbitration treaty, the Inter-American Convention on Commercial Arbitration ("Panama Convention"),[42] Article IV of which provides:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules *shall have the force of a final judicial judgment.* Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties. (Emphasis added.)

As with the New York and ICSID Conventions, the United States determined that "[*n*]*ew legislation will be required . . . in order to implement the provisions of the Convention within the United States,*" and the U.S. will not deposit its instrument of ratification until Congress enacts the implementing legislation. Message from the President of the United States transmitting the Inter-American Convention on Commercial Arbitration, Senate Treaty Doc. No. 97-12, 97th Cong., 1st Sess. 1 (1981); and *see* Bill to Implement the Inter-American Convention on International Commercial Arbitration, S. 2204, 100th Cong., 2d Sess. (1988).

---

[41] Article 69 of ICSID provides that "[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories."

[42] 14 Int'l Leg. Mat. 336 (1975). The President submitted the

Finally, both the Government and Iran rely for support on a line of cases decided under Chapter 1 of the Federal Arbitration Act, which addresses the issue of whether "final and binding" language in agreements to arbitrate satisfy the requirement of section 9 of the Arbitration Act, 9 U.S.C. § 9 (1982), that there be an agreement to entry of judgment as a precondition to confirmation and enforcement of any award under that chapter.[43] These authorities hardly provide that the existence of the words "final and binding" in an instrument providing for arbitration is, in and of itself and in the absence of any implementing legislation, sufficient to vest a federal court with the power to enforce an award.

In short, whether employed in individual arbitration clauses, arbitral conventions, or the Claims Settlement Declaration, the phrase "final and binding," as the Claims Tribunal held in Case A/21, means only that awards having that character are ripe for enforcement under municipal law. The Government refers to none of these multilateral arbitration treaties in arguing that the phrase "final and binding" creates enforceable rights and is self-executing. Instead, the Government marshalls a lengthy body of treaties dealing with subjects far removed from arbitration to create the impression that our courts commonly hold instruments such as the Algiers

---

[43] Amicus Br. at 28-29; Iran Br. at 15-16. The cases relied upon by Iran and the Government are for the most part efforts to confine *Varley v. Tarrytown Assoc.*, 477 F.2d 208 (2d Cir. 1973), to its facts. *Varley* held an award unenforceable under the Arbitration Act because the parties' agreement did not provide for entry of judgment, as required by 9 U.S.C. § 9. Iran did not seek to enforce the award of the Claims Tribunal by mea[illegible] 9, and that provision has nothing to do with this ca[illegible]nly one of the cited cases involved a foreign arbitral award, *Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc.*, 418 F. Supp. 982 (E.D. Mich. 1976). Although the award at issue in that case appears to have qualified for enforcement under the New York Con-

WWW.NEWYORKCONVENTION.ORG

Accords to be self-executing. *See* Amicus Br. at 12-13 and 19 n.14. The authorities cited by the Government simply do not support its position.[44]

II. THE DECISION OF THE CLAIMS TRIBUNAL IS NOT AN ARBITRAL AWARD SUBJECT TO RECOGNITION AND ENFORCEMENT UNDER THE NEW YORK CONVENTION

While the district court rejected Iran's contention that the Algiers Accords were self-executing, it nonetheless held that jurisdiction to enforce Claims Tribunal awards did exist under the New York Convention. 9 U.S.C. § 201, *et seq.* (1982). The New York Convention, however, is available only to enforce awards rendered in arbitrations voluntarily agreed to pursuant to a written agreement between the parties. The district court found that the Algiers Accords themselves constituted the requisite "agreement in writing," and that GMI was bound to the "arrangement" through the exercise of the President's sovereign authority. (CR 12 at 6). Neither Hoffman nor GMI were parties to the Algiers Accords, however, and their resort to the Claims Tribunal was imposed upon them, after their chosen forum to resolve their dispute with Iran, the courts of the United States, was barred.

[44] Thus, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), while acknowledging that a truly self-executing treaty may create enforceable rights without legislative action, goes on to state: "Treaties of the United States, though the law of the land, do *not* generally create rights that are privately enforceable in courts." 726 F.2d at 808 (Bork, J., concurring) (emphasis added). Judge Bork proceeded to find that *none* of the five treaties in force relied upon by the plaintiff was self-executing. *Id.* at 808-810. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) and *Whitney v. Robertson*, 124 U.S. 190 (1888), also cited by the Government, both held the treaties at issue not to be self-executing. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985); *Fok Young Yo v. United States*, 185 U.S. 296 (1902); and *Chew Heong v. United States*, 112 U.S. 536

Of equal importance is the fact that awards rendered by the Claims Tribunal do not qualify as "awards made in the territory of another Contracting State," a precondition to all enforcement proceedings in the United States under the New York Convention. See *infra* note 57. While the Claims Tribunal sits at The Hague, and the Netherlands is party to the New York Convention, this does not in itself qualify Tribunal awards as "Dutch" awards entitled to recognition. The district court dismissed this point as "form v. substance" and opted for "the overriding judicial interest in effective arbitral proceedings." (CR 12 at 7.) The New York Convention, however, "presupposes some measure of judicial review in the country of arbitration,"[45] and, the only court previously to address the issue, the High Court of England in *Dallal*, concluded that the New York Convention is not available to enforce Claims Tribunal awards. The New York Convention simply is an inappropriate mechanism to enforce an award of an international claims tribunal which operates outside the ambit of national arbitration law.

A. The New York Convention Applies Only To Awards Rendered By Arbitral Tribunnals Chosen By The Parties Pursuant To A Written Agreement To Resolve Disputes Through Arbitration

Among the requirements specified in the New York Convention is that the party seeking confirmation and enforcement of a foreign arbitral award file with the court "[t]he original agreement referred to in article II . . . . or a duly certified copy thereof." New York Conveniton, Art. IV(1)(b). Article II, in turn, requires that there be "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship,

[45] Official Report of the United States Delegation to the United

WWW.NEWYORKCONVENTION.ORG

United States
Page 16 of 39

whether contractual or not, concerning a subject matter capable of settlement of arbitration." *Id.*, Art. II(1).[46]

Thus, under the Convention and the implementing legislation, not every "arbitral award" rendered abroad is entitled to recognition and enforcement. Instead, such an "award" must have been rendered by an arbitral tribunal deriving its jurisdiction from the consent of the parties, evidenced by a writing signed by both of them. The requirement that the party seeking enforcement under the Convention present the court with a written arbitration agreement is no mere formality.[47] It serves to establish that the proceeding out of which the award issued was, in fact, a true arbitration and not an adjudication of some other kind. In this instance, the Claims Tribunal did not derive its jurisdiction from the consent of the parties, as confirmed by the absence of the required "agreement in writing" signed by Hoffman or GMI. Rather, the Claims Tribunal proceeding was imposed upon Hoffman as a result of the President's implementation of the Algiers Accords.

1. *The United States Implemented the New York Convention with the Understanding That It Applied Only to Proceedings to Which the Parties Had Voluntarily Agreed*

The legislative history of the Senate's ratification of the New York Convention, and of the amendments to the Federal Arbitration Act implementing it, make clear that the "Convention applies only in those cases where

[46] Article II also provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract, or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.*, Art. II(2).

[47] *See* A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* at 192-207 (1981).

the persons involved have voluntarily accepted arbitration."[48] The State Department spokesman who appeared before the Senate Committee on Foreign Relations in support of Senate ratification, Ambassador Richard D. Kearney, highlighted this point: "[T]here is nothing in the convention which imposes any burden on an individual which he had not *voluntarily agreed* to assume."[49] Ambassador Kearney elaborated on this point in hearings held before the same Committee when it was considering legislation to implement the Convention:

> The Chairman: Whether or not this comes into effect at all depends upon an agreement entered into voluntarily b[y] the parties. Is that correct?
>
> Mr. Kearney: That is correct, sir.
>
> The Chairman: In other words, you are not imposing this on people who do not wish any particular procedure; is that correct?
>
> Mr. Kearney: That is absolutely correct.
>
> . . . .
>
> The Chairman: So there is no possible opposition based upon the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?
>
> Mr. Kearney: That is correct.[50]

[48] S. Exec. Rep. No. 10, 90th Cong., 2d Sess. (Sept. 27, 1968) at 1.

[49] *Id.*, App. at 3 (statement of Richard D. Kearney) (emphasis added).

[50] S. Rep. No. 702, 91st Cong., 2d Sess. (1970), App. at 10 (statement of Richard D. Kearney). In considering S. 3274, which amended Title 9 of the U.S. Code to provide for a new Chapter 2 devoted exclusively to the New York Convention, Representative Fish likewise "emphasized" the following point: "[U]nder the proposal before us, no person would be compelled to enter into any arbitration agreement nor required to submit to the jurisdiction of any court under circumstances in which he himself had not voluntarily agreed to the court's jurisdiction. As a result, this bill is directed only toward implementing procedures which the parties to arbitration agreements have themselves agreed on." 116 Cong. [illegible]

WWW.NEWYORKCONVENTION.ORG

United States
Page 17 of 39

Any doubt as to the applicability of the New York Convention to awards of the Claims Tribunal is resolved by the Official Report of the United States Delegation to the United Nations Conference on International Arbitration, which states:

> It is definitely understood . . . that the convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. *If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently would not come within the purview of the convention.*[51]

Clearly, then, because the Claims Tribunal is a body to which Hoffman was "obligated" to refer its claims against Iran (upon penalty of forfeiting them entirely),[52] and particularly as to Hoffman and other U.S. claimants whose actions in U.S. courts were suspended by the President's Executive Order, the Claims Tribunal's proceedings are, indeed, "judicial rather than arbitral in character." Thus, the Tribunal's award does "not come within the purview of the [C]onvention."

2. *Neither Hoffman Nor GMI Was a Party to Any Agreement To Submit Its Disputes with Iran to the Claims Tribunal*

The district court, incorrectly, believed that *Dames & Moore* required it to find that the Algiers Accords themselves constituted the "agreement in writing" called for

[51] *Quoted in* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049, 1061 n.54 (1961).

[52] The Claims Settlement Declaration established a time limit for the submission of claims to the Claims Tribunal, Art. III(4), and the Executive Order which suspended the Hoffman/GMI claim effectively left those claims in perpetual suspension absent a filing with the Claims Tribunal by the specified deadline. Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981).

in Article II of the New York Convention.[53] In *Dames & Moore* the Court upheld the power of the President to "suspend" claims filed in U.S. courts against Iran and to transfer abroad Iranian assets previously frozen by Presidential orders. The Court did not decide whether the President had, or validly exercised, the power to *agree* on behalf of U.S. nationals to arbitration of their claims at The Hague, or whether such an agreement could be termed voluntary under the New York Convention.

Because of the consensual nature of arbitration (or at least arbitration within the scope of the New York Convention), to find that the President had the power to execute an "agreement" to arbitrate on behalf of Hoffman would require a determination that the Government acted as Hoffman's authorized agent, and was subject to Hoffman's direction and control.[54] Iran cannot seriously maintain that Hoffman authorized the President to enter into an agreement with Iran referring its disputes to arbitration before the Claims Tribunal or that Hoffman had any control over the President in that regard. Indeed, at the time the Algiers Accords were issued,

[53] The district court based its holding at least in part on a belief that "[t]he Claims Settlement Declaration is specific that it constitutes a written agreement between the nations on their own behalf and on behalf of their nationals." (CR 12 at 6.) No such provision appears in the Claims Settlement Declaration or elsewhere in the Algiers Accords. The district court appears to have confused the Claims Settlement Declaration with an amendment to the administrative rules which the Claims Tribunal promulgated long after Hoffman had filed its claims. *See infra* pp. 36-37.

[54] It is settled that "ordinary contract and agency principles determine which parties are bound by an arbitration agreement . . ." under the Convention. *Oriental Commercial and Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985). Where there is no agreement with or control over the agent by the principal, there is no agency. *Restatement (Second) of Agency*, §§ 1, 5 (1981); *Nelson v. Serwold*, 687 F.2d 278, 28[illegible] (9th Cir. 1982); *Orchards v. United States*, 4 Cl. Ct. 601, 607-08, aff'd, [illegible] F.2d 1571 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

WWW.NEWYORKCONVENTION.ORG

United States
Page 18 of 39

UNITED STATES ACCESSION TO THE NEW YORK CONVENTION

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

9 U.S.C. § 203

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

WWW.NEWYORKCONVENTION.ORG

shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law, to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

WWW.NEWYORKCONVENTION.ORG

ARTICLES I THROUGH VI OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, NEW YORK, JUNE 10, 1958.

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless if finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforceemnt of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation

WWW.NEWYORKCONVENTION.ORG

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the

corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

Initialed on January 19, 1981
by Warren M. Christopher

Deputy Secretary of State of the Government of the United States By virtue of the powers vested in him by his Government as deposited with the Government of Algeria

WWW.NEWYORKCONVENTION.ORG

transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the

arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Article V

The 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.

WWW.NEWYORKCONVENTION.ORG

ADDENDUM

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 (Claims Settlement Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

Article II

1. 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 occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including

WWW.NEWYORKCONVENTION.ORG

ADDENDUM

WWW.NEWYORKCONVENTION.ORG

STATEMENT OF RELATED CASES

Respondents/Cross-Appellants are aware of no related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1988, true copies of the foregoing Brief for Respondents Cross-Appellants and Respondents/Cross-Appellants' Supplemental Excerpts of Record were served by first class mail (postage prepaid) upon the following:

Anthony J. Van Patten, Esq.
Arndt & Van Patten
Suite 1420 City National Bank Building
606 South Olive Street
Los Angeles, CA 90014

Richard E.M. Brakefield, Esq.
117 East Eighth Street
Suite 804
Long Beach, CA 90813

Michael F. Hertz, Esq.
Joan E. Hartman, Esq.
Civil Division, U.S. Department of Justice
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044

MARC S. PALAY

WWW.NEWYORKCONVENTION.ORG

Draft of the Dutch Government's Proposed Convention was that the Draft disregarded the international character of the Tribunal awards and subjected them to Dutch Law, while facilitating the enforcement of the Tribunal awards in The Netherlands and in other countries by waiving the principle requiring an arbitral agreement between the litigants in each case, thereby being consistent with U.S. objectives and inconsistent with Iran's stand and interests.[69]

In sum, Iran has steadfastly maintained that the Claims Tribunal is governed by international law, while resisting attempts to apply Dutch arbitration law to Claims Tribunal proceedings as unjustified "interference" and in "violation of established principles of international law." *Id.* at 411. In blocking any attempt to provide national supervision of the Claims Tribunal, Iran was keenly aware that such supervision was essential to the enforcement of Claims Tribunal awards under the New York Convention. Iran cannot have it both ways.[70] The New York Convention simply is not an appropriate vehicle to enforce the international awards of the Claims Tribunal.

[69] Eshragh Letter, *supra* p. 41, at 405-06, 408.

[70] The Government argues, without authority, that GMI should be "estopped" from asserting that the Claims Tribunal award against it is not subject to Dutch law because it did not move within the three month statutory period for its nullification or otherwise appeal in the Netherlands. Amicus Br. at 34-35. In light of Iran's position that any attempt to assert such review over Tribunal proceedings would violate international law, coupled with that fact that it is Iran which has thwarted legislation that would have made at least partial review available to GMI, it is Iran that should be precluded from arguing that Dutch law has any application to the proceedings of the Tribunal or the GMI award, assuming that is even its contention.

CONCLUSION

Congress, not the courts, is the proper forum to which Iran and the Government should address their arguments concerning the enforcement of awards of the Claims Tribunal against U.S. nationals. This Court should hold that the district court lacks subject matter jurisdiction to confirm or enforce the award of the Claims Tribunal under the terms of the Algiers Accords and New York Convention, and remand this case to the district court with a direction to enter a judgment of dismissal.

Respectfully submitted,

MARC S. PALAY
THOMAS L. ABRAMS
T. JAY BARRYMORE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Attorneys for Respondents/Cross-Appellants

August 22, 1988

WWW.NEWYORKCONVENTION.ORG

a Deputy Legal Adviser of the State Department who participated in the negotiation of the Claims Settlement Declaration with Iran:

> Upon examination of Dutch law, it became apparent that *awards rendered pursuant to the Claims Settlement Agreement would not meet certain procedural requirements for valid arbitral awards under the Dutch Civil Code.* Therefore, provision will have to be made in an agreement among the United States, Iran, and the Netherlands *to qualify* the awards of the Claims Tribunal as valid awards under Dutch law without meeting those particular requirements. Such an agreement can be approved rather quickly by the Dutch Parliament.

Feldman, *supra* note 13, at 98 (footnote omitted) (emphasis added).

Such an agreement, however, was never reached. At the time of the creation of the Claims Tribunal, the Government of the Netherlands attempted, but failed, to secure the agreement of the United States and Iran to a written document setting forth "the nature of the arbitral proceedings, the Tribunal's judicial proceedings and the awards made by the Tribunal."[68] Thereafter, because of opposition by Iran, proposed legislation that would have exempted Claims Tribunal proceedings from most of the mandatory provision of Dutch arbitration law, while still making them "Dutch," was never enacted. *See* LDVP Opinion at 18-20. According to the *aide memoire* which accompanied the draft legislation:

> It was assumed in the proposals which the Netherlands made in connection with the preparations for the reception of the Tribunal in the Netherlands that the Tribunal would operate as an arbitral body in hearing civil disputes and that Dutch law on arbitration would therefore apply. If this were the case, the awards could if necessary be enforced in the country where they were made and, in principle, also in other countries pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. . . .
>
> *Nevertheless, such a viewpoint could be contested, since the arbitration takes place under an international instrument, the Algerian Declarations. Citizens of the United States and Iran are obliged by the Declaration to submit any claims they have to the Tribunal. Given the absence of prior contractual agreement between the parties concerned in each individual case and the international nature of the agreement between States underlying the arbitration, doubts may arise as to whether this is indeed arbitration within the meaning of Dutch law.*

Id. at 309-10.

Iran objected to such Dutch "interference," and stated to the Dutch Government that:

> The Iranian Government believes that the Tribunal is an international court in the strict sense and is essentially governed by public international law. The Tribunal, being set up pursuant to an international agreement, is international not only in origin and source but also in terms of object and function. . . . All these facts affirm the international character of the Tribunal and the awards rendered by it. It is thus surprising to find that the Bill describes the claims before the Tribunal as civil law disputes and this international arbitration as arbitration within the meaning of Dutch Law.
>
> . . . .
>
> The Explanatory Notes and the Dutch Foreign Ministry's letter both refer to the Draft of the Dutch Government's Proposed Convention and Iran's non-acceptance as a reason for presentation of the Bill. However, the question has not been raised as to why the Iranian Government did not accept the Draft. *The principal reason behind non-acceptance of the*

[68] Ministers of Justice and Foreign Affairs, the Netherlands, Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States: Explanatory Notes, 4 Iran-U.S. C.T.R. 308, 309 (CR 17, Ex. 1 at 22) (Supp. ER, Tab F) (emphasis added).

WWW.NEWYORKCONVENTION.ORG

notes that neither the General Declaration nor the Claims Settlement Declaration make any reference to the laws of the Netherlands, and that the Claims Tribunal's proceedings are not in conformity with mandatory provisions of Dutch arbitration law.[67] These include the requirement that, under Article 623 of the Dutch Code of Civil Procedure, an arbitration agreement concluded after a dispute has arisen be in writing and signed by the parties, before a Notary, that it specify the subject matter of the dispute, and that it set forth the names and domiciles of the arbitrators. *Id.* at 12-13. The LVDP Opinion concludes that, in the absence of compliance with these mandatory requirements, "it is likely that a Dutch

---

testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Federal appellate courts thus enjoy "the same freedom to examine foreign-law materials as is given to the trial courts under the second sentence of the new rule [44.1]. . . . [and] attorneys should be permitted to present new foreign-law materials on appeal." 9 Wright & Miller, *Federal Practice and Procedure*, Civil § 2446 (1971), at 415. *Stuart v. United States*, 813 F.2d 243, 251 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 1592 (1988) ("We realize that we may consider foreign law materials at any time, whether or not submitted by a party, and that late submissions often have been considered in cases interpreting treaties. . . . Absent special circumstances, parties should present issues of foreign law in their appellate briefs at the latest.") Gould raised the issue of the applicability of the law of the Netherlands to the award of the Claims Tribunal below. In addition, the United States, as amicus curiae, has interjected new issues concerning the law of the Netherlands into this case on appeal.

[67] LVDP Opinion at 5. The Government maintains that the GMI award is subject to the new Netherlands arbitration statute which entered into effect on December 1, 1986 and relaxed certain of the mandatory requirements of the prior law. Dutch Code of Civil Procedure, Book IV, Title 1 (1986). The Government bases this argument upon a paraphrase of the applicable provisions of the new statute. Amicus Br. at 33-34. The new act, however, provides that it "shall apply to arbitrations pending on the day on which this Act enters into force." Art. II(1). *See* LVDP Opinion at 10. "The Iran-

court applying Dutch law should decide that the arbitration agreement underlying the Gould Award is a nullity." *Id.* at 14.

The LVDP Opinion notes several other areas in which the proceedings of the Claims Tribunal are not in conformity with the Dutch Code of Civil Procedure: (1) under Article 625, an arbitration agreement must specify the period of time within which the arbitrators must render their award; the Claims Settlement Declaration fixes no such period of time (*id.* at 17); (2) a Dutch arbitration award may be enforced in the Netherlands only after obtaining leave for enforcement from the President of the District Court in which the award has been filed; under the terms of the Algiers Accords, as implemented, awards rendered against Iran are paid directly out of a Security Account "independently from the mandatory provisions of Dutch arbitration law" (*id.* at 17-18); (3) the Claims Settlement Declaration and the rules of the Claims Tribunal both provide that Tribunal awards are "final and binding" and the Claims Settlement Declaration further provides that "claims referred to the Claims Tribunal shall, as of the date of filing of such claims with the Claims Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court;" "[t]hese provisions appear to conflict with Dutch arbitration law, particularly with article 649 of the Dutch Code of Civil Procedure which gives the parties to arbitration the right to nullify an award on certain specific grounds even if such an award is not subject to appeal" (*id.* at 18). The Opinion concludes that: "the better view is that a Dutch court should hold that Dutch arbitration law is not applicable to the Claim Tribunal proceedings and that the Gould Award is not a Dutch national award." *Id.* at 21.

As a result of these obvious deficiencies, doubts over the enforceability under the New York Convention of

WWW.NEWYORKCONVENTION.ORG

United States
Page 29 of 39

tional law, and its decisions are part of international law. Its decisions are not part of domestic municipal law.

Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 Va. J. Int'l L. 259, 273 (1984) (*quoting* U.S. Claims Tribunal Agent Arthur Rovine). In short, it is abundantly clear that the Claims Tribunal is a creature of international law and that its awards are international, not national, in character. As stated by a Dutch legal authority, "[t]he Tribunal is in essence a special international Court constituted by an international treaty under the law of nations, whose high duties do not suffer control by any national authority."[61]

It is not surprising, then, that proceedings at the Claims Tribunal, and the means by which the Tribunal was constituted and functions, bear little resemblance to consensual commercial arbitration. For example, while Iran enjoys and exercises the power to name arbitrators to hear cases at the Claims Tribunal, U.S. claimants have no like right, and play no part in the selection of the members of the Tribunal who adjudicate their claims. In international arbitrations, party-appointed arbitrators are, invariably, required to be impartial and without connections to either of the parties.[62] There is no such requirement at The Hague. Indeed, Iran has, with complete impunity, seated highly partial, even violent, persons as members of the Claims Tribunal.[63] While U.S.

[61] Hardenberg, *supra* note 56, at 389.

[62] *E.g.*, Article 2(4) of the Rules for the International Chamber of Commerce, Court of Arbitration (eff. June 1, 1975) (providing that an arbitrator named by one of the parties "shall be independent of the party nominating him").

[63] Approximately two months after the Claims Tribunal rendered its award against GMI, the Iranian arbitrator, Shafei Shafeiei, who sat in the Chamber which authored the award, together with a second Iranian arbitrator, Mahmoud Kashani, physically assaulted Nils Mangard, a third-country arbitrator. *See* Iranian Assets Lit. Rep.

jurists who have been named to the Claims Tribunal by the United States have cast their votes both in favor and against claims of the U.S. claimants, according to the State Department no arbitrator named to the Tribunal by Iran has *ever* voted in favor of any of the several hundred awards thus far handed down against Iran. The rules adopted by the Claims Tribunal permit only limited challenges to the impartiality of members of the Tribunal.[64] Finally, since (as Iran agrees), the proceedings and awards of the Claims Tribunal are not subject to the supervisory or corrective review of the courts of the Netherlands, U.S. claimants have no avenue of redress from any irregulatory in an award.[65]

That the proceedings and awards of the Claims Tribunal are not subject to the laws of the Netherlands is confirmed by the legal opinion of the law firm of Loeff & van der Ploeg of Rotterdam ("LVDP Opinion"). (A copy of the opinion is annexed as an exhibit to the Supplemental Excerpts of Record.)[66] The LVDP Opinion

part of arbitrators Shafeiei and Kashani who "have arrogated to themselves the power to determine what is in Iran's interests and to vindicate those interests; in other words, they have become partisan and have now cast off even the semblance of impartiality." United States Challenge of Arbitrators Kashani and Shafeiei, *reprinted in* Iranian Assets Lit. Rep., 9,343, 9,346-47 (1984) (CR 4, Ex. 5 at 5-7).

[64] Notes to Articles 9-12, Final Tribunal Rules of Procedure (May 3, 1983) (emphasis added) (CR 4, App. A).

[65] Under the laws of the Netherlands in effect at the time that the Claims Tribunal rendered its award against GMI, arbitral awards made in the Netherlands and subject to its laws could be reviewed by the Dutch courts on the grounds that, *inter alia*, the award goes beyond the arbitration agreement, is based upon an agreement which is void or expired, decides matters which have not been claimed or awards more than was claimed, or contains contradictory statements. Dutch Code of Civil Procedure, Book III, Title 1 (1838) [hereinafter Dutch Code of Civil Procedure], Art. 649. The award against GMI arguably suffers from each of these fatal defects.

WWW.NEWYORKCONVENTION.ORG

United States
Page 30 of 39

Thus, in order for an award to be enforceable under the New York Convention, there is a requirement that the courts of the territory in which it was rendered had jurisdiction to review it.[59] This requirement was noted in the Official Report of the United States Delegation to the United Nations Conference that authored the Convention:

> [E]nforcement can be denied if the loser proves the award has not become 'binding' or has been set aside or suspended. *The latter element presupposes a measure of judicial review in the country of arbitration*, for in most cases an award does not acquire binding force and thus become susceptible of enforcement without some kind of judicial confirmation.[60]

The district court simply failed to confront the issue of the Tribunal award's nationality in reaching its decision to accept jurisdiction under the New York Convention. (*See* CR 12 at 7.)

2. *The Claims Tribunal Is an International Tribunal Not Governed by Dutch Law and Therefore Its Awards Are Not National Awards within the Purview of the New York Convention*

Iran has consistently represented to the Dutch Government and at the Claims Tribunal that "the Tribunal is an international court in the strict sense and is essentially governed by public international law" and that "a civil law or international trade arbitration was not meant by the parties to the Declaration." Letter from Mr. Eshragh (Agent of the Islamic Republic of Iran) to Legal Adviser's Office and Ministry of Foreign Affairs, the Netherlands, 5 Iran-U.S. C.T.R. at 405, 407 (1984), (CR 7, Ex. 2 at 126, 128) (Supp. ER, Tab D) [hereinafter Eshragh Letter].

While the United States *now* contends in this Court that "Tribunal awards may well qualify as Dutch national awards" (Amicus Br. at 37), it too contended in the district court that "international law" and not Dutch arbitration law "governs the Claims Settlement Declaration" and that "the parties to the Declaration attached no particular significance to the situs of the Tribunal, nor did they rely upon any peculiar features of Dutch law." Statement of Interest at 16 n.9 (CR 5). Similarly, at the Claims Tribunal, the U.S. Agent has represented that:

> This Tribunal is created by an international agreement, a treaty of Iran and the United States. This is an international tribunal; a creature of interna-

---

ment of a Swiss award that had been refused enforcement by a Swiss court because it had been rendered by only two arbitrators (and not three, as required by Swiss law). Ultimately, after a series of appeals, in one of which it offered *obiter dicta* on the enforceability in Holland of an a-national award, the Hoge Raad declined to enforce the award. The case is discussed and criticized at length by van den Berg, *supra* note 47 at 41-43, who concludes that "[i]f it can be proven that an award is not governed by a national law on arbitration, *it cannot be enforced under the Convention*." *Id.* at 43 (emphasis added).

[59] In contending that so-called "a-national awards" may be enforceable under the Convention, the Government relies on Article V(1)(d), which provides that enforcement may be denied where "the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration is taking place." Amicus Br. at 40-42. The Government argues that this provision acknowledges the parties' right to opt out of national arbitration law. As noted above, however, Articles V(1)(a) (agreement must be "valid under the law to which the parties have subjected it or . . . under the law of the country where the award was made") and V(1)(e) (award cannot have been "set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made"), are "built on the presumption that the award is governed by a national arbitration law . . . ." van den Berg, *supra* note 47 at 37. This conclusion is further supported by the legislative history of the Convention. *See id.* at 34-37. Thus, "[i]t is . . . inconceivable that, whereas Article V(1)(a) and (e) refer to a law applicable to the arbitration agreement and

WWW.NEWYORKCONVENTION.ORG

> ments of either the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Cmnd 6419) or English conflicts of laws rules. *Both the New York convention and the English rules that would apply independently of that convention require that the arbitrators shall have acquired their jurisdiction pursuant to an arbitration agreement which is valid according to its proper law. The bank here cannot point to any such agreement.*

(CR 4, Ex. 8) (Supp. ER at Tab G) (emphasis added). Although the holding in *Dallal* was brought to the attention of the district court—and, indeed, was extensively briefed—the order of the district court did not so much as cite the only precedent on the issue of the enforceability of Tribunal awards under the New York Convention. The absence of a valid "agreement in writing" precludes jurisdiction over Iran's petition under the New York Convention.

B. The New York Convention Does Not Apply To Awards Resulting From Proceedings Not Subject To A National Arbitration Law

1. *The Enforcement Scheme Provided for by the New York Convention Requires a Measure of National Judicial Control and Supervision*

The New York Convention applies only to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . ." Convention, Art. I(1). In acceding to the Convention, the United States adopted a "reciprocity" reservation, which further limited application of the Convention to awards that are "made in the territory of another Contracting State."[57] While the Claims Tribunal sits at

The Hague, and the Netherlands is party to the New York Convention, the Claims Tribunal essentially sits as an international court, and its awards do not qualify as "Dutch" awards so as to be entitled to recognition under the Convention. This is confirmed by the fact that the Claims Tribunal has not even attempted to comply with the mandatory provisions of Dutch arbitration law (see *infra* pp. 43-45).

The New York Convention simply does not apply to awards that are "detached from the ambit of a national arbitration law." van den Berg, *supra* note 47, at 29-40. This limitation upon the scope of the Convention is explained by another leading commentator:

> The title of the Convention, which refers to 'foreign' arbitral awards, cannot be totally deprived of significance, nor can the meaning of the term 'foreign' bear no relation to the traditional concept of a decision made under a foreign municipal law. Moreover, if an award which was not given under any municipal law could be recognized under the Convention, it would be hard to give a meaning to the requirement set by Article V (1) (e), that the award should have become 'binding on the parties' and not have been 'set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.' All these circumstances point to the conclusion that the Convention only sets an obligation to recognize awards which are made under a foreign municipal law.

G. Gaja, *International Commercial Arbitration: New York Convention*, pt. I.A.3 (1984) (footnotes omitted) (emphasis added).[58]

---

[57] The accession of the United States to the New York Convention provides that "The United States of America will apply the Contracting State." 21 U.S.T. 2566; 9 U.S.C.A. § [illegible] West 1987) (reprinted in Addendum).

[58] The Government suggests that a decision of the Netherlands' highest court, the Hoge Raad, *Société Européenne d'Etudes et d'Entreprises v. Yugoslav State*, Hoge Raad, October 26, 1973 (repro- [illegible]

Hoffman was pursuing its claims in a California federal district court. Rather than embrace the Claims Settlement Declaration, Hoffman contested the Government's right to suspend its claim. *See Security Pacific.*

Finally, Iran has conceded at the Claims Tribunal itself that those proceedings do not satisfy the requirement of Article II of the New York Convention that there be a written arbitration agreement signed by the parties:

> [H]ow can Article II of that Convention be reconciled with the absence of any written agreement between the arbitrating parties when one party is not a State having adhered to the Algiers Declaration. . . . *Any assertion that a claim brought before the Iran-United States Claims Tribunal by an American national (whose remedies before American courts were barred by an Executive Order of the President of the United States) is voluntarily submitted to the international Tribunal would require a rather ingen[i]ous construction of the terms of Article II the New York Convention.*[55]

Faced with what Iran itself concedes to be perhaps an insurmountable obstacle to enforcement of Claims Tribunal Awards under the New York Convention, the United States "ingeniously" argues that the procedural rules of the Claims Tribunal suffice to supply the requisite written agreement by the parties to resolve their disputes through arbitration. Amicus Br. at 32.

Twenty-seven months after the Algiers Accords, and seventeen months after Hoffman filed its claim with the Claims Tribunal, the Tribunal amended its rules to provide that "[t]he Claims Settlement Declaration constitutes an agreement in writing by Iran and the United States, on their own behalfs and on behalf of their nationals submitting to arbitration within the framework of the Algiers Declarations and in accordance with the

[55] Memorial of the Islamic Republic of Iran, Iran-U.S. Claims Tribunal, Case A/21, October 18, 1985, at 70 (CR 7, Ex. [illegible]

Tribunal Rules." (CR 4, App. A, Final Tribunal Rules of Procedure, Rule 1.3) The United States asserts that this rules amendment somehow provides the requisite agreement by Hoffman to have its claims against Iran resolved through arbitration. No after-the-fact tinkering by the Claims Tribunal with its rules, however, can supply a written agreement to arbitrate that does not exist.

Finally, the district court's finding that the Algiers Accords constitute the requisite agreement in writing under Article II is directly contradicted by the only other court to consider this question. In *Dallal v. Bank Mellat*, the High Court of England declined to enforce an award of the Claims Tribunal through the mechanism of the New York Convention. The *Dallal* court concluded that the proceedings at The Hague had not been in conformity with Dutch arbitration law (*see infra* pp. 43-45), in particular the requirement that agreements to arbitrate must be contained in writings signed by the parties:[56]

> If, as I consider, the proper law of the agreement was Dutch law, then the agreement was a nullity because it did not comply with the requirements of the Dutch code. It follows that, if the award of the tribunal at The Hague is to be recognised in England as an arbitral award, it cannot satisfy the require-

[56] Article 623(1) of the Dutch Code of Civil Procedure provides that "The arbitration agreement concluded after a dispute has arisen (submission) must be made in writing and signed by the parties. . . ." (English translation set forth in the *Dallal* opinion). *See infra* pp. 44-45. Under Dutch law, "only the rights which one has at one's free disposal can be brought before arbitrators and this only by agreement between the parties and arbitrators." L. Hardenberg, *The Awards of the Iran-US Claims Tribunal: Seen in connection with the Law of the Netherlands*, Int'l Bu[illegible]pt. 1984). Mr. Hardenberg, a Dutch lawyer, concl[illegible]:

> Both aspects are absent from the procedure before the Tribunal. The free disposal has been taken away from the parties by the treaty of Algeria and consequently there is no question of an arbitration compromise between the litigants.

WWW.NEWYORKCONVENTION.ORG

United States
Page 33 of 39

IRAN V. GOULD

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, Petitioner, v. GOULD, INC., GOULD MARKETING INC., HOFFMAN EXPORT CORPORATION, GOULD INTERNATIONAL, INC. and Does one through Ten, Respondent.	CV 87-03673 RG ORDER

For the reasons stated below, this court denies the defense motion to dismiss the petition of the Ministry of Defense of the Islamic Republic of Iran to enforce the arbitral award entered in its favor by the Iran-U.S. claims tribunal.

This case involves a petition to confirm an award granted by the Iran-United States Claims Tribunal (Tribunal). The Tribunal was created as part of the agreement that resolved the hostage crisis between the United States and Iran. The agreement was announced in declarations that are known collectively as the Algerian Accords. The function of the Tribunal is to adjudicate claims between nationals of one country and the government of the

WWW.NEWYORKCONVENTION.ORG

other, as well as claims between the two governments. Under the Algerian Accords, however, the two governments are not permitted to file claims before the tribunal against nationals of the other country. The governments are permitted, however, to file counterclaims arising out of the same occurrence or transaction. Therefore, Iran could not have directly brought its claim before the Tribunal in this action. Hoffman filed the initial claim before the Tribunal after its action in federal court was directed there by reason of the settlement process.

The petition that is the subject of this action is based upon an award granted in favor of Iran on its counterclaims. Hoffman's claims involved two contracts. Iran instituted counterclaims, over which, Hoffman argued, the Tribunal did not have jurisdiction. Finding that force majeure had terminated the contracts, the Tribunal issued an interlocutory award announcing its intention to conduct an equitable accounting between the two parties.

Subsequent to the interlocutory award, Hoffman was merged into Gould Marketing Inc. (GMI), a wholly-owned subsidiary of Gould International, Inc. (Gould). As a result of the merger shares of stock in Hoffman were converted into shares in Gould.

The Tribunal issued its award in favor of Iran on June 22, 1984, referring to GMI as the claimant. The award consolidated the claims arising from the contracts, and awarded Iran $3,640,247.13, along with specific performance of part of one contract.

Iran has filed this petition seeking to enforce the

WWW.NEWYORKCONVENTION.ORG

award. The motion to dismiss asserts two principal positions:

1. The Republic of Iran is not entitled to access to the courts of the United States, and

2. There is no legal mechanism for enforcement of the Tribunal's award available to a United States court.

Access

Defendants are, of course, correct in stating that the United States has not formally recognized the Republic of Iran and that, indeed, the nations have engaged in recent months in acts of mutual hostility, attended by substantial casualties on each side. It is likewise correct that, as an historical general principle, access to United States courts has been restricted to nations enjoying recognition by and diplomatic relations with this country. Whether that principle retains significant vitality in the turbulent years since World War II, which have seen wholesale departures from the niceties of 19th century diplomacy, might be debated. It is not necessary to engage in that analysis, however, because the crystal-clear governing rule is that access to our courts is a matter strictly within the purview of the Executive Branch. In Pfizer v. Government of India, 434 U.S. 308 (1978), the Supreme Court stated -- immediately after it restated the rule for which the case is cited by defendants here -- that it is the exclusive power of the Executive Branch to determine which nations are entitled to sue in this country. The Court went further to state the rule of complete judicial deference to the Executive Branch. That ends the inquiry. The Government's Statement of

WWW.NEWYORKCONVENTION.ORG

1. The statement is _dictum_: That may be true from a strictly technical standpoint, in the sense that it was not necessary to reach the result that obtained. The fact is that the court used the quoted conclusion to ground its decision, and the statement was hardly a "throwaway line."

2. The Ninth Circuit's holding was inconsistent with the decision in _Dames & Moore v. Regan_, which should be read to say that the Accords are self-executing: That argument has a bit more appeal, but the Panel obviously had studied _Dames & Moore_, since it was cited. It is generally the province of a court of appeals to tell district courts within its circuit what a Supreme Court decision means -- not vice-versa.

3. The court here should give "great weight" to the opinion of the Executive Branch as to interpretation of an international agreement: That is true, to some extent. Suffice it to say that the view of _Iran v. Boeing_ is probably quite a bit different from a soft chair in DOJ headquarters than it is from a district bench within the confines of the Ninth Circuit. One might speculate that the Panel deciding the case would at least have stated its conclusion in different terms were it considering the facts of the matter at bench, but this court is bound by the decision as it stands.

II. The court is of the opinion that jurisdiction to

WWW.NEWYORKCONVENTION.ORG

consider this case is offered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), [1970] 3 U.S.T.S. 2517, T.I.A.S. No. 6997. In the implementing legislation it is clear that actions arising under provisions of the Convention are deemed to arise under the laws of the United States. 9 U.S.C. § 203.

The Convention certainly is applicable to the claim here in that the Tribunal is a permanent arbitral body, the dispute involved legal persons and a commercial relationship, and the decision was rendered in the territory of a contracting state. The defense objection to this basis of jurisdiction is two-fold:

1. There was no agreement in writing: The fact that neither Presidents Carter nor Reagan physically signed the Accords is irrelevant. The history of those proceedings teaches that they both embraced the agreement at least as fully as if they had done so. The question whether the Executive can bind U.S. persons to such an arrangement as if they were signatories is quite effectively dispatched by the Dames & Moore decision. The power to exercise sovereign authority to the objective of settlement of nationals' claims against foreign governments is not subject to serious doubt. The Claims Settlement Declaration is specific that it constitutes a written agreement between the nations on their own behalf and on behalf of their nationals.

2. The Tribunal must have applied the law of The Netherlands for the award to be enforceable under the Convention:

WWW.NEWYORKCONVENTION.ORG

While the Tribunal made explicit reference to international law, it was sitting in the Hague. If it had applied Dutch arbitration principles the result would have been identical. The defense objection on this point has some appeal, but the form v. substance tension should be resolved in favor of the overriding judicial interest in effective arbitral proceedings, even on this scale. The court is not at all convinced, in any event, that reliance on the body of international law would take this award out of the ambit of the Convention.

The defendants' objection to the form of pleadings here while strictly correct, is unavailing to secure dismissal. The issue is fully before the court and has been met by extensive briefs and arguments of the defense. F.R.C.P. 1.

The motion to dismiss on the grounds discussed above is denied. There remain the issues of which parties are properly bound by the award and affirmative defenses to enforcement. A status conference to discuss the future progress of this case is ordered for February 10, 1988, at 3:00 p.m. The parties will submit status memoranda with recommendations no later than 5 days prior to conference.

RICHARD A. GADBOIS, JR.

United States District Judge

DATED:

January 14, 1988

WWW.NEWYORKCONVENTION.ORG