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*The
Iran—United States
Claims Tribunal
1981–1983*

SEVENTH SOKOL COLLOQUIUM

Edited by Richard B. Lillich

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Preface

The subject of this book—the Iran–United States Claims Tribunal—is the most significant arbitral body in history. It dwarfs such earlier landmarks as the Jay Treaty Commissions and the *Alabama Claims Arbitration*. If not in number of claims, then certainly in amount of money and complexity of issues involved, it far exceeds its predecessors—including the U.S.–German and U.S.–Mexican Commissions of the 1920s and 1930s—whose decisions still fill the pages of the leading international casebooks a half-century later. The largest and most important international arbitration to date, it surely will influence the Law of International Claims well into the coming century.

As is common knowledge, the Claims Settlement Agreement establishing the Tribunal was cobbled together in haste and confusion in January 1981 as part of a package deal whose overriding purpose—at least from the U.S. perspective—was to secure the release of the fifty-two hostages being held by Iran. It covers a wide range of claims—governmental and private—without much elaboration of detail. Thus the Tribunal now sitting in The Hague not unsurprisingly has had to confront a good deal of ambiguity and all too little clarity. Moreover, its interpretive task has been exacerbated because relatively few international arbitrations from which it might have obtained guidance have taken place since World War II. Nevertheless, drawing upon recent state practice, especially that involving lump sum agreements, plus commercial law principles derived from municipal and transnational business practice, the Tribunal in its first few years not only has resolved many complex issues before it in reasonably satisfactory fashion, but also has helped to clarify, shape and develop many areas of the traditional Law of State Responsibility for Injuries to Alien.

The present volume, containing seven chapters originally delivered as papers at the Seventh Sokol Colloquium on Private International Law held at the University of Virginia School of Law in April 1983, seeks to assess the Tribunal's jurisprudence two years on. The first three chapters—One and Two previously appeared in the *Virginia Journal of International Law* and Three in the *Arbitration Journal*, with whose permission they

now are republished in somewhat revised form—are written by persons either intimately engaged in practice before the Tribunal or exceptionally conversant with international arbitration in general and the Tribunal's awards in particular. The same can be said of the next three chapters, published here for the first time. The final chapter surveys, from the perspective of an active participant, both pre- and post-Claims Settlement Agreement litigation, some of it still sub judice, that has arisen in U.S. courts. Taken together, the seven chapters constitute the most extensive description, critique and evaluation of the Tribunal's work that has been published to date.

As in the past, the success of the Sokol Colloquium that generated this volume, as well as the merits of the volume itself, are due not only to the quality of the scholars/practitioners/government officials involved, but also to a number of other persons whose efforts deserve recognition. Mrs. Danielle N. Cormier, my former secretary in charge of the Gustave Sokol Program, was indispensable in organizing and administering the Colloquium. The officers and members of the John Bassett Moore Society of International Law, which cosponsored the event on behalf of the American Society of International Law, provided invaluable assistance in making it a success. My research assistants, Mr. Stephen D. Ramsey, University of Virginia School of Law Class of 1984, and Ms. Melinda Brown, University of Virginia School of Law Class of 1985, helped to edit the papers, and to read proof and index the volume, respectively. Finally, having relinquished responsibility for the Gustave Sokol Program after seven satisfying (and, I trust, fruitful) years, I would like to record my last formal thanks to Ronald Sokol, Esq., and the Gustave Sokol Fund for their initiative and generosity that have made the Program and this volume in particular possible.

Charlottesville, Virginia

RICHARD B. LILICH

Acknowledgments

The Gustave Sokol Program on private international law was established at the University of Virginia School of Law in 1976 under a grant from the Gustave Sokol Fund. Its activity to date consists of holding annual, two-day colloquia bringing together distinguished scholars, practitioners, and government officials from the United States and overseas to discuss in detail a current topic of or related to private international law. Prior colloquia include:

- ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS, Symposium, 17 Virginia Journal of International Law 359–493 (1977)
- PROVING FOREIGN AND INTERNATIONAL LAW IN DOMESTIC TRIBUNALS, Symposium, 18 Virginia Journal of International Law 609–751 (1978)
- THE FAMILY IN INTERNATIONAL LAW [Third Sokol Colloquium] (R. Lillich ed. 1981) (The Michie Co.)
- INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE INTERNATIONAL COMMUNITY [Fourth Sokol Colloquium] (R. Lillich ed. 1981) (The Michie Co.)
- HARMONIZATION OF LAWS IN THE EUROPEAN COMMUNITIES: PRODUCTS LIABILITY, CONFLICT OF LAWS, AND CORPORATION LAW [Fifth Sokol Colloquium] (P. Herzog ed. 1983)
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CHAPTER I

Developments at the Iran-United States Claims Tribunal: 1981-1983

DAVID P. STEWART
LAURA B. SHERMAN

The Iran-United States Claims Tribunal, established pursuant to the 1981 Algiers Accords¹ which led to the release of fifty-two American hostages from Iran, recently completed its second year of operation. While a great deal has been written about the hostage crisis itself,² the nature and extent of the U.S. responses thereto,³ and the constitutionality of the arrangements that brought it to an end,⁴ remarkably little attention has

The views of the authors expressed herein do not necessarily represent those of the Department of State or the U.S. Government.

¹See 81 DEP'T STATE BULL. 1 (1981), reprinted in 20 I.L.M. 223 (1981).

²See, e.g., S. MOODY, 444 DAYS: THE AMERICAN HOSTAGE STORY (1981); P. SALINGER, AMERICA HELD HOSTAGE (1981).

³See, e.g., *The Situation in Iran: Hearing Before the Senate Comm. on Foreign Relations*, 96th Cong., 2d Sess. (1980); *Iranian Asset Controls, Hearing Before the Subcomm. on Europe and the Middle East and Subcomm. on Int'l Economic Policy of the House Comm. on Foreign Relations*, 96th Cong., 2d Sess. (1980); E. Gordon, *The Blocking of Iranian Assets*, 14 INT'L LAW. 659, 660-72 (1980); Piper, *Executive Power Under the Hostage Act: New Life for an Old Law*, 14 CORNELL INT'L L.J. 369 (1981); IEEPA: *Legal Repercussions of the Freezing of Iranian Assets and Loans*, 12 INT'L CURRENCY REV. 25 (1980).

⁴See, e.g., *The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. (1981); Symposium: *Dames & Moore v. Regan*, 29 U.C.L.A. L. REV. 977 (1982); Symposium on the Settlement with Iran, 13 LAW. AM. 1 (1981); Marks & Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982); Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Prerogative in Foreign Affairs*, 13 INT'L L. & POL. 993 (1981); Note, *Dames & Moore v. Regan, Rethinking The Fifth Amendment Implications*

been devoted to the activities of the Tribunal itself.⁵ This chapter briefly reviews the background, organization, and activities of the Tribunal in The Hague from its inception through September 1983 and discusses in some detail (without critical comment) the emerging jurisprudence of the Tribunal as reflected in its more important awards and decisions.

ORIGIN OF THE TRIBUNAL

The Islamic revolution in Iran, the unlawful seizure of the U.S. Embassy in Teheran on November 3, 1979, and the subsequent detention of American diplomatic and consular personnel for more than a year created an international crisis of unique dimensions in U.S. history.⁶ Longstanding and extensive economic and commercial relationships between the two countries were abruptly destroyed. Bilateral trade plummeted from \$5.7 billion in 1977 to \$501 million in 1980,⁷ contractual arrangements were breached, and American investments in Iran were expropriated. On November 14, 1979, in response to the seizure of the Embassy and its personnel, and because Iran had announced its intention to withdraw its assets from the United States and to repudiate its financial obligations to U.S. nationals, the U.S. government froze Iranian assets in the United States and abroad worth some \$12 billion.⁸ Over the course of

⁵ See Lauterpacht, *The Iran-United States Claims Tribunal—An Assessment*, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 213 (M. Landwehr ed. 1982); Lowenfeld, *The U.S.-Iranian Disputes Settlement Accords: An Arbitrator Looks at the Prospects for Arbitration*, 36 ARB. J. 1 (1981).

⁶ See generally E. ABRAHAMIAN, *IRAN BETWEEN TWO REVOLUTIONS* (1982); Z. BRZEZINSKI, *POWER AND PRINCIPAL: MEMOIRS OF THE NATIONAL SECURITY ADVISOR 1977-1981* (1983); B. GRAYSON, *UNITED STATES-IRANIAN RELATIONS* (1981); B. RUBIN, *PAVED WITH GOOD INTENTIONS* (1980); P. SALINGER, *supra* note 2; J. STEMPEL, *INSIDE THE IRANIAN REVOLUTION* (1981); C. VANCE, *HARD CHOICES: CRITICAL YEARS IN AMERICA'S FOREIGN POLICY* (1983). See also *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 1 (Final Judgment of May 24, 1980), reprinted in 19 I.L.M. 553 (1980); *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1971 I.C.J. 1 (Request for the Indication of Provisional Measures), reprinted in 19 I.L.M. 139 (1980).

⁷ BUREAU OF CENSUS, DEP'T OF COMMERCE, *HIGHLIGHTS OF U.S. IMPORTS AND EXPORTS* 37, 87 (1981).

⁸ Exec. Order No. 12,170, 44 Fed. Reg. 65,279 (1979). See also 50 U.S.C. § 1701 (Supp. V 1981); Iranian Assets Control Regulations, 31 C.F.R. § 535.101 (1982). In imposing the freeze, the President exercised powers authorized by the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. § 1701 (Supp. III 1979)), and the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1225 (1976) (codified at 50 U.S.C. § 1601 (1976)). IEEPA authorizes the President to regulate transactions in foreign exchange, banking transac-

the ensuing year, U.S. nationals with claims against Iran sought recourse in American and foreign courts. By the time the Iranian government was prepared to negotiate the release of the hostages, a substantial portion of the frozen Iranian assets had been attached in judicial proceedings.⁹

While the efforts of the U.S. government were focused on ensuring the safe return of the hostages, the disposition of these private claims against Iran and the return of frozen Iranian assets became a major issue in resolving the hostage crisis. Due to the judicial attachments, a simple lifting of the freeze on Iranian assets would not have resulted in the return of those assets to Iran. An agreement, to be successful, had to provide for adequate compensation to American claimants. The U.S. negotiators had three basic options. First, the United States and Iran could have agreed to defer both the claims and assets questions until after the hostages had been released, thus leaving the freeze on Iran's assets in place until a solution could be reached with regard to the claims. Alternatively, the United States and Iran could have settled the claims of U.S. nationals by a lump-sum payment that would then have been distributed by the U.S. Foreign Claims Settlement Commission on the basis of its adjudication of the claims. This second option would have been consistent with U.S. practice since World War II.¹⁰ Finally,

importing and exporting of currency or securities. In addition, IEEPA authorizes the President to regulate or freeze property in which any foreign country or a national thereof has any interest. See generally *Emergency Economic Powers—Iran: Hearing Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Foreign Relations*, 97th Cong., 1st Sess. (1981); STAFF OF THE HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., *FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT* 12-14 (Comm. Print 1981). Unilateral trade sanctions were subsequently imposed, including, inter alia, the prohibition of exports to Iran on April 7, 1980, and 10 days later the prohibition of all imports from Iran, travel by U.S. citizens to Iran, and payments or transfers to persons in Iran. See Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980), reprinted in 50 U.S.C. § 1701 (Supp. V 1981). See generally Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 L. & POL'Y INT'L BUS. 1 (1983). Pursuant to the Algiers Accords, these sanctions were revoked, and other U.S. commitments given effect, in a series of Executive Orders issued contemporaneously with the Accords. See Exec. Orders Nos. 12,176-12,285, 46 Fed. Reg. 7,913-31. See also Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

⁹ See Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 CALIF. L. REV. 837 (1981); Note, *Prejudgment Attachment of Iranian Assets in the United States: Waiving Sovereign Immunity*, 13 INT'L L. & POL. 675 (1981).

¹⁰ See generally R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENT* 30-31 (1975).

the parties could have established an international mechanism permitting prompt and effective adjudication of the claims and assuring payment of them. With Iranian agreement to the third option,¹¹ a major sticking point in the negotiations was resolved and ultimately embodied in the Algiers Accords.

The Algiers Accords consist of two declarations issued by the government of Algeria on January 19, 1981, together with a number of technical implementing agreements.¹² The first declaration, the General Declaration,¹³ provided for the release of the hostages in return for a number of actions and undertakings by the United States, including, inter alia, the nullification of attachments and the transfer of Iranian assets. The second declaration, the Claims Settlement Agreement,¹⁴ established a new international arbitral body, the Iran-United States Claims Tribunal, composed of nine members (three appointed by the United States, three by Iran, and three third-country arbitrators chosen by the six party-appointed arbitrators) or such larger multiple of three as the two governments might agree.¹⁵

BASIC STRUCTURE AND JURISDICTION OF THE CLAIMS TRIBUNAL

The Tribunal is empowered by the Accords to decide, on the basis of respect for law,¹⁶ claims of U.S. nationals against Iran and of Iranian nationals against the United States arising out

¹¹ See Cutler, *Negotiating the Iranian Settlement*, 67 A.B.A.J. 996 (1981).

¹² See note 1 *supra*. The technical agreements consist of the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, reprinted in 20 I.L.M. 229 (1981) [hereinafter cited as Undertakings]; the Escrow Agreement, reprinted in 20 I.L.M. 234 (1981); and the Technical Arrangement Between the Banque Centrale D'Algerie, the Bank of England and the Federal Reserve Bank of New York (1981). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court upheld the President's authority to enter into and carry out the agreements with Iran.

¹³ Declaration of the Government of the Democratic and Popular Republic of Algeria, reprinted in 29 I.L.M. 224 (1981) [hereinafter cited as General Declaration].

¹⁴ 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, reprinted in 20 I.L.M. 230 (1981) [hereinafter cited as Claims Settlement Agreement].

¹⁵ *Id.* art. III(1).

¹⁶ The Claims Settlement Agreement provides that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." *Id.* art. V.

of debts, contracts, expropriations, and other measures affecting property rights.¹⁷ The Tribunal also has jurisdiction to hear certain official claims between the two governments based on contractual arrangements for the purchase and sale of goods and services.¹⁸ Finally, the Tribunal may decide disputes relating to the interpretation and implementation of the Accords themselves¹⁹ as well as certain bank claims.²⁰ Awards issued by the Tribunal are final and binding and are enforceable in the courts of any nation in accordance with its laws.²¹

To assure payment of awards in favor of U.S. nationals, the Accords provided for establishment of a Security Account, funded initially with \$1 billion in certain Iranian assets that had been frozen in the United States.²² This Account was created in August 1981 at the N.V. Settlement Bank of the Netherlands, a subsidiary of the Dutch Central Bank.²³ Under the Accords, Iran is obliged to replenish the Account promptly when payments to successful U.S. claimants cause the balance in that Account to fall below \$500 million.²⁴

The Accords established only the basic framework for the operation of the Tribunal. They specified that all claims must be filed no later than January 19, 1982,²⁵ that the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) would serve as the basis for the Tribunal's procedures,²⁶ that the seat of the Tribunal would be The Hague unless the governments agreed on a different location,²⁷ and that the expenses of the Tribunal would be borne

¹⁷ *Id.* art. II(1). Cf. General Declaration, *supra* note 13, para. 11 (excluding certain claims of the United States and U.S. claimants).

¹⁸ Claims Settlement Agreement, *supra* note 14, art. II(2).

¹⁹ *Id.* arts. II(3), VI(4).

²⁰ Undertakings, *supra* note 12, para. 2(B). See text at notes 47-50 *infra*.

²¹ Claims Settlement Agreement, *supra* note 14, arts. IV(1), IV(3).

²² General Declaration, *supra* note 13, paras. 6-7. See also 31 C.F.R. § 535.210 (1981).

²³ Technical Agreement Among Banque Centrale d'Algerie, Bank Markazi, Federal Reserve Bank of New York, and N.V. Settlement Bank of the Netherlands, Aug. 17, 1981 [available at Department of State] [hereinafter cited as August 1981 Technical Agreement]. See also the related Technical Agreement Among Bank Centrale D'Algerie, Bank Markazi Iran, the Federal Reserve Bank of New York, and De Nederlandsche Bank N.V., Aug. 17, 1981 [available at Department of State].

²⁴ General Declaration, *supra* note 13, para. 7. Bank Markazi, the Central Bank of Iran, independently assumed an obligation to replenish promptly the Security Account in such circumstances. See August 1981 Technical Agreement, *supra* note 23, art. (1) (d) (ii).

²⁵ Claims Settlement Agreement, *supra* note 14, art. III(4).

²⁶ *Id.* art. III(2).

²⁷ *Id.* art. VI(1).

equally by the two governments.²⁸ In addition, the Accords stipulated that claims for less than \$250,000 must be presented to the Tribunal by the government of the claimants, while claims of \$250,000 or more were to be presented directly by the claimants themselves.²⁹

The Tribunal is a unique institution, representing one of the most ambitious and complex international claims adjudication programs ever undertaken. It is one of a handful of mixed claims commissions in which the United States has participated since World War II and represents a departure from the more common practice of the United States and other nations in settling claims en bloc through lump-sum payments.³⁰ The Tribunal is distinguishable, however, from the traditional mixed claims commissions of the nineteenth and twentieth centuries where a neutral arbitrator, or "umpire," was called upon only when the party-appointed arbitrators could not reach a decision in a particular case.³¹

The magnitude and complexity of the claims presented to the Tribunal would likely confound a participant in earlier claims tribunals. For example, while the actual number of claims filed at the Tribunal only slightly exceeds those filed before the U.S.-Mexican General Claims Commission,³² the dollar amount claimed likely exceeds the combined total for all claims tribunals in which the United States has ever participated. In fact, just the single \$10.9 billion claim filed by Iran against the U.S. government over contracts under the Foreign Military

²⁸*Id.* art. VI(3).

²⁹*Id.* art. III(3). Private individuals rarely have been allowed to present their claims directly to an international arbitral body such as the Tribunal. The most recent example is that of the various mixed tribunals set up between the Allied and the Central Powers under the treaties of peace following World War I. See K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 14-21 (1946).

³⁰See note 10 *supra*.

³¹*Cf.* British-American Mixed Commission of 1853; the Venezuelan Protocols of 1903; and the Mexican-Belgian Administrative Arbitral Tribunal of 1927. See generally M. HUDSON, *INTERNATIONAL TRIBUNALS* (1944); Note, *The Mixed Arbitral Tribunals Created by the Peace Treaties*, 12 BRIT. Y.B. INT'L L. 135 (1931).

³²There were 3,617 claims filed before the U.S.-Mexican General Claims Commission for just under \$600 million. The Commission adjudicated only 148 before its demise, dismissing 54 and awarding \$4.5 million to the other 94. See A. FELLER, *THE MEXICAN CLAIMS COMMISSIONS* 60 (1935). By comparison, the case load of the Mixed Claims Commission established with the Central Powers after World War I was distinctly more substantial. For example, the United States-German Mixed Claims Commission had 20,340 claims filed before it. The Commission rendered 6,178 awards totaling \$186,813,901, the remainder of the claims being dismissed or withdrawn. See K. CARLSTON, *supra* note 29, at 15.

Sales Program may surpass the total for all claims tribunals together.

The final feature that distinguishes the Iran-United States Claims Tribunal from its predecessors is its compromise. The Accords were not the product of bilateral negotiations between two countries in the context of a demonstrated improvement in their economic and diplomatic relations. Rather they resulted from indirect negotiations through a third party carried on against a highly charged political background created by a specific international crisis. In addition, the applicable law clause in the Accords differs from that of other compromise because it is more sharply and narrowly drawn. The Accords require the Tribunal to decide cases solely on the "basis of respect for law," and set forth specific sources for that law.³³

THE FIRST YEAR

The six party-appointed arbitrators first met in May 1981 to select the three third-country arbitrators.³⁴ When the Tribunal officially convened in July 1981, the arbitrators faced the monumental task of giving effect to the Algiers Accords by creating a new international organization. The first requirement was to "set up shop": locate premises, establish a claims registry, hire essential staff, find competent interpreters and translators, adopt interim rules of organization and procedure, agree on a budget, and decide a series of threshold issues of jurisdiction and interpretation. The Tribunal divided itself into three Chambers for the arbitration of private claims and official claims, leaving the Full Tribunal to adjudicate questions of interpretation of the Algiers Accords and those legal issues that could best be resolved by all the arbitrators together.³⁵ It also

³³Claims Settlement Agreement, *supra* note 14, art. V. *Cf.* U.S.-Mexican General Claims Commission which was to decide "in accordance with the principles of international law, justice and equity" and the other Mexican Claims Commissions which were to decide "in accordance with the principles of justice and equity." A. FELLER, *supra* note 32, at 33.

³⁴The original arbitrators were: U.S.—Howard M. Holtzmann, George H. Aldrich, and Richard M. Mosk; Iran—S. Hossein Enayat, Shafie Shafeiei, and Mahmoud M. Kashani; third-country—Gunnar Lagergren (Sweden), Pierre Bellet (France), and Nils Mangard (Sweden). Judge Lagergren is President of the Tribunal.

³⁵Presidential Order No. 1 (Oct. 19, 1981), reprinted in *IRANIAN ASSETS LITIGATION* REP. 3,809 (Nov. 6, 1981), gave the individual Chambers jurisdiction over claims under article II(1) of the Claims Settlement Agreement, *supra* note 14. This Directive was modified by Presidential Directive No. 8 (Mar. 24, 1983), which gave the Chambers jurisdiction also over claims arising under article II(2). These claims were initially distributed among the three Chambers by lot. The President retains the right to transfer

adopted Provisional Rules of Procedure to govern the presentation and adjudication of claims.³⁶

The deadline for filing claims with the Tribunal was January 19, 1982, one year from the signing of the Accords. No one knew the precise number of claims to expect, but when the deadline had passed the staff of the Tribunal's registry found themselves in a cavernous room in the Peace Palace in The Hague surrounded by boxes containing over five thousand claims. In the course of time the massive documentation in support of these claims was organized, categorized, and referred to Chambers; deadlines for submission of Statements of Defense were set; and the process of adjudication was generally set in motion.

The Tribunal's pace during its first year was unquestionably slow and frustrating. By the end of July 1982 the Tribunal had issued only nine awards, six on agreed terms reflecting settlements reached directly between the parties, and it had held only a few prehearing conferences and hearings on the merits. An Iranian challenge on January 1, 1982, to Judge Nils Mangard, the Chairman of Chamber Three, and the subsequent resignation of the Iranian arbitrator assigned to Chamber Three, S. Hossein Enayat, disrupted the proceedings. Under the Provisional Rules of Procedure then applicable to the Tribunal, the Secretary-General of the Permanent Court of Arbitration at The Hague designated an Appointing Authority to decide the challenge. The Appointing Authority, Chief Justice Moons of the Supreme Court of the Netherlands, reached a decision on March 5, 1982, that the Iranian challenge had not been brought in the manner prescribed by the Provisional Rules of Procedure and dismissed the challenge.

But there were significant accomplishments during that first

claims between the Chambers: (1) if the preliminary or main issues in two or more claims before different chambers are similar; (2) if a Chamber member withdraws from a claim before the Chamber; and (3) in order to maintain balance in the work load of the Tribunal as a whole. Each Chamber consists of a U.S., Iranian, and third-party arbitrator. The original composition of the Chambers was: Chamber One—Lagergren (Chairman), Kashani, and Holtzmann; Chamber Two—Bellet (Chairman), Shafeiei, and Aldrich; Chamber Three—Mangard (Chairman), Enayat, and Mosk.

³⁶ Administrative Directive No. 2 (Sept. 19, 1981), reprinted in *IRANIAN ASSETS LITIGATION REP.* 3,720 (Oct. 2, 1981). According to Article 18, no priority for the scheduling of hearings or the making of awards shall be based on the date of filing of the Statement of Claim. *Id.* at *IRANIAN ASSETS LITIGATION REP.* 3,721.

year. The Tribunal decided two major interpretive cases.³⁷ In Case No. A/1,³⁸ the Tribunal decided certain issues relating to the operation of the Security Account, holding that settlements between arbitrating parties could be paid from the Security Account when the Tribunal approved the settlement and issued an award on agreed terms. At the same time, the Tribunal decided that interest earned on the Security Account should not be paid directly to Iran, but should continue to be credited to a separate suspense account in the depositary bank. The interest may be used by Iran to replenish the Security Account. Until all claims are decided and all awards paid, however, use of the interest for any other purpose requires the agreement of both the United States and Iran. In Case No. A/2,³⁹ brought by Iran, the Tribunal decided that it had no jurisdiction over "direct" claims by one government against the nationals of the other. In part as a result of this decision, Iran withdrew some 1,400 claims from the Tribunal.⁴⁰

MAY 1982 TO SEPTEMBER 1983

Current Caseload

During the past year and a half the Tribunal has made more encouraging progress in tackling the tremendous caseload before it. This caseload numbered about 3,850 as of mid-1983, including 20 interpretive disputes, 78 official claims, 445 bank claims, 521 claims each for \$250,000 or more, and 2,795 claims for less than \$250,000 each.

³⁷ Under the Claims Settlement Agreement, *supra* note 14, art. II(3), the Tribunal has jurisdiction "over any dispute as to the interpretation or performance of any provision" of the General Declaration. *See also* General Declaration, *supra* note 13, paras. 16-17. Jurisdiction over questions concerning the interpretation or application of the Claims Settlement Agreement is conferred by article VI(4).

³⁸ Case No. A/1 (Decisions of May 17, 1982, and Aug. 3, 1982), reprinted in 22 *I.L.M.* 591 (1983). *See also* Separate Opinion of Judges Holtzmann, Aldrich, and Mosk (Aug. 3, 1982) [available at Department of State]. The Tribunal has designated disputes concerning the interpretation of the Accords as "A" claims, while those involving official claims between the two Governments are denominated "B" claims. Private claims are identified simply by number. The last number to appear in an award number indicates the Chamber that issued the award. The designation "FT" indicates a decision of the Full Tribunal. *See* note 65 *infra*.

³⁹ Case No. A/2 (Decision of Dec. 19, 1981), reprinted in 21 *I.L.M.* 78 (1982).

⁴⁰ A government may, however, assert counterclaims that arise out of the same contract, transaction, or occurrence that constitutes the subject matter of a claim. Claims Settlement Agreement, *supra* note 14, art. II(1). *See* text at notes 118-134 *infra*.

Of the interpretive disputes,⁴¹ or "A" claims, two were filed by the United States requesting a determination of Tribunal jurisdiction over claims by Iranian banks based on standby letters of credit and other Iranian bank claims. Iran filed the remaining eighteen on a variety of subjects, including various alleged U.S. violations of the Algiers Accords with respect to the assets of the former Shah, Iranian diplomatic and consular properties and bank accounts in the United States, overseas attachments held by U.S. nationals on Iranian assets, transfer of Iranian tangible property held in the United States, and cases brought against Iran by U.S. nationals in foreign courts.⁴² Contrary to some suggestions, these interpretive disputes have not occupied the Tribunal's attention to the detriment of the private claims. While there has been an exchange of pleadings in all the current "A" claims, no hearings have yet been held (with the exception of Case Nos. A/1 and A/2). Seven hearings were scheduled between October 1983 and March 1984.

Similarly, the official, or "B," claims⁴³ have not taken precedence with the Tribunal; only two prehearing conferences have been held. Of the sixty claims filed by Iran against the United States, nine have been withdrawn or terminated and one has resulted in an award on agreed terms.⁴⁴ The Tribunal has received pleadings from both sides in the remaining Iranian claims and in almost all of the eighteen claims which the United States filed against Iran. The Iranian claims against the United States range from a claim against the Department of State for \$2,794 allegedly resulting from a refusal to issue an export per-

⁴¹ See text at notes 37-39 *supra*.

⁴² Iran has withdrawn two of these cases: Case No. A/10, which alleged that the United States government blocked payment of a letter of credit issued to a Finnish company, and Case No. A/12, which contained miscellaneous allegations.

⁴³ Claims Settlement Agreement, *supra* note 14, art. II(2) gives 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."

⁴⁴ Iran has withdrawn Iran Aircraft Indus. v. Dep't of Comm. Case No. B/70 (Aug. 15, 1983); Ministry of Posts, Tele. & Tel. v. Dep't of State, Case No. B/64 (July 18, 1983); Civil Aviation Org. v. Dep't of State, Case No. B/57 (June 13, 1983); University of Shiraz-Iran v. Gov't Printing Office, Case No. B/49 (May 23, 1983); Civil Aviation Org. v. Dep't of State, Case No. B/6 (Mar. 14, 1983); Iran Aircraft Indus. v. Gov't Printing Office Case No. B/43 (Feb. 28, 1983); Iran Aircraft Indus. v. Gov't Printing Office, Case No. B/45 (Feb. 28, 1983); Iran Nat'l Airlines Co. v. Peace Corps, Case No. B/52 (Feb. 28, 1983); Mottahedin Univ. v. Library of Congress, Case No. B/48 (Jan. 11, 1983). The award on agreed terms reflected a settlement reached in Ministry of Roads & Transp. v. Port of Vancouver, Wash., Award No. 79-B-67-2 (Sept. 12, 1983).

mit for certain equipment⁴⁵ to the \$10.9 billion claim based on the U.S. Foreign Military Sales Program to Iran.⁴⁶ The U.S. claims are by comparison much more modest; the most significant of them, filed on behalf of the Agency for International Development, seeks about \$36 million.⁴⁷

U.S. banks filed approximately forty-seven claims against Iranian banks, arising out of nonsyndicated loans made by overseas branches of U.S. banks to Iranian entities. These claims are before the Tribunal under paragraph 2(B) of the Undertakings (not under Article II of the Claims Settlement Agreement), and both awards and settlements in these claims are paid out of Dollar Account No. 2⁴⁸ maintained at the Bank of England in London (not out of the Security Account). Direct settlement negotiations between U.S. banks and Iran to resolve these claims are underway in London. To date, twenty-three settlements, totaling approximately \$911 million, have been reached, resulting in payment to U.S. banks of approximately \$586 million and withdrawal of these claims from the Tribunal.⁴⁹ Settlements in the principal remaining claims could be achieved by the end of 1983, or shortly thereafter.

The remaining 400 or so bank claims were brought by Iranian banks against U.S. banks. Most of these claims are based on standby letters of credit; the rest involve disputes over deposits held in U.S. banks both domestically and offshore during the hostage crisis and payment of interest on those deposits. The Iranian banks contend that the Tribunal also has jurisdiction over these claims under paragraph 2(B) of the Undertakings. As indicated above, the United States disagrees and has filed two interpretive cases⁵⁰ contesting the Tribunal's jurisdiction over most of these claims. The gravamen of the argument in each case is that paragraph 2(B) of the Undertakings gives the Tribunal jurisdiction over disputes filed by Iran relating

⁴⁵ Ministry of Posts, Tele. & Tel. v. United States, Claim No. B/43.

⁴⁶ Ministry of Nat'l Defense v. United States, Claim No. B/1.

⁴⁷ Agency of Int'l Dev. v. Ministry of Economic Affairs and Fin. Claim No. B/37.

⁴⁸ Dollar Account No. 2 was established pursuant to article 2(B) of the Undertakings, *supra* note 12.

⁴⁹ The Export-Import Bank has received the largest settlement so far, totalling \$419.5 million. See IRANIAN ASSETS LITIGATION REP. 7,095 (Sept. 2, 1983).

⁵⁰ Case No. A/16 requests the Tribunal's determination of its jurisdiction over Iranian bank standby letters of credit. Case No. A/17 requests a determination of Tribunal jurisdiction over Iranian bank claims other than standby letters-of-credit claims.

only to certain deposits and disputed interest on those deposits in overseas branches of certain U.S. banks. Iran's standby letter-of-credit claims and its claims with respect to all other overseas deposits and with respect to all onshore deposits do not come within this jurisdictional ambit. It is, however, possible that many of Iran's standby letter-of-credit claims could be brought as counterclaims to claims of U.S. account parties on the underlying contractual arrangements. The United States has urged the Tribunal to arbitrate such counterclaims in the context of the affirmative claims of U.S. nationals. The hearing on the issue of jurisdiction over Iranian bank standby letter-of-credit claims was scheduled for October 3, 1983, and the question of jurisdiction over other Iranian bank claims was scheduled for hearing for December 1983.

The major focus of Tribunal activity and the area of greatest progress over the past year has been the "large claims," that is, claims of private individuals and corporations of \$250,000 or more. The overwhelming number of large claims was filed by U.S. nationals against Iran. Response dates have now been set for the submission of Iranian Statements of Defense in the majority of claims, and many of Iran's Statements of Defense have already been received. By September 30, 1983, approximately 111 prehearing conferences and 68 hearings on the merits had been held. The Chambers have scheduled approximately another 35 prehearing conferences and 29 hearings to be held between October 1983 and May 1984. As of the end of September 1983 the Tribunal had issued 80 awards. Of these, 60 were in favor of American claimants; of these 60 awards, 40 were awards on agreed terms, authorizing and approving settlements negotiated by the parties, and 20 were arbitrated. These awards totaled just under \$88 million. Of the remaining 20 awards, 12 dismissed claims for lack of jurisdiction, 7 dismissed claims on the merits, and 1 approved a withdrawal of a claim. In addition, the Tribunal has issued a number of important interlocutory awards, decisions, and orders on jurisdictional and procedural issues, establishing precedents for use in later cases.

The United States filed 2,795 claims for less than \$250,000 each, the so-called small claims, on behalf of U.S. nationals. Through settlements and requests for withdrawals, that number has now decreased to 2,721. The prospect of arbitrating such a large number of claims poses a major case management

problem for the Tribunal. At its March 1983 session the Tribunal took a first step toward solving that problem by deciding immediately to recruit three additional staff members with responsibility for organizing the adjudication of these claims. Although the United States envisages the need for a much greater number of staff members to be hired later as this work progresses, the Tribunal's decision was an encouraging development. Unfortunately, the additional staff has not yet been employed.⁵¹ The United States has proposed to the Tribunal that it adopt a test-case approach in arbitrating the small claims. The United States has categorized all of the small claims according to the major legal issues and type of loss involved.⁵² Under this approach the Tribunal would select a few cases in each category for a full hearing. Based on the Chambers' decisions in these cases, the remaining small claims could then be arbitrated more expeditiously by category, subject to Tribunal ratification of their decisions. The Tribunal has given Iran until October 1983 to comment on this approach.

Following the parties' adherence to the Algiers Accords, the United States proposed, and Iran agreed in principle, that the small claims be settled en bloc as between the two governments. Under such an agreement the claims would be withdrawn from the Tribunal in return for a lump-sum payment by Iran and would be adjudicated by the U.S. Foreign Claims Settlement Commission. The United States remains prepared to negotiate such an agreement and has introduced legislation to give the Commission authority to adjudicate the claims should an agreement be reached.⁵³ There is, however, no way to tell whether or

⁵¹ See dissents of Judge Mosk in Case No. 86 and Case Nos. 10001-12782 (June 16, 1983) (Tribunal has refused to take meaningful action with respect to claims of less than \$250,000 presented by the governments).

⁵² See United States Government Proposal for Expedited Treatment of Claims of U.S. Nationals for Under \$250,000 Each (June 14, 1983) [available at Department of State]. There are twelve categories: (1) medical and educational expenses of Iranians in the U.S.; (2) breach of commercial contract or nonpayment of commercial debt by Iran; (3) breach of commercial contract or nonpayment of commercial debt by a non-governmental Iranian entity; (4) breach of commercial contract by both governmental and nongovernmental entities of Iran; (5) nonpayment of private debt; (6) expropriation of real property; (7) interference with use of bank account; (8) loss of personal property; (9) damages to business as a result of acts of Iran; (10) salary claims where claimant was employed by and in Iran; (11) salary claims where claimant was employed by a U.S. company in Iran; and (12) miscellaneous.

⁵³ See S. Rep. 1072, 98th Cong., 1st Sess. (1983); H.R. Rep. 3241, 98th Cong., 1st Sess. (1983). See generally *Claims Against Iran: Hearing Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982).

when Iran might prove amenable to a settlement in practice. If an acceptable settlement cannot be reached, the United States is prepared to arbitrate the small claims. The use of test cases and expedited procedures, along with additional staff, should enable the Tribunal to arbitrate the small claims efficiently without delaying adjudication of the large claims.

Other Developments

There have been significant changes in the composition of the Tribunal during 1983. On January 5, 1983, President Lagergren accepted the resignation of Judge Pierre Bellet, the Chairman of Chamber Two, effective August 1, 1983, or at such earlier time as his replacement was available. Under Article 13 of the Tribunal's Provisional Rules of Procedure, the six party-appointed arbitrators could reach agreement on the selection of a new arbitrator or either of the governments could request that the Appointing Authority, previously designated by the Secretary General of the Permanent Court of Arbitration in The Hague, choose the new arbitrator. Following the submission of Judge Bellet's resignation, the Iranian and U.S. arbitrators met a number of times to discuss possible candidates. In light of the fact that those discussions were making little headway, the United States officially requested the Appointing Authority to act on March 1, 1983. On July 13 the Appointing Authority named Professor Willem Riphagen of the Netherlands to replace Judge Bellet. Professor Riphagen, former legal advisor to the Netherlands Ministry of Foreign Affairs, was professor of international law at the University of Rotterdam. He has served as an ad hoc judge on the International Court of Justice in *Barcelona Traction, Light & Power Co., Ltd.*,⁵⁴ as president of the arbitration tribunal in *Air Services Agreement*,⁵⁵ and as Special Rapporteur for the International Law Commission's study of State Responsibility.

In mid-August the government of Iran announced the resignation of Judge M. Jahangir Sani, the Iranian-appointed arbitrator in Chamber Three. At a Full Tribunal meeting on September 5, the Tribunal decided that a party-appointed arbitrator had to resign to the Tribunal itself, not to the govern-

⁵⁴ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4.

⁵⁵ *Air Serv. Agreement (Fr. v. U.S.)*, 16 R. Int'l Arb. Awards 5 (1963).

ment which appointed him, and that it would accept Judge Sani's resignation effective on the date that his replacement was available to take up his duties at the Tribunal. On September 14, 1983, Iran announced that it was appointing Parviz Arsari Mion, a former judge of the Iranian Ministry of Justice, to replace Judge Sani.

Rules of Procedure

The Tribunal completed its substantive revision of the Provisional Rules of Procedure during its session in early March 1983 and adopted the final Rules at its May session.⁵⁶ The Tribunal is the first body to use the UNCITRAL arbitration rules, which were designed to apply primarily to single claim, private ad hoc arbitrations. The Claims Settlement Agreement stipulated their use with such modifications as might be necessary to adapt them to the particular circumstances of the Tribunal.⁵⁷ Earlier changes, based in large part on previously issued Presidential Orders and Administrative Directives, had dealt with such matters as the composition of the Chambers, the timing and format for submission of Statements of Claim and Defense, and the service of documents on the Tribunal's registry in English and Farsi. Subsequent amendments provided for the attendance of the Iranian and U.S. Agents at all prehearing conferences and hearings and allowed the presentation of amicus briefs by the governments or other interested nonparties in a particular claim when the Tribunal determined that such submissions were likely to be of assistance. Among the most recent changes are revised procedures for service of documents during prehearing conferences or hearings, provision for determination of costs in orders terminating arbitral proceedings, and provision that orders and other decisions of the Tribunal, in addition to awards, will be publicly available.

In a disturbing departure from the terms of the Claims Settlement Agreement, the Tribunal decided to retain the language of Article 33(2) of the UNCITRAL Rules permitting it to decide claims ex aequo et bono if expressly authorized in writing to do so by the arbitrating parties in a particular claim.

⁵⁶ Copies of the Tribunal's Rules are available from the Office of Iranian Claims, Office of the Legal Adviser, Department of State (hereinafter cited as Rules of Procedure).

⁵⁷ Claims Settlement Agreement, *supra* note 14, art. III(2).

In the view of the United States, this decision is inconsistent with the requirement of Article V of the Claims Settlement Agreement that the Tribunal decide all claims on the basis of respect for law. Article V was intentionally and carefully drafted so as to supersede Article 33 and avoid empowering the Tribunal to act *ex aequo et bono*. While the Tribunal adopted a contrary interpretation, the practical implications of the decision may be limited by the requirement that the arbitrating parties to any given claim agree in writing to an exercise of *ex aequo et bono* jurisdiction. To date, in no case have the arbitrating parties availed themselves of this provision.

A more positive development in the final Rules is the provision for the appointment of up to three persons by each of the governments to act as a substitute arbitrator for a temporary period, thus ensuring continued operation of the Tribunal in the event that one or more of their party-appointed arbitrators is temporarily unable to serve. In April 1983 the Secretary of State appointed Charles Brower, an experienced lawyer with an extensive background in international commercial arbitration and former Acting Legal Adviser of the Department of State, as one of the substitute U.S. arbitrators.

In sum, the Tribunal's practical accomplishments since May 1982 have been substantial. Over the past year and a half it has been hearing and deciding claims at a much faster pace than before. Significant problems still exist, however. The Tribunal's lack of a coherent case management system and the arguably differing approaches of the various Chambers tend to delay proceedings and could lead to inconsistent results.⁵⁸ Proceedings continue to be slowed by Iran's repeated requests for extensions of filing dates and other untimely demands,⁵⁹ as well as by repeated absences of the Iranian arbitrators from deliberations⁶⁰ and repeated refusals by the Iranian arbitrators to

⁵⁸ Compare *Isaiah v. Bank Mellat*, Award No. 35-219-2 (Mar. 30, 1988), with *Dallal v. Iran*, Award No. 53-149-1 (June 10, 1983). See text at notes 187-191 *infra*.

⁵⁹ The American arbitrators have filed dissents to many orders extending Iranian filing dates or postponing hearings at Iranian request. See, e.g., Dissent of Howard M. Holtzmann from Orders Granting Further Extensions of Time to File Statements of Defense, Claim Nos. 452 and 926 (June 20, 1983); Dissents of Richard M. Mosk from Orders in Claim Nos. 35 (Apr. 4, 1982), 88 (Oct. 20, 1982), and 42, 48, 60, 167 & 439 (Aug. 26, 1983).

⁶⁰ Judge Shafeiei, the Iranian arbitrator in Chamber Two, did not attend any Chamber deliberations during July 1983. For a month before his resignation in September 1983, Judge Sani, the Iranian arbitrator in Chamber Three, did not participate in that Chamber's deliberation. See text at notes 218-222 *infra*.

sign awards.⁶¹ There are some signs that the Tribunal is now prepared to set limits on such tactics. For example, the Tribunal no longer allows posthearing filings except in exceptional circumstances.⁶² In one award Chamber Three ordered Iran to pay additional attorneys' fees to the successful claimant because of Iran's failure to provide information until late in the proceedings.⁶³ Chamber Three has also refused to consider Iranian counterclaims in a few cases because they were filed late without any justification.⁶⁴ Such measures are necessary if the Tribunal is to accomplish its task effectively and efficiently.

JURISDICTIONAL DECISIONS OF THE TRIBUNAL

A review of the various decisions, orders, and awards issued by the Tribunal since its inception is both encouraging and discouraging—encouraging because by and large the results have been consistent with and demonstrate a respect for law; discouraging because some of the Tribunal's opinions have been neither as reasoned nor as jurisprudential as might have been expected and because the standards of proof imposed have been very high. While arbitration as a process differs from judicial resolution of disputes, nonetheless the Tribunal is an adjudicative body whose decisions must be made on the basis of respect for law. The Tribunal's awards and orders will not be accorded their proper precedential weight if they are not well reasoned and firmly grounded in law. For the Tribunal to establish its place in the international arbitration process generally, and more specifically to do justice to the claimants before it, it must resolve claims fairly, judiciously, and on their merits.

The following discussion highlights the more significant decisions of the Tribunal to date.⁶⁵ As might be expected, the ma-

⁶¹ See, e.g., *Blount Bros. Corp. v. Ministry of Housing and Urban Dev.*, Award No. 74-62-3 (Sept. 2, 1983); *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, Award No. 59-220-2 (July 27, 1983). See also text at notes 218-222 *infra*.

⁶² See *John Carl Warnecke & Assocs. v. Bank Mellat*, Award No. 72-124-3 (Sept. 2, 1983) (fairness, orderliness, and possible prejudice to the other party in the case required that the Tribunal disregard an unauthorized memorial filed after the hearing by Bank Mellat).

⁶³ *Ultrastystems, Inc. v. Iran*, Partial Award No. 27-84-3 (Mar. 4, 1983).

⁶⁴ See, e.g., *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983); *Blount Bros. Corp. v. Ministry of Housing and Urban Dev.*, Claim No. 62 (Order of Apr. 19, 1983); *General Dynamics Corp. v. Iran*, Claim No. 283 (Order of Dec. 20, 1982); *R.J. Reynolds Tobacco Co. v. Iranian Tobacco Co.*, Claim No. 35 (Order of Nov. 22, 1982).

⁶⁵ Pursuant to Article 32 of the Tribunal's Rules of Procedure, *supra* note 56, all awards and other decisions shall be made available to the public, except that upon the

majority of the early decisions clarify the scope of the Tribunal's jurisdiction as set forth in the Claims Settlement Agreement. As a general observation, the Tribunal has not maintained a consistent position on whether the jurisdictional provisions of the Accords should be read broadly or narrowly. In its "nullification" decisions,⁶⁶ Chamber Two described the Tribunal's jurisdiction as "very broad," in part because "it was the purpose of the two governments 'to terminate all litigation as between the government of each party and the nationals of the other.'"⁶⁷ On the other hand, in *Grimm v. Iran*⁶⁸ Chamber One explicitly stated that the scope of jurisdiction of an arbitral tribunal should be given a restrictive interpretation.

Choice-of-Forum

The choice-of-forum issue⁶⁹ required the Tribunal to interpret the meaning of the language in Article II(1) of the Claims Settlement Agreement which excludes from the jurisdiction of the Tribunal 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." In the Iranian view any contract that included a clause suggesting Iran as a possible forum was excluded from the jurisdiction of the Tribunal. The United States maintained, however, that a claim could be excluded only where: (1) the claim arose under a contract between the arbitrating parties; (2) the contract specifically

request of one or more of the arbitrating parties the Tribunal may determine that it will not make the entire award or other decision public. Copies of awards and other decisions may be obtained from the Tribunal's Registry or from the Office of Iranian Claims, Office of the Legal Adviser of the Department of State. Most are available in and published by the Iranian Assets Litigation Reporter and will shortly be available in bound volumes from Grotius Publications, Ltd. At present, neither the Tribunal nor the U.S. government publishes Tribunal documentation in official form, although that may occur in due course. See note 38 *supra*.

⁶⁶ *Amoco Iran Oil Co. v. Iran*, Interlocutory Award No. 12-55-2 (Dec. 30, 1982); *Phillips Petroleum Co., Iran v. Iran*, Interlocutory Award No. 11-39-2 (Dec. 30, 1982). The issue in these cases was whether post revolutionary legislation declaring prior oil agreements "null and void" precluded the Tribunal from hearing claims arising from such legislation. Chamber Two determined that it had jurisdiction over these claims.

⁶⁷ *Amoco Iran Oil Co. v. Iran*, Interlocutory Award No. 12-55-2 (Dec. 30, 1982) (citing preamble to General Declaration).

⁶⁸ Award No. 25-71-1 (Feb. 22, 1983).

⁶⁹ See generally Note, *Changed Circumstances and the Iranian Claims Arbitration: Applications to Forum Selection Clauses and Frustration of Contract*, 16 GEO. WASH. J. INT'L L. & ECON. 335 (1982).

provided that any dispute thereunder was to be within the sole jurisdiction of the competent Iranian courts; and (3) the contractual selection of Iranian courts was binding on the parties.

In a series of interlocutory awards rendered on November 5, 1982,⁷⁰ the Full Tribunal decided that it had no jurisdiction to determine whether the choice-of-forum clauses were "binding" because the Claims Settlement Agreement did not expressly grant such power.⁷¹ This decision is contrary to the views of most commentators that an international arbitral tribunal has the power to pass upon the validity of clauses affecting its jurisdiction.⁷² The Tribunal, however, decided that it did have jurisdiction to determine whether specific contracts fell within the remainder of the exclusion cause.⁷³ The Tribunal construed this clause somewhat narrowly, finding that only six of the nineteen contractual claims at issue fell within its terms and thus were excluded.⁷⁴ At the same time, the Tribunal left open the possibility that claimants thus excluded could still establish jurisdiction before the Tribunal through noncontractual theories such as quantum meruit and unjust enrichment. While none of

⁷⁰ *Dresser Indus., Inc. v. Iran*, Interlocutory Award No. 9-466-FT (Nov. 5, 1982); *Drucker v. Foreign Transaction Co.*, Interlocutory Award No. 4-121-FT (Nov. 5, 1982); *Ford Aerospace & Communications Corp. v. Air Force of Iran*, Interlocutory Award No. 6-159-FT (Nov. 5, 1982); *Gibbs & Hills, Inc. v. Iran Power Generation and Transmission Co.*, Interlocutory Award No. 1-6-FT (Nov. 5, 1982); *Halliburton Co. v. Doreen/IMCO*, Interlocutory Award No. 2-51-FT (Nov. 5, 1982); *Howard Needles Tammen & Bergendoff v. Iran*, Interlocutory Award No. 3-68-FT (Nov. 5, 1982); *Stone & Webster Overseas Group, Inc. v. Nat'l Petrochemical Co.*, Interlocutory Award No. 8-293-FT (Nov. 5, 1982); *T.C.S.B. v. Iran*, Interlocutory Award No. 5-140-FT (Nov. 5, 1982); *Zokor Int'l v. Iran*, Interlocutory Award No. 7-254-FT (Nov. 5, 1982). See also Dissenting Opinion of Messrs. Lagergren, Kashani, Shafeiei, and Sani as to Part II, Case Nos. 6 and 68 (Nov. 9, 1982); Concurring and Dissenting Opinions of Howard M. Holtzmann with respect to Interlocutory Awards of Jurisdiction in Nine Cases Containing Various Forum Selection Clauses (Nov. 5, 1982); Dissenting and Concurring Opinion of Richard M. Mosk on the Issues of Jurisdiction, Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 & 466 (Nov. 5, 1982).

⁷¹ See, e.g., *Halliburton Co. v. Doreen/IMCO*, Interlocutory Award No. 2-51-FT (Nov. 5, 1982), at 5-7. The Tribunal did "not reach the question as to whether changes in Iran may have any impact on the enforceability of forum selection clauses in contracts." *Id.* at 7.

⁷² See J. SIMPSON & H. FOX, *INTERNATIONAL ARBITRATION* 117-122 (1959) (discussion of decisions concerning Calvo Clause). Cf. *Chorzow Factory Case*, 1927 P.C.I.J., ser. A, No. 9, at 30 (international tribunal may decide whether it should extend jurisdiction).

⁷³ See *Gibbs & Hill, Inc. v. Iran Power Generation and Transmission Co.*, Interlocutory Award No. 1-6-FT (Nov. 5, 1982) at 4-5.

⁷⁴ With regard to those claims that were excluded, the Tribunal noted that "[t]he extent to which the . . . claim . . . is not based on contract remains to be determined" by the Chamber assigned the claim. *Drucker v. Foreign Transaction Co.*, Interlocutory Award No. 4-121-FT (Nov. 5, 1982), at 8.

these cases has yet been resolved, the Tribunal has dismissed a number of claims based on the decisions taken in these interlocutory awards. In *World Farmers Trading, Inc. v. Government Trading Corp.*,⁷⁵ for example, Chamber One dismissed a claim against one of the respondents because it was based on a contract which stated that "[e]ventual disputes must be finally and exclusively settled in Iranian courts."⁷⁶ The Tribunal continues, however, to construe such clauses strictly, upholding only those that "unambiguously restrict jurisdiction to the Courts of Iran."⁷⁷

Proof of Nationality

The Tribunal has to date addressed a number of other jurisdictional and procedural questions of particular importance for private claimants. Questions of proof of nationality have been especially significant. For the purposes of the Tribunal's jurisdiction, Article VII(1) of the Claims Settlement Agreement defines the term *national* of Iran or of the United States to include, in the case of an individual, a citizen of either country, and, in the case of corporations or other juridical entities, those organized under the laws of either country if the majority of its shares are held by citizens of that country. While a birth certificate, passport, or naturalization certificate will suffice to show the U.S. citizenship of an individual, proof of corporate nationality is more complex and a comparable approach would have posed potentially unmanageable difficulties. For large publicly traded corporations in particular, the burden of producing birth certificates or passports for at least fifty percent of their

⁷⁵ Award No. 66-764-1 (Aug. 16, 1983). Judge Holtzmann concurred in this award although it was based on Interim Awards of the Full Tribunal from which he dissented, *supra* note 70, out of respect for the decisions of the majority of the Full Tribunal. See also *United Technologies Int'l, Inc. v. Telecommunications Co. of Iran*, Award No. 78-238-2 (Sept. 9, 1983) (applying the findings in *Ford Aerospace, Halliburton, and T.C.S.B.* awards to discuss claim and counterclaim); *Continental Grain Export Corp. v. Gov't Trading Corp.*, Partial Award No. 75-112-1 (September 5, 1983) (applying findings in *Drucker* to discuss two claims).

⁷⁶ *World Farmers Trading Inc. v. Gov't Trading Corp.*, Award No. 66-764-1 (Aug. 16, 1983).

⁷⁷ See, e.g., *Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983). The Tribunal has maintained jurisdiction over contracts with forum clauses calling for arbitration, *Pomeroy v. Iran*, Award No. 50-40-3 (June 8, 1983); for settlement through competent courts, *Gruen Assocs., Inc. v. Iran Housing Co.*, *supra*; and for submission of disputes to Iranian administrative entities, *Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983).

individual shareholders, even if possible, could in some circumstances outweigh the value of the claims.

Recognizing this problem, the Tribunal established a presumption in favor of U.S. nationality for companies the shares of which are widely held by persons with U.S. addresses. Under standards set forth in *Flexi-Van Leasing Co. v. Iran*,⁷⁸ and *General Motors Corp. v. Iran*,⁷⁹ Chamber One held that publicly held corporate claimants which are not controlled by a small number of shareholders can make a prima facie showing of U.S. nationality by submitting three basic documents: (1) a certificate by a government official of the state of incorporation showing the date of incorporation and whether the corporation was in good standing on or after January 19, 1981; (2) copies of the relevant pages of the corporation's proxy statements filed with the Securities and Exchange Commission nearest to the time the claim arose and after January 19, 1981, containing the necessary information concerning principal shareholders and a sworn statement by a corporate official that the proxy statements are true and complete copies; and (3) a notarized affidavit by a corporate officer stating the percentage of voting stock which is held by stockholders of record with addresses in the United States. Further proof will be required only if the above documents indicate significant foreign ownership or if Iran produces evidence sufficient to overcome the presumption.⁸⁰ This presumption, adopted first by Chamber One, seems to be the standard applied by all the Chambers, considerably easing the burden of proof imposed on claimants.⁸¹

⁷⁸ Claim No. 36 (Order of Dec. 15, 1982). See also 77 AM. J. INT'L L. 642 (1983).

⁷⁹ Claim No. 94 (Order of Jan. 18, 1983). See also 77 AM. J. INT'L L. 642 (1983). Judge Holtzmann dissented from this order, stating that it was inappropriate to add the requirement of a statement concerning the place of residence of stockholders. Dissenting Opinion from Portions of Orders re Proof of Corporate Nationality Which Add a Requirement Not Included in *Flexi-Van Case*, Cases No. 15, 18, 37, 94, 231 & 243 (Jan. 26, 1983).

⁸⁰ Iran has filed an interpretive dispute, Case No. A/20 (Request of June 14, 1983), requesting the Full Tribunal to render a decision on the "criteria for the proper application" of the corporate nationality requirements of article VII.

⁸¹ See, e.g., *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, Interlocutory Award No. 23-120-2 (July 27, 1983); *Rexnord, Inc. v. Iran*, Award No. 21-132-3 (Jan. 10, 1983). Where the claimant corporation is either privately held or its shares are not widely traded, proof of citizenship of individual shareholders is still required. See, e.g., *Pomeroy v. Iran*, Award No. 50-40-3 (June 8, 1983) (claimant presented evidence that all outstanding stock held by three individuals who were citizens of the United States since birth); *Economy Forms Corp. v. Iran*, Award No. 55-165-1 (June 14, 1983) (claimant testified at hearing that 65 percent of the corporation's stock was

The presumption adopted for proof of corporate nationality has also been used in proving indirect shareholder control. Article VII(2) of the Claims Settlement Agreement provides jurisdiction over "claims that are owned indirectly by [Article VII(1)] 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."⁸² For example, where the claimants were the sole owners of stock in a Liberian corporation and had presented birth certificates and passports showing their U.S. nationality, the Tribunal held that the claimants owned the claims of the corporation and were the proper parties to assert them before the Tribunal.⁸³

Even if the U.S. shareholders of a foreign corporation are not the sole shareholders, the Tribunal held that they may still bring a claim if their ownership interest in the foreign corporation was "sufficient at the time the claim arose to control the corporation."⁸⁴ In *Management of Alcan Aluminum Ltd. v. Ircable Corp.*,⁸⁵ the Tribunal decided that control of a Canadian corporation by U.S. shareholders could be demonstrated in one of two ways: by a showing either that U.S. shareholders owned 50% or more of the voting shares or that U.S. shareholders controlled the corporation in fact, regardless of the total proportion of their shares. In determining the percentage of shares owned by U.S. shareholders, Chamber Three adopted the presumption enunciated in *Flexi-Van* that a high percentage of stock registered in the names of persons with U.S. addresses was in fact held by U.S. nationals as defined in Article VII and concluded that it could draw reasonable inferences based upon this correlation. In *Alcan*, however, the evidence submitted by the claimant showed that the proportion of shareholders with U.S. addresses barely topped 50%. Since these circumstances

held by a family trust, all of whose members were U.S. nationals). Where the claimant has failed to submit any evidence that it is a U.S. national, the Tribunal has dismissed the claim. See *French Am. Banking Corp. v. Iranit, S.A.*, Award No. 43-189-3 (May 5, 1983). See note 80 *supra*.

⁸² Claims Settlement Agreement, *supra* note 14, art. VII(2). See *Management of Alcan Aluminum Ltd. v. Ircable Corp.*, Award No. 41-91-3 (May 3, 1983).

⁸³ *Pomeroy v. Iran*, Award No. 50-40-3 (June 8, 1983).

⁸⁴ *Id.*

⁸⁵ Award No. 41-91-3 (May 3, 1983).

suggested a significant incidence of non-U.S. ownership, the Chamber requested additional evidence from the claimants. When the claimants failed to present additional evidence or to show that U.S. nationals in fact controlled the corporation, Chamber Three dismissed the claim.⁸⁶

An additional issue concerning corporate nationality has arisen in the case of nonprofit organizations. In *International Schools Services, Inc. v. Iran*,⁸⁷ Iran has asserted that the Claims Settlement Agreement does not confer jurisdiction over non-stock, not-for-profit corporations because they cannot meet the Article VII(1) (b) standard of U.S. ownership of an interest equivalent to 50% or more of the outstanding stock. In the U.S. view, such corporations are not excluded by Article VII(1) (b)'s use of stock as a criterion for nationality because they can demonstrate other sorts of controlling U.S. interests "equivalent to" stock. A hearing on this issue was scheduled for December 1983.

Another important nationality issue involved individuals who possess both Iranian and U.S. citizenship. Whether the Tribunal would accept jurisdiction over claims by such "dual nationals" affects, in particular, naturalized citizens of the United States who were born in Iran as well as U.S.-born wives and children of Iranian men who automatically received Iranian citizenship upon marriage or birth by operation of Iranian law. Iran contended that the U.S. citizenship of many claimants was invalid under Iranian law, and that even if the claimants' U.S. citizenship were valid the Tribunal should nonetheless read into its jurisdictional grant an asserted principle of absolute nonresponsibility of a state for the claims by its own citizens. Chamber Two rejected these arguments in *Esphahanian v. Bank Tejarat*⁸⁸ and held that the proper test required a determination of the dominant and effective nationality of the claimant; in other words, that nationality "which accord[s] with the facts . . . based on stronger factual ties between the person concerned

⁸⁶ Judge Mosk noted in his concurrence to *Alcan* that the claimants had every opportunity to supply some other evidence, such as statistical and sampling results, governmental filings, or other data. *Id.* (Mosk, J., concurring). Without additional evidence, the Tribunal was justified on the specific facts of the case in concluding that it could not infer that 50% or more of the shares were owned by U.S. nationals.

⁸⁷ Claim No. 111 (filed Nov. 18, 1981). See Memorial of the United States on the Issue of Jurisdiction Over Non-Profit Corporations (available at the Department of State).

⁸⁸ Award No. 31-157-2 (Mar. 29, 1983).

and one of the States whose nationality is involved."⁸⁹ In the U.S. view this holding is consistent with contemporary principles of international law as enunciated by the International Court of Justice.⁹⁰ Chamber Two considered a number of factors in determining effective nationality: place of residence, voting record, property ownership, schooling, payment of taxes, family ties, military service, and investments. In addition, the Chamber closely examined the claim itself to determine whether it arose from benefits not otherwise available to a foreign national in Iran. Only after deciding that all of the actions relevant to the claim could have been lawfully taken by a non-Iranian did the Chamber conclude that the claimant was a U.S. national within the meaning of the Claims Settlement Agreement and that the Chamber had jurisdiction to hear the claim.⁹¹ While the Chamber dismissed the claim in *Haroonian v. Iran*⁹² because the claimant did not become a citizen of the United States until June 1982 and thus at the time of filing was an Iranian national, the claimants in *Esphahanian* and *Golpira v. Iran*⁹³ were found to be U.S. nationals, even though they still retained Iranian passports, because their ties to the United States predominated.⁹⁴

A finding of nationality is not the end of the inquiry. Under Article VII(2) of the Claims Settlement Agreement, a claimant must also show that he owned the claim continuously from the time it arose to the date of the Algiers Accords, that is, until January 19, 1981. The fact, however, that a corporate claimant was dissolved after its claim had been submitted does not affect Tribunal jurisdiction since "the only relevant period for the purpose of jurisdiction is the period from the time the claim

⁸⁹*Id.* quoting *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4. For more information on this award, see 77 Am. J. Int'l L. 646 (1983). See also *Golpira v. Iran*, Award No. 32-211-2 (Mar. 29, 1983); *Haroonian v. Iran*, Award No. 33-418-2 (Mar. 29, 1983).

⁹⁰See *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4. See also *Mergé Case* (U.S.-Italy), 14 R. Int'l Arb. Awards 236 (1955); *Salem Case* (U.S. v. Egypt), 14 R. Int'l Arb. Awards 1161 (1932). The United States has argued, however, that by its terms Article VII of the Claims Settlement Agreement, *supra* note 14, conferred jurisdiction over claims by U.S. citizens whether or not they possessed Iranian nationality as well. See Memorial of the United States on the Issue of Dual Nationality at 8-25.

⁹¹*Esphahanian*, *supra* note 88, at 15-18.

⁹²Award No. 33-418-2 (Mar. 29, 1983).

⁹³Award No. 32-211-2 (Mar. 29, 1983).

⁹⁴Iran filed an interpretive dispute, Case No. A/18 (request of Feb. 25, 1983), contending that the Algiers Accords do not permit the Tribunal to arbitrate claims of dual nationals and requesting Full Tribunal consideration of the question. The Tribunal heard oral argument on the issues on Nov. 10-11, 1983.

arose until 19 January 1981."⁹⁵ The Tribunal has looked carefully at claims in order to determine their dates of origin. In *Isaiah v. Bank Mellat*,⁹⁶ the claimant asserted that he was the beneficial owner of a bank check that had been dishonored for lack of funds. At the time of dishonorment—that is, the time the claim arose—the claimant was neither the payee on the check nor its assignee. Thus, according to Chamber Two, he could not claim on the check because he did not own the claim from the time it arose and the actual owner at the time was not a U.S. national. The claimant, however, could show that he was the beneficial owner of the funds which were given to the Bank to purchase a bank check. If the Bank held these funds on January 19, 1981, according to Chamber Two, the claimant was the continuous owner of a claim against the Bank for unjust enrichment.

Having proven nationality and continuous ownership, the claimant must also show that its claim was "outstanding" on January 19, 1981.⁹⁷ Claims which arose after that date are not within the Tribunal's jurisdiction.⁹⁸ In determining when a claim has arisen, the Tribunal has looked to the claimant's pleadings. In long-term contracts, the claimant must allege and prove that there was actual or anticipatory breach of that contract before January 19, 1981. For example, in *Kimberly-Clark Corp. v. Bank Markazi Iran*,⁹⁹ the claimant argued that the respondent had breached a licensing agreement and had failed to make royalty payments under a license that expired in 1986 for the use of the Kleenex trademark. While agreeing that the license had been breached in various ways as early as October 1978, Chamber Two found that the claimant considered the license as continuing in force until March 1983. Based on this finding, the Chamber was not convinced that there was anticipatory breach of the license as a whole before January 19, 1981, and therefore concluded that it had jurisdiction to award com-

⁹⁵*Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983).

⁹⁶Award No. 35-219-2 (Mar. 30, 1983).

⁹⁷Claims Settlement Agreement, *supra* note 14, art. II(2). See *Amoco Oil Co. v. Iran*, Interlocutory Award No. 12-55-2 (Dec. 30, 1982); *Phillips Petroleum Co., Iran v. Iran*, Interlocutory Award No. 11-39-2 (Dec. 30, 1982) ("outstanding claim" refers to a cause of action which "existed" as of Jan. 19, 1981).

⁹⁸*J.I. Case Co. v. Iran*, Award No. 57-244-1 (June 15, 1983) (no jurisdiction for nonpayment of an installment where payment extension was granted until March 20, 1981, since no claim could have been made until the due date).

⁹⁹Award No. 46-57-2 (May 25, 1983).

pensation only for those payments due before that date. Similarly, in *Gould Marketing, Inc. v. Ministry of National Defense*¹⁰⁰ the claimant did not allege anticipatory breach of a ten-year contract due to expire in 1986 and therefore any claims for payments due after January 19, 1981, were held not to be within the Tribunal's jurisdiction.

"Other Measures"

Tribunal decisions have also dealt with the question of substantive jurisdiction. Article II(1) of the Claims Settlement Agreement establishes the Tribunal's jurisdiction over claims arising out of "debts, contracts . . . , expropriations or other measures affecting property rights." The first three elements of this jurisdictional grant should cause little difficulty; the meaning of debts, contracts, and expropriations is reasonably well-defined under international law. The final phrase, however, "other measures affecting property rights," is novel and therefore open to varied interpretation. The Full Tribunal has not resolved the meaning of this phrase and the two Chambers which have considered it have rendered inconsistent opinions.

In *Hoffland Honey Co. v. National Iranian Oil Co.*¹⁰¹ a Wisconsin beekeeper alleged that he suffered losses through damage to or destruction of bee colonies occasioned by the use of pesticides derived in a significant part from oil produced in Iran. The sales of oil by the National Iranian Oil Company (NIOC), according to Hoffland, were "other measures affecting property" for which Iran was responsible. Hoffland, however, had no contractual relationship with NIOC and did not allege either that NIOC's sales were the proximate cause of the claimed injury to its bees or that NIOC's oil sales were "wrongful as a matter of law." Chamber Two therefore dismissed Hoffland's claim. In so doing, Chamber Two left open the possibility that damages caused by NIOC's sales of oil could have been "other measures affecting property rights" if "wrongfulness" or proximate cause had been shown.¹⁰²

Chamber One, on the other hand, has read the phrase "other

¹⁰⁰ Interlocutory Award No. 24-49-3 (July 27, 1983).

¹⁰¹ Award No. 22-495-2 (Jan. 26, 1983).

¹⁰² *Id.* at 3. The Chamber nonetheless noted that Hoffland's claim was "political" in nature and thus inherently incapable of "judicial resolution" since neither government contemplated Tribunal intrusion into decisions concerning oil imports which affect national economic policy. *Id.* at 4.

measures affecting property rights" more narrowly. In *Grimm v. Iran*,¹⁰³ Mrs. Grimm filed a claim for loss of support and punitive and exemplary damages as a result of the assassination of her husband on his way to work as the General Manager of the Oil Service Company of Iran. Mrs. Grimm alleged that the government of Iran had breached its international responsibilities in failing to protect her husband adequately, and that his assassination had deprived her of his financial support—a "property right." Chamber One denied the claim on the basis that "other measures" does not encompass claims for damages to surviving dependents arising out of a failure to provide protection. Under the principle of *eiusdem generis*, it held the words "other measures" must be construed as generically similar to "expropriations." In passing, Chamber One also stated that "it is generally recognized that a provision which establishes the jurisdiction of an arbitral tribunal should be given a restrictive interpretation,"¹⁰⁴ a rather surprising statement since this principle is in fact subject to considerable dispute. In a forceful dissent, Judge Holtzmann, the U.S. member of the Chamber, contended that the ordinary meaning of "property rights" under international law includes a surviving dependent's right of financial support, and that the failure of Iran to protect Mr. Grimm's life resulted in a property loss to Mrs. Grimm which is "squarely within the jurisdiction of this Tribunal."¹⁰⁵

The decisions in *Hoffland Honey* and *Grimm* can perhaps be reconciled on the basis of their very different factual settings. In addition, Chamber One did admit in the *Grimm* decision that "[i]t would perhaps be possible to accept that the words 'other measures' may cover both acts and failures to act. . . ." ¹⁰⁶ Nonetheless, these decisions demonstrate that the Chambers did not necessarily agree on the meaning of the Accords and inconsistent decisions are possible.

The Tribunal also discussed the meaning of "other measures affecting property rights" in *Harza Engineering Co. v. Iran*.¹⁰⁷

¹⁰³ See note 68 *supra*. See also 77 AM. J. INT'L L. 649 (1983).

¹⁰⁴ *Grimm*, *supra* note 68, at 4.

¹⁰⁵ Award No. 25-71-1 (Mar. 22, 1983) (Holtzmann, J., dissenting).

¹⁰⁶ *Grimm*, *supra* note 68, at 3. Chamber One affirmed that acts of the government of Iran which interfered with a claimant's property rights could give rise to a claim in J.I. Case Co. v. Iran, Award No. 57-244-1 (June 15, 1983). In that case, however, the Chamber concluded that there was insufficient evidence of government intervention with claimant's property rights and dismissed the claim.

¹⁰⁷ Award No. 19-98-2 (Dec. 30, 1982).

Harza alleged that on four separate occasions its attempts to withdraw funds from a Bank Melli account were wrongfully dishonored and that Bank Melli's actions amounted to an expropriation of its funds by Iran through unreasonable interference with the use of those funds, thus constituting an "other measure affecting property rights." Chamber Two confirmed that these allegations could form the basis for a claim. It concluded, however, that Harza had failed to prove that Bank Melli's actions amounted to an "unreasonable interference" sufficient to establish expropriation.¹⁰⁸ The Chamber thus dismissed the claim for "want of proof."

Some claimants have expressed the fear that the *Harza* decision enshrines the principle of "come and get it"; in other words, that the Tribunal will not allow a claim against Iran if the claimant can go to Iran and retrieve the property which he claims.¹⁰⁹ This is not a fair reading of the decision, since the Chamber's opinion clearly states that "other measures affecting property rights" includes de facto expropriation and that a claim that the use of a bank account has been unreasonably interfered with, or that the account has in some other manner been taken, sufficiently establishes the Tribunal's jurisdiction under the Claims Settlement Agreement. Thus, it appears that this decision does not preclude similar claims where the claimant can meet the burden of proof required, nor does it exclude alternative theories for bank account claims such as breach of contract or unjust enrichment.

Other Jurisdictional Questions

The Tribunal has also considered two specific jurisdictional questions arising from Article II(1) of the Claims Settlement Agreement. By reference to paragraph 11 of the General Declaration, this article excludes from the Tribunal's jurisdiction claims "arising out of actions of the United States in response to" the seizure and subsequent detention of the hostages in Teheran. In *Haji-Bagherpour v. United States*,¹¹⁰ the claimant, an

¹⁰⁸*Id.* at 10-11.

¹⁰⁹*Cf.* *Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983) (claim for compensation for professional archives left in Iran dismissed for failure to prove their confiscation, the Chamber noting that at the hearing the government of Iran agreed to make such possessions available to the claimant).

¹¹⁰Award No. 23-428-2 (Jan. 26, 1983). Paragraph 11 also excludes from the Tribunal's jurisdiction claims arising from the seizure of the 52 U.S. nationals on Nov. 4,

Iranian national, sought to recover for damage to his tanker truck which allegedly occurred during the unsuccessful attempt to rescue the fifty-two hostages held in Teheran. Chamber Two dismissed the claim for lack of jurisdiction, noting that Haji-Bagherpour suffered damage because he "chanced to come upon the staging area for the rescue operation while the American armed forces were there. They would not have been there and would not have destroyed his truck if the fifty-two U.S. nationals had not been seized and detained."¹¹¹ Such measures were thus "in response to" the unlawful hostage seizure and within the scope of paragraph 11's exclusion.

Article II also precludes, by reference to paragraph 11 of the General Declaration, claims for injuries resulting from "popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran." While this issue has not yet been fully addressed by the Tribunal, Chamber Three held in a partial award in *Ultrasystems, Inc. v. Iran*¹¹² that costs incurred in preventing injury to U.S. nationals or U.S. businesses in Iran were not precluded from the Tribunal's jurisdiction by this phrase. Chamber Three stated that the "exclusionary provisions of paragraph 11 can hardly have been intended to cover more than claims arising directly out of actual injuries."¹¹³ While recognizing that costs incurred by claimant in protecting its personnel were not excluded by paragraph 11, the Chamber nonetheless rejected the claim because the costs for security measures were not recoverable under the applicable contract provisions. The Chamber left open the question of whether medical expenses incurred in treating an employee attacked in Iran were outside its jurisdiction under paragraph 11 since these costs were not part of the applicable contract provisions.¹¹⁴

The Tribunal has given some attention to other jurisdictional

1979, their subsequent detention, and injury to certain property within the U.S. Embassy compound in Teheran.

¹¹¹*Id.* at 3.

¹¹²Partial Award No. 27-84-3 (Mar. 4, 1983).

¹¹³*Id.* at 14.

¹¹⁴In his concurrence to *Ultrasystems*, Judge Mosk noted that if the claim for medical expenses is based on an agreement to pay the amount and is not a direct claim for injury, such a claim is within the jurisdiction of the Tribunal. Since Judge Mosk believed that the parties had in effect concluded a new contract which included this claim, he would have allowed it. Partial Award No. 27-84-8 (Mar. 4, 1983) (Mosk, J., concurring). See text at note 199 *infra*.

issues as well. For example, in *Isaiah v. Bank Mellat*¹¹⁵ the Tribunal decided for the first time that it has jurisdiction to hear claims based on unjust enrichment. In *Isaiah* the claimant alleged that he was the beneficial owner of funds retained by Bank Mellat after dishonoring of a bank check. Applying "general principles of law," Chamber Two held that "it would be inequitable for such a bank to escape liability to the beneficial owner of the funds represented by such a dishonored check and retain the funds to which the bank has no claim."¹¹⁶ After determining that the claimant was in fact the beneficial owner of the funds in question, the Chamber awarded him the amount due on the dishonored check.¹¹⁷

The Tribunal has clarified its position on the exclusivity of its jurisdiction over proper counterclaims. Article II(1) of the Claims Settlement Agreement vests the Tribunal with jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the affirmative] claim." While Article VII(2) excludes from all other courts "claims referred to the Arbitral Tribunal . . . as of the date of filing of such claims with the Tribunal," it does not mention counterclaims. The Tribunal therefore had to decide whether it had exclusive jurisdiction over possible counterclaims.

The Full Tribunal held in *E-Systems, Inc. v. Iran*¹¹⁸ that Article VII(2) referred only to counterclaims already before the Tribunal. It further held that no other provision of the Algiers Accords¹¹⁹ contains a mandatory counterclaim rule and that

¹¹⁵Award No. 35-219-2 (Mar. 30, 1983).

¹¹⁶*Id.* at 10.

¹¹⁷*But cf.* *Dallal v. Iran*, Award No. 53-149-1 (June 10, 1983) (Chamber One refusing to consider claimant's argument that the respondent bank would be unjustly enriched by dismissal of his claim because claimant explicitly raised the argument only in a posthearing brief). In his dissent of July 27, 1983, Judge Holtzmann stated that elementary fairness required acceptance of the plea of unjust enrichment. See text at notes 189-193 *infra*.

¹¹⁸Interim Award No. 13-388-FT (Feb. 4, 1983). See also Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk to Interim Award re Stay of Proceedings Before a Court in Iran (Feb. 9, 1983); Concurring Opinion of Drs. Kashani, Shafeiei, and Sani on Case No. 388 (Mar. 16, 1983).

¹¹⁹The Tribunal noted in particular General Principle B of the General Declaration, which states: "It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such

Iran was free in principle to initiate claims against U.S. nationals before Iranian courts even where the claims would have been admissible as counterclaims before the Tribunal.¹²⁰ The harshness of this conclusion from the perspective of U.S. claimants was immediately softened by the statement that the Tribunal has the power to issue such orders as may be necessary to conserve the respective rights of the parties before it and to give effect to its own decisions.¹²¹ Moreover, the Tribunal held that any awards issued by it will necessarily prevail over any inconsistent decisions rendered by Iranian or U.S. courts.¹²² Thus, since Iran had not filed a counterclaim before the Tribunal, but instead filed suit against the claimant in Iranian court on essentially the same issues, the Tribunal could request the government of Iran to stay the Iranian proceedings until proceedings at the Tribunal have been completed in order to ensure the full effectiveness of the Tribunal's decisions.¹²³

Where, however, Iran had filed a counterclaim at the Tribunal and in addition had filed suit in Iranian court, the Tribunal held that it had exclusive jurisdiction over the counterclaim under Article VII(2) of the Claims Settlement Agreement.¹²⁴ Thus, if the Tribunal had jurisdiction over the claim, Iran would have to dismiss the local proceedings.¹²⁵ Iran, however,

claims through binding arbitration." General Declaration, *supra* note 13, Gen. Principles (B). This Principle, according to the Tribunal, is a general rule that must be given effect by reference to the specific operative provisions of the Algiers Accords. *E-Systems*, *supra* note 118, at 8.

¹²⁰*E-Systems*, *supra* note 118, at 10.

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.* at 10-11. In *E-Systems* Iran did not file a counterclaim to a claim brought to the Tribunal by E-Systems, but the Iranian Ministry of Defense brought suit against E-Systems in the Public Court of Tehran based on the same contract, transaction, and occurrence as the claim previously submitted to the Tribunal by E-Systems. The Tribunal requested Iran to stay its local proceedings. See also *Rockwell Int'l Systems, Inc. v. Iran*, Interim Award No. 20-430-1 (June 6, 1983) (requesting extension of stay of Iranian court proceedings pending determination of the claim before the Tribunal); *Rockwell Int'l Systems, Inc. v. Iran*, Interim Award No. 17-430-1 (May 5, 1983) (requesting Iran to stay proceedings filed against Rockwell in Public Court of Tehran until June 8, 1983); *RCA Global Communications, Inc. v. Iran*, Claim No. 160 (Order of June 2, 1983) (requesting Iran to stay Iranian court proceedings pending Tribunal decisions as to whether the Iranian litigation involves an issue that can lead to decisions by the Tribunal inconsistent with decisions by the Iranian court).

¹²⁴*QuesTech Inc. v. Iran*, Interim Award No. 15-59-1 (Mar. 1, 1983) citing *E-Systems*, *supra* note 118.

¹²⁵In *QuesTech*, Iran filed both a counterclaim at the Tribunal and brought suit

has so far failed to comply with the Tribunal's orders in most of the claims in question.¹²⁶

The Tribunal has not yet addressed the question of whether claims at the Tribunal may also be brought before other arbitral bodies. In *Reading & Bates Corp. v. Iran*,¹²⁷ an arbitral proceeding in the name of the claimant corporation was commenced at the International Chamber of Commerce (ICC) in Paris. Iran requested the Tribunal to order the claimant to withdraw or stay the ICC proceedings, alleging that they arose from the same subject matter before the Tribunal. In response, the Tribunal ordered claimants to move for a stay of the proceedings until it could decide the question.

The issue of the Tribunal's jurisdiction over counterclaims already before it has arisen often. The Tribunal has held that jurisdiction over a counterclaim is dependent on jurisdiction over the claim; where there is no jurisdiction over the claim, the counterclaim will be dismissed.¹²⁸ Since the counterclaim must arise out of "the same contract, transaction or occurrence" as the claim in question, the Tribunal has dismissed counterclaims that are directed against third parties¹²⁹ and where the subject matter is distinct from the underlying claim.¹³⁰ The Tribunal has held that it has jurisdiction over affirmative counterclaims. "So long as the counterclaim falls within the requirements of Article II(1), . . . the counterclaim is

against QuesTech in the Public Court of Tehran. The Tribunal requested the government of Iran to move for a stay of the proceedings before the Public Court of Tehran pending the Tribunal's determination concerning its jurisdiction over QuesTech's claim. See also *Touche-Ross & Co. v. Iran*, Interim Award No. 26-480-1 (Aug. 17, 1983) (counterclaim excluded from jurisdiction of courts of Iran); *Watkins-Johnson Co. v. Iran*, Interim Award No. 19-370-2 (May 26, 1983) (requesting stay of Iranian court proceeding pending termination of proceeding at the Tribunal); *Ford Aerospace & Communications Corp. v. Iran*, Interim Award No. 16-93-2 (April 27, 1983) (the subject matter of the counterclaim excluded from the jurisdiction of the courts of Iran from the date the counterclaim was filed with the Tribunal unless and until the Tribunal decides it has no jurisdiction).

¹²⁶When, or whether, Iran ever will obey the Tribunal's requests is impossible to predict. In their concurrence to *E-Systems*, *supra* note 118, the Iranian arbitrators stated that Articles 290 through 298 of the Iranian Code of Civil Procedure, which govern the termination or stay of proceedings before the Iranian courts, do not provide for termination or stay at the parties' request and therefore the Government of Iran would find it legally impossible to implement the Tribunal's request.

¹²⁷Interim Award No. 21-28-1 (June 9, 1983).

¹²⁸*Reliance Group, Inc. v. Nat'l Iranian Oil Co.*, Award No. 15-90-2 (Dec. 8, 1982).

¹²⁹*Pomeroy v. Iran*, Award No. 50-40-3 (June 9, 1983).

¹³⁰*Harza Eng'g Co. v. Iran*, Award No. 19-98-2 (Dec. 30, 1982).

within our jurisdiction even if it exceeds the amount of the claim."¹³¹

The exact scope of permissible counterclaims has not yet been clearly defined. In some instances, the scope is very narrow. Chamber Two noted in *Owens-Corning Fiberglass Corp. v. Iran*¹³² that "[i]f a claim is based solely on a contract, a counterclaim must arise from the same contract to be within the jurisdiction of the Tribunal. Similarly, if a claim is for an occurrence, such as a taking of property, then a counterclaim would have to arise out of the same occurrence."¹³³ In *Owens-Corning Fiberglass*, the claim involved patent licenses granted to respondents. The Chamber held that respondents' counterclaim, which allegedly arose through the actions of claimant's cross-licensor, was not within its jurisdiction because the license agreements constituted the entire transaction. Left open, however, was the possibility that the word *transaction* could be interpreted to broaden the scope of permissible counterclaims. The Chamber noted that "[i]t can doubtless be argued that, in a case where a prolonged or complex business transaction results in several contracts, a counterclaim should be within our jurisdiction, even if it arises from a different one of those contracts than the one on which the claim was based, because both arise from the same transaction."¹³⁴

Another procedural question of significance is the ability of claimants to withdraw claims from the Tribunal before the issuance of an award. In some cases where no pleadings had been filed, the Tribunal has terminated proceedings upon receipt of a notice of withdrawal from the claimant.¹³⁵ In other cases the Tribunal has allowed a certain response period and then terminated proceedings.¹³⁶ In a number of cases,¹³⁷ how-

¹³¹*Gould Mktg., Inc. v. Ministry of Nat'l Defense of Iran*, Interlocutory Award No. 24-49-2 (July 27, 1983), citing *Owens-Corning Fiberglass*, *supra* note 132.

¹³²Interlocutory Award No. 18-113-2 (May 13, 1983).

¹³³*Id.* at 5.

¹³⁴*Id.*

¹³⁵See, e.g., Case No. 12254 (Order of Mar. 30, 1983); Case No. 11046 (Order of Jan. 13, 1983). Under Article 34(2) of the Rules of Procedure, *supra* note 56, upon a request for withdrawal the Tribunal "shall inform the parties of its intentions to issue an order for the termination of the proceedings" and shall issue such an order unless a "party raises justifiable grounds for objection."

¹³⁶See, e.g., *Dresser Indus., Inc. v. Iran*, Award No. 77-106-2 (Sept. 9, 1983); Case No. B-48 (Order of Jan. 11, 1983). See also Judge Mosk's Dissent from Order Requesting Respondents' Comments on Withdrawal of Claim No. 252 (Oct. 20, 1982).

¹³⁷See, e.g., counterclaim filed in *Core Laboratories, Inc. v. Iran*, Claim Nos. 10840 and 10842 (withdrawal requests of Mar. 15, 1983; counterclaims of Aug. 15, 1983).

ever, Iran has filed counterclaims in response to notice of an intent to terminate proceedings for a given claim.

SUBSTANTIVE DECISIONS OF THE TRIBUNAL

There have been some encouraging decisions on substantive issues of concern to many claimants. The following sections review some of the Tribunal's most important decisions to date concerning awards of interest and arbitration costs, the issue of Iranian control of entities, contract issues, questions concerning Iranian exchange controls, and evidentiary standards.

Interest, Costs, and Control

Interest and arbitration costs are certainly of significant concern to a great number of claimants. All but one¹³⁸ of the contested awards through September 30, 1983, resulting in payments to U.S. nationals have included interest at varying rates. In one case the Tribunal awarded interest at the rate specified in the applicable municipal statutory law.¹³⁹ Where a claimant could prove that it had borrowed money in order to compensate for its inability to obtain payment from the respondent, the amount of interest paid was awarded.¹⁴⁰ In other cases the Tribunal awarded a "fair" rate of 12% from the time the liability for damages arose.¹⁴¹ More recently, however, the Tribunal has determined that a "fair rate" of interest is 10%.¹⁴² Finally, in some cases the Tribunal has simply awarded a lump sum as interest damages.¹⁴³

¹³⁸No interest was awarded in *Isaiah v. Bank Mellat*, Award No. 35-219-2 (Mar. 30, 1983).

¹³⁹*White Westinghouse Int'l Co. v. Bank Sepah*, Award No. 7-14-3 (June 25, 1983).

¹⁴⁰*Rexnord Inc. v. Iran*, Award No. 21-132-3 (Jan. 10, 1983).

¹⁴¹*See Granite State Machine Co., Inc. v. Iran*, Award No. 18-30-3 (Dec. 15, 1982); *Raygo Wagner Equipment Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Dec. 15, 1982). *See also* Award No. 18-30-3 (Jan. 25, 1983) (Mosk, J., concurring).

¹⁴²*See, e.g., Blount Bros. Corp. v. Ministry of Housing & Urban Dev.*, Award No. 74-62-3 (Sept. 2, 1983); *Ram Int'l Indus., Inc. v. Air Force of Iran*, Award No. 67-148-1 (Aug. 19, 1983). In general, the Tribunal has awarded interest to run through the date of the award. *See, e.g., Ram Int'l Indus., Inc., supra*. In a number of awards, however, interest was awarded through the date of payment. *See e.g., Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983); *Esfahanian v. Bank Tejarat*, Award No. 31-157-2 (Mar. 29, 1983).

¹⁴³*See, e.g., Gruen Assocs. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983) (lump sum awarded as part of estimated amount of damages); *Economy Forms Corp. v. Iran*, Award No. 55-165-1 (June 14, 1983) (interest awarded in the form of a lump sum to be determined within the exercise of the Tribunal's jurisdiction); *Pomeroy Corp. v. Iran*, Award No. 51-41-3 (June 8, 1983) (lump sum payment of \$100,000); *Pomeroy v. Iran*, Award No. 50-40-3 (June 8, 1983) (lump sum of \$850,000 for delay in payment of amounts owing).

In many cases the Tribunal has left the costs of arbitration where they fell.¹⁴⁴ But in ten of the contested awards the Tribunal also awarded some costs of arbitration, including attorneys' fees.¹⁴⁵ In one recent ruling, however, a claimant was denied recovery of prearbitration expenses incurred in the course of efforts to collect amounts due under the relevant contractual arrangement at issue.¹⁴⁶

Two other similar issues of concern to claimants are proof of Iranian government control of an entity for jurisdictional purposes because the entity is named as respondent and proof of control in the substantive context of a claim of expropriation or nationalization.¹⁴⁷ In both situations the Tribunal has made clear that control or expropriation need not be de jure but may be de facto. This decision is essential to prosecution of many of the private U.S. claims. Thus, for purposes of jurisdiction, the Tribunal in *Oil Field of Texas, Inc. v. Iran*¹⁴⁸ found the National Iranian Oil Company to be the de facto successor to the rights and obligations of the Oil Services Company of Iran, even

¹⁴⁴*See, e.g., John Carl Warnecke & Assocs. v. Bank Mellat*, Award No. 72-124-3 (Sept. 2, 1983); *Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983). Article 38(c) of the Rules of Procedure, *supra* note 56, provides authority for awarding costs to a successful claimant.

¹⁴⁵*See, e.g., Chas. T. Main Int'l, Inc. v. Mahab Consulting Eng'rs, Inc.*, Award No. 70-185-3 (Sept. 3, 1983) (\$15,000); *Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983) (\$10,000); *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983) (\$25,000); *Ram Int'l Indus., Inc. v. Air Force of Iran*, Award No. 67-148-1 (Aug. 19, 1983) (\$15,000); *Pomeroy v. Iran*, Award No. 50-40-3 (June 8, 1983) (\$25,000); *Pomeroy Corp. v. Iran*, Award No. 51-41-3 (June 8, 1983) (\$5,000); *Ultrasytems, Inc. v. Iran*, Partial Award No. 27-84-3 (Mar. 4, 1983) (\$70,000); *Rexnord, Inc., v. Iran*, Award No. 21-132-3 (Jan. 10, 1983) (\$25,000); *Granite State Co., Inc. v. Iran*, Award No. 18-30-3 (Dec. 15, 1982) (\$25,000). In *Morris v. Iran*, Award No. 36-200-1 (Apr. 12, 1983), the claim was dismissed on the merits and the U.S. claimant was ordered to pay the respondent \$15,000 for its costs of arbitration. *See* Rules of Procedure, *supra* note 56, art. 40.

¹⁴⁶*Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983) (Iranian instrumentality not liable for expenses claimant incurred in trying to collect amounts due). Article 38(c) of the Tribunal's Rules of Procedure, *supra* note 56, provides for recovery of costs for "legal representation and assistance."

¹⁴⁷Claims Settlement Agreement, *supra* note 14, art. VII(3), defines Iran as "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." Respondents which are "government corporations" do not appear to raise significant questions under this language. *See, e.g., Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, Interlocutory Award No. 23-120-2 (July 27, 1983).

¹⁴⁸Interlocutory Award No. 10-43-FT (Dec. 9, 1982). The extent of NIOC's liability was remanded to the Chamber. *Id.* *See also* Concurring Opinion of Judge Mosk to Interlocutory Award No. 10-43-FT (Dec. 10, 1982).

though OSCO has not been formally dissolved or merged into NIOC.

Similarly, the Tribunal has held that where the government of Iran or one of its ministries or agencies has assumed the effective power to appoint and dismiss managers and directors in charge of day-to-day management of a private company, Iranian government control is established even in the absence of formal decrees of expropriation. Thus in *Raygo Wagner Equipment Co. v. Star Line Iran Co.*¹⁴⁹ Chamber Three found that the respondent, formally a private company, was for the purposes of the Accords a controlled entity because it was no longer run by its registered manager and board of directors, its shareholders were no longer in a position to exert their rights and fulfill their duties as shareholders, and it was now administered by persons appointed by a public authority. In *Rexnord, Inc. v. Iran*¹⁵⁰ the two companies with which Rexnord had dealt, Tcha-cosh and Iran Siporex Industrial and Manufacturing Works, were found to be Iranian entities regardless of whether they were in effect nationalized or expropriated by Iran because the power to appoint and dismiss managers and directors in charge of the day-to-day management of the companies had been with the government of Iran or its appropriate ministry or agencies since the latter half of 1979. In addition, in *Blount Brothers Corp. v. Ministry of Housing and Urban Development*¹⁵¹ Chamber Three found that the government of Iran's seizure of the majority of outstanding stock and its appointment of managing directors were sufficient to establish jurisdiction over Gostaresh Markem Company, a company that Iran had alleged to be a private joint-stock company.

The Tribunal has also held that indirect government control is sufficient to establish Tribunal jurisdiction over an Iranian entity. In *Economy Forms Corp. v. Iran*¹⁵² the stock of one respondent corporation was wholly owned by the Industrial Development and Renovation Organization, all of whose shares were in turn owned by the government of Iran; a number of shares of the other respondent corporation were owned by the Iranian Ministry of Energy. Chamber One noted that Article VII(3)

¹⁴⁹ Award No. 20-17-3 (Dec. 15, 1982).

¹⁵⁰ Award No. 21-123-3 (Jan. 10, 1983).

¹⁵¹ Award No. 74-62-3 (Sept. 2, 1983).

¹⁵² Award No. 55-165-1 (June 14, 1983). See also Concurring Opinion of Judge Holtzmann (June 20, 1983).

made no distinction between direct and indirect control and held that the separate juridical status of an entity two or more levels removed from the government itself was not a sufficient basis from which to conclude that the entity conducts its operations free of the control of the government.¹⁵³ Finally, in *Harza Engineering Co. v. Iran*¹⁵⁴ and *Golpira v. Iran*,¹⁵⁵ Chamber Two recognized the principle of control for the purposes of proving de facto expropriation, although in neither case did it find that an expropriation had occurred.

Contract Issues

As might be expected, many of the claims before the Tribunal arise from contractual disputes between U.S. nationals and Iran. These claims raise a number of significant issues, including contract formation, the effect of force majeure and frustration of contract, and the proper measure of damages.

The Tribunal has found a contractual relationship to exist in a variety of circumstances where a formally executed contract was never signed. In determining whether a contract existed, the arbitrators have looked to the intentions of the parties as expressed by their conduct. For example, in *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*,¹⁵⁶ one of the parties had never signed the formal contract. Nevertheless, noting that the respondent had consented in writing to the start of services, Chamber Two held that this written invitation to claimant to commence preliminary work "create[d] an obligation to pay for that work," and was "in reality, a contract."¹⁵⁷ Similarly, in *Economy Forms Corp. v. Iran*,¹⁵⁸ the parties never executed a formal contract for the provision, over a number of years, of specially manufactured concrete forming materials. Rather, they carried on their business by means of discussions between their respective representatives in Iran which led to the formulation of a list of respondent's requirements, communication of this list to the U.S. office of claimant, and dispatch by the claimant of a document called "Pro-forma Invoice." Chamber One held that a "contract may be formed in any manner suffi-

¹⁵³ See also *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, Interlocutory Award No. 23-120-2 (July 27, 1983).

¹⁵⁴ Award No. 19-98-2 (Dec. 30, 1982).

¹⁵⁵ Award No. 32-211-2 (Mar. 29, 1983).

¹⁵⁶ Interlocutory Award No. 23-120-2 (July 27, 1983).

¹⁵⁷ *Id.* at 11.

¹⁵⁸ Award No. 55-165-1 (June 14, 1983).

cient to show agreement, including conduct by the parties that recognizes the existence of such a contract."¹⁵⁹ It further found that the subsequent actions of the parties confirmed that each considered itself contractually bound.

The Tribunal has also recognized and enforced oral agreements. In *Woodward-Clyde Consultants v. Iran*¹⁶⁰ the respondent asserted that the written contract in question did not provide for oral authorization and therefore claimant could not recover for those services that were not specifically authorized in the contract. Chamber Three noted that claimant had received some payment for those services it had rendered pursuant both to the written agreement and the oral instructions. Such payments "confirm[ed] that [respondent], in any event, conveyed to [claimant] its consent in fact that each of the tasks should be performed."¹⁶¹ Given this explicit consent, the Chamber held that the respondent "may not now avoid liability merely because neither party observed contract formalities."¹⁶²

In a number of cases, the Iranian respondent has argued that an existing contract was invalid because the person signing it did not have such authority¹⁶³ or because the contract did not conform to Iranian law.¹⁶⁴ The Tribunal has rejected these defenses holding in each case that even if the contract had been invalid, subsequent conduct by the Iranian respondent ratified the contract.¹⁶⁵

¹⁵⁹ *Id.* at 12, citing U.C.C. § 2-204.

¹⁶⁰ Award No. 73-67-3 (Sept. 2, 1983).

¹⁶¹ *Id.* at 13.

¹⁶² *Id.*

¹⁶³ See, e.g., *Kimberly-Clark Corp. v. Bank Markazi Iran*, Award No. 46-57-2 (May 25, 1983) (respondent's defense that license agreement was invalid for failure to obtain proper signature held without merit since respondent's performance of its obligations for preceding two years constituted unequivocal ratification of the agreement); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Dec. 15, 1982) (respondent that denied validity of lease agreement for machinery on grounds that agent who signed agreement had no power to bind it held to have subsequently ratified agreement by receiving and using the machinery).

¹⁶⁴ See, e.g., *Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983) (respondent's contention that contract was invalid because not executed in compliance with provisions of Iranian law concerning the employment of foreign nationals rejected by the Chamber); *Pomeroy Corp. v. Iran*, Award No. 51-41-3 (June 8, 1983) (even if respondent's assertion that contract was invalid because claimant was not statutorily eligible to enter into contract was true, respondent conducted itself in manner which indicated that it considered contract to be valid). See also Concurrence of Richard Mosk to *Craig v. Ministry of Energy*, Award No. 71-346-3 (Sept. 2, 1983).

¹⁶⁵ But see *Raygo Wagner Equipment Co. v. Iran Express Terminal*, Award No. 30-16-3 (Mar. 18, 1983). In *Raygo*, Chamber Three found a lease agreement for machin-

For example, in *Pomeroy v. Iran*,¹⁶⁶ Iran contended that a contract to provide planning, development, and administrative services to the Iranian navy was invalid on the grounds that the official who signed it had no authority, that Pomeroy was not statutorily eligible to enter into a contract, and that no Farsi language version of the contract was executed. Citing the Civil Code of Iran,¹⁶⁷ Chamber Three held that a "party may not deny the validity of a contract entered into on its behalf by another, if, by its conduct, it later consents to the contract."¹⁶⁸ The Chamber found that by making substantial payments under the contract, by making facilities available to Pomeroy, and by accepting services from it, Iran "conducted itself in a manner which indicate[d] that it considered the contract to be valid."¹⁶⁹

The possibility that a valid contract may be terminated through frustration has been recognized by two of the Chambers. In *Queens Office Tower Associates v. Iran National Airlines Corp.*,¹⁷⁰ Chamber One held that three conditions were necessary in order for there to be frustration of contract: "1) the purpose of the lease was completely frustrated and performance rendered impossible by the exercise of governmental authority; 2) the supervening event or circumstance was [not] within the contemplation of the parties at the time of the execution of the lease and might not have been anticipated and guarded against; and 3) the event or circumstance which produced frustration is not attributable to the fault of the party alleging frustration."¹⁷¹ Applying these conditions, it found that the purpose of an agreement leasing commercial office space in New York City to Iran Air had been frustrated by the Executive Order that prohibited Iran Air from carrying out the

ery to be not binding because neither of the signatories had authority to act on behalf of respondent and because there was no subsequent express approval of the agreement. The Chamber dismissed the claim holding that Raygo had failed to sustain its burden of proving that respondent had ratified the lease agreement by receiving and using the machinery. See also Concurring and Dissenting Opinion of Richard M. Mosk in Award No. 30-16-3 (Mar. 25, 1983).

¹⁶⁶ Award No. 50-40-3 (June 8, 1983). See Iran's Request for Reconsideration or, in the Alternative, Interpretation and Correction (June 14, 1983).

¹⁶⁷ IRANIAN CIVIL CODE arts. 247, 248.

¹⁶⁸ Award No. 50-40-3 (June 8, 1983), at 17.

¹⁶⁹ *Id.*

¹⁷⁰ Award No. 37-172-1 (Apr. 15, 1983). See also Award No. 37-172-1 (Apr. 15, 1983) (Holtzmann, J., dissenting).

¹⁷¹ *Queens Office Tower Assoc.*, *supra* note 170, at 7, citing 119 Fifth Ave. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 (1947).

major part of its business¹⁷² and that performance of the lease agreement was rendered commercially impracticable by another Executive Order which revoked all licenses permitting transactions with Iran Air.¹⁷³ While stating it was a "close question," the Chamber concluded that "reasonable men in the position of the parties [on August 1, 1979,] would not have foreseen such a further deterioration in United States-Iran relations as would have led to a total cessation of economic and diplomatic relations."¹⁷⁴ On the final question of whether Iran Air could invoke frustration, the Chamber, citing no precedent and ignoring the general principle that a state may take lawful reprisals in response to an unlawful act, noted that "the free exercise by a State of one of its options in the international sphere is an independent cause of the events which ensue therefrom, regardless of the acts of another State which may have triggered such a response."¹⁷⁵ Iran Air was thus entitled to invoke the acts of the government of the United States as events causing frustration and impossibility.¹⁷⁶ Iran Air, however, was required to pay the amounts due under the lease for the period in which it occupied the premises. The remaining losses were left where they fell.

The possible implications of Chamber One's holding in *Queens Office Tower Associates* as to the responsibility for the U.S. sanctions imposed as a result of the illegal hostage taking by Iran are not yet clear. The question was left open by Chamber Two in *Gould Marketing, Inc. v. Ministry of National Defense of Iran*.¹⁷⁷ In *Gould*, Chamber Two found that a contract to provide services in Iran by a U.S. company was frustrated and its performance rendered essentially impossible as a result of the

¹⁷²Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980). See text at and accompanying note 8 *supra*.

¹⁷³Exec. Order 12,211, 45 Fed. Reg. 26,685 (1980). See text at and accompanying note 8 *supra*.

¹⁷⁴Award No. 37-172-1 (Apr. 15, 1983), at 12.

¹⁷⁵*Id.* at 14.

¹⁷⁶In a strong dissent to *Queens Office Tower Assocs.*, *supra* note 170, Judge Holtzmann argued that while the first two conditions for finding frustration were probably present, the third condition was not present since the party invoking frustration was at fault. He noted that international law recognizes that where one state violates its international legal obligations to another, the injured state has the right to take proportional countermeasures. The imposition of economic sanctions, according to Holtzmann, "was no more than a proportional response to the physical violence of attacking the [U.S.] Embassy and holding diplomatic personnel hostages for an extended period—indeed, it was a quite mild response." *Id.* at 8.

¹⁷⁷Interlocutory Award No. 24-49-2 (July 27, 1983).

continuing existence of force majeure¹⁷⁸ conditions in Iran. The Chamber determined that it could not issue a final award without considering additional questions concerning the consequences of the discharge of the contract through frustration or impossibility. It requested further argument on a number of issues, including whether it should leave the parties in the situation in which they found themselves after frustration and, if not, what effect the economic sanctions imposed by the United States should have on any accounting of damages.

In the more usual contract claims the Tribunal has taken a relatively consistent position as to the amount of recovery and damages allowed to claimants. Generally, the arbitrators have held that a claimant cannot recover the full contract price where its role terminated before the project was completed but is entitled to recover for services it had already performed.¹⁷⁹ In cases, however, where the Tribunal has determined that the respondent had breached the contract or had terminated it through no fault of the claimant, it has awarded compensation for losses caused by the contract termination. For example, in *Pomeroy v. Iran*¹⁸⁰ Chamber Three concluded that the respondent had terminated the contract through no fault of the claimant and therefore the claimant was entitled to compensation for lost profits. Noting circumstances which suggested that claimant's profits would probably have been lower than expected and its cost higher, the Chamber estimated a lesser amount of lost profits than the claimant had requested. In a

¹⁷⁸The Chamber defined force majeure as "social and economic forces beyond the power of the state to control through the exercise of due diligence." *Id.* at 11.

¹⁷⁹See, e.g., *Blount Bros. Corp. v. Ministry of Housing and Urban Dev.*, Award No. 74-62-3 (Sept. 2, 1983). In *Blount Bros.*, the Chamber found that all of the parties to the contract in question considered claimant's role terminated in December 1978 and therefore claimant could not recover the full contract price, which contemplated performance through 1981. However, the Chamber held that the claimant still was entitled to compensation for the performance already rendered, which the Chamber calculated as 23% of the total contract price. Similarly, in *Ultrasystems, Inc. v. Iran*, Partial Award No. 27-84-3 (Mar. 4, 1983), after determining that the contract had been terminated by mutual agreement and not on the basis of breach of contract on either side, the Chamber concluded that Ultrasystems was not entitled to compensation for profits it could have gained had the contract not been terminated. It did award, however, actual costs incurred in terminating the contract and other costs resulting directly from such termination. Judge Mosk concurred in this award. See note 114 *supra*.

¹⁸⁰Award No. 50-40-3 (June 8, 1983). Judge Mosk concurred in this award but stated that the Tribunal did not have sufficient evidence to support its reduction of the claimed amount for lost profits. Award No. 50-40-3 (June 13, 1983) (Mosk, J., concurring).

separate case involving the same claimant, however, having found no such circumstances, the Chamber awarded the full amount of lost profits claimed.¹⁸¹

Finally, the Tribunal has required that a claimant mitigate damages. In *Craig v. Ministry of Energy of Iran*¹⁸² Chamber Three found the claimant justified in terminating the contract because of respondent's breach and thus entitled to damages incurred by him as a result of such termination. Those damages "are the payment [claimant] would otherwise have received under the contract if it had not been prematurely terminated, less an amount attributable to steps that were taken or should have been taken by [claimant] to mitigate his losses."¹⁸³ Estimating that it would have taken the claimant three months to find comparable work, the Chamber awarded him three months of his net fees in addition to the amount owing for services rendered before the termination of the contract.

Exchange Controls

Iran has raised a defense to several claims that its foreign exchange laws, which regulate the amount of dollars and other hard currencies that may be exported from Iran, should be recognized by the Tribunal to prevent recovery by claimants from the Security Account. This defense ignores significant questions about the validity of Iran's restrictions under both the Treaty of Amity between Iran and the United States¹⁸⁴ and the Articles of Agreement of the International Monetary Fund¹⁸⁵ and about the relevance of internal Iranian laws to awards paid from the Security Account.

Chamber Two has twice dismissed Iran's argument that its exchange controls should prevent payment to an American claimant. In *Kimberly-Clark Corp. v. Bank Markazi Iran*¹⁸⁶ the Chamber held that since payment for amounts awarded an American claimant by the Tribunal must be paid from the Se-

¹⁸¹ *Pomeroy Corp. v. Iran*, Award No. 51-41-3 (June 8, 1983).

¹⁸² Award No. 71-346-3 (Sept. 2, 1983). See also Award No. 71-346-3 (Sept. 2, 1983) (Mosk, J., concurring).

¹⁸³ *Craig*, *supra* note 182, at 20.

¹⁸⁴ Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 853.

¹⁸⁵ Articles of Agreement for the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 150, 12 U.N.T.S. 39 [hereinafter cited as Articles of Agreement].

¹⁸⁶ Award No. 46-57-2 (May 25, 1983).

curity Account, it was unnecessary for it to determine the question of the legality under international law of Iranian exchange controls. In *Isaiah v. Bank Mellat*¹⁸⁷ the Chamber flatly stated that "exchange regulations are not relevant to a claim for unjust enrichment."¹⁸⁸

Chamber One has taken a different approach where the underlying transaction was alleged to violate exchange control regulations. In *Dallal v. Iran*¹⁸⁹ the claimant sought the face amount of two checks denominated in U.S. currency which upon presentation to a New York bank had been dishonored for insufficient funds. The factual situation was thus analogous to that in *Isaiah*, as both involved dishonored checks. Yet the Chamber declined to consider the claimant's unjust enrichment arguments on the grounds that they had been raised too late. It presumed the Iranian exchange controls to be valid and determined that it was not bound to enforce the transaction between Dallal and Bank Mellat if the purpose of that transaction had been to transfer capital out of Iran in violation of those controls. Asserting that a number of circumstances gave rise to "serious doubts" as to the true character of the transaction which the claimant did not dispel, the Chamber "assumed" that it was a prohibited transaction.¹⁹⁰ Since both Iran and the United States are party to the IMF Agreement that prohibits enforcement of such transactions,¹⁹¹ Chamber One concluded that it was unable to issue an award in favor of the claimant. It noted that "if the Tribunal were to permit the Claimant to obtain payment for the cheques in United States dollars from [the Security Account], the Tribunal would in fact enforce the exchange contract. Such an award would in practice circumvent the currency regulations which . . . both Iran and the United States as well as other member States of the IMF are obliged to respect."¹⁹²

Neither Chamber cited any precedent for these holdings,

¹⁸⁷ Award No. 35-219-2 (Mar. 30, 1983).

¹⁸⁸ *Id.* at 12.

¹⁸⁹ Award No. 53-149-1 (June 10, 1983).

¹⁹⁰ *Id.* at 12.

¹⁹¹ The Articles of Agreement for the International Monetary Fund provide in relevant part that "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member." Articles of Agreement, *supra* note 185, art. VIII(2) (b).

¹⁹² Award No. 53-149-1 (June 10, 1983).

and their application to future claims is unclear. As Judge Holtzmann noted in his dissent to *Dallal*,¹⁹³ many of the questions relating to the IMF Agreement had never been briefed or argued before Chamber One. Moreover, he stated that even if the IMF Agreement were applicable to the case, the majority had failed to consider whether the Iranian currency regulations were validly issued in conformity with the Agreement and whether they were enforceable in view of relevant provisions of the Treaty of Amity between Iran and the United States. Thus, there is ample reason to read the decision in *Dallal* as limited to its facts.

Evidentiary Standards

A final area of inquiry involves the standards of proof which the Tribunal requires claimants to meet. Article 24 of the Tribunal's Rules of Procedure states that "each party shall have the burden of proving the facts relied on to support his claim or defence."¹⁹⁴ The Tribunal may require the parties to produce "documents, exhibits or other evidence." By and large, the arbitrators have held claimants to high standards of proof.

In *Dallal v. Iran*¹⁹⁵ Chamber One put the burden of proving the validity of a currency exchange transaction on the claimant since the claimant was a party to the transaction and the respondent was not. Although the respondent failed to present evidence adequate to prove that the transaction in question was contrary to Iranian currency regulations, the Chamber found a number of factors that gave rise to serious doubts about the validity of the transaction and dismissed the claim. Similarly, in *Ultrasystems, Inc. v. Iran*¹⁹⁶ Chamber Three determined that a "final billing agreement" between the parties was not enforceable because "a number of circumstances surrounding the signing of the [agreement] cast serious doubt" on its authenticity.¹⁹⁷

Both of these decisions, and others,¹⁹⁸ have ignored the ex-

¹⁹³ Award No. 53-149-1 (July 27, 1983) (Holtzmann, J., dissenting).

¹⁹⁴ Rules of Procedure, *supra* note 56, art. 24.

¹⁹⁵ Award No. 53-149-1 (June 10, 1983).

¹⁹⁶ Award No. 27-84-3 (Mar. 4, 1983).

¹⁹⁷ *Id.* at 10.

¹⁹⁸ See *J.I. Case Co. v. Iran*, Award No. 57-244-1 (July 27, 1983) (Holtzmann, J., dissenting) (because of circumstances prevailing since the Islamic revolution, claimant was unable to present direct evidence of the inner workings of either the Iranian government or of the other respondents in order to prove interference with its property rights).

treme difficulties that claimants face in gaining access to documents and witnesses in Iran. As Judge Mosk noted in his concurrence to *Ultrasystems*: "The parties and the Tribunal operated under difficult circumstances. Of two key witnesses, one is deceased and the other is incarcerated in Iran. Other witnesses were unavailable. . . . Restrictions on travel between Iran and the United States, the lack of relations between the two countries, the age of the claim and language differences exacerbated proof problems."¹⁹⁹ While Judge Mosk stated that the Tribunal should draw adverse inferences from the failure of a party which had access to relevant evidence to produce it, the Tribunal has done so only in one case.²⁰⁰

Defenses and counterclaims by Iranian respondents have also been dismissed for lack of proof. In *Isaiah v. Bank Mellat*²⁰¹ Chamber Two dismissed Bank Mellat's defense that the claimant was not the beneficial owner of a dishonored check, stating that the Bank presented no evidence except its suspicions. Chamber Three dismissed counterclaims filed by the respondent in *Woodward-Clyde Consultants v. Iran*,²⁰² based on the "general rule of evidence that contradictory statements of an interested party should be construed against that party."²⁰³

The Tribunal has begun employing experts to assist it in determining the liability or the proper measure of damages in complex cases. Under Article 27(1) of the Tribunal's Rules of Procedure, the Tribunal may appoint one or more experts on specific subjects and establish terms of reference for their inquiry. The costs of such experts are apportioned between the parties according to the Tribunal's discretion,²⁰⁴ and the parties may be asked to deposit an amount as advances on such costs.²⁰⁵ In *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*,²⁰⁶ Chamber Two determined that the respondent had breached a contract for the provision of engineering and construction management services. Because of the technical complexity of the underlying project, it ordered the appointment

¹⁹⁹ Award No. 27-84-3 (Mar. 4, 1983) (Mosk, J., concurring).

²⁰⁰ See *Isaiah v. Bank Mellat*, Award No. 35-219-2 (March 30, 1983) (documents of allegedly expropriated company presumably available to respondent).

²⁰¹ *Id.*

²⁰² Award No. 73-67-3 (Sept. 2, 1983).

²⁰³ *Id.* at 16.

²⁰⁴ Rules of Procedure, *supra* note 56, art. 38(1) (a).

²⁰⁵ Rules of Procedure, *supra* note 56, art. 41(2).

²⁰⁶ Interlocutory Award No. 23-120-2 (July 27, 1983).

of two experts, an engineer and an accountant, to value the work performed by the claimant and requested the claimant to deposit \$25,000 as an advance for costs. In *Harza v. Iran*²⁰⁷ the same Chamber ordered the appointment of three experts²⁰⁸ to assist in determining the liabilities of the parties to a contract calling for the construction of a major dam in Iran. In that case both parties were each requested to deposit \$85,000 as advances for the costs of such experts.²⁰⁹ While the use of experts could in some measure facilitate the Tribunal's work, their appointment and the fixing of their terms of reference have been slow.²¹⁰

UPCOMING ISSUES

The Tribunal's decisions to date leave many substantive questions unanswered. The language of the decision in the case against OSCO,²¹¹ for example, suggests the possibility that the measure of damages awarded in cases of de facto successorship may be somewhat less generous than the measure of damages in ordinary contract cases, especially with respect to lost profits. As noted above,²¹² the Tribunal has still not determined the scope of paragraph 11 of the General Declaration, which excludes claims arising as a result of popular movements in the course of the Islamic revolution that were not an act of the gov-

²⁰⁷ Interlocutory Award No. 14-92-2 (Feb. 2, 1983).

²⁰⁸ Chamber Two appointed an expert familiar with the business practices and administration of import consulting engineering contracts, an expert in the field of geology and rock mechanics also experienced in the building of major dams, and an expert in hydraulics experienced in the building of major dams. *Id.*

²⁰⁹ Chamber Two originally ordered the parties to deposit \$25,000 each as an advance on costs. *Id.* In an amendment to the interlocutory order on September 9, 1983, it requested a further deposit from each party of \$60,000.

²¹⁰ See, e.g., *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, Interlocutory Award No. 23-120-2 (July 27, 1983).

In *Starret Housing Corp. v. Iran*, Claim No. 24 (Scheduling Order of May 18, 1982), Chamber One requested the parties to report to the Tribunal on or before August 1, 1982, on whether they had been able to agree on an accounting expert and his terms of reference. In a subsequent order of September 16, 1982, the Tribunal informed the parties that it intended to nominate an expert to advise the Tribunal in preparing draft terms of references for an accounting expert to be nominated in the case. Iran objected to the person nominated. Although the Tribunal found the objections to be unfounded, the expert decided not to accept the position. The Tribunal then requested the parties to submit proposals regarding terms of reference for an accounting expert by January 17, 1983. Order of Dec. 9, 1982. This date later was extended to January 31, 1983. Order of Jan. 24, 1983.

²¹¹ *Oil Field of Texas, Inc. v. Iran*, Interlocutory Award No. 10-43-FT (Dec. 9, 1982).

²¹² See text at notes 112-114 *supra*.

ernment of Iran. Nor has it yet directly addressed the substantive issue of attribution of responsibility to the government of Iran for acts by individuals, by quasi-governmental bodies, or by nonprofit organizations in Iran.

The Tribunal also faces the question of what standard of compensation it will apply in cases of expropriation. Iran has argued that international law dictates only "appropriate" compensation; claimants have argued that the traditional "prompt, adequate and effective" formulation governs between Iran and the United States both as a matter of customary international law and under the Treaty of Amity. Chamber Two was denied the opportunity to render its views on this issue in *ITT Industries, Inc. v. Iran*,²¹³ because the parties reached a settlement of the claim immediately before the issuance of the Chamber's opinion. In a concurrence to the Award on Agreed Terms, however, Judge Aldrich stated that expropriation had occurred and the claimant would have been entitled to prompt, adequate and effective compensation.²¹⁴

Another major issue still unresolved concerns jurisdiction over Iranian counterclaims for taxes and social security payments allegedly due but unpaid as of the time that U.S. claimants left Iran.²¹⁵ In *Intrend International, Inc. v. Imperial Iranian Air Force*,²¹⁶ the respondents filed counterclaims for allegedly unpaid taxes and social security payments. Chamber Two dismissed both counterclaims for lack of proof. In so doing, however, it noted that four questions remained unresolved:

1. Whether the counterclaim arises out of the same contract, transaction, or occurrence as the claim, as required by Article II(1) of the Claims Settlement Agreement;
2. Whether the counterclaim was outstanding on January 19, 1981, as required by the same article;
3. Whether the counterclaim is properly raised by a respondent; and
4. If jurisdiction exists, whether the Tribunal should consider

²¹³ Award No. 47-156-2 (May 26, 1983).

²¹⁴ Award No. 47-156-2 (May 26, 1983) (Aldrich, J., concurring). For the U.S. government's position on the proper standard of compensation, see Memorandum of the Legal Adviser (Oct. 13, 1983), reprinted in 129 *CONG. REC.* S16055 (daily ed. Nov. 14, 1983).

²¹⁵ See *Blount Bros. Corp. v. Ministry of Housing & Urban Dev.*, Award No. 74-62-3 (Sept. 2, 1983); *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983); *Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2, (July 27, 1983).

²¹⁶ Award No. 59-220-2 (July 27, 1983).

counterclaims in view, inter alia, of the difficulties involved and of the practice of national courts in refusing to enforce foreign revenue laws.²¹⁷

Even where the Tribunal has rendered what ordinarily would be viewed as a final award, Iran's recent actions have raised new questions. Judge Sani, the Iranian arbitrator in Chamber Three, failed to sign the awards in the "provisional managers" cases,²¹⁸ and Judge Shafeiei of Chamber Two did not sign the awards in the "dual national" cases.²¹⁹ In addition, Judge Shafeiei absented himself from the signing of two other awards by Chamber Two.²²⁰ More recently, Judge Sani refused to participate in five Chamber Three awards.²²¹ The government of Iran cited their nonparticipation as alleged grounds for setting some of the awards aside in litigation filed in the District Court of The Hague challenging five of these awards.²²²

Iran has also sought to challenge Chamber decisions either by filing an interpretive dispute or by asking for reconsideration of the case. For example, Case No. A/18, submitted on February 25, 1983, contends once again that dual nationals may not bring claims before the Tribunal, notwithstanding Chamber Two's decisions in *Esphahanian*, *Golpira*, and *Haroonian*.²²³

²¹⁷ *Id.* at 11-12.

²¹⁸ *Rexnord, Inc. v. Iran*, Award No. 21-132-3 (Jan. 10, 1983); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Dec. 15, 1983). See Judge Jahan-gir Sani's Reasons for Not Signing the Decision Made by Judge Mangard and Judge Mosk in Case No. 17 (Feb. 3, 1983) and in Case No. 132 (Apr. 7, 1983). See also Judge Mosk's opinions in *Rexnord, Inc. v. Iran*, Award No. 21-132-3 (Apr. 13, 1983) (Mosk, J., concurring); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Apr. 13, 1983) (Mosk, J.).

²¹⁹ *Esphahanian v. Bank Tejarat*, Award No. 31-157-2 (Mar. 29, 1983); *Golpira v. Iran*, Award No. 32-211-2 (Mar. 29, 1983); and *Haroonian v. Iran*, Award No. 33-418-2 (Mar. 29, 1983). See Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality (Oct. 12, 1983).

²²⁰ *Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983); *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, Award No. 59-220-2 (July 27, 1983).

²²¹ The five awards are *Blount Bros. Corp. v. Ministry of Housing & Urban Dev.*, Award No. 74-62-3 (Sept. 2, 1983); *Chas. T. Main Int'l, Inc. v. Mahab Consulting Eng'rs, Inc.*, Award No. 70-185-3 (Sept. 2, 1983); *Craig v. Ministry of Energy of Iran*, Award No. 71-346-3 (Sept. 2, 1983); *John Carl Warnecke & Assocs. v. Bank Mellat*, Award No. 72-124-3 (Sept. 2, 1983); *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-2 (Sept. 2, 1983).

²²² The government of Iran is challenging *Gruen Assocs., Inc. v. Iran Housing Co.*, Award No. 61-188-2 (July 27, 1983); *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, Award No. 59-220-2 (July 27, 1983); *Esphahanian v. Bank Tejarat*, Award No. 31-157-2 (Mar. 29, 1983); *Rexnord, Inc. v. Iran*, Award No. 21-132-3 (Jan. 10, 1983); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Dec. 15, 1982).

²²³ See text at notes 88-94 *supra*.

Shortly after the issuance of the award in *Pomeroy v. Iran*,²²⁴ the Iranian Agent to the Tribunal requested reconsideration or, in the alternative, interpretation and correction of the award.²²⁵ While the Tribunal's Rules of Procedure allow requests for interpretation²²⁶ or correction of computational, clerical, or typographical errors, or any errors of a similar nature,²²⁷ neither the Rules nor the Claims Settlement Agreement explicitly provide a procedure for appeal or reconsideration of an award.²²⁸ Iran's attempted challenges to the Tribunal's awards and its failure to comply with Tribunal requests raise questions about the Tribunal's ability to adhere to or enforce those decisions that it has reached and to maintain an orderly process of arbitration.

CONCLUSION

The foregoing summary of Tribunal activities and decisions through September 30, 1983, reflects considerable activity in resolving the claims pending before it as well as the emergence of a body of decisions against which the Tribunal's performance to date may be judged. It is still too early to reach definitive conclusions as to the place the Tribunal will ultimately occupy in the annals of international commercial arbitration, but it is hoped that the information herein will stimulate scholarly interest in and commentary about the Tribunal.

In the Algiers Accords the two governments agreed that, under the circumstances, the Tribunal offered the best mechanism for resolving the outstanding disputes between them and their respective nationals. Difficulties encountered during the first two and a half years of the Tribunal's existence, particu-

²²⁴ Award No. 50-40-3 (June 8, 1983).

²²⁵ Iran contended that the Chamber should not have awarded interest since the issue of the availability of interest under the Claims Settlement Agreement is now before the Full Tribunal for its consideration in Case No. A/19. Iran also argued that the award was issued in contravention of Article V of the Claims Settlement Agreement, *supra* note 14, because it did not cite any legal authority for the issuance of interest nor did it describe how the interest was to be calculated. Finally, Iran alleged "serious mistakes" in the award, citing as an example the Chamber's order to respondent to pay "damages for lost profits; a notion completely foreign to the issues involved in the case." See Request of June 14, 1983.

²²⁶ Rules of Procedure, *supra* note 56, art. 35.

²²⁷ Rules of Procedure, *supra* note 56, art. 36.

²²⁸ *Cf. Morris v. Iran*, Claim No. 200 (Sept. 16, 1983) (whether a Chamber or the Full Tribunal, despite the absence of any express provision, has inherent power to review and revise an award under exceptional circumstances—e.g., when an award was based on forged documents or perjury—is a question which the Tribunal does not need to reach).

larly as a result of Iran's continuing efforts to delay arbitral proceedings, have led some to doubt its ability to succeed in that endeavor, at least in a timely fashion. It will never be easy to pursue a claim at the Tribunal, but given the procedural and legal decisions now available, the task should be quicker. It remains clear that with the necessary commitment and determination, the Tribunal can successfully achieve a fair and just resolution of the claims before it.

CHAPTER II

The Iran-United States Claims Tribunal: Private Rights and State Responsibility

DAVID LLOYD JONES

Article V of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Agreement)¹ states the basis on which claims before the Iran-United States Claims Tribunal are to be decided and is of fundamental importance to any understanding of the nature and function of that Tribunal. It provides that "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."²

The provision differs from those in earlier agreements establishing claims commissions which have generally required the application of international law, justice, and equity.³ By contrast, Article V seems to have been derived, in part at least,

The opinions expressed herein are the personal opinions of the author.

¹Declaration 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, Jan. 19, 1981, art. V, *reprinted* in 20 I.L.M. 230 (1981) [hereinafter cited as the Claims Settlement Agreement].

²*Id.* Article V is repeated in Rule 33(1) of the Provisional Rules of Procedure of the Tribunal [available at the Office of Iranian Claims, Office of the Legal Advisor, Department of State] [hereinafter cited as Rules of Procedure].

³*See, e.g.,* General Claims Convention, Sept. 8, 1923, United States-Mexico, art. I, 43 Stat. 1730, 1731, T.S. No. 678.

from comparable provisions in the field of transnational arbitration.⁴ Although Article V appears to require the Tribunal to apply legal rules in deciding claims, it seems that the Tribunal retains a wide discretion as to which rules of law apply to any given issue, and this view is supported by the reference to "changed circumstances" and the slightly loose terminology requiring decisions "on the basis of respect for law." These factors have led one commentator to suggest that the Tribunal might have some discretion as to the extent to which it applies law.⁵ However, since the Tribunal's Rules of Procedure permit decisions *ex aequo et bono* only upon the express written authorization of the arbitrating parties,⁶ it appears that the Tribunal must apply legal standards in the absence of such authorization. Although the Tribunal to date has decided claims by applying rules of international as well as municipal law, it has in some cases⁷ approached certain issues with a flexibility which has led to criticism that it is failing to apply legal standards.

It is perhaps desirable that the Tribunal should enjoy a wide discretion as to which legal rules it should apply.⁸ Regrettably, however, the Tribunal has not yet indicated clearly its approach to the question of choice of law, leaving considerable uncertainty as to which law applies to any given issue. This is a matter

⁴See, e.g., Article 33 of the United Nations Committee on International Trade Law Rules, 31 U.N. GAOR Supp. (No. 17) at 198, U.N. Doc. A/31/17 (1976), reprinted in 15 I.L.M. 701, 714 (1976) [hereinafter cited as UNCITRAL]. See also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Aug. 27, 1965, art. 42, 17 U.S.T. 1270, 1286-87, T.I.A.S. No. 6090.

⁵Lauterpacht, *The Iran-United States Claims Tribunal—An Assessment*, in *PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* 213 (M. Landwehr ed. 1982).

⁶See Rules of Procedure, *supra* note 2. See also UNCITRAL, *supra* note 4, art. 33(2).

⁷See, e.g., *Drucker v. Foreign Transaction Co.*, Interlocutory Award No. 4-121-FT (Nov. 5, 1982); *Ford Aerospace and Communications Corp. v. Air Force of Iran*, Interlocutory Award No. 6-159-FT (Nov. 5, 1982).

⁸In *CMI Int'l. Inc. v. Ministry of Roads and Transportation*, Award No. 99-245-2 (Dec. 27, 1983), Chamber Two said of Article V of the Claims Settlement Agreement: "It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal, which include not only claims of a commercial nature, such as the one involved in the present case, but also claims involving alleged expropriations or other public acts, claims between the two Governments, certain claims between banking institutions, and issues of interpretation and implementation of the Algiers Declarations. Thus, the Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national law, 'taking into account relevant usages of the trade, contract provisions and changed circumstances' as Article V directs." *Id.* at 8.

of particular importance, for this issue raises a deeper question as to the nature and function of the Tribunal. Is the Tribunal a private arbitral tribunal created to resolve private law disputes arising under different systems of law and to hear private law claims against Iran and the United States, or is it an international or interstate tribunal charged with the task of ruling on the responsibility of the respondent state under public international law for the conduct which constitutes the subject matter of the claims? If the former is the case, the Tribunal would be required to rule on infringements of private law rights⁹ arising in municipal legal systems,¹⁰ a role that might otherwise be discharged by a national court or a private arbitral tribunal, subject, of course, to issues of sovereign immunity or Act of State. On this view, the United States and Iran may be regarded as having referred to a private transnational arbitral tribunal questions of private law that might in other circumstances be justiciable before domestic courts. If the latter is the case, the competence of the Tribunal lies in respect of such claims as are true international claims founded on an alleged breach of international law. On this view the Tribunal is an international or interstate tribunal dealing with the rights and duties of states under public international law in relation to their activities on the international plane, and is primarily concerned with an exercise in diplomatic protection on behalf of the United States.¹¹ A third possibility is that the Tribunal is performing both functions and is of a hybrid character.

This chapter will examine these three possible views of the Tribunal's function before considering their relevance to issues before the Tribunal. In particular, this chapter will consider the relevance of the Tribunal's character to the applicability of public international law in the determination of disputes, to the remedies the Tribunal may award, to questions of qualifying

⁹Such rulings would presumably apply only to contractual or property rights. See *Grimm v. Iran*, Award No. 25-71-1 (Feb. 22, 1983).

¹⁰The theory of internationalization of contracts, if accepted, would cut across this distinction and result in the application of international law as the law governing the transaction. For an application of this theory, see the Award of the International Arbitral Tribunal in *Texaco Overseas Petroleum Co. (TOPCO) v. Libya*, reprinted in 17 I.L.M. 1 (1978).

¹¹See *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., ser. A/B, No. 76, at 16 ("In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law").

nationality of claimants, and to the relationship between the Tribunal and municipal courts.

THE CHARACTER OF THE TRIBUNAL

A marked difference of approach is apparent from the Tribunal's handling of filed claims, which appear to fall into two categories. In the first category, claims are based on alleged infringements of private law rights. In *Ultrasystems, Inc. v. Iran*,¹² for example, the claim was apparently made inter alia on the basis of rights arising on the termination of a contract. Many of the claims filed before the Tribunal are claims for breach of contract, for failure to remit the proceeds of bills of exchange, and for sums due under letters of credit.¹³

In the second category, claims are based on the international responsibility of the respondent State. In *Grimm v. Iran*,¹⁴ for example, the widow of an American killed in Iran based her claim on an alleged breach by Iran of its duty under international law to exercise due diligence in affording protection to aliens. In *Haji-Bagherpour v. United States*,¹⁵ an Iranian national alleged that the United States violated customary international law when U.S. forces trying to rescue U.S. diplomatic and consular staff held in Teheran fired upon his truck. The United States denied liability under customary international law for damage done to the property of Iranian nationals incidental to military operations which in its opinion were lawful. The Tribunal dismissed the claim for lack of jurisdiction because Article II(1) of the Claims Settlement Agreement excludes from the Tribunal's jurisdiction "claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of actions of the United States in response to the conduct described in such paragraph. . . ."¹⁶ Paragraph 11 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Decla-

¹² Partial Award No. 27-84-3 (Mar. 4, 1983).

¹³ For examples of claims based on infringements of private law rights, see, e.g., *QuesTech, Inc. v. Iran*, Interim Award No. 15-59-1 (Mar. 1, 1983); *E-Systems, Inc. v. Iran*, Interim Award No. 13-388-FT (Feb. 4, 1983); *Rexnord, Inc. v. Iran*, Award No. 21-132-3 (Jan. 10, 1983); *Raygo Wagner Equip. Co. v. Star Line Iran Co.*, Award No. 20-17-3 (Dec. 15, 1982); *Granite State Machine Co. Inc. v. Iran*, Award No. 18-30-3 (July 29, 1982); *White Westinghouse Int'l Co. v. Bank Sepah*, Award No. 7-14-3 (June 25, 1982).

¹⁴ Award No. 25-71-1 (Feb. 22, 1983).

¹⁵ Award No. 23-428-2 (Jan. 26, 1983).

¹⁶ Claims Settlement Agreement, *supra* note 1, art. II(1).

ration)¹⁷ removes from the Tribunal's jurisdiction "any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, [or] (B) their subsequent detention. . . ."¹⁸ Nevertheless, the claim provides a clear example of a claim based on an alleged infringement of international law. Another striking example is provided by *Harza Engineering Co. v. Iran*,¹⁹ where a claim for the value of the aggregate credit balance of the claimant's accounts at certain Iranian government banks appears to have been treated by the Tribunal on the basis of an alleged expropriation of alien property in violation of customary international law and the Treaty of Amity between the United States and Iran.²⁰ Finally, it should be noted that many claims are presented on both grounds. In *Phillips Petroleum Co. Iran v. Iran*²¹ and *Amoco Iran Oil Co. v. Iran*,²² for example, claims were presented on the basis of alleged infringement of private rights and on the basis of alleged infringement of customary international law and the Treaty of Amity.²³

The decisions of the Tribunal to date do not provide a clear answer to the questions posed above. It is therefore necessary to examine in detail the possible answers before considering the effect they are likely to have on substantive and procedural issues before the Tribunal.

The Tribunal as an Alternative Forum for the Resolution of Private Law Claims

The circumstances of the birth of the Tribunal suggest that it is concerned with the private rights of individual claimants and not with the international responsibility of the United States and Iran. Under the Algiers Accords,²⁴ the United States

¹⁷ Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, reprinted in 20 I.L.M. 224 (1981) [hereinafter cited as General Declaration].

¹⁸ *Id.* para. 11.

¹⁹ Award No. 19-98-2 (Dec. 30, 1982).

²⁰ Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

²¹ Interlocutory Award No. 11-39-2 (Dec. 30, 1982).

²² Award No. 12-55-2 (Dec. 30, 1982).

²³ See also *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 (Dec. 19, 1983); *Starrett v. Iran*, Interlocutory Award No. 32-24-1 (Dec. 19, 1983).

²⁴ 81 DEP'T ST. BULL. 1 (1981), reprinted in 20 I.L.M. 223 (1981).

agreed to terminate all legal proceedings in its courts involving claims of U.S. individuals and businesses against Iran and its state enterprises²⁵ and to resolve such claims by arbitration.²⁶ The parties therefore seem to have intended that claims previously filed before U.S. courts should be transferred to another forum, namely, an international arbitral tribunal established for this purpose. Consequently, the claims filed before the Tribunal might be regarded as essentially the same as those previously before the U.S. courts; in other words, they are private law claims for the infringement of the private law rights of U.S. nationals and corporations. The Tribunal is therefore seized of jurisdiction in disputes that are private law disputes transferred to a transnational arbitral tribunal. This view of the Tribunal as arbiter of private claims derives considerable support from General Principle B of the General Declaration, which states that

[i]t is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its State enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.²⁷

There is a clear suggestion here that the Tribunal is an alternative forum for the resolution of private law disputes.

Articles I²⁸ and II of the Claims Settlement Agreement provide further support for this view. Article II(1) provides that

[a]n International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding

²⁵ General Declaration, *supra* note 17, General Principle B.

²⁶ Claims Settlement Agreement, *supra* note 1, art. II.

²⁷ General Declaration, *supra* note 17, General Principle B.

²⁸ Article I provides that "Iran and the United States will promote the settlement of claims described in Article II by the parties directly concerned." Claims Settlement Agreement, *supra* note 1, art. I.

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 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.²⁹

A number of observations can be made on this provision. First, the reference to "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States" is not couched in the language of State Responsibility. If this were the intention, it would be more appropriate to speak of claims by the United States and Iran in respect of injuries to their nationals.³⁰

Second, the reference to "claims outstanding on the date of this agreement" also supports this view. In *Phillips Petroleum Co. Iran v. Iran*³¹ and *Amoco Iran Oil Co. v. Iran*,³² Chamber Two considered whether a claim was outstanding on the date of the Claims Settlement Agreement if it had not been filed with a court at that date. The Chamber held that a claim was out-

²⁹ *Id.* art. II(1).

³⁰ The scheme for the settlement of disputes adopted by the parties requires that individuals and corporations should file claims before the Tribunal. *Id.* This might suggest that the arbitration was one of private law rights. Individuals, however, have often been permitted to file claims before international tribunals which were clearly concerned with questions of the international responsibility of states under international law. In these cases, the claim was the state's claim but, as a matter of convenience or procedure, the individual injured was permitted to put forward the complaint. For example, the Anglo-American Mixed Claims Commission established by the Convention on the Settlement of Claims, Feb. 8, 1853, United States-United Kingdom, 10 Stat. 988, T.S. No. 123, permitted individuals to file claims before an international tribunal. Similarly here, the fact that this procedure has been adopted cannot prevent the Tribunal from performing the functions of a truly international tribunal, if this was the intention of the states which established it. Consequently, it seems that this difficulty is more apparent than real.

³¹ Interlocutory Award No. 11-39-2 (Dec. 30, 1982).

³² Interlocutory Award No. 12-55-2 (Dec. 30, 1982).

standing for this purpose even if it had not been filed before a court.³³ In so ruling, the Chamber appeared to identify the claim before a municipal tribunal with the claim before the Claims Tribunal:

Whatever might have been Iran's intent, the phrase "whether or not filed with any court" modifies the phrase "such claims," which in turn refers to claims of nationals of the United States as well as claims of nationals of Iran. . . . We note further that the phrase "outstanding claim" refers to a cause of action which "existed" as of 19 January 1981, whether or not that claim had previously been sought to be enforced in court or arbitral proceedings. . . . Thus, the previous filing of a claim with a tribunal is not necessary for the claim to be "outstanding."³⁴

Chamber Two apparently assumed that the claim was the same claim whether before the municipal court or the international tribunal, an assumption that lends support to the view of the Tribunal as an alternative forum to which private law claims are referred.

Third, the words "whether or not filed with any court" suggest that at least some of the claims qualifying for adjudication by the Tribunal must be susceptible of decision by municipal courts. This might appear to rule out claims for breaches of international law that would frequently be regarded as nonjusticiable by municipal courts on grounds of Act of State. Fourth, the reference to counterclaims by respondent states against individual claimants is difficult to reconcile with the concept of a Tribunal charged with ruling upon the international responsibility of states, in that such counterclaims could not be based on an infringement of international law. Finally, claims and counterclaims are admissible under Article II of the Claims Settlement Agreement if they arise out of "debts, contracts (including transactions which are the subject of letters of credit or bank guarantees). . . ."³⁵ The reference to these transactions suggests that the function of the Tribunal is to decide private law claims.³⁶

³³ *Phillips Petroleum*, *supra* note 31, at 10; *Amoco Iran Oil*, *supra* note 32 at 9.

³⁴ *Amoco Iran Oil*, *supra* note 32, at 8-9.

³⁵ Claims Settlement Agreement, *supra* note 1, art II(1).

³⁶ However, the provision continued by referring to "expropriations or other measures affecting property rights. . . ." *Id.* This language is much more familiar in the context of international responsibility, and these words may therefore be taken to lend some support to the notion of the Tribunal as an arbiter of public duties.

The Tribunal as a Forum for the Resolution of Interstate Disputes

Although Article II(1) of the Claims Settlement Agreement seems to support the argument that the Tribunal is a transnational arbitral tribunal concerned with private law rights, the position is not quite so clear as might at first appear. Several factors, none of which is conclusive in itself, taken together constitute a persuasive argument that the Tribunal was intended to rule on the responsibility of states under public international law.

Whatever the particular designation of the instruments by which the United States and Iran agreed to establish the Tribunal, they are clearly treaties in that they are agreements concluded between states and governed by international law.³⁷ The Tribunal is an international tribunal and is so described in Article II(1) of the Claims Settlement Agreement.³⁸ Furthermore, its jurisdiction clearly extends to questions of State Responsibility. The jurisdiction of the Tribunal is not limited to claims made pursuant to Article II(1) of the Claims Settlement Agreement.³⁹ Paragraphs 16 and 17 of the General Declaration and Article II(3) of the Claims Settlement Agreement are of particular importance in this regard.⁴⁰ Since both of these instru-

³⁷ See A. McNair, *THE LAW OF TREATIES* 4 (1961). See also Article 2 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF. 39/27, at 289, reprinted in 8 I.L.M. 679 (1969).

³⁸ Claims Settlement Agreement, *supra* note 1, art II(1).

³⁹ *Id.* art. II(2). The Claims Settlement Agreement confers 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. *Id.* Article VI(4) confers jurisdiction over disputes as to the interpretation or application of the Claims Settlement Agreement. Furthermore, paragraph 2(B) of the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, reprinted in 20 I.L.M. 229 (1981) [hereinafter cited as *Undertakings*], confers jurisdiction over disputes between banking institutions.

⁴⁰ The General Declaration, *supra* note 17, para. 16 provides that "[i]f any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by paragraphs 12-15, inclusive [i.e., obligations in relation to return of the assets of the family of the Shah], Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws." *Id.*

Paragraph 17 provides that "[i]f any other dispute arises between the parties as to

ments are international agreements governed by international law and binding on Iran and the United States, any breach of obligations arising under these instruments would constitute a breach of international law and engage the international responsibility of the state in breach. Paragraphs 16 and 17, which confer on the Tribunal jurisdiction over such disputes, contemplate that in this context, at least, the Tribunal has the power to rule on the international responsibility of Iran and the United States. These provisions do not merely grant the Tribunal the power to rule on disputes as to the meaning of its constitutive instrument. On the contrary, the jurisdiction conferred here clearly relates to wider matters in the scheme of settlement adopted by Iran and the United States and would require the Tribunal to rule on the international responsibility of those parties.

The object of the creation of the Tribunal also supports this view. The Tribunal is one part of a larger scheme that was intended to restore a measure of normality in international relations between Iran and the United States. The "Declaration . . . Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran,"⁴¹ to employ its correct title, contemplates the existence of disputes between those two states on the international plane upon which the Tribunal must rule. It is significant that the Tribunal is expressly precluded from hearing claims relating to the seizure and detention of the U.S. consular and diplomatic staff in Tehran,⁴² claims arising out of the actions of the United States in response thereto,⁴³ and claims relating to

the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement may be enforced by the prevailing party in the courts of any nation in accordance with its laws." *Id.* at para. 17.

The Claims Settlement Agreement, *supra* note 1, art. II(3), provides that "[t]he 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." *Id.*

⁴¹ Claims Settlement Agreement, *supra* note 1.

⁴² *Id.* art. II(1); General Declaration, *supra* note 17, para. 11.

⁴³ Claims Settlement Agreement, *supra* note 1, art. II(1). See Haji-Bagherpour v. United States, Award No. 23-428-2 (Jan. 26, 1983) (denying jurisdiction to hear claim for damage to Iranian property during U.S. attempt to rescue American nationals detained in Teheran).

injury to U.S. nationals or their property during the Islamic Revolution in Iran resulting from acts not of the government of Iran.⁴⁴ These exceptions are pointless if the Tribunal's function is limited to that of a private law arbitration and are necessary only if the Tribunal would otherwise be seized of jurisdiction over them. Since any decision on the matters excluded would require the Tribunal to rule on the international responsibility of the respondent state, their exclusion suggests that the Tribunal is otherwise concerned with questions of international responsibility.⁴⁵

A further restriction on the Tribunal's jurisdiction is also relevant here. Article II(1) of the Claims Settlement Agreement grants the Tribunal jurisdiction over claims by U.S. nationals against Iran and claims by Iranian nationals against the United States.⁴⁶ The Tribunal has read this provision literally and has concluded that the presentation of a claim by one state against a national of the other is not permitted,⁴⁷ save by way of counterclaim.⁴⁸ While this restriction might appear arbitrary and unjustifiable in the context of a private arbitration concerned with the vindication of private law rights, it is more readily intelligible in the context of a truly international arbitration. Furthermore, the restriction suggests that the respondent state appears before the Tribunal in its public capacity and that it is its responsibility in public international law that is in issue.

Another relevant factor is that the scheme adopted by the parties to the Claims Settlement Agreement appears to adhere to the nationality of claims rules,⁴⁹ a rule of public international law applicable in cases of diplomatic protection.⁵⁰ While it is arguable that the purpose of these provisions is merely to restrict qualifying claims and that the restrictions on qualification

⁴⁴ Claims Settlement Agreement, *supra* note 1, art. II(1); General Declaration, *supra* note 17, para. 11.

⁴⁵ The scheme of settlement implemented by the General Declaration and Claims Settlement Agreement also required the United States to abandon its claims before the International Court of Justice in relation to these excluded matters. See General Declaration, *supra* note 17, para. 11.

⁴⁶ Claims Settlement Agreement, *supra* note 1, art. II(1). The terms *United States of America* and *Iran* are given wide definitions in the Claims Settlement Agreement. *Id.* art. VII(3), (4). See also *Oil Field of Texas, Inc. v. Iran*, Interlocutory Award No. 10-43-FT (Dec. 9, 1982).

⁴⁷ Case No. A/2 (Decision of Dec. 19, 1981), reprinted in 21 I.L.M. 78 (1982).

⁴⁸ Claims Settlement Agreement, *supra* note 1, art. II(1).

⁴⁹ *Id.* arts. II, VII.

⁵⁰ See generally I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 481-82 (3d ed. 1979).

only resemble the nationality of claims rule, the Tribunal's decisions suggest otherwise. In *Flexi-Van Leasing Co. v. Iran*,⁵¹ Chamber One made extensive reference to the nationality of claims issue in customary international law, state practice, and international arbitral awards in laying down the principles to be applied in determining whether a claim on behalf of a U.S. company qualified for adjudication by the Tribunal.⁵² More recently in *Esphahanian v. Bank Tejarat*,⁵³ a case where the claimant possessed the nationality of both Iran and the United States, Chamber Two applied the concept of dominant and effective nationality that has developed in relation to the nationality of claims in public international law.⁵⁴ Here again the Chamber relied heavily on decisions of international tribunals on questions of public international law.⁵⁵ Finally, Article VII of the Claims Settlement Agreement includes the requirement of continuity of nationality,⁵⁶ a requirement frequently encountered in instruments conferring jurisdiction on interstate tribunals such as Claims Commissions. In short, the close affinity of these procedural rules to those applicable in interstate arbitrations under public international law suggests that the Tribunal may be concerned with an exercise in diplomatic protection.

⁵¹ Claim No. 36 (Order of Dec. 15, 1982).

⁵² *Id.* at 3-8 (citing Parker Case (Mex. v. U.S.), 4 R. Int'l Arb. Awards 35, 39 (1926); Pinson Case (Mex. v. Fr.), 5 R. Int'l Arb. Awards 327 (1928); Norwegian Loans Case, 1957 I.C.J. 9, 39-40 (Separate Opinion of Judge Lauterpacht)).

⁵³ Award No. 31-157-2 (Mar. 29, 1983). See also *Golpira v. Iran*, Award No. 32-211-2 (Mar. 29, 1983). The issue of dual nationality is currently being considered by the Full Tribunal in Case No. A/18.

⁵⁴ Chamber Two did, however, emphasize that "the agreement of the two Governments to create this Tribunal was not a typical exercise of diplomatic protection of nationals." *Esphahanian*, *supra* note 53, at 14.

⁵⁵ The Chamber specifically relied on the Miliani Case (Italy v. Venez.), 10 R. Int'l Arb. Awards 584 (1903); Massiani Case (Fr. v. Venez.), 10 R. Int'l Arb. Awards 159 (1903); Stevenson Case (Gr. Brit. v. Venez.), 9 R. Int'l Arb. Awards 385 (1903); Canevero Case (Italy v. Peru), Hague Ct. Rep. (Scott) 284 (Perm. Ct. Arb. 1912); Hein Case (Gr. Brit. v. Ger.), 2 Trib. Arb. Mixtes 71 (1922); Barthez de Montfort Case (Fr. v. Ger.), 6 Trib. Arb. Mixtes 806 (1926); Born Case (Serbo-Croat-Slovene Comm.), 6 Trib. Arb. Mixtes 499 (1926); Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4; Mergé Case (U.S. v. Italy), 14 R. Int'l Arb. Awards 236 (1955). See *Esphahanian*, *supra* note 53, at 9-11.

⁵⁶ The requirement seems to be no more than "a generalisation from the jurisdiction traditionally conferred by agreement upon arbitral tribunals." 2 D. O'CONNELL, INTERNATIONAL LAW 1037-38 (2d ed. 1970). The Claims Settlement Agreement requires that a claim should have been owned by a U.S. or Iranian national continuously from the time it arose until the date on which the Claims Settlement Agreement entered into force. It entered into force January 19, 1981. Claims Settlement Agreement, *supra* note 1, art. VII(2).

As noted earlier, a number of the claims filed before the Tribunal have invoked the public responsibility of the respondent state in international law. The Tribunal has entertained these claims in the terms in which they are formulated, lending considerable support to the notion that the Tribunal has jurisdiction over such public law claims. Thus, in *Grimm v. Iran*,⁵⁷ Chamber One proceeded on an unstated assumption that it had jurisdiction to decide issues of international responsibility. In *Haji-Bagherpour v. United States*,⁵⁸ the issues joined between the parties were of the legality and illegality of the conduct of states on the international plane. In *Harza Engineering Co. v. Iran*,⁵⁹ Chamber Two considered the question of whether direct and repeated interference with the use and enjoyment of an alien's bank account constituted an expropriation in breach of treaty and customary international law. The Chamber held that the claim was within the jurisdiction of the Tribunal and engaged in a detailed consideration of the meaning of "expropriation" in public international law before dismissing the claim on its merits. The Tribunal has added further support to this notion by applying public international law to certain issues that have arisen in claims before it. In *Oil Field of Texas, Inc. v. Iran*,⁶⁰ for example, the Tribunal considered whether the National Iranian Oil Company was responsible to the claimant in respect of the activities of the Oil Service Company of Iran. The Full Tribunal answered the question in the affirmative and considered that public international law governed the issue of succession.⁶¹

The fact that both the United States and Iran are represented before the Tribunal by an Agent also supports this view.⁶² The precise role of the Agent before the Tribunal is unclear and will, no doubt, develop in practice. Of particular importance is the question of whether the Agent will have a measure of control over the presentation of claims by counsel

⁵⁷ Award No. 25-71-1 (Feb. 22, 1983).

⁵⁸ Award No. 23-428-2 (Jan. 26, 1983).

⁵⁹ Award No. 19-98-2 (Dec. 30, 1982).

⁶⁰ Interlocutory Award No. 10-43-FT (Dec. 9, 1982).

⁶¹ *Id.* at 21.

⁶² Article VI(2) of the Claims Settlement Agreement, *supra* note 1, provides that "[e]ach 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."

acting for individual claimants.⁶³ It is clear, however, that the Agent is the official and final representative of his government before the Tribunal with capacity to assume commitments on its behalf with reference to the proceedings. The Agent's existence and the supervisory functions he performs might again suggest that the claims presented before the Tribunal are the state's claims. Some support for this view of the Tribunal's function may be found in the attitude of the U.S. Agent. In the course of argument in *E-Systems, Inc. v. Iran*⁶⁴ Mr. Rovine stated that "[t]his Tribunal is created by an international agreement, a treaty of Iran and the United States. This is an international tribunal; it is a creature of international law, and its decisions are part of international law. Its decisions are not part of domestic or municipal law."⁶⁵

The Tribunal as a Hybrid

There remain certain obstacles in the path of the argument that the Tribunal is purely an interstate Tribunal in the sense described above. Normally, before a state may exercise a right of diplomatic protection in respect of injury to its nationals, it is necessary that the individuals injured should have exhausted such remedies as may be available to them before the courts or tribunals of the respondent state. However, under the scheme established by the Claims Settlement Agreement, the exhaustion of local remedies rule can have no application. Article III(4) provides that "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 the later."⁶⁶ This provision gave rise to a "race to the courthouse door" to file claims before the expiration of the time limit. The time scale adopted was both brief and strict, and the time available could not possibly have sufficed to enable individuals to exhaust any available local remedy. As a result, few, if any, claimants before the Tribunal have attempted to exhaust local remedies. It follows, therefore, that if the Tribunal is concerned with questions of the public law responsibilities of states,

⁶³ See generally J. RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 194 (1926).

⁶⁴ Interim Award No. 13-388-FT (Feb. 4, 1983).

⁶⁵ *E-Systems*, Case No. 388, at 58 (Hearing of Jan. 10, 1983) (statement of Arthur Rovine) [copy on file at the Virginia Journal of International Law].

⁶⁶ Claims Settlement Agreement, *supra* note 1, art. III(4).

the states party to the Claims Settlement Agreement must be regarded as having waived the normal rule of exhaustion of local remedies.

Moreover, Article V of the Claims Settlement Agreement, which refers not only to international law but also to choice-of-law rules and principles of commercial law, is, at first sight, difficult to reconcile with the notion of a tribunal charged to rule solely on questions of State Responsibility. However, a waiver of the requirement of local remedies provides a possible solution to this difficulty. It is possible that these legal systems other than public international law are applicable only in determining preliminary or incidental questions. If the Tribunal is primarily concerned with the international responsibility of the respondent state, it must nevertheless consider the nature of the individual rights that are alleged to have been infringed in contravention of international law. Such rights would usually arise under a municipal legal system. Normally, these private law rights and duties would be resolved at the municipal level and would give rise to international responsibility only if there was a denial of justice. If, however, one presupposes a waiver of the requirement of exhaustion of local remedies, as described above, and consequently the absence of any proceedings before municipal courts, it necessarily follows that the international tribunal will have to deal with both the preliminary issue of whether the claimant's private rights in municipal law have been denied and the substantive issue of whether this constitutes a denial of justice in international law. On such an interpretation, in order to succeed a claimant must establish both an infringement of private law rights in municipal law and a denial of justice in public international law.

At least one decision of the Tribunal is consistent with this interpretation.⁶⁷ There are, however, other cases in which the issue of liability appears to have been decided simply by the application of municipal law to determine the private law rights of the claimants and which might therefore suggest that it is not necessary for a claimant to establish a denial of justice in international law.⁶⁸ Consequently, whatever may have been the intention of those who drafted the Claims Settlement Agreement, and there are indications in both directions, it seems that

⁶⁷ *Harza Eng'g Co. v. Iran*, Award No. 19-98-2 (Dec. 30, 1982).

⁶⁸ See, e.g., note 13 *supra*.

the Tribunal may be prepared to assert its capacity to perform a dual function.

The Tribunal's only express statement on its juridical nature is ambiguous, but appears on one interpretation to support this view. In *Esfahanian v. Bank Tejarat*, Chamber Two, having examined the circumstances surrounding the creation of the Tribunal, stated:

From these facts certain conclusions may be drawn. First, the agreement of the two Governments to create this Tribunal was not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for these nationals.

Second, the Respondent State is not here simply in its capacity as a sovereign State. Rather, "Iran" and "the United States" are defined to include agencies, instrumentalities, and entities controlled by the State—a scope of responsibility far broader than usual governmental liability. By guaranteeing the debts of juridical persons not part of the government itself, the two Governments have here assumed responsibility for private as well as public law duties. This potentially broad liability is again far more than is normally comprehended in cases of diplomatic espousal of claims, pursuant to which States as such generally undertake to pay compensation for their own violations of international law.

Third, the Tribunal has been substituted for the national courts of both countries with a flexibility not found in either, consistent with its status as an international tribunal established by treaty. . . .⁶⁹

By concentrating on the identity of the parties to proceedings before the Tribunal, Chamber Two here obscures the real issue, which is whether the Tribunal is concerned with public duties owed by one state to another, or with private law duties owed by a state to individuals, or with both. As earlier noted,⁷⁰ the practice of permitting individuals to file claims before a Tribunal is only a procedural device that cannot determine the substantive role of the Tribunal. The Chamber's description of

⁶⁹ Award No. 31-157-2 (Mar. 29, 1983).

⁷⁰ See note 30 *supra*.

diplomatic protection is misleading in that it overlooks the fact that in the classical framework of the law of State Responsibility, while the claim seeks redress for an injury to a national, the right infringed is that of his state. Furthermore, the responsibility of the respondent state for acts of its agencies and instrumentalities under the Claims Settlement Agreement is not necessarily wider than that in cases of diplomatic protection in public international law where the acts of such agencies and instrumentalities would normally be attributed to the state. The important difference here is, rather, that on this view the jurisdiction of the Tribunal extends in addition to the liability of the state (as widely defined in the Claims Settlement Agreement) for breach of its private law duties. In the passage from *Esfahanian* quoted above, it appears that Chamber Two is not denying the Tribunal's character as a tribunal of responsibility in public international law but is rather asserting the existence of a further role, that of an arbiter of the private law duties of the respondent state. The Tribunal is on this view a hybrid that rules on the responsibility of the respondent state in public international law and on its liability in municipal systems of private law. However, even if the Tribunal were ultimately to confirm that it is performing a dual function, the difficulty concerning its nature and function would remain unresolved because if it is in fact discharging two separate functions, it remains essential to distinguish between them.⁷¹

THE RELEVANCE OF THE TRIBUNAL'S CHARACTER

It is a flaw in the jurisprudence of the Tribunal that it has, to date, offered little guidance as to its nature and function and has failed to identify the exact role it is performing. This is likely to have important consequences for the future functioning of the Tribunal.

The Relevance of Public International Law

If it is accepted that the Tribunal is, in whole or in part, an interstate tribunal charged with ruling on questions of State Responsibility, it follows that in fulfilling this function it will apply rules of public international law. Although the traditional

⁷¹ See *CMI Int'l, Inc. v. Ministry of Roads and Transportation*, Award No. 99-245-2 (Dec. 27, 1983). See also note 8 *supra*.