# THE UNIVERSITY OF HULL

# THE IRAN-UNITED STATES CLAIMS TRIBUNAL : A CASE STUDY IN STRUCTURAL ISSUES OF INTERNATIONAL ARBITRATION

**being a Thesis submitted for the Degree of**

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**by**

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# TABLE OF ABBREVIATIONS

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| AAA | American Arbitration Association. |
| ABA | American Bar Association. |
| A.D. | Annual Digest of Public International Law Cases. |
| AJIL | American Journal of International Law. |
| All E.R. | All England Law Reports. |
| AR | Annual Reports of the Iran-United States Claims Tribunal. |
| Arb.Int'l. | Arbitration International. |
| Arb.J. | The Arbitration Journal. |
| Bos.C.I.C.L.R. | Boston College International and Comparative Law Review. |
| Bus. Lawyer | The Business Lawyer. |
| BYIL | British Yearbook of International Law. |
| Cd., Cmmd. | U.K. Command Papers. |
| C.J.Q. | Civil Justice Quarterly. |
| Col.J.T.L. | Columbia Journal of Transnational Law. |
| Col.L.R. | Columbia Law Review. |
| CSD, Claims Settlement Declaration | Declaration of the Government of Algeria Concerning the Settlement of Claims Between Iran and the United States, 19 January 1981. |
| CTS | Consolidated Treaty Series. |
| C.W.R.J.I.L. | Case Western Reserve Journal of International Law. |
| Ed. | Editor, Edition. |
| Eds. | Editors. |
| F.2d. | Federal Reporter (U.S.A.), 2nd. |
| G.A.O.R. | General Assembly Official Records. |
| GD, General Declaration | Declaration of the Government of Algeria, 19 January 1981. |
| G.Wash.J.I.L.Econ. | George Washington Journal of International Law & Economics. |
| Habicht | Habicht, Post-War Treaties. |
| Hague Y.B.I.L. | The Hague Yearbook of International Law. |
| Harv.I.L.J. | Harvard International Law Journal. |
| Harv.L.R. | Harvard Law Review. |
| IBA | International Bar Association. |
| ICC | International Chamber of Commerce. |
| ICJ | International Court of Justice. |
| ICJ Rep. | International Court of Justice Reports. |
| ICLQ | International and Comparative Law Quarterly. |
| ICSID | International Centre for the Settlement of Investment Disputes Between States and Nationals of Other States. |
| ILC | International Law Commission. |
| ILC's Draft Convention | International Law Commission's Draft Convention on Arbitral Procedure, 1953. |

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| ILC's Model Rules | International Law Commission's Model Rules on Arbitral Procedure, 1958. |
| ILR | International Law Reports. |
| ILM | International Legal Materials. |
| Ind.J.I.L. | Indian Journal of International Law. |
| Int'l., Int. | International. |
| Int'l Lawyer | International Lawyer. |
| Int'l.Bus. Lawyer | International Business Lawyer. |
| Int'l.Fin.L.R. | International Financial Law Review. |
| Iran-USCTR | Iran-United States Claims Tribunal Reports, Grotius Publications, Volumes 1-16. |
| J.Int'l.Arb. | Journal of International Arbitration. |
| LCIA | London Court of International Arbitration. |
| L.N.T.S. | League of Nations Treaty Series. |
| L.P.I.B. | Law & Policy in International Business. |
| Midd.E.J. | Middle East Journal. |
| Misc. | Miscellaneous Reports, New York, (U.S.A.). |
| Moore, Int.Adj. | Moore, International Adjudications. |
| Neth.I.L.R. | Netherlands International Law Review. |
| Neth.Y.B.I.L. | Netherlands Yearbook of International Law. |
| NW.J.I.B.L. | Northwestern Journal of International Business and Law. |
| N.Y.S. | New York Supplement (U.S.A.). |
| PCA | Permanent Court of Arbitration. |
| PCIJ | Permanent Court of International Justice. |
| Proc.A.S.I.L. | Proceedings of the American Society of International Law. |
| Recueil des Cours | Recueil des Cours de l'Academie de droit international. |
| R.I.A.A., RIAA | United Nations Reports of International Arbitral Awards. |
| Stan.J.I.L. | Stanford Journal of International Law. |
| Syracuse J.I.L.C. | Syracuse Journal of International Law & Commerce. |
| Texas I.L.J. | Texas International Law Journal. |
| U.C.C.L.J. | Uniform Commercial Code Law Journal. |
| U.K.T.S. | U.K. Treaty Series. |
| UNCITRAL | United Nations Commission on International Trade Law. |
| UNCITRAL Rules | UNCITRAL Arbitration Rules of 1976. |
| UNCITRAL Model Law | UNCITRAL Model Law on International Commercial Arbitration of 1985. |
| Undertakings | 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. |
| UN Resolutions | Djonovich, UN Resolutions. |
| UN Systematic Survey | United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948. |
| UNTS, U.N.T.S. | United Nations Treaty Series. |
| U.S. | U.S. Supreme Court Reports. |

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| U.S. Sup. Crt. Rep. | U.S. Supreme Court Reports, Lawyers' Edition. 2nd. |
| Virg.J.I.L. | Virginia Journal of International Law. |
| Van.J.I.L. | Vanderbilt Journal of International Law. |
| Van.J.T.L. | Vanderbilt Journal of Transnational law. |
| Wash.L.R. | Washington Law Review. |
| W.L.R. | Weekly Law Reports. |
| Wetter | Wetter, International Arbitral Process, 5 Volumes. |
| YB. Comm.Arb. | Yearbook Commercial Arbitration. |
| YBILC | Yearbook of the International Law Commission. |
| YB.UNCITRAL | Yearbook of the United Nations Commission on International Trade Law (UNCITRAL). |
| Y.B.W.A. | Yearbook of World Affairs. |

# INTRODUCTION

## I. Purpose of the Study

The recourse to arbitration in the context of the hostage crisis in relations between Iran and the United States represents one of the most recent submissions, and a unique one, in the modern history of international arbitration. Interestingly, the reference to arbitration was not directly aimed at resolving the hostage crisis itself. It was, rather, to remove a major obstacle in the way of settlement of another crisis which had become intertwined with it, namely hundreds of financial claims between the two Governments and between each Government and nationals of the other.

International arbitration has been a mechanism well known throughout the history of the law of nations. Essentially, it has given birth to the modern concept of international judicial law. Along with the development of international arbitration in accordance with the changing circumstances of the international community, other forms of international judicial settlement have emerged. The most obvious example of the latter concept has been the introduction of the notion of judicial settlement as distinguished from international arbitration, and embodied in the establishment of the PCIJ and its successor the ICJ.

It is interesting that despite all these developments, international arbitration has retained its own identity and characteristic features, making it distinguishable from other forms of international judicial settlement. Essential aspects of these features inhere principally in the structure of international arbitration as a system established by the parties themselves and composed of judges of their own choice. In its mission and objectives, international

arbitration does not differ fundamentally from other forms of judicial settlement; it is a judicial form of dispute settlement and is expected to act on the basis of respect for law.

Nevertheless, in view of the special structure of international arbitration, the question has remained unresolved as to whether these characteristics may have, or are even intended by the arbitrating parties to have, implications for the conduct of the arbitration and its outcome. It is therefore very significant to establish the role and the extent of the role of structural issues in the international arbitral process.

This should lead us to understand the importance of organizational and structural issues in the process of international arbitration. There is no doubt that the effective organization and structuring of the arbitral tribunal can significantly influence the whole judicial process of arbitration, thereby contributing to the effectiveness and popularity of the arbitration device in settling international disputes. Moreover, the judicial value of arbitration awards, or any judicial decision indeed, cannot be assessed in isolation from the fundamental structural factors which significantly influence the process of its making. Among the structural issues are the questions of organization, time and cost-effectiveness of the arbitration process. Most important of all these issues are the fundamental questions relating to the composition of the arbitral tribunal, such as the method of selection, nationality, qualifications, cultural-legal training and independence and impartiality of the arbitrators. What is needed is, therefore, to illuminate the operation of these factors within the arbitral process. No doubt such an analysis can also highlight characteristic features of international arbitration by identifying the structural issues as a reflection of the expectations of the arbitrating parties.

A further feature, characteristic of international arbitration, is that arbitral tribunals, even in the form of institutional arbitration, are created by the

will of the parties. Therefore the successful conduct of the arbitration depends largely on the co-operation of both parties in setting up and continuing that process. This is particularly obvious in arbitration tribunals composed of three elements, arbitrators appointed by each of the two parties and a jointly appointed arbitrator, or arbitrators. The system as a whole represents a carefully balanced structure reflecting the interests of both parties to the arbitration. Major problems may arise when co-operation is withheld by one of the parties, particularly in the form of withdrawal of its arbitrator during the proceedings. Two important questions arise in this respect: first, the legality of either party withholding the required co-operation; second, the nature and extent of remedies developed in international arbitration, in accordance with its special structure and characteristics, against any such withholding of co-operation.

The Iran-United States Claims Tribunal offers one of the most recent developments, and a unique one, for a study in relation to the foregoing questions. Therefore the primary aim of this study is to conduct an analysis of the issues in the Iran-United States Claims Tribunal in relation to the role and effectiveness of arbitration in the settlement of disputes, particularly in respect of the foregoing structural questions. In applying these questions to the case of the Iran-United States Claims Tribunal we have attempted to : (a)- identify the problems associated with this type of tribunal in general, and with the Iran-US Tribunal in particular; and (b)- analyse the problems arising from the manner of practical application of the system. It is hoped that all these will indicate how fruitful the lessons can be for future development of international arbitration.

As already mentioned, the Iran-US Claims Tribunal has its own unique characteristics, mainly in relation to the nature of the Tribunal itself and the existence of the Security Account for the payment of awards rendered against

Iran. A question therefore arises as to the extent to which these new concepts have altered the traditional features of international arbitration. We will attempt to analyse the effects of these issues, in particular in relation to the judicial review of the Tribunal awards. We shall also examine the accompanying questions in the field of public international law regarding the theory of nullity or invalidity of arbitral awards and in general in relation to their effect in altering the traditional features of international arbitration.

## II. Scope of the Study

This study is divided into seven chapters. Chapter One is a discussion of the historical background and reasons for the establishment of the Iran-United States Claims Tribunal. The nature of the claims involved and the circumstances in which the Algiers Declarations were concluded can explain the structure and function of the Tribunal and the nature of its decisions. Moreover, the historical review can help us understand how the need for the peaceful settlement of this international dispute emerged as a desirable option, despite the high tension between the two countries. It also explains the special features in the Iran-United States Claims Tribunal system, such as the establishment of the Security Account.

Without an understanding of the general principles governing international arbitration and the special characteristics thereof, it would be difficult to appreciate the problems associated with the arbitration process. Therefore, Chapter Two attempts to explain the relevant topics of international arbitration in relation to its forms, nature, distinguishing features and role, as a means of elucidating the problems discussed in this study.

Chapter Three discusses, very briefly, the organizational and administrative aspects of establishing an arbitration tribunal on the scale of the Iran-United States Claims Tribunal, the expenses incurred by the two

Governments in this respect, the number of claims decided by the Tribunal and the work remaining to be done by it.

Chapter Four attempts to analyse in detail the basic structural issues relating to the composition of the Iran-United States Claims Tribunal in three separate Sections. Section A discusses the problems inherent in the tripartite[1] structure of the membership of arbitral tribunals in relation to the judicial nature of the process and in relation to the common and special characteristics of the Iran-United States Claims Tribunal in their bearing on the foregoing questions. Section B of this Chapter discusses the role of national/party-appointed arbitrators in relation to their appointment, resignation and in general their independence and impartiality. Section C analyses the questions surrounding the appointment of neutral arbitrators in relation to their nationality and cultural-legal training and the latter factors' influence on the outcome of these arbitrators' decisions.

In Chapter Five, we analyse the problems concerning the frustration of arbitration, particularly in relation to the withdrawal, resignation or non-participation of party-appointed arbitrators on the instructions of the State party concerned. The aim is to consider the relevant developments in the Iran-United States Claims Tribunal in the light of general principles applicable in international arbitration and the remedies permissible against the frustration of arbitration.

Chapter Six examines the procedural possibilities within and outside the Tribunal system for the judicial review of the Tribunal's decisions in particular connection with the character of the Tribunal awards and the existence of the Security Account. The primary aim is to demonstrate how the confusion created regarding the character of the Tribunal and the existence of

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1 The term "tripartite" used throughout this study signifies the presence of three elements in the composition of the arbitral tribunal adjudicating between two parties, not the number of the parties to the arbitration, as it is occasionally used.

the Security Account have influenced the practical and traditional circumstances regarding the claims of nullity and invalidity of arbitral awards. In addition, the role and function of the Full Tribunal in relation to the decisions made by the Chambers are analysed.

Although most of the above chapters and their sections are accompanied by a conclusion, we have found it useful to provide a brief general recapitulation and conclusion with respect to the questions discussed in this study. This has been done in Chapter Seven.

## III. Method of the Study

This research is a case study with fundamental theoretical dimensions. The basic methodology employed has been to analyse the questions which we have pursued in this study in the light of the theoretical principles and comparative practices in international arbitration vis-a-vis the decisions, awards and other practices of the Iran-United States Claims Tribunal.

For obvious reasons this study has been principally conducted from the point of view of public international (inter-State) arbitration. In discussing the problems, however, relevant topics of commercial international arbitration have not been neglected for the following reasons: (a)- The link between public international arbitration and commercial international arbitration, as described in Chapter Two of this study, is becoming increasingly inextricable. Therefore an attempt to limit the study within the framework of only one of these two types of international arbitration may ignore unnecessarily the wider field of comparison for the purpose of analysis. (b)- What is more important is that the Iran-United States Claims Tribunal is entrusted with deciding claims of a commercial as well as an inter-State nature. Accordingly, issues from both commercial international arbitration and public international arbitration are involved in the process. In other words, the Tribunal in practice exercises a dual function of both commercial and inter-State nature. This makes a sharp

distinction between these two types of arbitration, at least in this study, unnecessary.

The primary source material used for the purpose of analysing the practice of the Iran-United States Claims Tribunal has been the published reports of the Tribunal's awards and decisions and other reports on the organizational and structural aspects of the Tribunal's work, such as the Annual Reports published by the Secretary-General of the Tribunal.

In view of the continuous functioning of the Tribunal and the development of its practice, the reports and other literature on the work of the Tribunal have been developing continuously during our study. Attempts have been made to keep the study up dated with such reports[2] and literature on the Tribunal, or any general literature on international arbitration made available during the conduct of our research.[3]

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2 For instance, the Annual Reports published by the Tribunal which cover the period between 1st July and 30 June of the following year become available after some six months of the end of the period under review. These Reports usually contain update information on the developments in the organization, membership and other activities of the Tribunal. For the foregoing reasons we had not been able to obtain a copy of the Annual Report covering the period between 1st July 1988 to 30 June 1989 by the time the draft of this study was finalized.

3 One such item of literature is the recent treatise written by Judge Schwebel, the (American) Judge of the International Court of Justice, referred to in our discussion in Chapter Five. One Chapter of Judge Schwebel's work has been devoted to an analysis of the authority of truncated tribunals in international arbitration. Obviously, Judge Schwebel's treatise has enriched the literature for international lawyers and scholars researching on international arbitration. However, there are certain areas over which we do not completely agree with Judge Schwebel's conclusion. These areas of disagreement have been represented in Chapter Five of this study. Nevertheless, this is not intended to be a rebuttal of his views, for which a separate thesis might need to be written.

# CHAPTER ONE

# BACKGROUND AND REASONS FOR THE ESTABLISHMENT OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

## Introduction

The extent and the nature of recent disputes between Iran and the United States, and the circumstances in which the Algiers Declarations was concluded explain the structure and the function of the arbitral Tribunal agreed upon by the parties.

To demonstrate how the claims issue came to dominate the relationship between the two countries and subsequently led to the establishment of a claims settlement Tribunal, it is necessary to provide a measure of insight into the extent of the recent political and economic relationships between the two countries, the circumstances specifically giving rise to the disputes, the hostage crisis, the nature and category of the claims involved and the negotiating history of the Algiers Accords.

However, it has to be noted that many of the issues referred to in this chapter are only touched in outline, and in so far as they satisfy the purpose of this chapter. A detailed analysis of these issues is neither necessary nor possible within this limited scope and space.

## I- The Recent Political and Economic Relationships in Retrospect : A Brief Glance

### A- Political Issues

Although a tradition of bilateral relations between Iran and the United States existed before World War II, the United States' active involvement in

Iran is a matter of the post World War II era, which was particularly marked in the political events of the early 1950s.

Between April 1951 and August 1953 the Iranian Government headed by Dr Muhammad Mossadegh led a popular movement for the nationalization of the oil industry and the establishment of a political-economic foundation and social structure. To put an end to the forty years of exploitation of Iranian oil, Iran nationalized the oil industry and the interests of the Anglo-Iranian Oil Company, effective May 1, 1951, and declared its readiness to enter into negotiations with the company regarding compensation. As a consequence, severe disputes arose between the British and Iranian governments which continued during the whole period of Mossadegh's office, and the oil nationalization became a major source of foreign conspiracy against the Iranian popular movement and its government.[1]

The United States government which had started its role as a conciliator in this process, ultimately became identified as essentially hostile to the Iranian popular movement, and therefore concluded its conciliatory efforts by deciding on a coup d'etat as a final solution - no doubt persuaded in this by its British allies and their Iranian clientele. In an operation code named "Ajax" designed by the CIA, executed by a section of the Iranian Army and a group of "paid rioters led by well-known mobsters and racketeers", the United States succeeded in overthrowing Mossadegh and halting the Iranian popular movement.[2]

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1 For a brief discussion of these events see, 1- Homa Katouzian, the Political Economy of Modern Iran, 1981, Macmillan Press Ltd, pp. 164-179; and 2- Barry Rubin, Paved With Good Intentions. The American Experience and Iran, 1980, Oxford University Press, pp. 54-90.

2 Katouzian, op. cit. p. 179. See also, Kermit Roosevelt, Countercoup, The Struggle for the Control of Iran, New York, 1979, generally and in particular pp. 1-19; Roosevelt was in charge of the CIA operation in 1953. His memoirs, although they do not provide an accurate analysis of the events, clearly demonstrate the United States' involvement in the 1953 coup.

Details of the United States-Iranian relations in the period from 1953 to 1979 need not be recalled here ; what suffices to be said is that at the time when the 1979 revolution took place, the United States' presence in Iran, in the eyes of many Iranians, represented:

> More than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.[3]

As a consequence, the United States ultimately became identified by many Iranians as an imperialist force behind the country's difficulties. In fact, it is this background which explains the main rationale behind the seizure of the American Embassy in 1979, in Tehran ; that is to say, the political events leading to and following this incident cannot be understood in abstract and without an understanding of this earlier era, but only in conjunction with the political events of the early 1950s, especially the 1953 coup d'etat, and the whole series of events following therefrom.

**B- Economic Relationships**

The extent to which the United States role in the political events of the early 1950s was influenced by the American oil companies which were hoping to benefit from Iranian oil concessions is not known ; nevertheless it is clear that under the Consortium Oil Agreement of 1954 (concluded after the coup) the American oil companies received a considerable share. This agreement, which in effect destroyed the spirit of the oil nationalization, set up a consortium of oil companies to produce and market Iranian oil for 25 years and to pay 50% of the net proceeds to the Iranian Government. The Consortium was a combination of British companies with a 40% share, American

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3 Memorandum of the Government of Iran submitted to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports, 1980, Judgement of 24 May, 1980, p. 8.

companies with a 40% share, and French and Dutch companies with a total of 20%.[4] This arrangement was so important for the Americans that the United States Justice Department was forced to retreat from its complaint that such a combination violated U.S. antitrust laws.[5]

As early as 1955 the Treaty of Amity was concluded between the two countries.[6] The Treaty is a typical American commercial treaty of the 1948-1958 decade, generally known as "treaties of friendship, commerce and navigation"(FCN), though the Treaty with Iran did not adopt that name and certain provisions of the model treaty were omitted from the Iranian Treaty.[7] This type of treaty provides a body of assurances for the support of private enterprises of the signatories engaged in business on each other's territory.

There are three notable features found in this kind of treaty. Firstly, it makes considerable use of the national-treatment and most favoured nation treatment idea for commercial enterprises as well as natural persons.[8] Secondly it seeks to assure, when the state nationalizes the property of nationals and companies of the other contracting party, that just compensation will be paid.[9] Thirdly, it seeks to establish governing standards with regard to state

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4 Katouzian, op. cit. p. 202.

5 Rubin, op. cit. p. 95.

6 Treaty of Amity, Economic Relations and Consular Rights, Between the United States of America and Iran, August 1955, 284 U.N.T.S. p. 93.

7 See generally, Vernon Setser, "The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties", 55 Proc.A.S.I.L. (1961), pp. 89-104; and Robert R. Wilson, "A Decade of New Commercial Treaties", 50 AJIL, (1956), pp. 927-933.

8 See for instance, Articles 2 to 11 of the Treaty of Amity.

9 Article 4(2) of the Treaty of Amity provides:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."

enterprises when operating in competition with private enterprises. Therefore it adopts the "restrictive theory" of sovereign immunity with regard to state enterprises engaged in commercial activities ; that is, the immunity of sovereign is recognized with respect to sovereign or public acts (jure imperii) of states, but not with respect to private acts (jure gestionis).[10]

The series of circumstances noted above indicated the beginning of a new era of extensive commercial relationships between the two countries. Indeed, American investment in Iran began to increase rapidly after American participation in the Iranian oil industry and the protection accorded to them under the Treaty of Amity. For instance, by 1975 American investment in Iran had reached a level of over $1 billion. A March 1975 Iranian-United States trade agreement called for $15 billion in commerce over the next five years. The economic activities in the agreement included the provision of eight nuclear power stations and their fuel, prefabricated housing, hospitals, ports, farm machinery, pesticides, superhighways and vocational training centres. $5 billion of the total was the estimated value of American military sales to Iran.[11]

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10 Setser, op. cit. pp. 91-92. For instance, Article 11(4) of the Treaty of Amity provides:

> "No enterprise of the either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgements or other liability to which privately owned and controlled enterprises are not subject."

The question of validity of the Treaty of Amity was raised before the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran. The Court said that certain countermeasures taken by the United States vis-a-vis Iran in response to Iran's violation of that Treaty did not preclude the United States from invoking that Treaty, and "in any case any alleged violation of the treaty by either party could not have the effect of precluding that party from invoking the provision of the treaty concerning pacific settlement of disputes". (ICJ Reports, 1980, pp. 27-28.)

11 Keesing's Contemporary Archives, 1975, p. 27190. See also R.K. Ramazani, "Iran and the United States: An Experiment in Enduring Friendship", 30 Midd.E.J. (1976), 322, pp. 327-329.

These programmes were funded by increased oil revenue which was largely recycled through the international banking system to finance imports and capital projects. Iran held multi-billion dollar balances in accounts with U.S. banks and their branches abroad. This financial link also included substantial amounts of money loaned to the Government of Iran and its public and private enterprises by U.S. banks, either alone or acting in syndicates of international banks. The other aspect of this relationship included standby letters of credit and performance or payment bonds issued in favour of Iranian Government enterprises by U.S. banks and involved large amounts of money.

In short, the extensive commercial ties was an important facet of relationship between the two countries, and in turn indicated that a disruption of the kind which occurred following the revolution would inevitably create a flood of claims involving large amounts of money.

## II- The 1979 Revolution : Origins of the Existing Claims

Against the above noted political-economic background it would be very hard to imagine that the Government established as a result of the revolution in Iran would be able to continue the relationship on the same scale and in the same direction as it was before. Even the last government appointed by the Shah was compelled to take a series of actions in this respect in order to satisfy the prevailing public opinion in Iran. The Government cancelled about $7,000 million of an $11,560 million order which had been placed with companies in the United States. Iran's nuclear power programme, which was to have involved the building of 20 reactors, was scaled down to four reactors. A series of non-nuclear projects such as housing developments and steel complexes were cancelled.[12]

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12 Keesing's Archives, 1979, p. 29746.

On the other hand in the last months of the former regime's life due to the disruption of economic activities by strikes and other causes, the situation in Iran Precipitated the departure of thousands of American workers and companies. This meant that many projects were left uncompleted. For instance, on December 27, 1978 the Bell Corporation suspended a $575 million contract to build a helicopter plant in Isfahan, in view of the Iranian Government's failure to meet payments.[13]

Following the assumption of power by the Islamic Republic in February 1979, the Provisional Government made it clear that it would continue the policy initiated by the last government of reviewing all foreign contracts, with a view to cancelling or reducing most of the large-scale projects embarked on by the Shah. The Provisional Government officially rescinded its armament contracts with the United States (except for the supply of spare parts and specified equipment). All contracts with Bell, Gruman and Boeing were cancelled.[14]

Beginning in June 1979, the Provisional Government of the Islamic Republic started a systematic programme of nationalization. The programme intended; 1- to reorganize Iranian industry, which was in disorder due to extraordinary circumstances such as strikes, flight of managers, etc; 2- to remove Iran's dependence upon foreign capital; 3- to redistribute wealth. Pursuant to this policy the Government introduced the Law of Nationalization of Banks[15], the Law of Nationalization of Insurance Companies[16], and the Law for the Protection and Development of Iranian Industry.[17]

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13 Ibid, pp. 29733-29746.

14 Keesing's Archives, 1980, p. 30148.

15 The Law of Nationalization of Banks, 11 June 1979 provided:

> "Article 1- To protect the national rights and capital, to utilize the country's economic (production) machinery, and to guarantee people's deposits and savings in the banks, with acceptance of the conditioned legitimate principle of possession,

and with regard to; - the manner in which banks acquire their income, and illegitimate transfer of capital abroad; - the principal role of banks in the Country's economy, and the natural connection of the Country's economy with banking institutions; - the banks' indebtedness to the Government and their need of Government supervision; - the need to harmonize the banks' activities with the other institutions of the Country; - the need to lead banking activities in the direction of Islamic administration and profit-making. From this date of ratification of this Law, all banks are declared nationalized, and the Government should immediately take action for the appointment of managers for the banks....(unofficial translation, Iranian Official Gazette, No 10012 - 7July, 1979).

16 The Law of Nationalization of Insurance Companies provided:

"Article 1 - To protect the rights of insurer, to expand the insurance industry over the entire State, and to direct it toward the service of the people, from the date of ratification of this Law all insurance companies of the State are proclaimed nationalized, with acceptance of the conditioned legitimate principle of possession..." (Iranian Official Gazette, No 1-10264 - May 21, 1980).

The reference to the conditioned legitimate principle of possession probably indicated the Government's willingness to compensate, but the Laws did not provide any specific mechanism for the payment of compensation.

17 The Law for the Protection and Development of Iranian Industry, July 15, 1979 (Iranian Official Gazette, No 10031 - July 31, 1979).

The Law intended, as declared in its preamble, to re-organize Iranian industry and to remove Iran's dependence on the oil industry by acquiring self-sufficiency and the expansion of exports ; to provide employment; to oust the agents of despotism and exploiters.... It divided the Iranian industry into four groups. Group A included the oil, gas, electricity, railway and fishing industries, which were already nationalized, and added metal production, shipbuilding, and the car and aircraft industries to the nationalized industries. Group B included a list of 51 undesirable people who were owners of large industries and according to the Law, had acquired their massive wealth through illegal connections with the former regime and by means of illegitimate usage and waste of public facilities and rights. The property of these people was nationalized by this Law. Group C included those institutions which had borrowed massive amounts of money from banks, the Government taking control of their property acted to set-off their debts. All these categories of people and institutions happened to be captains of industry in Iran and had close dealings with U.S. banks and companies.

On January 15, 1979 a Single Act provided that all oil contracts had to be reviewed by a special Commission appointed by the Minister of Petroleum. Those contracts which were incompatible with the Law of Nationalization of the Oil Industry would be regarded as null and void, and all claims arising from the conclusion and performance of these contracts had to be settled by the Commission's judgement.[18]

Furthermore, as early as February 1979, the Islamic Revolutionary Tribunals had initiated a series of unsystematic but extensive orders which involved the property of those regarded as connected to the former Regime who were either arrested or had left the country. These orders included a variety of actions ranging from confiscations and attachments of property to dismissal and appointment of managers for the factories and companies all or some of whose owners or managers were regarded as connected to the former Regime. Various councils of workers, labour unions and revolutionary committees were also involved in taking over the companies and factories and appointing managers for these companies. These measures naturally involved the property of foreign companies, including American interests.

The actions taken by the revolutionary Tribunals, workers' councils and Islamic Committees were not necessarily compatible with the Government's policy. Neither were they in its control. To control the situation, at the same time partially complying with the popular demand for the public control of large companies and removal of Iran's dependence upon foreign capital, as well as keeping those factories operating, the Government had to intervene and to adopt necessary policies. For instance, on February 27, 1979 a Single Act provided that the Revolutionary Tribunals should not interfere in the appointment or dismissal of managers of the factories and mines.[19] To keep the

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18 The Law Relating to the Establishment of a Special Commission with regard to Oil Agreements, January 15, 1979 (Iranian Official Gazette, No 20-1018, February 10, 1979).

19 Iranian Official Gazette, No 16-10207, March 6, 1979.

operation of these companies within the Government's control Article 1 of the Bill of 19 June, 1979 provided:

> With regard to manufacturing, industrial... units belonging to either the public or private sector... whose managers or owners have left the said units or worksites, stopped work or cannot be reached for any reason ; and at the request of owners or managers of the said units, each of the Government Ministries, institutions or companies who have entered in some way into dealings with, or have some connections with and/or are related to the activities of the said units, are permitted to appoint... one or more managers, members of board of directors or observers for management and/or observation over affairs in order to prevent closure of same.[20]

On the other hand, there were a series of contracts and projects which were partially performed and of which certain reasons the Government wished to continue their performance, but in the circumstances existing at the time the American contractors and companies refused to fulfil their obligations.

The above-mentioned circumstances which involved nationalization or de facto control of the American nationals' or companies' property or cancellation of their contractual rights, had originally created claims of the American nationals and companies against Iranian Government. For instance, the American International Group Corporation owned 35% of the equity of the Iran American International Insurance Company; The INA Corporation owned 20% of the equity of Bimeh Shargh, an Iranian insurance company; the Continental Corporation owned 10% of the Hafez Insurance Co; and by nationalizing insurance companies Iran had necessarily nationalized the American corporations' interests therein.[21]

However, in the circumstances existing at the time, prior to the hostage-taking of American Embassy personnel in Iran, many American corporations, hoping to normalize the situation, had not initiated legal actions against the

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20 Ibid, No 10012, July 8, 1979.

21 See American International Group Inc v Islamic Republic of Iran, 493 Fed Supp, 522 (D.D.C. July 10, 1980), pp. 522-523.

Government of Iran, and only few of them had attempted to obtain court orders for the prejudgement attachments of the Iranian Government's or its agencies' assets in the United States. Even these limited numbers of claimants were relatively successful in this period.[22]

On the other hand, what is evident from the claims of U.S. contractors to obtain injunction orders to prevent payments of the standby letters of credit, is that the American contractors' refusal to fulfil their obligations had given rise to the claims of the Iranian Government or its entities against these corporations. However, the Iranian Government, having enjoyed the privilege of the letters of credit, did not need to bring any legal action but simply to claim the payment of the credit from the bank which had guarantied the contractor's performance.

Attempts to obtain injunctions against the payment of the standby letters of credit, in the period prior to the hostage crisis, were also marginally successful.[23]

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22 See Michael F. Hertz, "The Hostage Crisis and Domestic Litigation an Overview" in R. Lillich, The Iran-United States Claims Tribunal 1981-1983, Seventh Sokol Colloquime, 1984, Virginia University Press, 136, at pp. 137-138. See also the following Cases:

1- Behring International v Iranian Air Force, 475 F. Supp. p. 383, (D.N.J. 1979). Behring had provided freight forwarding services for the Iranian Air Force, and alleged that beginning in early 1979 it stopped getting paid for the services provided. THe Court held that the property of the Iranian Air Force was not immune from the attachment. (Ibid, pp. 393-396); 2- Reading and Bates Corporation v National Iranian Oil Company, 478 F. Supp. p. 724 (S.D.N.Y. 1979). Reading and Bates Corp sued the NIOC allegedly for the unlawful taking of an oil drilling rig. The Court held that the defendant was immune from the attachment. (Ibid, pp. 727-728); 3- Electronic Data System Inc v Social Security Organization of the Government of Iran, 651 F. 2d, p. 1007 (5th Cir, 1981). EDS brought an action against Iran for breach of contract. The plaintiff was successful in obtaining an injunction prohibiting transfer of some $20 million of Iranian funds from a New York bank. The Court also rendered a judgement in favour of plaintiff to the amount of $19 million. (Ibid, pp. 1007-1008. For the appellate proceedings of the Case, see Ibid, pp. 1007-1011).

23 See Mark P. Zimmett, "Standby Letters of Credit in the Iran Litigation: Two Hundred Problems in Search of a Solution", 16 L.P.I.B., 927, (1984) pp. 935-940. See also the following Cases:

1- KMW Int'l v Chase Manhattan, N.A. 606 F. 2d, p. 10. The Court of Appeal vacated the preliminary injunction granted to the plaintiff by U.S. District Court. (Ibid, p. 17); 2- American Bell International Inc v Islamic Republic of Iran, 474 F. Supp, p. 420. The Court denied the injunction relief. (Ibid, pp. 426-427); 3- United Technologies Corp v Citibank

## III- Hostage Crisis : Legal Implications

After the revolution the relations between Iran and the United States remained seriously strained. The United States had reduced its Embassy staff considerably and kept a comparatively small number of personnel in its Embassy in Tehran. However, this did not remove the suspicion among the Iranians that the United States was trying to influence the process of events within the revolution and the political power struggle for the control of Iranian politics. The suspicion was intensified following the United States' granting of a visa to the Shah, and his hospitalization in New York.[24]

On November 4, 1979, several hundred Iranian students seized the United States Embassy compound and 63 Americans inside, and demanded extradition of the Shah. In addition, three American diplomats who happened to be in the Iranian Foreign Ministry at the time were placed under restraint there.[25] By 20 November, 13 of the Americans had been released. One other was released later when he fell ill.[26] The remaining 52 were held in Iran until January 20, 1981, when they were released as part of the agreement concluded between Iran and the United States.[27]

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N.A. 469 F. Supp, p. 473. The Court denied the preliminary injunction. (Ibid, p. 481); 4- Stromberg-Carson Corp v Bank Melli Iran, 467 F. Supp. p. 530. The Court granted the injunction. (Ibid, p. 533) In this Case the relief sought involved about $2 million under two letters of guarantee. The Court's decision was based on the ground that under the circumstances existing in Iran at the time there was a risk that a fraudulent or nonauthentic demand of payment could be made. (Ibid, pp. 532-533.)

24 In Iran the United States action in granting a visa to the Shah was regarded as an attempt against the revolution.

For a further reading regarding the political events leading to the Shah's acceptance to the United States and the issues resulting from this, see generally: 1- Cyrus Vance Hard Choices, New York, Simon and Shuster, 1983, pp. 368-384; 2- Zbigniew Brzezinski, Power and Principle, New York, 1983, pp. 470-509; and Jimmy Carter Keeping Faith, Collins, London, 1982, pp. 431-596.

25 Keesing's Contemporary Archives, 1980, pp. 30149-30150, and 30205-30206.

26 Ibid, pp. 30205-30206.

27 See Infra, Numbers 143-145.

The full story of the hostage crisis is beyond the scope of this study, and has been discussed elsewhere.[28] Nevertheless, the events following the crisis constitute a major backdrop to the transaction which led to the establishment of the existing arbitral Tribunal, as well as the release of the hostages. In fact, the need to establish a claims adjudication tribunal did emerge in the aftermath of the hostage crisis and as a consequence of a series of complicated financial and legal issues which came to dominate the hostage issue. Thus, it is necessary to outline the course of these events and how the claims issue came to dominate the situation and led to the establishment of the existing claims Tribunal.

In Iran, the crisis led to the resignation of the Provisional Government, and the take over by the Revolutionary Council of the governmental activities. It also resulted in the boycott of negotiations with the United States pending the extradition of the Shah and his wealth, and an American confession to complicity in various human rights violations by the Shah's Government as well as apologies for interference in Iranian internal politics.[29]

The closure of the direct channel of negotiations accompanied by internationally unprecedented demands represented the lack of a harmonized policy on the part of Iran which was due to the extraordinary circumstances existing at the time. This in turn indicated that the prospect for an immediate solution of the problem was ostensibly dim. But what made the crisis even more complicated was a variety of unilateral actions taken by the United States against the Iranian Government. As a result of these measures, the crisis was

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28 See generally: 1- Warren Christopher, American Hostages in Iran. The Conduct of a Crisis, Yale University Press, 1985, pp. 1-71. The whole book also provides discussions regarding various dimensions of the crisis.; 2- D.R. Hinton, "Legal Response to Afghan/Iranian Crisis". 74 Proc.A.S.I.L., 248, pp. 248-273; 3- J.P. Terry, "The Iranian Hostage Crisis: International Law and United States Policy", 32 JAG Journal, 31, (1982), pp. 31-79; and 4- Alfred P. Rubin, "The Hostage Incident : The United States and Iran", 36 Y.B.W.A., 213, (1982), pp. 213-240.

29 Keesing's Contemporary Archives, 1980, pp. 30205-30206.

no longer merely a hostage issue, but a complexity of legal and financial issues, and thus not an easy problem to be solved immediately. The United States' reaction to the incident can be divided into acts of recourse to international organizations and unilateral retaliatory actions.

## A- Recourse to International Organizations

### A(1)- The Question Before the United Nations

At the request of the United States, the UN Security Council met in closed session on November 9, 1979 and the President of the Security Council issued a statement, supported by all members, emphasising the inviolability of diplomats and urging the Iranian Government in "strongest terms" to release the U.S. hostages without delay.[30] The response from Iran was not encouraging. In a letter dated 13 November 1979 the Foreign Minister of Iran restated Iran's grievances.[31] On December 4, 1979 the Security Council passed a resolution calling on the Government of Iran "to release immediately the personnel of the Embassy of the United States of America being held in Tehran, and to provide them protection and allow them to leave the country".[32]

Having found its resolution ineffective[33], the Security Council met again on December 31, 1979 and passed another resolution expressing its grave concern, reaffirming its resolution 457 in all its aspects, and calling for the immediate release of the hostages.[34] Following the continuation of the crisis[35], the Security Council in its last attempt met on January 13, 1980 and voted on a draft resolution providing for economic measures under Articles 39 and 41 of

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30 Keesing's Archives, 1980, p. 30206.

31 Ibid.

32 Resolution No 457, Dec 4, 1979, 18 ILM,(1979), pp. 1644-1645.

33 See Report of the Secretary-General of the UN Concerning Implementation of Security Council Resolution 457, 19 ILM (1980), pp. 248-250.

34 Resolution No 461, 31 December, 1979, 19 ILM (1980), pp. 250-251.

35 See Report of the Secretary-General In Pursuance of Security Council Resolution 457 and 461, 19 ILM (1980), pp. 251-254.

the Charter of the United Nations. The resolution was vetoed by a permanent member of the Council and the Council's efforts ended thereafter[36]

**A(2)- The Hostage Issue Before the International Court of Justice**

On November 29, 1979 the United States instituted proceedings against Iran before the International Court of Justice. The case was considered by the Court in two stages. First, the Court in its Provisional Measures unanimously made an order which provided that "the Government of the Islamic Republic of Iran should ensure the immediate release, without exception of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere..."[37]

Following its provisional order, the Court held hearings, and on May 24, 1980 rendered its Judgement on the merits. The Court unanimously affirmed the legal obligation of Iran immediately to take all steps necessary to release the hostages, and decided by a majority vote that the Iranian Government had breached its obligations under international law, and should make reparation to the United States.[38] However, the Court left it open to the

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36 See draft resolution dated January 13, 1980, 19 ILM (1980), p. 256.

37 Case Concerning U.S. Diplomatic and Consular Staff in Tehran, Provisional Measures, December 15, 1979, ICJ Reports, 1979, pp. 20-21.

38 Case Concerning U.S. Diplomatic and Consular Staff in Tehran, Judgement of 24, May 1980, ICJ Reports, 1980, pp. 41-44. For a discussion of the International Court of Justice's decision in this Case, see generally: H.C. Dillard and others, "the ICJ Decisions and Other Public International Law Issues", in Robert Steele, "The Iran Crisis and International Law", Proceedings of the John Bassett Moore Society of International Law, 1981, pp. 6-32; also Oscar Schachter, "International Law and the Hostage Crisis: Implications for Future Cases", in Warren Christopher, op. cit. 325, pp. 345-354.

It should be noted that the law and facts in the Hostages Case enjoyed a considerable degree of clarity. Furthermore, the comprehensive examination of the issues by the Court makes any further comment unnecessary. (See ICJ Reports, 1980, pp. 27-43) What has to be noted here is, although the Court briefly touched on the issue of abuse of diplomatic immunity (Ibid, pp. 38-41), the question of the gross abuses of diplomatic immunity publicly raised by Iran has generally been left unnoticed. Though such a consideration could not have justified acts of coercion of the kind in question, it could recognize the seriousness of the issue and provide a reliable stand-point for the contemplation of better and collective remedies against such abuses.

parties to agree on the form and amount of such reparations ; failing to do so the form and the amount of such reparations could be settled by the Court.[39]

**B- United States Unilateral Measures Against Iran**

Parallel to its international efforts the United States took a series of unilateral retaliatory measures against Iran.

On November 8, 1979 the United States Government ordered a halt to the shipment of $300 million worth of military spare parts (already paid for) to Iran.[40] On November 10, 1979 President Carter ordered the expulsion from the United States of all Iranian students who had overstayed beyond the expiry of their visas.[41] On November 12, 1979 President Carter ordered an end to U.S. oil imports from Iran, and a day later U.S. and British warships began manoeuvres in the Arabian Sea south of Iran.[42]

The most consequential of these measures, was a November 14, 1979 Presidential Order blocking "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become within the possession or control of persons subject to the jurisdiction of the United States".[43] The Order was issued, inter alia, under an International Emergency Economic Powers Act of 1977, and asserted that "the situation in Iran constituted an unusual and extraordinary threat to the national security, foreign policy and economy of the United

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39 Case Concerning U.S. Diplomatic Staff in Tehran, op. cit. p. 45.

40 Keesing's Archives, 1980, p. 30206.

41 Ibid. The decision was overturned on December 11, 1979 by a U.S. Federal Judge, as being unconstitutional and contrary to the rules of fair play and equality. This ruling was in turn reversed on December 27 by a Federal Appeals Court which ruled that the U.S. Administration was within its constitutional powers. (See Narenji v Civiletti, 617 F.2d, p. 754, D.C. Cir. 1979). By the end of 1979 more than 54,000 Iranian students had been interviewed by U.S. Immigration Officials but only 11 had been deported. (Keesing's Archives, 1980, p. 30206.)

42 Keesing's Archives, 1980, pp. 30206-30207.

43 Executive Order No 12170 - November 1979, 18 ILM (1979), p. 1549.

States".[44] It had also been preceded by reports that Iran intended to withdraw all its funds from U.S. banks and to transfer them to banks in friendlier countries.[45]

The Executive Order was legally implemented by Iranian Assets Control Regulations issued by the Department of Treasury.[46] The Regulations provided :

> No property subject to the jurisdiction of the United States or which is in the possession or control of persons subject to the jurisdiction of the United States in which or after the effective date (14 November 1979) Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except authorized.[47]

Under the Iranian Assets Control Regulations, the terms "Iran" and "property" were defined in broadest of terms.[48] The term "person subject to the jurisdiction of the United States" was defined to include :

> (a)- Any person wheresoever located who is a citizen or resident of the United States ; (b)- Any person actually within the United States ; (c)- Any corporation organized under the laws of the United States...; (d)- Any partnership, association, corporation, or other organization wheresoever organized or doing business which is owned or controlled by persons specified in Paragraphs (a),(b), or (c) of this Section.[49]

An April 7, 1980 Presidential Order announced further measures against Iran which involved :

> (i)-The breaking of diplomatic and consular relations, the expulsion of all diplomats and the closing of diplomatic and consular offices ; (ii)- the prohibition of all exports to Iran, except for food and medicine ; (iii)- the drawing up of an inventory of assets of the Iranian Government frozen since the previous November, with a view to their possible confiscation ;

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44 Ibid.

45 Keesing's Archives, 1980, p. 30207.

46 Iranian Assets Control Regulations, November 14-23, 1979, 18 ILM, 1979, pp. 1549-1556.

47 Ibid, Section. 535.201(a).

48 Ibid, Sections. 535.301, 535.311.

49 Ibid, Section. 535.329.

and (iv)- the invalidation of all visas issued to Iranians for future entry to the United States.[50]

The Presidential Order also envisaged that legislation would be passed to allow the seizure of the frozen Iranian assets in the United States to pay for private and governmental claims against Iran.[51]

The last of the United States' unilateral measures was a failed military operation inside Iranian territory allegedly for the rescue of the hostages, attempted on April 24, 1980.[52] In reporting the measures taken to the United Nations Security Council, the United States stated that the mission had been carried out as an act of self-defence under Article 51 of the United Nations Charter.[53]

The attempted operation was clearly in violation of the International Court of Justice's Provisional Order. The Court in its Provisional Order had expressed that no action was to be taken which might aggravate the tension.[54] The effect of the action also in prolonging the hostage crisis cannot be neglected, and despite the United States' claim of self-defence its legality as a legitimate self-defence is seriously questionable, both under the Charter of the United Nations and general international law.[55]

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50 Keesing's Archives, 1980, p. 30529.

51 Ibid.

52 Ibid, p. 30531, and pp. 30531-30534.

53 Ibid.

54 Case Concerning U.S. Diplomatic Staff in Tehran, ICJ Reports, 1979, Provisional Measures, p. 21.

55 This is not the place to discuss the legality of the rescue mission. But it needs to be noted that the International Court of Justice in its Judgement of May 24, 1980, did not find it necessary to consider the propriety of the action under international law, since it said that this was not the question before it. Nevertheless the Court said that the operation undermined the respect for the judicial process in international relations, and it recalled the Court's Order of 15 December 1979 calling on both parties not to take any action which might aggravate the tension. (ICJ Reports, 1980, p. 43) However, Judges Tarazi and Morozov in their dissenting opinion regarded the operation as an act violating international law. (Ibid, pp. 64, 56-57.)

For discussions regarding the legality of the United States rescue mission see generally: 1- Natalino Rozintti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, 1985, Martinus Nijhoff Publishers, Dordrecht, pp. 41-49. 57, 61-68; 2- Anetha Jeffery, "The American Hostages in Tehran :

## C- The Blocking of Iranian Assets : Legal Implications

The freeze which involved about $12 billion of Iranian assets[56], by its apparent connection with the financial disputes, was indeed consequential in rendering the hostage issue a complexity of legal, political and financial problems. The freeze certainly raised a host of questions and problems. Each of these questions constitutes a broad area of discussion in international law and cannot be placed within the limited scope of this study. However, it is possible to provide a very brief insight into the issues involved.

The Presidential Order generally referred to the situation in Iran as an unusual and extraordinary threat to the national security, foreign policy and economy of the United States. It did not specify whether it was taken in retaliation to the hostage-taking in Iran, or was solely based on Iran's intention to withdraw its assets from U.S. banks. To provide a safeguard in favour of U.S. nationals' claims against Iran, as was declared later, could have been another ground for the action.[57] Thus, it left the international legal basis of the action ambiguous and unclear. However, it is possibly right to say that the action was in reaction to all the three questions.

As regards to the legality of the freeze as a reaction to the hostage-taking in Tehran , it is hard to imagine that it was in self-defence, since it is

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The ICJ and the Legality of Rescue Mission", 30 ICLQ, 717, (1981), pp. 717-729; 3- John R. D'Angelo, "Resort to Force by States to Protect Nationals: the U.S. Rescue Mission to Iran and its Legality under International Law", 21(3) Virg.J.I.L., 485, (1981), pp. 485-519; and 4- Oscar Schachter, op. cit. pp. 325-345.

56 Robert Carswell and Richard J. Davis, "Crafting the Financial Settlement", in Warren Christopher, op. cit. 201, p. 205.

57 Though early Treasury Regulations provided that without a licence from the Secretary of State of the Treasury, any attachment of such property occurring after the blocking order was invalid, (Iranian Assets Control Regulations, op. cit. Supra 46, Sections: 535.201, 535.203(a), 535.310, 535.502) and permitted the banks to pay their standby letters into the blocked accounts of Iranian beneficiaries, these regulations were soon changed and a general licence was granted authorizing certain judicial proceedings against Iran [Iranian Assets Control Regulations as Amended and Published Through March 25, 1980, in 19 ILM (1980), pp. 514-523, Section 535.504(a),(b)(1),]; The new regulations also blocked all standby letters of credit payments. (Ibid, Section 535.568), (for this purpose see also, Michael Hertz, op. cit. p. 139, and Mark Zimmett, op. cit. pp. 940-942).

hard to accept that it bore any degree of proportionality to, and necessity resulting from the act of hostage-taking. Thus, the question falls into the category of economic reprisal and is subject to the general controversy over the legality of economic reprisal.[58]

As regards the second ground for the United States' action, namely Iran's intention to withdraw its assets from U.S. banks, the action is fundamentally questionable. The express reference of the Presidential Order to the "threat to .... economy of the United States", and the adoption of the Order under the International Emergency Economic Powers Act, indicate that the United States assumed that Iran's action would destabilize the dollar in international monetary system.[59]

This is a question which may arise in any case of action by a major depositor (e.g. an oil rich state) to withdraw its deposits from U.S. or other banks. That is a question of whether the probable consequences of the

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58 The Court in the Case Concerning United States Diplomatic Staff in Tehran did not find it necessary to consider the propriety of the freeze and other U.S. economic measures. (ICJ Reports, 1980, pp. 16-18) Nevertheless, in considering the question whether it was open for the United States to rely on the Treaty of Amity following its economic measures against Iran, the Court said:

> "However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran..".(Ibid, p. 28.)

However, Judge Morozov in his dissenting opinion said that the freeze action was taken in violation of international law. (Ibid, p. 54) Judge Tarazi also in his dissenting opinion regarded the action as incompatible with the judicial process. (Ibid, p. 64) With regard to the United States' intention to use the frozen assets for payments of claims against Iran, the dissenting judges regarded the action as the unilateral interpretation by the United States of its rights, and acting as a judge of its own cause. (Ibid, respectively, pp. 54, 64) See also Oscar Schachter, op. cit. pp. 354-364. For economic reprisals in international law, see generally, Derek W. Bowett, "Economic Coercion and Reprisals by States", in R.B. Lillich, Economic Coercion and New International Economic Order, the Michie Company, Virginia, 1976, 7, pp. 7-18.

59 In fact, the United States in the hearings before the ICJ argued that the threat of withdrawal constituted "nothing less than an attack on the stability of the world economy and the international monetary system". (Oscar Schachter, op. cit. p. 357.)

withdrawal of deposits on the economy of the depository state entitles the latter to block the assets. Regardless of the retaliatory aspect of the U.S. action, it is hard to accept that there is a reasonable ground to this effect.

The other controversial issue was the extraterritorial effect of the freeze. Under the express provisions of the Presidential Order and Section 535.329 of the Treasury Regulations, the freeze applied to Iranian dollar deposits in foreign branches of U.S. banks, which in effect blocked billions of dollars of Iranian deposits in London and Paris branches of U.S. banks. The extraterritorial application of the freeze was in effect an intrusion into the sovereignty of the states involved. It meant that the United States extended its legislation to transactions in those countries, and attempted to enforce that legislation against banks in those countries.

For Americans, the action was essentially justified on the basis of nationality jurisdiction, upon which branches and subsidiaries of U.S. banks abroad could be subjected to U.S. requirements. Moreover, in their view the gravity of the situation additionally supported the action.[60]

They also argued that the implied approval of the freeze by the International Monetary Fund was another ground to support the validity of the U.S. action and its extraterritorial effect. The argument was that the United States had formally notified the Fund of the freeze as an exchange control regulation imposed under Article VIII, Section 2(b) of the Fund Agreement, and had received no objection from the Executive Board of the IMF.[61]

To challenge the extraterritorial reach of the freeze, Bank Markazi Iran, the Central bank of Iran, brought actions in Paris and London against branches

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60 Ibid, p. 365.

61 Articles of the Agreement of the International Monetary Fund, as amended April 30, 1976, 15 ILM, (1976), p. 546. For details of the above issue see: 1- Richard W. Edwards, "Extraterritorial Application of the U.S. Iranian Assets Control Regulations", 75 AJIL, 870, (1981), pp. 881-889; and 2- Edward Gordon, "The Blocking of Iranian Assets", 14 Int'l Lawyer, 656, (1980), pp. 673-676.

of U.S. banks in these countries.[62] The defendants, however, argued that though the deposits in London and Paris were Eurodollar deposits they were necessarily operated by transactions in the United States, and were subject to U.S. jurisdiction.[63] Bank Markazi replied that the customary practice invoked by the defendants was a matter of convenience and was not an integral part of Bank Markazi's deposit contracts with the defendants.[64]

The issue was not solved, probably as a result of diplomatic efforts by the United States, and the compliance of the courts in prolonging the proceedings, and the cases were finally mooted by the Algiers Accords. Although, as a result of the closure of the cases there is no judicial opinion on the issue, it is hard to accept that the national basis of jurisdiction claimed by the United States could override the territorial sovereignty of the States involved which in any case requires priority under international law. With regard to the Americans' argument on the implied approval of the IMF, one does not need to refer to details of the Fund Agreement to conclude that the U.S. freeze action was not merely an exchange control regulation, but an action which was taken on different grounds and completely blocked any kind of access to the assets. Moreover, the legalizing effect of the IMF decisions is itself a matter of controversy.[65]

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62 In Paris the suits were filed against the Paris branch of Citibank, and the Paris branch of the Bank of America National Trust and Savings Association. In London they were against the London branches of six American commercial banks, including the Chase Manhattan Bank. The amounts sought were over $3 billion. (For details, see Edwards, op. cit. pp. 876-881; and Robert Mc Greevey, "The Iranian Crisis and U.S. Law", 2(2) NWJ.I.B.L., 384, (1980), pp. 398-400.

63 Edwards, op. cit. pp. 877-878.

64 Ibid, pp. 879-881.

65 Note that the Executive Board of the IMF is generally regarded by authorities on international law as being a politically oriented institution and lacking a judicial status. This is particularly due to the method of selection and composition of the IMF Executive Board members. Due to this fact, the structure of the Board does not guarantee a necessary degree of independence needed to qualify as an international judicial body. (See Christian Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction", in H. Mosler and R. Bernhardt, Judicial Settlement of International Disputes, Springer Verleg, Berlin, 1974, 285, pp. 295-296, also generally, pp. 294-299.

In short, by the freeze of Iranian assets, the crisis was no longer merely the question of the hostages held in Tehran. It was a circular dilemma : Iran held hostage the U.S. diplomatic and consular staff and the United States held hostage $12 billion in Iranian assets.

## IV- A Survey of the Claims Involved

If prior to the hostage crisis American companies were hoping to normalize the situation, following that incident this was no longer a possibility. The hysteria created following the incident and the thinking promoted by the United States Governments' freeze action and its subsequent statements of intention to meet the claims from the frozen assets, led to an explosion of claims against the Iranian Government and its agencies and entities in the United States courts. In some cases the American claimants obtained attachment orders of Iranian assets by litigation in the United Kingdom, West Germany and France.[66]

After the freeze order was issued approximately 400 cases were instituted against the Government of Iran and its various government corporations and instrumentalities.[67] The claimants varied from banks, insurance companies, petroleum service contractors, electronics companies to an airline, an aircraft manufacturer, a university, a tobacco company and an accounting firm.[68] The damages sought included some $3-4 billion.[69]

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66 Mc Greevey, op. cit. p. 388. For instance, Morgan Guaranty Trust Co sued Iran in West German courts and attached Iran's interests in Krupp Fried.(Ibid,) The attachment involved Iran's 25% interests in Krupp, reportedly worth about $435 million. (Gordon, op. cit. p. 676.)

67 Mc Greevey, op. cit. p. 387, and Hertz, op. cit. p. 140.

68 Mc Greevey, op. cit. pp. 387-388.

69 Stephen Howard, "Implications of Iranian Assets Case for American Business", 16 Int'l Lawyer, 128,(1982), p. 129.

These claims invoked causes of action within different categories. Generally speaking, some were claims of United States banks against the Iranian Government or its entities based on alleged default on the loan obligations. Some were based on the nationalization by Iran of the claimants' interests. Another category included various claims under the breach of contractual obligations. A considerable number of claims also sought to obtain preliminary injunctions against the payments of standby letters of credit. The array of issues involved in these cases was in part common to all the cases brought against Iran, and in part peculiar to each category.

Iran had also many claims against U.S. corporations. In fact, one of the major issues was that almost a billion dollars in performance bonds and letters of credit were being called by Iran claiming that projects or sales contracts had not been completed.[70]

The dilemma of claims ultimately became closely linked to the hostage crisis, and was the main reason which forced the two countries to establish a claims arbitration Tribunal under the Algiers Accords. Although these claims were terminated (in fact suspended) pursuant to the settlement reached, they were subsequently submitted to the Iran-United States Claims Tribunal in the Hague. The importance of the claims issue as a main backdrop to the establishment of the Tribunal and their subsequent consideration by the Tribunal makes it necessary to outline, briefly, the categories of claims involved, the causes of action in these claims and the issues raised in them.

**A- Bank Claims**

As it was noted earlier, the financial link between Iran and the United States included substantial amounts of loaned money to the pre-revolutionary government of Iran and various Iranian public or private entities by U.S.banks,

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70 Robert Carswell and Richard Davis, op. cit. pp. 202, 204.

either alone or acting in syndicates of international banks. The U.S. banks claims were mainly for loans which were estimated to be about $1.2 billion in syndicate loans (or about one third of the $3.6 billion of the international syndicate loans to Iran) and about $1 billion in direct loans to Iranian entities.[71] These claims were directed against the Government of Iran, Iranian governmental agencies, Iranian banks and Iranian companies and arose principally out of loans against these entities. There were also claims arising originally out of loans to Iranian private companies, for which the American banks tended to hold the Iranian Government responsible by virtue of the nationalization of these entities by the Iranian Government.[72]

The principal cause of claims invoked by the U.S. banks was the alleged default by Iran to meet its obligations on the loans.[73] Upon the premise of default, they claimed that the loans had become due and the banks were entitled to grasp the available remedies to them.[74]

These remedies fell into two categories : litigation and set-offs. Set-off is a traditional banker's remedy under which the banker is allowed to pay off the loans from the debtor's deposits. However, in the Iranian situation this was

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71 Ibid, p. 204. For discussions regarding bank claims against Iran see generally: 1- Ibid, pp. 204-205; 2- Robert Carswell and Richard Davis, "Economic and Financial Pressures", in Warren Christopher, op. cit. 173, pp. 189-194; 3- John Hoffman, "The Bankers' Channel", in Warren Christopher, op. cit. 235, pp. 235-245; 4- Edward Gordon, op. cit. pp. 676-678; 5- Robert Mc Greevey, op. cit. pp. 389-400; and 6- John Pritchard, in "The Commercial Aspects of the Iran Crisis : The Assets Freeze", in Robert Steele, op. cit. 51, pp. 55-63.

72 John Pritchard, op. cit. p. 55.

73 An isolated statement by Bani-Sadr, the then Iranian Minister, that Iran was repudiating the debts incurred during the Shah's reign was another reason which was invoked by U.S. banks in declaring defaults. Although Iran immediately repudiated the statement by Bani-Sadr and never sought to repudiate the debts, the Americans kept relying on Bani-Sadr's statement. (Carswell- Economic and Financial Pressures, op. cit. p. 193.)

74 It is not disputed that "until the freeze order, and despite the fact that the revolution was well under way, the Iranian Government, its agencies and instrumentalities, and Iranian banks and companies were generally meeting their obligations on their loans to U.S. banks". (John Pritchard, op. cit. p. 57) Thus, one of the essential issues which was generally ignored by the Americans was that Iran's failure to meet its obligations after the freeze was basically due to the freeze of its assets in the same banks by the United States Government. In fact, there was a circular logic in the relationship between the freeze order and the default by Iran on loans.

very complicated. First, the early Treasury Regulations foreclosed banks from setting off against the blocked assets, and prevented them from instituting litigation with respect to the blocked assets in the United States. However, as early as November 15, 1979 the prohibition on set-offs against assets held outside the United States were removed. Thus, so far as assets held in foreign branches of U.S. banks were concerned, both litigation and set-offs were permitted. A further amendment to the Treasury Regulations permitted the attachment of assets blocked in the United States through litigation.[75] The second problem in the way of set-offs was that few of the Iranian overseas deposits were in the name of an Iranian debtor. That is, in many cases, the banks tended to have claims against Iranian companies and Iranian banks, and in some cases the Iranian Government, while they tended to be holding assets of the Iranian Central bank, Bank Markazi. This did not correspond with the principle of mutuality of the obligations required for a proper set-off.[76] In order to overcome this problem the Americans invented and invoked the fallacious theory called by the Americans "the Big Mullah Theory" or in other words the "alter ago" theory. By this theory it was argued that as a result of the Iranian revolution and its subsequent nationalization programmes, all elements of Iranian economy were all parts of the same single entity, Iran.[77] In response to this argument we do not need to provide any analysis here, but simply to quote an American lawyer who said : "The extreme notion that any Iranian entity with money should be liable for the debts of any and all other Iranian entities would be no less than a random rape of the corporate veil".[78]

The other issue concerned the syndicate loans. A common provision in all syndicate loan agreements provided that any recoveries by a member of a

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75 John Pritchard, op. cit. p. 57; and Robert Carswell - "the Economic and Financial Pressures", op. cit. p. 183. See also No 57 Supra.

76 John Pritchard, op. cit. pp. 57-58; and John Hoffman, op. cit. p. 239.

77 Ibid; and Mc Greevey, op. cit. pp. 393-396.

78 Mc Greevey, op. cit. p. 394.

syndicate had to be shared on pro rata among all members. This led to the invoking by the Americans of a theory which came to be called by them the black hole set-off. This in fact meant, as claimed by the Americans, a set-off not only on behalf of the bank's own participation in the loan, but on behalf of all syndicate members as well. The assertion of this theory led to the set-off by a bank of not only its own loan but the whole syndicate loan.[79]

The default idea was not essentially appreciated by non-U.S. banks. Nevertheless, default was declared on a $500 million loan to the Government of Iran where a majority of the participants were U.S. banks.[80]

In seizing upon the other remedy, litigation, U.S. banks instituted many claims against the Government of Iran and its entities. Of the total cases brought in U.S. courts against Iran, 96 were filed by banks.[81] One of the largest of these claims was a suit by the Chase Manhattan Bank in which the amount sought exceeded $355 million.[82] The Chase's claim was based on the alleged defaulted loan obligations, and like the set-off issue Chase raised the alter ago theory upon which it had named more than twenty Iranian entities as defendants, including the NIOC and Bank Markazi, claiming joint and separate liability among all defendants and the "right to combine and offset the funds of Bank Markazi and the NIOC against the indebtedness of the other defendants".[83]

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79 John Hoffman, op. cit. pp. 240-241; and John Pritchard, op. cit. pp. 58-59.

80 Robert Carswell- "Economic and Financial Pressures", op. cit. p. 193.

81 Mc Greevey, op. cit. p. 390.

82 Chase Manhattan v Iran, 79 Cir (TPG)(S.D.N.Y. filed Dec 4, 1979), as quoted in Mc Greevey, op. cit. pp. 389-398.

83 For details see Ibid. In this Case, Chase's motion was mainly in connection with the London Cases (Supra No 62) denied and Chase counterclaimed against Bank Markazi in the London suit. (Mc Greevey, op. cit. p. 392) The writer rightly points out that: "United States banking regulations impose limits on the amount of money that a United States bank may lend to any one entity. If the (alter ago) theory were accepted, then the Chase loans to over twenty Iranian borrowers may have been in violation of the banking regulations...." (Ibid, p. 394) The other issues raised in these cases were validity of those loan agreements totalling $1.3 billion which were made in violation of Article 25 of the 1906 Constitution of Iran; and the question of availability of a force majeure defence, and

## B- Claims Arising from the Nationalization Programme in Iran

In many of the cases before the United States courts, plaintiffs asserted that the nationalization of their interests in Iranian companies constituted a cause of action under the Treaty of Amity and general international law, because Iran allegedly had failed to compensate. Accepting the plaintiffs' motion, several United States courts asserting jurisdiction in these cases ordered prejudgement attachments and preliminary injunctions against Iran.[84] We do not intend here to repeat what has already been discussed elsewhere[85] but in order to provide a measure of insight into the nature of the issues raised in these cases, it is necessary to outline them briefly.

### B(1)- Sovereign Immunity

**a-** Having adopted the modern restrictive theory of sovereign immunity, the United States Foreign Sovereign Immunities Act of 1976[86] recognizes a number of exceptions to the jurisdictional immunity of a foreign State under Section 1605 and to the immunity from attachment or execution under Section 1610. Common to the both sections above is a situation in which a foreign State has waived its immunity either explicitly or by implication.[87] In the

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sovereign immunity defence asserted by the NIOC, Bank Markazi and the Government of Iran. (For details see Ibid, pp. 396-398) The writer also points out that: "a fair degree of duplication was involved since some plaintiffs filed identical complaints in two or more districts for attachments". (Ibid, p. 390.)

84 E.g. American International Group Inc v Islamic Republic of Iran, 493 F.Supp. 522 (D.D.C. 1980); New England Merchants National Bank v Iran Power Generation and Transmission Co, 502 F. Supp. 120 (the Case included several nationalization cases among 96 consolidated actions. For details and for other cases see William N. Eskridge, op. cit. Infra, No 84.)

85 See generally a highly analytical examination of the issue by William N. Eskridge, "The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States", 22(3) Harv.I.L.J., 525, (1981), pp. 525-591. The writer's discussions clearly demonstrate the erroneous and partial decisions of the majority of U.S. courts against Iran. See also a useful article by David D. Dowd, "Sovereign Immunity-Act of State Doctrine-Claims lies for Iran's Failure to Compensate Following Nationalization", 14 Van.J.T.L., 909, (1981), pp. 909-930.

86 United States Foreign Sovereign Immunities Act of October 21, 1976, 15 ILM (1976), p. 1388.

87 Ibid, respectively, Section 1605(a)(1) and Section 1610(a)(1).

Iranian nationalization cases the plaintiffs argued that Iran had waived its sovereign immunity under Article XI of the Treaty of Amity.[88] In a leading decision a U.S. court asserted jurisdiction based on this argument, granted the attachment and moreover entered partial summary judgement against Iran.[89]

The decision was due to an apparent misconception and misinterpretation of the immunity waiver clause of the Treaty of Amity.[90] The express terms of the immunity waiver clause of the Treaty of Amity and the negotiating history of the American commercial treaties, including the Treaty in question suggest that the immunity waiver clause of the "Treaty of Amity is restricted to an ***enterprise*** of either High Contracting Party that engages in ***commercial, industrial, shipping or other business activities within the territory*** of the other High Contracting Party".[91] This, in turn explicitly means that ; "First Iran waived no immunity, because the immunity waiver clause covers only enterprises and not the contracting parties themselves."[92] ; Second, "Iran waived immunity only for enterprises when they compete in the United States markets."[93]

**b-** Under Section 1605(a)(2) of the United States Foreign Sovereign Immunities Act, a foreign State shall not be immune from the jurisdiction of the courts of the United States in any case, "in which the action is based upon a commercial activity carried on in the United States by the foreign State.... or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct

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88 For this part of Article XI of the Treaty of Amity see, Supra No 10.

89 American Int'l Group Inc v Islamic Republic of Iran, 493 F. Supp. 522, pp. 525-526.

90 For details of the issue and of the negotiating history of the American commercial treaties, see Eskridge, op. cit. pp. 532-533.

91 Ibid, p. 533.

92 Ibid, pp. 533-534.

93 Ibid, p. 534. The writer rightly points out that this interpretation of the Treaty is in accord with its terms and with the context of the waiver clause to provide competitive equality within territories thereof. (Ibid, pp. 534, 535-536.)

effect in the United States." In the cases above the United States claimants argued that Iran's nationalizations were a commercial activity that had direct effect in the United States. In the above mentioned leading Case, the Court accepting this argument said :

> Clearly, the failure of defendants to make provision of compensation to plaintiffs at the time of the taking of property has had a "direct effect" within the meaning of Section 1605(a)(2). Further, the failure of the defendants to provide compensation to plaintiffs, resulting in an increase of the State insurance monopoly from 25% or 50% to 100%, is an act "in connection with a commercial activity" within the meaning of Section 1605(a)(2).[94]

This erroneous and misconceived interpretation of an act uniquely sovereign in nature, the power to nationalize, as a commercial activity, is sufficiently evident in itself to make further discussion of the issue unnecessary, and simply serves to demonstrate here, that, in view of the prevailing sentiments, the United States judiciary could no longer offer a fair forum for Iranian cases.

**B(2)- Causes of Action**

The other important issue arising from Iranian nationalization cases was the causes of action upon which the claimants claimed compensation. They argued that the violation by Iran of the Treaty of Amity and international law constituted causes of action for compensation.[95] In the said leading Case, the U.S. District Court ruled that the plaintiffs were entitled to judgement on the basis of the defendant's violations of the Treaty of Amity and international law.[96]

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94 American International Group Inc v Islamic Republic of Iran, 493 F. Supp, 522, p. 526 (D.D.C. 1980). For a discussion of the issue see, Eskridge, op. cit. pp. 537-542. See also the same writer's discussion regarding Section 1605(a)(3) of the United States Foreign Sovereign Immunities Act. (Ibid, pp. 542-544.)

95 Eskridge, op. cit. pp. 526 and 545.

96 American Int'l Group Inc v Islamic Republic of Iran, op. cit. p. 526.

This, in fact, was nothing less than a unilateral interpretation by the U.S. courts of their own rights. Because, it is not disputed that the primary claims for relief, under international law, do not create causes of action cognizable in municipal courts.[97] The principle of exhaustion of local remedies is a generally accepted rule of international law.[98] In the absence of such forum, or after an unsuccessful action in that forum, the case can only be pursued through diplomatic channels.[99]

**B(3)- Act of State Doctrine**

"Act of state doctrine is a rule that municipal courts will not pass on the validity of acts of foreign governments performed in their capacities as sovereigns within their own territories."[100] It is also accepted that one of the clearest examples of the application of the rule by courts in various countries is foreign expropriation measures.[101] In fact one of the leading rulings in this respect has been made by the United States Supreme Court in the well-known Sabatino Case.[102]

In the Iranian nationalization cases, the act of state doctrine was considered an irrelevant issue, since the Iranian nationalization did not provide a mechanism for adequate compensation, and "where failure to compensate plaintiffs occurred in connection with commercial activity of defendants."[103]

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97 See generally, Ian Brownlie, Principles of Public International Law, Oxford, 1979, pp. 478-494. See also, Eskridge, op. cit. pp. 528, and 545-546.

98 Brownlie, op. cit. pp. 495-504.

99 In the American Int'l Group v Iran, op. cit. the Court considered the local remedies as being ineffective. (Ibid, p. 522) Even assuming so, this does not provide a basis for U.S. courts jurisdiction, since diplomatic channels are the only and further alternative means under international law.

100 Brownlie, op. cit. pp. 507-508.

101 Ibid, p. 508.

102 Banco National dc Cuba v Sabatino, 376 U.S. 398 (1964), in 11 U.S. Sup.Crt.Rep. p. 804.

103 American Int'l Group Inc v Iran, op. cit. p. 522.

With respect to this ruling what needs to be added in short, is that it clearly was in conflict with the Sabatino principle without proper grounds to be excepted from that.[104]

The last point which has to be noted here, is the assertion of the "alter ago" theory in the Iranian nationalization cases. The argument which was put forward by several U.S. claimants against Bank Markazi Iran, was accepted by the courts and led to the prejudgement attachments and preliminary injunctions restricting movements of the Bank's assets,[105] which in fact is an independent institution responsible for the conduct of Iran's monetary policy.[106]

**C- Claims Concerning Standby Letters of Credit**

In its simplest meaning a letter of credit is "an instrument by which a bank, on behalf of its customer, evidences to a third party its commitment to honour a demand for payment upon presentation by the third party of certain documents described in the instrument."[107] Though it was used traditionally to pay for the purchase of goods, in recent transactions, including Iranian cases, letters of credit have been used to secure performance of contracts.[108] The

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104 See generally, Eskridge, op. cit. pp. 547-552.

105 Ibid, pp. 575-580.

106 See Affidavit of Bank Markazi, as quoted in Ibid, p. 575.

107 Herbert A. Getz, "Enjoining the International Letter of Credit: The Iranian Letter of Credit Cases", 21 Harv.I.L.J., 189, (1980), p. 190. For discussions concerning the Iranian Letter of Credit cases see generally: 1- Ibid, pp. 189-252; 2- George Kimball and Barry A. Sanders, "Preventing Wrongful Payment of Guaranty Letters of Credit- Lessons from Iran", 39 Bus. Lawyer, 417, (1984), pp. 417-440; 3- Joseph D. Becker, "Standby Letters of Credit and the Iranian Cases: Will the Independence of the Credit Survive?", 13 U.C.C.L.J., 335, (1981), pp. 335-346; 4- "Note", "Fraud in Transaction: Enjoining Letters of Credit During the Iranian Revolution", 93 Harv.L.R., 992, (1980), pp. 992-1013 ; and 5- M. Zimmett, op. cit. pp. 927-962.

108 M. Zimmett, op. cit. p. 928.

The Iranian letters of credit involved some technical complexity in that they involved a four-party arrangement, consisting of an Iranian government enterprise and a U.S. contractor, and two banks. Two standby letters of credit were normally issued. The first was issued by a bank in Iran in favour of the government enterprise. The second letter was issued by the contractor's bank in favour of the Iranian bank which had issued the first letter. The other point is that the letter of credit guarantied payments with regard to two issues. First, it was a performance guarantee which would likely range from five to ten per cent of the face value of the contract. Second, it guarantied the return of the advance

most important feature of the standby letter of credit is that it represents an irrevocable and independent commitment of the issuer to make payment in accordance with the terms of the credit without regard to any dispute between the contractor and the developer over the underlying contract. The independence of the banker's obligation is an essential aspect of the letter of credit and has generally been recognized in international trade.[109] It follows that the bank must pay the credit upon the submission of the documents required, without any factual investigation into the performance of the underlying contract, and the only acceptable ground to enjoin the payment is to prove that the documents are forged or fraudulent or there is fraud in transaction.[110]

After the Iranian revolution, due to the departure of American companies many industrial projects or sales contracts were left uncompleted. Consequently the Government attempted to ask for the performance of these contracts or otherwise payment of the letters of credit from U.S. banks. The claim for payment of the letters of credit involved more than two hundred cases totalling several hundred million dollars.[111]

On the other hand, as the Iranian revolution developed, U.S. contractors could find no prospect in continuing business relationships with Iran. Therefore U.S. contractors sought to prevent payments of the letters of credit. Accordingly, they attempted to obtain preliminary injunctions to block their banks' letter of credit payments. Details of the issues raised in these cases are irrelevant to the purpose of this chapter. It only needs to be said that the Americans' reaction was consequential in undermining the credibility of the

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payment made by the government enterprises in case of a dispute. (Herbert A. Getz, op. cit. pp. 196-200.)

109 Zimmett, op. cit. pp. 928-929.

110 George Kimball, op. cit. pp. 419-421.

111 These numbers are understandable from the subsequent letters of credit claims submitted by Iran to the Iran-U.S. Claims Tribunal. (Zimmett, op. cit. p. 932.)

letter of credit in international transactions and also their obligations vis-a-vis the Iranian beneficiaries. The early Treasury Regulations permitting the payments of the credits to a blocked account were subsequently amended to prohibit all payments of the letters of credit.[112] United States courts which prior to the seizure of the hostages in many cases had reasonably denied requests by U.S. claimants for preliminary injunctions against payments of the credit by U.S. banks[113], after that incident shifted to a different policy without any reasonable legal explanation.[114]

**D- Related Issues**

The flood of claims against Iran in the United States courts went even beyond the United States Government's control. Several hundred million dollars of Iranian assets were attached under the court orders.[115] Some U.S. courts also entered judgements in favour of U.S. claimants notwithstanding the Treasury Regulations prohibiting the entry of judgement.[116]

Iran felt that U.S. courts were extremely hostile forum for impartial consideration of her claims and defences. In addition, she could not in principle accept the jurisdiction of U.S. courts on the issues which would be matters of sovereign immunity and acts of state.

The United States Government, despite its early encouragement of its nationals became gradually concerned about the negative effect of the

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112 See Supra No 57.

113 See Supra No 23.

114 See generally, Zimmett, op. cit. pp. 934-947; and George Kimball, op. cit. pp. 432-436. For instance, Touche Ross and Co v Manufacturers Hanover Trust Co, (107 Misc. 2nd 438, 434 NY. S 2d 575 (N.Y. Sup Ct. 1980) as quoted in Zimmett, op. cit. p. 944) the Court affirmed a preliminary injunction without opinion, despite having previously affirmed an order denying an injunction in a pre-hostage case.(Ibid, p. 944.)

115 M. Hertz, op. cit. pp. 143-144.

116 See, Electronic Data System Corp Iran v Social Security Organization of the Government of Iran, 508 F. Supp (N.D. Tex, May 2, 1980), p. 1350; also American Int'l Group Inc v Iran, op. cit. Supra No 84.

attachments on the release of the hostages.[117] Though the assets, as well as the claims were bargaining chips in the negotiations for the release of the hostages, it could hardly ignore claims of U.S. claimants without providing an alternative forum to this effect.

In short, the claims issue turned out to be closely linked to the whole dilemma surrounding the hostage crisis and thus an important issue in the heart of attempts for the release of the hostages.

## V- Negotiating History and the Terms of the Algiers Accords

### A- Negotiating History

**A(1)-** efforts to secure the release of the American hostages held in Tehran, proved unsuccessful in the first half of 1980. Resolutions of the Security Council, and the Judgement of the International Court of Justice proved to be ineffective in ending the crisis. Various mediation efforts initiated by the UN Secretary General, Pope John Paul II, and many other countries proved unsuccessful.[118] A United Nations Commission of inquiry which was formed after consultations with the parties involved, to investigate the grievances of the Iranian people against the Shah with a view to resolving the crisis, cut short of its visit to Iran and refused to publish its reports.[119]

The prolongation of the crisis may be attributed to : 1- the impossibility of direct negotiations between the two parties which was due to an order by Ayatollah Khomeini forbidding Iranian officials from meeting U.S. officials; 2-

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[117] The United States through its Justice Department filed statements of interest in Iranian cases arguing in favour of Iran's defence for the consolidation of all case in one panel, and of Iran's defence of sovereign immunity; and the Justice Department requested stays of proceedings. However, the requests for stays had mixed results. (For details see, Hertz, op. cit. pp. 140-143); and Mc Greevey, op. cit. pp. 411-416) For instance, in New England Merchants National Bank v Iran Power Generation and Transmission Co, (502 F. Supp, 120, pp. 133-134), which consisted of 96 consolidated actions, the Court denied the Justice Department's request for stay of proceedings.

[118] Keesing's Contemporary Archives, 1980, pp. 30205-30206, 30211.

[119] Ibid, p. 30525.

domestic political requirements in Iran which made the immediate solution of the crisis not a first priority on the Iranian political agenda[120]; 3- the refusal by the United States to meet the students' demands, namely, extradition of the Shah and a U.S. apology, which were considered by the United States as non-negotiable demands ; and 4- complication of the crisis because of United States retaliatory actions against Iran.

However, as time passed many obstacles were removed gradually. Completion of the parliamentary elections in Iran was a positive signal in the Iranian domestic political requirements for negotiation. In fact, a February 28, 1980 declaration by Ayatollah Khomeini had already made it clear that the fate of the hostages was to be decided by the new Iranian Majlis which held its first session on May 28, 1980.[121] The death of the Shah, on July 27, 1980 also removed the other obstacle regarding his extradition.[122]

The surrounding circumstances were, however, affected by the outbreak of the war between Iran and Iraq, following the latter's invasion of Iran, and the deadline created by the impending inauguration of President Reagan on January 20, 1981.[123]

**A(2)- Channels of Negotiations**

Since early May, 1980 confidential negotiations had begun between U.S. banks and Iranian representatives. This channel which came to be known as the "bankers' channel" worked out many details in the disputes involved and provided and important structure for the two countries when it merged with the intermediary efforts initiated by the Algerian Government.[124]

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120 See generally, Jonatan Greenberg, "Algerian Intervention in the Iranian Hostage Crisis", 20 Stan.J.I.L., 259, (1984), pp. 262-273.

121 Keesing's Archives, 1980, p. 30525.

122 Ibid, p. 30537.

123 Ibid, 1981, p. 31082.

124 See John Hoffman, op. cit. pp. 243-251.

On the political side, the first contacts started in mid September, 1980. Through the intermediary of the West German Government confidential meetings were arranged between Sadegh Tabatabai, (a close relative of Ayatollah Khomeini and a former Deputy Prime Minister in the Provisional Government, though not an office holder at the time) and Warren Christopher, the United States chief negotiator for the hostage crisis.[125] The meetings helped the parties to outline general terms for resolving the crisis, but did not continue afterwards.[126]

A statement on September 12, 1980 by Ayatollah Khomeini outlined the Iranians' conditions for resolving the crisis.[127] This statement, which came to be known as Iranians' "four conditions", was subsequently adopted by the Majlis as a basis for its position with regard to the resolution of the crisis.[128] Upon the ratification of the four conditions by the Majlis on November 2, 1980 the Algerian Government was requested by both parties to mediate.[129] The Algerian mediation, which enjoyed the trust of the disputing parties, embodied a desire by both Iran and the United States to end the crisis before the deadline created by the impending inauguration of President Reagan on January 20, 1981. the effort was successful and led to the conclusion of agreements encompassing the various terms for the release of the hostages as well as for other disputes, which were signed on January 19, 1981.[130]

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125 Robert B. Owen, "Final Negotiation and Release in Algiers", in Warren Christopher, op. cit. 297, pp. 305-306; see also Carswell, op. cit. pp. 208-209.

126 Ibid.

127 Keesing's Archives, 1981, p. 31082.

128 Ibid.

129 Ibid.

130 Ibid, pp. 31081-31088. For the Agreements see Infra, Numbers 143-145. The Iranian negotiating team was headed by Behzad Nabavi, the then Minister for Executive Affairs. The United States negotiating team was headed by Warren Christopher, the then Deputy Foreign Secretary. (Ibid.)

## A(3)- Underlying Issues

Having what was described in the preceding pages in mind, it is now clear that the disposition of various claims between Iran and the United States and U.S. companies was an essential part of the dilemma to be negotiated. In fact two main elements in the Iranian four conditions concerned this question. The conditions provided that the United States should;

> 1- pledge not to interfere in the affairs of Iran; 2- unfreeze all Iranian assets and return them to the Iranian Government; 3- to abrogate all claims by U.S. companies and the U.S. Government, and all economic and financial measures against Iran; 4- to return the assets of the Shah.[131]

On the other hand, the United States wanted not only to use the assets to obtain the release of the hostages, but at the same time to avoid nullifying claims of U.S. claimants, and moreover to secure payment of their claims.[132] In addition, the United States asserted that those parts of the assets which were attached in the United States by court orders were legally impossible to return by executive order. With regard to the assets held in overseas branches of U.S. banks, the United States argued that they could be returned but subject to the consent of U.S. banks which had claimed the right of set-off over those assets, or otherwise some sort of settlement be reached between Iran and U.S. banks over the assets held overseas.[133]

It was estimated that between 11 to 12 billion dollars of Iranian assets were blocked under the freeze order. From this total, $2,358 million were held at the Federal Reserve Bank of New York in gold and deposits; $5,579 million at overseas branches of U.S. banks; $2,050 million at domestic branches of

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131 Keesing's Archives, 1981, p. 31082. For the negotiating history of the Algiers Accords see generally; "Transcript of a Conference on the Settlement with Iran", 13 Lawyers of the Americas, 1, (1981), pp. 1-46; John Hoffman, op. cit. pp. 235-280; Robert Carswell, op. cit. pp. 201-231; and Robert Owen, op. cit. pp. 297-324.

132 Carswell, op. cit. pp. 205-206.

133 Ibid, pp. 206-207.

U.S. banks; and between $1,000 to $2,100 million were held in the United States or overseas by U.S. individuals.[134]

In reality the United States' proposal meant that they could guarantee the return of about $2.3 billion held in the Federal Reserve Bank, and if consent was given by U.S. banks about $5 billion held at overseas branches of U.S. banks could also be returned to Iran. This meant that from the total, the United States was ready to return about $7.5 billion immediately, and the remainder should be settled after the release of the hostages upon a satisfactory settlement of the claims issue.[135]

The return of the assets held in Europe was itself a controversial matter, since the U.S. banks proposal- which came to be known as Plan "C" provided that, the debt claims of the U.S. banks holding foreign deposits would be satisfied out of these and the remainder would be returned to Iran.[136]

The U.S. proposal embodying Plan "C", with regard to bank claims, was rejected by Iran both as regards the whole proposal and the context of Plan "C". Iran did not want to pay off the bank loans and demanded about $9.5 billion be returned to Iran.[137]

Subsequently, with regard to the assets held overseas, another proposal called by the Americans Plan "D" was developed. It proposed that Iran would bring all its bank loans current and pay the amounts necessary to put the loans in good standing, and provide some measures to provide security for future payments.[138] At the same time, an understanding was reached between the parties that the United States could not abrogate non-bank commercial claims, but there was a possibility of the abrogation of the claims that the United States

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134 Ibid, p. 205.

135 Ibid, pp. 206-207, 209-211.

136 John Hoffman, op. cit. pp. 249-256.

137 Ibid, p. 257, and Carswell, op. cit. p. 217.

138 John Hoffman, op. cit. pp. 256-257.

Government or the hostages themselves might want to assert against Iran, as a result of the Embassy seizure. It was also felt that the United States courts were not a desirable forum for Iran. In addition, the United States knew that in a normal situation many claims in U.S. courts might be denied as a result of Iran's sovereign immunity. Therefore the idea of an international arbitration was developed.[139]

In short, the final understanding was, that;

> the United States would pledge not to interfere in Iran's affairs; claims arising from the Embassy seizure could be waived; Iran's deposits in the overseas branches of U.S. banks would be unblocked when Iran's loans had been brought current; an international claims arbitration process would be used provided that Iran would establish an escrow deposit of $1 billion, which would be replenished by Iran when it fell below $500 million.[140]

On January 14, 1981 a Bill providing for Iranian acceptance of international arbitration of claims was passed by the Majlis. However, the Bill provided that "all contracts which specified the settling of disputes in Iranian courts were excluded from arbitration".[141]

Despite a general understanding between the parties, some questions regarding the bank claims remained unsolved. Doubts were removed in this respect when on January 15, 1981 Iran announced that it had decided ; 1- to pay off all its bank loans. Iran agreed to pay $3.4 billion of bank loans and to deposit $1.4 billion in an escrow account which would be paid after verification; 2- "to return the hostages upon the receipt of $8.1 billion; to accept in principle the U.S. proposal that $2.2 billion in deposits in the United

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139 R. Owen, op. cit. pp. 303-305.

140 Carswell, op. cit. pp. 214-215. Serious complications arose when on December 19, 1980 Iran demanded a $24 billion guarantee for return of its assets and the Shah's wealth, but this demand was never seriously followed. (Keesing's Archives, 1981, pp. 31082-31083.)

141 Carswell, op. cit. p. 220; and Keesing's Archives, 1981, p. 31083.

States be returned later, with a $1 billion replenishable escrow account providing security for claims programme".[142]

This proposal despite minor questions over the interest rates demanded by Iran, subsequently became the structure of the Algiers Accords, which were signed on January 19, 1981.

**B- The Terms of the Algiers Accords**

The settlement comprised two Declarations by the Government of Algeria of the Parties' commitments. In the first Declaration[143], Iran and the United States made commitments regarding their future political relations, the release of United States nationals in Iran and the return of Iranian assets. This agreement was accompanied by a separate instrument[144] comprising undertakings by Iran and the United States with respect to the General Declaration. The second Declaration[145] provided for the establishment of an international arbitral Tribunal for the settlement of specified outstanding claims between the parties. A technical agreement, named the Escrow Agreement[146], was signed which involved the Parties and the Escrow agent.

The General Declaration and the Undertakings provided for the following:

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142 Carswell, op. cit. p. 220.

143 Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter, the General Declaration, the GD), 20 ILM, (1981), p. 224.

144 Undertakings of the Governments of the United States of America and the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter, the Undertakings), Ibid, p. 229.

145 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. (hereinafter, the Claims Settlement Declaration, the CSD), 20 ILM (1981), p. 230.

146 The Escrow Agreement, 20 ILM, 1981, p. 234.

1- Release of the 52 U.S. nationals detained in Iran.[147]

2- A pledge by the United States not to intervene in Iran's internal affairs.[148]

3- Immediate return of $7.955 billion of Iranian assets.[149] This amount apparently included Iranian assets held at the Federal Reserve Bank of New York and deposits in foreign branches of U.S. banks. Form this amount Iran, however, directly received only $2.870 billion, since Iran agreed to repay $3.667 billion, its debts to U.S. banks and other syndicate members.[150], and to retain $1.418 billion in an escrow account pending the resolution of bank claims.[151]

4- With regard to the assets in U.S. branches of U.S. banks, it was agreed that they should be returned within six months from the date of the technical arrangement which had to be concluded within 30 days from the date of the General Declaration.[152] $1 billion of all such funds was to be placed in a special interest-bearing Security Account for the purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Iran has agreed to replenish this account up to a minimum of $500 million whenever it falls below this figure until all claims are satisfied.[153]

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147 Para 3 of the General Declaration and Para 1 of the Undertakings.

148 Para 1 of the General Declaration.

149 Para 1 of the Undertakings, and Para's 4 and 5 of the General Declaration.

150 Para 2(a) of the Undertakings.

151 Para 2(B) of the Undertakings. This Paragraph also provides that "in the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference by the Iran-United States Claims Tribunal."

152 Para 6 of the General Declaration.

153 Para 7 of the General Declaration.

5- With regard to the other assets in the United States and abroad, it was agreed that the United States should return them to Iran.[154]

6- The United States agreed "to terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgements obtained therein, to prohibit all further litigation based on such claims and to bring about the termination of such claims through binding arbitration".[155]

7- The United States agreed to withdraw all U.S. claims against Iran before the International Court of Justice and thereafter bar their prosecution[156]; 8- to bar all claims against Iran by the hostages and certain claimants[157]; 9- to revoke all U.S. trade sanctions against Iran[158]; 10- to freeze all of the Shah's and his close relatives' U.S. assets.[159]

The Claims Settlement Declaration provided for the establishment of an international arbitral Tribunal (Iran-United States Claims Tribunal).[160] The Parties agreed to submit to arbitration any claims not settled voluntarily within six months of the effective date of the Agreement.[161] The Tribunal has: 1- Jurisdiction over claims by nationals of either State against the government of the other State outstanding as of the date of the agreement, and arising out of debts, contracts, and expropriations.[162]; 2- jurisdiction over claims arising out of contracts between the two signatory governments.[163]; 3- the power to arbitrate in disputes regarding United States commitments to assist Iran in

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154 Para's 8 and 9 of the General Declaration. No specific deadline is provided under these Paragraphs.

155 Para B of the General Principles of the General Declaration.

156 Para 11 of the General Declaration.

157 Ibid.

158 Ibid, Para 10.

159 Ibid, Para 12.

160 Article 2(1) of the Claims Settlement Declaration.

161 Ibid, Article 1.

162 Ibid, Article 2(1).

163 Ibid, Article 2(2).

locating and recovering the Shah's assets.[164] The Tribunal is also to decide any dispute regarding interpretation or performance of the General Declaration and any question concerning interpretation of the Claims Settlement Declaration.[165] The Claims Tribunal's jurisdiction is expressly limited in two respects: It is not authorized to hear claims arising out of the Iranian revolution and the seizure of the United States nationals[166], or claims based on contracts which provided that Iranian courts were to have sole jurisdiction over disputes.[167]

The Tribunal is to be composed of nine members or such larger multiples of three as the two Countries may agree, a third of whom are to be selected by the United States, a third by Iran, and the members so appointed should select the remainder by mutual agreement.[168] The Tribunal is to "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 trade, contract provisions and changed circumstances."[169] The Tribunal is to follow the procedural rules for arbitration established by the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).[170]

After the conclusion and entry into force of the Algiers Declarations[171], the question of their validity under international law[172], and the U.S.

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164 Ibid, Article 2(3), and Para 16 of the General Declaration.

165 Ibid, and Para 17 of the General Declaration.

166 Ibid, Article 2(1), and Para 11 of the General Declaration.

167 Ibid.

168 Ibid, Article 3(1).

169 Ibid, Article 5.

170 Ibid, Article 3(2).

171 In accordance with the terms of Article VIII of the Claims Settlement Declaration the Agreement entered into force on 19 January 1981.

172 The question was whether the issue of hostage-taking in Iran amounted to the threat or use of force within the meaning of Article 52 of the Vienna Convention on the Law of Treaties. (For this purpose see generally: James M. Redwine, "The Effect of Duress on the Iranian Hostage Settlement Agreement", 14 Van.J.T.L., 874, (1981), pp. 847-890; Shlomo

Constitution[173], was raised in the United States. However, the new Administration declared that it would honour the agreement.[174]

## Conclusion

The settlement reached is a natural consequence of the extraordinary circumstances in which the negotiations were carried out. Extraordinary, both by way of the timing of negotiations and the way in which a very complicated set of legal-financial issues had to be settled. While a great many opportunities and time were lost between November 1979 and November 1980, the parties' desire to settle the issue within the very limited amount of time left before the January 20, 1981 deadline, was extraordinarily effective in the specific shaping of the settlement reached. This in fact represented an effort by the parties to assemble all the pieces of the problem which had multiplied during the preceding months.

The decision to establish an arbitration process for the settlement of claims was an inevitable and necessary consequence of the background described in the preceding pages. Arbitration in itself poses no problem. Although a lump sum agreement could have been another solution, in the circumstances existing at the time it was unlikely to satisfy the two States, especially from the political point of view. The questions are basically in

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Cohen and others, "The Iranian Hostage Agreement Under International Law and United States Law", 81 Col.L.R., 822, (1981), pp. 823-837, See also Transcript of A Conference on the Settlement with Iran, op. cit. pp. 46-71; and Oscar Schachter, op. pp. 369-373.

173 The question was whether the U.S. Administration was constitutionally authorized to nullify and bar suits and attachments against Iranian assets and to bar any further such claims. In Dames & Moore v Reagan, Secretary of Treasury, (20 ILM, 1981, p. 897) the U.S. Supreme Court ruled that in acting under the Algiers Accords, the U.S. President was within his constitutional powers. (Ibid, p. 915) For further details see also; Alan C. Swan, "Reflections on Dames & Moore v Reagan and the Maiami Conference", 13 Lawyer of the Americas, i, (1981), pp. i-xiii; also Transcript of a Conference on the Settlement with Iran (Maiami Conference), op. cit. pp. 71-137; and Sholomo Cohen, op. cit. pp. 857-892.

174 See Executive Order 12294 of February 24, 1981, (20 ILM, 1981, pp. 412-413). It is to be noted that despite the Accords' express provision for the termination of claims in the U.S. courts, the Presidential Order only suspended these litigations. The Order also did not apply to claims concerning the validity or payment of standby letters of credit, performance or payment bonds or other similar instruments. (Ibid, Section 5.)

connection with the issues which could necessarily effect the desirable functioning of the arbitral process.

It was clear from the outset that the two countries had different administrative and economic structures. That is, the United States Government did not exercise such wide commercial activities as assumed by the Iranian Government. As a result of this fact, the Iranian government entities were the counter-parts in the contracts and in the subsequent disputes with American corporations. Due to this fact the Iranian government entities were likely to have, and in fact had, many claims against American corporations. In other words, despite the desire declared in the General Principles of the General Declaration by both parties to terminate all litigation as between the Government of each party and the nationals of the other, the agreement failed to take notice of the Iranian government entities' claims. Therefore the question was left unclear as to whether the Iranian Government and its commercial enterprises were entitled to bring claims against their American contractual counter-parts. This is not merely a theoretical matter; in fact the submission and the subsequent withdrawal of 1400 claims by Iranian government entities against U.S. companies is a natural consequence of the parties' failure to take notice of this fact.

Iran's commitment to provide a bottomless account in favour of the American claimants is an apparent consequence of the American freeze action, which was unlikely to be adopted in a normal situation. However, this leaves the parties in an unequal position, since the United States has not provided any such security.

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175 See D.P. Stewart and Laura B. Sherman, "Developments at the Iran-United States Claims Tribunal: 1981-1983", 24(1) Virg.J.I.L., 1, (1983), p. 9. Iran's decision to withdraw its claims was following the Tribunal's decision that it lacked jurisdiction over this category of claims. (See Case A/2, 1 Iran-USCTR. p. 101).

Moreover, the agreement failed to provide an express provision with regard to the standby letters of credit. General references to the applicable law and the choice of law issues, without a detailed provision regarding these issues and the Tribunal's function, are a potential source of controversial questions which may arise with regard to the Tribunal's function and the nature of its decisions.

# CHAPTER TWO

# INTERNATIONAL ARBITRATION : AN OVERVIEW OF SOME SELECTED TOPICS

## Introduction

International arbitration is a frequently used institution for the settlement of disputes of varying nature. It is, however, a complex subject and the term "international arbitration" is used to accommodate different concepts. The aim of this study is to provide a survey of different systems of international arbitration and to touch upon the areas where they differ form one another. However, this is only an overview of these complex subjects, further restricted by the limitations imposed by the space and scope of this study.

## I. The Concept of Arbitration

In terms of a definition, arbitration has been described as

> a reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction.[1]

or

> Arbitration is a device whereby the settlement of a question which is of interest for two or more persons, is entrusted to one or more persons- the arbitrator or arbitrators- who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement.[2]

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1 W.H. Gill, The Law of Arbitration, 2nd edition, London, Sweet & Maxwell, 1975, p. 1.

2 Rene David, Arbitration in International Trade, Kluwer Law & Taxation Publications, London, 1985, p.5.

To avoid the shortcomings of a definition some writers have tried to identify the major characteristics of arbitration common to all types of arbitration;

> 1- Arbitration is a method by which any dispute can be resolved; 2- The dispute is resolved by a third and neutral person; 3- The arbitrators are empowered to act by virtue of the authority vested in them by the parties...; 4- Arbitrators are expected to determine the dispute in a judicial way; 5- Arbitration is a private system of adjudication; 6- The award is final and conclusive and puts an end to the parties dispute; 7- The award binds the parties by virtue of their implied undertaking and they voluntarily give effect to the arbitrator's decision; 8- The arbitration proceedings and awards are independent of the state.[3]

Not all aspects of this characterization of arbitration are free from controversy. Indeed, some elements of the above definition may bear directly upon the debate surrounding the juridical nature of arbitration. That is, whether arbitration derives its power from the agreement of the parties and has a contractual character, or on the contrary, from a specific legal system and is of a jurisdictional nature.[4] A hybrid character, combining elements from the contractual and jurisdictional theories, is the third suggestion which has been discussed in this context.[5] There are some indications to suggest that there exists a fourth theory regarding the juridical nature of arbitration. The proponents of this theory reject the above three theories and argue that arbitration has an autonomous character.[6]

It is notable that the purpose of determining the legal nature of arbitration is to establish the position of arbitration within the two distinctive legal systems of national law and international law and to determine the extent

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3 Julian Lew, Applicable Law in International Commercial Arbitration, Oceana Publications, New York, 1978, p. 12.

4 See generally, Ibid, pp. 51-56. Also, T. Gebrehana, Arbitration an Element of International Law, 1984, Almqvist and Wiksell International, Stockholm, pp. 25-41.

5 Julian Lew, op. cit. pp. 57-61.

6 Ibid.

to which the arbitration process is governed by the system concerned. Further, it is to appraise the weight of the argument in favour of the autonomous status of arbitration. That is to say, whether arbitration can truly be regarded as operating in a different legal system divorced from the two systems of national and international law. We will elaborate on this and its relationships to the nationality and different systems of arbitration in Section IV below.

## II. Arbitration in International Law

Historically, the arbitration mechanism has been recognized by various nations from the earliest times. The Laws of Manu, the Code of Hammurabi, Roman Law, Christian and Islamic traditions have all acknowledged arbitration as a peaceful and flexible means of dispute settlement.[7] The essential factor behind the development of arbitration has been attributed to the role of "consensus" in approaching the disputes arising in the practical life.[8]

In the history of international law the idea of setting up some form of arbitral tribunal is traceable to the early publicists. Within the contemporary notion of international law arbitration symbolizes a logical form of coordination in international relations. This is significant particularly because of the special structure of the international legal system based on mutual consent of states making up the international community. Within this sphere arbitration offers a better chance to resolve disputes through the consensual control of the parties over the whole process of arbitration.[9]

In international law arbitration is defined as "the settlement of disputes between states by judges of their own choice and on the basis of respect for law."[10] In the words of the International Law Commission it is:

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7 For a historical review see, Gebrehana, op. cit. pp. 11-16.

8 Ibid, p. 13.

9 Ibid, see generally, pp. 16-24.

10 Articles 15 and 37 of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes respectively. (The texts of the Conventions in 1 AJIL (1907), p.

> a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted .[11]

It is not disputed that the 1794 Treaty of Jay[12] and the 1872 Alabama Claims Arbitration[13] constitute a starting point in the development of contemporary international adjudication. Because of the success of the Alabama Arbitration, the Alabama Claims model was applied to other cases which in turn were effective in the evolution of international arbitration.[14] An important aspect of the Alabama Arbitration is accepted to be its evolving of international arbitration as a "process of decision-making according to law and supported by appropriate procedural standards".[15]

The second historical phase of international arbitration is without doubt the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907. The Hague Conventions recognized arbitration as "the most effective, and at the same time the most equitable, means of settling disputes"[16], and established the arbitral machinery of the Permanent Court of Arbitration[17] and a set of procedural rules for the conduct of arbitration.[18] It

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107 and 2 AJIL (1908), p. 43 respectively; also in J.Gillis Wetter, The International Arbitral Process. Public and Private, Oceana Publications Inc. New York, 1979, Vol 5, p. 187) The definition of international arbitration in the Hague Conventions has been adopted by many other multilateral conventions. (For details see Hans von Mangoldt, "Arbitration and Conciliation", in H. Mosler and R. Bernhardt, Judicial Settlement of International Disputes,Springer Verlag, Berlin, 1974, p. 423.)

11 YBILC, (1953), Vol II, p. 202.

12 Treaty of 19 November 1794, between the U.K. and the U.S., 52 CTS, p. 243. The Treaty provided for adjudication of claims arising out of injury to aliens by mixed commissions. (For an appraisal of the Jay Treaty see George Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol 4 International Judicial Law, London, 1986, Stevens and Sons Ltd, pp. 21-48. See also generally, Moore, International Adjudications, (hereinafter Moore, Int.Adj.) Oxford University Press, London, 1931, Vols. 3 and 4.

13 The Treaty for the Arbitration of Alabama Claims, between the U.K. and the U.S., signed at Washington, 8 May 1871, 143 CTS, p. 145. For an analysis of the Alabama Claims Arbitration see generally, Schwarzenberger, op. cit. Vol 4, pp. 49-80. For useful official documents of the Alabama Claims Arbitration see G. Wetter, op. cit. Vol 1, pp. 27-56.

14 For the review of these cases see Schwarzenberger, op. cit. Vol 4, pp. 81-94.

15 Ian Brownlie, Principles of Public International Law, op. cit., p. 707.

16 Article 16 of the 1899 Convention and Article 38 of the 1907 Convention.

17 Articles 20 and 41 of the 1899 and 1907 Conventions respectively.

must be noted that the Permanent Court of Arbitration has no real permanent status. It is not composed of permanent judges, nor is there a court, but simply a machinery from which an arbitration tribunal may be assembled to deal with a particular dispute. The only permanent feature of the PCA is its Administrative Council and the International Bureau which acts as a secretariat or registry for the tribunals set up.[19] Except in the early decades of its establishment the PCA has not had an active role, nevertheless, it continues to exist.

In modern international law arbitration has been regarded as one of the means for the peaceful settlement of disputes. Article 33 of the Charter of the United Nations refers to various peaceful means including "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement,..." by which the parties to any dispute are to seek a solution. It is certain that the Charter by its express reference to arbitration and "judicial settlement" next to each other regards them as two separate institutions.[20] The same reasoning applies with regard to Article 95 of the Charter which in effect makes clear that the function of the International Court of Justice as the judicial organ of the United Nations does not preclude the establishment of other tribunals.[21]

In reality , however, the distinction between arbitration and judicial settlement is much less definite. They are both legal means of settling disputes on the basis of law and, in contrast to diplomatic means, the awards or judgements rendered by arbitration or judicial settlement are binding upon the

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18 Generally Articles 21-57 of the 1899 Convention and Articles 42-90 of the 1907 Convention.

19 See Schwarzenberger, op. cit. pp. 112-117; Hazel Fox, "Arbitration", in H. Waldock, International Disputes : The Legal Aspects, Europa Publications, London, 1972, 101, pp. 108-113, and Brownlie, op. cit. pp. 707-708.

20 D.H.N. Johnson, "International Arbitration Back in Favour, 34 Y.B.W.A. (1980), 305, p. 306.

21 Ibid.

parties.[22] The main important difference between arbitration and judicial settlement has been accepted to be in the influence and choice of the parties over the composition of the arbitral tribunal and procedure of the arbitration.[23] In contrast to the parties' freedom in arbitration, in judicial settlement , such as the International Court of Justice's system, the composition and the rules of procedure are basically fixed and the parties' influence over these issues is only possible in very exceptional circumstances and to a minor extent.[24] Another distinguishing feature in this context, though not a decisive criterion, is regarded to be the permanency of the judicial settlement system as recognized from the usually ad hoc and temporary structure of public international arbitration.[25]

A further point is whether the difference between arbitration and judicial settlement as regards the influence of the arbitrating parties on competence, structure and procedure can lead to a distinction between the judicial nature of the arbitration process on the one hand and of "judicial settlement" on the other.

The question is whether international arbitration is as strictly a judicial procedure as "judicial settlement", or it is a quasi-judicial system of dispute settlement. Modern international law tends to answer this question in the negative. The idea of quasi-judicial arbitration is regarded to be an "utterly inadequate" criterion for distinguishing arbitration from "judicial settlement".[26] H. Lauterpacht points out that "there exists in any case the very strongest objection to a view that decisions of an adjudicating body can be partly legal

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22 Ibid, also Mangoldt, op. cit. p. 424, and Schwarzenberger, op. cit. Vol 4, pp. 145-146.

23 H. Mangoldt, op. cit. pp. 424-427.

24 In this regard note Article 31(2),(3) of the Statute of the International Court of Justice which provides for the appointment of ad hoc judges on certain occasions, and Article 38(2) of the same Statute for decisions *ex aequo et bono*. See also Article 26(2) of the same Statute.

25 For details see Mangoldt, op. cit. pp. 424-428.

26 Ibid, p. 426.

and partly non-legal".[27] He further argues that "such a view fails to take into account the provisions of treaties creating arbitral tribunals and prescribing the sources of law applicable by them. Neither does it find support in the activities of international arbitral tribunals..."[28]

This is a generally accepted view in contemporary international law which is based on sound theoretical grounds. The question, however, remains whether in reality the parties' exercise of influence would not attenuate the judicial nature of arbitration.

## III. The Effectiveness of International Arbitration

### A. Public International Arbitration

Many writers are of the view that the current picture of public international arbitration practice does not live up to the earlier expectations placed upon arbitration in the settlement of disputes in the field of inter-State relations. For instance, a review of the arbitration practice reveals that, in contrast to the earlier popularity of inter-State arbitration, since the First World War the practice of arbitration has followed a sharp decline.[29] Eventhough during the 1980s public international arbitration has regained a certain degree of acceptance[30], it has never been able to establish itself as a major method of inter-State dispute settlement.

However, the establishment of two major international arbitration tribunals in the 1980s are examples of some recent notable developments in

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27 H. Lauterpacht, The Function of Law in the International Community, 1933, p. 380.

28 Ibid, p. 381.

29 Ibid, p. 464; and Louis B. Sohn, "The Function of International Arbitration Today", 108 Recueil des Cours, (1963), I, p. 1.

30 See generally, D.H.N. Johnson, op. cit. p. 305; Louis B. Sohn, "The Role of Arbitration in Recent Multilateral Treaties", in T.E. Carbonneau (Ed.), Resolving Transnational Disputes Through International Arbitration, University Press of Virginia, Charlottesville, 1984, 21, pp. 22-27.

this respect. The first is the Iran-US Claims Tribunal established pursuant to the resolution of the hostage crisis between Iran and the United States.[31] The Tribunal is entrusted to decide thousands of claims and after more than seven years of work it still has a heavy case load to deal with. The second is the establishment and successful completion of the work of the Egypt-Israeli Arbitration Tribunal concerning the Taba Dispute.[32]

The problems affecting the effectiveness of inter-State arbitration may be seen in relation to two broad areas. First, the general problems of judicial settlement in international law in relation to the political and psychological aspects of the international legal system. That is, the problems arising from the reluctance of sovereign States to submit disputes, which have necessarily some political dimensions, to any system of judicial settlement, e.g. arbitration. As a result of this factor, the initial ideas developed in the course of the twentieth century to replace the use of force by arbitration is out of the question.[33]

The second factor, which is closely tied to and cannot completely be divorced from the first one, is the failure on the part of public international arbitration to reach a practical and a generally acceptable level of institutionalization. This is evident from the fact that the arbitration provisions in many multilateral treaties for the pacific settlement of international disputes have failed to be utilized in an institutional manner or in any other manner at all.[34] The attempts, principally sponsored by the UN International Law

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31 Declaration of the Government of Algeria Concerning the Settlement of Claims between Iran and the United States of 19 January 1981 [The Claims Settlement Declaration], 20 ILM, 230.

32 The Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront of September 11, 1986, between Egypt and Israel, 26 ILM, (1987), p.1; and the Arbitral Award in the Taba Dispute, 27 ILM,p. 1421.

33 Mangoldt, op. cit. pp. 440, and particularly 487.

34 For example, the Hague Convention for the Pacific Settlement of International Disputes of 1907 (Articles 51-90); Geneva General Act for the Pacific Settlement of International Disputes of 1928, 93 L.N.T.S. 345, revised April 28 1949, 71 U.N.T.S. 101; the American Treaty of Pacific Settlement (Pact of Bogota) of 1948, 30 U.N.T.S. 55; the European Convention on the Pacific Settlement of Disputes of April 29, 1957(Articles 1,19)(the text in 320 U.N.T.S. p. 243, also in 5 European Yearbook, p. 347); and the Protocol to the

Commission, to encourage States to adopt a modern and universal system of arbitration procedure has also failed to bear fruit. The idea behind the work of the International Law Commission was to develop a set of arbitration rules which would provide practical safeguards to secure the functioning of the tribunal against the attempts by a party to frustrate the arbitration[35] - a common problem in many public international arbitration practices.[36]

The underlying principle behind this approach by the ILC was that "States having once entered into an undertaking to arbitrate are legally bound to refrain from any action which would frustrate their undertaking".[37] Upon this premise the Draft Convention of the International Law Commission on International Arbitration (1953)[38] provided a number of rules which emphasised on the binding nature of the undertaking to arbitrate[39] and provided for: power by the International Court of Justice to settle disputes as to the scope of the obligation to arbitrate[40]; appointment by the International Court of Justice of arbitrators not designated by a party to the dispute in

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Charter of the Organization of African Unity (Article 30)(3 ILM, p. 1116). In relation to the general arbitration provisions of the above treaties it is to be noted that the legal effect of such undertakings of general nature has been questioned by some writers who believe that the existence of a compromis is necessary for the engagement of obligation to submit to arbitration. (F.A. Mann, Studies in International Law, Clarendon Press, Oxford, 1973, pp. 256-257. In reality also very few cases "have been brought before an arbitration tribunal as a result of a general treaty or compromissory clause and that- almost without exception- a dispute has only been submitted to an arbitral tribunal after the parties have reached a basic agreement to that effect."(Mangoldt, op. cit. p. 470.)

35 Ibid, pp. 439-440.

36 Ibid, pp. 491-492. For instance, in the Franco-Tunisian Arbitration Tribunal the national arbitrators were withdrawn before the completion of the arbitration proceedings. (24 ILR (1957), pp. 767-770); also, Hungary, Bulgaria and Romania refused to appoint their representatives to the arbitral commission which was to be established under the Peace Treaties.(Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, First Phase, ICJ Reports (1950), p. 65, Second Phase, ICJ Reports, (1950), p. 221.

37 H. Fox, op. cit. p. 101.

38 Text in Wetter, op. cit. Vol 5, p. 228.

39 Ibid, Article 1(3).

40 Ibid, Article 2(1).

contravention of its obligations[41]; and certain other safeguards to secure the functioning of the tribunal until the award has been rendered.[42]

The opponents of the ILC's proposals argued that:

> The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the compromis.[43]

Some prominent authorities on international arbitration were also critical of the ILC's approach. Professor Carlston questioned "whether the larger interests of the international community will be served by transforming the existing conception of arbitration into the conception of judicial arbitration as envisaged by the Commission".[44] He argued that "the strength of the existing system of international arbitration as a means for pacific settlement of disputes lies in its flexibility and responsiveness to the will of the parties".[45] Judge De Visscher also voiced similar views on the ILC's draft convention.[46]

The ILC's attempts to introduce a quasi-compulsory arbitration with stricter judicial aspects were not accepted by majority of States. As a result, the International Law Commission had to limit itself to the adoption of the Model Rules on Arbitral Procedure (1958)[47] which, according to some observers, has not yet been applied in a single case.[48]

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41 Ibid, Article 3(2).

42 Ibid, Articles 4 to 10 and 21(1). See also Mangoldt, op. cit. pp. 440-441.

43 Report by the Special Rapporteur of the ILC on Arbitral Procedure, 24 April 1957, YBILC (1957), Vol II, p. 2, Para 7.

44 Carlston, "Codification of International Arbitral Procedure", 47 AJIL, (1953), 203, p. 218.

45 Ibid.

46 Charles De Visscher, "Reflections on the Present Prospects of International Adjudication", 50 AJIL (1956), 467, pp. 470-471.

47 Report of the International Law Commission Covering the Work of its 10th Session, G.A.O.R., 13th Session, Supplement No 9, Document A/3859; also reproduced in YBILC

We already touched upon the notion of quasi-judicial arbitration in Section II above. It is notable that State practice is a major source of international law. Given the reluctance of the majority of States to submit to the ideas of judicial arbitration promulgated by the ILC, the question concerning the degree of strictness of international arbitration from the judicial point of view may yet to be resolved.

The question of popularity of the inter-State arbitration practice should, however, be tested in conjunction with the development of institutions of judicial settlement, such as the Permanent Court of International Justice and its successor the International Court of Justice. Moreover, as a result of the greater participation of States and State enterprises in international trade, States are increasingly participating in another form of international arbitration, namely arbitration in the field of international commerce. For instance, one third of the many cases submitted each year to the ICC arbitration involves State parties.[49]

Furthermore, it is submitted that public international arbitration in certain subject areas, e.g. mixed claims commissions entrusted to decide on the question of injuries suffered by aliens and arbitration tribunals established to settle territorial disputes, has a good record.[50] In addition, recent developments shows that arbitration is increasingly being regarded as the most appropriate institution and procedure for settling disputes relating to the interpretation and application of codificatory treaties, and interpretation and application of multilateral treaties.[51] For instance, Professor Sohn points out that while there

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(1958), Vol II, p. 78; and 53 AJIL (1959), p. 239. Text of the Model Rules also in J.G. Wetter, op. cit. Vol 5, p. 232.

48 Mangoldt, op. cit. p. 441.

49 Kar-Heinz Bockstiegel, "States in the International Arbitral Process", in Julian Lew (Ed.), Contemporary Problems in International Arbitration, Centre for Commercial Law Studies, Queen Mary College, University of London, 1986, p. 40.

50 For a review of arbitration treaties and arbitration practice see, Mangoldt, op. cit. pp. 463-466,and generally pp. 432-483; D.H. Johnson, op. cit. pp. 313-327; H. Fox, op. cit. pp. 113-125; and K.R. Simmonds, R. Lapidoth and H.W. Baade, "Public International Arbitration", 22 Texas I.L.J., 149,(1987), pp. 149-155.

51 Louis B. Sohn, ".. Multilateral Treaties", op. cit. pp. 22-27.

were less than twenty post-1970 multilateral agreements referring disputes to the International Court of Justice, more than sixty such agreements refer disputes concerning their interpretation and application to arbitration.[52] In this regard the provision of a comprehensive arbitration clause for the settlement of disputes in the all important Law of the Sea Convention of 1982 is the most notable one.[53] In fact, the acceptability and flexibility of arbitration recognized by the Law of the Sea Convention has opened a new era of hope for the future of international arbitration. As a result, some writers believe that it can be duplicated in other areas.[54]

## B. International Commercial Arbitration

Unlike public international arbitration, international commercial arbitration is growing at an increasing speed. As a result of the rapid expansion in international trade, international commercial arbitration has become a growingly popular method for the settlement of disputes in this field. This is because of the advantages that international commercial arbitration offers as an alternative to a foreign court, which makes it particularly acceptable to States and state enterprises party to a commercial dispute. It also offers a considerable degree of liberty for the parties to establish a tribunal composed of arbitrators from different countries and thus from different legal cultures. The parties are also in liberty to adjust the procedure to the circumstances of the case and to define the law applicable to the substance of the dispute.[55] Furthermore, international commercial arbitration awards, due to the existence of recent

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52 Ibid, p. 26.

53 The United Nations Convention on the Law of the Sea, 1982, 21 ILM, p. 1261, Part XI Articles 186-191 and Part XV Articles 279-299 and Annexes V, VI, VII, VIII.

54 Sohn, ".. Multilateral Treaties", op. cit. p. 37.

55 For a discussion on the advantages and disadvantages of international commercial arbitration see: Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 1986, pp. 16-19; Hans Smit, "The Future of International Commercial Arbitration : A Single Transnational Institution?" 25 Col.J.T.L. (1986), 9, pp. 10-12; and also Pieter Sanders, "Trends in International Commercial Arbitration", 145 Recueil des Cours, (1975) II, 205, pp. 215-17.

international conventions particularly the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards[56], are likely to receive a greater measure of recognition and enforcement in the countries parties to the UN Convention than are judgements of national courts.[57]

Another major factor behind the popularity and advantage of international commercial arbitration is the role of the institution for the development and application of an international *lex mercatoria*. The *lex mercatoria* is generally referred to as uniform law derived from international conventions, trade usages and custom, and ideas of business fairness. Some also tend to broaden the issue by referring to the concept of general principles of law.[58] The *lex mercatoria* has primarily been discussed in the context of the law applicable to the substance of the dispute. For instance, Article VII(1) of the European Convention of April 1961 on Commercial Arbitration provides that arbitrators should take account of trade usages. More recently, Article V of the Claims Settlement Declaration establishing the Iran-US Claims Tribunal provides that the arbitrators should take account of relevant usages of trade.[59]

Another distinguishing feature of international commercial arbitration is the high level of institutionalization developed in this field. Various institutions are actively involved in the area of international commercial

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56 Adopted on June 10, 1958, (330 U.N.T.S. p. 38). Note also the Inter-American Convention on International Commercial Arbitration of 1975, (14 ILM, p. 336. Also in J.G. Wetter, op. cit. Vol 5, p. 313); and the European Convention on International Commercial Arbitration of 1961. (484 U.N.T.S. p. 349, also in Wetter, op. cit. Vol 5, p. 316.)

57 Hans Smit, op. pp. 10-11.

58 For detailed discussions concerning the lex mercatoria see generally: Berthold Goldman, "The Applicable Law: General Principles of Law- The Lex Mercatoria", in Julian Lew, Contemporary Problems in International Arbitration, op. cit. p. 113; A. Redfern, op. cit. pp. 89-92; Ole Lando, "The Lex Mercatoria in International Commercial Arbitration", 34 ICLQ, (1985), 747, pp. 747-768; and W. Lawrence Craig, William W. Park and Jan Paulson, International Commercial Arbitration, Loose Leaf, Oceana Publications, June 1984, Part VI, Chapter 35, "Lex Mercatoria", pp. 1-15. Some writers have also discussed the concept of a commercial law of nations. This is distinct from the lex mercatoria in that the first is regarded as part of public international law applicable in relations between states. (F.A. Mann, Studies in International Law, op. cit. p. 140).

59 For a review of the role of the *lex mercatoria* in international conventions and arbitral awards see generally, Goldman ,op. cit. pp. 116-122.

arbitration. Among the most significant of these institutions is the Court of Arbitration of the International Chamber of Commerce (ICC) which is a leading organization. Under the auspices of the ICC the largest number of international commercial arbitrations have been conducted.[60] The London Court of International Arbitration[61] and the American Arbitration Association[62] are also actively involved in the field of international commercial arbitration. There are also major arbitration institutions in Stockholm, the Soviet Union, Austria, Switzerland, the Federal Republic of Germany, the German Democratic Republic, Poland and India.[63]

Moreover, two sets of rules, the UNCITRAL Arbitration Rules[64] and the UNCITRAL Model Law on International Commercial Arbitration[65], both adopted by the United Nations Commission on International Trade law (UNCITRAL), are available for use in ad hoc arbitration in international commerce. These rules can easily be referred to in a contract without the need for lengthy negotiations over procedural matters. For instance, the two countries in the Iran-US Arbitration Tribunal adopted the UNCITRAL Arbitration Rules as the rules of procedure of the Tribunal.[66] The other advantage of these rules is that they are designed for world-wide use by parties from different legal, social and economic systems and provide international uniformity.[67]

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60 Hans Smit, op. cit. p. 12. It is not possible to provide a description of these institutions within the scope of this study. For a discussion of the ICC arbitration and other arbitration institutions see generally, J.G. Wetter, op. cit. Vol 2, pp. 120-230; and Ernest J. Cohn, Martin Domke, and Frederic Eisemann, Handbook of Institutional Arbitration in International Trade, North-Holland Publishing Co, Oxford, 1977.

61 See generally, Wetter, op. cit. Vol 2, pp. 131-138.

62 Ibid, generally, pp. 120-130.

63 For a description of these institutions see generally, Ernest Cohn, op. cit.

64 Adopted in 1976, 15 ILM, p. 701; also in Wetter, op. cit. Vol 4, p. 413.

65 Adopted in 1985, 24 ILM, p. 1302.

66 Article 3(2) of the Claims Settlement Declaration.

67 See generally, Pieter Sanders, "Commentary on UNCITRAL Arbitration Rules", 2 YB. Comm.Arb. (1977), p. 172; Terence W. Thompson, "The UNCITRAL Arbitration Rules", 17 Harv.I.L.J. (1976), p. 141; and Andrew Glenn Weiss, "The Status of the UNCITRAL

It is also notable the Permanent Court of Arbitration, in addition to its role as a public international arbitration institution, has formulated a set of arbitration and conciliation rules for settlement of international disputes between two parties of which only one is a State.[68] Under these Rules the International Bureau of the PCA is authorized to arrange facilities for the conduct of arbitrations which are not strictly international. Like the PCA's current activity in the field of public international arbitration, its record in the commercial field is also poor.

## IV. Forms of International Arbitration

Generally speaking, two main categories of international arbitration are identifiable: public international arbitration and international commercial arbitration. Of these two the first takes place within the domain of public international law and is properly international. International commercial arbitration, on the other hand, despite a growing degree of autonomy accorded to it under the national laws of the countries where major institutional arbitrations take place may at some stage fall within the domain of national law in two respects: the law of the country of the arbitral proceedings, as well as the country where the enforcement of the award is sought. Nevertheless, some recent developments have not only made the line dividing these two classes of arbitration rather flexible but also a degree of confusion has emerged in relation to the proper criteria of the internationality of arbitration.[69] This situation may be attributable to the following factors.

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Model Law on International Commercial Arbitration Vis-a-Vis the ICC, LCIA and UNCITRAL Arbitration Rules: Conflict or Complement?", 13 Syracuse J.I.L.C. (1986), p. 367.

68 The Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State (1962), (text of the Rules in Wetter, op. cit. Vol 5, p. 53).

69 For instance, Dr Gillis Wetter has expressed the view that public and private arbitration "form a unity, just as the past and the present are inextricably linked with one another",(Gillis Wetter, op. cit. Vol 1, p. xxiv) This statement seems to suggest the

## A. Public International Arbitration

In principle, public international arbitration involves only States as parties to the arbitration. Public international arbitration is entirely divorced from any system of municipal law. Eventhough it has to have its seat in national territory, the arbitration proceedings are outside the jurisdiction of the territorial sovereign. That is, the law governing the arbitration is international law not a national legal system.[70] It is, therefore, accepted that under such circumstances all aspects of arbitration are outside the control of any system of national law. As a consequence, arbitrators enjoy immunity from judicial process in the country of arbitral proceedings and the question of public policy, "*ordre public*", with regard to the local law is irrelevant.[71] As regards to the law applicable to the substance of the dispute the same reasoning applies. In other words, in the absence of the parties' agreement to the contrary international law is applicable.[72] However, the application of municipal law to the substance of the dispute is not entirely unprecedented in international law. On occasion an international tribunal may be faced with the task of deciding issues on the basis of the municipal law of a particular State. For instance, in the Serbian Loans Issued in France Case[73] the Permanent Court of International Justice applied the Serbian law to the substance of the dispute. This is not regarded as depriving the tribunal of its international character.

Moreover, a peculiar feature of the awards rendered by public international tribunals is that they are enforceable only by the methods

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relationships between these two categories of arbitration not disregarding the different legal systems in which they operate.

It is submitted that the general criteria in identifying these two categories is the concern of both organization and jurisdiction of the arbitral tribunal. (Brownlie, op. cit. p. 710.)

70 F.A. Mann, Studies in International Law, op. cit. pp. 257-258.

71 Ibid, p. 258.

72 Ibid.

73 PCIJ Rep., series A, No. 20/21 Judgement NO 14, July 12, 1929, reproduced in Hudson 2 World Court Reports, pp. 370-374.

available under international law. Therefore, unlike national (international commercial) arbitral awards, the possibility of their enforcement by national courts is at best remote and at worst non-existent.[74] In other words, the strongest assumption is that the existing international arrangements for the recognition and enforcement of arbitral awards, e.g. the above-mentioned UN (New York) Convention of 1958, cover only awards rendered in an arbitral process governed by national arbitral procedure laws[75] and do not extend to public international, a-national, awards. For instance, counterclaim awards rendered by the Iran-US Claims Tribunal in favour of Iran against private US claimants are facing a problem of enforcement even in United states courts which is a party to the compromis and arbitration.[76]

Even the most recent positive development regarding the recognition by the court of a third country of a public international award, Dallal v. Bank Mellat[77], can at most be interpreted as being based on the grounds of international comity rather than strict legal principles.[78] Thus, in the absence of an agreement between the arbitrating States and the third State, the power of the arbitrating States to enforce the award does not extend beyond their own courts.[79]

In some instances, however, the existence of certain elements in a public international arbitration makes a clear-cut identification of the

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74 F.A. Mann, Studies in International Law, op. cit. pp. 258-259.

75 See Article I(1) of the New York Convention which applies to the recognition and enforcement of awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". See also Albert J. Van Den Berg, The New York Convention of 1958 : Towards a Uniform Judicial Interpretation, London, Kluwer Law & Taxation, 1981, pp. 28-40.

76 For a commentary on this see generally, Robert P. Lewis, "What Goes Around Comes Around : Can Iran Enforce Awards of the Iran-United States Claims Tribunal in the United States?", 26 Col.J.T.L. (1988), p. 515.

77 [1986] 2 W.L.R. 745.

78 Ibid, 761.

79 For an analysis of the implications of the Dallal Case see, Hazel Fox, "States and Undertaking to Arbitrate", 37 ICLQ, (1988), 1, pp. 24-29.

arbitration's character rather difficult. The appearance of nationals of States to present their claims before public international arbitral tribunals in certain areas such as diplomatic protection of nationals is not unprecedented. This is, however, believed to be a procedural capacity for the individual concerned and does not render him as party to the arbitration.[80] Nevertheless, with the recent developments the situation has become rather complicated. For instance, the Convention on the Settlement of Investment Disputes Between States and Nationals of other States[81] provides for the arbitration between a State party to the Convention and a National of another contracting State arising directly out of an investment.[82] The overwhelming public international features of the ICSID arbitration, such as the treaty under which it is established and the recognition of its full international personality under the treaty[83], is beyond any doubt. However, the presence of "nationals" in the ICSID arbitration can hardly be regarded as merely a procedural matter.

In a more recent public international arbitration, the Iran-United States Claims Tribunal, the nature of participation of "nationals" in the proceedings is equally complicated. Surprisingly, despite the fact that the Tribunal is a creation of an international treaty concluded between the two States, most of the American claims are submitted by "nationals" of the United States. In fact, Chamber Two of the Tribunal hinted in a case that its role and character was quite different from that of the traditional public international law tribunals:

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80 Brownlie, op. cit. p. 578.

81 ICSID Convention, held at Washington, March 18, 1965, 575 U.N.T.S. p. 160, No 8359.

82 Ibid, Article 25(1). For a description of the ICSID arbitration see .Wetter, op. cit. Vol 2, pp. 139-144; also Aron Broches, "The International Centre for the Settlement of Investment Disputes", in Ernest J. Cohn, Martin Domke, and Frederic Eisemann, "Handbook of Institutional Arbitration...", op. cit. pp. 1-16.

83 See Articles 18, 19-24 of the ICSID Convention. Also note the provisions for the application of international law to the substance of the dispute under Article 42(1) of the Convention.

> ... 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,...[84]

Whether it is possible to combine a hybrid function, as Chamber Two of the Tribunal has suggested, is difficult to absorb and its details are beyond the scope of this study. On the other hand, the participation of "nationals" alone in the framework of a public international arbitration, such as the ICSID arbitration and the Iran-US Claims Tribunal is unlikely to undermine the overwhelming public international character of the arbitration. Indeed, the public international character of the ICSID arbitration is generally accepted by different schools of thought[85] and this can be assumed to be the case with the Iran-US Claims Tribunal.[86]

### B. International Commercial Arbitration

The term "international commercial arbitration" does not necessarily signify the same concept of internationality as in public international arbitration. It has no sharply defined context, and in the broadest of terms it is described as "all private adjudication of commercial disputes with international aspects".[87]: or similarly, "arbitration is international if it implicates

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84 Esphahanian v bank Tejarat, Case No. 157, 2 Iran-USCTR, 157, p. 165.

For a discussion of the character of the Tribunal see generally; David Lloyd Jones, "The Iran-United States Claims Tribunal : Private Rights and State Responsibility", 24(2) Virg.J.I.L. (1984), 259; and William T. Lake & Jane Tucker Dana, "Judicial Review of Awards of the Iran-United States Claims Tribunal : Are the Tribunal's Awards Dutch", 16 L.P.I.B. (1984), 755.

85 Julian Lew, "Applicable law...", op. cit. pp. 20-21; F.A. Mann, Studies in International Law, op. cit. p. 300.

86 E.g. in Dallal v Bank Mellat the public international character of the Iran-US Tribunal awards was clearly recognized by the Court. [1986] 2 W.L.R. 745, 761.

87 Hans Smit, op. cit. p. 9.

international commercial interests".[88] In a more elaborate characterization it is said that:

> by virtue of the structure and procedure chosen, the arbitration may have no real connection with any national jurisdiction. Or simply, by virtue of a diversity of facts, the arbitration may have important and substantial connections with several States but no preponderant connection with any one State.[89]

The main ambiguity associated with the above descriptions of international commercial arbitration is that they do not address the issue of the law governing the arbitration process. This ambiguity occurs because of some major developments in the field of international commercial arbitration in connection with the notion of delocalized arbitration. That is, some writers seem to rely on the *lex mercatoria* as a uniform system of law and as a premise for the notion of stateless or denationalized arbitration.[90]

On the basis of this theory it is argued that the arbitration of international commercial disputes which takes place in a neutral country has no real allegiance to any country and therefore is not bound by public policy of any one country.[91] The underlying question, however, remains whether these developments have been able to accord the institution a separate legal identity[92] from the legal system which should in principle govern the arbitration process.

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88 Article 1492 of the Amended French Code of Civil Procedure, The French International Arbitration Provisions of the Decree Amending the Code of Civil Procedure, 1981, 20 ILM, p. 917.

89 Julian Lew, Applicable Law..., op. cit. p. 14. See also Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration for a similar description. For a discussion on this, see Alan Redfern and Martin Hunter, op. cit. pp. 9-16.

90 Goldman, op. cit. p. 125; W. Lawrence Craig, op. cit. p. 2; Ole Lando, op. cit. pp. 762-768; and Pieter Sanders, Trends in International Commercial Arbitration, op. cit. pp. 255-256.

91 Ole Lando, op. cit. p. 762.

92 E.g. Dr. F.A. Mann is of the view that "no such body of law exists". (Mann, "Private Arbitration and Public Policy", 4 C.J.Q. (July 1985), 257, p. 264.)

The fact is that the present-day international commercial arbitration, in many respects enjoys a large degree of autonomy and independence from the control of national law. The laws of many countries in which major arbitration institutions are situated have recently amended their relevant regulations to allow more autonomy and freedom for international commercial arbitration. The 1979 United Kingdom arbitration Act[93], for instance, abolishes the special case procedure and replaces it by a limited right of appeal to the High Court on a question of law, provided that all the parties agree to the reference or, if appeal is made by one party only, with the leave of the Court.[94] The other major feature of the Act is the option given to the parties to contract out the new judicial review system by means of "exclusion agreements", subject to certain restrictions and exceptions regarding domestic transactions and "special categories" of international transactions.[95]

The French International Arbitration Provisions of the 1981 Decree Amending the Code of Civil Procedure[96] provides a wider base for recognition of international commercial arbitral awards. The only exception to that recognition can be made in cases of "manifest violation of international public policy"[97] The grounds for challenge of international commercial arbitral awards made in France are also restricted considerably to five fundamental points under the Amendment to the Code.[98]

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93 18 ILM, (1979), p. 1248.

94 Ibid, Section 1.

95 Ibid, Sections 3 and 4.

96 20 ILM, (1981), p. 917.

97 Ibid, Article 1498.

98 Ibid, Article 1502. Also note that under Article 1504 of the Code domestic arbitral awards can be challenged on the same grounds as Article 1502.

The 1985 Belgian Statute on Setting Aside of Arbitral Awards[99] precludes challenge before Belgian courts of arbitral awards rendered in Belgium in cases where none of the parties is a Belgian national or resident.[100]

The 1986 Netherlands New Statute on Arbitration[101] follows the same pattern of modernization and grants more freedom for arbitrations taking place in the Netherlands. Although, unlike the three above-mentioned Statutes, it does not technically distinguish between domestic and international arbitration, the Dutch Statute has considerably departed from the restrictions under its previous law. Under the new Statute the award can be set aside only for a limited number of exceptional grounds.[102]

In the most recent development of this kind the Swiss Statute of 1987 on International Arbitration[103] follows the general trend in granting large freedom of choice to the parties.[104] The Statute reduces to a minimum the intervention by the Swiss courts in the process of arbitration.[105] A similar pattern of trend in according more flexibility and freedom to international commercial arbitration has been followed in the 1986 Florida International Commercial Arbitration Act.[106], the 1986 Canadian Statute on International Commercial Arbitration[107] and the 1983 Lebanese International Arbitration Provisions of the Code of Civil Procedure.[108]

It has to be noted, however, that this relatively large, but not absolute, degree of freedom has been granted upon international commercial arbitration

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99 24 ILM, (1985), p. 725.

100 Ibid, Article 1.

101 26 ILM, (1987), p. 921.

102 Ibid, Article 1065.

103 27 ILM, (1988), p. 37.

104 See Introductory Note to the Swiss Statute on International Commercial Arbitration, Ibid, p. 39

105 Ibid, p. 40.

106 26 ILM, (1987), p. 949.

107 Ibid, p. 714. See also the Introductory Note to the Statute, Ibid, pp. 714-717.

108 27 ILM, (1988), p. 1022. See also the Introductory Note , Ibid, pp. 1022- 1027.

by the national legal system. Thus, the existence of this freedom is dependent upon national law and is relative in scope and application according to where and when this freedom has been granted. None of these national legal systems- possibly with the exception of the Belgian Statute- has abandoned the right of judicial review of international commercial arbitral awards in absolute terms. They have only restricted the scope of this review. Therefore, the essential nexuses between international commercial arbitration and the national legal system, namely the relationships between arbitration and the laws of the country where the award is made and of the country where recognition and enforcement is sought, remain intact. Indeed, the 1981 French Decree on International Commercial Arbitration by granting to French courts a power of review of all awards rendered in France, though on limited grounds, was enacted in reversal of the earlier trends towards the absolute delocalization of arbitration. It is notable that the above-mentioned Law clearly overrides the 1980 Paris Court of Appeals' refusal in the Gottaverken Case[109] to declare jurisdiction to set aside an award rendered in France on the ground of the lack of attachment to the French legal order. Moreover, the French courts in principle, though on few occasions, have asserted the right of judicial review of international commercial arbitral awards.[110]

It is also notable that the UNCITRAL Model Law on International Commercial Arbitration, unlike the earlier silence under the UNCITRAL Arbitration Rules, clearly acknowledges the role of national courts in relation to the granting of assistance to international commercial arbitration[111], and in

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109 20 ILM, (1981), p. 883; see also the NORSOLOR Case, 20 ILM, (1981), p. 887.

110 E.g., Arab Republic of Egypt v SPP, Paris Court of Appeal, 23 ILM, (1984), p. 1048. The Court in this Case ruled to set aside the ICC Arbitral Award (SPP v Egypt, 22 ILM, p. 752) rendered against Egypt.

111 See Article 6 of the UNCITRAL Model Law in conjunction with Articles 11(3), 11(4), 13(3), 14, and 16(3) of the same Rules.

relation to the judicial review[112], recognition, and enforcement of such awards.[113]

Another feature of international commercial arbitration is the growing participation of States and State enterprises in this field. An important aspect of this category of arbitration is the development of recent theoretical and practical trends to detach arbitration from the municipal legal system and to delocalize, denationalize, or supranationalize it. The same trends have also been developed in relation to arbitration between two private parties which implicates international commercial interests.

The question is associated with a high degree of controversy. Theoretically, the notion of delocalization relies on the party autonomy to detach arbitration from every municipal system of law.[114] In addition, it is argued that the arbitration detached from the municipal legal system can either be submitted to public international law or to a new system of law which is generally referred to as general principles of law or the *lex mercatoria*.[115]

Details of the proposition developed regarding the delocalization of commercial arbitration and the availability of a new system of law regarded as the *lex mercatoria* or general principles of law which is advocated by a number of writers are beyond the scope of this study. It is useful to point out, however, that the theory of delocalization refers to "removing the functioning of the arbitral tribunal from the supervisory authority of local courts".[116] As a consequence, it is argued, that the courts at the place of arbitration have no power to make an "internationally effective declaration of the award's

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112 Ibid, Article 6 in conjunction with Article 34(2).

113 Ibid, Articles 35 and 36.

114 Ole Lando, op. cit. pp. 762-768; Goldman, op. cit. pp. 123-125; and Jan Paulson, "The Extent of Independence of International Arbitration from the law of the Situs", in Julian Lew, Contemporary Problems..., op. cit. pp. 141-148.

115 Ibid.

116 Jan Paulson, "The Extent of Independence..", op. cit. p. 141.

nullity".[117] The theory assumes that there exists an autonomous system of law, the *lex mercatoria*, or international business law with mandatory international public policy rules which can govern all aspects of the arbitration.[118] The proponents of the notion claim that the evidence of the existence of such a legal system can be found in clauses in international contracts, international awards, municipal legislation, municipal case law, international conventions and rules of arbitration established by international bodies.[119]

In terms of arbitral practice, the debate over the theory of delocalization has been fuelled by a number of controversial awards. This begins with the decision in the arbitration in 1958 between Saudi Arabia and the Arabian American Oil Company (Aramco)[120], in which the Tribunal held that the arbitration was governed by international law. The Tribunal's reasoning was that because of the jurisdictional immunity of foreign States the arbitral proceedings to which a "sovereign State is a party" could not be subject to the laws of another State. The Tribunal also noted that the parties had expressly excluded that it should not be governed by the laws of Saudi Arabia. Therefore, it concluded that international law governed the arbitration.[121]

In a similar circumstance, the arbitral Tribunal in the BP v. Libya Arbitration[122] expressly rejected the Aramco doctrine. The Tribunal held that the sovereign immunity of States was not absolute and that the denationalization could deprive the arbitration of an effective enforcement mechanism existing under national law. The Tribunal's conclusion was that

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117 Ibid.

118 Ole Lando, op. cit. p. 765.

119 Goldman, op. cit. pp. 113-123; and Ole lando, op. cit. pp. 747-768. For a critical analysis of the notion of delocalization of arbitration see generally; Wetter, op. cit. Vol 2, pp. 403-411; and F.A. Mann, Studies in International law, op. cit. pp. 260-270. See also, Alan Redfern and Martin Hunter, op. cit. pp. 55-61.

120 27 ILR., p. 117.

121 Ibid, pp. 155-156.

122 53 ILR., p. 297.

having fixed Copenhagen as its seat the procedural law of the arbitration was Danish.[123]

Nevertheless, the Aramco doctrine was later reinforced in another important arbitral award in the Texaco v. Libya Arbitration.[124] Again the Tribunal, as in the Aramco Case, relied on the sovereign immunity theory and further on the intention of the parties to remove their differences from the jurisdiction of the local courts as the basic premises of delocalization.[125]

It is also notable that in the Aminoil Arbitration[126] the Arbitration Agreement provided that "any mandatory provisions of the procedural law of the place where the arbitration is held", in this case the French legal system, was the law governing the arbitral procedure.[127] Nevertheless, the Tribunal, without rejecting the role of the French law, by referring to the liberal approach of the French law concerning the procedural law of arbitral tribunals, held that it had a transnational character.[128]

Developed in the context of the arbitration between States and aliens, the delocalization theory is now claimed to be applicable to the arbitration between two private parties in the field of international commerce.[129]

The delocalization theory is based on a desire to provide uniformity and flexibility to international commercial arbitration. However, the theory has been strongly challenged on grounds of principle and practicality. Professor Wetter points out that the delocalization theory runs the "risk of not resulting in awards recognized under the New York Convention".[130] He also rightly argues

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123 Ibid, pp. 327-329. See also, Sapphire Arbitration (Sapphire Int'l Petroleum Ltd. v National Iranian Oil Company, 13 ICLQ, (1964), p. 1011; 35 ILR, p. 136) for a similar decision.

124 53 ILR, p. 389.

125 Ibid, pp. 452-454.

126 21 ILM, (1982), p. 976.

127 Ibid, p. 999.

128 Ibid.

129 See Alan Redfern and Martin Hunter, op. cit. pp. 60-61.

130 Wetter, op. cit. Vol 2, p. 409.

that "unless an award is so attached to a specific jurisdiction, claims of nullity or challenge procedures cannot be instituted, nor is it clear by which law the liability of the arbitrators is governed".[131]

Dr. F.A. Mann believes that in both cases of arbitration - arbitration between a state and an alien and arbitration between two private parties- the arbitration is governed by national law regardless of the parties' wishes.[132] He also believes that there is no legal basis for public international law to govern these categories of arbitration and there is no independent system of law as general principles of law to be applicable to the arbitration.[133] The basis of Dr Mann's argument is that the jurisdiction of the courts of the country where arbitration takes place could not be taken away or limited by the parties or the arbitrators and the arbitral tribunal could not help being subject to the laws of that country. This, he believes, is a matter for decision by the courts of the place of arbitration.[134]

In short, the theory of delocalization represents a desire for uniformity of the international commercial arbitration practice. However, the legal basis for an absolute delocalization of arbitration in the field of international commerce involving private parties, remains unclear. Nevertheless, the notion of delocalization appears to be gaining some support as it develops. The idea of application of general principles of law to the substance of the dispute, but not as the governing law of arbitration, seems to have a wider acceptance. Yet, as the law stands now, the most acceptable method for a true internationalization of arbitration involving private parties is through international conventions such as the ICSID Convention.

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131 Ibid, pp. 409-410.

132 F.A. Mann, Studies in International law, op. cit. pp. 261-270.

133 Ibid.

134 Ibid, pp. 265-266.

# V. Essential Issues in International Arbitration

## V(1)- Terms of Reference : Basis of Jurisdiction of the Arbitral Tribunal

It must again be emphasised that it is for the parties to determine the procedure for the conduct of arbitration and the nature and scope of the dispute to be arbitrated.[135] However, in practical application of the arbitration agreement, and/or according to the circumstances of whether the arbitration agreement provides a well-detailed plan of action or fails to do so, a series of questions are likely to arise.

The first question to arise may concern the existence or non-existence of an obligation to submit to arbitration with regard to the validity of the arbitration agreement, or with regard to the scope of its application. Despite some disputes on the logic of reasoning, legally and practically it is well established that an arbitral tribunal whether public or private is empowered to decide whether the arbitration agreement is valid and in effect to rule upon the existence of the arbitration tribunal de jure.[136]

This authority is itself covered by the undisputed principle of "competence de la competence", that an arbitral tribunal is competent to decide questions of its own jurisdiction. For instance, Article 73 of the Hague Convention of 1907 provides that "the tribunal is authorized to declare its competence in interpreting the compromis..." Article 36(6) of the Statute of the International Court of Justice in affirming that principle reads ; "in the event of

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135 Merrills, International Dispute Settlement, 1984, London, Sweet & Maxwell, p. 76. See also Kenneth Carlston, The Process of International Arbitration, 1949, reprinted 1972, Greenwoods Press, Westport, pp. 62-64.

136 This question has been discussed mainly in regard to the compromissory arbitral clause in respect of both the validity of the agreement and practical problems concerning the refusal by a party to cooperate on such occasions. In the case of arbitration based on compromis the question may be less complicated, but it still theoretically exists. In this respect H. Mangoldt points out that a unilateral application by one party entails "the obligation of the other party to cooperate in the constitution of the tribunal" but "the definitive constitution of the tribunal depends upon its own decision on any objections the respondent might raise with regard to the existence of an undertaking to arbitrate". (Mangoldt, op. cit. p. 498) A similar principle has been accepted in international commercial arbitration. See for instance, Article 21(1) of the UNCITRAL Arbitration Rules.

a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court". Also in the Nottebohm Case the International Court of Justice pointed out that;

> Since the Alabama Case, it has been generally recognized, following the earlier precedents, that in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.[137]

The principle "competence de la competence" may raise the question of an award rendered in excess of jurisdiction and award based on an invalid compromis. In public international law there is no solution for such questions unless the arbitrating parties prior to or after the announcement of the award agree to submit the validity of the arbitral award to the judgement of the International Court of Justice or another international body.[138]

In the case of international commercial arbitration the question follows a different path. In national courts the validity of the award can be checked on the ground that it is based on an invalid compromis or it has been rendered in excess of jurisdiction.[139]

Objection to the jurisdiction of the tribunal should be made in a timely manner; otherwise the arbitrating parties' conduct may constitute a tacit conferral of jurisdiction to decide a question not included in the compromis.[140] For instance, in the Case of the Arbitral Award rendered by the King of Spain, the International Court of Justice held that it was no longer open to Nicaragua which by express declaration and express conduct had recognized the award as valid to challenge its validity.[141]

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137 ICJ Reports, 1953, 110, p. 119.

138 E.g. in the Arbitral Award Made by the King of Spain on December 23, 1906 Case the ICJ was asked to decide on the validity of the Award. (ICJ Reports, 1960, p. 192.)

139 Ibid, pp. 5, 11-12.

140 See generally Carlston, op. cit. pp. 169-173.

141 ICJ Reports, 1960, 192, p. 213.

A similar principle is applicable in international commercial arbitration. For instance, Article 21(3) of the UNCITRAL Arbitration Rules provides that "a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to counter-claim".

**V(2)- Composition of the Arbitral Tribunal**

The composition of the arbitral tribunal regarding the parties' choice of arbitrators and the system by which they are selected is an essential question. Historically, arbitration has been entrusted to the head of a third state, or the Pope was called upon to act as a single arbitrator.[142] In recent times, as international arbitration has developed, the role of arbitrator has required more legal-technical expertise. Therefore in cases where the parties have preferred to select a single arbitrator, they have appointed an eminent judge or international lawyer.[143] The other method has been the reference of the dispute or disputes to a mixed commission composed of equal numbers of nationals of the parties, with further reference to a disinterested third member in the event of disagreement.[144] The most common method in present-day arbitrations is the reference of dispute to a tribunal composed of an uneven number of persons, generally three or five, which decides disputes by a majority vote.[145] The common method of selection in the latter category is that each party appoints one or two arbitrators, depending upon the whole number of arbitrators required or the provisions of the compromis, and the other or others are

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142 See, L. Sohn, op. cit. p. 60.

143 Ibid, p. 61. See also for instance, the Tinoco Arbitration of 1923 (1 R.I.A.A. p. 369) and the Island of Palmas Case of 1928 (2 R.I.A.A. p. 829).

144 For details see, Mangoldt, op. cit. pp. 524-526, and Merrills, op. cit. p. 71.

145 Ibid.

appointed by joint agreement of the parties or the party appointed arbitrators.[146]

For instance, the Alabama Claims Arbitration consisted of "five members each to be appointed by a head of state : one each by those of Brazil, Italy, and Switzerland, and one each by the heads of state of the two parties".[147] Another example is to be found in Article 24 of the Hague Convention of 1899, which provides that "each party appoints two arbitrators and these together choose an umpire".[148]

With regard to the composition of the arbitral tribunal the compromis may require certain qualifications as regards the nationality and personal qualifications of the arbitrators.[149] A question of particular importance is the possibility of the challenge of an arbitrator and the award on the basis of the lack of qualifications required in the compromis or generally the lack of impartiality. It is accepted that the lack of qualifications required is a ground for the challenge of an arbitrator.[150] The lack of impartiality such as corruption on the part of an arbitrator is also a ground for the challenge of arbitrator and

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146 The agreement may simply define the composition of the tribunal and leave the identity of the members to be settled later (e.g. Article 3(1) of the Claims Settlement Declaration between Iran and the United States); or it may name the members in the compromis. (e.g. the Arbitration Agreement between Egypt and Israel, Supra no 32).

147 Schwarzenberger, op. cit. Vol 4, pp. 56-, 74-75.

148 For a review of relevant instruments in respect of the composition of arbitral tribunals see generally, L. Sohn, op. cit. pp. 61-81.

149 E.g. Article 45 of the Hague Convention of 1907 restricts the parties' choice of national arbitrators to only one. The same Convention requires that arbitrators should have known competency in questions of international law, and be of high moral reputation. (Article 44) On this question in international commercial arbitration see A. Redfern, op. cit. pp. 165-174.

150 E.g. Article 6 of the Model Rules of the International Law Commission on Arbitral Procedure provides certain provisions in this respect. See also Article 10(1) of the UNCITRAL Arbitration Rules concerning the challenge of arbitrator on the basis of lack of impartiality and independence.

the validity of the award.[151] However, the question of the personal liability of an arbitrator on those grounds has received less attention and is less clear.[152]

With regard to the composition of the arbitral tribunal the following points are important :

**a-** In an arbitral tribunal which is composed of national and neutral arbitrators, due to the fact that the national arbitrators have certain affinity with the view of "his" party, the result of the arbitration is in effect determined by neutral arbitrator or neutral arbitrators. This structure of decision-making may effect strict adherence of the neutral arbitrator to law and render him as a mediator between the views of national arbitrators.[153]

Another important point is the cultural-legal background of the neutral arbitrators. That is to say, many issues in present-day international law are subject to doctrinal disputes which are in many respects attributable to the differing social-cultural backgrounds in which they have developed. Consequently, the position that a neutral arbitrator may take in such areas of law will essentially be based on his own background. This may become more important when the social-cultural backgrounds of the neutral arbitrator coincides with either of the national arbitrators, and effects the position taken by the tribunal.[154]

**b-** For obvious reasons a party to arbitration may refuse to cooperate in the appointment of the national or neutral arbitrators, or the party appointed arbitrator may at the instruction of his party or for any other reason withdraw from the proceedings. To prevent frustration of the arbitration, the notion of the

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151 E.g. Article 35(b) of the Model Rules of the ILC on Arbitral Procedure.

152 In international commercial arbitration the question of personal liability of the arbitrator as regards his lack of due care has been discussed. The conclusion is generally in favour of immunity from personal liability. (A. Redfern, op. cit. pp. 205-206.)

153 Mangoldt, op. cit. p. 528, and generally, pp. 528-532.

154 This is in practice an important issue and in fact the essence and great advantage of arbitration is that arbitrators can be selected from different environments and backgrounds. (H. Smit, op. cit. p. 10.)

third party appointment of the neutral or national arbitrators has been developed and well established, which is of course subject to the prior consent of the parties. Present-day arbitration agreements and treaties almost all provide provisions for such occasions.[155]

The provision of the third party appointment of the arbitrators may concern the appointment of the neutral arbitrator or the party appointed arbitrator as well. Practical necessity demands that it should cover both of the questions.

Examples of the third party appointment of the arbitrators may be found in many instruments ; for instance, Article 3(2) of the Model Rules of the ILC on Arbitral Procedure provides that in the event of the tribunal not being constituted within a certain period, "the President of the International Court of Justice shall, at the request of either party, appoint the arbitrators not yet appointed".[156] It is noteworthy that in almost all institutional commercial arbitrations the rules of procedure of the institution concerned provide for an automatic action for the appointment of the arbitrators in case the parties fail to do so. It is also accepted that in ad hoc international commercial arbitrations the national court concerned has the authority to appoint the arbitrator in case of failure by a party to do so.[157]

**c-** A question exists with regard to the authority of an international tribunal to retain power to proceed and to render a binding award from which a nationally or otherwise appointed arbitrator has withdrawn or abstained from participation in the tribunal's proceedings.

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155 For a review of these instruments see L. Sohn, op. cit. pp. 62-81.

156 See also Article 6(2) of the UNCITRAL Arbitration Rules, and Article 21 of the European Convention on the Peaceful Settlement of Disputes.

157 A. Redfern, op. cit. pp. 162-163, 166.

## V(3)- Rules of Procedure

**a-** Another important subject upon which the successful conduct of an arbitration will often depend is the question of procedural rules, both as regards its function in general, its adequacy for the specific type of the arbitration chosen, and its capability in providing the fundamental procedural rights necessary for a just and judicial system of dispute settlement.

The need for a system of procedural rules for a successful conduct of arbitration is obvious. What is expected of their function, in short, is to facilitate a prompt and at the same time a just disposition of the claims to be arbitrated.[158] In the first instance, it is for the parties to define the rules of procedure in detail or incorporate a system of model rules in the compromis.[159] However, the factors affecting the conduct of arbitration are very variable, and unless careful attention has been given to the procedural rules a successful outcome may not be possible.

**b-** As international arbitrations take place in many different types and for different purposes, an important point with regard to the procedural rules is whether they are suitable for the function of the particular arbitration chosen. Some factors are important in this respect:

In international arbitration the parties are usually of different legal-cultural background. It is important for the procedural rules to recognize these differences and to direct the arbitration along the commonly understandable channels. It is also important for the procedural rules to provide an adequate mechanism with regard to the differences in language and similar issues.[160]

The procedural rules should take account of the special characteristics of the arbitral tribunal as to whether it is a multi-case arbitration or is only to

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158 Carlston, op. cit. p. 3 and generally pp. 3-35. See also A. Redfern, op. cit. pp. 223-231.

159 In international commercial arbitration the freedom of the parties with regard to procedural rules may be restricted by the mandatory rules and public policy requirements of the law of the place of arbitration. (A. Redfern, op. cit. p. 223.)

160 Carlston, op. cit. pp. 4-7.

decide a single case ; whether the arbitration has a public international or commercial nature.[161] The flexibility and possibility of modification of the rules; their precision on questions to be decided, the scope of the pleadings, the time and manner of introduction of evidence - all these are among the necessary points which need to be foreseen in the rules of procedure.[162]

It is equally important for the procedural rules to safeguard certain fundamental procedural rights, such as the right to be heard, the right to obtain a reasoned award by the arbitral tribunal, etc.[163]

**V(4)- Basis of Decision : Applicable Substantive Law**

In referring to the question of applicable law a distinction should be made between the law governing the arbitration proceedings and the law applicable to the merits of the dispute. The distinction, however, in public international arbitration is less important where the whole process of arbitration is governed by international law.

An important issue is to define as much as possible the arbitral tribunal's function with regard to the applicable law in order to prevent unpredictable decisions. In reality, however, the arbitration agreements either make no provision in respect of the applicable law or they make general references such as "the tribunal will decide on the basis of international law".[164] In public international arbitrations both of the above situations may lead to a similar result, i.e. that the tribunal as an "international body will have

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161 Ibid, generally, pp. 7-21.

162 Ibid, generally, pp. 29-35.

163 Ibid, generally, pp. 36-61. It is noteworthy that a material departure from established procedural rules by the arbitral tribunal may render the award as null and void. (Ibid, p. 38) On this question in international commercial arbitration see A. Redfern, op. cit. pp. 330-331.

164 See Mangoldt, op. cit. pp. 533-536.

to base its decisions on international law, as the law governing the legal relationship between the parties".[165]

Another issue with regard to the applicable law is arbitration "ex aequo et bono" generally and in relation to an arbitration which is acting on the basis of respect for law. In the circumstances where the tribunal is to decide on the basis of respect for law the question exists, whether it should decide cases submitted to it on the "basis of strict law, or ex aequo et bono, mitigating its decisions by the application of equity and justice".[166] It is accepted that an arbitral tribunal is authorised to decide in accordance with equity, ex aequo et bono, when international law does not contain an answer to the problem, and the dispute is of non-legal nature.[167]

On the other hand, states may, regardless of the nature of a dispute and the state of law, agree that the dispute should be decided ex aequo et bono. The most obvious example of this authority is provided in Article 38(2) of the Statute of the International Court of Justice. However, what is certain is that the decision of ex aequo ex bono has an exceptional or supplementary role to that of a decision on the basis of law. That is, unless the parties have expressly agreed, or the dispute is of a non-legal nature, the arbitration tribunal should decide the case according to law.[168]

Some final points should be made with regard to the effect of the arbitral award in international arbitration. The question of the legal status of the award depends on both general international law and the terms of the

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165 Ibid, p. 533. See also Merrills, op. cit. pp. 78-82.

166 L. Sohn, op. cit. p. 41.

167 For details and the review of the law and practice on the issue see generally, Ibid, pp. 41-59. Note also Article 26 of the European Convention on the Peaceful Settlement of Disputes of 1957 concerning disputes of non-legal nature.

168 It must be noted that some writers have recognized a degree of distinction between decisions in which equity has been used as a general principle of law (embodied in Article 38(1)(c) of the Statute of the ICJ) and decisions in ex aequo et bono as a friendly and conciliatory form of arbitration (embodied in Article 38(2) of the Statute of the ICJ). (See Brownlie, op. cit. pp. 27-29.)

arbitration agreement. The first point is that by signing the arbitration agreement and participating in the proceedings, the parties are under an obligation to execute the award.[169] However, the award rendered by an international arbitral tribunal need not necessarily be final for two reasons ; 1- The arbitration agreement itself provides certain appeal mechanisms from the award.[170] 2- Under international law on certain occasions such as the existence of essential constitutive, or procedural and jurisdictional errors, the award may be regarded as null and void. Therefore it is possible for a party to claim the doctrine of nullity and refuse to execute the award.[171] Moreover, at certain stages such as the clarification of the award, the arbitral tribunal has an inherent power to correct it.[172]

## Conclusion

As this study has merely touched upon some selected topics of international arbitration in general terms, a straightforward conclusion is not feasible. What can be said however, is that international commercial arbitration is growingly becoming a widely popular method of dispute settlement and is developing in scope. There are some signs that public international arbitration has regained some degree of favour recently. Nevertheless, the earlier utopian expectations placed upon public international arbitration as a substitute to war have not materialized and can hardly be expected to do so in the foreseeable future. The current detente in international relations, however, offers a good deal of chance for the development of the judicial methods of international dispute settlement, including arbitration.

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169 Carlston, op. cit. p. 205. Also Merrills, op. cit. p. 83.

170 Ibid.

171 Ibid, see also Carlston, op. cit. generally, pp. 185-204.

172 Ibid, p. 224.

Public international arbitration on the one hand and international commercial arbitration on the other remain two distinct systems of arbitration operating within two distinct legal systems. Nevertheless, with the recent developments the line dividing these two systems of arbitration are becoming more flexible. A possible option for a true internationalization of arbitration in the field of international commerce and for its unification is the adoption of an international convention similar to the ICSID Convention but much broader in scope and application. This would not only offer a possibility for the uniformity of international commercial arbitral practice but would also accord it with adequate mechanisms for the recognition and enforcement of awards in the courts of the contracting States. Whether there is enough political desire on the part of States to submit to such a mechanism is another matter.

# CHAPTER THREE

# ORGANIZATIONAL AND ADMINISTRATIVE ASPECTS OF ARBITRATION IN THE IRAN-UNITED STATES CLAIMS TRIBUNAL

## Introduction

Most often, the smooth running of international arbitration depends on a number of "behind the scenes" organizational and administrative factors. The effective utilization of these factors can contribute to the efficacy, cost-effectiveness, expediency and ultimately the judicial effectiveness of the arbitral process. In arbitrations conducted under the auspices of one of the major arbitration institutions these facilities are provided by the institute concerned.[1] In ad hoc, single-case arbitrations, not conducted by one of the arbitration institutions, organizational and administrative matters may not be the primary problem. However, there may be a need for a secretary or registrar to arrange for meetings, exchange of documents submitted by the parties, and hearings, and to keep minutes and attend to other relevant matters.[2]

In circumstances such as the Iran-United States Claims Tribunal, organizational and administrative tasks are very much greater, in view of the huge number of claims submitted. In this Chapter we will discuss briefly the

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1 For a review of organizational and administrative aspects of major international commercial arbitration institutions see generally, J. Gillis Wetter, International Arbitral Process..., op. cit. Vol 2, pp. 120-254.

2 See generally, A. Redfern and Martin Hunter, Int'l Commercial Arbitration, op. cit. pp. 181-196; J.L. Simpson and H. Fox, International Arbitration, Stevens & Sons Ltd., London, 1959, pp. 289-294. For a review of administrative and organizational issues in the ICJ see generally, Shabtai Rosenne, The Law and Practice of the International Court of Justice, Sijthoff, Leyden, 1965, Vol 1, Chapters VI, and VII, pp. 221-263.

matters pertaining to the administration and organization of arbitration in the Iran-United States Claims Tribunal.

## I. Place of Arbitration

Article VI(1) of the Claims Settlement Declaration provided that "the seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States". In accordance with Article VI(1), the Tribunal was established in The Hague and will probably continue to work there until the end of its mission.

The members initially appointed by Iran and the United States met for the first time at the Peace Palace on 18 May 1981.[3] After the selection of three neutral members, the Tribunal's first meeting was held in the Small Court Room at the Peace Palace on 1 July 1981.[4] The Tribunal held a number of meetings on preliminary organizational matters in the Bol Zaal of the Peace Palace, which served as the centre of its activities until 15 March 1982. During this period Mr Varekamp, Secretary-General of the Permanent Court of Arbitration, acted as Secretary-General and Registrar of the Tribunal. Since 15 March 1982 the Tribunal has worked in its present offices.[5]

Geographically, The Hague has offered a place between Iran and the United States acceptable to the Parties. Moreover, the traditional situation of

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3 Annual Report Period Ending 30 June 1983, (AR 81/83), p. 2.

The administrative and organizational aspects of the Tribunal's work have been generally detailed in the Annual Reports published by the Secretary-General since 1983.

On administrative and organizational aspects of the Tribunal's work see also, Jamison M. Selby and David P. Stewart, "Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal", 18 Int'l Lawyer, (1984), 211, pp. 212-216; Gunnar Lagergren, "Iran-United States Claims Tribunal", in A. Bos and H. Siblesz, (eds.), Realism in Law Making, Essays on International Law in Honour of Willem Riphagen, 1986, Martinus Nijhoff Publishers, Dordrecht, 113, pp. 121-123; and Willem A. Hamel and others (a joint contribution), "The Iran-United States Claims Tribunal", 1 Hague Y.B.I.L. (1988), 358, pp. 362-370.

4 AR 81/83, p. 3.

5 Ibid. The Tribunal's present offices are at Parkweg 13, 2585 JH, The Hague.

major international judicial organizations such as the PCA and the ICJ in The Hague makes it an ideal place for international arbitration in view of both the host country's supportive services needed for organizing the arbitration, and the research facilities available, especially at the library of the Peace Palace to which the Tribunal members have had access.

Indeed, the Dutch Government has extended considerable assistance in facilitating the work of the Tribunal. For instance, the character and scope of the Tribunal's work required the rental of separate premises, the recruitment of personnel and the purchase and hire of equipment. These activities would be expected to involve the Tribunal in a variety of legal transactions and commitments. Therefore, all these matters required the clarification of the legal personality of the Tribunal and its immunities and privileges. In principle, all these would normally require one or more inter-governmental agreements to be concluded. Apparently such agreements have not been concluded so far. However, the Dutch Government has itself recognized the legal personality of the Tribunal and granted fiscal privileges and immunities to the Tribunal, its members and its staff.[6]

Four principal statements have been made on these issues by the Dutch Government, in which it has recognized the legal personality of the Tribunal as established under international law.[7] Accordingly, it was accepted that the Tribunal would have the legal capacity accorded to legal persons under the Netherlands law and in particular, that it shall have the capacity to contract for, to acquire and to dispose of movable and immovable property and to be a party to legal proceedings.[8]

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6 AR 81/83, p. 9. See also: (a)- Statement on Legal Personality of the Tribunal; (b)- Statement on Fiscal Privileges of the Tribunal, its Members and its Staff; (c)- Statement on Fiscal Privileges of Staff Members who are Netherlends nationals; and (d)- the Statement on the Tribunal's Immunity. (Ibid, respectively Annexes VI,VII, VIII and IX).

7 Letter of 28 January 1982 from the Ministry of Foreign Affairs of the Netherlands, Ibid, Annex VI, pp. 1-2.

8 Ibid, p. 1.

A statement on the Tribunal's immunity issued by the Ministry of Foreign Affairs of the Netherlands also confirmed that the Tribunal enjoyed certain immunities in the Netherlands. The statement accepted that the Tribunal, within the scope of the performance of its tasks, shall enjoy in the Netherlands immunity from jurisdiction. These immunities exempted the Tribunal from (a)- requisition or attachment of its property and assets; and (b)- administrative or judicial constraints.[9] It is notable that these provisions were first intended to be included in a proposed Host State Agreement, and although it failed to conclude such Agreement, the Dutch Government accepted that the provisions were based on established international usage.[10] In fact, the Dutch Government pointed out that "the rule that the Tribunal in its capacity as a body established under public international law enjoys certain immunities and privileges in the country where it has its seat is, in general terms, derived directly from the generally accepted principles of international law.[11]

Furthermore, fiscal privileges were granted to the Tribunal, its Members, and its staff. It was pointed out, for instance, that the Members of the Tribunal, the Secretary-General and the Registrars would enjoy all fiscal privileges accorded to diplomatic agents of comparable ranks assigned to the Kingdom of the Netherlands.[12]

Indeed, the assistance given by the Government of the Netherlands has been very significant. For instance, recently the Netherlands Government in a change of its earlier position on the matter, decided to place the Parkweg Premises at the Tribunal's disposal rent free with effect from 1 January 1989, on condition that the Tribunal accepted the obligation to shoulder the entire

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9 Letter of 2 Feb. 1983 from the Ministry of Foreign Affairs of the Netherlands, Ibid, Annex IX, pp. 1-2.

10 Ibid, p. 2.

11 Ibid.

12 Ibid, Annex VII, p. 5, and generally, pp. 1-7.

upkeep of the building and its furnishings.[13] It is understood that the Tribunal was paying around $200,000 annually for the rent of its premises.[14] Therefore this grant of facility can help alleviate some of the financial problems the Tribunal is facing.

In general, the selection of The Hague as the place of arbitration between Iran and the United States has been significant for the expedition of the work of the Tribunal. By way of tradition as well, The Hague has offered a neutral place for many international judicial organizations, which is very important for the conduct of international arbitration. However, through the introduction of the Proposed Bill on the Applicability of Dutch Law to the Awards of the Iran-United States Claims Tribunal[15], this tradition of neutrality of the host country has been somewhat damaged in general, and in particular because of its apparent prejudice against Iran.[16]

## II. Secretariat of The Tribunal

Due to the enormity of its task, the Tribunal has employed a large number of staff. During the past years the staff of the Tribunal has generally numbered over seventy, from some 13 nationalities. They are generally divided among five departments or divisions: Registry, Legal Services, Language Services, Administration and General Services. They are directly managed by the Secretary-General, Mr Christopher Pinto of Sri Lanka, under the general supervision of the President of the Tribunal.[17]

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13 AR 87/88, p. 46. See also Letter from the Ministry of Foreign Affairs of the Netherlands dated 10 August 1988, Ibid, p. 163.

14 See, for instance, Summary of Statements of Account- Financial Year 1987-1988, Ibid, p. 171.

15 On this see Infra Chapter Six, p. 344.

16 For details of this argument see Ibid, pp. 344-348.

17 See generally AR 81/83, pp. 11-36; and AR 1987/88, pp. 22-50. See also organizational chart of the Tribunal, Ibid, Annex XIV, p. 87.

## II(1). The Registry

The registry is responsible for receiving, serving and distributing all Tribunal documentation as well as for maintaining the Tribunal's case file, and accordingly, its functions are of central importance to the Tribunal's work. The Registry has usually employed about five staff. The main aspects of the Registry's function involve the filing, scrutiny, processing, and numbering and distribution of claims, and maintenance of records and delivery of documents.

Article II(4) of the CSD provided 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 later. Those deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria...". Accordingly, filing of all claims presented up to and during 19 January 1982 were completed by the Registry by late 1982.[18]

By way of Administrative Directives issued prior to the adoption of the Rules of the Tribunal and later by adoption of the Rules of the Tribunal, the Registry's function with regard to filing of claims has involved scrutiny of documents for compliance with Administrative Directives and the Rules of the Tribunal, especially regarding such matters as : use of both the official languages of the Tribunal, number of copies required, signatures etc.[19] The Registrar may refuse to accept any document which is not received within the required period, or which does not comply with the Algiers Declarations or with the Tribunal Rules. Any such refusal by the Registrar is, upon objection by an arbitrating Party concerned, within thirty days of notification of refusal, subject to review by the arbitral Tribunal.[20]

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18 AR 81/83, p. 15.

19 Paragraph 5 of the Modification to Article 2 of the Tribunal's Rules. See also AR 81/83, p. 14.

20 Paragraph 5 of the Modifications to Article 2 of the Tribunal Rules.

As regards the numbering and classification of claims, the Registry applied the following codes:

- Claims based on Article II, paragraph 1 of the Claims Settlement Declaration (claims of nationals) and claims of banking institutions based on paragraph 2(B) of the Undertakings of the two Governments were given a serial number starting with 1 ("cases").

- Claims based on Article II, paragraph 2 of CSD (official claims of one Government against the other) were given a serial number starting with 1, with a pre-fix B, ("B" cases).

- Disputes referred to in Article II, paragraph 3 of the Claims Settlement Declaration as to the interpretation or performance of the general Declaration as specified in paragraph 16-17 of the General Declaration; as well as questions concerning the interpretation or application of the Claims Settlement Declaration referred to in Article VI, paragraph 4 of that Declaration were given a serial number starting with 1, with a pre-fix A ("A" cases).

- Claims of nationals of less than $250,000 were given a serial number starting with 10.001.

"A" cases were assigned to the Full Tribunal. The other categories of claims were assigned to Chambers by lot. It is notable that "B" cases were first assigned to the Full Tribunal but pursuant to Presidential Order No. 8 were re-assigned to Chambers.[21]

Another function of the Registry has been to keep records of the claims and documents filed. Therefore for each claim a Master File has been maintained containing the original documents in the Tribunal's two official languages and a docket sheet in those languages. The Registry has also been responsible for the reproduction and delivery of awards and other decisions, including orders, of the Tribunal. All outgoing documents were served through the Agents.[22]

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21 AR 87/88, p. 22-23.

22 Ibid, p. 23.

## II(2). Legal Services

The legal Services Division of the Tribunal has allocated to itself a large bulk of the Tribunal staff. The Division consists of legal assistants to the arbitrators, Chambers clerks, and secretaries. Indeed, at some point the number of this Division's staff has amounted to 19 legal assistants, 14 secretaries and 3 clerks.[23] The legal assistants have usually been in direct co-operation with the arbitrators rather than with the Secretariat of the Tribunal. These assistants have apparently comprised Iranian Legal Assistants, US Legal Assistants and third country legal assistants. The presence of a large number of legal assistants demonstrates the complexity of the legal issues involved and the growing need for continuous legal research in international arbitration, which is mainly performed by these assistants.

## II(3). Language Services

One of the biggest practical difficulties which the Tribunal appears to have overcome, though at a considerable financial cost, is the conduct of its arbitral processes in two official languages. In accordance with paragraph 2 of the Notes to Article 17 of the Tribunal Rules, English and Persian are the official languages to be used in the arbitration proceedings, and these languages "shall be used for all oral hearings, decisions and awards". In addition, any documents filed with the Tribunal, such as statement of claim, statement of defence and their annexes, etc., should be submitted in both English and Persian.[24] As a consequence, this provision has had implications for the size of the staff. In particular, it required the employment of a large number of translators and simultaneous interpreters and other bilingual staff.[25] However, the Tribunal Division of Language Services is mainly concerned

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23 See e.g., Organizational Chart of 1987/1988, AR 87/88, p. 87.

24 Paragraph 3 of the Notes to Article 17 of the Tribunal Rules.

25 AR 87/88, pp. 34-42; see also Lagergren, op. cit. p. 121.

with the translation of documents emanating from the Tribunal itself, including awards, decisions, opinions and orders and minutes of the Full Tribunal meetings.[26]

The Language Services Division has generally consisted of about 15 staff members. This Division has, in addition to the translation of documents, provided simultaneous interpretation at all hearings, pre-hearing conferences and meetings of the Tribunal and the Committee on Administrative and Financial Questions[27], as well as in settlement negotiations.

Moreover, the work of the Tribunal as a whole has required certain other administrative and financial staff and general services personnel which, in general, have numbered about 15 staff members.[28]

## III. Financial Aspects of the Organization of the Iran-United States Claims Tribunal

Financially, the establishment of the Iran-United States Claims Tribunal has taken place at a considerable cost for the parties. It is notable that in accordance with Article VI(3) of the CSD the "expenses of the Tribunal shall be borne equally by the two governments". It is also notable that in accordance with Paragraph 2 of Modifications to Article 38 of the Tribunal Rules, the fees and expenses of the Tribunal are to be fixed by the Full Tribunal.[29]

The Tribunal's expenses for the Financial year 1982/83 were over four million US dollars.[30] With gradual increases due to inflation and other factors

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26 AR 87/88, pp. 34-37.

27 The Committee on Administrative and Financial Questions (CAFQ) was established at the eighth meeting of the Tribunal. It is composed of one Iranian arbitrator, one American Arbitrator and One neutral Arbitrator designated by the Tribunal to propose administrative, financial and staff Rules and other related policies for the adoption by the Tribunal. (Ibid, p. 79).

28 Ibid, pp. 42-50.

29 On the financial matters see Ibid, pp. 51-55.

30 See AR 81/83, p. 38.

the Tribunal's expenses currently amount to about six million US dollars. For instance, the expenditure for 1987/88 was $6,160,332, equally borne by the two governments.[31] Generally speaking, if the average annual expenses of the Tribunal between the financial year 82-83 and 89-90 is assumed at around 5 to 5.5 million US dollars, the total amount incurred by the two governments during these years is something between 40 to 44 million US dollars.

It has to be noted that this amount exclusively covers only the costs of running the Tribunal- costs such as fees, rents, purchases etc. In other words, the expenses that the arbitrating parties in individual cases or generally the two governments have incurred, in the course of bringing their claims before the Tribunal and during the proceedings, are separate matters. Notably, the two Governments have appointed Agents to the Tribunal who have their own offices and staff at their disposal. It is significant that almost all of the claims submitted by the American claimants are directed against the Government of Iran, or its controlled entities, while most of the counter-claims and claims submitted against the American nationals and the American Government are claims of the Government of Iran or its controlled entities. As a consequence, the Government of Iran has established the Bureau for International Legal Services for coordinating its claims or defences. The Hague Branch of this Bureau is run under the supervision of the Agent of Iran to the Tribunal with a staff number almost the same size as that of the Tribunal. Moreover, the parent office of this Bureau is situated in Tehran, with a similar number of personnel devoted to the Iran-US Tribunal affairs.[32]. All this is to say that the two governments have, in addition to the expenses of running the Tribunal,

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31 AR 87/88, p. 51.

The Annual Reports of the Tribunal also include analyses of expenditure, final statement of account and audit report. On these see, e.g., the Financial Year 1987-88 (AR 87/88, pp. 164-195).

32 The Bureau for International Legal Services has mainly relied on Iranian lawyers. It has, however, occasionally used the services of some international and commercial lawyers, especially in the cases involving the National Iranian Oil Company (NIOC).

incurred costs at least equal to those of running the Tribunal, for bringing their claims before the Tribunal or defending the claims against them.

The American Government, for its part, has been responsible for submitting more than 2800 claims of less than US $250,000 and coordinating all the cases at some level through its Agent. Nevertheless, in claims over $250,000 the American claimants appear to have employed their own lawyers and incurred the relevant expenses. Apparently, the US Government has also charged its nationals for the services it has provided on their behalf.[33] In general it may be safe to say that the two Governments have incurred expenses at least equal to the costs of running the Tribunal, for the running of their offices and coordinating their claims and defences, in addition to the expenses of the Tribunal

## IV. Statistics of Claims Before The Tribunal

### IV(1). Claims Filed

By 30 June 1988, 3946 Cases had been filed with the Tribunal. 23 of these were "A" Cases which were filed between 20 October 1981 and 30 June 1988. The rest were submitted for filing within the time-limit provided under the CSD, between 20 October 1981 and 19 January 1982. It is to be noted that the above total number does not include 1330 claims submitted by the Government of Iran against U.S. nationals and withdrawn subsequent to the

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33 It is worth noting that the Tribunal is not charging the arbitrating parties in individual cases for what may be called the cost of arbitration, since the Tribunal's expenses are borne by the two Governments. However, in certain cases the Tribunal may ask the arbitrating parties to deposit the costs of expert advice and of other special assistance required for a particular case. (Paragraph 1(a) of Modification to Article 38 of the Tribunal Rules, and Paragraph 2 of Modification to Article 41 of the same Rules). The question of awarding of the costs of arbitration as provided for under Articles 38 to 41 of the Tribunal Rules regarding the costs of legal representation etc., as to which party should bear them is a different matter and unrelated to our discussion here. Nevertheless, it has to be noted that the Tribunal does not include the cost of running the arbitration in calculating and awarding such costs, since these are borne by the two Governments.

Decision of the Tribunal in Case (A/2)[34], that the Tribunal did not have jurisdiction over claims of the two Governments against nationals of the other.[35]

With the reclassifications made by June 1988, the Cases on the Tribunal's files at that time included: 23 "A" Cases; 74 "B" Cases; 962 "Cases"; and 2887 claims of less than $ 250,000.[36] 585 of these Cases had been brought by the Government of Iran or by Iranian nationals. These included: 20 "A" Cases; 53"B" Cases; 402 "Cases"; and 110 claims of less than $ 250,000.[37]

Also by current reclassification and category, the Cases that had been brought by the United States or its nationals included: 3 "A" Cases; 21 "B" Cases; 560 "Cases"; and 2777 claims of less than $250,000. In other words, the total number of cases brought by the US Government or by its nationals stood at 3361.[38]

**IV(2). Claims Finalized**

By 30 June 1988, 1051 Cases had been finalized by the Tribunal. These included 11 "A" Cases, 45 "B" Cases, 755 "Cases" and 240 claims of less than $250,000.[39]

The Tribunal has been working for about eight years since its establishment. Moreover, in practice it has been working with more than 9 arbitrators, because the resigning members, in accordance with Article 13(5) of the Tribunal Rules, have continued to work on the Cases they had participated in a hearing on the merits. For instance, there are cases in which an original member of the Tribunal, resigning in 1984 or 1985, has participated in their

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34 Decision of 13 January 1982, 1 Iran-USCTR. p. 101.

35 See AR 87/88, pp. 24-26 and generally, pp. 24-33.

36 Ibid, p. 25.

37 Ibid, pp. 25-26.

38 Ibid, p. 26.

39 Ibid, p. 29.

decision in 1987. Given the time spent by the Tribunal and the number of arbitrators involved, the number of Cases decided quantitatively is still less than one- third of the total number of claims submitted.

However, it must be noted that among the Cases finalized there have been many important ones, and the majority of those pending are claims of less than $250,000. In June 1988 the Cases pending were 12 "A" Cases, 29 "B" Cases, 207 "Cases", and 2647 claims of less than $250,000.[40] As an improvement in practical terms, the Tribunal has been able to adopt a more effective procedure regarding the latter category of cases and has made considerable progress on the matter. For instance, during 1987-88 each of the three Chambers rendered an award in an "expulsion Case" of which some 1500 are pending. Consequently, a number of claims presenting similar issues were withdrawn and terminated.[41] However, given the number of all categories of Cases pending, the Tribunal may have some years of work ahead of it, if the rest of the claims are not settled by negotiations.

### IV(3). Amounts Awarded

Up to 30 June 1988, the total amount awarded to American parties and paid out of the Security Account was over US $870 million. Of this amount $533 million was by awards on agreed terms.[42]

In relation to Iran, in addition to the Partial Award of the Tribunal in Case A/15, which included about half a billion US dollars[43], a total amount of around $64 million was awarded in favour of Iran. Again, about $42 million of the latter figure was by awards on agreed terms.[44]

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40 Ibid, p. 30.

41 Ibid, p. 14.

42 AR 87/88, p. 27.

43 See Infra, Chapter 4, Section A, p. 139.

44 AR 87/88, p. 27.

The magnitude of the share of the amounts awarded on agreed terms, shows the significant role of the settlement negotiations taking place alongside the arbitration at the Iran-US Claims Tribunal. In fact, more than 50 percent of the Cases finalized by the Tribunal have been by awards on agreed terms.[45] This demonstrates that the Tribunal's work would take even longer in the absence of settlement negotiations. In this regard, however, two points should be borne in mind. First, the settlement negotiations should not be seen in isolation from the arbitration before the Tribunal. They are actually closely connected. In fact, during the arbitral proceedings, by making deductions from the Tribunal's practice, the parties have been able to reach a settlement. Without the proceedings before the Tribunal, the parties could find it difficult to find proper criteria for the settlement of their claims by negotiations. Second, the Secretariat of the Tribunal has actually encouraged settlement negotiations. The Tribunal has placed its premises at the disposal of the parties for the purpose of settlement negotiations and provided interpreters and other facilities for that purpose.[46]

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45 Ibid, p. 26.

46 Ibid.

# CHAPTER FOUR

# COMPOSITION OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

## 1. Generally

The ground rule for the composition of the Iran-United States Claims Tribunal has been laid down in Article 3(1) of the Claims Settlement Declaration. Article 3(1) provides:

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

Except from a second reference in Article 3(2) of the CSD, no more details on the composition of the Tribunal have been provided in the arbitration agreement. Article 3(2) in effect relinquishes this and many other likely questions concerning the conduct of arbitration to the UNCITRAL Arbitration Rules. It reads:

> Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of the three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal.

## 2. Forms of Composition of Arbitral Tribunals

The composition adopted under the CSD is partly unique and partly a commonly used model in present-day international arbitrations. As regards the number of arbitrators making up the Full Tribunal it represents a rare option. Arbitral tribunals with over 5 arbitrators are rare[1], but not entirely unprecedented. For instance, the Arbitral Tribunal under the Convention on Relations between the Three Powers and the Federal Republic of Germany[2] consists of nine members, three of whom are appointed by the Federal Republic of Germany, three by France, Britain and the United States (one by each), and the remaining three, who are neutral, jointly by the Federal Republic of Germany and the Three Powers.[3]

The composition of the three-member chambers of the Tribunal, on the other hand, represents the most frequently used model in present-day international arbitrations. Indeed, practically, it is the chambers which are principally entrusted with the role of deciding various claims submitted to the Tribunal. In other words, the Tribunal generally conducts its work in chambers of three, and only interpretative disputes and certain other cases are decided by the full panel of nine.[4]

The establishment of three chambers is a necessary and useful action in the composition of the Tribunal. Given the great number of claims, it saves a

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1 For a review see, Hans Mangoldt, "Arbitration and Conciliation", op. cit. p. 525 ; also Louis B. Sohn, "The Role of Arbitration in Recent Multilateral Treaties", op. cit. pp. 28-30.

2 The 1952 Convention on Relations Between the Three Powers and the F.R.G., as amended in 1954, in Supplement to 49 AJIL (1955), p. 57.

3 The Charter of Arbitration under the Convention on Relations Between the Three Powers and the F.R.G., Article 1, Ibid, p. 62.

It is notable that this Arbitral Tribunal has been introduced in the context of a multilateral arbitration and from this point of view it is distinct from the Iran-US Tribunal. Indeed, as a survey of arbitration treaties reveals the arbitral tribunals with more than five arbitrators have usually been provided for when more than two States are parties to a dispute. (See Max Habicht, Post-War Treaties for the Pacific Settlement of International Disputes, Cambridge, Harvard University Press, 1931, p. 1037.

4 See AR 86/87, pp. 21-22. See also Supra Chapter 3, p. 99.

considerable amount of time and expense for a tribunal which has already lasted more than seven years and is expected to exist for some years more.

In the three-member arbitral tribunal system usually each party appoints one arbitrator and the third arbitrator is appointed by joint agreement of both parties or by joint agreement of the parties or the party appointed arbitrators. Modern arbitration treaties, both in terms of general arbitration treaties referring to this system and in terms of arbitral tribunals actually constituted, and rules of procedure adopted by many international law organizations and arbitral institutions provide examples of the frequent application of this system.[5]

Article 5 of the UNCITRAL Arbitration Rules[6] provides for the appointment of three arbitrators in the absence of any agreement to the contrary. Article 7 of the same Rules provides that " if three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding

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5 For a review on this see generally: Habicht, op. cit. p. 1037; United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes. 1928-1948, UN Publication, (Sales No.:49. V.3), 1949, pp. 89 ff and United Nations, A Survey of Treaties for the Pacific Settlement of International Disputes 1949-1962, UN Publication (Sales No.:66. V.5), New York 1966, pp. 5-85; also Sohn, Arbitration and Multilateral Treaties, op. cit. p. 29. Also note the following:

International Convention for the Prevention of Pollution from Ships, London, Nov. 2, 1973, Protocol II, Article 3, 12 ILM, p. 1441; Convention for the Establishment of the European Space Agency, Paris, May 30, 1975, Article 17, 14 ILM, (1975), p. 885; International Convention for the Protection of New Varieties of Plants, Paris December 2, 1961, Article 38, 815 UNTS, p. 89; Treaty Establishing the Caribbean Community, Chaguaramas (Trinidad), July 4, 1973, Annex, Article 12 (Where there are only two parties), 946 UNTS, p. 17; and International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, Nov. 29, 1969, Annex, Article 14, 9 ILM, (1970), p. 25; also note Article 3(iii) of the Cease-Fire Agreement Between India and Pakistan of 30 June 1965 which established a three-member Arbitral Tribunal to arbitrate the Parties' dispute over the Rann of Kutch sector. It is notable that the Arbitral Tribunal was chaired by Judge Gunnar Lagergren, who later became the first President of the Iran-United States Tribunal, and consisted of two other members of Iranian and Yugoslav nationalities appointed by Pakistan and India. Article 3(iii) required that none of the arbitrators should be a national of either India or Pakistan. (Wetter, International Arbitral Process, op.cit. Vol 1, pp. 250-53). For the text of the arbitration award see 7 ILM, p. 633; 50 ILR, p. 2.

6 The UNCITRAL Arbitration Rules of 1976, 15 ILM (1976), p. 701.

arbitrator..." The UNCITRAL Model Law on International Commercial Arbitration[7], and the Convention for the Settlement of Investment Disputes[8] provide for the appointment of three arbitrators, unless the parties have agreed otherwise. The 1982 Rules of Procedure of the Inter-American Arbitration Commission[9], and the PCA Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of which only One is a State[10], adopted in 1962, provide similar provisions.

Other types of arbitral tribunals are also commonly used in present-day arbitrations. For instance, the Arbitration Rules of the London Court of International Arbitration[11], the ICC Rules of Arbitration[12], and the Commercial Arbitration Rules of the American Arbitration Association[13]

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7 Article 10(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985, 24 ILM, p. 1302. Note also Article 11 (3)(a) of the same Model Law.

8 Articles 37(2)(b) of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States of 1965, 575 UNTS, p. 160.

For a further review on the composition of arbitral tribunals in international commercial arbitration, see generally: Alan Redfern and Martin Hunter, International Commercial Arbitration, op. cit., pp. 152-160; and Rene David, Arbitration in International Trade, op. cit., pp. 223-229.

9 Articles 5 and 7 of the Rules, as amended and in effect April 1, 1982, published by the Inter-American Arbitration Commission.

10 Article 5, Wetter, op. cit. Vol 5, p. 53.

11 Article 3(2) of the LCIA Rules, in force from 1 January 1985, text published and provided by the LCIA.

For the sole arbitrator system examples see also; the United Kingdom-Netherlands Agreement Relating to the Delimitation of the Continental Shelf Under the North Sea of October 6, 1965, Article 2, 595 UNTS, p. 105; The Convention on the International Hydrographic Organization, Monaco, May 3, 1967, Article 17, 751 UNTS, p. 41; European Agreement Concerning an Aeronautical Satellite Programme, Neuilly-sur-Seine, December 9, 1971, Article 13, 906 UNTS, p. 3; and Treaty Establishing the Caribbean Community, Chaguaramas (Trinidad), July 4, 1973, Annex, Article 12(5) (when there are more than two parties to the dispute), 946 UNTS, p. 17. Also note the following Cases; Tinoco Arbitration of 1923, 1 RIAA, p. 369; the Island of Palmas Case of 1928, 2 RIAA, p. 829; Gold Looted by Germany from France Case, 20 ILR, p. 441; and Diverted Cargoes Case, 22 ILR, p. 820.

12 Article 2(5) of the Arbitration Rules of the Court of Arbitration of the International Chamber of Commerce, in force from 1 June 1975, (Wetter, op. cit. Vol 5, p. 89), and as amended and in force from 1 January 1988, (text published and provided by the ICC).

13 Section 16 of the Rules as amended and in effect on October 1, 1977, Wetter, op. cit. Vol 5, p. 65.

require that a sole arbitrator will be appointed if the parties have not agreed otherwise.

The benefit of the sole arbitrator system is that it saves a considerable amount of time and expense, but naturally it is more suitable for a single case arbitration than arbitrations with many claims. This system, by way of joint appointment of a neutral person, embodies a good deal of independence and freedom for the arbitrator and as a consequence a reasonable degree of adherence to the law can be expected from him in deciding the dispute.

Another type of arbitration tribunal which is used in contemporary arbitration practice is the arbitral tribunal consisting of five members. It may be composed of one arbitrator selected by each side and three neutral members[14], or two arbitrators selected by each side and only one neutral member.[15] This is, obviously, a more expensive method and depending upon whether there are three neutral members or only one, it may produce important differences in the conduct of the proceedings and the nature of the result reached. In the first

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14 See Article 22 of the Geneva General Act for the Pacific Settlement of International Disputes, September 26, 1928, Habicht, Post-War Treaties, op. cit. p. 936, (also 93 L.N.T.S., p. 345), revised April 28, 1949, 71 UNTS, p. 101; also the German-Swiss Arbitration Treaty of 1921, Article 6, Habicht, op. cit. p. 20; the European Fisheries Convention, London, March 9, 1964, Article 13 and Annex II, Article 2(2), 581 UNTS, p. 57; The Arbitration Agreement between the United Kingdom and Saudi Arabia Concerning the Buraimi Oasis Case, Article 1, July 1954, text in Wetter, op. cit. Vol 3, p. 357. For a review on treaty practice see UN Systematic Survey, op. cit. p. 89 ff and Habicht, op. cit. p. 1037. Five member arbitral tribunals were, for instance, constituted in the Ambatielos Arbitration, 23 ILR (1956), p. 306; Lake Lonoux Arbitration, 24 ILR (1957), p. 101; the Naulilaa Case, 4 ILR, pp. 274, 526. See also the 1986 Egypt-Israeli Agreement to Arbitrate Boundary Dispute Concerning the Taba Beachfront, Article 1, 26 ILM, (1987), p. 1, and the text of the Taba Dispute Arbitration Award, in 27 ILM (1988), p. 1421.

15 Article 32 of the Hague Convention for the Pacific Settlement of International Disputes, 1899, 1 AJIL (1907), p. 107; Article 45 of the Hague Convention for the Pacific Settlement of International Disputes, 1907, 2 AJIL, (1908), p. 43. It is notable that Article 45 of the 1907 Convention requires that only one of the two members appointed by each party can be its national. The preferred number under Article 3(3) of the Model Rules on Arbitral Procedure of the International Law Commission is also five, however, the formula of selection is left to the parties. (G.A.O.R., 13th Session, Suppl. No. 9, Doc. A/3859; also reproduced in YBILC, (1958), Vol II, p. 78; and 53 AJIL (1959), p. 239. Text of the Model Rules also in Wetter, op. cit. Vol 5, p. 232.); see also Agreement on safeguards under the Non-Proliferation Treaty, Brussels, April 5, 1973, Article 22, 12 ILM (1973), p. 469.

case, there is good reason to expect independence in the conduct of the proceedings and a decision on the basis of law, since the neutral arbitrators are able to decide without the agreement of the party-appointed arbitrators. In the latter case a similar result is, comparatively, less likely and the process may be influenced by the sentimental views of the party appointed members who usually have a certain affinity with the views of their respective parties and whose adversary positions are particularly stronger when they are nationals of the appointing parties.[16]

Another type of arbitral tribunal is the kind in which each party initially appoints only its own arbitrator or arbitrators and failing to achieve unanimity in a two-man tribunal and majority in a four-man tribunal the provision is made for the appointment of an umpire who will preside over the tribunal in order to settle the dispute by a majority vote. A series of Iranian general arbitration treaties provided for a two-man tribunal of this kind.[17]

### 3. Forms of Composition of the Iran-US Tribunal

Returning to the Iran-United States Claims Tribunal, although the composition of chambers resembles typical three-man tribunals, there is a slight difference. That is that the composition of each individual chamber is determined by the President of the Tribunal. The Tribunal Rules provide that "The composition of the chambers, the assignment of cases to various chambers, the transfer of cases among chambers and relinquishement by chambers of certain cases to the Full Tribunal will be provided for in orders issued by the President pursuant to his powers under Article III, Paragraph 1 of the Claims Settlement Declaration."[18] Theoretically, this may make no

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16 See Sohn, Arbitration and Multilateral Treaties, op. cit. pp. 29-30.

17 See, for instance, Article 5 of the Treaty of Friendship Between Greece and Persia (Iran) of 1931, entered into force 1949, in UN Survey of Treaties 1949-1962, op. cit. pp. 9-10 and generally UN Systematic Survey 1928-1948, op. cit. p. 95. For more details on this type of tribunal see Mangoldt, op. cit. pp. 526-527.

18 Article 5 of the Tribunal Rules which in fact reflects Article 3(1) of the CSD.

difference, since it is the parties which ultimately choose all members of the Tribunal and each chamber must consist of one member appointed by each of the three methods set forth in the CSD. Practically it may prove to be of some significance as regards the working relations between the members of a chamber. On the other hand, the power conferred upon the President in this respect has a useful implication for the expeditious conduct of the process of arbitration. For instance, by virtue of this authority the President was able to form a special chamber following the episode of 3 September 1984.[19] The incident disrupted the continuance of the Tribunal's function. However, by establishing this chamber, consisting of the President, one American Arbitrator from Chamber Two and the Iranian member from Chamber Three, the process was able to continue.[20] On some occasions, however, some members of the Tribunal have voiced their concern about the possibility of abuse of this authority by the President.[21]

It is also notable that under the Tribunal Rules a provision is made for the advance appointment of substitute members whose main aim is to prevent the possible disruption of the proceedings and to fill the vacancy arising as a result of the absence of a member of the Tribunal.[22]

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19 For the documents concerning details of the episode see generally 7 Iran-USCTR, pp. 281-316.

20 The mandate of the special Chamber was limited to deal only with requests for awards on agreed terms and requests for termination of proceedings. (Presidential Order No. 29, September 19, 1984, Ibid, pp. 301-302.)

21 In this regard see, Presidential Order No. 31, 21 September 1984, appointing Professor Bockstiegel by Judge Lagergren as Chairman of Chamber One, while the latter as President was himself the chairman of chamber one and his resignation and the former's appointment as members of the Tribunal had to take place as from 1st October 1984. (6 Iran-USCTR, pp. 302-303.) See also Dissenting Opinion of Judge Kashani in this respect which is critical of the above shortcoming in the Presidential Order No 31. (Ibid, pp. 303-304.)

22 "Note" to Article 13 of the Tribunal Rules Provides:

> "Iran may, in advance, appoint up to three persons, to be available to act as a substitute member for a temporary period for a specific member, or members, of the Tribunal appointed by Iran; the United States may, in advance, appoint up to three

Despite the above mentioned difference in the method of allocation of arbitrators to the chambers, which is a negligible point, the chambers can be identified as a standard three-man tribunal with all the inherent advantages or weaknesses that associate this type of tribunal. This conclusion may, in many respects, be applicable to the Full Tribunal which is simply a multiple of the three-member tribunal with no particular structural difference, at least as far as the method of appointment is concerned.

It is accepted that the differences in the composition of arbitral tribunals regarding the model applied may produce important differences in the conduct of the proceedings and in the nature of the result reached.[23] There are certain problems, or one may say consequences, associated with the three-man arbitral tribunals. However, that is not to say that any and every problem is a natural consequence of the system chosen and therefore an expected result of the parties' option in selecting this particular system. Many problems may also arise due to the manner of practical application of the system. There might also

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> persons, to be available to act as a substitute member for a temporary period for a specified member, or members, of the Tribunal appointed by the United States. The members of the Tribunal appointed by Iran and the United States may select, in advance, by mutual agreement, a person to act as substitute for a temporary period for any of remaining one third of the members of the Tribunal."

Iran has not made any advance appointment regarding substitute members, however, it has appointed them on ad hoc basis whenever necessary. (See Annex V to AR 86/87 of the Tribunal, p. 64, also Ibid, pp. 56-59. The United States has appointed three substitute members who have substituted American Arbitrators occasionally. (Ibid, pp. 64, 70-76) No neutral substitute member has been appointed so far.

It is also notable that under Paragraph 5 of Article 13 of the Tribunal Rules it is provided that:

> "After the effective date of a member's resignation he shall continue to serve as a member of the Tribunal with respect to all cases in which he had participated in a hearing on the merits, and for that purpose shall be considered a member of the Tribunal instead of the person who replaces him."

Also note Paragraph 4 of the same Article for a similar provision regarding the substitute members.

23 Sohn, Arbitration and Multilateral Treaties, op. cit. p. 29 ; Mangoldt, op. cit. pp. 527-532.

be other factors, such as the factor notable in the Iran-US Tribunal[24], which may complicate or influence the situation.

In applying these problems to the case of Iran-US Tribunal the aim is to identify the problems associated with this type of tribunal in general and within the Iran-US Tribunal in particular ; to analyse the problems arising from the manner of practical application of the system ; to conclude how fruitful the lessons can be for future development of international arbitration.

In pursuit of this aim the following problems seem to merit primary consideration:

A- What kind of influence the composition of the Tribunal has exerted on the basic terms of the Tribunal's mission?

B- What is the role of national arbitrators in the composition of the Tribunal and to what extent have they acted as independent judges?

C- To what extent has the principle on diversity of cultural-legal backgrounds of international arbitrators been observed in the selection of the neutral members of the Tribunal, and to what extent can such a question be identified as a factor influencing the policies of the Tribunal?

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24 This factor essentially is the existence of the Security Account (Para 7 of the GD) in favour of only one party against the other. It not only has serious effects on the enforcement of the awards against Iran, something that it was intended for, but also on the structure, psychology and conduct of the proceedings which may alter traditional expectations placed upon a three-member arbitral tribunal. Details will be analysed later.

## SECTION A

# INTERNATIONAL ARBITRATION : JUDICIAL OR QUASI-JUDICIAL

## I. Generally

The basic criticism levelled at the tribunal composed of one neutral member and two national members, or any other formation in which the neutral arbitrators consist of only one-third of the members, is that the neutral arbitrator has to reach a decision in an atmosphere in which the nationally motivated irreconcileable views of national arbitrators usually clash with each other. This has two implications. First the neutral member may have to decide wholly in favour of one of the parties since he must obtain the affirmative vote of one of the national members in order to reach a decision.[25] Second, the neutral member may have to adopt a mediatory role between the views of national members in order to reach a compromise solution.[26] In both circumstances the role of law may be diminished as a result.

It is submitted that the underlying factor behind this trend is the practical reality that the neutral arbitrator will probably try to avoid the embarrassing position of bringing about a decision wholly based on adoption of the position of one of the parties. That is why, they explain, dissenting opinions of national arbitrators are relatively rarely expressed in this type of tribunals, and then only when the tribunal's decision completely rejected the submissions of the "arbitrator's" party.[27]

However, part of the problem may be attributable to the process of decision making. The fact which is very common in arbitration practice; that the decision should be reached by a majority vote, instead of giving the

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25 Sohn, Arbitration and Multilateral Treaties, op. cit. p. 30.

26 Mangoldt, op. cit. p. 528.

27 Ibid, p. 529.

presiding arbitrator the right to make the award alone if no majority could be reached.[28] In the first situation, as Professor Sanders points out, "the arbitrators are therefore forced to continue their deliberations until a majority, and probably a compromise solution has been reached".[29]

In this connection it is notable that according to Article 5 of the CSD and Article 33 of the Tribunal Rules, the Tribunal should decide all cases on the basis of respect for law. Article 32(3) of the tribunal rules requires that the Tribunal should state the reasons upon which the award is based. Moreover, under Article 33(2) of the same rules the Tribunal is authorized to decide ***ex aequo et bono*** only if the arbitrating parties expressly and in writing have authorized it to do so.

Some have also tried to justify the presence of national arbitrators by the argument that international arbitration unlike the compulsory judicial settlement is not a strictly judicial procedure and a limited conciliatory role of the arbitral tribunal is discernible. This view has been rejected on two grounds.

H. Lauterpacht points out:

> But there exists in any case the very strongest objection to a view that decisions of an adjudicating body can be partly legal and partly non-legal. A body wielding such powers is not a legal body at all. A body which applies legal rules only when it deems it fit to do so and disregards them on other occasions, applies law only as it were by accident; it applies law because legal rules happen to coincide with what the arbitrator believes the law ought to be... Such a view fails to take into account the provisions of treaties creating arbitral tribunals and prescribing the sources of law applicable by them.[30]

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28 It is notable that under Article 31 of the Tribunal Rules "any award or other decision of the Tribunal shall be made by a majority vote of the arbitrators". Only in procedural matters the presiding member is authorized to decide on his own where there is no majority which is also subject to revision by the Tribunal.

29 Pieter Sanders, "Commentary on UNCITRAL Arbitration Rules", 2 YB.Comm.Arb. (1977), 172, p. 208.

30 H. Lauterpacht, The Function of Law in the International Community, op. cit., pp. 380-381.

Two categories of safeguards against the shortcomings in the three-man tribunals have been suggested. These are the appointment of foreign nationals as party arbitrators[31]; or the provision of the power for the neutral member to decide freely, if the two other members disagree.[32] The first suggestion does not remove the problem completely but is likely to reduce the tension in the conduct of the proceedings. The latter suggestion is less likely to be adopted by many States.

On the other hand, the three-man tribunal model remains the most popular system because of the nervousness of the disputing parties towards entrusting the matter fully to the neutral arbitrators. In addition it has been argued that the national or ad hoc member has a useful function. That is, to ensure that the contentions and arguments of the party which appointed him are fully understood by the tribunal as a whole.[33]

Moreover, it is submitted that the parties are probably aware of the shortcomings in the system and by choosing this type of tribunal they therefore have not ruled out the possibility of a mediatory solution.[34]

## II. Compromise Decisions

There are no explicit provisions or restrictions regarding the nationality of arbitrators in either the CSD or the Tribunal Rules. However, the arbitrators appointed by Iran and the United States have all been their respective nationals.[35]

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31 See, e.g. Article 3(iii) of the Cease -Fire Agreement Between India and Pakistan of 1965, Wetter, op. cit. Vol 1, p. 250; also note a series of Iranian arbitration treaties which provided similar provisions, in UN Systematic Survey 1948, op. cit. p. 95.

32 For this category, see, e.g. Article 8(3) of the Air Transport Agreement of May 4, 1965, between Malawi and Ghana, 541 UNTS, p. 163. (See also generally, Mangoldt, op. cit. pp. 529-530.)

33 J.L. Simpson and Hazel Fox, International Arbitration, op. cit., p. 88.

34 Mangoldt, op. cit. pp. 529-530.

35 See Infra, Section C, pp.201-203.

Having noted that point and applying the problem pursued in this sub-section to the case of Iran-US Tribunal it is not surprising to declare that the practice of the Tribunal lends substantial support to the theory in question in both respects. Some examples merit closer consideration.

Many manifest instances of compromise can simply be found in the views expressed by the arbitrators. In a recent important Case[36] Arbitrator Bahrami of Iran in his concurring opinion said : "...I concurred in the Award issued in the present case in order to obtain a majority..."[37]

In American International Group Inc. v Iran[38], arbitrator Mosk of the United States is more clear about the compromise solution reached in that Case. He said:

> I concur in the Tribunal's Award in order that a majority can be formed... This Award represents a "compromise solution" in which I have joined so that some award could be issued. Otherwise, this case, heard almost a year ago, would remain undecided.[39]

In Starret Housing Corp v Iran[40], Arbitrator Holtzman regarded the award as erroneous, however he gave his affirmative vote to it. In his concurring opinion he said:

> I concur with reluctance to the Interlocutory award in this Case. I do so in order to form a majority... In view of the many errors in the Interlocutory Award, it would be easier to dissent from it than to concur in it. the Tribunal Rules provide, however, that awards can be made by a majority vote. thus, in a three-member chamber, at least two members must join or there can be no

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36 Interlocutory Award in case No A/15 (I:G), Award No. ITL 63-A15(I:G)-FT, 20 August 1986, 12 Iran-USCTR. p. 40.

37 Ibid, Concurring Opinion of Hamid Bahrami, p. 82.

38 American International Group Inc. v Iran, Award No 93-2-3, Dec.19, 1983, 4 Iran-USCTR, p. 96.

39 Ibid, Concurring Opinion of Richard M. Mosk, p. 111.

40 Starret Housing Corp v Iran, Award No ITL 32-24-1, Dec. 19, 1983, 4 Iran-USCTR, p. 122.

> decision. My colleague, Judge Kashani, having dissented, I am faced with choice of joining the President in the present interlocutory Award despite its faults, or accepting the prospect of an indefinite delay in progress toward final decision of this Case.[41]

In many other cases also similar statements have been made.[42] Moreover, a closer consideration of many of these views proves that the concurring arbitrators have not only different views regarding the reasoning but also the conclusion of the awards in which a majority has been formed on the basis of the same concurring opinions. This clearly indicates that a majority has been declared in order to secure some form of solution but there is no real agreement over these issues. This not only is evidence of a compromise solution, but also gives rise to the validity of a majority reached in such circumstances. Because it is accepted that a concurring opinion applies when one member of the tribunal concurs with the other members of the tribunal in regard to the conclusion arrived at, but does not concur with its reasoning.[43] However, in the Cases referred to above the contents of the concurring opinions reveal that there is a disagreement on both accounts. For instance, a closer reading of the concurring opinion of Arbitrator Bahrami in the above

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41 Ibid, Concurring, opinion of H. Holtzman, p. 159.

42 See, Ultrasystem Inc. v Iran, Award No. 27-84-3, 4 March 1983, Concurring Opinion of R.M. Mosk, 2 Iran-USCTR, 100, at p. 114; R.N. Pomeroy v Iran, Award No. 50-40-3, 8 June 1983, Concurring Opinion of Mosk, 2 Iran-USCTR, 372, p. 390; Economy Forms Corp v Iran, Award No. 55-165-1, 13 June 1983, 3 Iran-USCTR, 42, p. 55. In this Case Arbitrator Mosk said: "Why I do concur in this inadequate Award, rather than dissenting from it ? The answer is based in the realistic old saying that there are circumstances in which something is better than nothing."; World Farmers Trading Inc v Govt. Trading Corp, Award No. 66-764-1, 16 August 1983, Concurring Opinion Holtzman, 3 Iran-USCTR. 197, p. 199; Chas T Main v Mahab, Award No. 70-185-3, 2 September 1983, Concurring Opinion Mosk, 3 Iran-USCTR. 270, p. 277; Alan Craig v Ministry of Energy, Award No. 71-346-3, 2 September 1983, Concurring opinion Mosk, 3 Iran-USCTR. 280, p. 293; Continental Grain v Govt. Trading Corp, Award No. 75-112-1, 5 September 1983, Concurring Opinion Holtzman, 3 Iran-USCTR. 319, p. 325; William L. Pereira Associates, Iran v Iran, Award No. 116-1-3, 17 March 1984, Concurring Opinion, Mosk, 5 Iran-USCTR. 198, p. 230; Cal-Main Foods, Inc v Iran, Award No. 133-340-3, 31 May 1984, Concurring Opinion Mosk, 6 Iran-USCTR. 52, p. 64.

43 See, "Note by Dr. Shafeiei regarding concurring opinion of H. Aldrich", in ITT Industries, Inc v Iran, Award No. 47-156-2, 26 May 1983, 2 Iran-USCTR. 348, p. 356; see also generally, Jhabvala, "the Scope of Individual Opinions in the World Court", Neth.Y.B.I.L. (1982), pp. 33-51.

Case[44] reveals that he has serious disagreements over the operative part of the Tribunal's award.[45] In American International Group v Iran, the concurring arbitrator does not only apply a different reasoning but also states that the award of damages should have been higher than that provided in this case.[46]

## III. Special Characteristics

A peculiar feature in most of these cases is that they have not been adopted unanimously as the case for a typical compromise solution might be expected to have been.[47] On the contrary, while the views of concurring arbitrators indicate the adoption of some kind of compromise solution between the concurring and neutral arbitrators, the arbitrators appointed by the other party have not only voted against the award but also have, on some occasions strongly criticised the award in their dissenting opinions. This cannot can be explained fully under either of the above mentioned theories concerning the three-member arbitral tribunals.[48]

For instance, with the exception of three unanimous awards[49], the rest of the cases referred to above have been decided by a majority vote, in four of which the national arbitrators of the Party against whose position the awards were rendered have issued dissenting opinions criticising the majority's views.[50]

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44 See Concurring Opinion, Bahrami, Interlocutory Award in Case A/15(I:G), 12 Iran-USCTR. 40, p. 82.

45 Ibid, pp. 82-87.

46 4 Iran-USCTR. pp. 112, and generally, 112-121.

47 See Supra, Section A, p. 116.

48 Ibid.

49 These Cases are : World Farmers Trading, Inc v Govt. Trading Corp, 3 Iran-USCTR. 197; Continental Grain v Govt. Trading Corp, Ibid, p. 319; Cal-Main Foods, Inc v Iran, 6 Iran-USCTR. 52. In the latter Case the Iranian member dissented in part and concurred in part. (Ibid, p. 66.)

50 Dissenting Opinion of American Arbitrators in Case A 15(I:G), (12 Iran-USCTR. p. 64-80); Dissenting Opinions of Arbitrator Kashani in Starret Housing Corp v Iran, (4 Iran-USCTR. 122), and in Economy Forms Corp v Iran, (3 Iran-USCTR. 42), have been printed respectively in 7 Iran-USCTR. p. 119, and 5 Iran-USCTR. p. 1. The dissenting opinion of

A result and at the same time clear evidence of the mediatory trends in the composition of the Tribunal and its chambers has been the adoption of a number of decisions by way of dividing the case into a number of issues and then deciding it piecemeal at different times with different majorities. In other words, a portion of the award has been taken by forming a majority with the Iranian arbitrator and the other portion or portions of the same case has been decided by forming a majority with the American member of the chamber.

This situation clearly has weakened the weight and legal authority of the Tribunal's decisions and at the same time may have resulted in unnecessary delays until a compromise has been made in order to form a majority for the undecided portion of the award. For instance, in Ultrasystems Inc. v Iran, on 4 March 1983 Chamber Three of the Tribunal has issued a Partial Award against the respondent with the affirmative vote of the American member of the Chamber with the Iranian member dissenting.[51] The Final Award, dismissing the remaining claims, has been rendered on 7 December 1983 by forming a majority with the Iranian arbitrator with the American member dissenting.[52] Commenting upon this situation in his dissenting opinion to the Final Award Arbitrator Mosk writes:

> In the instant case, the Chairman, having obtained my reluctant compromise vote in order to form a majority for the Partial Award... has now taken a portion of that award away with a different majority. Such actions are not conducive to the formation of majorities.[53]

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Arbitrator Ansari in William L. Pereira Associates, Iran v Iran (5 Iran-USCTR. p. 198) has not been made available so far.

It is also notable that two other of these Cases have been decided in the absence of the Iranian member of Chamber Three despite Iran's strong objection. (Chas T. Main v Mahab, 3 Iran-USCTR. 270, p. 276 ; and Alan Craig v Ministry of Energy, Ibid, p. 291.)

51 Ultrasystems Inc. v Iran, Partial Award No 27-84-3, 2 Iran-USCTR. p. 100.

52 Ultrasystems Inc. v Iran, Award No 89-84-3, 4 Iran-USCTR. p. 77.

53 Ibid, p. 82. See also the following Cases: Harnischfeger Corp v MORT, Partial Award No 14-180-3, 13 July 1984, 7 Iran-USCTR. p. 90 and the Final Award No 175-180-3, 26 April 1985, in the same Case, in 8 Iran-USCTR. p. 119; and International Technical Products Corp v Iran, Partial Award No. 186-302-3, 19 August 1985, 9 Iran-USCTR. p. 10 and the Final Award No 196-302-3, 24 October 1985, in the same Case, Ibid, p. 206.

The same mediatory trends have also been manifested in the individual opinions entitled "concurring and Dissenting" opinions of the party-appointed arbitrators, which have been adopted in a situation similar to those described above but not necessarily at different times. In other words, these opinions are concurring in part and dissenting in other part or parts of the award. That is, different portions of a case have been decided with different majorities. The arbitrators of each Party have concurred in the portions which were favourable to their respective parties' position and dissented from the unfavourable decisions in the other portions of the case. As a result, the Chamber has been able to form a majority for all portions of the case.[54]

It may be argued that the above mentioned indications are not conclusive enough to establish a departure from the rule of law by the neutral members of the Tribunal. On the other hand, it is the award itself which should be the basic criterion in determining the role of law and its limits within the arbitral process. It is therefore essential to have a closer analysis of some important decisions rendered by the Tribunal.[55]

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54 See for instance, "Opinion of Parvis Ansari Moin, Concurring in Part and Dissenting in Part", in Cal-Main Foods Inc. v Iran, 6 Iran-USCTR. p. 66; "Concurring and Dissenting Opinion of Charles N. Brower", in International Technical Products Corp v Iran, 9 Iran-USCTR. p. 243. Also note in the same Case Arbitrator Ansari of Iran has appended the following words to his signature: "dissenting opinion in part and concurring opinion in part in order to form majority." (Ibid, p. 206); Questech Inc v Iran, Award No 191-59-1, 20 September 1985, 9 Iran-USCTR. p. 107. See especially the notes attached to the signatures of the Iranian and American members of Chamber One explaining their views as dissenting in part and concurring in part. (Ibid.);Forum Selection Cases, Concurring and Dissenting Opinion of Holtzman, Mosk and Aldrich with Respect to Interlocutory Award on Jurisdiction..", 1 Iran-USCTR. p. 284; International Schools Services Inc. v NICIC, Award No 194-111-1, 10 October 1985, 9 Iran-USCTR. p. 187. See especially the notes attached to the signatures of the Iranian and American members explaining their views as dissenting in part and concurring in part. (Ibid,); and Dissenting Opinion of Holtzman, Training Systems Corp. v Bank Tejarat, 13 Iran-USCTR. p. 345.

55 Many of these Cases also involve controversial issues of fact and law which may be discussed from the other dimensions that these cases involve. Our analysis here is, however, limited to the questions pursued in this sub-section.

## IV. Case A/1[56]

**IV(1)-** Issue I of this case involved the question of the disposition of interest earned on the Security Account.[57] In this interpretive Case the Tribunal was asked to announce on the basis of the Agreements concluded between the Parties whether the interest earned on the Security Account should be transferred to Iran as the owner of the funds, or whether it should be retained in the Security Account available, like the principal, to secure and pay awards against Iran by the Tribunal.[58]

Iran argued that: a)- the funds in the Security Account were "Iranian property"; b)- the Account had a $1 billion ceiling that would be exceeded if, prior to the payment of awards interest were credited to the account and it never agreed to allow more than $1 billion of its property to remain in the Account; c)- any interpretation which would result in the Account's exceeding the sum would place an obligation on Iran to which it had not explicitly consented.[59]

The United States contended that : a)- the $1 billion ceiling was on initial funding only and it did not cover the accrual of interest; b)- the funds in the Security Account were in the nature of escrow in the name of the Escrow

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56 Iran-United States, Case A/1, (Issues I, III, IV), 30 July 1982, 1 Iran-USCTR. p. 189. This Case involves four separate issues concerning the operation of the Security Account. Only Issue I is dealt with in this sub-section.

57 See Paragraphs 6 and 7 of the GD. It is notable that the Security Account is a special interest-bearing account with a maximum ceiling of $1 billion established from the Iranian funds received from the United States pursuant to the settlement reached by the Algiers Declarations. The Account has a minimum level of $500 million and should be replenished by Iran whenever it falls below that level. It is to be used for the sole purpose of securing the payment of, and paying, awards against Iran rendered by the Tribunal in accordance with the CSD. After all arbitral awards against Iran have been satisfied any amount remaining in the Security Account should be transferred to Iran. (Para 7 of the GD.) It is notable that the Security Account is an escrow account and the Algerian Central Bank is acting as Escrow Agent for the Parties, and that is the Escrow Agent which upon receipt of a notification by the President of the Tribunal instructs the depository bank to make the payment of the award. None of the Agreements concluded between the parties addresses the question of disposition of interest earned on the Security Account. (See generally, the Technical Agreements of 17 August 1981, 1 Iran-USCTR, pp. 29, 38).

58 Case A/1, op. cit. p. 189.

59 Ibid, pp. 189-190.

Agent and the interest on an escrow account can be paid only at the direction of the account holder, which was not authorized by the agreements to direct payment of interest to Iran; c)- Iran's property right to the funds in the Security Account was a residual one to the funds which remain after all awards to US claimants had been satisfied; d)- the question of ownership of the funds should be placed in the context of the United States possession of the funds prior to the creation of the Account; by virtue of the attachments obtained by US claimants.[60]

By a majority of 5 to 4 the Full Tribunal rejected the contentions of the Parties and established, quite reasonably, that there was a gap, or at least an ambiguity on the question of the disposition of interest earned on the Security Account in the relevant agreements concluded between the parties. It also found that standard banking usages did not apply to so unique a situation in which the question was to determine the rights of the parties to the funds in an escrow account.[61]

The Tribunal therefore went on to find a solution in the object and purpose of the agreements concluded between the Parties. It said:

> The relevant governing principles established by the Parties are a recognition of Iran's rights in its assets, along with agreements to resolve disputes by binding arbitration, and the creation of a Security Account consisting of Iranian funds in order to satisfy awards against Iran. In this context, in the Declarations, the interests of Iran, the "owner" of the funds were set against those of the United States and its national claimants, who had the benefit of the freeze orders and, in some cases, of judicial attachments of Iranian assets. The balance was a careful one, and was premised on maintaining equilibrium between the Parties.[62]

Despite the Tribunal's brief attempt to explain how it has reached the very general concept of equilibrium and its failure to explain the latter's

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60 Ibid, p. 190.

61 Ibid, pp. 190-191.

62 Ibid, p. 191.

relevance to the problem at issue, they remain secondary to why it has resorted to that concept which is attributable mainly to its failure to find a legal solution. Yet the surprising part is the conclusion it has based upon this concept:

> In determining to whom the interest on the Account should be remitted as it accrues, the Tribunal should ensure that neither Party is favoured... The Tribunal therefore concludes that the interest must, as it has been, be credited as it accrues to a separate interest-bearing account in the N.V. Settlement Bank unless and until the two Governments agree to a different result. In the absence of such agreement, the funds in the separate account, including interest earned by them, would be finally remitted to Iran at the same time as any balance in the Security Account.[63]

Then the Tribunal added that in order to avoid any prejudice to Iran and to remain in harmony with the principle of equilibrium, Iran should be allowed to have access to the funds in the separate account in order to help satisfy its replenishment obligation if the need arose.[64]

**IV(2)-** The rationale behind the operative part of the Tribunal's decision in deciding to credit the interest to a separate account which is to be established by the Tribunal's order is very vague and can hardly be understood in legal terms. A possible explanation may lie in the Tribunal's tendency to implement its own sense of fairness rather than legal principles.

The separate account in reality has no use except for the replenishment of the Security Account. The only minor difference visible between this system and that of the automatic transfer of the interest to the Security Account,

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63 Ibid, pp. 191-192. It is doubtful that the Tribunal by addressing the issue as "to whom the interest on the Account should be remitted" is giving a right impression of the question at issue. A proper formulation of the question would be whether the Escrow Agent, the account holder, was authorized to transfer the interest to the owner of the funds or it should be added to the principal and become available for the payment of claims against Iran.

The decision also did not explain why and how the transfer of the interest to Iran could alter the assumed equilibrium between the Parties.

64 Ibid, p. 192.

advanced by the United States Government, is in the procedure and formalities rather than the result and substance. The question then is why the Tribunal did not explicitly adopt such a position? This situation strengthens two assumptions : First, the Tribunal has tried to avoid creating the impression of basing its decision on the position of the United States ; and second, to preempt the argument put forward by Iran regarding the $1 billion ceiling for the Security Account without properly addressing it.

Even accepting the concept of equilibrium, it is doubtful that the establishment of the separate account serves that purpose. In searching for a decision based upon the premise of equilibrium, the suggestion set forth by the President of the Tribunal in his dissenting opinion is closer to that concept than that adopted by the Tribunal. The President of the Tribunal in principle agreed with the majority that the Tribunal's decision should observe the equilibrium between the Parties. However, upon the same premise he suggested that "the interest on the Security Account should be shared in equal parts, as it accrues, one half being added to the Security Account and the other returning to Iran..."[65]

It is significant to note that the majority of five was formed because of the concurrence of three American Arbitrators with two neutral members of the Tribunal. The American members, who in fact had a different conclusion from that of the two neutral members, expressed their concurrence in order to form a majority.[66]

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65 Ibid, Dissenting Opinion Lagergren, p. 199.

66 Ibid, Separate Opinion, Aldrich, Holtzman and Mosk, p. 200, and pp. 200-202. With regard to the circumstances within which the American Arbitrators concurred in the decision of the Tribunal, the Iranian Arbitrators argued that the concurring opinion of the American members was in fact a dissent and opened the question whether at all a majority was achieved. (Ibid, Separate Opinion, Kashani, Shafeiei, 203, p. 204) The opinion of the Iranian members despite its title was meant to be a dissent and in fact they refused to sign the decision. (Ibid, pp. 197, 204.)

The Iranian members also argued that the provision for interest in Paragraph 7 of the GD was made in response to the concern of Iran, as owner of the principal, and there was nothing to support the "presumption that the purpose of providing for the accrual of

This situation reveals the relativity within which decisions are usually reached in this type of tribunal. In such situations the minority neutral members are the real determining factor and the national members of the party who are able to work out a compromise solution with the neutral members can secure a decision favourable to them.

**IV(3)-** Viewing the question without prejudice to the merits of the dispute and to the positions of the Parties, the decision of the Tribunal in Case A/1 fails to bring about any solution to the dispute at all.[67] Given the total ambiguity regarding the rationale behind the establishment of a separate account in general and regarding the latter's relevance to the concept of equilibrium assumed by the Tribunal in particular, and the Tribunal's indication that the dispute should be resolved by the agreement of the Parties, the decision to establish a separate account can only be interpreted as disguising the Tribunal's failure to reach a solution.

A fact characteristic to any system of judicial settlement, including arbitration, is that the decision or the award should be conclusive and put an end to the parties dispute[68], or in the words of the International Law Commission it should constitute a definitive settlement of the dispute.[69] The Tribunal's decision in this Case leaves the dispute exactly where it was before.

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interest was to afford an indirect means of increasing the amounts of the guarantee, especially when the amount and its limits had been precisely laid down by the same Paragraph 7." They also added that; the ownership right of Iran to the funds in the Security Account and therefore its right to the interest on it was not disputed by the Parties; and no obligation on the part of Iran could be presumed in the absence of any provision on the contrary and the burden of proof was on the US to prove the existence of an obligation. (Ibid, pp. 210-212.)

67 The Iranian Arbitrators argued that the Tribunal in fact had not discharged its obligations at all and the Parties never demanded the Tribunal to fill the alleged gap or on the basis of that gap rewrite the contract for them. (Ibid, pp. 205-206.)

68 Julian Lew, "Applicable Law...", op. cit. p. 12.

69 Article 32 of the Model Law on Arbitral Procedure of the International Law Commission of 1958. See also Articles 54 and 81 of the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 respectively.

Looking from a different angle it may be argued that given the unique factual and legal situation existing in the Case the Tribunal was facing a situation amounting to a *lacuna juris*. Indeed, one may find some support for this view both within the merits of the Case itself and within the lines of reasoning that the Tribunal adopted.

In a reasoning with which the President of the Tribunal in his dissenting view also agreed, the Tribunal after declaring that it could find no solution in the common intention of the parties, or in banking usages, decided that a solution should be found in the object and purpose of the agreements concluded between the parties.[70] Given the Tribunal's acknowledgement that there was a gap or at least an ambiguity in the law, the concept of equilibrium may have been adopted by the Tribunal in response to the existence of that gap, regardless of whether such a meaning could be inferred from the object and purpose of the Parties' agreements. That is to say, the Tribunal's assertion of the concept of equilibrium may be regarded as an attempt to avoid the danger of bringing about a finding of non-liquet on the ground of the silence of the law.

Many arbitration rules expressly provide that "the tribunal may not bring a finding of non-liquet on the ground of the silence or obscurity of international law or of the compromis."[71] It is notable, for instance, that the decision of the International Court of Justice in the Haya de la Torre Case has been widely criticised as being tantamount to a finding of non-liquet. In this Case the Court expressed that it was unable to give any practical advice on various courses that might be open to the Parties for the purpose of terminating the Asylum, since it would amount to "departure from its judicial function".[72]

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70 Case A/1, op. cit. pp. 190-191, 198.

71 Article 12 of the Draft Convention of the International Law Commission on Arbitral Procedure of 1953, reproduced in Wetter, op. cit. Vol 5, p. 228 ; see also Article 11 of the Model Rules on Arbitral Procedure of the International Law Commission of 1958; Article 42(2) of the ICSID Convention.

72 ICJ Rep, 1951, pp. 79, 83.

Some writers' interpretation of the North Sea Continental Shelf Cases[73] and the Barcelona Traction Case[74] present the argument that the Court in these Cases came close to recognizing that certain issues were not covered by existing rules of international law, in the absence of any particular agreement by the parties.[75]

It is generally accepted that where the tribunal is authorized to decide on the basis of respect for law, a finding of non-liquet should be excluded and the tribunal's duty is to find the answer in general principles.[76] The very explicit references and discretion given under Article 38(1) of the Statute of the ICJ and specifically sections (c) and (d) of the same Article has enabled the International Court of Justice and other international tribunals alike to avoid, theoretically and practically as well, the question of gaps in international law in a less formal manner.[77]

It is also understood and permitted that the prohibition of non-liquet would lead the international judicial system to adopt a wider method of judicial interpretation and to consider equitable solutions in judicial process.[78] However, the application of equity as a general principle of law is to be distinguished from a decision *ex aequo et bono*. The first as a legal concept is a "general principle directly applicable as law...; while a decision *ex aequo et bono* can only be taken if the parties agree and the court is then freed from the strict application of legal rules in order to bring about an appropriate settlement..."[79]

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73 ICJ Rep. 1969, p. 3.

74 ICJ Rep. 1970, p. 3.

75 See D.W. Greig, International Law, London, Butterworths, 1976, pp. 31, 51.

76 Simpson and Fox, op. cit. p. 143. Indeed many reject a finding of non-liquet generally on theoretical and practical grounds as well. (See generally, Lauterpacht, the Function of Law, op. cit. pp. 63-69.)

77 George Schwarzenberger, op. cit., Vol 4, p. 663; Shabtai Rosenne, op. cit., Vol 2, p. 605.

78 Ibid.

79 Tunisia/Libya Continental Shelf Case, ICJ Rep. 1982, p. 60. See also Schwarzenberger, op. cit. Vol 4, p. 655; and the North Sea Continental Shelf Cases, ICJ Rep. 1969, p. 48.

On the other hand, the eventual dangers ahead of the application of a wider method of interpretation are fully recognized. An obvious example being that the court or the tribunal will tend to exceed the consensual basis of its jurisdiction and will violate the principle of respect for law.[80] The basic test suggested to avoid the excess of power is that the court or the tribunal should refrain from rewriting contract and from legislating for the parties.[81]

In the circumstances of the Iran-US Tribunal decision in Case A/1 there may be grounds to argue in support of the reasoning of that decision to the point that it concludes that any solution should observe the equilibrium assumed between the Parties, no matter whether it has been applied as a general principle of law or whether it has been inferred from the parties' agreements.

However a possible reasonable solution based upon equity or equilibrium would be, as the President of the Tribunal in his dissenting opinion suggested, that the interest be shared in equal parts. This solution is realistically closer to the concept of equilibrium and at the same time avoids the danger of legislating for the parties.

The decision of the majority, on the other hand, is far from equilibrium and has two paradoxical implications. First, it in effect revises the parties' agreements and therefore fails the test necessary for a measured interpretation required in case of gaps in the law. Second, in the particular circumstances of this particular decision it embodies a result paradox to the first point above; the suggestion made for the establishment of a separate account is so meaningless and without a practical use which falls nothing short of a disguised finding of non-liquet.

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80 Shabtai Rosenne, op. cit. Vol 1, p. 99; Schwarzenberger, op. cit. Vol 4, pp. 719-720.

81 Ibid.

## V. Case A/15(I:G)[82]

**V(1)**- Following the transfer by Iran of $3.667 Billion to the Federal Reserve Bank of New York and the retirement of Iran's syndicated debts pursuant to the conclusion of the Algiers Declarations[83], a balance of almost $400 million remained with the Federal Reserve.[84] Iran sought return of this balance and argued that by not transferring the balance with the Federal reserve, the United States had not properly fulfilled its obligations under the General Principle A and Paragraph 2 of the GD or Paragraph 2(A) of the Undertakings.[85] The United States responded that it had no specific obligations with respect to the balance with the Federal Reserve bank under the Algiers Accords and that the dispute should be settled by negotiation.[86]

By a majority of 6 to 3, in which the Iranian Arbitrators concurred with the neutral members, the Tribunal in principle agreed with all the arguments put forward by Iran. After a careful and elaborate examination of relevant instruments the Tribunal stated that the obligation to restore Iran's financial position to that which existed prior to the freeze order was so comprehensive that it could not be construed to mean that Iranian funds not used for the purposes defined in the two Declarations might be kept by the United States and not returned to Iran.[87] "Such an interpretation would clearly run contrary to the letter and spirit of General Principle A..."[88]

The Tribunal also added that funds in excess in Dollar Account No. 1 could not legally be used for any of the purposes defined by the Parties to the

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82 Case No. A/15 (I:G), Award No. ITL 63-A15(I:G)-FT, 20 August 1986, 12 Iran-USCTR. p. 40.

83 See Para 2(A) of the Undertakings.

84 This balance as of the date of the issuance of the Interlocutory Award in Case A15 amounted to $500 million because of the accrual of interest. 12 Iran-USCTR. p. 42.

85 Ibid, pp. 43-46.

86 Ibid, pp. 44-46.

87 Ibid, p. 48.

88 Ibid.

Accords, and in such a case it seemed difficult to understand why and on what basis they could be held indefinitely in this Account.[89] It further noted that both Parties agreed during the hearing that "indefinite retention of the excess could not have been contemplated. As a matter of fact, it would be absurd".[90]

In concluding its reasoning for the Award the Tribunal stated that pursuant to General Principle A the United States made a commitment to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." Thus it was evident that the financial position of Iran would not be restored "in so far as possible" if the Iranian assets previously transferred in escrow pursuant to the General Declaration were not returned to Iran when they ceased to be usable for the purpose of guaranteeing the payment of, and paying, the debts that Iran promised to pay in Paragraph 2(A) of the Undertakings.[91] It further expressed that : "The United States will not have fully fulfilled its obligations as long as it has not caused the return of those assets."[92]

These views have been expressed as part of the reasoning adopted for the Award after a careful analysis by the Tribunal. However, the concluding part of the Tribunal's award, which should naturally remain in harmony with the reasoning of the award -i.e. in this Case, a ruling that the United States had breached its obligations under the Algiers Accords, lacks that harmony.

That is, the conclusion arrived at by the Tribunal is rather surprising and somehow contradicts its own reasoning. First of all the Tribunal stopped short of a clear and explicit ruling on whether the United States had breached its obligations under the Algiers Accords. Secondly, the Tribunal found that:

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89 Ibid, p. 58.
90 Ibid.
91 Ibid.
92 Ibid.

Taking the foregoing into account, the Tribunal finds that the implementation of General Principle A of the General Declaration requires, at this stage, that the two Parties should immediately enter into negotiation, and negotiate in good faith with a view to determine, by mutual agreement, which claims were pending against Dollar Account No. 1 and what amount should be kept in this Account in order to pay such claims In the same agreement, the Parties should determine what amount of the funds presently held in Dollar Account No. 1 is not needed to pay the remaining claims pending against this Account, and such amount should be transferred to Iran immediately upon conclusion of such agreement. In the same agreement, a reconciliation of accounts leading to a release and discharge of the United States in the administration of Dollar Account No.1 should be agreed upon by the Parties. Should the Parties be unable to arrive at such an agreement within a reasonable time after the issuance of this Award, they might apply to this Tribunal, individually or jointly, in order to resolve the remaining difficulties.[93]

**V(2)-** In evaluating this Award two points should primarily be borne in mind. First, the Award has been rendered as an interlocutory award. Therefore the Tribunal has reserved the option to render a final award which might be in line with its reasoning in this interlocutory Award. However, the question of why the Tribunal has decided to issue an interlocutory award instead of a final award raises a certain curiosity as to whether the interlocutory Award has been used to cover the mediatory intentions behind the Tribunal's ruling. Second, it is not entirely clear whether or not in the Tribunal's view the United States has acted in contravention of its obligations under the Accords. If the answer is in the affirmative, why then has the Tribunal stopped short of a clear-cut ruling in this respect? If the answer is in the negative, on the basis of what obligations is the United States obliged to negotiate with a view to returning the funds in excess to Iran? Perhaps it is possible to make a third assumption, that the obligation to negotiate is a technical prerequisite for any future rulings on the issue by the Tribunal. The latter could be regarded as nothing less than a mere justification for a mediated solution. In short, the rationale behind the

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93 Ibid, pp. 62-63.

imposition of negotiation is not entirely clear; the mere existence of this ambiguity is itself liable to criticism.

Furthermore, what strengthens the assumption regarding the mediatory efforts of the Tribunal in this Case is the intention declared in the decision that the Parties should agree on a "reconciliation of accounts leading to a ***release and discharge*** (emphasis added) of the United States in the administration of Dollar Account No.1." This part of the decision has been adopted in response to the United States' request regarding the release, discharge and indemnity by Iran of the United States' conduct with regard to Dollar Account No.1 and waiver of any challenge to such conduct.[94] Consequently, the main aim behind the adoption of the Interlocutory Award, as we will see later, is to pave the way for a compromise decision ; on the one hand, the funds in excess in Dollar Account No.1 be returned to Iran and on the other the United States be indemnified and released from any claims of breaches of obligation regarding its conduct under the Algiers Accords.

Finally, the Award has left the parties in a position that both have interpreted for their own cause. While the Iranian Arbitrators have expressed that the Award confirms that the United States is in breach of its obligations[95], the American members, who have dissented, maintain that it is in accord with their view that the United States has not violated the Algiers Accords.[96] They both also agree that this is a mediated solution rather than a decision strictly based on law.[97]

**V(3)-** Although the express indications by the arbitrators of both Parties are clear enough to demonstrate the effects of meta-legal and mediatory

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94 Ibid, p. 62.

95 Ibid, Concurring Opinions of Arbitrator Bahrami and Ansari, respectively pp. 87, and 89-91.

96 Ibid, Dissenting Opinion of Arbitrators Holtzman, Aldrich, and Brower, p. 74.

97 Ibid, Dissenting Opinion of American Arbitrators, p. 80, and Concurring Opinion of Bahrami, pp. 82-83.

considerations in the conclusion arrived at by the Tribunal, some may argue that the obligation placed upon the Parties to negotiate by the Interlocutory Award rests purely on judicial grounds.

Having noticed the limits that the scope of this Chapter imposes upon a full judicial analysis of the Case, it is useful to note, briefly, the recognition in international law that a decision ordering the parties to negotiate can be legal in origin and scope.[98] The most obvious evidence of this recognition may be found in the Tacna Arica Arbitration[99], the Case of Railway Traffic Between Lithuania and Poland[100], the Lake Lanoux Arbitration[101], and the North Sea Continental Shelf Cases.[102]

The scope of application of this notion, however, remains very much limited to special circumstances - i.e.; the duty to negotiate arises from specific engagements in which the issues are not covered by the existing rules of international law.[103] The emerging concept of cooperation or duty to negotiate has basically developed in the context of relations between neighbouring States regarding common natural resources.[104] The legal basis upon which this concept has been premised is explained in the following terms:

> In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a right of assent, or a right of veto, which at the discretion of

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98 See Dissenting Opinion, Judge Gros, Tunisia/Libya Continental Shelf Case, ICJ Rep. 1982, 3, p. 144.

99 19 AJIL, 393 (1925), p. 398.

100 PCIJ Rep. 1931, Ser A/B, No. 42, 108, p. 116; reproduced in Hudson, World Court Reports, Vol 2 (1927-1932), 750, pp. 755-756.

101 24 ILR (1957), 101, p. 128.

102 ICJ Rep. 1969, pp. 47-48. Also note Paragraphs 73-79 of the Judgement of the ICJ in the merits of the Fisheries Jurisdiction Case, (U.K v Iceland), ICJ Rep. 1974, pp. 31-33.

103 The North Sea Continental Shelf Cases, op. cit. pp. 47-48.

104 See Rainer Lagoni, "Oil and Gas Deposits Across National Frontiers", 73 AJIL, (1979), 215, pp. 233-239.

> one State paralyses the exercise of the territorial jurisdiction of another.[105]

The duty to negotiate may also arise from the prior agreement of the parties to negotiate.[106]

It is significant to note that an undue application of this notion in a judicial decision would transcend the judicial function of the adjudicating body and may amount to an unauthorized decision of *ex aequo et bono* or to an unasked judicial recommendation.[107] For instance, the International Court of Justice's reference in the Haya de la Torre Case to the Latin American traditions of courtesy and to the hope that "the Parties would be able to find a practical satisfactory solution"[108] has been regarded as amounting to an implied recommendation to the Parties to settle the matter by negotiation.[109] Such recommendations would clearly be in excess of power and may undermine the validity of the tribunal's decision. Schwarzenberger has pointed out that:

> To give unasked advice from the Bench in contentious proceedings would be more than officiousness. It would mean exceeding the consensual basis of the Court's jurisdiction and just fall short of a breach of *Non ultra petita partium* rule.[110]

Judging in the light of the above mentioned principles, nothing in Case A 15(I:G), including the Tribunal's own reasoning indicates that: a)- the tribunal was unable to find a breach of obligations by the United States without the need for prior negotiations; b)- or the existing circumstances could justify

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105 Lake Lanoux Arbitration, 24 ILR, p. 128.

106 E.g. Tacna Arica Arbitration, op. cit. 19 AJIL, (1925), 393, p. 398.

107 See generally, Fitzmaurice, The Law and Procedure of the International Court of Justice, Cambridge, Grotius Publications, 1986, Vol 2, pp. 558-563.

108 ICJ Rep. 1951, p. 83.

109 Fitzmaurice, op. cit. Vol 2, pp. 558-563.

110 Schwarzenberger, op. cit. Vol 4, p. 720. See also Kenneth Carlston, "The Process of International Arbitration", op. cit. pp. 155-169.

the decision ordering the Parties to negotiate. Nor did the Parties confer upon the Tribunal the power to mediate between them.

The only possible explanation which might mitigate the criticism lies in the interlocutory nature of the Award. It serves the Tribunal to disguise its compromise solution and to evade a finding of the breach of obligations, and provides the United States with the opportunity to escape the retrospective consequences of such an action. However, if the negotiations failed within the four-month period prescribed in the Award[111] the Tribunal would have to take a decision in line with its own reasoning in the Interlocutory Award. Even then the language adopted by the Tribunal is not very promising regarding any future finding of the breach of obligations and the award of damages.[112]

**V(4)-** Indeed, further developments proved this assumption. In fact, the Interlocutory Award had served the Tribunal to convey its message to the Parties that it was not prepared to decide wholly in favour of only one party, namely Iran, whose arguments were expressly or by implication accepted by the Tribunal. The circumstances created prior and pursuant to the issuance of the Interlocutory Award clearly indicate a tendency on the part of the Tribunal to satisfy the United States demand that it be released from the obligations regarding the administration of Dollar Account No.1. However, judging from the basis of the findings in the Interlocutory Award, this could only be established if Iran was brought to a situation in which it was ready to make an undertaking in this regard as a bargaining chip in return for the transfer of the excess funds. In fact, it appears that the Tribunal has carefully avoided making any express pronouncements as regards the breach of obligations by the United States in order to pave the way for a middle ground solution.

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111 Interlocutory Award in Case A15(I:G), op. cit. 12 Iran-USCTR. p. 64.

112 Paragraph 17 of the GD gives the Tribunal competence to award damages arising from any such breaches of obligations.

Later, after the negotiations between the Parties had failed, something which was predictable, the Tribunal was asked by Iran to implement the Interlocutory Award.[113] In its Partial Award of May 4, 1987, the Tribunal was easily able to make a decision without any technical difficulty. The Tribunal was easily able to establish that only $63 million of the funds in Dollar Account No.1 were subject to outstanding claims and the funds in excess of that, which amounted to more than $450 million, were not subject to any claims whatsoever.[114] Therefore the Tribunal ordered that the amount in excess of $63 million in Dollar Account No.1 should immediately be transferred to Iran.[115] However, this time Iran had already materialized its earlier hints[116] to give a complete release to the United States and to waive any challenge to the United States administration of Dollar Account No.1.[117] Therefore it is not surprising that a considerable part of the Tribunal's Partial Award is devoted to a comprehensively worded decision which discharges the United States of its obligations in this regard, for which the only legal authority that the Tribunal is able to cite is Iran's undertaking to this effect.[118] No doubt,

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113 Case No. A15(I:G), Award No. 306-A15(I:G)-FT, 4 May 1987, 14 Iran-USCTR. p. 311.

114 Ibid, p. 313.

115 Ibid, pp. 316, 319.

116 During the hearing for the Interlocutory Award Iran had hinted that it was ready to give a complete release to the United States, apparently in return for the transfer of the funds to Iran. (See the Interlocutory Award No. ITL 63-A15(I:G)-FT, 20 August 1986, 12 Iran-USCTR. p. 62.

117 Case No. A15(I:G), Award No. 306-A15(I:G)-FT, 4 May 1987, 14 IRAN-USCTR. pp. 316-317.

118 Ibid, p. 317. This part of the Tribunal's Award reads:

"Having duly considered the views of the Parties and the aforementioned declarations of Iran, the Tribunal declares that, upon transfer to Iran of the amount determined in this Award, the United States and the Federal Reserve Bank shall be released and forever discharged from any claims, counterclaims, setoffs, liabilities, rights, obligations, demands, and causes of action, whether in rem or in personem or otherwise, past or present or future, known or unknown, and from any other matters which Iran, including its agencies, entities under its

in such a situation the case for a decision on the breach by the United States of its obligations under the Algiers Accords is automatically out of the question for the Tribunal.

This time, not surprisingly, the American Arbitrators have concurred in the decision despite their earlier dissent to the adoption of the Interlocutory Award. Something which they have attributed to the inappropriateness of re-opening issues previously decided by majority vote.[119] However, a careful reading of their concurring view, which is entirely devoted to the issue of the release, discharge and indemnity of the United States obligations stated in the partial Award, reveals that the inclusion of the release in the Tribunal's Award has been the main reason encouraging them to concur in the decision.[120]

Interestingly, they take up the issue to emphasise that Iran's declarations of release were publicly made to the United States and to the Tribunal "in order to induce the transfer of the funds and were manifestly intended to be effective upon transfer of funds. Nothing compelled Iran to undertake the obligations expressed in these declarations."[121]

The above statement by the American Arbitrators which may legally be a right view, however does not reveal the realities behind the proceedings and the Tribunal's conduct of the Case which in effect caused Iran to undertake such obligations in return for the transfer of its funds.

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> control, and their successors and/or assigns, or any third persons, has raised, or could have raised, or may in the future raise in connection with, related to, or arising out of payments from, investment of, or any other actions taken in the course of the administration by the Federal Reserve bank of New York of Dollar Account No. 1, except for payments from, investment of, or any other actions taken after the date of the transfer referred to above in the administration of the funds remaining in the Account."

119 Ibid, Concurring, Opinion of Holtzman, Aldrich and Brower, p. 320.

120 Ibid, pp. 320-323.

121 Ibid, p. 321.

## VI. The Influence of Meta-Legal Factors

The nature of the motives and meta-legal considerations which affect some of the decisions of the Tribunal remain unknown and possibly diverse in category, and only certain guesses can be made. A prime concern seems to be the need to avoid antagonizing the Parties over certain politically or economically sensitive issues and secure their cooperation in the proceedings. This is a factor which is more than ever visible in the Iran-US Tribunal due to its multi-case and semi-permanent nature which requires long term cooperation by the Parties. In fact, it is believed that the success of any third-party mechanism depends largely upon its ability to "convince the disputants to compromise" on as many issues as possible, thus freeing the dispute settlers to resolve only those questions that are remaining.[122] Upon this theory some writers belive that the members of the Iran-United States Claims Tribunal have demonstrated such talents and experience in convincing the parties to cooperate.[123]

There can be no objection to the theory that an arbitral body should try to convince the parties to cooperate or to compromise. It is, however, doubtful whether the tribunal itself should reflect such practical and mediatory trends in its decisions. Moreover, the limits and criteria of the application of this notion are undefined and unclear and it may not necessarily be applied on an equal basis with regard to both parties, rather it will depend on and vary according to

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[122] Gerald Aksen, "The Iran-US Claims Tribunal and the UNCITRAL Arbitration Rules - An Early Comment", in Jan C Shultz and A. van den Berg (eds), The Art of Arbitration: Essays on International Arbitration, Kluwer, the Netherlands, 1982, 1, p. 5.

[123] Certain administrative and procedural decisions of the Tribunal have also been regarded as such:

> "Directive No 1 is also important and helpful because it provides several subtitles that demonstrate this panel's savvy. To begin with, the deftness with which the Tribunal avoided deciding what might otherwise have been tough questions becomes evident..." (Ibid).

the extent and strength of the leverages that either party enjoys in forcing the Tribunal to adopt such policies. This is where the idea becomes destructive and contrary to the principle of the equality of the parties. For instance, since Iran's power of manoeuvre in this regard is very limited due to the existence of the Security Account, the adoption of meta-legal considerations favourable to Iran may happen far less usually and may be of far less significant nature than those applied in similar circumstances in favour of its counter-parts, the Americans. In addition, it should be borne in mind that international arbitration has gradually developed itself as primarily a judicial system of dispute settlement. A brief glance at the historical development of international arbitration reveals that the present-day international arbitration is primarily designed to be a process of decision-making according to law.[124]

Nevertheless, such considerations have been and to a certain degree remain a reality in the arbitral process. It is submitted that the tendency to adopt compromise solutions has long been a characteristic of international arbitral practice. Generally international tribunals have a tendency to avoid decisions wholly adopting the position of one side or the other. More generally, they tend to adopt mediated solutions particularly where there is factual or legal uncertainty.[125]

Furthermore, there are those who explain this tendency on the theoretical grounds as well as practical ones. The theory is based on the premise that "all forms of third-party dispute settlement may be viewed as variations of a single basic social structure, a triad in which two persons unable to resolve a dispute call on the assistance of some third party."[126] The logic of this structure, it is argued, necessitates the effort "to prevent breakdown of the

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124 For a review see generally, Louis B. Sohn, "The Function of International Arbitration Today", 108 Recueil des Cours, I, (1963), 1, pp. 41-59.

125 Ted Stein, "Jurisprudence and Jurists' Prudence : The Iranian-Forum Clause Decisions of the Iran-US Claims Tribunal", 78 AJIL (1984), 1, pp. 34-35.

126 Ibid, p. 32.

triad by way of eliciting the consent of the loser to the decision rendered", in order to secure his compliance with the decision.[127] Upon this premise the application of the mediatory solutions becomes justified not as "an antithesis to judging but rather as a component in judging."[128]

Therefore, it is claimed, an analysis which merely focuses on legal norms, however authoritative from the legal point of view, may be an incomplete assessment of a tribunal's performance. Because it fails to view the question from a perspective in which the "application of legal norms is only one of the devices" - not even the primary device - "that a tribunal may employ to help it accomplish its mission as a conflict resolver."[129] In arguing in support of this view the question is put:

> How it is that a tribunal composed of highly competent individuals, further enlightened by the parties' presentations, can do so woeful a job? Explanations premised on temporary weakness of mind or lapses of scholarship are inherently unconvincing. Explanations premised on institutional context and function may have more power."[130]

**VI(1)**- Thus, viewed from this perspective, some find certain decisions of the Tribunal "richly mediated" solutions.[131] A clear example of such solutions may be found in the Iranian-Forum Clause decisions of the Full Tribunal.[132] In these decisions, it is argued, that the overall approach of the majority indicates its acceptance of the basic US premise, i.e. "that no

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127 Ibid.

128 Ibid, p. 33.

129 Ibid, p. 35.

130 Ibid.

131 Ibid, p. 42.

132 See generally, Gibbs and Hill, Inc v Tavanir, Award No. ITL-1-6-FT, 1 Iran-USCTR. p. 236; Halliburton Co v Doreen/IMCO, Award No. ITL-2-51-FT, Ibid, p. 242; HNTB v Iran, Award No. ITL-3-68-FT, Ibid, p. 248; George W. Drucker, JR. v Foreign Transaction Co. Award No. ITL-4-121-FT, Ibid, p. 252; T.C.S.B., Inc. v Iran, Award No. ITL-5-140-FT, Ibid, p. 261; Ford Aerospace v The Air Force of Iran, Award No. ITL-6-159-FT, Ibid, p. 268; Zokor International, Inc. v Iran, Award No. ITL-7-254-FT, Ibid, p. 271; Stone and Webster v National Petrochemical Co., Award No. ITL-8-293-FT, Ibid, p. 274; Dresser Industries, Inc. v Iran, Award No. ITL-9-466-FT, Ibid, p. 281. All Awards issued on 5 November 1982.

American should be required to seek a remedy in an Iranian court".[133] However, by rejecting certain politically sensitive US arguments and by adopting a line of reasoning which did not embody that sensitivity the Tribunal was able to achieve almost the same result, while at the same time it was able to elicit Iran's consent as the main loser in these decisions.[134]

The Iranian Forum-Selection decisions of the Tribunal consisted of nine test Cases, as referred to above, in which the Tribunal attempted to decide the scope of its jurisdiction under the exclusionary provision of Article 2 of the CSD. Article 2(1) of the CSD excludes from the jurisdiction of the Tribunal, inter alia, "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."[135]

Details of the issue and arguments of the Parties and the decisions of the Tribunal are irrelevant to our study in this Section. What is relevant here is the point raised by the United States argument concerning the enforceability of the Iranian forum Clauses. After contending that the exclusionary provision of Article 2(1) should be narrowly interpreted in a way that the particular choice

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[133] Stein, op. cit. p. 44.

[134] Ibid, pp. 42-44.

The word "consent" does not necessarily mean the affirmative vote of the loser party's arbitrators to a particular decision. It rather refers to the acceptance by the losing party of the decision rendered against that party by the tribunal. As indeed, in the Forum Clause decisions the Iranian Arbitrators dissented from the majority's views rendered against Iran.

For the judicial analysis of the Forum Selection Cases see generally, Ibid, pp. 1-52; Arthur L. George, "Changed Circumstances and the Iranian Claims Arbitration: Application of Forum Selection Clauses and Frustration of Contract", 16 Geo. Wash. J. Int'l L. & Econ. (1982), 335, pp. 335-376; A.F. Lownfeld, " The Iran-US Claims Tribunal. An Interim Appraisal", 38 Arbitration Journal, (Dec. 1983), 14, pp. 16-21; R. Hakan Berglin, "Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals; The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", 21 Texas Int'l L. J.,(1985), 39, pp. 39-65; and Mark B. Feldman, "Ted L. Stein on the Iran-US Claims Tribunal - Scholarship Par Excellence", 61 Wash. L.R. (1986), 997, pp. 997-1005.

[135] For a background study, see, Supra Chapter 1 pp...

of forum clause should meet all the specific requirements of that Article, the United States in addition argued that the choice of forum clause had to be "binding".[136] Upon this premise the United States argued that the changes that had taken place in Iran and its legal system were fundamental enough to preclude a fair and reasonable expectation of relief, and therefore none of the choice of forum Clauses were binding.[137]

This was certainly a sensitive question for Iran which in fact required the Tribunal to examine the "quality of Iranian Justice."[138] Iran rejected this and other US arguments, adding that the US argument "incorporates an acute political issue which may not be raised before the Tribunal" and that, entertaining this argument by the Tribunal "would eventually be ineffective and inconsequential".[139] Iran also argued that the exclusionary clause of Article 2(1) should be interpreted broadly and upon that a contract containing a general reference to governance of Iranian laws or courts in one form or another should be excluded from the jurisdiction of the Tribunal.[140]

**VI(2)-** The overall approach of the Tribunal indicates its adoption of the US position except to the meaning of the word "binding" which it regarded as redundant.[141], and added that, "it is not generally the task of this Tribunal, or any arbitral tribunal, to determine the enforceability of choice of forum Clauses in contracts."[142] As a result, the Tribunal found that only six of the

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136 Memorial of the Government of the United States of America in Gibbs and Hill, Inc v Tavanir, op. cit. as quoted in Stein, op. cit. pp. 4-5. Unfortunately the Reports published by the Grotius (Iran-USCTR.) do not provide any independent reference to the memorials of the parties.

137 Ibid, p. 6.

138 Ibid, p. 8.

139 Memorial of the Government of the Islamic Republic of Iran, in Gibbs and Hills, Inc v Tavanir, op. cit. as quoted in Stein, op. cit. p. 8.

140 Ibid, p. 7.

141 Halliburton Co v Doreen/IMCO, Case No 51, Award No. ITL-2-51-FT, 1 Iran-USCTR. p. 242; George W. Drucker, JR. v Foreign Transaction Co., Ibid, p. 256; and TCSB, Inc v Iran, Ibid, p. 266.

142 Ibid, respectively, pp. 245, 255, 264-265.

nineteen Clauses considered in the above nine Cases met the specific requirements of Article 2(1) exclusion and the rest fell within the jurisdiction of the Tribunal.[143]

The Tribunal's refusal to give effect to the word "binding" and its decision not to examine the enforceability of the choice of forums Clauses, has been viewed by some writers as being based on the political considerations such as, avoiding Iran's sensitivity in this regard and securing its cooperation, than the legal principles.[144] However, this view is subject to controversy as some other writers find the tribunal's approach in avoiding the examination of the enforceability of the forum selection Clauses as being consistent with legal principles and the practice of international tribunals.[145]

The solution reached in the Iranian-Forum Selection Cases seems to be of an additional dimension, in the sense that its process of adoption seems to have been influenced by more general factors, i.e. political considerations and the need to secure the parties' cooperation, rather than the mere internal politics of the Tribunal as a tripartite arbitrating body. Indeed in many other cases in which elements of mediation are evident, including those in which there are indications that compromise has been a prerequisite for the formation of a majority, it cannot definitely be said that this has been the only reason - or the primary reason - forcing the Tribunal in the direction of a compromise solution. However it can certainly be said that it has been one of the forces working in this direction.

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143 See generally the decisions of the Tribunal in these nine Cases referred to above.

144 Stein, op. cit. pp. 36-44.

145 R.H. Berglin, op. cit. pp. 42-43, and generally, pp. 39-65; and Lownfeld, op. cit. pp. 18-19.

## VII. Internal Politics

The extent of the role of the internal politics of the Tribunal arising from its composition cannot easily be established. This is due to the fact that deliberations in all arbitration tribunals, or any other form of judicial settlement are confidential, and therefore a judicial analysis has to confine itself to the examination of the symptoms, that is the decisions rendered by the Tribunal in question.

Furthermore, in international arbitral tribunals, and the Iran-US Tribunal alike, separate opinions of the neutral members are rarely expressed and then, unlike the indications given by the national members they do not express how a majority was formed. This, however, does not mean that the neutral members do not compromise their positions and it is only the national members who take bargaining positions.

Surprisingly, in a series of statements or individual opinions from the members of the Tribunal which ironically have emerged as a result of the tension between the arbitrators, some insights of the deliberative process, and consequently, of the internal politics of the process of decision-making can be found. These instances, though few in number can provide useful samples for the examination of the issue.

**VII(1)-** Judge Sani, the Iranian Arbitrator, in a series of statements which explain his dissenting view and the reasons behind his resignation, and his non-signing of one of the awards and non-participation in the deliberations of the two other awards, inter alia, gives some account of the deliberative process within the Tribunal. We will quote some of the relevant parts of these statements at length in order to provide a clear picture of the situation.

In Granite State Machine Co, Inc v Iran[146], he writes that Judge Mangard who had made an earlier promise to Mr Mosk[147], in order to abide by that promise was looking for some sort of temporary expedient exclusively related to Case No. 30, declared in a Chamber meeting that "he and Mr Mosk had agreed upon a rate of 8.50 percent damages, provided that I join the majority..."[148]

Recording the events following his resignation which led to the disruption of the above mentioned proceedings and deliberations, he further adds that, during the meeting which transpired between Judge Mangard, Mr Mosk and Mr Hosseini[149] following Judge Sani's resignation, Judge Mangard and Mr Mosk finally "agreed to issue an award on the basis of the same rate of 8.50 percent, allowing me to write my dissenting opinion. I expressed my agreement with this arrangement..."[150]

In another statement issued by Judge Sani in protest to the issuance of the Award in Raygo Wagner[151], Case No. 17, by the two members of Chamber Three in his absence which had been preceded by his refusal to participate in the deliberations due to resignation, we may find more information to serve our discussion.

He writes that Dr. Kashani[152] telephoned him to state that as a result of his efforts in concert with Mr Hosseini, Mr Mangard and Mr Mosk had :

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146 Granite State Machine Co, Inc. v Iran, Case No. 30, Award No. 18-30-3, 15 December, 1982, 1 Iran-USCTR. p. 442.

147 Mr Mangard and Mr Mosk were respectively Chairman and the American member of Chamber Three of the Tribunal.

148 Sani, Opinion in Case No. 30, op. cit. p. 453.

149 Mr Hosseini was the then "Iranian Legal assistant" to the Tribunal and to Judge Sani.

150 Sani, Opinion, in Case No. 30, op. cit. p. 453.

151 Raygo Wagner Equipment Co. v Star Line Iran Co. Case No. 17, Award No. 20-17-3, 15 Dec. 1982, 1 Iran-USCTR. p. 411.

152 Dr. Kashani was the then Iranian member of Chamber One of the Tribunal.

promised that if I were prepared to meet with them they would refrain from taking action on Cases Nos. 17 and 132, but they would be compelled to file Case No. 30. I considered discussions under such conditions to be not only inconsistent with legal principles but also morally improper. Yet,for much greater considerations and seeking the advice of Mr kashani and Mr Hosseini, I accepted the proposal and met Mr Mangard and Mr Mosk outside of the Court premises.[153]

He further adds:

> In this meeting... I expressly stated that my resignation was utterly unrelated to that of Mr Bellet. In order to receive assurances in this respect, Mr Mangard and Mr Mosk suggested that to avoid further confusion I withdraw my resignation. Following these discussions, I presented two proposals, one, that if Mr Mangard and Mr Mosk intended to issue an award in Case No. 30, they do so in keeping with the decision they last made, namely, to assign a damages rate of 8.50 percent. A consensus was finally arrived at between Mr Mangard and me to withdraw the decisions issued in Cases Nos. 17 and 132, and to review those Cases on 15 January 1983. Mr Mosk also evinced no opposition to this arrangement, though he did state that he would have to discuss it with his American colleagues. As a minimum condition, I endorsed the withdrawal of Awards issued in the two above mentioned Cases and I promised to return to the Hague in order to determine, at least, what was to be done with respect to those two Cases.[154]

**VII(2)-** The fact that these statements disclose the process of deliberations, which should in principle remain secret[155], reveals the extent of the tension within the Tribunal which itself is important regarding the other structural aspects of a tripartite tribunal, for which a separate study is

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153 Sani, Reasons for Not Signing Decision in Case No. 17, 1 Iran-USCTR. p. 416. A rather identical statement regarding the reasons for not signing the decision was also filed in Case No. 132 by Judge Sani. ( Rexnord Inc. v Iran, Case No. 132, Award No. 21-132-3, 10 January 1983, 2 Iran-USCTR. 6, p. 14.)

It is notable that these two Cases are not simply cases of refusal to sign the award by an arbitrator, unlike what the case seems to be in Case No. 30, they involve non-participation in parts of the deliberations and any way the question of the authority of a truncated tribunal has been raised as a result. This is itself an important issue in international arbitration. We will deal with this problem later in Chapter 5 below.

154 Ibid.

155 See Paragraph 2 of the Note to Article 31 of the Tribunal Rules which requires that the Tribunal should deliberate in private and its deliberations should be and remain secret. See also Article 54(3) of the Statute of the ICJ for a similar provision.

needed.[156] However those parts relevant to our study in this subsection which emerge from these statements are clear enough. Even the counter-statements made by the American arbitrator[157] and the Chairman of Chamber Three[158],

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156 See Secions B and C of this Chapter.

157 See "Comments of Richard M. Mosk with Respect to Mr Jahangir Sani's Reasons for Not Signing the Decision made by Mr Mangard and Mr Mosk in Case No. 17", (1 Iran-USCTR. p. 424), and "Concurring Opinion of R.M. Mosk in Rexnord Inc. v Iran, case No. 132, (2 Iran-USCTR. p. 27).

Judge Mosk argued that Judge Sani's statement violated the principle of confidentiality of deliberations, and added that an arbitrator should not participate in or aid efforts to attack Tribunal awards, because to do so may cast doubt on that arbitrator's impartiality. (Comments of Mosk in Case No. 17, op. cit. p. 424). Upon the principle of confidentiality of deliberations Judge Mosk insisted that Judge Sani's statement was not part of the award and should be subject to the tribunal's confidentiality standards, i.e. it should not be filed or circulated. If Judge Sani's document received any other treatment, Judge Mosk expressed, his counter-statement should receive the same treatment and circulation so that the record would be complete and accurate. (Ibid, p.428.) He also added that; judge Sani's representatives stated (to him) that Judge Sani might reconsider his purported resignation if the substance of this and the other awards was changed; late in the day on December 15, 1982, he and Judge Mangard met with Judge Sani at a hotel because he refused to come to the Tribunal premises; Judge Sani "demanded revision of this and other awards as a condition of his not resigning", but he and judge Mangard made "absolutely no promises" to Judge Sani; nevertheless, he and Judge Mangard agreed to tell Judge Sani that the award would be held in the registry until January 5, 1983, that there would be discussions concerning the Case on January 4, 1983, and that "an award in the case would be issued promptly thereafter (either the one on file or a new or revised one resulting from any further discussions)." (Ibid, p. 429.) Further Mr Mosk added that he did not feel it necessary to give a point by point rebuttal to every assertion of Judge Sani, but other facts and representations by him were in correct. (Ibid, p. 427.)

Arbitrator Mosk's comments in case No. 17 provoked a reply from Judge Sani, in which he argued that as a result of Mr Mosk's statements certain facts could then be said were established. Among them he counts that: He consented to reconsider his resignation if the awards in Case No. 30 and certain other cases were changed; he met with Mr Mangard and Mr Mosk late on 15 December at "Promenade Hotel, as I had refused to come to the Tribunal premises."; he proposed in that meeting that deliberations on the relevant cases be continued; no objection, "particularly, from Mr Mosk was made against my proposal..." (Mr Jahangir Sani's Reply to Mr Mosk's Comments Concerning Case No. 17, 1 Iran-USCTR. 428, p. 434).

Judge Sani further in rejection of Mr Mosk's contention that he made no promise to him writes: "If so, it seems very strange that, contrary to a legal requirement, awards properly signed and filed were not promptly served to the parties, and necessary notifications were not sent... " (Ibid.)

Finally, Judge Sani attached testimonies from Mr Kashani and Mr Hosseini in support of his original contentions and a certificate from the Co- registrar of the Tribunal indicating that Judge Mangard had informed the registry that the awards in Cases Nos. 17 and 132 should be withheld until further notice, and that a memorandum by Judge Mangard had requested the registry to return the Award filed in Case No. 132 to him. (Ibid, pp. 437-438.)

158 Nils Mangard, "Notes on Judge Jahangir Sani's Refusal to sign the Awards Issued in cases Nos. 30, 17, and 132", 13 June 1983, filed with the Tribunal on 14 July 1983.

which are intended to rebut Judge Sani's statements, are not of such primary relevance as to weaken the conclusion that meta-legal considerations have played a considerable role in the decision-makings of the Tribunal. In fact, Judge Mosk recalling the principle of confidentiality of deliberations in international arbitration expresses that such a confidentiality is particularly essential in arbitration proceedings such as these, in which arbitrators may be forced to continue deliberations until a majority, and probably a compromise solution has been reached. Judge Mosk also argued that Judge Sani used his purported or threatened resignation to attempt to extract changes in the awards and delays in the proceedings.[160]

Indeed, these statements not only indicate the bargaining situation in the decision-makings but also reveal certain peculiarities, i.e. that there can be a compromise and at the same time a dissent. Arbitrator Mosk is his comments to Arbitrator Sani's aforementioned statements writes:

> From all of Judge Sani's writings it appears that his idea of a compromise is an award that includes provisions he desires in return for his signature on the award as a dissenting arbitrator."[161]

The statement made by the Chairman of Chamber Three also demonstrates a kind of bargaining tendencies in relation to the decision-making process between the members of the Tribunal. He recounts that in a meeting between the three members of Chamber Three on 4 January 1983, he proposed:

> "... that we should have a free and open discussion of Cases Nos. 17 and 132. If we should agree on different solutions of the disputes than those contained in the awards previously filed, these awards would be withdrawn and new awards would be filed. If not, Judge Sani could choose to sign the previous awards but attach a dissenting opinion."[162]

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159 Comments of Mosk in Case No. 17, op. cit. p. 424.

160 Ibid, p. 427.

161 Concurring Opinion of Mosk, in Rexnord Inc. v Iran, Case No. 132, 2 Iran-USCTR. p. 28.

162 "Notes" by Judge Mangard, op. cit. p. 7. Judge Mangard further recounts that a discussion then ensued between him and Judge Sani on issues of substance in Cases Nos. 17 and 132,

These statements clearly lend support to the idea of the tendency of tribunals, and particularly of arbitral tribunals, to legitimize their decisions by seeking to elicit the consent of the losing party.[163] The fact that in the particular circumstances of these and some other cases, the Tribunal has not been able to achieve that goal does not necessarily weaken the creation of a presumption that this tendency may have been applied in many other cases. On the contrary, one may even conclude that only in the above Cases has this tendency failed and that that goal has not been achieved because of what Judge Sani calls "repeated breaches of promise."[164]

## Conclusion

An attempt to categorize the factors driving the tribunal in the direction of meta-legal considerations faces a great difficulty and is virtually impossible. Neither is it possible to assess the extent and limits of these factors in an overall appraisal of the Tribunal's practice. This is due to an inherent shortcoming in any legal analysis of judicial decisions as being virtually limited to the factual-legal information reflected in the decisions themselves. Second, even when certain indications of meta-legal tendencies can be established from the observation of the symptoms of a judicial conduct, meaning decisions, one can hardly define their exact nature with certainty, since, to do so may ignore the interrelation between various factors which are

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and he specifically asked Mr Sani "if it would be correct to say that unless I changed my mind regarding the control issue he found further deliberations useless. He answered that this was a correct interpretation of his position." (Ibid,p. 8.)

163 Not all the efforts mentioned in these Cases may be interpreted as a direct indication of the tendency to legitimize the decisions in the psychological and sociological sense of the word, the meaning which we have intended to convey throughout this Subsection. Additionally, in the particular circumstances of these Cases the two arbitrators efforts to seek a solution by the means described above may partly be attributable to their aim in seeking a legal legitimization as well, and avoiding the legal uncertainty regarding the authority of a truncated tribunal. Even then, these two efforts appear to have overlapped each other in the particular circumstances mentioned above.

164 Sani, Reasons for Not Signing Decision in Case No. 17, 1 Iran-USCTR. p. 417; and, Sani, Reasons for Not signing Decision in Case No. 132, 2 Iran-USCTR. p. 15.

operating in this process. However it is possible and useful to identify some of the major factors involved in certain given instances.

In the light of the foregoing assessment of the Tribunal's practice the following factors seem to have been relevant in exerting influence on the Tribunal's mission and in acting as a force driving the Tribunal in the direction of meta-legal considerations.

First, in some instances the existence of gaps or ambiguities in the legal rule governing the issue tantamount to what may be called a *lacuna juris*, has influenced the Tribunal to resort to notions such as equilibrium. An apparent example of this may be found in the decisions of the tribunal concerning the operation of the Security Account.[165] Resort to notions such as equity or equitable solutions may be regarded as permissible[166], but the manner of the practical application of such has to be assessed on the basis of the circumstances of each individual case.

Second, there are some signs that certain political considerations have influenced some of the Tribunal's decisions. The Tribunal's approach in the Forum Selection Cases has been regarded by some commentators as having this nature.[167] The Tribunal's decision in the Interlocutory Award in case A15(I:G) in avoiding a straight forward finding of a breach of obligations by the United States and particularly ordering negotiations between the parties may be categorised as such. Undoubtedly, one of the main motives behind the United States refusal to return the assets involved in the Case above, prior to the announcement of the Award by the Tribunal, has been political. The United States' desire to use the assets as bargaining chips for the political negotiations of the post-hostage settlement era, finds some reflection in the Award. In fact,

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165 Case A/1, op. cit. p. 191. See also the decisions of the Tribunal in Issues III, and IV of the same Case, Ibid, pp. 192-197.

166 See generally, Louis B. Sohn, The Function of International Arbitration Today, op.cit. pp. 41-59.

167 Ted L. Stein, op. cit. pp. 36-44 ; and Mark B. Feldman, op. cit. pp. 1003-1005.

the use of the funds in excess in Dollar Account No. 1 as bargaining chips in the political negotiations by the United States, or perhaps by both Parties, was so obvious that later in its submission of 15 January 1987 the United States requested the Tribunal to declare that the implementation of the A15(I:G) Award was not linked to the issue of hostages held in Lebanon.[168]

Third, the tribunal's practice in the instances quoted above lends some support to the notion that arbitral tribunals particularly have a tendency to legitimize their decisions by attempting to elicit the loser party's consent to their decisions.

Fourth, quite clearly the politics dictated by the structure and composition of the Tribunal has played a considerable role in influencing the Tribunal's mission. The need to achieve a majority has influenced the outcome of many cases as we have seen. The mechanics of the necessity for cooperation between the members, threats of resignation and non-participation in the proceedings can be categorized as such.

Fifth, the Tribunal's heavy workload has been another justification in this regard. Due to this fact in many cases the Tribunal has adopted a flexible approach in choosing and citing the law applicable and awarding damages.[169] Referring to this point Judge Sani writes:

> If, as we are told, the decisions of this Tribunal are destined to be studied carefully in the future and will likely influence the course of international law, then I cannot but wonder how awards like the present one will stand up to scrutiny. I am of course aware of the arguments, repeatedly advanced, that the Tribunal's heavy workload must be disposed of expeditiously. Yet, in this haste all recognized legal principles are sacrificed, the resulting decisions, such as the present one, will necessarily

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168 Case A/15, Award No. 306-A15(I:G)-FT, 4 May 1987, 14 Iran-USCTR. 311, pp. 313-314.

169 See Christine D. Gray, Judicial Remedies in International Law, Clarendon Press, Oxford, 1987, pp. 181-185.

> be so flawed and insupportable as to damage the reputation and standing of a tribunal enjoying a certain international status.[170]

It therefore becomes clear that various metalegal factors have influenced the Tribunal's decisions, among which the specific composition of the Tribunal has played a significant role. It is obvious that the decisions rendered under such circumstances are of undoubted interest for the history of international law, but the significance of their authority as a source of international law remains a matter of doubt.

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170 Dissenting Opinion of Sani, Case No. 40, (R.N. Pomeroy v Iran, Award in 2 Iran-USCTR. p. 372), 4 Iran-USCTR. p. 237.

## SECTION B

# NATIONAL/PARTY-APPOINTED ARBITRATORS : IMPARTIALITY AND INDEPENDENCE

### I. Elaboration

The proposition national/party-appointed arbitrator, or ad hoc judge, embodies two contradictory elements which, appraised within the context of realities, may prove to be in conflict with one another. The first element is the fact that the arbitrators, regardless of their nationality and/or of the party which appointed them, are expected to act independently and impartially. The second is the thesis developed out of the long lessons of reality that, the arbitrators with the nationality of the party which appointed them and the arbitrators appointed by a party, regardless of their nationality, do usually tend to have a certain affinity with the views of the appointing party, and base their decisions on the position of that party. Obviously, the elements of nationality and the partiality of the appointment may act independently or in combination, according to whether one or both exist in the process. The resultant effect of this contradiction is generally to undermine the effectiveness and judicial nature of the arbitral process.

The institution of the party-appointed adjudicator operates in the judicial settlement in its strictest meaning, i.e. the ICJ adjudication system as well as in international arbitration.[1] However, the notion faces different

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1 Note, Article 31(2) of the Statute of the ICJ which provides that, "if the Court includes upon the Bench a judge of the nationality of one of the parties any other party may choose a person to sit as judge." See also Paragraph 3 of the Same Article for a similar effect. Also note, Article 26(2) of the Same Statute which provides for the formation of a special chamber for dealing with a particular case in whose composition the court should seek the *approval of the parties*. (emphasis added.) For further developments regarding Article

degrees of seriousness and application in these two systems of adjudication. This is because the application of this system in judicial settlement is something of an exceptional nature and then of a limited role. This is not to minimize the seriousness of the institution in the ICJ composition and its eventual consequentiality. Indeed, on some occasions in the International Court the vote of a judge ad hoc has proved to be decisive.[2] Rather it is to differentiate between the eventual implications of the institution for the effectiveness of the legal nature of judicial settlement on the one hand and international arbitration on the other.

In contrast to judicial settlement, in international arbitration the institution of party arbitrators is the cornerstone in the composition of the arbitral tribunals, it is very frequently used and its role is very extensive. As is usual in a tripartite tribunal of the kind, such as the Iran-US Tribunal, the party-appointed arbitrators make up two-thirds of all the tribunal members.

The fact that despite the above-mentioned contradiction in the role of the party-appointed adjudicator, the institution remains the corner-stone in the composition of international arbitral tribunals and is the most frequently used model in that context is very significant. It serves as an important criterion in determining the basic nature of expectations placed upon this system and therefore the effectiveness of the legal nature of international arbitration. This is a point which may demonstrate the degree of legal effectiveness expected of

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26(2) which have taken place by way of the revision of the Rules of the Court, see generally, Schwarzenberger, op. cit. Vol 4, pp. 391-398.

On the institution of national/party-appointed, or ad hoc judges, see generally, Ibid, pp. 374-390; Shabtai Rosenne, op. cxit. Vol 1, pp. 202-208; I.R. Suh, "Voting Behaviour of National Judges in International Courts", 63 AJIL (1969), 224, pp. 224-236; Daniel D. Nsereko, "The International Court, Impartiality and Judges Ad Hoc", 13 Ind.J.I.L., (1973), 207, pp. 207-230; Rene David, op. cit. pp. 253-255; Alan Redfern and Martin Hunter, "International Commercial Arbitration", pp. 170-174; and more generally, J.Gillis. Wetter, "The International Arbitral Process" op. cit.Vol 3, Chapter 9, p. 355.

2 E.g. in the South West Africa Case [(1966) ICJ Rep. 61] there was a tie of 7 to 7 votes. In the Lotus Case [PCIJ Rep. Series A, No. 10, (1927), 33, reproduced in Hudson, 2 World Court Reports, 23, p. 46] there was a tie of 6 to 6 votes. In both Cases the stalemate was ended by the President's casting vote.

international arbitration and may identify one of the characteristic differences between international arbitration on the one hand and the judicial settlement in its strictest meaning on the other.

The principal function expected of the party-appointed adjudicator is subject to controversy. Varying interpretations have been given in this respect. On the one hand, it is believed that the fundamental conceptual basis for the institution of national/party-appointed arbitrators, or judges ad hoc, is the incohesiveness of the international community and distrust in the international judicial system.[3] Therefore, it is argued, the basic aim of the system is to ensure that a person knowledgeable in the national legal systems and philosophies of the parties will be available to acquaint the court or the tribunal with them, explain their positions in the case and help in drawing up awards in a way understandable to them, and ultimately obtain the parties' confidence in the proceedings.[4]

On the other hand, it is stated that a national or ad hoc member is a judge-advocate in the literal sense and he combines contradictory functions manifested in a tendency to press his party's or his government's contentions to the "point of dissenting from the decision of the tribunal if needs be".[5]

From the historical perspective, however, it is certain that the institution has developed in the context of mixed commissions, bodies composed exclusively or predominantly of the nationals of the disputant States and combining the functions of negotiators, advocates, and judges. In the words of Lauterpacht, these claims commissions were "frequently little short of bodies of negotiators putting forward their claims in the form of legal arguments".[6]

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3 Daniel Nsereko, op. cit. p. 222, and generally, pp. 217-222.

4 Ibid, p. 222. See also J.L. Simpson and Hazel Fox, International Arbitration, op. cit. p. 88.

The problem is equally applicable in international commercial arbitration. (See, Rene David, op. cit. pp. 253-255 ; and A. Redfern and martin Hunter, op. cit. pp. 171-173.)

5 Simpson and Fox, op. cit. p. 88.

6 H. Lauterpacht, "The Function of Law..." op. cit. p. 221.

This fact is clearly confirmed by the long historical experience of international arbitration since the Jay Treaty of 1794 to the early 20th century during which the national/party-appointed arbitrators have usually acted as representatives of the interests of their States.[7] The doubts, therefore, refer to the question of whether subsequent developments in the machinery of arbitral settlement have brought about any improvements so as to transform arbitration to a more advanced stage of legal organization. This is the question which we will study in the case of Iran-United States Claims Tribunal.

As regards the reasons behind the partisan tendencies of the national/party-appointed arbitrators, this is not the place to engage in philosophical arguments on the subject. This has been discussed elsewhere.[8] A simple quotation of some clear facts, however, will suffice for our purpose. For instance, a survey of the work of both the Permanent Court of International Justice and its successor, the International Court of Justice, proves the reality that in overwhelming majority, or perhaps in almost all, of occasions ad hoc judges have regarded it as their duty to base their decisions on the positions of their governments. It is submitted, for instance, that the record of the ICJ shows that no ad hoc judge has ever dissented against an opinion favourable to his own government. On many occasions they have dissented against the majority opinion unfavourable to their governments, and on many occasions they were the sole dissenters from the otherwise unanimous opinions of the Court.[9] The record of the Permanent Court of International Justice also shows a similar result.[10] In short, it is established that their voting behaviour tends to tip the scale towards their partiality rather than impartiality.[11]

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7 See generally, Ibid, pp. 220-224.

8 On this see, Ibid, pp. 228-232, and generally, pp. 232-241; and Nsereko, op. cit. pp. 222-230.

9 Nsereko, op. cit. p. 226.

10 Lauterpacht points out that a survey of the judgements given by the PCIJ shows that, in sixteen cases, the parties have availed themselves of the right to appoint a national judge. In three of these cases the national judge voted with the majority in favour of the

## II. Theoretical Framework of the National/Party-Appointed Arbitrators' Independence and Impartiality

The terms independence and impartiality, as used in many international arbitration rules, are considered to be interchangeable. Nevertheless, partiality is believed to arise where an arbitrator "favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute."[12] Dependence, on the, on the other hand, "arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties."[13]

Provisions regarding the requirement of independence and impartiality in international arbitration rules are usually drafted in general terms. That is: first, no detailed provisions are made in relation to ethics of international arbitrators; second, nothing explicitly indicates that standards of behaviour expected of party appointed arbitrators are different from those of non-party arbitrators. For instance, The UNCITRAL Arbitration Rules[14], the UNCITRAL Model Law on International Commercial Arbitration[15], the ICSID Rules[16], the LCIA Rules[17] and the ICC Rules all require that arbitrators must exercise their function independently and impartially.

Indeed, the ICC Rules and the LCIA Rules have expressly emphasized that the arbitrators appointed by the parties should remain independent of the

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contention advanced by his State. In one case the record does not disclose the names of all the dissenting judges. In the remaining twelve cases the national judges regarded it as their duty to disagree with the decision of the majority and to uphold in dissenting opinions the defeated views of their governments. (Lauterpacht, the Function of Law, op. cit. p. 230.)

11 Nsereko, op. cit. p. 226.

12 Rule 3.1 of the International Bar Association's Ethics for International Arbitrators, 26 ILM, p. 583; also in David J. Branson, "Ethics for International Arbitrators", 1 Arb.Int'l. (1987), 72, p. 75. See also Martin Hunter, "Ethics of the International Arbitrator", 53 Arbitration (1987), 219, p. 222.

13 Ibid.

14 Articles 9 and 10 of the UNCITRAL Arbitration Rules of 1976, 15 ILM (1976), p. 701. See also, Pieter Sanders, "Commentary on UNCITRAL Arbitration Rules", op. cit. p. 187.

15 Article 12 of the UNCITRAL Model Law of 1985, 24 ILM, p. 1302.

16 Article 6 of the ICSID Rules of Arbitration, (text in Wetter, op. cit. Vol 4, p. 496.

17 Article 3(1) of the LCIA Rules of 1985, published by the LCIA.

parties appointing them and impartial at all times.[18] In the Iran-United States Tribunal Rules Articles 9 and 10 of the UNCITRAL Rules have been maintained unchanged. An addition has been made to Article 9 which widens the scope of that Article with regard to any single case before the Tribunal. This addition in effect harmonizes the provisions of Article 9 with the multi-case nature of the Tribunal's proceedings.[19]

Despite these, however, there are some indications in the general theory which might be regarded as a different treatment of the impartiality required of the party-appointed arbitrators from that of the neutral members. For instance, the Code of Ethics drawn up jointly by the ABA/AAA accepts that non-neutral arbitrators may be "predisposed toward the party who appointed them."[20] They are also permitted to be "predisposed toward deciding in favour" of the party which appointed them.[21] As regards the requirements of disclosure, communications with and payments by the appointing party, similar flexibilities have been recognized by the above Code of Ethics[22], which in turn emphasise on the unsettled foundation of the non-neutral arbitrators' independence from the appointing parties. The Code, however, emphasises that non-neutral arbitrators in all other respects are obliged to act in good faith and with integrity and fairness. They should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.[23]

The fact that some of these rules have chosen to remain silent on the topic, added to the explicit recognition in the AAA/ABA Code of Ethics of

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18 Articles 3(1) of the LCIA and 2(4) of the ICC Rules.

19 See Modification to Article 9 of the (UNCITRAL) Tribunal Rules. Also, Note to Articles 9-12 of the same Rules.

20 Canon VII-A(1) of the Code of Ethics for Arbitrators in Commercial Disputes Established by the ABA and AAA (1977), [text reproduced in Wetter, op. cit. Vol 3, p. 429].

21 Ibid, Canon VII-E.

22 Ibid, Canon VII, Paragraphs B, C and F.

23 Ibid, Canon VII-A(1).

different standards of behaviour for party-appointed arbitrators, illustrates "the great dichotomy that pervades the international arbitral process"[24] in this regard.

Whether the flexibilities described in the AAA Code of Ethics find a universal recognition is seriously doubted. Dr Gillis Wetter points out that even where the existence of "the rule of absolute independence is not recognized, the correctness of the principle is not questioned".[25] and it is doubtful that these rules could receive official sanction outside the United States.[26]

Moreover, the recent guide-lines drafted by the International Bar Association on Ethics of International Arbitrators which reflect internationally accepted guide-lines make no distinction between standards of behaviour expected of the party appointed arbitrators and those of non-party members.[27] The IBA Guide-lines, inter alia, put a particular emphasis on the nature of relationships between an arbitrator and a party; the rules of disclosure and prohibit any unilateral communications with a party or its representatives.[28]

It has to be said that in international commercial arbitration it ultimately falls to the domestic law concerned, the lex arbitri and the law of the country where enforcement of the award is sought, to determine the degree of impartiality expected of party-appointed arbitrators. The practice in this respect is not completely uniform. It is submitted that in the Common Law system, particularly in the United States, party-appointed arbitrators are permitted to be sympathetic to the party who appointed them.[29] The principle of absolute

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24 G. Wetter, op. cit. Vol 2, p. 364.

25 Ibid, p. 365.

26 Ibid, p. 368.

27 David Branson, op. cit. p. 73, see also Introductory Note to the IBA Guide-lines Para 1.

28 IBA Guide-lines, op. cit. Sections 3.3-3.5, 4.1-4.4 and 5.1, and 5.3.

29 Rene David quotes that the courts of England and the United States have recognized that the party-appointed arbitrators are permitted to perform a form of judge-advocate and partisan function, while in some other countries the award of an arbitral tribunal was objectionable when it appeared that the party appointed arbitrators had behaved in the course of the proceedings as partisan arbitrators. (R. David, op. cit. pp. 254-255). For a

independence of all arbitrators, however, prevails in most civil law systems. In general the American practice is regarded as an exception to that rule.[30]

A similar dichotomy between the theory and practice prevails in public international arbitrations. In theory, each arbitrator is independent and must be strictly impartial. In reality, however, it is not certain whether many States place a serious emphasis on this point. Besides, given the political structure of the international community the idea of representation of interest in the development and existence of the institution of party arbitrators cannot be taken for granted.

The practice of international law in this regard is, to a considerable degree, inarticulate and few cases have emerged and as yet they are not conclusive enough. The most notable one is the Buraimi Oasis Arbitral Tribunal case, in which the British Arbitrator resigned in protest to what he called the lack of impartiality on the part of the Saudi Arabian Arbitrator, who was the Saudi Arabian deputy Foreign Minister and the Minister responsible for the disputed area of Buraimi.[31] The Saudi Arabian Arbitrator in response argued that his position and activities with regard to the disputed area were known to the British Government and the British Arbitrator well before the establishment of the Tribunal, and in fact, he had negotiated the establishment

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more detailed review on the position of the English and American and Swedish laws on the issue see generally, Wetter, op. cit. Vol 3, pp. 401-428 and Vol 2, pp. 364-368. See also Michael Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration", 38 ICLQ (1989), 26, pp. 28-29, 42-48; and Martin Hunter, 50 Arbitration, op. cit. pp. 219-224.

30 Ibid.

It is generally accepted that partiality and bad faith of the arbitrators will lead to the nullity of an arbitral award. (See, Kenneth Carlston, "The Process of International Arbitration", op. cit. pp. 55, 56-61. See also Article 35(b) of the Model Law of the ILC on Arbitral Procedure, 1958 ; and Article 52(1)(c) of the ICSID Convention. However, both in the field of public international arbitration and commercial arbitration there has been a reluctance to accept frivolous and trivial charges of partiality or even mere partisanship as a cause for nullity of the award. (Carlston, op. cit. pp. 55-61; and Micheal Tupman, op. cit. pp. 42-48.)

31 For the documents relating to this incident see Wetter, op. cit. Vol 3, pp. 368-377.

of the Arbitral Tribunal with the British authorities.[32] However, the circumstances surrounding the issue and the lack of any judicial ruling on the problem makes a clear-cut conclusion very difficult.

In some other cases of the international arbitral practice established within the frame of the Permanent Court of Arbitration, however, the element of representation of interests has been somehow acquiesced to or accepted by the parties or the tribunals concerned. For instance, in the Casablanca Case the parties appointed as arbitrators legal advisers of their respective Foreign Offices who had conducted the diplomatic correspondence in this case prior to its submission to arbitration.[33]

It is also submitted that according to a body of opinion, the party-appointed judges remain under the authority of their States, that they are bound to follow its instructions and that the award has no binding force if the arbitrators have failed to follow their instructions.[34] Nevertheless, it can certainly be said that the latter opinion cannot be regarded as forming part of the modern international law. It demonstrates the diversity of the views in this regard, however, and adds fuel to the existing uncertainty regarding the exact scope of the national/party-appointed arbitrators' impartiality and independence.

In the Iran-United States Claims Tribunal, on some occasions, the American arbitrators have referred to the Code of Ethics drawn up by the AAA/ABA as an instructive instrument for the conduct of the Tribunal's arbitrators.[35] No express reference, however, has been made to this Code by the other members of the Tribunal or the Tribunal as a whole. The degree of

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32 Ibid, p. 374.

33 Lauterpacht, the Function of Law, op. cit. p.223. For more examples in this respect see generally Ibid.

34 Ibid.

35 Concurring Opinion, Holtzman, Starrett Housing Corp v Iran, 4 Iran-USCTR. 159, p. 181; Mosk, Concurring Opinion, Ultrasystems Inc. v Iran, 2 Iran-USCTR. 114, p. 121; and Mosk, Dissent to Order, R.J. Reynolds Tobacco Co v Iran, 3 Iran-USCTR, p. 40.

recognition of the relevant provisions of that Code in the Tribunal's practice is therefore unclear.

Another point which is worth mentioning is the provisions for certain procedural safeguards for securing the effectiveness of the proceedings against possible problems which may arise as a result of the non-neutral arbitrators' allegiance to the party which appointed them. For instance, an advantage which is peculiar to the permanent arbitration institutions is that the arbitrators should preferably be chosen from among a list of known persons.[36] The object of this provision would seem to be the desire that only persons of the required standing and those who have undergone some international scrutiny and screening are appointed. Any provisions which limit the powers of the appointing party over the non-neutral arbitrators' conduct in the course of proceedings, e.g. resignation, withdrawal and payment of fees, and entrust the arbitral tribunal or the arbitration institution with a greater degree of organizational autonomy in these respects may be categorized as part of such safeguards.

The purpose of these kinds of provisions is to prevent the possible disruption of the proceedings which may take place as a result of partisan efforts by the non-neutral arbitrators after the tribunal has been constituted. This category of provisions which is quite commonly adopted in arbitration rules or arbitration agreements is intended to ensure that: a)- the arbitrators, including the non-neutral arbitrators, cannot be removed unilaterally by either party after the tribunal has been constituted[37]; b)- if any vacancy occurs as a

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36 See Articles 23-24 and 44-45 of the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 respectively 1 AJIL (1907), p. 107 and 2 AJIL, (1908), p. 43; and Section 4 of the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, 575 U.N.T.S. p. 160) regarding the establishment of the Panel of Arbitrators (and Conciliators),. It is notable that under Article 40(1) of the latter Convention the arbitrators may also be appointed from outside the Panel of Arbitrators. See also, Redfern and Martin Hunter, op. cit. pp. 162-163.

37 See, for instance, Article 4 of the Model Rules on Arbitral Procedure of the ILC of 1958.

result of death, resignation or withdrawal..., of an arbitrator a replacement procedure is in place. That is, if the replacement is not made within a specified period, a body or a person entrusted with the power as appointing authority is empowered to do so according to the provisions of the parties' agreement.[38]

## III. Institutional Autonomy

Against these uncertainties in the general practice, an appraisal of the issue in respect of the practice of the Iran-United States Tribunal is rather complicated, particularly when the Tribunal Rules do not provide much guidance on the issue. In fact, one of the criticisms which may be brought against the Tribunal is that the Tribunal or the parties have failed to draw up detailed rules of conduct or ethics for the arbitrators, neutral and non-neutral alike. The Tribunal Rules are of a relatively general nature and do not provide much detailed guidance on these issues which is needed for a tribunal which has a semi-permanent nature, and in effect operates within an institutional framework. In the absence of such provisions in the Tribunal Rules or the general theory, it follows that the practice of the Tribunal and of the Parties regarding these issues are to be given the primary importance for drawing out the applicable principles to the situation.

### a- appointment

Quite clearly under the CSD and the Tribunal Rules the initial selection and appointment of non-neutral members is left to the unfettered discretion of the appointing-party concerned.[39] This fact can be confirmed by more than seven years practice of the Tribunal and the Parties, in the course of which

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38 Ibid, Article 5 in conjunction with Article 3. Also note Article 13 of the Tribunal Rules to a similar effect.

39 However, the parties have no power to delay or withhold such appointment. If either Government fails to appoint its respective arbitrators, the appointing authority under Article 7 of the Tribunal Rules is entrusted with the power to make such appointment.

several appointments of party arbitrators have been made by the Parties. There is no evidence that in the course of appointment of a party arbitrator his impartiality and independence has been a prime concern for either Party. No challenge or objection, in the course of "initial" appointment, has been made against a party arbitrator in this regard. Nor is there evidence that there has been given any consideration at all to the independence and impartiality of a party arbitrator by the Party which appointed him. Arguably, the overall indications suggest the contrary ; that the party-appointed arbitrators have been expected to represent the interests of the Party which appointed them.

The principal concern for the United States as regards the Iranian Arbitrators has been to have the Tribunal legally constituted, since the Iranian Arbitrators' participation is needed to this end, and to keep it operating. That is to say, it is Iran which is usually a respondent in the majority of the cases. As possible obstructive attempts may naturally be expected from the Iranian side, the principal concern for the United States regarding the Iranian Arbitrators has been to legalize the constitution of the Chambers and of the Tribunal and to keep it operating. Nor has Iran ever taken the question of the impartiality of the American Arbitrators seriously. A question which has been of principal concern to Iran, and to the United States, as regards the neutral members. It is obvious that in such a situation the Parties have only been looking forward to securing the affirmative vote of the neutral member, or members, in order to achieve a decision favourable to them. For instance, in a recent letter exchanged between the American and Iranian Agents concerning the vacancy arising from the resignation of the Iranian member of Chamber One, the American Agent, expressing his anxiety to fill the vacancy as soon as possible, suggested:

> I note that there are several highly skilled attorneys on the staff of the Iranian delegation in the Hague who are experienced in international arbitration. The attorney for the claimant in Case Number 430 has informed me that the claimant would interpose no objections under Articles 9-12 of the Tribunal's Rules to such an appointment.[40]

The Iranian delegation to which the American Agent referred happened to be the body responsible for the defence and pursuit of the cases for Iran before the Tribunal, a fact which was undoubtedly known to the American Agent. Yet his remarks do not imply that he has confidence in the independence and impartiality of Iranian Arbitrators. On the contrary, they clearly demonstrate the minimal degree of seriousness with which the Parties view the independence and impartiality of each other's arbitrators.

Quite clearly, one of the classes of activity or circumstance which are treated as incompatible with the exercise of judicial function in a particular case is a situation in which a judge has previously taken part as agent, counsel, or advocate for one of the parties.[41] That is, advisory governmental work for one of the parties, after a dispute had arisen, has long been established by the practice of the Permanent Court of International Justice and of the International Court of Justice to constitute a judicial incompatibility. For instance, Judge Jessup did not sit in the Temple of Preah Vihear Case, having taken part as counsel in the preparation of the case. Judge Khan for a similar reason, did not participate in the Barcelona Traction Case, and Judge Lauterpacht, having advised one of the parties, withdrew from the Nottebohm Case.[42]

It is notwithstanding the possibility of this kind of incompatibility that the American Agent expresses his readiness to waive, in advance, any objection to such incompatibility should a member of staff of the Iranian

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40 Letter from John Crook, Agent of the United States, to M.K. Eshragh, Agent of the I.R. of Iran, dated 2 April 1987, in AR 86/87 of the Tribunal, 58, p. 59.

41 See Article 17(2) of the Statute of the International Court of Justice.

42 See Jeremy D. Morley, "Relative Incompatibility of Functions in the International Court", 19 ICLQ, (1970), 316, p. 319; see also, Schwarzenberger, op. cit. Vol 4, pp. 347 and generally, pp. 348-365, and Shabtai Rosenne, op. cit. Vol 1, pp. 196-197.

delegation had been appointed as arbitrator. This is where a marked departure from the strict rules of incompatibility can be seen in the practice of the Iran-US Tribunal. A feature which quite possibly marks a characteristic difference between international arbitration as a whole on the one hand and international judicial settlement in its strictest meaning on the other.

In fact, the person who was later appointed by Iran to replace the resigning member of Chamber One appears to have acted as legal adviser for the Agent of Iran in a number of cases before the same Chamber.[43] However, it is not yet clear whether he has or will participate in the decision of the Cases in which he has previously acted as legal adviser to Iran. This would not seem to be the case, since the letter concerning his appointment appears to be mindful of the possible incompatibility of this kind and acknowledges that a disclosure concerning cases with which he has been possibly involved will be made to the Tribunal.[44]

Indeed, Mr Nouri has later disqualified himself in Cases Nos. 20 and 21 on the ground of his previous work on them while a member of the Bureau for International Legal Services of Iran.[45] The irony is, however, that Iran refused to appoint a substitute for Mr Nouri for some time and the two other Iranian Members initially refused to serve on these Cases on the same grounds of incompatibility.[46] The President of the Tribunal requested the Agent of Iran to

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43 See Letter of MK. Eshragh, Agent of Iran, dated 5 July 1987, concerning the appointment of Mr A. Nouri as Iran's arbitrator in Chamber One. (AR 86/87 of the Tribunal, p. 60) Also note, for instance, that Mr Nouri has acted as legal adviser to the Agent of Iran in the following cases : Queens Office Tower Associates v Iran, Case No. 172, Award No.37-172-1, 15 April 1983, 2 Iran-USCTR. p. 247 ; Sylvania Technical Systems, Inc. v Iran, Case No. 64, Award No. 180-64-1, 27 June 1985, 8 Iran-USCTR. p. 298 ; Flexi-Van Leasing Inc. v Iran, Case No. 36, Award No. 259-36-1, 11 October, 1986, 12 Iran-USCTR. p. 335 ; and INA Corporation v Iran, Case No. 161, Award No. 184-161-1, 12 August 1985, 8 Iran-USCTR, p. 373. It is notable that these Cases have been terminated prior to the appointment of Mr Nouri as arbitrator, however, they demonstrate his general governmental advisory work for Iran.

44 Letter of Eshragh, dated 5 July 1987, op. cit. p. 60.

45 See, AR 87/88, pp. 2-3.

46 Ibid.

appoint an arbitrator for these Cases within thirty days.[47] After the expiry of that period, the Agent of the United States requested the Appointing Authority to appoint an arbitrator for these Cases.[48] However, following an accommodation of different points of view, Arbitrator Ansari agreed to act instead of Mr Nouri in those Cases.[49] Ironically, the above-mentioned circumstances surrounding the disqualification by Mr Nouri of himself raises some curiosity as to the true intention behind the issue.

Despite all the foregoing, however, given the particular circumstances of the Iran-US Tribunal's case there still seems to exist a question of general nature in this regard. First, Section 1 of the Notes to Articles 9-12 of the Tribunal Rules indicates that :

> As used in Articles 9, 10, 11 and 12 of the UNCITRAL Rules, with respect to the initial appointment of a member the terms "party" and "parties" mean one or both of the two Governments, as the case may be. After the initial appointment, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be. Arbitrating parties may challenge a member only on the basis of the existence of circumstances which give rise to justifiable doubts as to the member's impartiality or independence with respect to the particular case involved, and not upon any general grounds which also relate to other cases. Challenges on such grounds may only be made by one of the two Governments.

Second, given the distinction made between the terms "party" and "arbitrating party" and the obvious fact that under the terms of the Tribunal's jurisdiction, except in case of a counterclaim, there is no private respondent in any case before the Tribunal and it is only either of the two Governments or their controlled entities against which a claim may be brought before the Tribunal - a fact as a result of which all awards against any controlled entities

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47 Ibid. See also letter from Bockstiegel to the Agent of Iran, 15 Feb. 1988, Ibid, Annex III, pp. 61-62.

48 Ibid, p. 3. See also Letter from T.A. Ramish, the Agent of the US, to the AA, 5 April 1988, Ibid, Annex IV, pp. 63-64.

49 Ibid, p. 3.

of the Iranian Government are paid from the Security Account which is the property of the Iranian Government - theoretically, instances such as the one described above may well constitute grounds for incompatibility of a general nature which may be made by anyone of the two Governments. However, as it appears from the letter from the American Agent, while the Parties have been ready to ignore the question of incompatibility, in respect of the party arbitrators, in its most obvious form, it is therefore not surprising if they have taken a relaxed approach towards a lesser important question of that kind.

One may possibly categorize the temporary leave and appointment of Charles Brower, the American member of the Tribunal, to a governmental position and his further return to the Tribunal as constituting one of such general grounds. Although he takes every care to explain that his appointment as Deputy Special Counsellor to the President of the United States responsible for coordinating responses to all requests to the White House in connection with inquiries into the sale of American arms to Iran during his leave from the Tribunal, is not incompatible with his duties as arbitrator, this remains controversial and at best shows the parties' very liberal approach to the issue.[50]

**b- Resignation and Disqualification**

There are some indications in both the Tribunal Rules and the Tribunal's practice which may generally be regarded as mechanisms intended to limit the control of the appointing party over the non-neutral arbitrator's conduct after he has been appointed and after the tribunal has been constituted. Article 10(2) of the Tribunal Rules provides that "a party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made." As Professor Sanders in his "Commentary on UNCITRAL Arbitration Rules" points out, this provision is primarily designed

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50 See Letter of Charles N. Brower to the President of the Tribunal dated January 8, 1987, AR 86/87 of the Tribunal, p. 70.

in response to an obvious situation; that a party should not be entitled to start the challenge proceedings based on the same circumstances as were already known to him when making the appointment.[51] However, a natural implication of such a provision is to prevent the creation of a situation in which the appointing party by assuming an unlimited right of control over its arbitrator may withdraw him in an arbitrary manner. Moreover, the essence of the provision of the challenge proceedings in arbitration rules is a confirmation of a widely accepted principle, that the only method by which an arbitrator may be removed from office is through the challenge procedure. This principle is a commonly accepted precondition for the integrity of the arbitration process and many arbitration rules do not find it necessary to put an express provision to this effect. In fact when a challenge procedure has been foreseen in the arbitration rule or agreement and/or in the absence of any express provision derogating from that principle a presumption should be made in favour of the applicability of this principle. For instance, Article 4(1-3) of the Model Law of the ILC on Arbitral Procedure expressly emphasises the existence of this principle.

In fact, the Tribunal had the opportunity to declare on the importance and inviolability of this principle. Although the Case before the Tribunal primarily concerned the removal of a neutral arbitrator, the Tribunal's ruling quite clearly has a general application. The Tribunal clearly expressed that "any right of a State Party to an arbitration agreement to remove an arbitrator from office by a unilateral decision would seriously impair the integrity of the arbitration process and would be contrary to all general principles of justice."[52] Obviously this ruling is declaratory of a general principle without any distinction between the neutral and non-neutral arbitrators.

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51 Pieter Sanders, "Commentary on UNCITRAL Rules", op. cit. p. 189.

52 "Re Judge Mangard", Decision of 15 January 1982 of the Full Tribunal, 1 Iran-USCTR. 111, p. 114.

On other occasions which directly concerned the party-appointed arbitrators, more emphasis has been put on the integrity of the composition of the Tribunal. In the episode concerning the resignation of Judge Sani, the Iranian arbitrator, the position adopted by Judge Sani implied that it is the appointing government that accepts his resignation rather the Tribunal or its President. He submitted his resignation to the Government of Iran, and the Government of Iran accepted his resignation and set the effective date of his resignation.[53] However, the Tribunal's approach to the problem would seem to have been that there could be no legally effective resignation by any member of the Tribunal without submission of such resignation to, and its acceptance by the Tribunal. This presumption is confirmed by the statement attributed to the President of the Tribunal in the Full Tribunal meeting that the Tribunal had received no valid reasons for Judge Sani's absence and had not authorized that absence.[54] The fact that Chamber Three has proceeded to render awards in the absence of Judge Sani may be seen as another confirmation of the above mentioned presumption that the Tribunal has treated Judge Sani's resignation as not being legally effective unless endorsed by the Tribunal.[55] Chamber Two's issuance of Awards in the absence of Judge Shafeiei who had taken an unauthorized leave may be regarded as another example.[56] However, the

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53 See the text of documents concerning Judge Sani's resignation attached to his reply to Judge Mosk's Comments in Case No. 17. (1 Iran-USCTR. 428, p. 440.) Further, Iran informed the Tribunal that it had accepted Judge Sani's resignation and set the date upon which it became effective. In fact, on the basis of this process Judge Sani argued that he "considered his resignation to the Islamic Republic of Iran to be effective upon the Tribunal..." (See Explanation for Failure of Judge Sani to Sign Awards", Woodward-Clyde Consultants v Iran, Case No. 67, Award No. 73-67-3, 2 September 1983, 3 Iran-USCTR. 239, pp. 254-255. Identical explanations have been attached to four other Cases in which Judge Sani failed to sign the Awards: Chas T. Main v Mahab, Ibid, 270, p. 276; Alan Craig v Ministry of Energy, Ibid, 280, p. 291; John Carl Warnecke & Associates v Bank Mellat, Ibid, 256, p. 268; and Blount Brothers Corp v Ministry of Housing, Ibid, 225, p. 237.)

54 See, e.g. Woodward-Clyde Consultants v Iran, Ibid, p. 255.

55 E.g. Ibid.

56 See Intrend International Inc., v Iranian Air Force, Case No. 220, Award No. 59-220-2, 27 July 1983, 3 Iran-USCTR.p. 110; Gruen Associates, Inc., v Iran Housing Co, Case No. 188, Award No. 61-188-2, 27 July 1983, Ibid, p. 97 ; Reynolds Metal Co v Iran, Case No.

question of whether an unauthorized or illegal absence of an arbitrator is strong enough authority for the remaining two-third members of an arbitral tribunal to proceed and to render valid awards in the absence of the arbitrator, or arbitrators, appointed by one of the parties, is a separate issue and will be discussed in the following Chapter.

These instances clearly demonstrate the degree of detachment and independence that the party-appointed arbitrators should observe from the party which appointed them in the course of their conduct, if not specifically in the course of making judgements. Indeed, further evidence shows the acceptance of this principle in some areas of conduct by some of the party-appointed arbitrators. For instance, Judge Mostafavi of Iran did recently submit his resignation to the Tribunal.[57]

However, despite the implicit acceptance in Judge Mostafavi's letter of resignation of the authority of the Tribunal to decide on and determine the effective date of a party-appointed arbitrator's resignation, in general the Iranian arbitrators have maintained an opposite position. For instance, Judge Bahrami-Ahmadi only notified the Tribunal of the submission to and acceptance of his resignation by the Government of Iran.[58]

Moreover, the Iranian arbitrators have expressly taken the position that: 1- the resignation of a party-appointed member should be addressed to the Government appointing him; 2- that the resignation of a third-country member should be addressed to both Governments; 3- that resignation was a matter solely within the discretion of the member concerned, the Tribunal having no power or role in the process; 4- that any decision by the Tribunal purporting to

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83, Award No. 60-83-2, 27 July 1983, Ibid, p. 119; and National Airmotive Corp v Iran, case No. 449, Award No. 58-449-3, 14 July 1983, Ibid, p. 91. See also "Shafeiei Reasons for not Signing Awards in Cases Nos. 83, 188, 220 and 449", Ibid, p. 124. Judge Shafeiei in his statement, among other things, argued that his annual leave had been completely justifiable and natural. (Ibid, p. 139.)

57 Dated 17 March 1987, AR 86/87 of the Tribunal, p. 55.

58 AR 87/88, p. 2, and Ibid, Annex II, p. 60.

"accept" a member's resignation was outside the competence conferred on the Tribunal by the Algiers Declarations; 5- that Article 13, paragraph 5 of the Tribunal Rules did not impose, and should not be interpreted as imposing on a member, after his resignation, any obligation to continue to serve as a member with respect to all cases in which he had participated in a hearing on the merits.[59]

The Tribunal, however, has taken a different view. Notably, the Tribunal decided on 9 December 1987, to treat Mr Bahrami-Ahmadi's communication as notification to it of the latter's intention to resign; and, in view of the availability of his substitute, to set the effective date of his resignation from 31 December 1987.[60]

**c- Financial Independence**

Another point which needs to be noted briefly is that the party-appointed arbitrators are paid by the Tribunal administration and not directly by the appointing parties, although in the early days of the Tribunal's constitution, the period before January 1982, the Parties had agreed that certain parts of these arbitrators' fees had to be paid by the respective appointing Parties.[61] The financial aspect of the party-appointed arbitrators' independence from the party which appointed them is a useful and a well-recognized principle, however, in the particular circumstances of the Iran-US Tribunal, and possibly most public international arbitrations, it cannot be expected to have any serious effect on the inherent shortcomings of the party-appointed arbitrators' performance. The principle, however, is as a whole useful and can, especially in commercial arbitrations, ensure a greater degree of independence for the non-neutral arbitrators.

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59 Ibid, p. 4.

60 Ibid, p. 2.

61 See Annex III to AR 82/83 of the Tribunal, p. 3.

## IV. Assessment

Despite some occasional indications in the Tribunal's practice emphasising the independent status of the party-appointed arbitrator, their overall performance in the main area of function, namely decision-making, remains highly suspect. This fact is clearly evident in the voting behaviour of these arbitrators and in the inconsistency of reasoning employed by them in various cases.

For the arbitrators appointed by Iran and the United States the function entrusted to them has principally been the accomplishment of a national duty vis-a-vis their respective countries. This has been particularly intensive in the case of the Iran-US Tribunal because the arbitration has been functioning against an unusual background of continued intergovernmental tension. In fact, the party appointed arbitrators have not made any attempt to hide this sense of national duty, rather they have, on occasions, expressed sympathetic and sentimental views. The background of continued intergovernmental tension has also reflected itself in their performance and voting behaviour in one way or another. Although one may recognize some distinction between the Iranian and American Arbitrators in regard to the latter's more cautious approach to making their national sentiments public, no real difference can be found in the outcome. It is notable that the Government of Iran has been the respondent in the majority of cases and a Party which has very often been ordered by the Tribunal to pay large sums of money to American claimants. In contrast to that, on the American side it has usually been private corporations which have their claims before the Tribunal. Given the above fact, the Iranian Arbitrators, imbued with a revolutionary commitment and a feeling that the arbitral machinery of the Tribunal was mostly working to the advantage of the Americans, have quite often made their sentiments public.

Nevertheless, a general improvement and a more cautious approach in expressing such inclinations is visible in the performance of the Iranian Arbitrators in the post September 3, 1984 phase of the Tribunal's work. This may be as a consequence of several factors, including: the changes in the composition of the Iranian and neutral members; the lessons learnt from the pre-September 84 phase of the Tribunal's work; the recognition to a certain degree by the Iranian members of the institutional integrity and authority of the Tribunal; and the settlement of the major controversial jurisdictional problems and politically sensitive issues in the pre-September 84 phase of the Tribunal's life, etc. This does not, however, imply a change of attitude by the party-appointed arbitrators, as regards their assumption of their role as judges-advocate as reflected on their voting behaviour.

**a- Individual Opinions**

The individual opinions expressed by the non-neutral members constitute a useful instrument by which the degree of independence and impartiality of these arbitrators can be tested. That is not to say that the expression of dissenting view by a national/party-appointed judge is necessarily evidence of his bias and lack of impartiality. Many differences of opinion are the result of a mere difference of opinion and/or a reflection of the heterogeneous and divided nature of the world society, consisting of different cultures and legal systems. This division of cultural-legal understandings is necessarily reflected in the conduct and performance of the national/party-appointed arbitrators. Indeed some argue that the individual opinions act as valuable supplements to the views of the majority and help in the development of international law.[62] Nevertheless, the circumstances in which a dissenting view has been expressed, the style and the reasoning behind the opinion may

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62 R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication",14 ICLQ, (1965), 788, pp. 800-801.

expose the extent to which a dissent constitutes a partisan pleading or a conviction based on strong legal arguments.

It is therefore submitted, for instance, that the use of discourteous speech is a sign of poor style and suggests that the judge's own argumentation is suspect.[63] Moreover, a dissenting opinion must have its own independent reasoning and should not simply become a criticism of the majority judgement.[64] It should express reason, not emotion.[65]

In many instances the dissenting or even concurring opinions of the arbitrators of both Iran and the United States do amount to a criticism or an attack on the majority judgements. Sometimes they are merely a criticism of the Tribunal awards and it appears that the lengthy arguments put forth in some of these individual views are simply designed to criticise the majority judgement. In other words, the opinions of these arbitrators, although couched in legal language, read very much like the arguments of a party to the dispute. However, the extent to which these differences have been motivated by the sheer lack of impartiality or the diversity of cultural-legal understandings between the arbitrators is unclear. The latter justification can hardly be applicable to the case of American Arbitrators who usually have enjoyed a relatively common cultural-legal background with that of the neutral European members of the Tribunal. Nevertheless, it seems possible to attribute the motive behind some of these individual opinions to the very fact of predisposition and partisan behaviour of the non-neutral arbitrators.

Starting with the individual views, particularly dissenting opinions of the American Arbitrators, the element of predisposition and partisan behaviour is manifest both in an overall appraisal of these views and in each individual

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63 Lyndel Prott, The latent Power of Culture and International Judge, International Books, 1979, p. 186.

64 Ibid.

65 Ibid, see also R.P. Anand, op. cit. p. 807.

case. The fact that these views are primarily designed to criticise the majority judgement accompanied by a moderate criticism of the majority by calling the award as "erroneous", "incorrect" and "misreading"[66] is the first indication of such trends. If these views were merely confined within the limits of a general criticism of the kind described above they could be regarded as negligible, in view of the fact that such partisan pleadings are not rare even within the practice of the International Court of Justice.[67] This, however, is not the case. In many instances the individual views expressed, for instance, by the American members do clearly transcend such boundaries and in a way cast doubt on the impartiality of the dissenter himself. Expressions such as calling the Tribunal "irresolute" and its decisions a manifestation of "the prejudice to orderly process" are quite often repeated in these dissenting views.[68] They have also accused the Tribunal of not acting "fairly"[69] and "manifesting a lack of regard to its own dignity".[70] A joint dissenting opinion by all three American Arbitrators states that "...this last minute capitulation by the Tribunal

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66 See, Forum Selection Cases- Holtzman, Concurring and Dissenting Opinions, 1 Iran-USCTR. 284, p. 293; Forum Selection cases- Mosk, Concurring and Dissenting Opinion, Ibid, p. 307; Holtzman, Dissenting Opinion, Grimm v Iran, 2 Iran-USCTR. 81, p. 87; Holtzman,Dissenting Opinion in Queens Office Tower Associates v Iran Air, Ibid, pp. 254-255, 258; Mosk, Dissenting Opinion to Final Award in Ultrasystems Inc. v Iran, 4 Iran-USCTR. 80, p. 82; Mosk Dissenting Opinion, Behring International Inc. v Iranian Air Force, 4 Iran-USCTR. 93, p. 95; Mosk, Dissenting Opinion, Schering Corporation v Iran, 5 Iran-USCTR, 374, p. 375; Mosk, Dissenting Opinion, Harnischfeger Corp. v MORT, 8 Iran-USCTR. p. 135; Dissenting Opinion, Holtzman, Aldrich and Brower, Case A15(I:G), 12 Iran-USCTR. 64, p. 77; Dissenting Opinion, Brower, International Systems and Controls Corp v Iran, Ibid, p. 265. See also, Dissenting Opinion of Holtzman, ST. Regis Paper Co. v Iran, 14 Iran-USCTR, 86, p. 99; Disstenting Opinion of Holtzman, Whittaker Corp. v Iran, 14 Iran-USCTR, 263, p. 273; Concurring Opinion of Ansari, Futura Trading Inc. v NIOC, 13 Iran-USCTR, 99, p. 121; and Dissenting Opinion of Aldrich, OTIS Elevator Co. v Iran, 14 Iran-USCTR. p. 300.

67 See, R.P. Anand, op. cit. p. 802.

68 Holtzman, Aldrich and Mosk, Dissent from Procedural Decisions, Forum Selection Cases, 1 Iran-USCTR. p. 320. Identical phrases have been used in the following dissenting opinions : Holtzman, Dissenting Opinion, Cases Nos. 452 and 926, ( Transamerica ICS, Inc v Iran, and David Michael, Inc v Iran) 3 Iran-USCTR. 84, p. 85; Holtzman, Aldrich and Mosk Dissent from Orders in Cases Nos. A-16, 582 and 591, Ibid, 380, p. 383.

69 Mosk, Dissent to Order in case No. 180, (Harnischefger Corp. v MORT), 4 Iran-USCTR. p. 76.

70 Dissenting Opinion of Holtzman to Order in case No.33, Ibid, 65, p. 67.

to unreasonable, unilateral demands will impair the integrity of the orders of the Tribunal".[71]

Turning to the individual views, particularly dissenting opinions, of the Iranian arbitrators, the situation is by no means different from that of their American colleagues. Perhaps a clear difference in the views and conduct of the Iranian members may be seen in their clearer assertion of their role as judges-advocate and as representatives of interests of their appointing party. It is possible, for instance, to interpret some of the statements made by the Iranian members as an explicit recognition of that role. Judge Shafeiei, for instance, has asserted that in the face of the Tribunal's lack of understanding of Iran's problems it was for the Iranian arbitrators "to protect Iran's right to a defence".[72] The use of sympathetic, sentimental and patriotic language in the individual views of the Iranian arbitrators are also implicit in this direction.[73]

Another indication of this understanding is that the Iranian members have very rarely regarded their American colleagues as fully independent and impartial judges. This might also be true of the American arbitrators views concerning the Iranian members. In other words they would not seem to have placed such an expectation upon their role at all. This is manifest in the fact that despite some sharp criticisms, which they have levelled occasionally against some of the neutral members of the Tribunal in this respect[74], no such

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71 Holtzman, Mosk and Aldrich, Dissent from the Procedural Decisions in the Forum Selection case, 1 Iran-USCTR. 320, p. 324.

72 Shafeiei, reasons for not signing the Awards made by Mr Aldrich and Mr Bellet in Cases Nos. 83, 188, 220, 449, 3 Iran-USCTR. 124, p. 130. The fact that he has refused to participate in certain parts of these cases is also a confirmation of the assumption of a partisan role by the Iranian Judges.

73 E.g. Ibid, pp. 127-130; Kashani, Dissenting Opinion in Economy Forms Corp v Iran, 5 Iran-USCTR. 1, pp. 49-50 ; Declaration of the Iranian arbitrators appended to their signatures in case A/18, 5 Iran-USCTR. pp. 266-267; Dissenting opinion of the Iranian arbitrators in Case A/18, 5 Iran-USCTR. 275, pp. 277, 328-337.

74 See Declaration of the Iranian members in case A/18, 5 Iran-USCTR. p. 266; Shafeiei Reasons for not signing Awards in cases Nos. 83, 188, 220 and 449, 3 Iran-USCTR. pp. 124-130; Shafeiei, Dissenting Opinion, Cases Nos. 39 and 55, filed 2 September 1983, 3 Iran-USCTR. 297, p. 315 ; and the Statement of the Iranian Arbitrators concerning the Episode of 3 September 1984, 7 Iran-USCTR. 306, pp. 307-310.

questions have been brought upon the partisan conduct of the American members.

Particularly in the pre-September 84 phase of the Tribunal's work there has been a sharp division of opinion between the Iranian arbitrators on the one hand and the remaining members on the other. This has led the Iranian members to attack and question seriously some neutral members' independence and impartiality in a full scale advocative and advesarial manner. For instance, in the Case A/18 the Iranian members accused the Tribunal, particularly its neutral members, of "bad faith interpretation" and being devoid of "all credibility" to adjudicate any dispute between Iran and the United States.[75] Judge Shafeiei has also accused Chamber Two of committing "blatant intentional violations of the Algiers Declarations and the Tribunal Rules" and "breach of trust".[76] On another occasion, the Iranian members have accused the chairmen of Chambers Two and Three of submissiveness to the wishes of American corporations and bias against Iran.[77] Finally, the Episode of 3 September 1984, in which two Iranian members were alleged to have physically attacked the Chairman of Chamber Three and prevented him from entering the Tribunal premises, was the culmination of the on-going tension within the Tribunal in that period.[78] In fact, it has been claimed that this was

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75 Declaration of the Iranian members, case A/18, 5 Iran-USCTR. p. 266.

76 Shafeiei, Reasons for not signing Awards in Cases Nos. 83, 188, 220 and 449, 3 Iran-USCTR. p. 125.

77 "Statement of the Iranian Arbitrators in Connection with the Recent Events at the Iran-United States Claims Tribunal", 7 October 1984, 7 Iran-USCTR. 306, pp. 307-310, and the "Letter" from the Iranian Arbitrators concerning the same episode, 6 October, 1984, Ibid, pp. 284-288.

The substance and the degree of accuracy of the allegations made by the Iranian members is irrelevant to our study in this Section. It is notable however, that they have usually refrained from criticising the President of the Tribunal whose record they regarded acceptable while setting out certain figures and facts and comparing his record with that of the then Chairmen of Chambers Two and especially Three. (Ibid, pp. 307-310. See also Ibid, pp. 284-288.)

78 For the documents concerning the Episode of September 3, 1984, see generally, 7 Iran-USCTR. pp. 281-316.

not the first incident of this kind within the Tribunal and on another occasion one of the American members intended to assault the President of the Tribunal apparently in the presence of the Agents of Iran and the United States.[79]

The obvious conclusions which can be drawn from the observation of the above-mentioned facts is yet again the confirmation of the reality that the national/party-appointed judges have felt duty bound to act as guardians of the interests of their countries.

A brief reference should be made to the fact that the post September 3 record of the national arbitrators is very rarely associated with the kind of tension experienced before and at that date. It is notable in this regard that the United States initiated a challenge against the two Iranian arbitrators involved in that Episode.[80] Apparently in response to that challenge Iran withdrew the two arbitrators and replaced them with two new members.[81] This may be regarded as a recognition of the grounds upon which the challenge was based and the limits within which partisan tendencies should be expressed.

**b- Method of Reasoning**

Another important characteristic and a clear evidence of the partisan mentality of the national/party-appointed arbitrators is reflected in the inconsistency of the methods of reasoning employed by them. In other words, these inconsistencies become evident not necessarily in a single case but rather in an overall assessment of an arbitrator's performance. Such an overall examination reveals that, in the words of Lauterpacht, the arbitrator, or arbitrators, in question have applied legal rules only when they have "deemed it fit to do so" and disregarded them on another occasions. They have applied law

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79 Letter from Eshragh, Agent of Iran, to Agent of the United States, 6 September 1984, Ibid, p. 283.

80 Letter from Agent of The United States to the Appointing Authority, 17 September 1984, Ibid, p. 289.

81 Annual Report of the Tribunal Period Ending 30 June 1985 (AR 84/85), pp 3-4.

and legal rules only when they happened to coincide with what the arbitrator "believed the law ought to be".[82]

For instance, Arbitrator Mosk of the United States has strongly objected throughout the Tribunal's life to the granting of extensions to the Iranian respondents to file their statements of defence, or to the postponement of hearing to allow more time for the preparation of defence for the Iranian respondents.[83] He has regarded such decisions of the Tribunal as "prejudice to orderly process" and against the Tribunal Rules.[84] Nevertheless, when American litigants have been subjected to the same orderly standards that he has advocated against the Iranian litigants, he has dissented from such decisions, calling them "exaggerated formalism" and "denial of justice".[85] ; or he argued that it was well established that international tribunals were not bound to make strict, literal interpretations when to do so was inherently unfair and that the Tribunal should have shown flexibility.[86]

A similar kind of selectiveness and variation of the line of reasoning from one case to another with regard to identical or similar issues can be seen in the record of the Iranian arbitrators. A notable example in this respect is the varying positions that they have taken in different cases with regard to the

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82 Lauterpacht, the Function of Law, op. cit. p. 380.

83 See, for instance, Holtzman, Dissent from Order in Pepsico Inc. v Zamzam Bottling Co, 1 Iran-USCTR. p. 174; Time Limits- Dissent to orders in 37 Case, Holtzman, Ibid, p. 178; Holtzman, Dissent from Orders in Cases Nos. 452, and 926, 3 Iran-USCTR. p. 84; Holtzman, Dissent from Orders in Cases Nos. 33, 87, and 174, Ibid, p. 87; Holtzman, Dissent from Orders in Cases 111, 582, and A-16, Ibid, p. 316 and Ibid, p. 380; Holtzman, Dissent to Order, Foremost Tehran Inc. v Iran, 4 Iran-USCTR. p. 63; Holtzman, Dissent from Order in Case No. 33, Ibid, p. 65; and Holtzman, Dissent from Order, Sylvania Technical Systems Inc. v Iran, 5 Iran-USCTR. p. 141.

84 E.g, Dissent to the Procedural Decisions in Forum Selection Cases, Holtzman, Mosk and Aldrich, 1 Iran-USCTR. p. 320.

85 Dissent of Holtzman, Mosk and Aldrich from Final decision in Re Raymond International (U.K) Ltd. 1 Iran-USCTR. p. 396.

86 Dissent of Holtzman in Refusal cases 1,2 and 3, Ibid, 129, p. 130.

method of interpretation that an arbitral tribunal should adopt in establishing its jurisdiction.[87]

**c- Voting behaviour**

The voting record of the national/party-appointed arbitrators is yet other evidence of the reality of their partisan behaviour. For instance, 35 out of about 70 total dissenting opinions which the American arbitrators have issued as of late 1986 are against the procedural decisions such as orders granting extension of time for filing a defence by the Iranian Respondents, or some decisins refusing the late submission of claims by the American claimants. The significance of these figures becomes evident when it is noticed that in the overwhelming majority of these cases the Americans have been claimants and in all of these cases the extension of time, or other decisions, were somehow unfavourable to the American litigants.

In the same period the Iranian arbitrators have issued about 50 dissenting opinions all from the decisions rendered against Iran. It should be noted that these figures do not include the cases in which the national judges have simply dissented from the decisions unfavourable to their respective parties without expressing a separate opinion.

It is, however, certain that in all instances that the American or Iranian arbitrators have dissented from a decision, they have done so because the decision in question had been against or unfavourable to the respective arbitrator's party. In other words, they have never dissented from a decision favourable to their respective parties. They have, in an important majority of cases, dissented from the decisions against their respective parties ; and most of

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87 E.g. note generally the views of Iranian members in the Case A/2 (1 Iran-USCTR. 104, especially p. 105) and compare them with the dissenting opinion of the same members in Case A/1 (Ibid, p. 203) and with the dissenting opinion of two of these members in Case A/18 (5 Iran-USCTR. 279, especially, pp. 287-290); and Judge Ansari in Case A/18 (Ibid,) compare with his dissent in Case A/16 (9 Iran-USCTR. 97.)

the decisions which have been rendered in favour of either party have been made so only by forming a majority between the arbitrators of the winning party and the neutral arbitrators.[88]

## Conclusion

The role of the party-appointed arbitrators combines two contradictory functions of independence and impartiality on the one hand and partisan tendencies on the other. The submission, particularly in public international law, by the parties to an arbitration system in which the party-appointed arbitrators make up the majority arbitrators may be interpreted as a recognition of that role.

Theoretically, the prevailing view in international arbitration requires that the party-appointed arbitrators should be held to the same standards of independence as the neutral members. This, however, does hardly correspond to the realities in the practice of international arbitration.

The institutional integrity and autonomy of an international arbitral tribunal is a useful safeguard against excessive partisan tendencies of the party-

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88 Recently, Mr Richard M. Mosk, a former American Member of the Tribunal has published an article entitled "The Role of Party-Appointed Arbitrators in International Arbitration : The Experience of the Iran-United States Claims Tribunal", [ 1(1) The Transnational Lawyer, (1988), p.p. 253-270 ]. In fact, only the last 4 pages of this article are devoted to the experience of the Iran-United States Claims Tribunal. (Ibid, pp. 267-270). However, the article does not provide as much of an inside account of the Tribunal's experience regarding its Party-appointed arbitrators, as one would naturally expect from a former Party-appointed member of the Tribunal.

Although Mr Mosk does not strongly argue that the Party-appointed arbitrators of the Tribunal have acted in the same manner as one would expect from a neutral member, he implies that the American Arbitrators have been more independent than their Iranian colleagues. For instance, he points out that the American Arbitrators voted for the Partial Award in Case A/15, awarding Iran $500 million. (Ibid, p. 267) One may be able to accept that the American members have kept some appearence of independence in their conduct and individual opinions. However, as we have noted in this Section, no such difference may be found between the Iranian and American members when the latter's voting behaviour is examined. Moreover, as was stated in Section A of this Chapter, the American members dissented from the essential part of the decision of the Tribunal in Case A/15. Their vote for the Partial Award in this Case, though it was noticeable, was a somewhat superficial gesture of independence, since the Full Tribunal had already decided the essential part of this Case by forming a majority with the Iranian Members. (For details of this Case, see Supra Section A, pp. 132-140.)

appointed arbitrators and for securing an orderly process of arbitration. However, what ultimately matters is the vote which these arbitrators are giving in the course of deciding a claim. This can hardly be controlled by any such measures.

In the Iran-United States Claims Tribunal, it is quite clear that the arbitrators of both countries have essentially acted as representatives of the interests of their countries rather than as fully and strictly independent and impartial judges. Their predisposition in favour of their respective parties has not been protested against by the other party in so far as it has not led to the disruption of the Tribunal proceedings. That is, neither party has entertained a serious expectation of the independence and impartiality of the other party's arbitrators.

To overcome these shortcomings in international arbitration no new constructive suggestions can be made here. In fact, the recent history of international arbitration is full of various suggestions for the improvement of the legal character and organization of international arbitration.[89] These suggestions are based on a particular reliance on the appointment of neutral arbitrators to the extent of enabling them to form a majority without the need for the affirmative vote of the national members, i.e. a five-member tribunal composed of three neutral members acting on the basis of majority vote. They can provide a useful framework for the improvement of the shortcomings in international arbitration.[90] In the absence of such acceptance and recognition by States to grant a more independent status to international arbitration and in

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89 See generally, Hans Mangoldt, "Arbitration and Conciliation", op. cit. pp. 523-33; and Louis B. Sohn, "The Role of Arbitration in Recent Multilateral Treaties", op. cit. pp. 28-30.

90 The most recent and successful arbitral tribunal composed of three neutral and two party arbitrators may be the Egypt-Israeli arbitral Tribunal concerning the Taba dispute. (See Article 1 of the Agreement to Arbitrate Boundary Dispute Concerning the Taba Beachfront between Egypt and Israel, September 1986, 26 ILM, (1987), p. 1 ; and the Arbitral Award in the Taba Dispute, 27 ILM, p.1421.

view of the continued and frequent reliance on the three-member tribunal of the kind discussed here, it should be accepted that the parties, by adopting such a composition, are aware of the inherent implications in the system but prefer to have a settlement of a quasi-legal nature.

# SECTION C

# CULTURAL-LEGAL BACKGROUND OF THE NEUTRAL ARBITRATORS

## I. Generally

Perhaps it is an exaggeration to say that in international disputes there are "in practice no neutrals".[1] However, the suggestion that the element of nationality or the existence of formal alliances or common interests between States may become a subconscious factor and influence the decision of the international judge has widely been recognized in international law. H. Lauterpacht points out:

> The conviction that international judges in their capacity as members of their national communities may not always be capable of the required detachment, refers not only- not even principally- to the attitude of judges in disputes in which their own State is directly interested as a party. For it is not with these judges that the decision will rest as a rule.... The doubts refer to the attitude of judges nationals of States which are not direct parties to the dispute, i.e. of what might be described as neutral judges. For, ... in addition to the fact of the interdependence of nations in general, formal alliances and specific common interests make third States and their nationals directly interested in the outcome of a dispute.[2]

Furthermore, because of the absence of an international legislature the task of adaptation of legal rules to social change in the sphere of international relations is necessarily left to the judicial discretion of the international judge.[3] As a result, the relevance of the cultural-legal background of the international judge becomes even more evident. This is because an international judge's

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1 Lauterpacht, The Function of Law, op. cit. p. 204 and p. 225.

2 Ibid, p. 204.

3 Ibid, p. 203.

conception of his own role has essentially been moulded by his training in a particular national legal-cultural system.[4] This training, it is argued, induces "a kind of predisposition or attitude with which a judge approaches every case."[5] In fact it has been emphasised that an international judge "can perhaps overcome the influence of political and national affiliations : it is harder for him to be freed from the assumptions basic to the legal culture from which he comes, and the modes of reasoning he has internalized during his professional career."[6]

It is upon the recognition of this principle that Article 9 of the Statute of the International Court of Justice requires that the judges should represent different "civilizations and the principal legal systems of the world". The rationale behind the adoption of Article 9 would seem to lie in the need to internationalize the Court with a view to enabling it to balance all interests so as to develop a universally accepted international law.[7] Undoubtedly, it is inevitable that these judges will retain and reflect their legal-cultural education in their activities in the international Court. In fact, some ICJ judges have regarded this as a justified reflection of the principle embodied in Article 9 of the Statute.[8]

Furthermore, a review of the experience of the International Court of Justice clearly reveals the creation of different voting groups representing different legal systems, such as those from the Latin American States, the Socialist Countries, the Western States, etc.[9] A closer consideration of some

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4 Lyndel Prott, "The Latent Power of Culture..." op. cit. p. xix.

5 Ibid, p. 191.

6 Ibid, p. 193.

7 See generally, R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication", 14 ICLQ, (1965), 788, pp. 805-806.

8 Dissenting Opinion, Judge Levi Carneiro, Anglo-Iranian Oil Co Case, ICJ Rep. 1952, p. 161.

9 See generally, Lyndel Prott, op. cit. pp. 54-58. See also Anand, the Role of Individual Opinions, op. cit. pp. 805-806.

particular cases also demonstrates the existence of such voting groups and cultural-legal blocs and their effect on the decisions of the Court. The South West Africa Case is one of the best examples in this regard. The importance of the Case in relation to our discussion here is twofold. First, it shows how some changes appearing in the composition of the Court in the Second Phase of the Case[10]- in comparison with the membership in the First Phase of this Case[11]- were decisive in causing the Court to adopt a decision against its jurisdiction in complete contravention of its earlier decision in the First Phase.[12] Second, the Case provides a good example of the effect of judicial predisposition on judicial reasoning. It is submitted, for instance, that in the Second Phase the majority came to the conclusion, by analogy with municipal law that no legal interest existed in the applicants. The dissenters, on the other hand, all came to the conclusion in the very same Case, also by analogy with private law, that such an interest did exist.[13] Yet the de facto revision of the 1966 South West Africa Judgement in the Namibia Case[14] following the changes in the membership of the Court, in the wake of the 1966 South West Africa Judgement, with an increase in the number of judges from Africa and some other changes[15] proves the effect of judicial predisposition on the decisions of international judges beyond any doubt.

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10 South West Africa Cases, ICJ Rep. 1966, p.6.

11 South West Africa Cases, Preliminary Objections, ICJ Rep. 1962, p. 319.

12 The voting figures in both Phases of the Case show the deep split on the issue. In the First Phase there was a majority of eight to seven in favour of the Court's jurisdiction. In the Second Phase there was also a majority of eight to seven against the Court's jurisdiction. (It is notable that in the Second Phase the majority was formed by the President's casting vote.) The absence of Judge Bustamante Sirven and Judge Zafrulla Khan respectively due to illness and withdrawal and the death of Judge Badawi are considered to have been the main reasons for the reversal of the Court's earlier decision. (See generally, Schwarzenberger, Vol 4, op. cit. pp. 315-316).

13 Lyndel Prott, op. cit. p. 195. For a further review see generally, Ibid, pp. 196-229.

14 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, 1971, p. 16.

15 See Schwarzenberger, Vol 4, op. cit. pp. 316-317.

Furthermore, in the most recent example of the Court's activity also certain signs of judicial predisposition may be traced behind the negative vote of the British and the Japanese judges- no doubt the American Judge as well- against the essential parts of the Court's Judgement against the United States.[16] In other words, in view of the above countries' close alliance with the United States and given the factual legal circumstances of the Case itself and the adoption of the essential parts of the Judgement by a majority of all members with the exception of the above three judges, these judges' negative vote can hardly be disconnected from the phenomenon of judicial predisposition. The dissenting views of the Soviet and the Syrian Judges to certain parts of the Judgement in the Hostages Case can also be categorized as such.[17] Interestingly, the latter Case at the same time shows the limits of judicial predisposition. That is, in the circumstances such as this Case, where the facts are clear and the rules are commonly established, judicial predisposition becomes of minimal relevance. The unanimous vote of all 15 judges to sub-paragraphs 3 and 4 of the above judgement ordering Iran to release the hostages and to refrain from instituting any judicial proceedings against them is an obvious example in this respect.[18]

With regard to some older examples taken from the history of international arbitration it is submitted, for instance, that in the North Atlantic Fisheries arbitration in 1910, Judge Drago insisted on delivering a dissenting opinion on the meaning of the term "bay" in the British-American Treaty of

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16 See the voting figures with regard to sub-paragraphs 2,3,4,5,6,10,11,12 and 13 of the operative part of the Judgement of the ICJ in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ Rep. 1986, pp. 146-149. For a further reading see Dissenting Opinions of Judge Oda, Judge Schwebel and Judge Jennings, Ibid, respectively, pp. 212, 259 and 528.

17 Case Concerning United States Diplomatic and Consular Staff in Tehran, ICJ Rep. 1980, p. 3. Note the negative vote of these judges to sub-paragraphs 1 and 2 of the operative part of the Judgement, (Ibid, p. 44); and the Dissenting Opinions of Judges Morozov and Tarazi, Ibid, respectively, pp. 51 and 58.

18 Ibid, pp. 44-45.

1818. Later it was suggested that in acting in this manner the Argentine judge had in mind not only the interpretation of the Treaty, but also the possibility of safeguarding the interests of his country in the issue of the River La Plata.[19]

In short, it is submitted that an examination of the record of judges trained in a particular system indicates that there are certain tendencies to be seen in almost all the ICJ judges from a particular legal culture. Of course, many attitudes depend significantly on individual personality and experience, but the role of the legal culture should not be underestimated. For instance, the European judges appear to have developed a gradual confluence of juristic methods and a coincidence of legal solutions.[20] Even, it is claimed, the difference of opinion between Common Law and Continental judges could be attributed not to a difference of opinion as to the solution itself but rather to the method of justification of this solution.[21] In contrast, judges from "Third World" States appear to represent different tendencies from that of the European judges in many respects.[22] And the fact that the socialist judges are set apart as a group from their colleagues on the Court, with new techniques and approaches to problems of social order, is also generally accepted.[23]

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19 Lauterpacht, The Function of Law, op. cit. pp. 225-226. For further examples see also Ibid, p. 226.

20 Lyndel Prott, op. cit. pp. 220-221.

21 Ibid, p. 221.

22 Ibid, pp. 224-226.

23 Ibid, pp. 226-227. See also, Anand, "The Role of Individual Opinion", op. cit. pp. 805-806.

## II. International Adjudication and the Developing Countries: A Brief Glance

The view is widespread that the developing countries appear convinced that international judicial organs such as the World Court cannot be sufficiently sensitive to third-world concerns.[24] The developing States also feel little confidence in an international legal system in whose making "they played no role and whose output is still largely determined by Western-dominated legal conceptions".[25] As a consequence, the developing States have, in recent years, expressed a desire to develop a new international law. Despite some progress which have been made in modifying and reconsidering international law, according to the changed circumstances of the international community and in order to develop a universally accepted international law, the present international law is still largely a legacy of Western civilization. In other words, there are many areas of international law over which the developing countries on the one hand and the industrialized countries on the other are sharply divided.

Notably, a number of resolutions were passed by the General Assembly of the United Nations on the initiative of some Third World countries in the context of sovereignty over natural resources, during the 1960s and 1970s. The main incentive behind these attempte was to introduce new concepts in regard to the law governing these areas.

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24 Arthur Rovine, "The National Interest and the World Court", in Leo Gross, The Future of the International Court of Justice, Oceana Publications, Inc. New York, 1976, Vol 1, 313, p. 315.

The problem of lack of confidence shown by the developing countries extends also to international commercial arbitration. Many of these States fear that arbitral tribunals, established under the auspices of Western based arbitral institutions, will have an "inbuilt cultural and social bias against them, however impeccable the intellectual integrity of the individual arbitrators may be." (Alan Redfern and Martin Hunter, op. cit. p. 168).

25 Ibid, and generally, R.A. Falk, "The New States and International Law", 118 Recueil des Cours, II, (1966), 1, pp. 34-35; also R.P. Anand, International Law and the Developing Countries, Martinus Nijhoff Publishers, Dordrecht, 1987, p. 106; and Anand, "Role of International Adjudication", in Leo Gross, op. cit. Vol 1, 1, pp. 5-9.

To begin with, on 14 December 1962, the General Assembly passed Resolution 1803 (XVII), entitled "Permanent Sovereignty Over Natural Resources", by 87 votes to 2, with 12 abstentions.[26] Paragraph 4 of Resolution 1803 clearly recognized the right of a State to take measures such as nationalization, expropriation or requisitioning for reasons of public utility, security or national interest. This Paragraph also emphasized that in such cases the owner "shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures and in accordance with international law.

Further, on 17 December 1973 the General Assembly adopted Resolution 3171 (XXVIII), again on Permanent Sovereignty over Natural Resources, with 108 votes in favour, one against and 16 abstentions.[27] Paragraph 3 of Resolution 3171 provided that "each State is entitled to determine the amount of possible compensation and the mode of payment" and that any dispute which might arise should be settled in accordance with the national legislation of each State carrying out such measures.

Again, on 12 December 1974 the General Assembly adopted Resolution 3281 (XXIX), entitled "the Charter of Economic Rights and Duties of States", by 120 votes to 6, with 10 abstentions[28], despite the doubts and objections of the industrialized countries. The Charter re-emphasised the right of each State to nationalize or expropriate alien property on payment of "appropriate compensation in accordance with its own laws and regulations"[29]

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26 G.A. Resolution 1803(XVII), General Assembly Official Records, 17th Session, Supp. 17, p. 15; as quoted in J. Djonovich (Ed.), IX United Nations Resolutions (1962-1963), Oceana Publications Inc, New York , 1974, Series I, p. 107. For the voting record of the Resolution 1803, see Ibid, p. 21.

27 13 ILM (1974), p. 238.

28 Charter of Economic Rights and Duties of States 1974, GA Resolution 3281(XXIX). 14 ILM, (1975), p. 251.

29 Article 2(2C) of the Charter of Economic Rights.

and in effect rejected the formula of "prompt, due and effective" compensation advanced by the industrialized States.

The developing countries are of the view that many of the provisions embodied in this Charter and other relevant resolutions form part of international law.[30] On the hand, most of the industrialized countries reject that argument. Whether the standard of "appropriate compensation" laid down in the Charter represents general international law and whether resolutions of the General Assembly at all have the force of law are subject to serious controversies between these two groups of countries, with the developed countries taking a negative view in relation to the question.[31]

The deep roots of this difference of opinion are, obviously, the very political economic and cultural factors which divide these two groups of countries. It is natural that this division will manifest itself in the views of lawyers, jurists and academics of the countries in question, as, for instance, when lawyers from the industrialized countries take the view which is essentially based on the position of their own countries.[32] For similar reasons Third World lawyers have adopted a position which is more consistent with the Third World perspectives.[33]

As a consequence, the kind of influence that the cultural-legal predisposition of the membership of an international adjudicating body can exert on the outcome is of particular importance in such controversial circumstances. An obvious example would be the Iran-United States Claims Tribunal which is to decide various issues of such controversial nature. In the

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30 See, Anand, International Law and the Developing Countries, op. cit. p. 113-115.

31 See D.J. Harris, Cases and Materials on International Law, Sweet & Maxwell, 1983, p. 432. For a discussion of these differences of approach, see also generally F.V. Garcia-Amador, The Changing Law of International Claims, Oceana Publications, Inc. London, 1984, Vol 2, pp. 667-728, and particularly pp. 729-745.

32 Ibid.

33 Anand, International Law and the Developing Countries, op. cit. pp. 113-116.

following part we will examine this problem in the practice of the Iran-US Tribunal. Before that, however, two points require attention:

First, international arbitration is no exception to the problems discussed above. It is true that in international arbitration the parties have a greater degree of choice for selecting such judges as they consider suitable from the relevant points of view, including the judges'legal culture. Indeed, the essence and advantage of international arbitration is considered to be the fact that arbitrators can be selected from different environments and backgrounds.[34] It is in recognition of this principle that Article 14(2) of the ICSID Convention emphasises that in designating persons to serve on the "Panels of Arbitrators and Conciliators", due regard should be paid to the "importance of assuring representation on the Panels of the principal legal systems of the world and the main forms of economic activity".[35] Moreover, in view of the fact that it is the neutral arbitrators with whom the decision will rest as a rule, the mechanisms employed in their selection and the effect of their legal culture are of primary importance in regard to the outcome of arbitration.

Second, it must again be emphasised that depending upon the experience, training and personality of the arbitrator in question judicial predisposition can be controlled to a certain extent. We will also attempt to trace this point in this study.

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34 Hans Smith, "The Future of International Commercial Arbitration...", op. cit. p. 10.

35 A kind of indirect and implicit recognition of this principle may be found in Article 2(1) of the ICC Rules of 1988, which provides that in selection of arbitrators consideration should be given to "the proposed arbitrator's nationality place of residence and other relationships with the countries of which the parties or the other arbitrators are nationals". See also Article 3(3) of the LCIA Rules of 1985.

## III. Qualifications and Backgrounds of the Arbitrators Appointed to the Iran-United States Claims Tribunal

**III(1)**- The qualities required of the international arbitrator are basically left to the discretion of the arbitrating parties. Some arbitration agreements or arbitration rules do not specify such qualities, and those which provide provisions to this effect are necessarily of general nature. The Hague Conventions of 1899 and 1907, for instance, require that arbitrators should be of "known competency in questions of international law and of the highest moral reputation.."[36] More elaborated requisites can be found in Article 2 of the Statute of the International Court of Justice. They read in conjunction with Articles 16, 17-20 of the same Statute and Article 4 of the Rules of the Court and are considered to be sevenfold: he is to be internationally-minded, independent, disinterested, impartial, conscientious, competent and of high moral character.[37] These requisites are naturally associated with a certain degree of subjectivity. Nevertheless, the Statute, the Rules and the practice of the Court and the experience of international adjudication as a whole offer practical guidance in those respects.[38] For instance, the element of nationality, i.e. which specific third State the judge or neutral arbitrator belongs, acts as an important criterion in determining his disinterestedness and consequently his impartiality. Professional qualifications also ensure that the international judge should have a background of legal training and knowledge, either in domestic law or in international law.[39] It appears that in public international adjudications the prevailing view is that the person in question should have a background of training and knowledge in international law, in order to

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36 Articles 23 and 44 of the 1899 and 1907 Conventions respectively.

37 Schwarzenberger, Vol 4, op. cit. pp. 275-276.

38 For details see Ibid, pp. 276-281.

39 Article 2 of the Statute of the ICJ.

minimize conscious or unconscious resort of the judge to national legal tradition.[40]

In international arbitration in the field of commerce, however, the principal emphasis in regard to the professional qualifications of arbitrators is placed on their knowledge and experience in the areas closer to that field. The ICSID Convention, for instance, provides that persons designated to serve on the "Panel of Arbitrators (and Conciliators)" should be persons of "high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement". A particular emphasis on competence in the field of law has also been put in the case of persons on the "Panels of Arbitrators".[41] Within the context of commercial international arbitration, therefore, knowledge and experience in international arbitration- by which is meant commercial international arbitration- and knowledge and experience in the field of international trade, contract law, commercial law and private international law with an outlook of comparative law are the most relevant.[42]

A point commonly emphasised both in public international arbitration and commercial international arbitration is that the arbitration must have a true international structure. To achieve this, it should take place in a third, neutral country in relation to both parties and the arbitrators should have an open mind towards "legal pluralism, to various cultures and various political and social systems".[43] In addition, it is essential that the arbitration should take place before a panel of arbitrators which includes arbitrators of different nationalities

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40 Lyndel Prott, op. cit. pp. 212-216.

41 Article 14(1) of the ICSID Convention.

42 See Pierre Lalive, "International Arbitration-Teaching and Research", in Julian Lew, (Ed.) "Contemporary Problems in International Arbitration", op. cit. p. 16; also A Redfern and Martin Hunter, op. cit. pp. 168-169; and R. David, op. cit. pp. 246-251.

43 Pierre Lalive, op. cit. p. 16.

and backgrounds.[44] All these, obviously, are designed to ensure the utmost degree of independence, disinterestedness and impartiality on the part of the arbitrators.

**III(2)-** There are no explicit provisions either in the CSD or the Tribunal Rules in relation to the qualifications and backgrounds of the arbitrators to be appointed to the Iran-US Claims Tribunal. In practice, however, members of the Tribunal have all had legal training and experience, including experience as international arbitrators, jurists, lawyers and law academics. The first President of the Tribunal and the Chairman of Chamber One, Judge Gunnar Lagergren, has been an eminent Swedish Judge as Marshall of the Realm of Sweden. He has been president of arbitration tribunals in a number of major public and private international law cases, a judge of the European Court of Human Rights and a member of the Permanent Court of Arbitration.[45] Among the most famous international arbitration tribunals over which Judge Lagergren has presided are the German-Allied Arbitration Tribunal, the Ran of Kutch Arbitration[46], BP v Libya[47] and the most recently established Egypt-Israeli Arbitration Tribunal.[48] Quite clearly, Judge Lagergren's outstanding experience in the field of international arbitration has been an important asset to the Tribunal. The other two originally appointed neutral members of the Tribunal were of French and Swedish nationalities. Judge Pierre Bellet, Chairman of Chamber Two, had been a former Chief Justice of the French Supreme Court and the President of the French

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44 Ibid.

45 Press Release by the Iran-United States Claims Tribunal, June 9, 1981, provided by the Secretariat of the Tribunal. See also Annex II to the Annual Report of the Tribunal Period ending 30 June 1983 (AR 82/83), p. 3.

46 50 ILR, p. 2; 7 ILM, p. 633.

47 53 ILR, p. 297.

48 Article 1 of the 1986 Egypt-Israeli Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront, 26 ILM, (1987), p. 1.

Committee of Private International Law.[49] Judge Nils Mangard, Chairman of Chamber Three, had been Judge of the Appeal Court of Stockholm and a member of the International Council for Commercial Arbitration.[50] Judge Bellet had been active in international arbitration. He was later appointed as a member of the Egypt-Israeli Arbitration Tribunal. Judge Mangard had been president of international arbitration tribunals in previous cases.[51]

The President of the Tribunal during 1984-1988 was Professor Karl-Heinz Bockstiegel who had held the appointment since Judge Lagergren's resignation on 1 October 1984. Professor Bockstiegel is a national of the Federal Republic of Germany. He is Professor of International Business Law and Director of the Institute of Air and Space Law at Koln University, as well as the author and editor of a wide range of publications in the field of international law. He is a well-known arbitrator and has been a member of, and presided over several international arbitral tribunals.[52] Professor Bockstiegel has also been active as a member, officer and rapporteur of a number of national and international legal and commercial institutions.[53] The other two original neutral members of the Tribunal have also resigned and been replaced by new members. Judge Bellet was replaced by Professor Willem Riphagen on 1 August 1983.[54] Professor Riphagen himself later resigned and was replaced by Dr Robert Briner on June 1985.[55] Judge Mangard's resignation took effect from 1 July 1985. Professor Michel Andre Virally replaced Judge Mangard[56] and served as a member of the Tribunal until his resignation in 1988.

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49 Press Release of June 9, 1981 of the Tribunal, op. cit.

50 Ibid.

51 Ibid.

52 Press Release, 5/12/84 , provided by the Secretariat of the Tribunal.

53 Ibid.

54 Annex to AR 86/87 of the Tribunal, p. 63.

55 Ibid, p. 62.

56 Ibid. It is notable that under Paragraph 5 of Article 13 of the Tribunal Rules the resigning neutral members continued to work for the Tribunal for some time after their resignations,

Professor Riphagen of the Netherlands has been Professor of International Law at the Erasmus University of Rotterdam, legal adviser to the Netherlands Ministry of Foreign Affairs and a member of the International Law Commission. He has also acted as ad hoc judge in the International Court of Justice, and has been a member of the PCA and Chairman of the Netherlands delegation to the UN Conference on the Law of the Sea.[57] Dr Briner, a Swiss national, is a partner in a law firm in Geneva. He is an international arbitrator of recognized standing and experience, and the author of several publications on law and arbitration.[58] Professor Virally, a French national, has worked as Professor of International Law at the University of Law, Economics and Political Science of Paris and at the Graduate Institute of International Studies of Geneva. He has also acted as counsel to several governments in disputes before the International Court of Justice and arbitral tribunals.[59]

The arbitrators appointed by Iran and the United States have all been their respective nationals. Iran has, since the establishment of the Tribunal, made many appointments and at present none of the three Iranian arbitrators is an original member.[60] Generally speaking, the Iranian arbitrators have been known judges or academics with domestic and civil law training. Apparently, they had not had any particular experience in international arbitration prior to their appointments to the Tribunal.[61] The three original Iranian members were Judges Kashani, Shafeiei and Enayat, who have been members of Chambers

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on the undecided cases in which they had previously participated. This participation for the original neutral members continued well into 1987 on some occasions.

57 Press release, 18 July 1983, provided by the Secretariat of the Tribunal.

58 Communique No. 85/2, 15 April 1985 provided by the Secretariat of the Tribunal.

59 Ibid.

60 Annex V to AR 86/87, pp. 62-63.

61 This statement may not be applicable to the non-original Iranian members of the Tribunal, who have usually had close dealings with the preparation of Iran's defence and with arguments for the cases before the Tribunal.

One to Three respectively.[62] Judges Kashani and Shafeiei had recognized backgrounds in teaching at The Law School of the National (Shahid Beheshti) University of Iran, with the former having experience as attorney at law and the latter being a former judge. Judge Enayat had been a former Foreign Ministry legal aide. Judge Enayat was replaced by Judge M. Jahangir Sani on 1 March 1982, who in turn was replaced by Judge Ansari Moin on 14 September 1983. Judge Kashani was replaced by Judge Mohsen Mostafavi on 29 November 1984. He in turn was replaced by Judge Assadollah Nouri on 5 July 1987. In 1989 Judges Ansari and Nouri were still members of the Tribunal. Judge Hamid Bahrami-Ahmadi succeeded Judge Shafeiei on 29 September 1984.[63] The above members have qualifications similar to the original Iranian members.[64]

The American arbitrators in early 1988 were Judges H.M. Holtzman, H. Aldrich and Charles N. Brower, who were members of Chambers One to Three respectively. The first two are the original members, but the latter replaced Judge R.M. Mosk, the original American member, on 16 January 1984.[65] Judge Howard Holtzman is a New York attorney and a former Chairman of the Board of the American Arbitration Association. Judge H. Aldrich has been a former member of the International Law Commission and once headed the US delegation to the Law of the Sea Conference. Mr Richard Mosk of the California bar, has served on the staff of the President's Commission on the Assassination of President Kennedy.[66]

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62 Annex V to AR 86/87, pp. 62-63.

63 Ibid.

64 Iran has also appointed Judges Ameli and Aghahoseini as substitute (ad hoc) arbitrators to act in a specific number of cases. (Ibid, p. 64.)

65 Ibid, pp. 62-63. The United States has also appointed substitute and ad hoc members. (Ibid, p. 64.)

66 See generally, Gerald Aksen, op. cit. p. 4.

It should be mentioned that Mr Charles Brower, the American Member of Chamber Three, has resigned effective from 31 March 1988[67] and Mr Richard Alison has been appointed as his successor.[68] Mr Hamid Bahrami-Ahmadi, the Iranian Member of Chamber Two, also resigned[69] and Mr Khalil Khalilian replaced him effective 1 January 1988.[70]

## IV. The Process of Appointment of the Neutral Members

**IV(1)**- There is no doubt that professionally all the neutral members of the Tribunal have been and are highly qualified persons of recognized standing in their home countries and in international arbitration. The subject matter of their professional backgrounds as a whole, seems to indicate a mixture of public international law and commercial law interests. Given the diversity in the nature and categories of the claims dealt with by the Tribunal this mixed emphasis on both public international and commercial law in selecting the neutral members is understandable.

Quite clearly, the element of nationality in the composition of the neutral members of the Tribunal is one of the most important factors both in its own right and as an important criterion in assessing these members' legal-cultural backgrounds. So far, despite a relative diversity in the nationalities of the neutral members, on the whole they come from a common politico-economic bloc of countries, namely Western Europe. It is again true that under the CSD and the Tribunal Rules the selection of the neutral members is a product of the mutual agreement of the Party-appointed arbitrators- or if they fail to do so the appointing authority is the person who is authorised to make such appointments, as on two occasions he has done. In other words, it is true

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67 AR 87/88, p. 1. For the text of his letter of resignation see, Ibid, Annex I, p. 59.

68 Ibid, p. 2.

69 Ibid. For the notification by Mr Bahrami of the submission to and acceptance by the Government of Iran of his resignation from the Tribunal see, Ibid, p. 60.

70 Ibid, p. 2.

that the ultimate responsibility for the appointment of the neutral members rests with the Parties themselves.[71] This choice of the Parties, however, should be seen in the context of the process by which they are to select a mutually acceptable arbitrator and/or the framework within which the appointing authority is empowered to make an appointment. Of course, in reality each Party will try to select a person of the nationality and background who best suits its own expectations. As a result, the question of whether there are any safeguards, such as Article 9 of the Statute of the ICJ, to guarantee a balanced representation of the expectations of both parties, is of principal significance. In the absence of such prior arrangements the question is whether the Parties have in practice observed that principle. Undoubtedly this question is equally applicable to the process of designation of the appointing authority as well as to the appointments made by that authority.

A particular problem with the instruments governing the arbitral process in the Iran-US Tribunal is that the CSD, having been hastily drafted, essentially leaves many structural issues to the UNCITRAL Arbitration Rules. On the other hand, the UNCITRAL Arbitration Rules which are drafted to be used as a universally acceptable model for international arbitration[72] do not appear to have been designed principally to provide detailed guidance to a unique situation such as the Iran-US Tribunal. These Rules have primarily been designed to be adopted for ad hoc, single-case commercial arbitration tribunals[73] rather than for a tribunal which has a multi-case, semi-permanent

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71 A kind of exception to this unlimited freedom of the parties is the provision made by the rules of some international arbitration institutions. For instance, Article 3(3) of the LCIA Rules of 1985 provides that the "Court" may refuse to appoint the arbitrators nominated by the parties if it determines that they are not "suitable or independent or impartial". Under the same Rules and the ICC Arbitration Rules the formal confirmation of the arbitrators nominated by the parties is to be made by the "Court" of the institutions concerned. (Ibid, Article 3(5), and Articles 2(3) and 3(4) of the ICC Rules of 1988.)

72 See Terence W. Thompson, "The UNCITRAL Arbitration Rules", 17 Harv.I.L.J. (1976), 141, p. 143 ; also Pieter Sanders, Commentary on UNCITRAL Arbitration Rules, op. cit. p. 173.

73 Ibid, pp. 174-175.

nature and works in an institutional framework. Moreover, the UNCITRAL Rules are designed to be adopted for an arbitral tribunal made up of a sole arbitrator or three arbitrators.[74] By contrast, the nine-member plenary structure is essential to the composition of the Tribunal. The three-member Chambers are also ultimately part of a bigger nine-member composition. These and the above-mentioned features require that the backgrounds of the neutral membership should have been paid much more detailed attention in the Tribunal's mandate and its Rules than that given in the UNCITRAL Rules. In fact, the only reference to the question in hand in the UNCITRAL Rules is that the neutral member will be of a nationality other than the nationality of the parties.[75] No further modifications have been made to the UNCITRAL Rules regarding the problem in question under the Tribunal Rules.

**IV(2)-** It appears that in the course of negotiations for the appointment of the neutral members, the question of legal culture of arbitrators has not been given necessary attention by the Iranians. The limited amount of information available suggests that the negotiations were conducted by three Iranian members and the Agent of Iran with the American Arbitrators and the Agent of the United States during about three weeks at the Peace Palace with the assistance made available by the Secretary General of the PCA.[76] The result reached, however, is surprising from what might be described as the Iranian stand-point. The selection of two arbitrators from Sweden and one from France, whose legal system has close similarities to the pre-revolutionary legal system of Iran, indicate the Iranian concern not to select nationals of the closest allies of the United States, while the other areas of concern from the third world standpoints have been mainly left untouched. The selection at the same

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74 Ibid, pp. 184-187. See also Articles 6 and 7 of the UNCITRAL Arbitration Rules.

75 Article 7(3) of the UNCITRAL Rules. Even this reference primarily concerns the appointments made by the appointing authority rather than those made by the parties themselves.

76 AR 83/82, p. 2.

time of two Swedish Judges from among over 150 nations is not only surprising, but has also limited the possibility of a broader base representation in the composition of the neutral members, which could have had at least one neutral member with Islamic, third world or socialist legal background. On the other hand, in view of the principal emphasis placed on fundamental Islamic principles in every and all aspects of Iranian society, including its judicial system, by the Islamic Government of Iran, and the kind of anti-Western philosophy it has advocated, it is not clear how the Iranian team has reconciled such trends with the predominantly Christian-Western structure of the neutral membership of the Tribunal- not to mention the ideological obstacles that the acceptance and enforcement by Iran of the awards of such an adjudicating body as a whole faces from the point of view of the Islamic principles strongly advocated by the Government of Iran, details of which are beyond the scope of this study.

A clear sign of the Iranians' unease with the neutral membership, which in turn indicates that the earlier appointments were not conducted thoroughly and were not whole-heartedly accepted by Iran, emerged soon after the appointments were made. In fact, the Tribunal had not yet started with the proceeding of the actual cases when Iran announced that it had no confidence in the neutrality and impartiality of Mr Mangard, the Chairman of Chamber Three.[77] Iran's suspicion as to the impartiality of this Judge continued well into the last day of his office and beyond, effects of which will be discussed in the next subsection. The challenge, or what Iran called "disqualification", instituted against Judge Mangard, though not directly concerning the problem of legal culture, entails important questions in relation to the appointment and challenge of the neutral members.

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77 The Letter of 1 January 1982 and its enclosure from the Agent of Iran to Mr Mangard, as quoted in the Decision of the Appointing Authority concerning the challenge against Judge Mangard, 5 March 1982, 1 Iran-USCTR. 509, p. 515.

Iran argued basically, that Judge Mangard by making statements condemning and "accusing the Islamic Republic of Iran of executions" had disqualified himself, and the Government of Iran had no confidence in his impartiality to decide highly controversial and politically sensitive disputes between the two countries.[78] It is not, however, clear why the Government of Iran chose to declare a unilateral disqualification of Judge Mangard in contravention of, and instead of acting under the challenge procedure provided for by the Tribunal Rules.[79] This unilateral method of action by Iran has not only provoked intervention by the Tribunal in the affair, which would otherwise have been unnecessary, but also appears to have been consequently prejudicial to the merits of Iran's claim in the course of consideration of the challenge by the Appointing Authority.

Apparently, with the view that Iran's unilateral demand for Judge Mangard's resignation interfered with the due functioning of the arbitration, the Tribunal by intervening in the matter ruled that the only method by which an arbitrator could be removed was through challenge by a High Contracting Party and decision by the Appointing Authority pursuant to Articles 10-12 of the UNCITRAL Rules; and that Iran's action constituted a challenge to Mr Mangard pursuant to Article 11 of the UNCITRAL Rules.[80] The Tribunal's intervention in view of the method of action taken by Iran is understandable in order to emphasise the principle of integrity of the arbitration process and such intervention would have been unlikely if Iran had opted to act under the proper procedure of challenge under the Tribunal Rules. However, despite the Tribunal's mindfulness to express that its decision did not deal with the question of validity or timeliness of the challenge to be considered by the

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78 Ibid.

79 See Ibid, and the arguments presented by Iran in the Decision of 15 January 1982 of the Tribunal concerning the Letter of 28 December 1981 and 1 January 1982 of the Agent of Iran to Mr Mangard, Ibid, 111, p. 112.

80 Ibid, p. 115.

Appointing Authority[81], the intervention may have overshadowed the merits of proceedings before that Authority.

In other words, the decision of the A.A.(Appointing Authority) was principally devoted to the procedural shortcomings in Iran's challenge of Mr Mangard. No real attempt was made to analyse the merits of the claim. The AA did not seek any clarification or evidence from Iran in support of her claim.[82] In fact, it appears that the AA by over-relying on procedural matters ignored the essential question. Therefore he gave no answer to the questions of: 1- whether or not Judge Mangard had made any such statement and if so when it was made, although in view of the fact that Judge Mangard did not deny Iran's claim the answer can be assumed in the affirmative ; 2- whether or not such statements can constitute a reasonable ground for the challenge and disqualification of the arbitrator.

As to the point of whether a circumstance such as the one in question can be incompatible with the exercise of judicial function, it is beyond the scope of this study to provide a detailed analysis of the issue.[83] It is, however, to be observed that under the accepted norms of international law certain private activities of the international judge may be incompatible with his exercise of the judicial function. It is believed, for instance, that the publication of legal articles and books by members of the ICJ dealing with current aspects of the Court's activities or controversial aspects of the development of international law which are directly concerned with the disputable facts of the Court's Statute and Rules may be incompatible with the judicial function.[84] Acceptance of decorations by a serving judge from any government but his

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81 Ibid. See also Dissenting Opinion of Arbitrators Kashani and Shafeiei, Ibid, pp. 115-118.

82 See Decision of Dr J. Moons, Chief Justice of the Supreme Court of the Netherlands regarding the challenge of Judge Mangard, 5 March 1982, 1 Iran-USCTR. pp. 509-518.

83 On this see generally, Schwarzenberger, Vol 4, op. cit. pp. 345-373.

84 Ibid, pp. 364, 371-372.

own was considered incompatible with the spirit of the Statute of the PCIJ.[85] The closest precedent to the case of Judge Mangard is perhaps the complaint made by the Indian Government on political speeches made in Pakistan, on Kashmir, by Judge Zafrulla Khan in 1968.[86] What kind of treatment was given to the Indian Government's complaint by the Court is not known, but it may have been taken into consideration by the Court in adopting the Report on Judicial Incompatibilities in 1968.[87] It is therefore rather surprising that the AA did not give any consideration to the issue of whether Judge Mangard's statement could have been incompatible with his role at the Tribunal.

To return to the process of appointment, on further occasions in which the replacement of the resigning neutral members has been at issue, the Iranians have demonstrated a greater degree of awareness of the importance of the cultural-legal background of the neutral members. This has perhaps been a result of the experience they have had with the European members of the Tribunal. As a result, they have insisted that a person, or persons, from countries other than the political-military allies of the United States and as a whole outside the Western hemisphere be appointed.[88] Iran's attempts, however, have been completely rejected and blocked by the United States. For instance, the United States rejected Iran's proposal to appoint a nominee from an Eastern European country, who had been a member of the ICJ longer than any other person to that date, on the ground of his possible bias in favour of Iran.[89] All this resistance by the United States to the appointment of a person from the Third World or from the Eastern bloc in turn demonstrates the kind of ease and harmony they have felt with the judges from the Western hemisphere.

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85 Ibid, p.363.

86 Ibid, p. 356.

87 Ibid.

88 See generally, Letter from Dr M. Kashani to Dr Charles Moons, Chief Justice of the Supreme Court of the Netherlands, 24 September, 1984, 6 Iran-USCTR. pp. 305-322.

89 Ibid, p. 316.

The American arbitrators' refusal to participate in any effective negotiations regarding the candidates put forward by Iran, the Iranian arbitrators submit, has been because of the confidence they have had in the alternative method of selection, namely the appointment by the AA, if the parties failed to reach agreement. It is submitted that because of the identity of cultural-legal traditions that the American members have felt with the AA they have had no incentive to pursue negotiations with their Iranian counterparts since they could be certain that the individual appointed by the AA would not be from outside the Western hemisphere.[90] Indeed, both of the appointments made by the AA, namely Professor Riphagen and Professor Bockestiegel, support the argument advanced by the Iranian members.

Indeed, this situation reveals two important problems regarding the proposition of the AA in relation to the question at issue in this Section. First, the unconditional adoption of the UNCITRAL Rules for the Tribunal, combined with the parties' failure to agree on an Appointing Authority, has meant that the important question of the designation of the AA has been left to the commercially structured provisions of these Rules. Second, the above point is in fact part of a bigger problem, namely the parties' failure to make necessary modifications to the UNCITRAL Rules in order to adjust them to the true character of the Iran-US arbitration. Certain modifications made by the Tribunal are necessarily concerned with procedural matters, and as a rule it could not have assumed the authority to modify the provisions concerning its own structure, which are matters for the Parties. Meanwhile, continuous disagreements and tension between the Parties have prevented any necessary modifications being made to the Rules. The Iranian arbitrators and the Agent of Iran have argued that their request for the modification of the structural provisions as provided for under Article 3(2) of the CSD has not been duly met

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90 Ibid, p. 305.

by the Americans, and therefore certain provisions, e.g. the designation of the AA, have not taken place under a mutually acceptable mechanism in line with the inter-State nature of the Tribunal, and as a result the United States has been granted a favoured and preferential position under the existing UNCITRAL Rules.[91]

The point is that, under the UNCITRAL Rules, if the Parties cannot agree on the Appointing Authority the Secretary General of the PCA will be asked by one of the Parties to designate an Appointing Authority.[92] It was argued by Judge Kashani that the Secretary-General of the PCA is an administrative official and takes his instructions from the Minister of Foreign Affairs of the Netherlands who acts as President of the Administrative Council of the PCA.[93] This reference of the designation of the AA to the Secretary-General of the PCA may therefore be consequential in inter-State arbitrations if not necessarily in commercial arbitrations for which the UNCITRAL Rules appear to have been primarily designed. Indeed, the Secretary General of the PCA seems to have neglected the sensitive inter-State aspect of the Iran-US arbitration in making his designation. The designation of the President of the Supreme Court of the Netherlands runs quite contrary to the idea accepted in many inter-State arbitration agreements, that the President of the ICJ should act as the Appointing Authority[94], his position being free from political influence

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91 Ibid, pp. 306-314.

92 See Articles 6 and 7 of the UNCITRAL Rules.

93 See Letter from Kashani, 24 September 1984, op. cit. p. 313. See also Article IX of the Rules of the Administrative Council of the PCA (as quoted Ibid,) providing that the Secretary-General of the PCA takes his instructions from the President of the Administrative Council who under the Preamble of the said Rules should be the Minister of Foreign Affairs of the Netherlands.

94 See, for instance, Article 3(2) of the ILC Model Rules on Arbitral Procedure of 1958 and Article 3(2) of the Draft Convention of the ILC on Arbitral Procedure of 1953. See also: Article 1(4) of the Charter of Arbitral Tribunal On Relations Between the Three Powers and the Federal Republic of Germany, 49 AJIL (1955), p. 62; Article 3(4) of the Charter of the Arbitration Commission on Property Rights and Interests in Germany, 49 AJIL (1955), p. 113; Article 1 of the Buraimi Oasis Arbitration Agreement, between Saudia Arabia and the United Kingdom, in Wetter, op. cit. Vol 3, p. 357.

and therefore a guarantee for a much more degree of neutrality. In other words, although the intervention by the Secretary General of the PCA appears to have been unavoidable and necessary in view of the Parties' failure to select a mutually acceptable Appointing Authority, his particular choice of the AA does not follow the desirable line in inter-State arbitrations. Nor does it reflect the rightful Iranian sensitivity that the AA and the neutral arbitrators should be selected from countries other than the closest political-military allies of the United States[95]- something that the Secretary General of the PCA should clearly have been aware of when making his selection.

As noted earlier, both of the appointments made by the AA have been in total disregard of the justified Iranian concern in relation to the cultural-legal backgrounds of the arbitrators. The AA's first appointment, namely Professor Riphagen was his compatriot and with close association with the Ministry of the Foreign Affairs of the Netherlands as a legal adviser to the Ministry. The second appointment made by the AA, namely Professor Bockestigel, leaves no doubt as to the AA's- and ostensibly to the Americans'- intention to select the neutral membership of the Tribunal from the Western hemisphere and essentially from the European allies of the United States. No doubt, these selections reveal the sensitivity of the AA and of the United States to the fact of legal culture of neutral members and the possible influence that their Western legal tradition, or otherwise the non-Western legal thinking of any potential neutral member proposed by Iran, could exert on the outcome of

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95 Letter From Kashani, 24 September 1984, op. cit. 6 Iran-USCTR. pp. 314-316.

It is notable that the AA has adopted an interpretation which runs quite contrary to the letter of Article 12(1)(c) in conjunction with Article 6 of the UNCITRAL Rules, in the sense that requirement for negotiating to reach agreement between the Parties on the AA within the one-month time limit has become redundant. [see decision of 15 March by the AA, Dr Moons, President of the Supreme Court of the Netherlands, regarding the challenge of Judge Mangard, 1 Iran-USCTR. 509, pp. 513-514]. For a detailed study on this, see the UNCITRAL preparatory history quoted Ibid, p. 514.

arbitration. There is no doubt that in the case of the Iran-US Tribunal the United States has mostly benefited from this factor.

Two further neutral members of the Tribunal have been appointed by mutual agreement. By the time of these appointments, however, Iran appears to have realized that she enjoyed no effective leverage to cause the appointment of a non-Western arbitrator in view of the limited amount of manoeuvring it could exercise to influence the process, a restriction due particularly to the existence of the Security Account, and in view of the Western structure of the alternative method of selection, namely the appointment by the AA. Iran therefore seems to have tried to reach a mutual agreement rather than to leave the matter to the discretion of the AA. She has, however, attempted to select the new members either from the neutral countries of the Western Europe or from less enthusiastic allies of the United States. the appointment of Dr Briner of Switzerland and Professor Virally of France seems to indicates such trends.

In fact, the United States' insistence on preventing the appointment of a non-Western European arbitrator has continued to date. It is significant that in 1988 Mr Bockstiegel, the President of the Tribunal, and Mr Virally, the Chairman of Chamber Three, resigned from the Tribunal.[96] The negotiations over the replacements for these two Members by the six Party-appointed arbitrators failed to result in agreement.[97] It is obvious that the main difficulty in choosing the substitutes for the resigning Members did concern their nationality and background.

The Agent of the United States by a letter dated 8 September 1988, requested the Appointing Authority to appoint two persons to serve as Members of the Tribunal.[98] Apparently, on the previous experience in respect

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96 AR 87/88, p. 3. For the text of the letters of resignation of Mr Bocksteigel and Mr Virally see Ibid, respectively, pp. 66-70 and 71-72.

97 Ibid, p. 4.

98 Ibid. For the text of the letter of the US Agent see, Ibid, Annex VIII, pp. 73-74.

of the disregard of Iranian concerns as to the nationality and background of the arbitrators and the fear that the arbitrators appointed by the AA could fall even short of what Iran could achieve through negotiations, on 9 November 1988 the six Party-appointed arbitrators reached agreement on appointment of two new members for the Tribunal.[99] The pattern imposed by the Americans in preventing the appointment of Third-World or Eastern Bloc arbitrators is still evident in the new appointments made. The two new Members are Mr Benget Broms of Finland and Mr Gaetano Arangio-Ruiz of Italy.[100]

## V. Assessment

A comprehensive assessment of the effects of the Western structure of the neutral membership of the Tribunal is neither possible nor intended, in view of the limited scope of this Section. Nor is it logical to assess the decisions of an international judicial body exclusively from the point of the view of the legal-cultural background of the decision-makers. Moreover, many of the related questions may largely depend on the individual personality, experience and integrity of the arbitrator, or arbitrators, in question. Nevertheless, it may be possible to detect the effects of the matter in question in certain specific aspects of the Tribunal's work. Take, for instance: the working relationship between the neutral arbitrators and the national arbitrators of the two Parties; the reaction of the arbitrating Parties to the work of the neutral members; the effect of the structure of the neutral membership on certain issues subject to controversy between the Third World and industrialized countries, e.g. expropriation cases; and the differences among

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99 Ibid, p. 4. For the text of the agreement of the six party-appointed arbitrators see, Ibid, Annex IX, p. 75.

100 Ibid, p. 4.

the neutral members in certain significant areas as reflected in the policies of their respective Chambers.

**V(1).** Certain elements of the facts discussed in the preceding Sections of this Chapter, in particular in Section B, also bear upon our discussion regarding the working relationship between the neutral members of the Tribunal and its national members. Quite clearly, these facts reveal the creation of a certain rift between the Iranian members on the one hand and the rest of the Tribunal members on the other, in particular in the pre-September 84 phase of the Tribunal's work. The partisan tendencies of the Iranian members were discussed in Section B. However, this polarization of the Tribunal membership as between the Iranians and the neutral members also arises from the fact that the former have felt no sense of identity or similarity of understanding and culture with the latter members. Furthermore, the Iranian group have come to realize that the neutral members have shared considerable common values and views with the American members as to many of the questions involved. This has not only led to the polarization mentioned, but also created a feeling of suspicion among the Iranian members, and their Government, in regard to the full impartiality of some of the neutral members.

It is significant that the Iranian members have been directly involved with their American colleagues in the negotiations for the appointment of the neutral members and should, naturally, have come to realize the importance that the Americans have attached to the Western perspectives of the neutral members by their insistent rejection of the appointment of even one member from the Third World or Eastern bloc countries. Although, for the reasons already explained, the Iranian members have not been able to block the Americans' efforts, this has not altered the feeling which has added to the rift within the Tribunal membership.

One may argue that the appointment of one or two of the neutral members from non-Western European countries could have led to a greater disharmony in the policies of the Tribunal. This might be true. However, the advancement of such an argument implicitly recognizes the effect of the legal culture of the arbitrators on the process of arbitration; the principle which we are trying to argue here.

Consequently, the kind of statement cited from the Iranian arbitrators in Section B equally identifies the polarization of the Tribunal membership as arising from the closer identification of the background of its neutral members with that of the American arbitrators. Obviously, the neutral members of the Tribunal have not made any controversial statements of the kind expressed by the Party-appointed arbitrators. Therefore, the latter group of statements has to be relied on for the purpose of our discussion in this Section, though with great caution. In general, it can be stated that in most of the controversial legal issues the neutral members of the Tribunal have had closer views to those of the American members than to those of the Iranian arbitrators. Of course, this partly relates to the fact that Iran has been the respondent in most of these cases. However, in our view, the latter fact cannot exclusively explain the above situation. One may have to accept that the question of legal-cultural background of the neutral members has played a considerable role in the process.

It has to be noted, briefly, that the above conclusion and our discussion in Section B do not negate the arguments we have made in Section A of this Chapter regarding the question of compromise decisions in international arbitration generally, as we have explained the latter's limits and peculiarities and its surrounding circumstances.

In short, it is possible to say that part of the tension and suspicion which have existed between the Iranian members and the neutral members relates to

the particular background of the neutral members of the Tribunal. There is no need to refer to all the statements made by the Iranian members again, as we have discussed some of them already in Section B above.[101] However, it is notable that in certain instances the Iranian members have felt that a particular decision made against Iran by the majority of the Tribunal was rooted in the Western background of the neutral members of the Tribunal. For instance, in Case A/18 the Iranian arbitrators stated:

> ... The composition of the so-called neutral arbitrators, itself the result of the imposed mechanism of the UNCITRAL Rules, is so unbalanced as to have made the Tribunal lose all credibility to adjudicate any dispute between the Islamic Republic of Iran, as a Third World revolutionary Country, and the United States, as the symbol of the world capitalism. The Tribunal is now composed of two Swedish arbitrators, one of whom persists in staying on despite the fact that he was rightly disqualified by the Islamic Republic prior to the commencement of the Tribunal's proceedings over two years ago, and of an agent of the Dutch Government's Ministry of Foreign Affairs, the NATO military ally of the United States.[102]

In the same Case the Iranian arbitrators implicitly argued that the Tribunal because of its predominantly Western structure was not able to adjudicate fairly between the Parties, of which one was a Third World country.[103] Many other statements to that effect have also been made by the Iranian members.[104] For instance, Judge Shafeiei in a statement pointed out that "owing to the

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101 See Supra, Section B, pp. 177-182.

102 Declaration of the Iranian Arbitrators in Case A/18, 5 Iran-USCTR. p. 266.

103 Dissenting Opinion, Iranian Arbitrators, Case A/18, 5 Iran-USCTR. 275, p. 336.

104 See the following Cases: Declaration appended to the signature of Judge Ansari in R.J. Reynolds Tobacco Co v Iran, 7 Iran-USCTR. pp. 198-199; "Supplementary Comments" by Dr. Shafeiei on "Non-Signature of the Award", Tippetts, Abbett, and Others v TAMS-AFFA, 6 Iran-USCTR. 252, pp. 268-269, and Ibid, Shafeiei, "Reasons for Not Signing Award", 230, pp. 251-252; Dissenting Opinion, Shafeiei, 25 May 1983, Amoco Iran Oil Co v Iran, 2 Iran-USCTR. pp. 345-346; Kashani, Letter to Charles Moons, Chief Justice of the Supreme Court of the Netherlands, 24 September 1984, 6 Iran-USCTR. 305, pp. 316-317; Statement by Judges Kashani and Shafeiei "in Connection with the Recent Events at the Iran-US Claims Tribunal", 7 October 1984, 7 Iran-USCTR. 306, pp. 307-311; Dissenting Opinion, Shafeiei, Cases Nos. 39 and 55, 2 September 1983, 3 Iran-USCTR. 297, p. 299.

completely Western structure of the Tribunal" it could not or did not want to understand Iran's problems.[105]

With the changes in the composition of both the Iranian and neutral arbitrators following the episode of September 1984, the tension in relations between the Iranian and some of the neutral members might have eased somewhat, but it has not relaxed completely. In certain controversial issues there are indications that it has re-emerged. For instance, in a recent Dissenting Opinion[106] Judge Ameli implied that the claimant had irregularly acquired knowledge of the deliberations by having contact with a Chamber member.[107] In response, Judge Bockstiegel, the President and Chairman of Chamber One, felt the need to join Judge Holtzman in a Separate Opinion[108] denying the assertion of improper conduct.[109] A further round of exchange of Separate Opinions continued between Judge Ameli and Judge Bockstiegel.[110] Again, Judge Ameli hinted that the claimant had been in contact with a member of the Chamber, which had enabled it to know "before the Tribunal's Order of 1 October 1987 that it should correct, and how it should correct, the Bill of Sale it had originally submitted..."[111] Judge Bockstiegel responded that he "had no contact whatsoever with either Party during the deliberations in this Case".[112] He argued that Judge Ameli, like "bad losers in sport", found it difficult to

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105 "Dr Shafeiei Reasons for Not Signing the Awards Made by Mr Aldrich and Mr Bellet", 9 August 1983, 3 Iran-USCTR, 124, p. 130.

106 Granger Associates v Iran, Dissenting Opinion of Ameli, 20 October 1987, 16 Iran-USCTR, 317, p. 327.

107 Ibid, p. 329.

108 Separate Opinion of Bockstiegel and Holtzman, 10 November 1987, Ibid, p. 329.

109 Ibid, pp. 329-330.

110 Separate Opinion of Ameli, 15 December 1987, Ibid, pp. 330-333; Separate Opinion of Bockstiegel, 27 January 1988, Ibid, pp. 333-334.

111 Ibid, p. 333.

112 Ibid, p. 334.

accept that "others may have different views for which they may even find a majority."[113]

Our discussion regarding the cultural-legal background of the neutral members of the Tribunal should by no means be interpreted as bearing upon the question of impartiality and independence of these members from the point of view of their personal integrity. Indeed, it is beyond the scope of this study or any academic study of this kind to approach the question from this point of view. It is true that some of the statements made by Iranian members of the Tribunal concerning certain neutral members do clearly amount to questioning the latters' personal impartiality. However, our reference to these statements is intended merely to demonstrate the fact of the polarization of the Tribunal membership and the tension therein. For instance, the Iranian members claimed that Mr Mangard, the first Swedish Chairman of Chamber Three, had "... totally hostile feelings specifically directed against the Islamic Republic of Iran".[114] They further claimed:

> In Chamber One, whose former Chairman was mutually acceptable to the parties, awards have been rendered against the Islamic Republic in only four Cases over the course of the past three and one half years, with their judgment sums amounting to approximately $2.7 million. Moreover, that same Chamber rendered two awards together of about $8.4 million in favour of the Islamic Republic. Chamber Three, however, has issued awards against the Islamic Republic in a total of about 22 Cases, including five awards issued in a single day; and in these contentious Cases above, awards amounting to approximately $83 million have been unjustly and wrongfully rendered against the Islamic Republic... Furthermore, that Chamber has not rendered a single award in favour of the Islamic Republic.
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> In setting forth these facts and figures, it is not our intention to inquire why Chamber Three has issued a particular award against, or failed to issue one in favour of, the Islamic Republic. Our purpose here, rather, is to indicate through this

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113 Ibid.

114 "Letter from the Iranian Arbitrators, Kashani and Shafeiei, to Mr Lagergren", 6 September 1984, 7 Iran-USCTR. p. 285.

simple comparison- under conditions where the Cases were by and large comparable and had been distributed by lot among the various Chambers of the Tribunal- why there is such a striking difference between the records of Chambers One and Three, and whether any factor other than the fact that the Chairman of Chamber Three has been imposed and is under the total control and protection of the United States, can possibly explain this striking discrepancy.[115]

It is impossible for us to verify the accuracy of the above statements or to rely on them as undisputed facts in the absence of any further independent evidence in support. However, there are some inconclusive indications of heed given by the Tribunal to the sensitivities expressed by Iran with regard to Judge Mangard. For instance, during the meetings of the Full Tribunal on 4 and 5 September 1985, the question was discussed as to whether Article 13, paragraph 5 of the Tribunal Rules applied to Mr Mangard in Case No. 48.[116] It is again notable that Article 13(5) requires the participation of a former member of the Tribunal in all Cases in which he has participated in a hearing on the merits. In the above-mentioned meetings, which were held in response to the Iranian Agent's request, the Tribunal decided that the requirement did not apply to Judge Mangard.[117]

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115 "Statement of the Iranian Arbitrators, Mahmoud Kashani and Shafei Shafeiei, in Connection with the Recent Events at the Iran-United States Claims Tribunal", 7 Iran-USCTR. 306, p. 310.

116 American Bell Int'l Inc v Iran, Case No. 48, 12 September 1985, 9 Iran-USCTR. p. 409.

117 Ibid, pp. 409-410. Due to the absence of a majority between the Full Tribunal members, the President of the Tribunal, Judge Bockstiegel, by a casting vote decided the matter.

It is notable that Mr Charles Brower, the American member, argued in a dissenting opinion to the President's view that:

> ...This exercise of authority inevitably compromises in some measure the integrity of the Tribunal's processes. The exclusion of Judge Mangard from completing this Case can mean only of two things: Either it constitutes an interpretation of Article 13(5) at variance with that previously made by Chamber Three, in which case the previous Award would be Called into question; or it means that Article 13(5) thereby is changed, presumably to make its application discretionary. (Ibid, p. 412.)

Indeed, the record of some of the neutral members of the Tribunal argues well for the strength of their integrity and impartiality, even in enabling them to transcend, to a considerable degree, the sub-conscious influences of cultural-legal predispositions. Judge Gunnar Lagergren, a national of Sweden and the first President of the Tribunal, is the most notable example in this regard. A general survey of the individual opinions expressed by Judge Lagergren clearly reveals the strength of his views, his integrity and his ability to establish a just balance in his working relationship between the two groups of Party-appointed arbitrators.[118] This is a manner of working against which neither of the two Governments, or their arbitrators, appear to have raised any objection.

**V(2).** The development of different policies towards certain subjects, though not necessarily strategic ones from the point of view of what constitute the irreconcilable views of the Third World countries and industrialized States, demonstrates that the notion of cultural-legal background of the international judges should not be overstated in appraising their practice. It has been observed, for instance, that the Chambers of the Tribunal have developed their own special approach regarding certain issues, which in principle has to be attributed to the position of their neutral members.

It is submitted that Chambers One and Three of the Tribunal, chaired respectively by Judges Bockstiegel and Virally, have relied on conflicting principles regarding the award of interest.[119] In Sylvania Technical Systems,

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[118] See generally, Dissenting Opinion of President Lagergren, Case A/1, 1 Iran-USCTR. pp. 197-199; Dissenting Opinion, Lagergren, Kashani, Shafeiei, and Sani, GIBBS and Hill, Inc v Tavanir, 9 Nov. 1982, 1 Iran-USCTR. p. 241; Dissenting Opinion of Lagergren, Kashani, Shafeiei and Sani, HNTB v Iran, 9 Nov. 1982, 1 Iran-USCTR. pp. 250-251; Dissenting Opinion of President Lagergren, Int'l School Services v Iranian Copper Industries, 6 April 1984, 5 Iran-USCTR. pp. 348-353; and Separate Opinion Lagergren, INA Corp v Iran, 15 Aug. 1985, 8 Iran-USCTR. p. 385.

[119] For an analysis of the issue see, Dr Gillis Wetter, "Interest as an Element of Damages in the Arbitral Process", International Financial Law Review, December 1986, pp. 20-23.

Inc v Iran[120] , Chamber One awarded 12 percent simple interest on the ground that a general rate of interest should be derived from rates of return on investment even if in a particular case the claimant may have been borrowing at a higher rate.[121] On the other hand, in Mc Collough and Company, Inc v The Ministry of Post, Telegraphs and Telephones, NIOC and Bank Markazi[122], Chamber Three held that a fair rate of interest on all the amounts determined to be due and owing to the claimant was 10 percent simple interest per annum.[123] The position of Chamber Three was that a reasonable or fair rate of interest based on a number of individual factors should be established.[124]

Of course, these instances of difference of opinion do not reveal any pattern of opinion which one could attribute to the cultural-legal background of the arbitrators. On the contrary, they demonstrate a difference of approach to identical questions by judges with apparent similarity of legal culture. On the whole, however, the Tribunal has consistently continued with the practice of awarding interest as a rule, despite the differences among the Chambers as to the rate and the principle according to which its rate should be established. Consequently, the Tribunal has offered no solution to the question that in Iran and other Muslim jurisdictions the law prohibits the award of any interest.[125] Aside from the question of practicality of the prohibition of the award of interest in Muslim countries, the fact that the Tribunal has never approached or resolved the problem from the latter point of view lies mainly in the absence of neutral judges from Muslim countries in the composition of the Tribunal.

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120 Award of 27 June 1985, 8 Iran-USCTR, p. 298.

121 Ibid, pp. 320-322.

122 Award of 22 April 1986, 11 Iran-USCTR, p. 3.

123 Ibid, pp. 29-32.

124 Ibid.

125 In Mc Collough the Tribunal referred to the question of interest in Iran and Muslim countries.(11 Iran-USCTR, p. 27) Moreover, the Tribunal accepted that "no uniform rule of law relating to interest has emerged from the practice in transnational arbitration." (Ibid, p. 28) Also note that in Case A/19 the Full Tribunal had scheduled to solve the practice of awarding interest. No such decision has been made public so far.

On another subject the practice of the neutral members of the Tribunal has also tended to be a reflection of their legal-cultural training. This has proved to be in conflict with the Islamic Law views of the Iranian members. It is submitted that in approaching the question of party testimony, though the Tribunal has made a nominal distinction between a party giving information and a witness, it has in practice been open to accept all evidence presented to it, whether styled as witness "testimony" or as party "information".[126] This practice of the Tribunal has been developed to the point of representing the Common Law concept of testimony advocated by the American claimants and by the American Arbitrators and thus making the distinction made by the Tribunal nominal.[127] Interestingly, even this nominal distinction made by the Tribunal is believed to reflect the civil law traditions of the neutral members of the Tribunal.[128]

This approach was clearly unacceptable to the Iranian members. In Economy Forms Corporations v Iran[129] Judge Kashani[130] objected to the practice of the Tribunal in the following terms:

> ... Although the Tribunal acknowledges that the claimant has presented no evidence or documentation in order to establish its nationality, the majority has exempted the claimant from the obligation to do so. Without the slightest legal basis, it has accepted the assertions solely on the basis of the statements of Mr. Jennings himself, who is an interested party in this claim and thus it has made it clear that its Award is invalid.[131]

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126 For an analysis of the practice of the Tribunal in this respect see Michael Straus, "The Practice of the Iran-United States Claims Tribunal in Receiving Evidence from Parties and from Experts", 3 J.Int'l.Arb. (1986), pp. 57-69. It is submitted that in the following Cases the Tribunal heard the claimants as witnesses: Esphahanian v Bank Tejarat, 2 Iran-USCTR. p. 157; Golpira v Iran, 2 Iran-USCTR. p. 171; and Leila Danesh Arfa Mahmoud v Iran (Mahmoud v Iran), 9 Iran-USCTR, p. 350; and Alan Craig v Ministry of Energy of Iran, 3 Iran-USCTR. p. 280. (Michael Straus, op. cit. pp. 59-60.)

127 Ibid, pp. 61-62.

128 Ibid, p. 61.

129 June 13, 1983, 3 Iran-USCTR. p. 42.

130 The Dissenting Opinion of Judge Kashani is printed in 5 Iran-USCTR. p. 1.

131 Ibid, p. 23.

Obviously, Kashani's objections should be seen against the background of principles in Iranian and Islamic Law that the testimony of an interested party is without legal effect.[132] Undoubtedly, there are theories in international arbitration which argue that the municipal legal rules of denying or excluding the testimony of interested parties are irrelevant in international arbitration because of difficulties in presenting other evidence.[133] However, there are no general rules in international law which would govern the question precisely.[134] As a consequence, the question of which of the above-mentioned views are desirable depends largely on the judicial conception applied. This is where the question of legal-cultural conceptions of the international judge becomes relevant. For instance, in the above Cases, for a neutral arbitrator with extreme civil law or Islamic law views it would hardly have been acceptable to rely on the testimony of an interested party as a sole basis for his decision.

**V(3).** Perhaps the most unfortunate aspect of the absence of judges from Third World and Eastern bloc countries in the composition of the Tribunal relates to the decisions of the Tribunal regarding the question of expropriation and nationalization in general and the standard of compensation thereof in particular. Generally speaking, the absence of a truly diverse membership on the Tribunal, in terms of cultural-legal background of the arbitrators, has had the consequences that : 1- No serious consideration has been given to the position of Third World countries regarding the standard of compensation in the changing law of nationalization and expropriation; and 2- The majority members have approached the problem primarily from the point of view of industrialized countries.

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[132] E.g., Article 1313(5) of the Iranian Civil Code of 1935.

[133] See Sandifer, Evidence Before International Tribunals, Revised Ed., University Press of Virginia, Charlottesville, 1975, p. 364; see also Michael Straus, op. cit. pp. 58-61.

[134] See Simpson and Fox, op. cit. p. 192.

Consequently, the Tribunal's decisions in this respect remain essentially Eurocentric. So is their decisions' precedent value. For in our view, in referring to the case law in particularly controversial areas such as the one in question, one should bear in mind the circumstances in which a judicial decision has been made. These circumstances includes the particular background of the decision-makers.

Perhaps it would not be wrong to say that the position of neutral members of the Tribunal regarding the problem in question resembles the position of Judge Drago in the North Atlantic Fisheries Arbitration in relation to his attempt to define the meaning of the term "bay".[135] In fact, in one sense the neutral members of the Tribunal, as well as the American Arbitrators, have used the opportunity of the Iran-U.S. Cases to set standards in order to dispel the present confusion in the assessment of compensation which exists in the present law of expropriation, basing these standards upon the approach of the Western countries.

In a series of important Cases of nationalization and expropriation, Iran has repeatedly argued that the traditional requirement of full compensation does not represent the current state of law. While Iran does not seem to have seriously disputed the principle of compensation generally, it has argued that present-day international law lays down a standard of partial compensation, the amount determined "with a view to the laws and regulations of the State concerned."[136]

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[135] See Supra, pp. 191-192.

[136] Payne v Iran, 8 August 1986, 12 Iran-USCTR. 3, pp. 11-12.

Our concern with the Cases of nationalization is limited to demonstrating the position of the Tribunal regarding the issue, which is essentially a reflection of the position of its neutral members. Various analyses of the nationalization and expropriation Cases before the Tribunal have been made elsewhere. See generally: Brice M. Clagett, "The Expropriation Issue before the Iran-United States Claims Tribunal : Is Just Compensation Required by International Law or Not?", 16 L.P.I.B. (1984), p. 814; Steven R. Swanson, "Iran-U.S. Claims Tribunal : A Policy Analysis of the Expropriation Cases", 18 C.W.R.J.I.L. (1986), p. 307; Charles N. Brower, "Current Developments in the Law of Expropriation and Compensation : A Preliminary Survey of Awards of the Iran-United

In the American International Group v Iran[137], Iran argued that:

... There is no international legal entitlement to compensation equal to "full value" of the property nationalized. The suggestion of full compensation derives from the traditionally asserted standard of "prompt, adequate and effective" compensation which has been repudiated by modern developments in international law; instead, a standard of "partial compensation" should be applied, based on references contained in resolutions of the United Nations organs and from post-War settlement practice.[138]

In Sedco v NIOC[139], Iran contended that customary international law required "appropriate" compensation to be calculated in the light of all the circumstances of the case.[140] In all these Cases Iran argued that such compensation should be calculated according to the net book value of the property.[141]

Quite clearly, two of the main pillars of Iran's position were that : (a)- on the basis of the practice of "lump sum" agreements between States and compensation settlements between States and foreign companies these settlements have usually amounted to less than the full value of the property taken.[142]; (b)- the conclusion derived from the UN resolutions required for "appropriate" compensation, meaning, less than the full value of the property.

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States Claims Tribunal", 21 Int'l Lawyer, (1987), p. 639; M. Pellonpaa and M. Fitzmaurice, "Taking of Property in the Perspective of the Iran-United States Claims Tribunal", XIX Neth.Y.B.I.L. (1988), p. 54. For a further review see also, Gunnar Lagergren, "Five Important Cases on Nationalization of Foreign Property Decided by the Iran-United States Claims Tribunal", Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No. 5, University of Lund, 1988, p. 5.

137 19 December 1983, 4 Iran-USCTR. p. 96.

138 Ibid, p. 103 and pp. 104-105.

139 27 March 1986, 10 Iran-USCTR. p. 180.

140 Ibid, p. 183.

141 Ibid. See also : Amoco Int'l Finance Corporation v Iran, 14 July 1987, 15 Iran-USCTR. 189, p. 245; American Int'l Group v Iran, 4 Iran-USCTR. 96, p. 106; and INA Corporation v Iran, 12 August 1985, 8 Iran-USCTR. 373, p. 378.

142 It is accepted that this category of settlement has been reached on less than the full value of the property taken. (On this and on the relevant references see M. Pellonpaa and M. Fitzmaurice, op. cit. pp. 104-105).

Obviously, in all these Cases the American claimants' position was that under both Article IV(2) of the Treaty of Amity between Iran and the United States[143] and customary international law they were entitled to "just" compensation equal to the "full value", meaning the "fair market" value of the nationalized property.[144]

The Tribunal's approach in the various Cases of nationalization has generally been in support of the position of industrialized countries, shown in its practical rejection of all the arguments made by the Third World nations. The arguments employed by the Tribunal were:

> Assessment of the present state of customary law on this subject on the basis of the conduct of States in actual practice is difficult, *inter alia*, because of the questionable evidentiary value for customary international law of much of the practice available. This is particularly true in regard to "lump sum" agreements between States (a practice often claimed to support the position of less than full compensation), as well as to compensation settlements negotiated between States and foreign companies. Both types of agreements can be so greatly inspired by non-judicial considerations- e.g., resumption of diplomatic or trading relations- that it is extremely difficult to draw from them conclusions as to opino juris.

As regards the resolutions of the General Assembly, the Tribunal said that they were not generally binding, but it was accepted that such resolutions in certain specific circumstances might be regarded as evidence of customary international law.[146] In the view of the Tribunal, from various relevant resolutions of the General Assembly only Resolution 1803(XVII) "reflects, if it

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143 For Article IV(2) of the Treaty of Amity and other issues related thereto see Supra Chapter One, p. 11, note 9.

144 See American Int'l Group v Iran, 4 Iran-USCTR. p. 105; INA Corporation v Iran, 8 Iran-USCTR. pp. 377-378; Payne v Iran, 12 Iran-USCTR. pp. 11-12; Sedco v NIOC, 10 Iran-USCTR. pp. 182-183; and Amoco Int'l Finance Corporation v Iran, 15 Iran-USCTR. pp. 242-252.

145 Sedco v NIOC, 10 Iran-USCTR. 157, pp. 184-185. See also, Amoco Int'l Finance Corporation v Iran, 15 Iran-USCTR. 189, p. 266.

146 Sedco v NIOC, 10 Iran-USCTR. 157, p. 186.

does not evidence, current international law".[147] It is notable that from among the resolutions of the General Assembly on the permanent sovereignty over natural resources the above-mentioned resolution is, comparatively, the most ambiguous one in relation to the question of standard of compensation. Moreover, the Tribunal did not give any explanation at all as to why only the above resolution could reflect customary law and not the other resolutions as well, particularly in view of the fact that the voting pattern of all the relevant resolutions of the General Assembly on the question of nationalization and expropriation were, by and large, similar. Therefore the Tribunal's selection of that specific resolution in the context of the standard of compensation does not inspire confidence and amounts to only lip service to the Third World countries.

More surprising is the fact that the Tribunal went on to say that, nevertheless, the pertinent part of Resolution 1803 was subject to conflicting interpretations as to whether it reflected the traditional standard of compensation or, on the other hand, signified an erosion of this principle.[148] One wonders how, then, a resolution which according to the Tribunal was subject to such a degree of controversy could in the view of the Tribunal reflect current international law, and if so which of the two conflicting interpretations represented current law. As if aware of the paradox in its reasoning, the Tribunal went on to accept implicitly that learned writers believed that Resolution 1803 reflected a change in customary international law so that less than full compensation should be payable.[149] However, the Tribunal produced other reasoning to render the latter conclusion, in practice, inapplicable to the Cases before it. It declared that the standard of less than full compensation derived from Resolution 1803 did only apply in cases of compensation in the

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147 Ibid.

148 Ibid, p. 187.

149 Ibid.

context of a formal, systematic large-scale nationalization.[150] This, the Tribunal noted, did not exist in the Cases in hand.[151]

Apparently, none of the Cases of nationalization before the Tribunal qualified as large-scale nationalization and the Tribunal did not make any attempt to consider all these Cases together as part of a pattern which would qualify them as large-scale nationalization. The Tribunal's approach to the question was adopted despite the fact that in some of these Cases the sums awarded amounted to almost one hundred million US dollars.[152] Nor did the fact that all these expropriations or nationalizations had taken place as a result of a revolution and as part of a pattern for changing the political-economic structure of Iran persuade the Tribunal to accept that they qualified as large-scale nationalization. Therefore in all major cases of nationalization the Tribunal ruled that "full compensation" was the standard applicable under international law.[153]

The fact is that the current state of international law regarding standard of compensation is by no means settled. One can equally argue in favour of or against the position adopted by the Tribunal. There are strong enough authorities cited which can with equal cogency lead to a conclusion different from that arrived at by the Tribunal.[154] The question, therefore, depends ultimately on the sub-conscious predisposition resulting from the training and

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150 Ibid. See also INA Corporation v Iran, 8 Iran-USCTR. p. 378.

151 Sedco v NIOC, 10 Iran-USCTR. p. 187. See also INA v Iran, 8 Iran-USCTR. p. 378.

152 See e.g., the Award in Sedco v NIOC, 15 Iran-USCTR. pp. 186-187.

153 See e.g., Payne v Iran, 12 Iran-USCTR. p. 12; Amoco Int'l Finance Corporation v Iran, 15 Iran-USCTR. p. 269; American Int'l Group v Iran, 4 Iran-USCTR. p. 109; Sedco v NIOC, 10 Iran-USCTR. p. 187; and INA v Iran, 8 Iran-USCTR. p. 378.

154 On this see Dissenting Opinion of Judge Ameli, INA Corporation v Iran (8 Iran-USCTR. pp. 403-417). See also Concurring Opinion of Judge Holtzman, Ibid, p. 391 and Separate Opinion of Judge Brower, Sedoc v NIOC, 10 Iran-USCTR. p. 189. It is notable that the American Arbitrators maintained without qualification that "full" compensation was the proper state of law.

background of the judges in question. That is why even common facts are interpreted in conflicting ways by different judges.

For instance, the LIAMCO Arbitration[155] was cited by the Tribunal as probably the only one among the recent arbitrations concerning nationalization of oil concessions which "could be argued in a way to have expressed doubt about the traditional standard of full compensation".[156] Nevertheless, at the same time the Tribunal argued that in the latter Arbitration "... compensation at full value for *damum emergens*" was held as an undisputed minimum standard.[157] Quite clearly, this reading by the Tribunal is not only a misinterpretation of the LIAMCO Award, but also reveals a clear contradiction in the Tribunal's own reasoning. Judge Ameli of Iran, on the other hand, argued that the LIAMCO Award "by no stretch of imagination qualified as applying "full compensation" standard".[158] This difference of approach bears a clear resemblance to the different conclusions the majority and the dissenters in the Second Phase of the South West Africa Case arrived at as to the existence of legal interest in the applicants, both each conclusion arrived at by way of a private law analogy.[159] It is needless to mention that the existence of cultural-legal predispositions has been accepted as a major reason behind that approach by the judges of the ICJ.[160]

It should be noted briefly that in the LIAMCO Arbitration the sole arbitrator by expressly quoting various resolutions of the United Nations on the topic of nationalization, including Resolution 1803 and Resolution 3281, expressed the opinion that "... the said Resolutions, if not a unanimous source

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155 12 April 1977, 62 ILR, p. 141.

156 Sedco v NIOC, 10 Iran-USCTR. p. 187.

157 Ibid, p. 188.

158 Dissenting Opinion Ameli, INA v Iran, 8 Iran-USCTR. p. 414.

159 See Supra, p. 190.

160 See Ibid.

of law, are evidence of the recent dominant trend of international opinion..."[161] However, the sole arbitrator did not rely on either of the terms "full" or "appropriate" compensation; instead, he adopted the formula of "equitable compensation".[162] In the final analysis, this arbitrator awarded a total of about $80 million to the claimant.[163] It is notable that the claimant had demanded a total amount of over $200 million.[164] Whether the amount awarded in this Case was based on the standard of full compensation is open to question. However, what constitutes the most relevant part of our argument in this discussion is that the Tribunal in Sedco v NIOC came to accept that the LIAMCO Award was probably the only one among recent arbitrations to have expressed doubt about the traditional standard of compensation. This, in our view, is because the sole arbitrator, Dr Sobhi Mahmassani of the Lebanon, was probably the only one judge of non-Western background to have had the opportunity in recent arbitrations to render a binding award on the question.[165]

It must be accepted that the Tribunal in arriving at the standard of "full compensation" also relied on Article IV(2) of the Treaty of Amity as a *lex specialis*, along with its reliance on customary international law.[166] Quite clearly, given the express provisions of Article IV(2) of the Treaty of Amity and the ruling of the International Court of Justice in the Hostages Case regarding the applicability of that Treaty between the two Countries[167], the Tribunal had a better case in relying on that Treaty as a basis for the standard of "full compensation". However, the controversial aspect of the Tribunal's

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161 LIAMCO Award, 62 ILR. p. 189.

162 Ibid, pp. 209-210.

163 Ibid, p. 218.

164 Ibid, p. 210.

165 For the process of appointment of Dr Mahmassani in the LIAMCO Arbitration see Ibid, pp. 146-148.

166 INA Corp v Iran, 8 Iran-USCTR. p. 379; Sedco v Iran, 10 Iran-USCTR. p. 184; Amoco Int'l Finance Corp v Iran, 15 Iran-USCTR. pp. 214-224.

167 See Supra, Chapter One, p. 12, note 10.

reasoning may be its ruling regarding the position of customary international law on the matter.

Finally, it has to be noted that in INA v Iran, Judge Lagergren in his Separate Opinion provided a more even-handed analysis of the issue of compensation.[168] After referring to several authorities in support of his argument, he said:

> I conclude from the foregoing that an application of current principles of international law, as encapsulated in the "appropriate compensation" formula, would in a state undergoing a process of radical economic restructuring normally require the "fair market value" standard to be discounted in taking account of "all circumstances".[169]

## Conclusion

The idea of equitable geographical distribution of membership and representation of all forms of civilizations and principal legal systems in the composition of international judicial bodies is a well established principle. This is particularly relevant to international arbitration, in which it may be argued that the notion in question is one of its characteristic features.

Various instances quoted above demonstrate the effect of conscious and sub-conscious legal-cultural training of the international judge on the outcome of his decisions. The influence of legal-cultural training of an international judge can be more consequential with regard to particularly controversial areas of international law over which certain blocs of States are divided in the world community.

The principle of equitable geographical distribution of membership and representation of all possible forms of legal systems has been totally and consistently neglected in the composition of the neutral members of the

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168 8 Iran-USCTR. pp. 385-390.

169 Ibid, p. 390.

Tribunal. This has been so because of the refusal by the American Government and/or by its arbitrators to agree on the appointment of non-Western European members. The reasons for the success of the Americans in this exclusion, which has resulted from the imbalance in the negotiating positions of the two Governments, lie in two facts: 1- the existence of the Security Account which in effect has deprived Iran of the traditional mechanisms of manoeuvring, e.g., threat of withdrawal; and 2- the Appointing Authority had in practice shown, through the appointment of Judge Bockstiegel and Judge Riphagen, no real understanding of the principle of equitable geographical distribution and representation of all possible forms of legal systems in the composition of the neutral members of the Tribunal. All the indications support the claims made by the Iranian arbitrators and the Agent of Iran that the American Arbitrators did not enter into any serious negotiations on the topic in question because they were confident that the AA would disregard the appointment of a non-Western European member.

A reasonable composition for the neutral members could be: one Western European member, one with Third World/Islamic background, and the third from a background neither close to that of the Iranian members nor to the American Arbitrators.

The consistent refusal by the American Arbitrators or their Government to accept the appointment of even one non-Western European arbitrator throughout the changes in the composition of the neutral members proves the importance of the influence of the cultural-legal predisposition of the international judges on the outcome of adjudication, in the calculations of the Americans for this purpose. In other words, this proof supports our argument in this Section.

The effect of the absence of non-Western European judges or, in other words, the effect of the presence of an all Western European Judges on the

neutral membership of the Tribunal is evident in certain Cases decided by the Tribunal, particularly in the Cases of expropriation. The decisions of the Tribunal in these respects remain American-European orientated. Thus the precedent value of these particular decisions should be assessed in the light of all the relevant circumstances, including the composition of the Tribunal, in particular the legal-cultural background of its neutral members.

# CHAPTER FIVE

# WITHDRAWAL OF ARBITRATORS

## Introduction

During the early years of the Tribunal's life the Iranian members of Chambers Two and Three failed to participate in certain parts of the deliberations in a number of Cases. This pattern was repeated in a Case decided in 1987. The remaining members of the Chambers concerned proceeded in the absence of the Iranian members and rendered Awards against Iran. The authority of the two remaining members of these Chambers and the validity of these Awards were strongly challenged by Iran and by the Iranian members. Nevertheless, Presidential Orders were issued for payment of these Awards out of the Security Account and they were paid to the claimants. In the absence of a due process to challenge the validity of awards under the Tribunal's governing provisions, Iran attempted to challenge the validity of these Awards via the municipal legal system of the place of arbitration.[1] However, because of the complexities and uncertainties involved in a challenge by way of recourse to municipal law[2] and due to the fact that the payment of these Awards out of the Security Account had already made a challenge practically meaningless, Iran's attempts to challenge the Awards in the Dutch courts failed to bear results. Moreover, because of the same fact of the payment, Iran's unilateral declaration of nullity of the Awards was, in practice, without any effect.[3]

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1 See generally Infra, Chapter Six, pp. 342-344.

2 See generally Ibid, pp. 344-348.

3 On the doctrine of nullity and the question of unilateral declaration of nullity of arbitral awards see Infra, Chapter Six, pp. 328-330.

However, the situation gave rise to the still unsettled question of the authority of an arbitral tribunal to proceed and render valid awards in the absence of a party-appointed arbitrator. Regardless of the controversy which may exist over the facts presented by the disputing sides involved, the underlaying problem is mainly a question of law. That is, whether in the absence of an express provision the arbitral tribunal is legally constituted by two of its members, or two members of a three-member tribunal are authorized to continue the proceedings in the event of the withdrawal of a party-appointed arbitrator.[4] The question is one which refers to and has implications for the theory and distinguishing characteristics of international arbitration as distinct from judicial settlement in its strictest meaning, i.e., the ICJ system. In other words, although similarities between international arbitration and judicial settlement are generally appreciated, this particular question bears directly upon a point which can be regarded as distinguishing arbitration from other forms of judicial settlement. It follows that the problem should be analysed within the strict confines of the law and practice of international arbitration.

We will divide the discussion of the question as follows:

Section A: factual-legal provisions pertaining to the problems before the Iran-United States Claims Tribunal.

Section B: the general problems of withdrawal of party-appointed arbitrators and frustration of arbitral proceedings.

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4 The most recent work on the issue is a book by Judge Schwebel of the ICJ, International Arbitration : Three Salient Problems, Cambridge, Grotius Publications, 1987. Chapter Three of this book is devoted to a lengthy discussion of the authority of truncated tribunals to proceed in the absence of a withdrawing party-appointed arbitrator. This Chapter provides a fresh account of the problem in international arbitration. However, its conclusions are not totally free from controversy. We will elaborate on these issues throughout this Chapter.

# SECTION A

# FACTUAL-LEGAL ISSUES PERTAINING TO THE NON-PARTICIPATION OF IRANIAN ARBITRATORS IN THE PROCEEDINGS IN A NUMBER OF CASES

## I. Relevant Rules of Procedure Applicable to the Validity of Awards of the Iran-United States Claims Tribunal

First, three procedural questions concerning an arbitral award should be distinguished: (a)- How should the Tribunal be composed? (b)- What are the rules of deliberation? and (c)- What is the form of the award? In other words, these questions concern three different issues: the composition and constitution of the Tribunal, the rules of deliberation, and the form of the award. Under the CSD and the Rules of the Tribunal these questions have been addressed in the following provisions.

**(a)- Rules Pertaining to the Composition and Constitution of the Tribunal**

The provisions of Articles III(1) and III(2) of the CSD regarding the composition of the Tribunal and of its Chambers were quoted in the preceding Chapter. It is useful to recall that under Article III(1) of the CSD it is stated that : "claims may be decided by the Full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall "consist of one member appointed by Iran, one by the United States, and one from among the three neutral members". This requirement for the constitution of the three-member panels is restated in point 3(d) of the Introduction to the Tribunal Rules.

Further provisions for the composition of the Tribunal were laid down in Article 13 of the Tribunal Rules in relation to the vacancies in the membership and filling of such vacancies. Article 13 of the UNCITRAL Rules which has been maintained under the Tribunal Rules provides:

Replacement of A Member

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Article 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

The above provisions have been supplemented under the Tribunal Rules in the following terms:

Modifications of UNCITRAL Rules

Article 13 of the UNCITRAL Rules is maintained unchanged with the following additions:

1. The following is added to the last sentence of paragraph 2 :

In applying the provisions of this paragraph, if the President, after consultation with the other members of the Full Tribunal, determines that the failure of a member to act or his impossibility to perform his functions is due to a temporary illness or other circumstances expected to be of relatively short duration, the member shall not be replaced but a suitable member shall be appointed for the temporary period in accordance with the same procedures as described in Note 5 to Articles 9-12.[5]

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5 Notes 4 and 5 to Articles 9-12 provide:

Note 4

In the event that a member of a chamber is challenged with respect to a particular case and withdraws, or if the challenge is sustained, the President will order the transfer of the case to another chamber.

Note 5

In the event the Full Tribunal is seized of a particular case and a member is challenged with respect to that case and withdraws, or if the challenge is sustained, a substitute member shall be

**(b)- Rules of Deliberation**

The rules of deliberation are set forth in Article 31 of the Tribunal Rules:

Decision

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2.In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

Note to Article 31

1. Any award or other decision of the arbitral tribunal pursuant to paragraph 1 of Article 31 shall be made by a majority of its members.

**(c)- Form of the Award**

The other relevant provision in Article 32(4) of the Tribunal Rules which is an unchanged version of the UNCITRAl Rules relates to the form of the award. Article 32(4) provides:

Form and Effect of Award

Article 32

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

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appointed to the Full Tribunal for the purpose of that case in accordance with the procedure set forth in Article III of the Claims Settlement Declaration as was used in appointing the member being substituted. An appointing authority, if needed, shall be assigned as provided in Article 12 of the UNCITRAL Rules.

It should be noted briefly that the provision of Article 31(1) of the Tribunal Rules refers solely to the method of reaching a decision and has no bearing on the way the Tribunal is composed and constituted. Therefore, the provisions of this Article can by no means be interpreted in such a way as to permit the majority of arbitrators to deliberate in the absence of one of the arbitrators.

Further, the provision of Article 32(4) of the Tribunal Rules solely and exclusively refers to the form of the award. In other words, it refers exclusively to the absence of an arbitrator during the signing of an award to which he has participated in its drawing up. It is therefore, beyond any doubt that this Article cannot be extended to justify the majority of arbitrators to convene and deliberate, in part or on the whole, in the absence of one of the arbitrators.

## II. Facts Pertaining to the Cases in which Iranian Arbitrators Failed to Participate in the Deliberations

**A.** Beginning on 15 December 1982 and continuing throughout 1983, the arbitrators Mangard and Mosk, respectively Chairman and American Member of Chamber Three, deliberated and rendered eight awards in the absence of arbitrator Sani of Iran. In the first of these Awards, Raygo Wagner Equipment Company v Star Line Company[6], rendered on 15 December 1982, the following statement was appended to the Award:

> Judge Jahangir Sani took part in the hearing and deliberations in this case. The Tribunal was informed that he in effect would not sign the Award, and he was not present or available at the signing.[7]

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6 Case No. 17, Award No. 20-17-3, 15 December 1982, 1 Iran-USCTR. p. 411.

7 Ibid, p. 415.

In the second Award, Granite State Machine Co, Inc v Iran[8], rendered on the same day, the statement by the two arbitrators read that "Having been informed of the time when the Award would be signed at the Tribunal, Judge Jahangir Sani failed to be present and was not available".[9] In the third Award, Rexnord Inc v Iran[10], rendered on 10 January 1983, the statement appended by the two arbitrators to the Award read: "Judge Jahangir Sani took part in the hearing and deliberations in this Case. He has refused to sign the Award and has stated that he would not sign it".[11]

In five other Awards[12], all issued on 2 September 1983, and rendered in the above mentioned manner, the following statement, quoted here in full, was attached to each of the Awards by the two arbitrators:

> The deliberations in this case were held, with members Mangard, Jahangir Sani and Mosk present, after the Hearing which was held on 14 and 15 March 1983 and before the Tribunal's summer recess, which began on 11 June 1983. During the Chamber's final meeting prior to the recess, it was determined that the Chamber would re-convene in early August 1983. In conformity with this determination, the Chairman issued a memorandum on 13 June 1983, requesting the arbitrators to reserve 8, 10 and 12 August for deliberation. (Emphasis added). Presidential Order No. 10 dated 15 June 1983, provided that, in cases involving requests for interim relief or other urgent matters, Chamber Two was authorized to act in lieu of Chamber Three until July 1983. Furthermore, the Tribunal's official schedule of proceedings, dated 6 June 1983, indicated that a meeting of the Full Tribunal was scheduled for 15-17 August 1983, that Hearing before Chamber Three were scheduled for 18.19, 25 and 30 August, and that a pre-Hearing

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8 Case No. 30, Award No. 18-30-3, 15 December 1982, 1 Iran-USCTR. p. 442.

9 Ibid, p. 448.

10 Case No. 132, Award No. 21-132-3, 10 January 1983, 2 Iran-USCTR. p. 6.

11 Ibid, p. 13.

12 These Awards were: Blount Brothers Corp v Ministry of Housing, Case No. 62, Award No. 74-62-3, 3 Iran-USCTR. p. 225; Woodward-Clyde Consultants v Iran, Case No. 67, Award No 73-67-3, Ibid, p. 239; John Carl Warnecke & Associates v Bank Mellat, Case No. 124, Award No. 72-124-3, Ibid, p. 256; Chas T. Main International, Inc. v Mahab, Case No 185, Award No. 70-185-3, Ibid, p. 270; and Alan Craig v Ministry of Energy, Case No. 346, Award No. 71-346-3, Ibid, p. 280.

Conference before Chamber Three was scheduled on 1 September 1983.

On 6 August 1983, the Chairman of Chamber Three issued a schedule of meeting under which the finalization of awards was to take place in Case Nos. 84, 124, 185 and 346 on 11 and 12 August 1983 (Emphasis added), and further deliberations were to be held in Case Nos. 35, 62, 67 and 127 on 13 August 1983.

By a letter dated 10 August 1983, the Agent of the Islamic Republic of Iran stated to the Tribunal,

> [that Judge Mostafa Jahangir Sani the Iranian Arbitrator of Chamber Three has submitted his resignation to the Government of the Islamic Republic of Iran. His resignation has been accepted by the Government and will be effective as of 10 August 1983. His successor will be introduced to the Tribunal in due course.]

No reasons were cited for the purported resignation.

The President of the Tribunal ordered that certain Hearings before the Full Tribunal, which were scheduled to take place during its 15-17 August meetings, be postponed. In addition, the Chairman of Chamber Three cancelled the meetings set for the finalization of awards and further deliberations during the week of 8 August 1983. (Emphasis added)

Judge Jahangir Sani did not appear at the Full Tribunal meeting held on 15 August 1983. At the 17 August 1983 Full Tribunal meeting, the President stated that the Tribunal had as yet received no valid reasons for Judge Jahangir Sani's absence and had not authorized that absence. The President also declared that it would be for Chamber Three and the Full Tribunal to determine the legal consequences of that absence in the individual cases pending before them. Thereafter, the Chairman of Chamber Three ordered that the Hearings scheduled for 18, 19 and 25 August and the Pre-Hearing Conference scheduled for 1 September be postponed.

By a letter dated 18 August 1983 and conveyed by post and telex, the Chairman of Chamber Three informed Judge Jahangir Sani of the President's declarations and notified him that a new schedule had been set under which, *inter alia*, the finalization (Emphasis added) and signing of the Award in this Case would take place on 2 September 1983.

In a telex dated 24 August 1983 to the Chairman of Chamber Three, Judge Jahangir Sani acknowledged receipt of

the letter of 18 August 1983 and informed the Chairman that he considered his resignation to the Islamic Republic of Iran to be effective upon the Tribunal and that he was no longer legally authorized or empowered to participate in the taking of decisions or the issuance of awards except for "the preparing and drafting, or drawing up and elaborating, of a judicial opinion or award which has previously been communicated or announced".

> Neither in this telex nor in a telex received on the following day addressed, to the Full Tribunal, did Judge Jahangir Sani state that it would be physically impossible for him to take part in the meeting of 2 September.
>
> Judge Jahangir Sani was not present for the Signing of the Award in this Case at the 2 September Chamber meeting. Under the above circumstances, the Tribunal has determined that it may proceed with signing of the Award in the absence of Judge Jahangir Sani pursuant to Article 32, paragraph 4, of the Tribunal Rules.[13] (Emphasis added).

**B.** In four Awards issued on 14 and 27 July 1983, Judges Bellet and Aldrich, Chairman and American Member respectively of Chamber Two, rendered Awards in the absence of Judge Shafeiei, the Iranian Member of Chamber Two. Two of these Awards were Awards on agreed terms. However, the two other Awards[14] were rendered against Iran. Identical explanations were attached to these Awards by the two Arbitrators. The explanation read:

> After the Hearing in this Case on 26 May 1983 the three arbitrators agreed to begin deliberations at the end of June. Throughout the period from February to late June the three arbitrators had been in agreement that July would be fully dedicated to the final deliberations in this and the other pending cases (Emphasis added), in view of the 1 August effective date of Chairman Bellet's resignation from the Tribunal.
>
> On 23 June 1983, however, Mr Shafeiei sent Chairman Bellet a note informing him that he intended to be absent from the Tribunal on vacation until the end of July> The Chairman responded by a note dated 29 June saying that, while a brief vacation was acceptable, Mr. Shafeiei was expected after 5 July.

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13 Ibid, respectively pp. 237-238; 254-255; 268-269; 276-277; and 191-192.

14 Gruen Associates, Inc. v Iran Housing Co, Case No. 188, Award No. 61-188-3, 27 July 1983, 3 Iran-USCTR. p. 97; and Intrend International Inc., v Iranian Air Force, Case NO. 220, Award NO. 59-220-2, 27 July 1983, Ibid, p.110.

Nevertheless, after a further exchange of notes, Me Shafeiei has absented himself until the present and has given no address or telephone number where he could be reached. Only yesterday afternoon, too late to be of any use, did Mr. Shafeiei's legal assistant give the Tribunal a telephone number in another country where Mr. Shafeiei could be reached.

The Chairman has had all the successive drafts of this Award since Mr Shafeiei's departure deposited in his office in due time so that, if he had been present, he could have read and commented upon them, but no comments have been received. The Chairman also deposited in Mr Shafeiei's office on 20 July 1983 a letter informing him of the place and time of signature. Mr Shafeiei failed to attend the signing. In these circumstances an arbitral tribunal cannot permit its work to be frustrated. This statement is made pursuant to Article 32, paragraph 4 of the Tribunal Rules of Procedure.[15] (Emphasis added).

C- In the Cases involving Chamber Three, Judge Sani filed a dissenting opinion.[16] He also filed two identical statements in Cases Nos 17 and 132.[17] No statements were filed by Judge Sani in regard to five other Awards rendered in his absence.

In the "Opinion" filed in Case No. 30, Judge Sani expressed his reasons for not signing the Award in that Case. He also stated that "the issues of damages and costs were not adequately deliberated upon"[18], and perhaps hinted that the decision by the two other members did not fall under Article 32(4) of the Tribunal Rules.[19] Nevertheless, an overall reading of Judge Sani's "Opinion" in Case No. 30 suggests that he did not regard himself as being excluded from the deliberations, since he never suggested that he was absent from the deliberations. His main objection is, rather, to the signing of the Award in his absence. This indicates that unlike other Cases, Case No. 30 was

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15 Ibid, respectively, pp. 92; 120; 108-109; and 117-118.

16 The "Opinion" of Judge Jahangir Sani, in Case No. 30, 1 Iran-USCTR. p. 452.

17 "Mr Jahangir Sani's Reasons for Not Signing the Decision Made by Mr Mangard and Mr Mosk", 1 Iran-USCTR., p.415; and 2 Iran-USCTR. p. 14, respectively.

18 1 Iran-USCTR. p. 454.

19 Ibid.

indeed a case of failure to sign the award. This conclusion is supported by the fact that Iran did not challenge the Award in Case No. 30 in the Dutch courts.[20]

Unlike his "Opinion" in Case No. 30, Judge Sani's statement filed in Case Nos. 17 and 132 expressly stated that these Awards were rendered without deliberation and in his absence. He expressed that "... I was not notified of the deliberative session which resulted in the issuance of an Award in the present Case; nor did I happen to be present on the Tribunal premises (Emphasis added) and, consequently,at the meeting itself, when it was held".[21] He added that the fact that this Award was rendered "without consultation" (Emphasis added) with him and in his absence constituted a serious violation of recognized legal principles and therefore he would not take part in the signing of that Award.[22] Judge Sani went on to say:

> On Wednesday 13 December 1982, at the same time that I had been requested to return to Tehran to further discuss my resignation tendered in relation to case No. 30, I was confronted by the unanticipated and surprising news that Mr. Mangard and Mr. Mosk had proceeded to issue Awards in cases Nos. 17 and 132. As I have explained in my "Opinion" with respect to case No. 30, in the few days preceding the signing of these cases we had some forms of discussion in relation to case No. 30, but did not have the least discussion about the two other Cases...
>
> ... I expressed my utter repudiation of what had transpired in the preceding few days, and stated unequivocally that my colleagues' issuance of awards in the cases mentioned above without my presence and participation were legally unsupportable. (Emphasis added) I sensed there that my colleagues had formed a wrong impression of my resignation. Supposing that I had tendered my resignation so closely following that of Mr Bellet, to further delay the issuance of Award in Case No. 30, they had considered themselves bound to also take actions in relation to cases NOs. 17 and 132, for which Hearing sessions had been held but **no** deliberations had taken place.[23] (Emphasis added).

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20 See Infra Chapter Six, p. 343, note 11.

21 1 Iran-USCTR. p. 415; and 2 Iran-USCTR. p. 14, respectively.

22 Ibid.

23 Ibid, pp. 415-416; and pp. 14-15, respectively.

Judge Sani then went on to elaborate on the facts in support of his assertion.

In response to Judge Sani's statement, Judge Mosk filed a statement in which he stated that "Judge Sani's statement of facts was inaccurate".[24] Judge Mosk added that Judge Sani "refused to participate in some of the deliberations in Case No. 17 (Emphasis added) and did not sign the Award."[25] Judge Mosk further explained two points. First, "refusal to sign is not looked upon favourably in arbitration practice".[26] Second, "under international law, Judge Sani cannot frustrate the work of the Chamber or the Tribunal by wilfully absenting himself and refusing to sign an Award."[27]

Furthermore, in his Concurring Opinion in Rexnord v Iran (Case No. 132)[28] , Judge Mosk rejected Judge Sani's assertion that there had been no discussion concerning this Case.[29] He said that Judge Sani had participated in deliberations and been invited to attend further deliberations (Emphasis added), but that Judge Sani had chosen to absent himself and had refused to sign any award.[30] Judge Mosk added:

> Apparently under Judge Sani's theory, an award is invalid unless he has been able to deliberate not once, not twice, but as many times as he desires and only at the times which suit his preference. Under this theory, few of the thousands of cases before this Tribunal could be decided.[31]

In a "Reply to Mr Mosk's Comments"[32], Judge Sani disputed Mr Mosk's account of the facts and maintained that he had not participated in any

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24 Comments of Richard M. Mosk With Respect to Mr Jahangir Sani's Reasons for Not Signing the Decision Made by Mr Mangard and Mr Mosk in Case No. 17, 1 Iran-USCTR. 424, p. 425.

25 Ibid.

26 Ibid.

27 Ibid.

28 2 Iran-USCTR. 27, p. 28.

29 Ibid.

30 Ibid.

31 Ibid.

32 Mr Jahangir Sani's Reply to Mr Mosk's Comments of 3 March 1983, Concerning Case No 17, 1 Iran-USCTR. p. 428.

final deliberative session about the Case.[33] He added that "where an arbitrator has not participated in the deliberation, it is meaningless to talk about his refusal to sign".[34] He argued that the Tribunal Rules did not authorize two arbitrators to deliberate in the absence of the third, they simply authorize them to act when the third fails to sign an award.[35] In Judge Sani's view Article III(1) of the Claims Settlement Declaration which provided that "claims may be decided by the Full Tribunal or by a panel of three members of the Tribunal..." required that "at least until such time as the final deliberation is concluded and appropriate decision is made, the presence of all the three members is absolutely necessary".[36]

Judge Mangard, the Chairman of Chamber Three, also issued a statement regarding Judge Sani's refusal to sign the Awards. Recounting his version of the events, Judge Mangard's statement implied that the deliberations in Case Nos. 17 and 132 had not been completely finalized. The following are quotations from Judge Mangard's statement:

> In Judge Sani's opinion, he was no longer a member of the Tribunal and not competent to take part in any <u>deliberations</u> (Emphasis added) or to sign awards...
>
> ....In his view there had not been sufficient deliberations in these two Cases previously, and he was not prepared for final deliberations with such short notice....
>
> ....In view of Judge Sani's firm refusal to take part in any <u>further deliberations</u> (Emphasis added) and to sign any awards at all... Mr Mosk and I then signed the three Awards and filed them with the Registry.[37]

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33 Ibid, p. 413.

34 Ibid.

35 Ibid, p. 432.

36 Ibid.

37 "Notes on Judge Jahangir Sani's refusal to sign the Awards issued in Cases Nos. 30, 17, and 132", dated 13 June 1983, filed with the Tribunal on 14 July 1983, pp. 4-5; the statement is also quoted in Schwebel, op. cit. pp. 260-261.

**D-** In the four Cases involving Chamber Two, Judge Shafeiei filed a statement on 9 August 1983 in relation to all four of these Cases to which two other memoranda dated 5 and 8 August 1983 were attached.[38] We will quote Judge Shafeiei's statement at some length in order to shed light on the circumstances under discussion. Judge Shafeiei wrote:

> The recording of the name of an arbitrator at the bottom of an award signifies that he participated in the making of that award- that is, that he participated in the Chamber hearings and in completely democratic discussions and deliberations, in taking a decision, in preparing the draft award, in studying it and, finally, in preparing the final award and signing it. I have had absolutely no part or role in the formulation of the present awards, nor have I been present therein. Everything has been carried out in my absence and even without my knowledge. Therefore, it would have been appropriate for Mr George Aldrich and Mr Bellet to explain just why they have recorded my name. Throughout the month of July, I availed myself of my annual leave in order to take a much needed rest and to complete some backlogged chamber work; and this was entirely permissible and justified. But meanwhile, Mr Bellet and Mr Aldrich held formal Chamber meetings on a two-member basis and rendered the present Awards.
>
> If these gentlemen had refrained from recording my name at the end of those Awards, I could at least have praised their frankness. However, these gentlemen wrote my name, along with making certain presentations. I call this action by Mr Bellet, the former Chief Justice of the Supreme Court of France, and Mr George Aldrich, the American Arbitrator, as prevarication, duplicity, and hypocrisy.
>
> ... Under no circumstances a Chamber meeting may be convened in the absence of either of the two arbitrators appointed by their respective Governments, even with respect to urgent administrative matters. The action by Mr Bellet and Mr Aldrich constitutes a flagrant and intentional violation of the Algiers Declarations and other regulations governing the Tribunal.
>
> Today, it is clearer than ever before that the Government of Iran has become a victim of breach of trust because of the existence of the Security Account, which has induced this

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38 "Dr Shafeiei's Reasons for Not Signing the Awards Made by Mr Aldrich and Mr Bellet", 9 August 1983, 3 Iran-USCTR. p. 124.

Chamber to engage in blatant, intentional violations of the Algiers Declarations and the Tribunal Rules.

At any event, nothing can justify, or diminish the odiousness of these illegal acts by the above-mentioned gentlemen.... In my memos to Mr Lagergren dated 5 and 8 August 1983, I have explained in detail why my signature does not appear at the end of the aforementioned Awards. It appears appropriate to attach the said memos hereto.[39]

In his memo of 5 August 1983 to Judge Lagergren, the President of the Tribunal, Judge Shafeiei restating his position wrote:

> Now, even supposing, in arguendo, that I have unjustifiably failed to perform my functions- and it is of course possible that an arbitrator might, like any other human being, either die, resign, or fail to act- clear provision has been made for such exigencies in Article 13, paragraph 2 of the Tribunal Rules.[40]

Judge Shafeiei noted that the Security Account in particular had prompted "the Tribunal to violate the law". If it did not exist, Judge Shafeiei argued, "then at least the interests of the American claimants themselves would demand that law and judicial procedure be properly observed in the issuing of Awards, for illegal awards will in that case certainly encounter difficulties at the enforcement stages".[41] Judge Shafeiei further complained that the President of the Tribunal bore a major share of responsibility for the above illegal acts by instructing to pay the Awards out of the Security Account.[42]

In his Memo of 8 August 1983, Judge Shafeiei elaborated on his previous arguments. He explained that the American Arbitrators and the United States Department of State had created the impression that the Tribunal had been established solely and exclusively to examine the hundreds of claims by American claimants and pay "each American claimant its share out of the

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39 Ibid, pp. 124-125.
40 Ibid, pp. 125-126.
41 Ibid, pp. 127-128.
42 Ibid, p. 128.

Security Account, as quickly as possible".[43] He explained that Iran was being sent notice to file defences within a short space of time and as a country which was in a state of war, revolution, and internal disarray was therefore placed under great pressure.[44] In the face of this attempt and this inequitable pressure, he said, and "owing to the completely Western structure of the Tribunal" which could not or did not want to "understand Iran's problems", the Iranian arbitrators were trying to protect "Iran's right to a defence" and to prevent the Tribunal from "being transformed into an internal claims commission of the United States Department of State".[45] He stated that the impression was created by the American arbitrators that the Iranian arbitrators were preventing the Tribunal from "examining cases, thwarting its work, and slowing down its operations".[46]

After explaining the difficulties of working under such pressure and with the onerous workload and language problems for the Iranian arbitrators, Judge Shafeiei maintained that he had permitted himself to take a one-month summer leave.[47] He said that he had informed the Chairman of Chamber Two of his intention and had refused to accept any date for meetings in July. The attachments to Judge Shafeiei's memoranda of 8 August showed that on 23 June 1983 he wrote to Mr Bellet about his intention to take a few weeks of holiday until the end of July and requested that no Chamber meeting be held in his absence.[48] Judge Bellet in reply, explaining that Chamber Two was in function until 31 July and that several Cases had to be deliberated before that date, because he had to leave the Tribunal by that date, invited Judge Shafeiei

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43 Ibid, p. 129.
44 Ibid, pp. 129-130.
45 Ibid, p. 130.
46 Ibid, p. 129.
47 Ibid, p. 130.
48 Ibid, p. 132.

to be present at the Tribunal from 5th July.[49] In a letter dated 1 July Judge Shafeiei replied that Mr Bellet's end of mission on 31 July could not deprive him of his annual holidays and that circumstance did not obligate the Chamber members to decide "through accelerated and abnormal deliberations".[50] Judge Shafeiei also urged Judge Bellet not to hold a Chamber meeting during the Tribunal's annual recess and during his absence.[51]

On July 13, one day prior to the signing of the Award in Case No. 449, Judge Bellet responded to Judge Shafeiei's letter of 1st July. Judge Shafeiei argues that at the time of sending that letter, Mr Bellet knew that he was on leave, and that that memo did not reach him at all; a Xerox copy was merely given to Judge Shafeiei's legal assistant.[52] In the memo, Mr Bellet responded that the annual recess extended only until 17 July and not after that date and rejected Mr Shafeiei's request for a longer period of leave.[53] Judge Bellet stated that according to an order from the President of the Tribunal, Chamber Two should be available at any time during July 1983. He further urged Mr Shafeiei to be present until the end of July at all Chamber meetings to deliberate especially on the Cases of Intrend, Gruen, Hoffman and Chas T. Main. Otherwise, he stated, Mr Aldrich and he would have to proceed without Judge Shafeiei.[54]

Relying on this account, Judge Shafeiei argued that his departure on annual leave was completely justified and natural.[55] Even if he had failed to carry out his duties, Judge Shafeiei stated, Article 13(2) of the Tribunal Rules had already very simply and clearly made provision for the replacement of an

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49 Ibid.
50 Ibid, p. 134.
51 Ibid.
52 Ibid, p. 135.
53 Ibid, p. 136.
54 Ibid.
55 Ibid, p. 139.

arbitrator failing to perform his function.[56] According to Judge Shafeiei, Article III(1) of the CSD did not permit the convening of the Chamber in his absence.[57] In support of his argument Judge Shafeiei cited a Full Tribunal precedent according to which, "if the plenary Tribunal found it necessary to vote on any administrative issue in the absence of a member appointed by a High Contracting Party, one of the members appointed by the other High Contracting Party (chosen by consultation among themselves) should not take part in the vote".[58]

It is notable that on October 13, 1983, Judge Aldrich, the American Member of Chamber Two, filed his "Comments on "Judge Shafeiei's Reasons for Non-Signature of Awards..."[59] Judge Aldrich argued that Judge Shafeiei's absence was "unauthorised and impermissible" and that he intended:

> (a) to avoid any further deliberations with Judge Bellet; (b) to attempt thereby to prevent Chamber 2 from rendering awards in the pending Cases prior to the 31 July effective date of Judge Bellet's resignation on any awards issued during that absence.[60]

In such circumstances, Judge Aldrich said, he and Mr Bellet had decided that:

> ... The Chamber was justified, and in fact obligated, by international law and precedent to proceed with the awards on which we could agree, explaining therein the reasons for the absence of Judge Shafeiei's signature. Any other conclusion, in a continuing tribunal of this type with many cases on its docket, would permit the Tribunal's work to be sabotaged. In this connection, we were aware that the Full Tribunal on a number of occasions had met and taken decisions, even judicial decisions, in the absence of one or more of arbitrators".[61]

**E-** The clearest example of the withdrawal of a Party-appointed arbitrator from the deliberations took place recently. In this Case, Saghi v

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56 Ibid.

57 Ibid.

58 Ibid, pp. 139-140.

59 Ibid, p. 145.

60 Ibid.

61 Ibid, p. 146.

Iran[62], neither the withdrawing arbitrator nor the remaining members of Chamber Two, who decided the Case, attempted to misrepresent the facts or the legal issues governing them. The statement appended to the Award read: "Mr Bahrami-Ahmadi did not participate in the deliberation of this case, stating that in his view such cases are not admissible, and refused to sign the present Award".[63]

Mr Bahrami-Ahmadi, the Iranian Arbitrator, filed a "Declaration of Hamid Bahrami-Ahmadi with Respect to the Legal Opinion Issued by Two Members of Chamber Two, In Connection with Case No 298".[64] By naming the decision of the two remaining members as "legal opinion" Mr Bahrami has hinted that he did not consider it as being an Award properly made. The Declaration of Mr Bahrami read as follows:

> I take note of the legal opinion rendered by two members of Chamber Two in connection with determination of the nationality of the claimants in the above-mentioned case. I have neither participated in the deliberations in that Case, nor signed the legal opinion relating thereto, for the following reasons:
>
> 1. The Government of the Islamic Republic of Iran has not agreed, on the basis of any of the provisions of the Algiers Declarations, to this Tribunal's jurisdiction to hear claims against its own nationals. Moreover, by its objection following the issuance of the Award in Case No. A/18, the Government of Iran eliminated whatever doubts possibly existed as to whether it tacitly accepted the Tribunal's jurisdiction in this regard.
>
> Because there has not been any agreement as to the Tribunal's jurisdiction (clause compromissoire) in this connection, my esteemed colleagues and I are unable to intervene in such claims.
>
> 2. The Tribunal Rules do not grant any authority for two members of a Chamber to issue an Award without the third member's having participated in the deliberations thereon. The

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62 Award No. ITL-66-298-2, 12 January 1987, 14 Iran-USCTR. p. 3.

63 Ibid.

64 Ibid.

Chambers of this Tribunal are three member panels, and a necessary precondition of the validity of their Awards is that all three arbitrators have been effectively present at the deliberative sessions thereon. Therefore, I regard the present "Interlocutory Award" as constituting a "legal opinion" by my colleagues, for which reason the instant Declaration cannot be construed as a separate opinion by this writer. My purpose here is merely to note that the document which has been issued cannot be taken as constituting an Award by Chamber Two of the Tribunal....[65]

In response to Mr Bahrami's Declaration the two remaining members of Chamber Two, Mr Briner and Mr Aldrich, filed "Comments on the Declaration of Judge Bahrami-Ahmadi".[66] The "Comments" read:

> The Declaration of Judge Bahrami-Ahmadi which was filed in this Case on 19 January 1987 requires a brief comment by the other two Members of the Chamber in order to avoid any misunderstandings. While we understand the reasons why Judge Bahrami-Ahmadi felt it necessary to refuse to participate in the deliberation and signature of the Interlocutory Award filed on 12 January 1987 in this Case, it was clear to us that he understood the reasons why we felt obliged to proceed without him. As this Tribunal has previously held, a continuing international tribunal with many cases on its docket cannot permit its work to be frustrated by the refusal of one of its members to deliberate a claim or sign an award. The Award in this case, ITL 66-298-2, like the decision of the Full Tribunal in Case No. A18, Dec 32-A18-FT, which determined the meaning of the Claims Settlement Declaration with respect to claims by dual nationals, is final and binding pursuant to Article IV, paragraph 1 of the Declaration and 32, paragraph 2 of the Tribunal Rules. The Tribunal has the right to expect all concerned to act accordingly.[67]

**F-** It is notable that in a number of Cases the Iranian members have refused to sign the Awards. These Cases, like Case No. 30 mentioned earlier, are instances of failure to sign, for which clear provision has been made under Article 32(4) of the Tribunal Rules. For instance, in International School Services v Iranian Copper Industries[68], decided by the Full Tribunal, the

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65 Ibid, pp. 8-9.

66 Ibid, p. 9.

67 Ibid, pp. 9-10.

68 6 April 1984, 5 Iran-USCTR. p. 338.

Iranian arbitrators refused to sign the Award. The statement appended to the Award said:

> In this Case final deliberation and voting took place in the week of 5-9 March 1984. The Iranian Members of the Tribunal refuse to sign the Award because they assert that the Award was "improperly provided by a U.S. Arbitrator and signed by the so-called neutral arbitrators without due deliberation and consideration.[69]

There are also other cases of failure to sign awards of the Tribunal by the Iranian members.[70] However, these are all instances of refusal to sign and thus distinct from the examples of deliberation in the absence of a party-appointed arbitrator as discussed earlier.

**G-** In short, despite the confusion created by the statements appended to the Awards which were decided in the absence of Judges Sani and Shafeiei, as to whether they were instances of failure to sign the Award or failure to participate in the deliberation, on which we will elaborate below, it is clear that the Parties have treated them as instances of failure to participate in the deliberation. Thus, for its part the United States Government has maintained that the Iranian arbitrators did not have the right to frustrate the proceedings by refusing to participate in the deliberations. According to the US Government, the Tribunal was not only empowered but required to continue despite the absence of a Party-appointed arbitrator.[71]

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69 Ibid, p. 348. Also note Dissenting Opinion of Judge Lagergren, the then President of the Tribunal, Ibid, pp. 348-353. As a consequence, the Award was adopted by a majority of 5 members.

70 See generally: American International Group, Inc v Iran, 19 December 1983, 4 Iran-USCTR. 96, p. 111; The DOW Chemical Company v Iran, 8 May 1984, 6 Iran-USCTR. 38, pp. 39-40; Tippetts and others v TAMS-AFFA, 22 June 1984, 6 Iran-USCTR. 219, p. 229; General Motors Corp v Iran, 28 August 1984, 7 Iran-USCTR. 220, p. 222; and Sedco, Inc v NIOC, 2 July 1987, 15 Iran-USCTR. 23, pp. 187-188.

71 Letter from John Crook, the U.S. Agent, to the President of the Tribunal, 16 August 1983, pp.1-6; the U.S. position stated in the above letter is also quoted in Schwebel, op. cit. pp. 264-269.

On the other hand, the position which can be inferred from the comments of the Iranian members and the further challenge of the Awards in question in the Dutch Courts[72], is that the Tribunal cannot legally be constituted in the absence of a Party-appointed arbitrator.

## III. A Factual-Legal Confusion

Before beginning to discuss the question of withdrawal of arbitrators in international arbitration, the clarification of an important point is necessary. As noted earlier, the rules relating to the composition and constitution of the Tribunal, deliberation, and the form of the Award are three separate matters. As a consequence, Article 32(4) of the Tribunal Rules relates to the form of the Award; that is, the absence of an arbitrator during the signing of a document which he has helped to draw up. On the other hand, the absence of an arbitrator during all or part of the proceedings, e.g. deliberation, is an entirely distinct matter which can by no means be covered by Article 32(4) of the Tribunal Rules. It is again important to point out that the rules of deliberation permitting a decision to be made by the majority of the members should not be confused with the rules according to which an arbitral Tribunal has to be composed and constituted. The latter can perhaps be termed as "the rule of quorum". In other words, the application of the rule of decision by a majority vote is dependent upon whether the arbitral tribunal has been properly composed and constituted in the first place.

The point is that in all the Cases decided by Chambers Two and Three in the absence of Judges Sani and Shafeiei, the remaining members relied on Article 32(4) of the Tribunal Rules to explain the absence of the Iranian member's signature. The contents of the explanations appended to the Awards by the remaining members, however, reveal that these instances are not simply

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72 See Infra, Chapter Six, pp. 343-344.

examples of failure to sign the Awards. They are, rather, examples of failure or refusal by the Iranian arbitrators to participate at least in parts of the deliberations.

This fact is supported not only by the statements made by the Iranian members, but also by the counter-statements of the American arbitrators. The expressions quoted in the preceding pages, such as: "... to reserve 8, 10, 12 August for deliberations..."[73]; "July would be fully dedicated to the final deliberations..."[74], make it clear that the deliberations were not yet finalized.

Moreover, the counter-statements made by the American arbitrators, including expressions such as, "Judge Sani refused to participate in some of the deliberations in Case No. 17..."[75]; or "he was invited to attend further deliberations..."[76], clearly acknowledge that these were instances of failure or refusal to participate in the deliberation and not in the signing of the Awards. This fact is also evident in the line of reasoning adopted by the American members in their counter-statements, where they have attempted to explain the legality of an incomplete tribunal to function in the absence of a withdrawing arbitrator.

What is surprising, therefore, is that the initial explanations appended to the Awards in question by the two arbitrators- particularly their reference to Article 32(4) of the Tribunal Rules- have portrayed the matter as if it were merely a case of refusal to sign the Award. In consequence, they have made no attempt to explain their view as to the legality of an incomplete tribunal to proceed in the absence of a withdrawing arbitrator. Thus they have not made it explicit and clear whether in their view the remaining members were legally authorised to proceed in the absence of a Party-appointed arbitrator. Therefore

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73 E.g. Blount Brothers Corp, v Ministry of Housing, 3 Iran-USCTR. 225, p. 237.

74 E.g. Gruen Associates Inc. v Iran Housing Co, 3 Iran-USCTR. 97, p. 108.

75 Comments of Richard M. Mosk..., 1 Iran-USCTR. p. 425

76 Concurring Opinion of Mosk in Rexnord v Iran, Case No. 132, 2 Iran-USCTR. p. 28.

the Tribunal has not made any analytical contribution to the question of whether the remaining members of an incomplete tribunal are authorised to proceed in the absence of a defaulting Party-appointed arbitrator. They have also created confusion as to the facts of these Cases. In other words, they have not made it entirely clear in express terms whether they were asserting a right to proceed in the absence of a Party-appointed arbitrator from the deliberations, or simply asserting the right established under Article 32(4) of the Tribunal Rules.

However, despite the fact that the majority members have merely relied on Article 32(4) of the Tribunal Rules, their action implies the assertion of the right to proceed in the absence of a defaulting Party-appointed arbitrator. Whether or not such an action is permitted under international law and practice will be discussed in the next Section.

## SECTION B

# THE GENERAL PROBLEMS OF WITHDRAWAL OF ARBITRATORS AND FRUSTRATION OF ARBITRAL PROCEEDINGS : THE LEGALITY OF AN INCOMPLETE TRIBUNAL

### I. Generally

In Chapter Two above it was briefly noted that a distinguishing characteristic of international arbitration, as against other means of judicial settlement, has been in the greater degree of control and influence that the arbitrating parties have traditionally exercised over the whole proceedings. This has been termed as the "necessity for consent of the arbitrating parties to every stage in the arbitration".[1] It follows that a State may withdraw its consent at various stages in the arbitration, either before or after the constitution of the tribunal. In other words, a State may withhold co-operation necessary for the constitution of the tribunal, for instance, by not appointing its own arbitrator or by not agreeing on the appointment of the neutral members. Similar obstructive attempts may be made in the course of the arbitral tribunal's work; for instance, by withdrawing the party-appointed arbitrator or by refusal to appoint or agree to the appointment of a substitute in the event of some change in the composition of the tribunal. Within the traditional conception of arbitration, as a consequence, "consent, not only given at the beginning of the arbitration proceedings, but continued throughout the proceedings until the tribunal retires to make its award, is, therefore, an essential ingredient to the completion of any arbitration".[2]

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1 Hazel Fox, Arbitration, in H. Waldock, "International Disputes..." op. cit. p. 101.

2 Ibid.

Needless to say, the assumption of such a pattern for international arbitration was rooted in the traditional idea of arbitration which was reflected in the establishment of arbitral tribunals structured according to that conception. As a consequence, especially in the past, many of the arbitration instruments did not find it necessary to establish certain safeguards for assuring the parties' compliance with the arbitral process. In other words, consent of the parties constituted an essential ingredient during the whole process of arbitration.

Instances which appear to be indicative of the application of such a notion of arbitration are not rare. By way of example it is useful to point out that Hungary, Bulgaria and Romania refused to appoint their representatives to the Arbitral Commission provided for under the Peace Treaties of 1947 on the ground that there were no treaty violations to be arbitrated.[3] In the French-Tunisian Arbitral Tribunal the Tunisian arbitrators did not appear and the Tribunal failed the first time it was resorted to by France.[4]

The theory of "consent to every stage in the arbitration" may, however, result in an unlimited freedom for the parties which would undermine the judicial nature of the arbitral process as a method of dispute settlement on the basis of respect for law. Further, it may seriously undermine the binding character of the process stemming from the initial agreement of the parties to submit to arbitration. In other words, such a conception of arbitration may result in what is termed "diplomatic arbitration"[5], rather than a fully judicial system.

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3 See, Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, First Phase, ICJ Rep. 1950, p. 65; Second Phase, ICJ Rep. 1950, p. 221.

4 24 ILR (1957), pp. 767-770.

5 E.g., H. Fox observes that in the Casablanca Case (Scott, Hague Court Reports, 1st Series, 1916, p. 110), and the North Atlantic Coast Fisheries Case, Ibid, p. 141), the arbitrators were prepared to waive a strict application of the law in order to achieve an acceptable settlement. (Fox, op. cit. p. 102.)

In view of the problems associated with the above-mentioned conception of arbitration, there have been new developments aimed at limiting the excessive control of the parties over the arbitral process and securing a stricter judicial character for international arbitration. These new trends, known as "judicial arbitration", place a greater emphasis on the judicial nature of arbitration, and are based on a sound principle, namely the principle of non-frustration. Underlying this principle is the belief that an agreement to arbitrate involves an international obligation and that States having once entered into an undertaking are legally bound to take all necessary steps to allow the arbitration to proceed and to refrain from any action which would frustrate their undertaking.[6] Relying upon this principle and in order to secure the effectiveness of the arbitral process, certain procedural safeguards are proposed which would provide alternative guarantees in the areas where the co-operation by one of the parties to arbitration is lacking.[7]

The new conception of international arbitration emerged during the Hague Conventions for the Pacific Settlement of International Disputes, but manifested itself principally in the work of the International Law Commission on Arbitral Procedure. Similar tendencies have been expressed in a series of multilateral and bilateral treaties concluded mainly during this century.

It is therefore clear that the answer to the problem of frustration of arbitration depends partly on the question of which of the two conceptions of international arbitration is employed or which of them is assumed to be the generally accepted view.[8] However, what in our view should also be taken into account is not only the sustainability of one conception over the other on theoretical grounds but the extent of its acceptance by State practice. Moreover, even if the new notion of "judicial arbitration" were to be generally

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6 Ibid, p. 106.

7 Ibid.

8 See Schwebel, "International Arbitration...", op. cit. p. 146.

accepted, it would still be necessary to identify the specific areas of the arbitral structure over which this conception should prevail. In addition, limits to the remedies which the judicial conception of arbitration might offer to the problem of withdrawal of arbitrators would also have to be established. These are the considerations which we will attempt to examine in relation to the theory and practice of international arbitration.

## II. Theoretical Analysis

Before beginning the discussion, we need to offer a general clarification of the problem of withdrawal of a party-appointed arbitrator in international arbitration. Article 25(3) of the Statute of the International Court of Justice provides that "a quorum of nine judges shall suffice to constitute the Court." This rule establishes the rule of quorum. The rule specifies the minimum number of judges whose presence allows the court or the tribunal to be legally constituted. It is notable that neither under the Statute nor under the Rules of the Court has a quorum provision been made for the five-member chambers of the Court, provided for in Articles 26 and 29 of the Statute. The absence of a quorum requirement for chambers of the Court has led to the logical conclusion that a proper constitution and meeting for a chamber requires the participation of all five judges specified under those Articles.[9] This conclusion is supported by the last section of Article 29 of the Statute which provides for the selection of two substitute judges for the purpose of replacing those judges of the chamber who find it impossible to sit. This means that a chamber is not permitted to hold a meeting if one of its five members is unable to sit, and a substitute member must replace him. Moreover, the general view is that where there is no provision for a quorum the presence of the full number of judges of the tribunal is required.[10]

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9 Simpson and Fox, "International Arbitration", op. cit. p. 220.

10 Ibid, p. 222.

In international arbitration throughout its historical inception to the present time, with certain exceptions, a provision stipulating the minimum number of judges who can legally constitute the arbitral tribunal is generally lacking in arbitration instruments. This lack of provision does not happen simply because of the negligence of the arbitrating parties. On the contrary, it is closely connected with the special structure of arbitral tribunals normally composed of the arbitrators appointed by each party in equal numbers and the neutral arbitrator or arbitrators. That is to say, the structure of arbitral tribunals normally demonstrates a balanced representation of the interests of both parties in their composition. Because of this structure the parties could hardly confer in advance on their case in anticipation of problems like the rule of quorum and on the constitution of the tribunal in the absence of the arbitrator appointed by one of the parties.

What needs to be added briefly is that the rules on deliberations that require the majority vote, and the rules specifying the form and signing of the award should be distinguished from the rules which govern how the tribunal is to be composed. For instance, Judge Hudson rightly points out that provisions requiring that a decision may be made by a majority is not tantamount to provisions that a "majority may constitute a quorum.[11]

**II(1). The Rule of Equilibrium**

The arguments in favour of and against the legality of rump tribunals are equally sound and the preference of one view over the other may ultimately depend on the conception of arbitration applied. Such is the case with the position of commentators. To begin with, the theory which may act against the legality of rump - truncated, or incomplete - tribunals is the carefully balanced equilibrium in the composition of arbitral tribunals. This is particularly relevant

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11 Hudson, International Arbitration, Washington, 1944, p. 53.

if the tribunal is a tripartite one of the kind in the Iran-United States arbitration. On the basis of this equilibrium in the membership of the arbitral tribunals it has been argued that:

> ... It can hardly be supposed that the compromis or general arbitration treaty would have allowed that a dispute could be dealt with and decided without the presence of both parties' arbitrators, whose absence would essentially alter the complexion of the tribunal set up. Rather, it must be concluded that it was the will of the parties that the tribunal should function only when fully constituted.[12]

This principle appears to have been equally recognized in arbitration in the field of international commerce to the effect that the parties "must play an equal role in the constitution of the arbitral tribunal.[13]

A clear support for the notion of necessity for equilibrium or equality in the composition of arbitral tribunals can be found even in those rare instruments which do provide for the rule of quorum. In a number of arbitration tribunals established between the Federal Republic of Germany and the Three Powers of France, the United Kingdom and the United States, principle of equilibrium has been clearly recognized.

To begin with, the Arbitral Tribunal under the Convention on Relations between the Three Powers and the Federal Republic of Germany[14] consists of nine members, three of whom are appointed by the Federal Republic of Germany, three by France, the United Kingdom and the United States and the remaining three, who are neutral, by joint agreement of the FRG and the three Powers.[15] The quorum for a plenary session is to be five, provided that it

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12 Hans Mangoldt, "Arbitration and Conciliation", op. cit. p. 533.

13 Rene David, "Arbitration in International Trade", op. cit. p. 265.

14 As amended 1954, Supplement to 49 AJIL (1955), p. 57.

15 Charter of the Arbitration Tribunal, Article 1, Ibid, p. 62.

includes an equal number of members appointed by the Federal Republic of Germany and the Three Powers, and at least one neutral member.[16]

The Arbitral Commission on Property, Rights and Interests in Germany[17] is composed on the same pattern as the Arbitration Tribunal on Relations between the Three Powers and the Federal Republic of Germany. A quorum of five is again sufficient for a plenary session, provided it is established in the observance of the above-mentioned equilibrium.[18] Provision has also been made for the establishment of Chambers, which are to consist of one of the members appointed by the FRG, one of the members appointed by France, the United Kingdom or the United States, and a neutral member.[19]

What is highly significant with regard to these arbitral bodies is the fact that the principle of equal participation of the parties in the composition of the tribunal has not only been observed in their full plenary structure, but also when the tribunal has to function in the absence of some of its members. The natural conclusion to be made from these provisions is that the constitution of the tribunal where one of the parties is unequally represented in the composition of the tribunal is not legally permitted.

It is notable that the provision of quorum in these arbitration instruments is warranted by the fact that they are composed of more than three arbitrators. For instance, Article 6 of the Jay Treaty provided that three of the five commissioners could act provided that one of the commissioners named on each side and the fifth (neutral) commissioner were present.[20] In the Iran-United States Claims Tribunal also there has been a precedent according to which if the Full Tribunal which consists of nine members has found it

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16 Ibid, Article 4.

17 Charter of the Arbitration Commission, Article 3, Supplement to 49 AJIL (1955), p. 113.

18 Ibid, Article 5.

19 Ibid, Article 5(4).

20 Treaty of 19 November 1794, Between Great Britain and the United States, 52 CTS, p. 243.

necessary to vote on any administrative matter in the absence of a member appointed by one of the two Governments, one of the members appointed by the other Government has not taken part in the vote.[21]

In short, the provision for the rule of quorum in arbitration instruments providing for arbitral tribunals of more than three members is generally rare, and in the case of arbitral tribunals composed of three members the rule of quorum is almost non-existent.[22] As noted, there are some arbitration instruments providing for a tribunal composed of more than three members which included the rule of quorum. However, the rule of quorum in these instruments is subject to the condition that the rule of equilibrium in the composition of the tribunal, when it is constituted by a quorum, is observed. Taking these facts together, it is obvious that the general absence of the rule of quorum in three-member arbitral tribunals is because no equilibrium could be achieved if a provision is made for the rule of quorum under such circumstances. That is to say, under ***normal*** circumstances an arbitral tribunal, especially a three-member tribunal, is not properly constituted when the rule of equilibrium is not observed and when its governing provisions do not explicitly permit it to function without such equilibrium.

The second argument, which may lead to a conclusion unsupportive of the idea of the legality of an incomplete tribunal in the absence of a party-appointed arbitrator, lies in some measure in the nature of arbitration. It has been argued that arbitration is a flexible method of dispute settlement responsive to the will of the parties. In the words of Judge De Visscher, these

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21 See statement of Judge Shafeiei, 3 Iran-USCTR. p. 139-140.

22 There are two exceptional cases: Judge Hudson points out that the provision in the Inter-American Plan of Arbitration of 1890 that a majority may act notwithstanding the absence or withdrawal of the minority was exceptional. (Hudson, International Arbitration, op. cit. p. 53) The other known exception is the Lena Goldfields Arbitration Agreement which expressly provided that the two arbitrators could constitute the Tribunal should the arbitrator of the other party default. (5 A.D., p. 426; for a detailed summary of this Case see The Times, 3 September 1930, p. 7.)

flexible qualities in arbitration "which at all times have kept arbitration in certain favour with governments"[23] are essential in preserving the identity of the arbitral process as distinct from other means of judicial settlement.

A similar deduction can be made from the comments of Professor Carlston on the Draft Convention on Arbitral Procedure of the International Law Commission. He argued that:

> The strength of the existing system of international arbitration as a means for the pacific settlement of disputes lies in its flexibility and responsiveness to the will of the parties, even though as a procedure it is subject to the interruptions which the Commission now seeks to remedy ; that these interruptions or breakdowns of arbitration have in practice been few in number as against the great number of international arbitrations which have taken place successfully; that many of these breakdowns could have perhaps been avoided by a more skilled use of technique; and, finally, that the ultimate end to be sought is to preserve all various procedures developed through history which conduce to the amicable settlement of international disputes.[24]

**II(2). The Principle of Effective Interpretation**

The situation, however, is not that simple. For the question of the authority of a "rump tribunal" arises mainly where the arbitrators of one party, usually instructed by that party, withdraw from the proceedings in order to frustrate the arbitration. This problem should be measured against the very important principle that arbitration treaties are treaties, and where States have undertaken by treaty to arbitrate, their obligation is binding and this obligation they are bound to fulfil.[25]

Having accepted the general rule that treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

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23 Charles De Visscher, "Reflections on the Present Prospects of International Adjudication", 50 AJIL, (1956), 467, p. 469.

24 Kenneth Carlston, "Codification of International Arbitral Procedure", 47 AJIL, (1953), 203, p. 218.

25 Stephen Schwebel, "International Arbitration...", op. cit. p. 149.

the treaty in their context and in the light of its object and purpose"[26], it follows that the parties are under an obligation to co-operate in constituting the tribunal. Such a conclusion has been confirmed by the International Court of Justice in the Advisory Opinion in the first Phase of the Peace Treaties Case.[27] In this Case the second among four of the questions put to the Court read:

> Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the Articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?[28]

The Court answered the question in the affirmative, saying that "either party is obligated, at the request of the other party, to cooperate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commission provided for in the Treaties would completely fail its purpose".[29]

Similarly, in the Ambatilos Case[30] the International Court of Justice held that the United Kingdom was under an obligation to submit to arbitration.[31]

It is therefore clear that the binding character of the agreement to arbitrate requires the parties' co-operation in constituting and conducting the arbitration. The implication is that the failure to co-operate, or any obstructive attempt by a party, is a breach of obligation and engages international responsibility. This is the conclusion which appears to be generally accepted by many authorities.[32] However, whether the breach of a treaty obligation of

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26 Article 31(1) of the Vienna Convention on the Law of Treaties, 8 ILM, (1969), p. 679.

27 ICJ Rep. 1950, p. 65.

28 Ibid, p. 75.

29 Ibid, p. 77.

30 Judgement of May 19th 1953, "Merits: Obligation to Arbitrate", ICJ Rep. 1953, p. 10.

31 Ibid, p. 23.

32 See Michael Reisman, Nullity and Revision, Yale University Press, London, 1971, pp. 462-473, especially, p. 473; Hans Mangoldt, op. cit. pp. 532-533; and Schwebel, op. cit. pp. 152-153.

that nature could be remedied by constituting a "rump tribunal" or authorising such a body to proceed in the absence of a party-appointed arbitrator, is a separate question.

Premised upon the principle that withdrawal of an arbitrator, on the initiative or with the approval of his government, that is not authorized by the parties or by the tribunal, constitutes an international wrong, Judge Schwebel concludes that the withdrawing State cannot be heard to challenge the tribunal's right to proceed and render an award.[33] He bases his argument on the doctrine that no legal right may spring from a wrong, which is generally recognized in international law.[34] The cogency of this principle, he argues, may resolve the problem "in favour of the binding character of international awards rendered by truncated tribunals".[35]

What follows from the conclusion of Judge Schwebel is that the breach of an arbitration treaty obligation in the circumstances in question can be remedied by methods not contemplated in the treaty by the parties, be it the authority of the truncated tribunal to assume for itself the right to proceed in the absence of a party-appointed arbitrator.

However, it would seem that the idea that a breach of an arbitration treaty obligation, in a manner in question, can be remedied by methods not contemplated by the parties was rejected by the International Court of Justice in the Peace Treaties Case. The Court, while accepting the principle that the parties were under an obligation to co-operate in constituting the Commission, rejected the question that the Arbitral Commission could be constituted in the

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33 Ibid, pp. 152-153.

34 Ibid, p. 153.

35 Ibid.

absence of the arbitrator of the defaulting party. The wording of the Court is clear and unambiguous.[36] The Court said:

> In these circumstances, the appointment of a third member by the Secretary-general, instead of bringing about the constitution of a three-member commission such as the Treaties provided for, would result only in the constitution of a two-member Commission. A Commission consisting of two members is not the kind of commission for which the Treaties have provided. The opposition of the Commissioner of the only Party represented could prevent a commission so constituted from reaching a decision whatever. Such a commission could only decide by unanimity, whereas the dispute clause provides that "the decision of the majority of the members of the Commission shall be the decision of the Commission and shall be accepted by the parties as definitive and binding". Nor would the decisions of a Commission of two members, one of whom is appointed by one party only, have the same degree of moral authority as those of a three-member Commission. In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.
>
> In short, the Secretary-general would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the provisions of the Treaties. In the present case, the refusal by the Governments of Bulgaria, Hungary and Romania to appoint their own commissioners has made the constitution of such a Commission impossible and has deprived the appointment of the third member by the Secretary-General of every purpose.
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> As the Court has declared in its Opinion of March 30th 1950, the Governments of Bulgaria, Hungary and Romania are under an obligation to appoint their representatives to the Treaty Commission, and it is clear that refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-general of his powers of appointment. These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation. **The failure of machinery for settling disputes by reason of the practical impossibility of**

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36 It is notable that in the course of preparation by the International Law Commission of its Draft Convention on Arbitral Procedure, Judge Hudson pointed out that in accordance with the Peace Treaties Case the International Court of Justice did not accept the legality of a rump tribunal. (YBILC, 1952, Vol I, p. 35). Judge Schwebel argues that Judge Hudson's reading of the Case was in error. (Schwebel, op. cit. p. 161.)

> creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.[37] (Emphasis added)

It is quite clear that the Court has acknowledged the engagement of international responsibility of the non-cooperating State. However, it has not found it appropriate to reach a conclusion on the basis of the principle that no one can profit from his own wrong. In the Opinion of the Court, the creation of a two-member commission cannot be said to be an appropriate remedy for the breach of obligation by a party in refusing to appoint its own arbitrator. In the view of the Court such a remedy would be a revision of the treaty obligation of the party concerned, rather than providing an appropriate remedy for it.

However, there is an internal conflict with the Opinion of the Court in this Case. In a passing reference in dictum, apparently in response to the arguments raised by the dissenting Judges, the Court distinguished between an arbitration commission originally established with a full number of its members and later reduced by such circumstances as the withdrawal of one of the arbitrators, and an arbitration tribunal not originally constituted. Without taking a clear position on the matter, the Court said that "it has been pointed out" that such an arbitral tribunal- an arbitral tribunal originally constituted- "may make a valid decision".[38] Further, the Court went on to say that this situation "presupposes the initial validity of a commission, constituted with the will of the parties" and was distinct from the earlier situation where "the initial validity of the constitution of the commission" was in doubt.[39] This dictum of the Court's Opinion is in effect giving conflicting signals. Though the Court

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37 ICJ Rep. Peace Treaties Case, Second Phase, 1950, 221, pp. 228-229. For a commentary on the Peace Treaties Case, see D.H.N. Johnson, "the Constitution of An Arbitral Tribunal", 30 BYIL, (1953), 152, pp. 160-163.

38 ICJ Rep, 1950, p. 229.

39 Ibid.

made a distinction between the two situations described above, there is no reason why the two situations should be treated as distinct and separate. If the absence of a national arbitrator prevents a proper constitution of the tribunal by reason of the lack of moral authority or by the reason of not being the same commission for which the parties have provided, for the same reason the withdrawal of a national arbitrator should deprive the tribunal of its legal authority. Of course, this reasoning could equally apply vice versa. That is , if the withdrawal of a national arbitrator does not deprive a tribunal already constituted of its legal authority, for the same reason a national arbitrator's non-participation from the beginning may not prevent a two-member tribunal being constituted in his absence.

Professor Carlston has submitted the opinion that the distinction made by the Court between the two situations was prompted by the citation to the Court of two precedents in which the arbitral tribunals had proceeded in the absence of the withdrawing arbitrator.[40] Professor Carlston argues that the fact that in one of these precedents the two governments did not accept as binding the decisions made by the Tribunal lacking in membership of the third member and submitted anew to a separate commission, was not brought to the attention of the Court.[41] In the view of Professor Carlston, the circumstances of other cases brought to the attention of the Court were totally irrelevant.[42]

It is notable that in the Peace Treaties Case two dissenting Judges, Read and Azevado, took the view of authorizing a "rump tribunal" to proceed in both

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40 Kenneth Carlston, "Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of the International Court of Justice", 44 AJIL (1950), 728, pp. 732, 734. We will analyse these precedents in this Chapter.

41 Ibid.

42 Ibid.

Among the precedents cited was the Lena Goldfields Arbitration (5 A.D. p. 426; The Times 3 September 1930, p. 7). As noted earlier, in the Lena Goldfields Arbitration the arbitration agreement had expressly authorized the Tribunal to proceed if one of the arbitrators was withdrawn. The implications of this Case will be analysed below.

of the circumstances contemplated in the Opinion of the Court.[43] Their reasoning was that effective meaning should be given in interpretation of treaties and wrongful conduct should not be put at an advantage.[44] These two Judges held that the case of absence of a member *ab initio* and the case of absence of a member later, after the establishment of the tribunal, had no essential difference between them.[45] Judge Read relied in particular on the principle recognized in the Factory at Chorzow Case[46], that the defaulting government was estopped from alleging its own treaty violation in support of its own contention.[47]

Another point which should be borne in mind is that in the Peace Treaties Case the Parties' agreement did not make a provision for the third Party appointment of national members of the Arbitral Commission, in the event of a Party's failure to appoint its own arbitrator. Such a provision was only made for the appointment of the neutral member by the Secretary-general of the UN, in the event of the neutral member failing to be agreed upon by the Parties. Therefore the Court's answer to both of the above-mentioned circumstances, especially when it was referring to the situation where a tribunal has been truncated after its establishment, presupposes the situation that there is no provision for the third-party appointment of a national arbitrator. In other words, if the dictum of the Court's Opinion were to be interpreted as a positive answer to the authority of an arbitral tribunal becoming truncated after its constitution, this should be rationalized because of the absence of a provision for the third party appointment of a national

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43 ICJ Rep. 1950, Dissenting Opinion of Judge Read, p. 231; and Ibid, Dissenting Opinion of Judge Azevado, p. 248.

44 Ibid, respectively, pp. 241-245; and 251-253.

45 Ibid, p. 253.

46 PCIJ Reports, Series A, No. 9, Judgement No:8, p. 31, (as reported in Hudson 1 World Court Reports, 589, p. 610).

47 ICJ Rep. 1950, Dissenting Opinion Judge Read, p. 244.

member. On the other hand, in a situation where a provision has been made for the third party appointment of the national arbitrator the facts and the circumstances are totally different. This may make the applicability of the dictum of the Court's Opinion totally unrelated. That is, where there exists an alternative method for the appointment of national/party-appointed arbitrator, the arguments relating to the frustration of arbitration and the recourse to the rule of effectiveness are irrelevant.

Indeed, at the time when the Court's Opinion was rendered, according to the Court itself a review of arbitration practice showed that few arbitration treaties contained express provisions for the third-party appointment of national arbitrators to remedy the refusal by a party to appoint its arbitrator.[48] In other words, most views which have been expressed in support of the legality of an incomplete tribunal, including an interpretation which may be derived from the dictum of the Opinion of the Court in the Peace Treaties Case, have in mind a situation where no alternative method guarantees the appointment of the national arbitrator, or filling the vacancy arising from his withdrawal. As a consequence, where there exists a mechanism for the enforced filling of vacancy arising from the withdrawal of a party-appointed arbitrator the circumstances are totally different from those assumed under the dictum of the Opinion of the Court in the Peace Treaties Case. The circumstances where a system for the enforced filling of vacancies has been provided for in the arbitration agreement, or the arbitration rules, in effect render most of the views which have been expressed without the consideration of this factor somewhat irrelevant. This argument applies equally to the interpretation of the precedents existing in this field.

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48 ICJ Rep. 1950, p. 229.

## III. The Development of the Notion of Third-Party Appointment of National/Party-Appointed Arbitrators as an Alternative to the Legality of a Rump Tribunal

In line with a fully judicial conception of international arbitration and in order to safeguard the arbitral process against obstructive attempts by a party, e.g., withdrawal of a party-appointed arbitrator, two logical solutions come automatically to mind: either to provide a provision in the arbitration agreement, or rules, authorizing the remaining members of the tribunal to function in the absence of a party arbitrator who has been withdrawn; or to foresee the possibility in the arbitration agreement of the third-party appointment of the party arbitrator, as well as the neutral one, in the event of failure to do so by a party. These two solutions, as it is clear, are not complementary to one another. They are two alternatives; it is either the first one or the second.

In the course of the historical development of international arbitration, in order to transform it into a fully judicial institution these two solutions would naturally have occurred to the very many able draftsmen and to the Parties of the huge number of arbitration agreements concluded in the course of this and the preceding centuries. While the notion of third-party appointment of the neutral members and gradually of the national members, appears to have gained an evolutionary measure of acceptance, over the same time the idea of authorising the arbitral tribunal to function in the absence of a national member, except in the extremely few instances already cited, has not been taken up with any degree of seriousness.[49]

The first Hague Conference on the Pacific Settlement of International Disputes in 1899 was intended to deal with voluntary arbitration only, and this

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49 A series of reviews has been conducted in this respect. See generally, M. Habicht, "Post-War Treaties" op. cit. pp. 20 ff..; UN, Systematic Survey, op. cit. pp. 94-108; see also Louis B. Sohn, "International Arbitration Today", op. cit. pp. 61-81; and Hans Mangoldt, "Arbitration and Conciliation", op. cit. pp. 432-461.

attitude was reflected in the Convention of 1899. It was only during the second Hague Conference that some aspects of compulsory arbitration were discussed.[50] Even so, the process of appointment of arbitrators was left primarily to the goodwill of the Parties. The 1899 Hague Convention on the Pacific Settlement of Disputes, for instance, offers no guarantee for the appointment of party arbitrators.[51] The alternative offered for the appointment of umpire, which is an improvement on the 1899 Convention, is not a guarantee at all and ultimately depends on the consent of both Parties.[52] Nevertheless, the changes made under the 1907 Convention regarding the composition of the arbitral tribunal were part of developments operating to limit the absolute freedom of the parties in international arbitration.[53]

A further step in the direction of judicial arbitration was taken in the Geneva General Act for the Pacific Settlement of International Disputes, (1928).[54] Article 23 of this Act, which was retained unchanged in the revision of 1949 provided:

> 1. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third power, chosen by agreement between the parties, shall be requested to make the necessary appointment.
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> 2. If no agreement is reached on this, each party shall designate a different power, and the appointments shall be made in concert by the powers thus chosen.
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> 3. If, within a period of three months, the two powers so chosen have been unable to reach an agreement, the necessary appointment shall be made by the President of the Permanent

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50 Mangoldt, op. cit. pp. 433-434.

51 See Article 24 of the 1899 Hague Convention on the Pacific Settlement of Disputes.

52 See Article 45 of the 1907 Hague Convention on the Pacific Settlement of International Disputes.

53 See J.B. Scott, Proceedings of the Hague Peace Conferences, the Conference of 1907, Vol I, p. 416.

54 93 LNTS, p. 345, as revised in 1949 in 71 UNTS, p. 101.

> Court of International Justice (the President of the ICJ under the revised Act). If the latter is prevented from acting or is a subject of one of the parties, the nomination shall be made by the Vice-President. If the latter is prevented from acting or is a subject of one of the parties, the appointment shall be made by the oldest member of the Court who is not a subject of either party.

It is clear that although this Convention succeeded in establishing a role for an independent third-party appointment of the arbitrators by the President of the International Court, failing agreement by the parties, this appointment can only be made after the exhaustion of two protracted processes, for both of which the consent of both parties is necessary. Nevertheless, the Convention marks an improvement compared to the Hague Conventions. Professor Sohn has noted that similar provisions are contained in some twenty bilateral treaties for the pacific settlement of disputes.[55]

It appears from Professor Sohn's study that while some of the treaties concluded during the 1920s and 1930s contained explicit provisions that the third-party appointment mechanism was to include national arbitrators as well as the neutral ones, others were rather vague in this regard.[56] A series of bilateral treaties concluded by Iran with Belgium, the Netherlands and Switzerland fell within the first category.[57] So did a series of bilateral treaties concluded by Germany with Switzerland, Sweden, the Netherlands and Denmark.[58] It is necessary to remember that although such provisions indicated the emphasis placed on the judicial and compulsory character of the arbitration, the idea was not entertained at all that the tribunal could be permitted to function in the absence of the defaulting party's arbitrator.

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55 Sohn, "International Arbitration Today", op. cit. p. 64.

56 Ibid, p. 65.

57 Iran and Belgium, May 23, 1929, Article 5, UN Systematic Survey, op. cit. p. 581; Iran and the Netherlands, March 12, 1930, Article 3, Ibid, p. 770; and Iran and Switzerland, April 25, 1934, Article 4, Ibid, pp. 1069-70.

58 Germany and Switzerland, December 3, 1921, Article 8, Habicht, Post-War Treaties, op. cit. p. 20; Germany and Sweden, August 29, 1924, Article 7, Ibid, p. 456.

The significance of the latter point becomes even more apparent when it is read in conjunction with the Advisory Opinion of the International Court of Justice in the Peace Treaties Case. It was noted here above that the Court rejected the authority of the Secretary-General of the UN, designated by the Parties as the Appointing Authority, to appoint the third member of the Arbitral Commission, for the reasons explained in the Opinion of the Court. There was no provision for the third-Party appointment of the national Commissioners, and according to the Court "it was intended that the appointment of both national Commissioners should precede that of the third member".[59] The Court's Opinion alerted the arbitration agreements concluded afterwards to the wisdom of providing more adequate mechanisms against non-appointment or withdrawal of party arbitrators. Indeed, there appear to have been some steps taken in this direction, but again no question of authorization of the arbitral tribunal to function in the absence of a party arbitrator has been entertained in any of these agreements concluded after the Opinion of the Court in the Peace Treaties Case. The effect of the Opinion of the Court in the Peace Treaties Case has, however, been to cause more treaties to include provisions for the third-party appointment of national members of the arbitral tribunal. For instance, Article 21 of the European Convention for the Pacific settlement of International Disputes[60] is intended to cover such as circumstance as the absence of a party arbitrator. It is notable that although Article 21 of this Convention shortens the delays in the procedure for the appointment of the arbitrators for the purpose of eventual appointment by the President or Vice-President of the ICJ, no significant improvement is evident, compared to Article 23 of the Geneva General Act.

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59 ICJ Rep. 1950, 221, p. 227.

60 320 UNTS, p. 243.

A phenomenon of highest significance in this respect is the work of the International Law Commission conducted during the greater part of the 1950s. The work of the ILC sheds light not only on the theoretical aspects of the problem but also in some measure on the practice of States. We will examine this issue in some detail. In so doing we will try to demonstrate the relationship between the notion of third-party appointment of national members and the question of the authority of rump tribunals to function in the absence of a party-appointed arbitrator. One of the aims behind this analysis will be to demonstrate that the notion of third-party appointment mechanism and the idea of permitting an incomplete tribunal are not co-existent. They are, rather, two different alternatives. That is, either of them may be adopted for securing the integrity and functioning of the arbitral process, and there is no rationale whatever for having both of these mechanisms at the same time. Further, it will be attempted to demonstrate which of the above options was regarded by the ILC and by States as an acceptable system for securing the integrity of the arbitral process.

### III(1). Codification of International Arbitral Procedure by the International Law Commission

The codification of international arbitral procedure was among the three topics which were given priority by the International Law Commission at its First Session in 1949.[61] At the same session Professor George Scelle was elected Special Rapporteur on the arbitral procedure and was asked to prepare a working paper for submission to the Commission at its Second Session.[62] Interestingly, in a mandate summed up by the Chairman of the Commission, Professor Scelle was asked in particular to conduct a thorough study in regard

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61 See generally Report of the ILC Covering its First Session, in Yearbook of the ILC, 1949, 277, p. 281.

62 Ibid.

to the question of legality of incomplete tribunals. The mandate of Professor Scelle read:

> ... [a] question which had already arisen several times, in the Case of Hungarian Optants, for example, as also before a Franco-Mexican Claims Commission and a German-American Claims Commission : namely, what were the powers of a commission made up of two members representing the two powers concerned and one arbitrator, after the representative of one of the powers had withdrawn?[63]

At the Second Session in 1950, Professor Scelle submitted a draft proposal on arbitral procedure to the International Law Commission. On the question of the right of "rump tribunals" to function, Professor Scelle was of the view that the withdrawal by an arbitrator, spontaneously or on the orders of his government were both inadmissible and should this occur the remaining members were authorized to proceed. He gave the following analysis:

> Spontaneous withdrawal is inadmissible. The arbitrator was not bound to accept the task entrusted to him; but he can no more give up his functions...
>
> The withdrawal by a Government of a so-called national arbitrator is still less admissible, since the investiture of the arbitrator is not the act of his Governments, but of the parties to the dispute. It is a well-established principle in public law that a judicial act cannot be revoked or modified except by persons who were competent to perform in accordance with the procedure by which it was originally carried out.... We shall therefore accept as an obligatory rule of a procedural code that the withdrawal of an arbitrator cannot prevent the tribunal from acting nor from rendering a binding award whenever it is materially able to do so.
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> ... To withdraw a national judge is a breach of the obligation implicitly but necessarily assumed under the agreement to submit the dispute to a judicial settlement. Full approval should therefore be given to the decision taken by presidents of mixed arbitral tribunals or commissions in such cases not to interrupt the procedure before the diminished tribunal. Thus the Franco-Mexican Commission, under the chairmanship of Professor

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63 General Directives on the Drafting of Reports, Ibid, p. 237.

> Verzyil, pronounced twenty-three awards in the absence of the Mexican Commissioner...
>
> ... A national arbitrator may not withdraw or be withdrawn by the Government that appointed him. Should this occur, the tribunal is authorized to continue the proceedings and to render an award which shall be binding...[64]

Professor Scelle's proposal aroused some controversy within the International Law Commission. Some members of the Commission accepted the same line as Professor Scelle's, while others expressed the opinion that the withdrawal of an arbitrator should be permissible.[65] What is most significant to note, however, is that there was unanimity among all the members of the Commission, including Professor Scelle himself, that the latter's proposal was not declaratory or codificatory of the existing law; it went clearly beyond that. This point was raised by Judge Hudson and was accepted by Professor Scelle. Referring to the instances he could recall[66], Judge Hudson implied that they did not constitute convincing evidence that such a principle existed in the law.[67] Moreover, Judge Hudson maintained that in his view the principle authorizing a "rump tribunal" to function did not "actually exist in the current law".[68] Therefore, he suggested that since the principle did not exist in the law, he preferred to see the question of replacement of an arbitrator who withdrew or was withdrawn, stipulated in the compromis or the treaty between the parties as one which should be settled by agreement between the parties.[69] However,

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64 U.N. Doc. A/CN. 4/18, pp. 32-35; See also M. Whiteman, Digest of International Law, Department of State Publication, 1971, Vol 12, p. 1071. Substantial parts of the ILC's discussions on arbitral procedure are also quoted in Schwebel, op. cit. pp. 154-175.

65 See generally, Yearbook of the ILC, 1950, Vol I, pp. 268-273.

66 Ibid, p. 270. Judge Hudson referred to the following Cases: Lena Goldfields Co Ltd v USSR Arbitration Award; The Mexican Claims Commission Cases; the Black Tom Explosion Case; and the Hungarian Optants Case. (Ibid, p. 270) For references see Ibid.

67 YBILC, 1950, Vol I, p. 270.

68 Ibid.

69 Ibid.

Judge Hudson was prepared to accept that the law should be in conformity with the principle proposed by the Rapporteur.[70]

Interestingly, in response to Judge Hudson's contention, Professor Scelle accepted that:

> What he was advocating was not a universally recognized principle of international law. But there were precedents. He accepted Mr Hudson's notion, provided the question of replacement of an arbitrator were stipulated in the compromis. But he could not accept it if it were not laid down in the compromis. His concern was to establish a principle. He would like to go further than the existing law, since he considered that the Commission was not called upon merely to record the positive law on the subject.[71]

There were other objections raised against Mr Scelle's proposal. For instance, Mr Francois pointed out:

> Mr Scelle had stated that once the undertaking to arbitrate had been accepted by the parties, the latter could not evade the obligation to arbitrate. But the point was, what was the undertaking that the parties had accepted? The undertaking was to have recourse to arbitration- namely, to a procedure for the settlement of disputes which left the parties a certain amount of latitude either to agree or to decline to submit any particular issue to arbitration.
>
> That latitude allowed to States was what distinguished arbitration from judicial proceedings. The 1899 Hague Convention had been very rough and ready. It had been revised in 1907 with the object of perfecting it. Mr Scelle wanted still more; he wanted absolute perfection, but he also regarded it with apprehension. A scheme as perfect as the one Mr Scelle proposed establishing ran the risk of remaining a dead letter... Theoretically, Mr Scelle's point of view was entirely justified, but in practice it might prove risky. Hence, he wished Mr Scelle had been less ambitious, and he hoped he would be prepared to review the proposals he had put before the Commission, and to return a year hence with a text which might be more easily accepted by the various States.[72]

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70 Ibid.

71 Ibid.

72 Ibid, p. 271.

As a consequence of the debates in the ILC, Mr Scelle was asked to draft his proposal less categorically, so that the Commission would be able to reach agreement on it the following year.[73]

Accordingly, Professor Scelle submitted a second report, the second preliminary draft, to the Third Session of the ILC in 1951. Infact, the discussion over Professor Scelle's proposal took place in 1952 at the Fourth Session of the ILC.[74] At this Fourth Session the second preliminary draft was discussed. Article 9 of the second preliminary draft, which had kept the idea of legality of incomplete tribunals intact, provided:

> 9. An arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the other members of the tribunal.
>
> Should the withdrawal take place without the consent of the constituted tribunal, the latter shall be authorized to continue the proceedings and to render its award.
>
> If the withdrawal prevents the continuation of the proceedings, the tribunal may require that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him.[75]

There were a number of jurists opposed to the above proposal, including Mr Francois and Mr Kozhevnikov.[76] Mr Hudson and Mr Zourek also doubted the competence of an incomplete tribunal, contending that a tribunal from which an arbitrator was absent could not be regarded as legally constituted.[77]

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73 Ibid.

74 YBILC, 1952, Vol I, pp. 28-38.

75 Ibid, p. 28.

76 Ibid, pp. 22-23; see also generally, pp. 28-38.

77 Ibid, p. 35.

At the end of the debate, however, a revised version of Article 9 of the second preliminary draft was tentatively adopted by the Commission. The revised version provided:

> 1. Once the hearing has begun, an arbitrator may not withdraw or be withdrawn by the Government which has appointed him, save in exceptional cases and with the consent of the tribunal.
>
> 2. If, for any reason such as previous cognizance of the case, a member of the tribunal considers that he cannot take part in the proceedings, or if any doubt arises in this connexion within the tribunal, it may decide, on the unanimous vote of the other members, to require his replacement.
>
> 3. Should the withdrawal take place, the remaining members, upon the request of one of the parties, shall have the power to continue the proceedings and render the award.[78]

The most important phase in the work of the ILC on arbitral procedure is, however, the Fifth Session of the Commission, which marks a turning point with regard to the work of the Commission in relation to the legality of incomplete tribunals. It is notable that after the tentative adoption of a "draft on arbitral procedure" in its Fourth Session, the Commission decided to transmit the draft to governments with the request that they should submit their comments. The Commission also decided to draw up, during its Fifth Session in 1953, a final draft for submission to the General Assembly.

The written comments made by governments prompted the Commission to rethink its proposal and to introduce substantial changes in the draft accordingly.[79] By the introduction of these changes the notion of authorizing a "rump tribunal" to function was totally abandoned in the Commission's final Draft.[80] There is no need to examine the views expressed by governments;[81] the fact that the ILC had to alter fully its earlier position

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78 Ibid, p. 38.

79 Report of the ILC Covering the Work of Its Fifth Session, in YBILC, 1953, Vol II, 200, p. 204.

80 Ibid.

81 See generally, Ibid, pp. 232-241.

and to introduce substantial changes demonstrating the weight of the reaction of governments to the Commission's initiatives.

What is most significant is that in the final draft adopted in 1953 the notion of authorizing an incomplete, or diminished, tribunal to function was totally abandoned within the Commission. Furthermore, in line with the "judicial arbitration" approach an alternative solution was suggested, namely, filling the vacancy arising from the withdrawal of an arbitrator by the same method as that laid down for the original appointment, including the possibility of the appointment by a third authority, the President of the International Court of Justice.[82] Even Professor Scelle came to admit that the Commission had a choice of either allowing the tribunal to function in the absence of one or more of its members, or stipulating that any vacancy must be filled by a third authority in the final eventuality.[83] It was the second alternative which was adopted by the Commission, to the exclusion of the idea of allowing the remaining members of the tribunal to function.

The logic of the exclusionary nature of these two alternatives with regard to each other was clearly pointed out by Professor Lauterpacht, the Chairman, in concluding the meeting. He stated that:

> ... although truncated tribunals had been known since the end of the eighteenth century, the reason why they had functioned as such was because no provision for the replacement of an arbitrator had existed. The purpose of the present draft was to make provisions for replacement, and to ensure that a tribunal should always function with a quorum.[84]

A similar line of reasoning was adopted in the Report of the Commission concerning its Fifth Session, which was submitted with the final draft to the General Assembly. We will quote the relevant paragraphs of the Report at some length in order to demonstrate the exclusionary nature of the

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82 Ibid, p. 204.

83 YBILC, 1953, Vol I, p. 20.

84 Ibid, p. 52.

two alternatives - the authority to function and the enforced replacement of arbitrator, with regard to each other. The Report said:

> 32... At the same time, the draft makes provision against the work of the tribunal being frustrated by the withdrawal of an arbitrator for reasons not approved by the tribunal. In such cases, it is laid down, the vacancy shall be filled in the manner prescribed for the cases in which the parties have been unable to agree on the appointment of arbitrators. Thus, although illicit withdrawal on the part of an arbitrator may cause some delay in the proceedings, it can no longer bring them permanently to a standstill.
>
> 33. For the latter reason it has been found unnecessary, unlike in article 7, paragraph 3, of the previous draft, to lay down that in the case of the withdrawal of an arbitrator the remaining members of the tribunal shall have the power to continue the proceedings and render an award. Such a procedure would hardly be warranted in cases in which the withdrawal takes place with the consent of the tribunal. However, even in cases in which an arbitrator has withdrawn in face of the refusal by the tribunal to allow him to do so, the Commission is of the opinion that the sanction as previously proposed was both **too drastic and unnecessary**. (Emphasis added) Undoubtedly, cases have occurred in the past in which the tribunal, after a national arbitrator has withdrawn, continued with its work and rendered an award. **This was probably unavoidable seeing no machinery was at the time in existence for filling the vacancy created by the illicit withdrawal of an arbitrator. Once such machinery is created as is the case in the present draft - there is no longer any reason for an incomplete tribunal to proceed with the case**.[85] (Emphasis added)

As a consequence, the relevant Article in the ILC's Draft Convention on Arbitral Procedure of 1953 contains no provision whatever authorizing an incomplete tribunal to function. As an alternative solution, therefore, provision has been made for filling the vacancy created by the illicit withdrawal of an arbitrator. Article 7(2) of the Draft reads:

> Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal in the manner provided for in paragraph 2 of article 3.

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85 YBILC, 1953, Vol II, p. 204.

It is notable that paragraph 2 of Article 3 provides for the appointment by the President of the ICJ, should a party fail to appoint its arbitrator.

Again, it is crystal clear that the idea of power of an incomplete tribunal to function was fully rejected by the ILC in the final draft and instead an alternative solution was adopted. The rationale behind the adoption of this solution is that while it is against frustration of arbitration, it keeps the tripartite structure and the equilibrium in the composition of the tribunal intact, in line with the special characteristics of international arbitration. Indeed, having born the above facts and circumstances in mind any other conclusion derived from the experience of the ILC on arbitral procedure can hardly be convincing. One such conclusion is the opinion expressed by Judge Schwebel in his recent treatise on the issue in question. After a careful examination of the work of the ILC on arbitral procedure, Judge Schwebel has expressed a view which can hardly be accepted by the present writer, especially in relation to what can be inferred from the experience of the ILC. Judge Schwebel, concluding on the basis of the work of the ILC, writes:

> ... The better view of the law is that truncated tribunals do have the power to proceed and to render valid awards. That the International Law Commission itself oscillated, and adopted an alternative solution for withdrawal, i.e. enforced replacement, does not derogate from this conclusion. Nor is that conclusion destroyed by the possibility, perhaps probability, that, if formulated as a draft rule of international law on which all States were invited to vote, a majority might reject the authority of a truncated arbitral tribunal to act.[86]

The main problem with Judge Schwebel's conclusion derived from the work of the International Law Commission is that in the final analysis it turns out to rely on exclusively theoretical grounds and not on what can logically be deducted from the work of the ILC. It further disregards State practice and the circumstances which led to the failure of the idea of legality of an incomplete

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86 Schwebel, op. cit. p. 177.

tribunal, proposed during the work of the ILC on arbitral procedure, to crystallize into a rule of law. Judge Schwebel appears to take no account of the fact of States' practice, and by extension, their disapproval of the notion in question throughout the history of arbitration. In our view, it is one thing to make a case for the theoretical or logical validity and viability of a principle. It is another to make a case for its viability as an established rule of law. Given the undisputed fact, unanimously acknowledged by the ILC, that the notion of authorizing a truncated tribunal to function did not form part of the existing law when it was proposed to the International Law Commission, and the fact that it failed the very first test of being transformed into a legal rule, it is not clear how and at which point of time the notion entered into the body of international law, let alone the unsoundness of arguing that it represents the better view of the law.

The second problem, which is an argument entirely within the judicial conception of international arbitration, is how to reconcile the notion of legality of an incomplete tribunal with the alternative solution of enforced replacement of the withdrawing arbitrator. It was noted earlier that, as acknowledged by the International Law Commission, with the adoption of the enforced replacement mechanism there was no logical-legal basis whatever for an incomplete tribunal to function in the absence of one of its members. Indeed, as the Report of the International Law Commission shows, the Cases which could be interpreted as being supportive of the legality of an incomplete tribunal have taken place out of necessity and in a context where no machinery was at the time in existence for preventing the frustration of the arbitration.

The acceptance of the legality of an incomplete tribunal in the circumstances where a provision exists for the enforced replacement of an arbitrator, leads to conflicting results. That is to say, this exclusionary nature of the two alternative solutions in question vis-a-vis each other is not only evident

in the historical evolution of the concept of enforced replacement, including in the work of the ILC, but is also inherent in their nature, their rationale and the purpose for which they are designed. In other words, the existence of a machinery for filling the vacancy created by the illicit withdrawal of an arbitrator clearly indicates that the parties have excluded the other option, namely that of authorizing an incomplete tribunal to proceed. Therefore the support under such circumstances of the authority of an incomplete tribunal to function would clearly lead to a violation of the agreement of the parties and a revision of their original intention as to the method by which they wished to prepare a remedy against an illicit withdrawal.

With the rejection of the idea of the power of an incomplete tribunal to function within the ILC, there may be no need to go beyond the events after the submission of the Report of the ILC to the General Assembly. However, since the ILC's Draft Convention contained certain other initiatives representing the progressive development of international arbitral procedure based on the judicial conception of arbitration, a brief glance at the outcome of the work of the ILC in the General Assembly is useful in order to shed light on the attitude of States towards the change in the traditional conception of arbitration.

First of all, as a result of opposition by many States which regarded the International Law Commission's approach as a departure from the traditional conception of party autonomy arbitration, the ILC's Draft failed to be adopted as a multilateral convention. The Draft was discussed in the Sixth Committee of the General Assembly at its 8th Session. The discussion centred mainly on the Commission's departure from international practice and from the traditional concept of international arbitration.[87]

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87 See Resolution 797 (VIII), 7 December 1953, UN Resolutions, Vol 4, p. 223. Details of discussions are beyond the scope of our study here. For a review of the views expressed see a summary review in L.B. Sohn, "International Arbitration Today", op. cit. pp. 69-77; Hazel Fox, "Arbitration", op.cit. pp. 106-108; and for a final analysis of the reaction of States see Report by George Scelle, Special Rapporteur, to the ILC, 24 April 1957,

The discussion of the ILC's Draft was renewed at the Tenth Session of the General Assembly, taking into account comments received from Governments in the interval. After a considerable discussion of the question as to what extent the draft departed from international practice, the matter was referred back to the ILC for further study.[88]

As a result of opposition from a considerable number of States, the ILC abandoned the goal of a multilateral convention on arbitral procedure. Alternatively, the ILC, after modifying the Draft and in some respects adopting a compromise approach between the two - judicial and diplomatic - conceptions of arbitration[89], decided to submit the rules as "Model Rules" to the General Assembly.[90]

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YBILC, 1957, Vol II, pp. 1-12. Interestingly, the Report by Professor Scelle indicates some anger at the reaction of many Third World countries in rejecting the ILC's proposal which primarily included his proposals. Professor George Scelle, whose insistence on his proposals had carried a slight majority of the ILC with him, thus enabling the ILC to adopt his proposal (Ibid, p. 2), made the following remark in his Report:

> "While recording these facts very objectively, the Special Rapporteur is somewhat relieved to note from the comments on the 1953 draft that several Governments of States with a long democratic tradition and a constant concern for judicial correctitude were, with certain minor reservations, favourably disposed to the adoption of [the Draft] in both its letter and spirit..." (Ibid.)

Professor Scelle further remarked:

> "Indeed, the fact that international organization is now passing through a period of transition and the contradictory social and constitutional conceptions of the various groups of States- among them those which have most recently attained to major international competence, i.e. full sovereignty- should warn against harbouring disappointing illusions." (Ibid, p. 11.)

See also Report by George Scelle to the ILC, 6 March 1958, YBILC, 1958, Vol II, p. 2, paragraph 2.

88 General Assembly Resolution 989 (X), December 1955, G.A.O.R., 10th Session, Suppl. No. 19 (A/1316), pp. 46-47; also quoted in Report by George Scelle of April 1957, YBILC, 1957, Vol II, p. 2.

89 Report by George Scelle, YBILC, 1957, Vol II, p. 7.

90 Ibid, p. 11 and Report of the ILC to the General Assembly concerning the work of its 9th Session, Ibid, pp. 143-144.

In the General Assembly the Model Rules which the Commission intended to be looked at as "a guide, not as a straitjacket"[91], were subject to further debate and opposition by some States which favoured the traditional concept of arbitration.[92] As a consequence, the General Assembly by adopting a resolution merely took note of the ILC's Model Rules on Arbitral Procedure and decided to bring them to the attention of member States for their consideration and use.[93] It is notable that the Model Rules have not as yet been adopted in a single case.

This summary of evolution of the work of the ILC further demonstrates the extent to which many States regard international arbitration as an institution distinct from compulsory forms of judicial settlement, and the extent to which its peculiar features are the source of acceptance by them.

It is, however, possible to make an argument in favour of the advancement of the judicial conception of arbitration on the basis of the work of the ILC and its surrounding circumstances, particularly in regard to the theory of non-frustration as it relates to the notion of enforced filling of vacancies. Indeed, a survey by Professor Sohn demonstrates that most States of the world have actually accepted provisions for the third-party appointment of arbitrators on at least one occasion in bilateral agreements concluded between them.[94]

What is, however, important to note is that even an argument based on the judicial conception of arbitration also negates the theory which favours allowing an incomplete tribunal to function. This is because the developing trends in the judicial conception of arbitration have generally opted for the idea

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91 Report of the ILC covering the work of its 10th Session, (1958), YBILC, 1958, Vol II, p. 82, Paragraph 18.

92 G.A.O.R., 13th Session, Sixth Committee, pp. 27 ff; see also L.B. Sohn, op. cit. pp. 75-76.

93 Resolution 1262 (XIII), November 14, 1958, G.A.O.R., 13 Session, Suppl No. 18 (A/4090), p. 53; also in UN Resolutions, Vol 7, p. 147.

94 L.B. Sohn, "International Arbitration Today", op. cit. pp. 77-78.

of enforced filling of vacancies. The implications are that: first, in none of these many circumstances have States actually accepted or contemplated the notion of permitting an incomplete tribunal to function; second, by adopting an alternative method, the automatic or enforced filling of vacancies, they have implicitly but necessarily rejected the possibility that the Tribunal could function in the absence of one of its members.

In view of these circumstances, the views expressed in support of the authority of an incomplete tribunal are not totally convincing.[95] In other words, given the fact that the notion of enforced filling of vacancies has itself been developed in the context of the judicial concept of arbitration, and the inherent exclusionary nature of this system vis-a-vis the idea of legality of an incomplete tribunal, even the judicial conception of arbitration declines to favour the latter view. That is to say, although an illicit withdrawal of a party-appointed arbitrator on the instructions of his government is a wrongful act, the nature and the kind of procedural remedy against that wrong has been restricted by the parties to only enforced filling of vacancies. The importance of this argument can be appreciated if it is noticed that the resort to the judicial safeguard of enforced filling of vacancies lies in the wish of the parties to keep the special equilibrium in the structure of arbitration tribunals untouched; a result which cannot be achieved by the notion of authorizing an incomplete tribunal to function.

### III(2). The Concept of Enforced Replacement in International Commercial Arbitration

A review of major arbitration rules frequently referred to in the field of international commerce also reveals a general endorsement of the method of enforced filling of vacancies, and by implication, the exclusion of the power of an incomplete tribunal. Article 2(11) of the ICC Rules of Arbitration of 1988,

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95 See Schwebel, op. cit. p. 167.

for instance, provides for the replacement of an arbitrator by the ICC Court of Arbitration if he is "prevented *de jure or de facto* from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time-limit". In fact, the ICC Court of Arbitration regularly applies its general powers of appointment when a party refuses to nominate its arbitrator[96] or when a replacement becomes necessary.

Provisions for the enforced filling of vacancies arising from an arbitrator's inability to fulfil his functions are also foreseen under the Rules of the LCIA.[97] The Rules of Procedure of the Inter-American Commercial Arbitration have also incorporated the UNCITRAL Arbitration Rules and make the same provisions for the replacement of the arbitrator as those under Article 13(2) of the latter Rules. That is the case where arbitrations are conducted under the UNCITRAL Arbitration Rules by the American Arbitration Association.[98]

The most elaborate provisions regarding the problem in question are contained in Article 56(3) of the ICSID and particularly in Rules 8(2) and 11(2)-(a) of the Rules of Procedure of the ICSID for Arbitration Proceedings under the ICSID Convention. Interestingly, these regulations provide not only for the filling of vacancies, but also for the authority of the Chairman of the Administrative Council to appoint a substitute directly, in the circumstances

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96 E.g., see Islamic Republic of Iran v Cementation International Ltd, Cour de Justice Civile, Geneva, December 21, 1983, Appeal for nullity of arbitral award for lack of jurisdiction and arbitrariness of appointment conducted under the ICC auspices; in W. Laurence Craig, and others, "International Commercial Arbitration", Loose Leaf, 12A, issued November 1986, Oceana Publications Inc, London pp. 60-63.

97 Article 3(6) of the LCIA Rules of 1985.

It is notable that Article 16(2) of the LCIA Rules provides that "if an arbitrator refuses or fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given reasonable opportunity to do so, the remaining arbitrators shall proceed in his absence". This provision is included in the Section concerning the award and apparently refers to the failure of an arbitrator to comply with the provisions referred to in that Article after the hearing and in the course of making of the award.

98 American Arbitration Association, Procedure for Cases Under the UNCITRAl Arbitration Rules; published by the AAA.

where the resignation of a party-appointed arbitrator is not acceptable to the tribunal.[99] As a result, in the latter case the vacancy is not filled by the original method of appointment, which is appointment by the relevant party in the first instance, and if this party fails to appoint, by the Chairman of the Administrative Council. However, in circumstances where the resignation is not acceptable to the tribunal, the appointment is made directly by the Chairman of the Administrative Council. This provision is intended to lessen the possibility of a malicious resignation. Furthermore, with the direct appointment of a substitute by the Chairman the possibility of repeated withdrawals and appointments of party-appointed arbitrators is removed. In fact, this provision of the ICSID Rules provides a clear safeguard against the abuse of enforced replacement mechanism, and can be used in the future structuring of arbitral instruments.

The ICSID Arbitration Rules also require that "upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceedings shall be or remain suspended until the vacancy has been filled.[100]

Most important of all is the position of the UNCITRAL Arbitration Rules because of their adoption as the Rules of Procedure of the Iran-United States Claims Tribunal. The drafting history of the UNCITRAL Rules gives no indication that the drafters gave any contemplation to the idea of authorizing an incomplete tribunal to function. Indeed, the Commentary on the relevant provisions of the draft UNCITRAL Arbitration Rules, appended to the report of the Secretary-General[101], supports this assumption. This Commentary clearly indicates that the relevant provisions governing the replacement of

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99 Article 56(3) of the ICSID Convention and Rule 11(2)-(a) of the ICSID Rules of Procedure for Arbitration (Text of the Rules in Wetter, op.cit. Vol 4, p. 469).

100 Rule 10(2) of the ICSID Arbitration Rules.

101 See "Report of the Secretary General: Revised draft set of UNCITRAL Arbitration Rules: Commentary on the Draft UNCITRAL Rules", (A/CN. 9/112/Add.1), 12 December 1975, 7 YB.UNCITRAL, 1976, pp. 166-181.

arbitrators are applicable, among other grounds, to the situation where an arbitrator is unwilling to perform his functions.[102] This express reference by the Commentary leaves no doubt that under the UNCITRAL Rules the only remedy against the withdrawal of a party arbitrator is the enforced replacement mechanism.

The UNCITRAL Model Law on International Commercial Arbitration which was finally adopted in 1985 - when the events in the Iran-US Claims Tribunal mentioned in Section A of this Chapter had been brought publicly to the attention of international lawyers - follows the same pattern of enforced filling of vacancies regardless of their cause and nature.[103] The wording of Article 15 of the Model Law, referring to the "withdrawal from office for any other reason", apparently covers the situations such as obstructive withdrawal, since other justifiable circumstances of failure by an arbitrator to act are clearly mentioned under Article 14 of the Model Law.

It is notable that according to a survey by Dr Gillis Wetter on major national arbitration laws, the presence of all arbitrators is necessary during the hearing under the laws of the State of New York, England, Switzerland and Sweden.[104] It must however, be noted that Article 660 of the Iranian Code of Civil Procedure of 1972 requires that:

> Where one of the arbitrators after he has been informed, does not appear in the session held for proceedings or consultations, or he appears but refuses to give award, the award given by the majority of votes shall be valid even if unanimity of votes has been a condition in the agreement for arbitration. Non-appearance or refusal of an arbitrator to give an award or to sign the same shall be recorded in the Award.

Generally speaking, despite the exceptions mentioned above, the remedy against the withdrawal of arbitrators in private law arbitration also

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102 Ibid, p. 171. See also the Working Paper prepared by the Secretariat on the UNCITRAL Rules, (A/CN. 9/113), Ibid, 181, p. 185.

103 UNCITRAL Model Law, Articles 14 and 15.

104 Wetter, op. cit. Vol II, p. 457.

appears to be the enforced filling of vacancy, rather than authorizing the remaining members of the tribunal to proceed.

In conclusion to this sub-section it must be said that in our view, where there is a provision for the enforced replacement of all arbitrators, including the party arbitrator, the need to apply the doctrine of non-frustration, for authorising the remaining members to proceed does not necessarily arise. The reason is that with enforced replacement there is possible delay, but no cause for the permanent frustration of the arbitration.

In fact, in answering the above question one may also need to distinguish between two circumstances. First, where the agreement of the parties does not provide for the enforced replacement mechanism in the event of the withdrawal by an arbitrator. In that case, the doctrine of non-frustration of arbitration may be relevant, despite the fact that the absence of a provision for replacement in the arbitration agreement may represent a traditional and diplomatic approach to the arbitration in question. In other words, the conflict between the diplomatic conception of arbitration and the theory of non-frustration, which is based on the judicial conception of arbitration, should be resolved in favour of the latter.

The second situation is where the agreement of the parties provides for an enforced replacement mechanism as a safeguard against the frustration of arbitration in the event of withdrawal by an arbitrator. With this safeguard, the withdrawal by an arbitrator should not necessarily lead to frustration of arbitration. As a result, the application of the doctrine of non-frustration of arbitration as an argument for authorizing the remaining members to proceed becomes irrelevant, since the withdrawing arbitrator can be substituted by a third party in the final eventuality. Furthermore, while in the first situation there may be no clear evidence that the parties have excluded the possibility of an incomplete tribunal functioning, in the second situation the existence of the

enforced replacement mechanism implies that the parties have necessarily excluded the possibility of an incomplete tribunal functioning.

Another point which needs attention is whether the multi-case structure of the arbitration, such as the Iran-US Claims Tribunal, is in itself strong enough reason to deviate from the parties' agreement providing for the enforced replacement mechanism and to authorize an incomplete tribunal to function in such circumstances. It has been argued that "provisions for third-party appointment of a substitute arbitrator may not be sufficient to meet the situation of a claims tribunal hearing a multiplicity of claims in which arbitrators appointed by one of parties repeatedly withdraw at critical stages of the proceedings", since such withdrawals may result in undue and unacceptable delay.[105] Although this argument cannot be taken lightly, there are still serious doubts as to whether it can in theoretical terms be considered as any different from the case of ad hoc single-case tribunals and thus justify the legality of an incomplete tribunal.

## IV. Precedents

There is a considerable body of instances which can be utilized for studying the problem in question. These Cases have generally been noticed in the context of the problem of frustration of arbitration.[106] What is significant to note is that the relevance and value of many of these Cases may be subject to differing interpretations. It follows that a straightforward review of them without a set of criteria against which they can be assessed, may not produce

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105 Schwebel, op. cit. p. 145. It is notable that the remaining members of the Chambers involved in the Cases discussed in Section A of this Chapter have also implicitly relied on the continuing function of the Tribunal as an argument to proceed in the absence of the Iranian member of the Chamber.

106 E.g., see Schwebel, op. cit. p. 180 ff; Carlston, the Process of International Arbitration, op. cit. pp. 42-51; and Reisman, Nullity and Revision, op. cit. pp. 316-369.

the desirable result. The criteria which can be established in this regard may be summarized as follows:

**1.** Unlike the normal circumstances of a Case interpretation in which the opinion of a judicial body constitutes the primary source of interpretation, such an approach may not be the only method, not even the principal method, for an optimum analysis in this case. This is because in the present situation it is not only the very propriety of the action or inaction by the remaining members of an arbitral tribunal which is the subject of the analysis, but also the extent to which that action or inaction reflects a body of principles acceptable as law. In such circumstances the views expressed by a truncated tribunal in support or rejection of its authority may primarily be of theoretical value, contributing to the theoretical aspect of the argument. It is the attitude of the arbitrating parties towards the problem in a given Case which should, in addition to the view of the remaining members of an incomplete tribunal, be taken into account as reflecting State practice. This is due to the special characteristics of international arbitration as being created by the will of the parties. This is not to minimize the role of the Case law on the issue; rather, to point out the interrelation between a given relevant judicial precedent and its acceptability by the parties involved.

The above point is particularly delicate, because the problem is not disposed of by relying simply on the rule that arbitral tribunals are competent to decide their own jurisdiction. It is, rather, to establish whether such a body was properly constituted in the view of not only itself but also of the parties upon whose agreement it was created. Furthermore, the particular circumstances in which an incomplete tribunal has acted or not acted should be read in conjunction with the arbitral tribunal's governing provisions, that is, the provisions of the arbitration agreement and the rules of procedure.

**2.** A particularly relevant point to be borne in mind is also the specific composition of the arbitral tribunal in regard to whether or not the role of the party-appointed arbitrator was of principal significance in the particular Case in question, considering that in the case of arbitral tribunals composed predominantly of neutral members the continuation of the proceedings by the remaining members may be less controversial.

**3.** Another very important point with regard to the review of the Cases in which an incomplete tribunal has proceeded in the absence of a withdrawing arbitrator, is that they should be read in conjunction with the very many other cases in which withdrawing arbitrators have routinely been replaced. In other words, a review of the reported precedents alone does not give a complete picture of the story. For there are many instances in international arbitration, usually unreported, in which an incomplete tribunal has awaited the replacement of the withdrawing arbitrator in accordance with its governing provisions without continuing the proceedings. It is not convincing to say that these cases do not shed light on the question.[107] In fact, such cases are highly relevant. They demonstrate that continuing the process in the absence of one of the arbitrators was not regarded as the proper course of action by the remaining members of the tribunal.

Due to the fact that these instances are not normally reported widely, a complete citation of relevant cases is not feasible. However, it is possible to note some examples which are well-known. For instance, the Arbitration between the Islamic Republic of Iran and Cementation International Ltd[108] indicates that the ICC Court of Arbitration has applied its general powers of appointment. In fact, it has been noted that the ICC Court of Arbitration regularly applies its general powers of appointment when an express mode of

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107 Schwebel, op. cit. p.295.

108 Laurence Craig and others, "International Commercial Arbitration", op. cit. 12A; issued November 1986, pp. 60-63.

designation of an arbitrator provided for by the contract is frustrated.[109] The Arbitration between the Postal Administration of Portugal and the Postal Administration of Yugoslavia[110], and the Arbitration between SPA and the Government of Congo[111] are among such cases, though they were conducted by other arbitration institutions.

**4.** In fact, not in all instances has the Iran-US Tribunal relied on the idea of continuing the proceeding in the absence of a Party-appointed arbitrator. Most recently, in two Cases Nos. 20 and 21 before Chamber One, Mr Noori, the Iranian member of the Chamber, disqualified himself pursuant to Article 9 of the Tribunal Rules on the ground of his previous dealing with these Cases while a legal adviser to the Government.[112] The other Iranian members of the Tribunal designated by the President to act instead of Mr Noori similarly disqualified themselves on the same ground. The President of the Tribunal taking into account Articles 13 and 7(2) of the Tribunal Rules requested the Agent of Iran to appoint a member for these Cases within thirty days. The President's action was approved by the non-Iranian members of the Tribunal.[113] Preparations by the American Agent for the request for appointment by the Appointing Authority was under way when one of the Iranian members of the Tribunal, Mr Ansari, agreed to act instead of Mr Noori.

Although the above case does not fall within the category of malicious withdrawals, and in principle Mr Noori was obliged to disqualify himself, the circumstances surrounding this case, including the refusal by other Iranian members to act instead of Mr Noori and the delay by the Iranian Government

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109 Ibid.

110 March 1956, 23 ILR, pp. 591-592.

111 November 1979, ICSID Arbitration, 67 ILR, p. 319.

112 Article 9 of the Tribunal Rules, with its Modifications made by the Tribunal, provides that an arbitrator should disqualify himself if there are circumstances likely to give justifiable doubts as to his impartiality or independence with respect to a particular case.

113 See AR 87/88, pp. 2-3; Letter of 15 February 1988 from the President of the Tribunal to the Agent of Iran, Ibid, pp. 61-62.

to appoint a replacement, raise some questions as to the real intention behind this act of disqualification. However, despite these surrounding circumstances the Tribunal did not attempt to argue for its authority to proceed. On the contrary, it requested the Government of Iran to appoint a replacement for Mr Noori. Nor was the multiplicity of the Cases to be dealt with by the Tribunal regarded as a cause for continuing the proceedings in the absence of Mr Noori's substitute, even in view of the refusal by other Iranian members of the Tribunal to replace Mr Noori. Nevertheless, the relevance of this Case is very limited in view of the fact that the absence of Mr Noori had a legitimate justification which may have prevented the Tribunal from asserting the right to proceed in his absence. That is to say, in view of the apparent justification for the absence of Mr Noori it would have been hard for the remaining members of the Chamber to argue that his absence was not justified.

Interestingly, the latter point brings to the surface another contradiction in the theory of legality of incomplete tribunals; that is, that the question of whether a withdrawal is justified or not falls with the remaining members of the tribunal, whose legality is in question in the first place. In other words, the theory of legality of incomplete tribunals is principally legitimized on the basis of an illegal withdrawal by an arbitrator. However, an implication of the theory is that an incomplete tribunal whose right to continue the proceedings depends primarily on the illegality of the withdrawal, under that theory, is already constituted before ascertaining its own legality, in order to determine the legality of the withdrawal.

Such a competence could be accepted if there were indications in the governing provisions that the other members of the tribunal were competent to decide the legality of the withdrawal. For instance, the ICSID Convention gives the remaining members of the tribunal the power to decide whether the

resignation of one of its arbitrators has been justified.[114] However, even under the ICSID system the penalty or remedy against an illegal withdrawal or resignation of a party-appointed arbitrator is to deprive the party concerned of the right to make a substitute appointment and as an alternative to authorize the Chairman of the Administrative Council to appoint a replacement directly.[115]

However, many other rules of arbitration, including the Rules of the Iran-US Claims Tribunal, do not differentiate between illicit and other forms of withdrawals. As a consequence, it should be assumed that the provision for the enforced filling of vacancies covers all categories of withdrawals.

In the light of the foregoing presumptions, the Cases relating to the problem of incomplete tribunals may be reviewed in the following categories:

## IV(1). Cases in which the arbitration agreement or the governing rules expressly permitted the remaining members of the tribunal to continue the proceedings in the event of the withdrawal by a party-appointed arbitrator

The only known case falling within this category is the Lena Goldfields Arbitration.[116] In this Case, the Agreement of 1925 between the Government of the Soviet Union and the Lena Goldfields Company provided for a three-member tribunal consisting of two Party arbitrators and a neutral member. It is significant that the Agreement expressly provided that should one of the Parties or its arbitrator default the two remaining members could, at the request of the other Party settle the dispute, on condition that such decision was unanimous.[117]

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114 Article 56(3) of the ICSID Convention, and Rule 82) of the ICSID Rules of Arbitration.

115 Article 56(3) of the ICSID Convention , and Rule 11(2)-(a) of the ICSID Rules of Arbitration.

116 Lena Goldfields Co Ltd. v USSR, Arbitration Award of 2 September 1930, 5 A.D., pp. 426-427; The Times, 3 September 1930, p. 7.

117 Ibid.

After the appointment of the three arbitrators the Soviet Union withdrew her arbitrator and refused to participate in the arbitration. The remaining members of the Arbitration Court met and declared that "according to the plain language of Article 90, paragraph 6, the jurisdiction of the Court remained unaffected".[118] Thus the Arbitration Court rendered award in favour of the Lena Goldfields Company.[119]

It is obvious that the Lena Goldfields Arbitration Court was able to act by two of its members solely on the basis of express provision in the Agreement of the Parties. Therefore the relevance of this Case depends largely on whether the provision authorizing the remaining members to act represents a general principle or an exception. In terms of frequency of inclusion of such provisions in arbitration agreements it is certain that the above-mentioned clause in the Lena Goldfields Arbitration Agreement represents an extremely exceptional example. The question is therefore why such provisions are not inserted in other arbitration agreements. Is it because the theory of permitting an incomplete tribunal to function is so well-established that the insertion of such a provision would merely be declaratory of an established principle? The answer can hardly be in the affirmative. For if such a principle did actually exist in the law, one would find no explanation at all for the failure of the attempts by the ILC in its long years of work to introduce the concept of legality of incomplete tribunals into international law.

Judge Schwebel has argued that the above-mentioned clause in the Lena Goldfields Agreement may be assumed to be the common intention in many other arbitration agreements which are silent on the matter.[120] In our view such an argument runs not only contrary to the realities of the situation, including the above-mentioned experience of the ILC, but also against the very

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118 Ibid.

119 Ibid.

120 Schwebel, op. cit. pp. 214-215.

fact of the need for conducting such a scholarly research into the matter. Moreover, if such a common intention existed in many other arbitration agreements which are silent on the matter there would have been no need throughout the history of the law of international arbitration to develop the notion of enforced filling of vacancies. For if such an assumption could be derived from the Lena Goldfields Agreement, that is, if the above-mentioned clause in the Lena Agreement represented the common intention in many other arbitration agreements, the painstaking work done over the years for the development of the notion of enforced filling of vacancies would be quite absurd.

Moreover, in view of the express authorization of the remaining members of the Lena Goldfields Arbitration Court, we do not find any direct connection between that Case and the rule of effective interpretation, upon which the doctrine of non-frustration of arbitration is based. We have acknowledged that the rule of effectiveness in interpretation of treaties is a viable principle resulting in some support to the authority of an incomplete tribunal as far as the theoretical aspects of the argument are concerned. However, there appears to be little connection between the above Case and the rule of effective interpretation. Again, the primary aim of a Case study in these particular circumstances is to establish the extent of the support which one may be able to derive for one's theoretical arguments from the practice. However, in view of the express provision in the Lena Goldfields Arbitration for the authority of an incomplete tribunal, one can hardly derive a direct practical support for the rule of effective interpretation from that Case, in spite of what some have suggested.[121]

In short, the Lena Goldfields Case represents a uniquely exceptional example and its relevance to the argument in favour of the legality of a

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[121] Ibid, p. 215.

truncated tribunal is very limited. Had the clause in the Lena Goldfields Case been further inserted into a number of other agreements one could possibly argue in favour of its representing a principle, but this certainly is not the case.

## IV(2). Cases in which the remaining members have continued the proceedings in the absence of an express provision

In addition to the Lena Goldfields Case, there are some other instances in which incomplete tribunals have continued the proceedings despite the withdrawal of a party-appointed arbitrator. All these Cases provided for a three-member tribunal.

**a-** During the later phase of the Republic of Columbia-Cauca Company Arbitration[122], on 22 October 1897 the Columbian Commissioner, Mr Pena, resigned from the Commission in protest at what he called the majority's intention to render an award in excess of jurisdiction.[123] The two remaining members of the Commission, the arbitrator appointed by the Claimant Company and the neutral member, passed a resolution that it was impracticable to procure timely appointment of a replacement because the extended time fixed by Article 8 of the Arbitration Agreement would expire on 31 October 1897.[124] Therefore the two arbitrators resolved to proceed and rendered an award against the Government of Columbia.[125]

The validity of that award was challenged by the Columbian Government in the US courts, among other points, on the ground of absence of its arbitrator.[126] The validity of the action by the two Commissioners was,

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122 Republic of Columbia v Cauca Co, (Circuit Court, D. West Virginia, January 1901), 106 Fed. P. 337.

123 Letter from Mr Pena, Columbian Commissioner, Ibid, p. 345.

124 Ibid, pp. 345-346.

125 Ibid, pp. 346-347.

126 Ibid, p. 337.

however, confirmed by these courts[127], in particular by the US Supreme Court.[128]

**b-** During the hearing in the French-Mexican Arbitration[129] the Mexican member of the Commission withdrew from the proceedings. Despite this withdrawal the French member of the Commission and the Chairman continued the proceedings in his absence and rendered twenty-three Awards. Mexico lodged a protest against the awards, declaring that they were invalid. By a Convention of August 2, 1930, a new Commission was set up, which was to decide, among others, the claims which the "rump Commission" had already decided.[130]

**c-** The so-called Sabotage Cases, or Black Tom Explosion Case[131] provides another example for discussion in the context of our problem. This Arbitration Commission consisted, unusually, of two American members and one German. Established under the Claims Agreement of August 10, 1922, it was composed of Mr Justice Owen J. Roberts of the United States Supreme Court, as Umpire; Colonel Christopher B. Garrett, as American Commissioner; and Dr Victor L.F. Henecking, as German Commissioner.[132] The Tribunal was constituted and continued its work for some length of time. Because of certain disagreements, in a note of 24 March 1939 the German Embassy notified the Department of State of the withdrawal of the German Commissioner, and in a note of 10 June added that after the withdrawal of the German member "the Commission has been incompetent to make decisions".[133]

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127 Ibid, pp. 348-349.

128 190 U.S. 524, pp. 527-528, As reproduced in 47 U.S. Sup. Crt. Rep. 1159, pp. 1162-1163.

129 5 A.D., p. 424-426; Whiteman, Digest of International Law, op. cit., Vol 12, pp. 1067-1069.

130 Ibid.

131 L. H. Woolsey, "The Arbitration of the Sabotage Claims Against Germany", 33 AJIL, (1939), p. 737; see also United States of America on Behalf of Lehigh Valley Railroad Co, etc. v Germany [The Sabotage Cases-Black Tom and Kingsland], Ibid, pp. 770-772.

132 Ibid, p. 737.

133 Ibid, 740.

The Umpire and the remaining Commissioner declined to allow the arbitration to be frustrated and proceeded with the consideration of the Case.[134] The American Commissioner and the Umpire expressed the view that the withdrawal of the German member did not terminate the jurisdiction of the Commission.[135] However, the German Government declared that the decision of the remaining members was without legal effect and refused to recognize the validity of the Award.[136]

d- The Norwegian Shipowners Claims Arbitration[137] has also been cited by some writers as being supportive of the legality of incomplete tribunals.[138] However, it can definitely be said that this Case is an instance of refusal by an arbitrator to sign the award and to appear in the session in which the Award was announced, and not an example of withdrawal from the proceedings. The Agreement of 30 June 1929 between Norway and the United States provided for a three-member Arbitration Commission, composed of one American member, one Norwegian and one neutral who was the President of the Commission.[139] It is notable that the decision was to be made by a majority vote.[140]

The Award was announced on 13 October 1922. On the same date and by a letter dated 13 October, the American member of the Commission sent a

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134 Ibid.

135 Ibid.

136 Ibid. Judge Schwebel notes that in 1953 the German Government entered into an international agreement with the US for the payment of the very Awards rendered by the two remaining members. But he cites no reference or treaty for his assertion. (Schwebel, op. cit. pp. 225-226.)

137 Scott, "United States-Norway Arbitration Award", 17 AJIL, (1923), p. 287. The Award is reported Ibid, pp. 362-398; also in 1 RIAA. pp. 307-346.

138 Schwebel, op. cit. pp. 292-295.

139 The text of the Arbitration Agreement is included at the beginning of the Award, 17 AJIL, (1923, pp. 362-365).

140 Article IV of the Arbitration Agreement, Ibid.

letter to the Secretary General of the PCA, under whose auspices the Arbitration was conducted, which read:

> Sir:
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> In making the award signed today, Friday, October 13, by Mr James Vallotton and the Secretary General of the Permanent Court of Arbitration, Mr Vallotton and Mr Vogt, in my opinion, have disregarded the terms of submission and exceeded the authority conferred upon the United States-Norway Arbitration Tribunal by the Special Agreement of June 30, 1921, which imposes definite limits upon its jurisdiction.
>
> I have therefore refused to be present when the award was announced.
>
> I send you this notice in order that the parties to this Arbitration may be informed by you of the reasons for my absence and that they may be made a matter of record...[141]

It is obvious not only from the date of the letter but also from the contents of it that after all the judicial processes were completed, the American member simply refused to be present when the Award was formally announced. The Norwegian Shipowners Case was not a case of withdrawal from the proceedings at all. It can only be treated as tantamount to a refusal to sign the award. There is no problem in international arbitration if an arbitrator refuses formally to sign the award; the majority can simply record his refusal and announce the award. The argument that the Case was not a typical example of withdrawal from the proceedings is strengthened by the fact that although the United States Government protested against the Award, prior to its acceptance of the Award, it did not rely at any time on the withdrawal of the US Arbitrator as a basis of the protest. It is also clear from the letter of the United States Secretary of State[142] which indicates his Government's intention

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141 Ibid, p. 399.

142 The text of the letter of 26 February 1923 of the US Secretary of State, in Scott, op. cit. 17 AJIL, (1923), pp. 287-289.

to pay the amount of the Award, that its earlier protest was on the ground of the failure of the Tribunal to give the reasons for the Award.[143]

While some of the above-mentioned cases appear to provide some support to the notion of legality of incomplete tribunals, certain points may affect their relevance to the issue.

First, the governing provisions in the above cases did not provide for an automatic mechanism for the replacement of the resigning or withdrawing member. Although in the Cauca Case a mechanism for the filling of vacancies did exist by the joint agreement of the Foreign Ministers of Columbia and the United States[144], the limited amount of time left to the expiry of the life of the Commission was asserted as a basis of action by the remaining members of the Commission to proceed with the Case. Moreover, the replacement mechanism under that system was not a fully guaranteed system.

Second, the fact that the Franco-Mexican Commission's decisions' were further submitted to a new tribunal diminishes the value of that precedent.

Three, all these and other factors have led commentators to adopt conflicting interpretations of these cases, according to and in support of their own conceptions of international arbitration. Professor Carlston, a great authority on international arbitration, does not appear to regard any of these cases as legally valid.[145] On the other hand, Michael Reisman points out that the subsequent referral of the Franco-Mexican Commission's decisions to a new commission may be regarded as a clear indication that the Commission's ruling was unlawful. However, he further says that the remaining members' decisions in that Case were not incorrect. Nevertheless, he points out that the

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143 Ibid, p. 290.

144 Article VI of the Columbia-Cauca Company Arbitration Agreement of 4 January 1897, in 190 U.S. 524, as reported in 47 U.S. Sup. Crt. Rep. p. 1159.

145 Carlston, the Process of Int'l Arbitration, op. cit. pp. 42-51.

fact that the "Commission subsequently terminated proceedings reveals the presiding Commissioner's uneasiness and failure of his strategy".[146]

Judge Schwebel, on the other hand, appears to regard all these cases as supportive of his theory of the authority of truncated tribunals to proceed.[147] For instance, he appears to disregard the effect of the 1930 Convention referring the decisions of the French-Mexican Commission to a new commission.[148] In his view, the 1930 Convention had been concluded solely for political reasons, that is because France was more interested in having awards rendered by a process which would result in Mexican payment of these twenty-three claims.[149] The point is that this argument is exactly the same as the one which the proponents of illegality of incomplete tribunals have advanced. After all, they argue, an effective result in international arbitration depends on a process which would be acceptable to both parties.

## IV(3). Cases in which the withdrawal of party arbitrators has led to the disruption of the proceedings

### IV(3)-(A). Arbitral tribunals with more than three members

There are instances in which the withdrawal of party arbitrators has disrupted or virtually terminated the work of the arbitral tribunal. In the absence of any indications to the contrary, it is possible to assume that the remaining members of these tribunals did not consider it to be legally justified to proceed in the absence of one or more of party-appointed arbitrators. However, there might also have been other considerations for suspending the proceedings in the particular circumstances of each case.

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146 M. Reisman, Nullity and Revision, op. cit. pp. 467-468.

147 Schwebel, op. cit. pp. 188-189, 193, 210, and 295.

148 Ibid, p. 210-211.

149 Ibid, p. 211.

a- To begin with, in the Jay Treaty Arbitration[150], the work of the two Arbitration Commissions, set up in Philadelphia and London, respectively under Articles 6 and 7 of the Treaty, was halted because of the withdrawal of the American Commissioners in the Philadelphia Commission and the retaliatory withdrawal of the British Commissioners in the London Commission.[151] Both Commissions were composed of five members - two Americans, two British and one neutral.[152] Three Commissioners constituted a quorum, provided that one of the Commissioners of each side and the neutral member were present.[153]

It is notable that before the final withdrawal of the Party-appointed Commissioners, they had occasionally withdrawn and after the suspension of the proceedings returned and the Commissions had been reconstituted.[154] However, after the final withdrawals the proceedings were permanently disrupted. Later, the Parties signed an agreement for a lump sum solution to the Philadelphia Cases and the reconstitution of the London Commission.[155]

b- In the 1955 Buraimi Oasis Arbitration[156], the British Arbitrator in protest at what he called the lack of impartiality on the part of the Saudi Arabian Arbitrator resigned during the work of the Tribunal.[157] It is notable that the Tribunal consisted of five members - three neutral members, one

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150 For the text of the Treaty see 52 CTS, p. 243, Treaty of 19 November 1794, between Great Britain and the United States. For the Report of the work of the Philadelphia Commission acting under Article 6 of the Treaty see Moore, International Adjudications, Vol 3, Oxford University Press, London, 1931. For the report of the Work of the London Commission, acting under Article 7 of the Treaty see Ibid, Vol 4. Certain parts of the Treaty of Jay including Articles 6 and 7 are printed in Ibid, Vol 4, pp. 3-6.

151 See Moore, op. cit. Vol 3, pp. 96-97, 165-171, 233-234; and Ibid, Vol 4, p. 108.

152 November 19, 1794, Treaty of Jay, Articles 6 and 7.

153 Ibid.

154 Moore, op. cit. Vol 3, pp. 96-97, 165-171.

155 Ibid, Vol 3, pp. 352-356.

156 For the text of the Arbitration Agreement establishing the Arbitral Tribunal between Saudi Arabia and Britain, 1954, see Wetter, International Arbitral Process, op. cit. Vol 3, pp. 357-365.

157 For the documents relating to the incident see Ibid, pp. 368-378.

British and one Saudi Arabian.[158] A provision for the eventual replacement of the Party-appointed arbitrators, in case of their withdrawal or death, etc., by the President of the ICJ was incorporated into the Arbitration Agreement.[159] The decision of the Tribunal was to be made by a majority vote.[160]

It is significant that, despite the fact that the Tribunal was predominantly composed of neutral members, after the resignation of the British member the remaining four members of the Tribunal made no attempt to continue the proceedings. The Saudi Government urged for the replacement of the British member and shortly after the withdrawal of the British arbitrator, the President of the Tribunal and later one other neutral member resigned from the Tribunal.[161] Therefore the work of the Tribunal came to a halt and the remaining members instead of taking up the idea of continuing the proceedings, chose to resign from the Tribunal.

**c-** The Franco-Tunisian Arbitration Commission[162] consisted of three French and three Tunisian members. A provision was made for a neutral member who was to resolve any eventual dispute between the national members by a casting vote. According to Article 21 of the Convention establishing the Tribunal, four members constituted a quorum on condition that two of the members were French and two Tunisian. The presidency of the Tribunal was to alternate, every two years, between a French and a Tunisian arbitrator.

After the constitution of the Tribunal the Tunisian arbitrators argued that the Arbitration Convention was inapplicable following Tunisia's

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158 Article I of the Arbitration Agreement, Ibid, p. 358.

159 Article XIV(e), Ibid. A similar provision regarding the replacement of the neutral members existed under Article I of the Agreement.

160 Article XIII(a), Ibid.

161 Ibid, pp. 377-378.

162 24 ILR, pp. 767-770; Whiteman, Digest of International Law, op. cit. Vol 12, pp. 1071-1072.

independence, and withdrew from the Tribunal.[163] Lacking a quorum, the French President of the Tribunal asked for the replacement of the Tunisian arbitrators in accordance with the Arbitration Agreement and suspended the proceedings.[164]

It has been argued that the failure of the Jay Treaty Commissions and the French-Tunisian Arbitration Tribunal to proceed was because of the express quorum requirement under the relevant provisions and therefore they do not constitute relevant precedents.[165] It is also submitted that the Buraimi Oasis Tribunal's failure to proceed was on the ground of the lack of majority following the resignation of two of its neutral members.[166] In our view, although certain aspects of these Cases may limit their relevance, such as the existence of the rule of quorum, they are not totally unrelated to our question in this Chapter, for the following reasons:

**1-** The existence of the rule of quorum in two of these Cases, the Franco-Tunisian, and Jay Treaty arbitrations, in effect argues in favour of the principle of equal representation of the arbitrators of both parties in the composition of arbitral tribunals. Because in all the cases cited above and throughout this Chapter, the presence of an equal number of arbitrators of each of the parties has been a precondition for a quorum. With the very rare exceptions already discussed, there are no other examples of the quorum rule in international arbitration instruments which would derogate from that principle.

**2-** The provision for the rule of quorum has generally been made in those arbitration agreements which have provided for more than three members - usually five or more. Nevertheless, the rule of equal representation of the arbitrators of both parties has been maintained in the quorum provisions. The

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163 Ibid.

164 Ibid.

165 Schwebel, op. cit. pp. 183, 250.

166 Ibid, p.245.

natural conclusion is that, because of the impossibility of achieving a quorum based on the principle of equal representation, the parties have generally refused to provide for the rule of quorum in the three-member arbitral tribunals. That is to say, this kind of tribunal is not permitted to function in the absence of one of its members, since there is no possibility of observing the equilibrium between the parties.

**3-** In the Buraimi Oasis Arbitration Tribunal the neutral arbitrators resigned only after the resignation of the British arbitrator. In other words, their resignation was a way of suspending the proceedings because of the withdrawal of the British arbitrator. Thus, the fact that the neutral members resigned may be seen as their recognition of their inability to continue the proceedings in the absence of a Party-appointed arbitrator.

## IV(3)-(B). The Case of three-member arbitral tribunals

There are three important Cases which may lend considerable support to the argument that the notion of enforced filling of vacancies implies an exclusion of the right of an incomplete tribunal to function. These Cases have a close identity with the current judicial conception of arbitration. First of all, all three of these Cases provided for a three-member tribunal similar to the Chambers of the Iran-US Claims Tribunal. Secondly, they all provided for an advanced mechanism for the eventual replacement of the withdrawing arbitrator by a third party.

**a-** In the Romanian-Hungarian Mixed Arbitral Tribunal, or the well-known Hungarian Optants Cases[167], the Treaty of Trianon provided for the

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167 Francis Deak, The Hungarian-Rumanian Land Dispute, New York, Columbia University Press, 1928, pp. 74-154; Reisman, op. cit. p. 686-698. The Case has also been extensively analysed in Schwebel, op. cit. pp. 193-200.

establishment of a three-member Tribunal, consisting of one Hungarian, one Romanian and one neutral who would be the President of the Tribunal.

After the Constitution of the Tribunal and during the hearing of a case, the Romanian arbitrator under the instruction of his Government withdrew in protest at what was called the Tribunal's excess of jurisdiction.[168] The work of the Tribunal was suspended and both Parties appealed to the Council of the League of Nations. In a controversial decision the Council of the League of Nations proposed certain conditions before appointing a substitute. This was not accepted by Hungary. Finally, the Council of the League of Nations, despite the objections of Romania, decided to appoint substitute arbitrators to a Mixed Arbitral Tribunal Which would be expanded to a five-member Tribunal.[169] Before the establishment of that Tribunal the Parties reached a settlement.[170]

**b-** The second one is the Upper Silesian Arbitral Tribunal Case. The 1922 Geneva Convention of Upper Silesia provided for a Tribunal composed of one German, one Polish and a neutral arbitrator, as President chosen by the League of Nations.[171] After the constitution of the Tribunal, the Polish arbitrator resigned and the Polish Government maintained that the activity of the Tribunal had come to an end.[172] The President of the Tribunal suspended the proceedings and asked the Polish Government for the replacement of its arbitrator. The matter was finally resolved by negotiations between the Parties.[173]

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168 Deak, op. cit. pp. 74-77; Reisman, op. cit. p. 692.

169 Deak, op. cit. p. 154.

170 Ibid; and Schwebel, op. cit. p. 197.

171 Georges Kaeckenbeeck, The International Experiment of Upper Silesia, Oxford University Press, 1942, pp. 26-30.

172 Documents concerning the resignation of the Polish arbitrator annexed to Kaeckenbeeck's report are in French. The Case has also been analysed in Schwebel, op. cit. pp. 285-288. Our reference regarding the resignation of the Polish arbitrator is to the latter.

173 Ibid, pp. 287-288.

**c-** The third illustrative precedent and the most recent one is the Sudan Arbitration Case.[174] According to the Arbitration Agreement between the Government of Sudan and the Turriff Construction Company Ltd, a British Company, the Arbitration Tribunal consisted of three arbitrators, one appointed by the Government of Sudan, one appointed by Turriff and the President by common agreement of the two Parties.[175] After the appointment of all three members and constitution of the tribunal, the Tribunal met on 14th March 1969 at the Hague for preparation for the hearing. The Arbitration was conducted under the auspices of the PCA.[176]

On 8th May 1969, the Government of Sudan wrote to the British Ambassador at Khartoum stating that, for the reasons set out in the letter, it had decided to withdraw from the Arbitration. The Secretary-General of the PCA was also informed of this by the Government of Sudan.[177] Nevertheless, the three members of the Tribunal confirmed to the Secretary-General that it was their several intention to be present at the Peace Palace on the date fixed for the hearing.[178] However, on 26 May the Secretary-General received a cable from Judge Mudawi, the member of the Tribunal appointed by the Government of Sudan, reading: "Owing personal reasons unable to attend please postpone".[179] On 29 May 1969, the President of the Tribunal also received a cable from Judge Mudawi which read: "Owing unforeseen circumstances unable attend postpone".[180]

Thereafter, repeated efforts were made by the Secretary-General and by the President of the Tribunal to obtain further information from Judge Mudawi

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174 The Case was reported by Dr L. Erades, the President of the Sudan Arbitration Tribunal in 17 Neth.I.L.R., (1970), pp. 200-222.

175 Ibid, p. 202.

176 Ibid, pp. 205-207.

177 Ibid, p. 207. The text of the letter is reprinted in Ibid, pp. 207-209.

178 Ibid, p. 211.

179 Ibid, p. 212.

180 Ibid.

as to the length of the postponement required.[181] Judge Mudawi did not appear at the hearing which was to commence on 5 June 1969. On 5th June 69, at the request of Turriff, 9th June was fixed as a new date for the hearing, with the further request that "if Judge Mudawi be not present at the date and time fixed for the hearing ... the hearing be further adjourned until further order".[182] Turriff's request was accepted and it was agreed that in the event of the hearing being further adjourned as aforesaid the following actions should be taken: (a)- the submissions of Turriff and any written evidence or other material desired to be advanced or deposited by Turriff should be taken before and deposited with two members of the Tribunal and fully recorded, authenticated and preserved at the Peace Palace by the Secretariat.[183]; (b)- "On such date thereafter as the hearing shall take place the Tribunal shall consider the said transcripts and written evidence and other material together with such additional submissions, evidence and material as may then be placed before it".[184]

It is notable that neither Turriff nor the arbitrator appointed by it argued that the two remaining members had the authority to proceed in the absence of Mr Mudawi.

On 19th June 1969 Judge Mudawi was still absent. However, the depositing of evidence by Turriff in the manner described above with the two arbitrators continued until 3 July 1969.[185] On 4th July 1969, the Secretary-General having been unable to obtain any information from Judge Mudawi that he would be able to attend for the hearing at any time in the future, despite a further cable dated 3 July asking Judge Mudawi whether he would be available on any date, September, or October, concluded that a vacancy had occurred

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181 Ibid.

182 Ibid, p. 213.

183 Ibid.

184 Ibid.

185 Ibid, p. 214.

within the meaning of Clause 2(I) of the Submission. He notified the Parties accordingly. Under Clause 2(3) of the Submission it then became the duty of the Government forthwith to appoint a new arbitrator to fill the vacancy. The Government did not fill the vacancy within 60 days as prescribed in the Submission Agreement.[186] Under Clause 2(6) of the Submission Agreement Turriff requested the President of the ICJ to fill the vacancy. On 2nd October 1969 the President of the ICJ duly appointed Professor Kwamena Bentsi-Erchill, Dean of the Law School of the University of Zambia and he accepted the appointment.[187] Dr Erades, the President of the Tribunal, describing these events in his article writes that upon the appointment of the new member the remaining members were automatically deemed to have been re-appointed.[188]

It has to be noted that although the Arbitration Agreement expressly provided for the suspension of the proceedings in the event of a vacancy, such a provision in our view is nothing more than declaratory of the principle which is inherent in the provision for the third-party replacement mechanism.

In short, in our view these Cases clearly demonstrate that neither the Parties involved nor the remaining members felt that an incomplete tribunal was permitted to continue the proceedings in the absence of a withdrawing arbitrator. It is true that certain criticisms have been levelled at the action by the Council of the League of Nations in regard to the appointment of a replacement in the Hungarian Optants Cases during the sessions of the ILC by some of its members.[189] However, these criticisms concern the failure of the Council of the League of Nations to make a prompt appointment. There was nothing wrong with the action of the remaining members of that Tribunal in

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186 Ibid, p. 215.
187 Ibid.
188 Ibid.
189 YBILC, 1952, Vol I, pp. 22-29.

suspending the proceedings and asking for a replacement in accordance with its governing provisions.

Finally, it is worth mentioning that one of the illustrative examinations into the problem of incomplete tribunals has been conducted by the Office of Legal Advisor to the US Department of State. In a memorandum prepared in the course of the Peace Treaties Case by this Office it was stated that it was unsound to argue in favour of the legality of incomplete tribunals.[190] Nevertheless, for obvious reasons the United States adopted a different position in the Peace Treaties Case.

The above-mentioned memorandum, after a thorough study of the views of various writers[191], pointed out that:

> The views of the treatise writers lead to the conclusion that it is unsound to argue that a tribunal composed of less than the number of members contemplated by the basic agreement may decide without having been organized as a full tribunal.[192]

The memorandum noted that cases decided by less than a full tribunal did not inspire confidence. With regard to the Cauca Company Case, the memorandum observed:

> This Case cannot be regarded as a precedent for action by a two-member tribunal, when the agreement calls for a three-member tribunal. Here, as Justice Holmes emphasized, the Columbian Commissioner resigned when hardly anything remained to be done except to sign the award.[193]

With respect to the Lena Goldfields Case, the memorandum noted:

> If anything is to be gleaned from the Lena Goldfields Case in support of the contention that a two-man tribunal can decide a case in lieu of a three-man tribunal, provided they are in agreement, it is the proposition that if it is desired that a two-man tribunal shall be authorized to decide the case provided

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190 M. Whiteman, Digest of International Law, op. cit. Vol 12, pp. 1063-1068.

191 Ibid, pp. 1063-1066.

192 Ibid, p. 1063.

193 Ibid, pp. 1066-1067.

> they are unanimous in their views, such a provision must be made in the agreement to arbitrate. Even, in such a case, the USSR refused to comply with the decision as binding.[194]

The memorandum also doubted that the Sabotage Cases could have any precedent value, because:

> The only reason why it was found possible to give effect to the award in those cases was the fact that such money was used in settlement of the awards made pursuant to the above-discussed decision, was already in the Treasury of the United States in the Special Deposit Account, ear-marked for settlement of the awards of the Commission.[195]

Finally, with regard to the French-Mexican Claims Commissions, the memorandum pointed out that:

> This then was an instance where awards of a two-member Commission, presuming to act for a three-member Commission, were subsequently repudiated. Even the action here taken differentiated between decisions made before the Mexican Commissioner withdrew and those made by the two-man Commissions.[196]

## Conclusion

From the consideration of the foregoing discussion it is obvious that the practice and theory of international arbitration do not provide a uniform answer to the question of legality of "rump, incomplete, or truncated" tribunals. The answer to the question depends largely on the conception of arbitration applied.

It is true that international arbitration in the late twentieth century has gradually developed a closer identity with the judicial conception of arbitration. However, there are certain areas of international arbitration which retain its unique and characteristic features as distinct from other forms of

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194 Ibid, p. 1067.
195 Ibid, p. 1067.
196 Ibid, pp. 1067-1068.

judicial settlement. Among these features is the particular structural equilibrium in the composition of most arbitral tribunals with respect to the parties. This equilibrium is particularly relevant where the tribunal is composed of three members, and/or a multiple of that number with the same formation. It is also important to note that the arbitration tribunal derives its powers from the agreement of the parties.

The principle of non-frustration of the arbitral proceedings is well-founded and sound. However, the controversy is not so much over the illegality of a malicious withdrawal by a party-appointed arbitrator, over which the theory of non-frustration becomes applicable. There can be little doubt that such a withdrawal is unlawful and engages the international responsibility of the State in question, should it be proved that the withdrawal has taken place under its instructions. The question is, rather, whether authorizing an incomplete tribunal to proceed is an appropriate remedy for that action. This question has to be answered in the light of the practice of States as one of the main sources of the law of international arbitration as well as other applicable principles.

The work of the International Law Commission on Arbitral Procedure clearly demonstrates that the notion of legality of an incomplete tribunals did not form part of international law at the time of that work, and with the failure of that idea to materialize in the instruments adopted by the International Law Commission, it can hardly be assumed to have legality now.

On the basis of the strength of the principle of non-frustration and some precedents, it may be argued that, in cases where there is no specific provision for the enforced filling of vacancies, an incomplete tribunal, in the event of an obstructive withdrawal may be permitted to function, on the assumption that the parties have not excluded such a possibility.

The situation in which there is a provision for the enforced filling of vacancies is totally different. The existence of such a provision clearly implies that the parties have necessarily excluded the possibility for the remaining members to continue the proceedings, particularly if the tribunal is a three-member one, where the indications derived from the structure of the tribunal are stronger in the direction of the above conclusion.

The existence of the provision for the enforced filling of vacancies implies that in the view of both parties the constitution of the tribunal by the remaining members in the absence of a member is not the proper remedy against the withdrawal by an arbitrator. Moreover, it indicates that the parties have intended to keep the carefully balanced equilibrium in the tripartite structure of the tribunal untouched.

In addition, in such cases an argument based on the principle of non-frustration is less relevant. This is because if the procedure for the replacement is followed there should be no possibility for the permanent frustration of the arbitration.

The history of the development of international arbitration also supports the above argument. It is that while almost all arbitration instruments, especially those drafted currently, provide for the enforced replacement of vacancies, the provisions permitting an incomplete tribunal are almost non-existent. Therefore the simple question arises of why these instruments have not chosen the solution of permitting, beforehand, an incomplete tribunal to function, despite the fact that by providing for the enforced replacement system they have shown an awareness of the problem of frustration by providing a remedy against it. A particularly relevant point in this respect and in respect to the Iran-US Claims Tribunal is the drafting history of the UNCITRAL Arbitration Rules, during which there was no contemplation of permitting an incomplete tribunal to function.

Furthermore, although the multiplicity of claims dealt with by the Iran-US Tribunal is an argument which cannot be taken lightly in relation to the problem in question, it is doubtful whether it can by itself justify a departure from the agreement of the Parties regarding the nature of the remedy against the withdrawal of arbitrators. Moreover, the Iran-US Claims Tribunal has been working since 1981 and it may have to work for some years to come. As a consequence, many Cases are still pending before the Tribunal which were filed in 1981/82. With the exception of very minor interruptions, there are no indications that the Party-appointed arbitrators have been withdrawn regularly. That is, interruptions arising from the withdrawal of an arbitrator have not been the main cause of prolongation of the proceedings.

The legality of an incomplete tribunal is even less admissible in the circumstances where the remaining members of the tribunal have not made any attempt to ask for the replacement of the withdrawing member prior to continuing with the case.

With regard to the Iran-US Claims Tribunal Cases, what is important to be borne in mind is that in the instances of withdrawal cited earlier, the remaining arbitrators, with the exception of the Saghi Case[197], have not in explicit terms claimed the right to proceed with these cases based on the principle of non-frustration. They have, rather, justified and presented the action as a case of refusal to sign the Award. There are individual opinions of the American arbitrators which have asserted the right to proceed on the basis of the rule of non-frustration. However, the explanations appended to the Awards themselves by the remaining arbitrators concerned have justified the action solely on the basis of the provision in the Tribunal Rules which concerns the case of refusal to sign the award. Given the absence of any legal reasoning to explain the international legal basis of their action in relation to the principle

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197 See Supra, pp. 252-254.

of non-frustration by the remaining members involved, the contribution of these Cases to the theory of non-frustration is ambiguous and limited.

There is a question as to whether Iran's withdrawal of its challenges to the Awards in the Cases discussed[198] may constitute a tacit recognition of the validity of the Awards made by the remaining members of the Chambers of the Iran-US Tribunal. In view of the circumstances in which Iran found it imperative to withdraw its challenges, described in Chapter Six below, this is unlikely to be the case.

Finally, it is necessary to distinguish between two circumstances. First, is the question of personal liability of the arbitrator, who by unjustifiable action, deprives the tribunal of the power to act. The personal liability of the arbitrator cannot necessarily be remedied against the appointing party by allowing the remaining members of the tribunal to proceed, in the absence of express authorization to do so.

Second, when the international responsibility of a State is engaged as a result of a withdrawal by instructing its arbitrator to withdraw, it is doubtful that the remaining members of an arbitral tribunal with a limited mandate would be competent to consider the international responsibility of that State and thus remedy it by proceeding with the case. It is the right of the other party to bring an action before a competent tribunal for the breach of international obligations against the State concerned.

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198 See Infra, Chapter Six, p. 345.

# CHAPTER SIX

# PROCEDURAL REMEDIES AGAINST AWARDS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

## SECTION A

# PROCEDURAL REMEDIES AGAINST INTERNATIONAL ARBITRAL AWARDS

### I. The Legal Possibility of Nullity or Invalidity of International Arbitral Awards

It is undisputed that a judgement or award duly pronounced is binding upon the parties. This binding force of the award is "inherent in the judicial process".[1] That is, by "entering into the arbitration agreement and participating in the proceedings before the tribunal, the parties impliedly engage to execute the award when rendered".[2]

Thus the binding effect of *res judicata* constitutes a general principle of law[3] and as such it has been stressed in many international legal instruments. Article 37 of the Hague Convention of 1907 for the Pacific Settlement of International Disputes provides that "recourse to arbitration implies an engagement to submit in good faith to the award". Article 60 of the Statute of the PCIJ and of the ICJ provides that "the judgement is final and without appeal". Moreover, Article 94(1) of the Charter of the United Nations provides that "each member of the United Nations undertakes to comply with the

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1 Simpson and Fox, "International Arbitration", op. cit. p. 228.

2 Carlston, "The Process of International Arbitration", op. cit. p. 205; see also E.K. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law, Sijthoff, Leyden, 1966, p. 65; and Schwarzenberger, Vol 4, op. cit. p. 639.

3 Dissenting Opinion, Judge Anzilotti, Chorozow Factory Case, PCIJ Rep., Series A, No. 13, p. 27, in Hudson 1 World Court Reports, (1922-1926) pp. 638-640; and Nantwi, op. cit. p. 66.

decisions of the International Court of Justice in any case to which it is a party. Provisions stressing the rule of finality of international awards have also been expressed under Article 26 of the ILC's Draft Convention on Arbitral Procedure of 1953 and Article 30 of its Model Rules on Arbitral Procedure of 1958. Similarly, Article 4(1) of the Claims Settlement Declaration between Iran and the United States and Article 32(2) of the Rules of the Tribunal provide that "all decisions of the Tribunal shall be final and binding".

The binding character of the award cannot, however, extend to judicial decisions which are seriously and irremediably deficient. It is universally admitted that an international judicial decision may, on certain specific grounds, be treated as null and void.[4] The existence of the principle of nullity in international law is supported by the practice of States and the views of writers.[5] The views, however, may differ as to the exact scope of these grounds and as to what constitutes a ground of nullity.

Since 1875 the Institute of International Law has recognized that it is possible for an international arbitral award to contain a flaw which makes it liable to be declared a nullity. In the view of the Institute, nullity of the *compromis*, excess of arbitral powers, proved corruption and essential error are four basic grounds for the nullity of international arbitral awards.[6] Even though the Hague Conventions on the Pacific Settlement of International Disputes are silent on the matter, the unanimous view is that such a silence could hardly be regarded as a change in the established doctrine on nullity of international arbitral awards.[7] In other words, the rule of nullity is a generally accepted principle, and the reference to the rule of finality of international arbitral

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4 Simpson and Fox, op. cit. p. 250; Nantwi, op. cit. p. 114; Schwarzenberger, op. cit. Vol 4, p. 700.

5 Carlston, The Process.., op. cit. p. 221. For an in-depth analysis of the arbitral practice in this respect see generally, Reisman, Nullity and Revision, op. cit. pp. 419-634.

6 Schwarzenberger, Vol 4, op. cit. p. 700.

7 Carlston, the Process of..., op. cit. p. 214.

awards in the arbitration agreement, or the silence of the arbitration agreement on the question of nullity, does not prevent the possibility of an award being declared a nullity on certain specific grounds.

Professor Carlston has expressed the view that the insertion of a clause expressing the finality of the award in various arbitration agreements is declaratory of existing law providing for the obligatory force of the award as distinct from its moral force.[8] Nevertheless, he believes that the declaration of the customary rule of finality of the award cannot be "construed with prejudice to the legitimate rights of the contracting parties to justify a denial of justice by reason of exceeding of powers or of any other legal fault which carries with it the nullity of the decision."[9] An examination of various cases, conducted by Professor Carlston, reveals that the presence of the rule of finality of the award has not prevented States from making successful claims of nullity.[10] Neither has it prevented appropriate international judicial bodies set up specifically to review an arbitral award subject to a claim of nullity from declaring the award a nullity. For instance, in the Orinoco Steamship Company Case before the Hague Tribunal under the compromis of 13 February 1909, an award of an international tribunal was for the first time formally annulled and modified by the decision of a second tribunal.[11]

The most convincing expression of the principle of nullity in modern international law can be found in the comprehensive work of the International Law Commission on arbitral procedure as embodied in the Draft Convention of

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8 Ibid, pp. 211-218.

9 Ibid, p. 212.

10 For a review, see Ibid, pp. 211-218.

11 William Cullen Dennis, "The Orinoco Steamship Company Case before the Hague Tribunal", 5 AJIL, (1911), 35, p. 36; see also Carlston, the Process of.., op. cit. pp. 145-151.

1953 and the Model Rules of 1958. Article 30 of the Draft Convention provides that:

> The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) that the tribunal exceeded its powers;
>
> (b) that there was corruption on the part of a member of the tribunal;
>
> (c) that there was a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.

We have already noted the Orinoco Steamship Company Case of 1910. A further confirmation of the principle of nullity can be found in the decision of the International Court of Justice in the Arbitral Award Rendered by the King of Spain Case.[12] The issue before the International Court of Justice was an award made in 1906 by the King of Spain between Honduras and Nicaragua on a sector of their common frontier. The parties brought the case before the Court under Article 36 of the Court's Statute and a special agreement concluded in 1957.[13] The decision of the Court was that the Award was valid on the grounds of estoppel by express declarations and by conduct on the part of Nicaragua.[14] In a subsidiary way, the Court also dealt with the substance of the submissions of excess of power and essential error, made by Nicaragua as grounds of nullity of the Award, and rejected both contentions.[15] The point which is relevant to our discussion here is that the Court did consider itself competent to hear an international dispute submitted to it by two States concerning the validity of an award. It said:

> ... The Court will observe that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a

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12 ICJ Reports, 1960, p. 192.

13 Ibid, pp. 194 and 203.

14 Ibid, p. 213.

15 Ibid, pp. 214-216.

> Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.[16]

A modern form of recognition of the principle of nullity or invalidity of arbitral awards has been provided for in Article 52(1) of the ICSID Convention. Under this Article either party may reque

( e award on one or more of the following grounds:

> (a) that the tribunal was not properly constituted;
>
> (b) that the tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the tribunal;
>
> (d) that there was a serious departure from a fundamental rule of procedure; or
>
> (e) that the award failed to state the reasons on which it was based.

In practice, the right to challenge the validity of the ICSID arbitration awards has been exercised by the parties within the special framework provided for under the ICSID Convention.[17] The exercise of this right has, on occasion, led to the annulment of the award. Two recent Cases of AMCO Asia Corp. v Republic of Indonesia[18], and Klocker Industrieanlagen GmbH v United Republic of Cameron[19], are notable in respect of the annulment of international arbitral awards.[20]

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16 Ibid, p. 214.

17 See Article 52(3) of the ICSID Convention.

18 The annulment decision of May 16, 1986, 25 ILM, (1986), p. 1439.

19 11 YB. Comm. Arb. (1986), p. 162.

20 For an analysis of the practice of the ICSID with regard to the annulment of its arbitral awards, particularly the above quoted Cases, see generally, Bjorn Pirrwitz, "Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 23 Texas I.L.J. (1988), pp. 73-116.

## II. The Principle of Nullity of Arbitral Awards in Private Law

A private law analogy also leads to a result similar to that generally accepted in international law. In fact, in international commercial arbitrations, which at some stage fall within the domain of private law, there exists an already established mechanism for the judicial supervision of arbitral awards by way of recourse to the courts of competent national jurisdiction.

The review by the courts of competent national jurisdiction of international commercial arbitral awards has traditionally taken place in the forms of appeal and challenge of the validity of the award. While recent trends in most countries where major international arbitration institutions are situated tend to restrict a review by way of appeal in favour of the finality of the arbitral process, the essence of the right of the parties to challenge the validity of an award on fundamental grounds of invalidity remains intact in most of these arbitration laws.[21] That is, the legal possibility of nullity or invalidity of international commercial arbitral awards is generally accepted and the validity of the award can be checked by the courts of competent national jurisdiction upon a challenge by a party.

Notably, the French International Arbitration provisions of the Decree of 1981 Amending Code of Civil Procedure[22], which represents current trends in favour of the finality of arbitral awards, expressly recognizes that the validity of the award can be challenged on five specific grounds, as follows:

1. if there is no valid arbitration agreement;

2. if there were irregularities in the appointment of the arbitrators;

3. if the arbitration tribunal exceeded the authority conferred upon it;

4. whenever due process has not been respected;

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21 See generally, Alan Redfern and Martin Hunter, "International Commercial Arbitration", op. cit. pp. 315-319.

22 20 ILM, p. 917.

5. when the award has been made in contravention of international public policy (*ordre public*).[23]

Similarly, provision has been made for the annulment of the arbitral awards under the Netherlands new Statute of 1986 on Arbitration.[24] The Swiss Statute of 1987 on International Arbitration[25] also recognizes that an arbitral award can be set aside on the grounds specified under this Statute.[26] Under the 1979 United Kingdom Arbitration Act[27] a limited right of appeal against an arbitrator's decision to the High Court, either with the consent of all parties or with the leave of the Court, on a question of law has been granted.[28]

Furthermore, the most recent arbitration instrument which is designed with the aim of universal acceptability, the UNCITRAL Model Law on International Commercial Arbitration of 1985, expressly recognizes the importance of the legal possibility of invalidity of arbitral awards. Under Article 34(2) of the UNCITRAL Model Law an arbitral award may be set aside by the courts of competent national jurisdiction[29] if the party making the application furnishes proof that the award is invalid on one or more of the grounds specified under this Article. The latter elaborates extensively on the grounds upon which an arbitral award may be set aside. These grounds may be summarized as refering to : 1- the invalidity of the arbitration agreement; 2- procedural irregularities; 3- excess of jurisdiction; 4- failure to constitute the tribunal properly; and 5- the subject matter of dispute being not capable of

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23 Ibid, Article 1502. See also Article 1504. For an example in this respect see Arab Republic of Egypt v SPP, Paris Court of Appeal, 12 July 1984, 23 ILM, (1984), p. 1048.

24 26 ILM, p. 921, Article 1065.

25 27 ILM, p. 37.

26 Ibid, Articles 190 and 192.

27 18 ILM, p. 1248.

28 Ibid, Sections 1(2)-(3). For a review of the case law interpreting the 1979 Arbitration Act, see Paul A.C. Jaffe, "Judicial Supervision of Commercial Arbitration in England", 55(3) Arbitration, (1989), p. 184.

29 The competent national jurisdiction is specified under Article 6 of the Model Law which mainly includes the law of the place of arbitration.

settlement by arbitration under the law of the country of arbitration; or the award being in conflict with the public policy of that country.

It is significant that regarding failure to constitute the tribunal properly the following provision has been made under this Article:

> (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law;...

Most important of all is the existence of a provision similar to Article 34(2) of the UNCITRAL Model Law under Article 5 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Although the New York Convention does not deal with the setting aside of arbitral awards, its provisions can be relied on as ground for the refusal of recognition and enforcement of the award. The importance of the New York Convention in creating uniformity of policy among the many States parties to the Convention in regard to international commercial arbitration is undeniable. What is more significant is that it may equally represent a uniform opinion forming a general principle of law.

## III. A Particular Reference to Irregularities in Composition of the Arbitral Tribunal

In the preceding sub-section it was shown that the principle of nullity is a viable norm of international law and international arbitrations in all forms. The grounds upon which the validity of an award can be challenged, though subject to some differences of opinion as to their scope, are nevertheless identifiable in general from a survey of various arbitral instruments of past and present times.

It is important to point out that organizing the composition of the tribunal in strict accordance with the agreement of the parties constitutes a

fundamental procedural matter. This fact has been acknowledged in the overwhelming majority of arbitral instruments either by express reference to "irregularities in the composition" of the arbitral tribunal or by a general reference to "a serious departure from a fundamental rule of procedure", these circumstances providing grounds for challenge of the validity of the award. For instance, Article 30(c) of the ILC's Draft Convention of 1953 and Article 35(c) of its Model Law on Arbitral Procedure both recognize that a serious departure from a fundamental rule of procedure is a ground upon which the validity of an award may be challenged. It is obvious enough that the right to due deliberation by a tribunal duly constituted is of a fundamental procedural character.[30] It is undisputed that the tribunal must respect the " law governing its creation and defining its powers as laid down in the compromis, and it must likewise observe certain other established rules of a fundamental character which inherently, under the generally accepted rules of law and justice, regulate the conduct of any judicial body".[31] In fact the view has been expressed that "there are certain fundamental procedural rights upon which a State may rely in any international arbitration and of which no State would consent to be deprived".[32] It would not be wrong to assume that the right to due deliberation by a tribunal duly constituted is of such nature.

Moreover, the fundamental procedural character of an irregularity regarding the composition of the arbitral body has been acknowledged by the express reference of many arbitration rules to this issue as constituting a ground for challenge of the validity of the award. Such a recognition can be found in Article 52(1)-(a) of the ICSID Convention, which refers to the failure to constitute the tribunal properly. Such is the case with Article 5(d) of the Convention on Recognition and Enforcement of Foreign Arbitral Awards and

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30 Carlston, "The process of...", op. cit. pp. 42-43.

31 Ibid, p. 36.

32 Ibid, p. 38.

Article 34(2)-(a)-(iv) of the UNCITRAL Model Law on International Commercial Arbitration, both of which refer to a departure from the agreement of the parties regarding the composition of the tribunal.

In view of the normative character of these provisions, which can hardly be doubted, it is clear that failure to constitute the tribunal properly or a departure from the agreement of the parties regarding the composition of the arbitral body is a ground for invalidity of the award.

## IV. Forms of Remedies Against Arbitral Awards

**IV(1).** In international arbitral processes one may distinguish three different remedies against awards: revision (by the arbitral tribunal having rendered the award); challenge or appeal (to another body, typically a court); and nullity.[33] The terminology is not precise. In fact they are sometimes interchangeable. An award may be null and void *ab initio* without any claim alleging nullity having been formally presented.[34] However, as far as the procedural aspects of these remedies are concerned, they can be categorized as revision, appeal and challenge. The latter concerns the validity of the award or a claim asking for the annulment of the award.[35]

The purpose of an action challenging the validity of the award is to annul or set aside the award on certain fundamental grounds. On the other hand, an appeal may usually be made to a higher judicial body for a general judicial review or on a point of law. Revision, it is submitted, is designed as a

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33 J. Gillis Wetter, International Arbitral Process, op. cit. Vol II, p. 539.

34 Ibid.

35 Throughout this study the term "challenge" of the award is used to signify a challenge regarding the validity of the award as distinguished from an appeal for a general judicial review. The term "challenge" is used with the same meaning as described above in Article 35 of the ILC's Draft Convention.

remedy for the purpose of rectifying an error committed by the tribunal or for allowing it to consider and adjudicate upon a newly discovered fact.[36]

It is obvious that the legal system which governs the arbitration process is, in addition to the arbitration agreement and its rules of procedure, the ultimate yardstick against which the validity of the award can be tested. This law, the governing law of arbitration, is public international law when the arbitration takes place within the domain of that law. In other forms of arbitration it is primarily the law of the place of arbitration which determines the validity of the arbitral award. However, in the latter case, the law of the country where recognition and enforcement of the award is sought may also exercise a degree of judicial review pertaining to the validity of the award.

Thus it becomes clear that in all forms of arbitration, other than public international arbitration, the legal system and the courts of the competent national jurisdiction offer already existing procedural remedies by which the validity of the award can be challenged. In addition, under the rules of some international commercial arbitration institutions there is a mechanism for a review of the award before its announcement. For instance, under the ICC arbitration system the award may not be signed by the arbitral tribunal until it has been scrutinized by the ICC's Court of Arbitration.[37]

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36 Wetter, op. cit. Vol II, p. 539. See, for instance, Article 29 of the ILC Draft Convention and Article 38 of its Model Rules . E.g., for documents concerning the re-opening of the BP/Libya Case see Wetter, op. cit. Vol II, pp. 559-662. See also generally, " The Venezuela-Guyana Boundary Dispute : An In-Depth Documentary Case Study of Nullity of An Arbitral Award", Ibid, Vol III, p. 3.

37 See Article 21 of the ICC Rules of Conciliation and Arbitration of 1988, published by the ICC. Under this provision the Court is empowered to modify the form of the award to ensure that it meets the procedural requirements for enforcement under the law of the place of arbitration and of the parties' countries. The Court is also permitted to bring substantive points to the arbitrator's attention for further consideration, such as defective reasoning or miscalculation of damages. The Court, however, may not exercise any binding power over the arbitrator in this respect. (See Steven J. Stein and Daniel R. Wotman, "International Commercial Arbitration in the 1980s: A Comparison of Major Arbitral Systems and Rules", 38 Bus. Lawyer, (1983), 1685, p. 1720.)

**IV(2).** Unlike the structure of municipal legal system, international law does lack an automatic mechanism for the challenge of the validity of the award. Due to this inherent problem in international law, it mainly falls to the parties to foresee in their arbitration agreement or their rules of procedure the possibility of challenging the award before a separate tribunal or before the International Court of Justice. It has been stipulated under Article 31(1) of the ILC's Draft Convention on Arbitral Procedure that "the International Court of Justice shall be competent, on the application of either party to declare the nullity of the award on any of the grounds set out in the preceding article".[38] Similar provisions have been made under Article 36 of the Model Rules of the ILC on Arbitral Procedure for recourse to the ICJ for challenge of the award.

The most practical and institutionalized provision for challenge of the award has been made under Article 52 of the ICSID Convention. The existence of this provision is significant because of the self-contained and mostly public international structure of the ICSID arbitration. Within the time-limit of 120 days prescribed under this Article a party may request annulment of the award on the grounds specified therein.[39] This Article provides that an ad hoc Committee of three persons should be appointed from the Panel of Arbitrators and that:

> None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).[40]

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38 Note the time-limit required for the submission of the challenge under Article 31(2) of the Draft Convention. See also Article 32, Ibid.

39 Article 52, paragraph 2 of the ICSID Convention.

40 Article 52, paragraph 3, Ibid.

As noted earlier, the ad hoc Committee is set up frequently to hear the challenges made against the ICSID arbitration awards.

It is therefore obvious that in public international arbitrations, in the absence of express provisions in the arbitration agreement it would be difficult in practice to find an appropriate forum to challenge the validity of the award. Nevertheless, theoretically, the absence of such provision does not exclude the possibility of an *ab initio* nullity of the award. On the other hand, a mere declaration of nullity by the dissatisfied party can hardly deprive the award of its obligatory force. Ordinarily, awards are binding upon the parties and mere objection by one of the parties cannot destroy this obligation. Professor Carlston argues that a State's entitlement to the exercise of the power to refuse enforcement will depend upon the merits of its contentions as to the validity of the award.[41] He writes:

> If a State should refuse to execute the award, it would do so in its own risk, and to maintain that the award is null will not itself free the State from the responsibility which it incurs by its action or inaction. Only if the award is null in fact and law will the State be free from such responsibility. In such a case the award never had an obligatory force to be suspended.[42]

Obviously, Carlston's view, while it recognizes the responsibility that a unilateral declaration of nullity may involve, does give a degree of subjective discretion to the disaffected State by not insisting upon the per se illegality of such a declaration.

In practice, however, given the well-known fact that international law is not sanctioned by an enforcement mechanism, the enforcement of the award depends largely on its acceptance by the party against which the award has been made. Consequently, in the event of a unilateral declaration of nullity by a State a regulation of some final settlement between the parties becomes

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41 Carlston, the Process, of...", op. cit. p. 222.

42 Ibid, pp. 222-223.

necessary. This settlement may be in the form of an agreement to submit the dispute of nullity to another tribunal- as was done in the Orinoco Steamship Company Case[43] and the Arbitral Award made by the King of Spain Case[44]- or in any other form on which the parties may agree. The possibility for this situation regarding the awards rendered against Iran by the Iran-US Claims Tribunal is different because of payment of that category of award out of the Security Account. This will be elaborated upon below.

Finally, it has to be noted that the doctrine of nullity is a deep-rooted principle. However, the problems associated with it should not be neglected. The theory of nullity may be abused by the dissatisfied party. This may undermine the effectiveness of the arbitral process and the rule of finality of the award. In particular, in public international arbitration, in which a unilateral declaration of nullity by a party may in practice prevent the enforcement of the award, the problems are greater. On the other hand, it is obvious that a possibility should exist for setting aside awards which are deficient and invalid. The solution appears to be in striking a balance between the rule of finality of the award and the doctrine of nullity, by way of limiting the grounds of invalidity to a minimum of specific fundamental points.

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43 5 AJIL, (1911), p. 35.

44 ICJ Rep. (1960), p. 192.

# SECTION B

# PROCEDURAL REMEDIES AGAINST AWARDS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

## I. Generally

Article IV(1) of the Claims Settlement Declaration, as well as Article 32(2) of the Tribunal Rules, provides that "awards of the Tribunal shall be final and binding". There are no provisions in the CSD regarding the grounds for invalidity of the award or its revision. Given the extraordinary circumstances and the short period of time in which the CSD was drafted it is not surprising that it does not contain specific provisions concerning the above or other similar issues. This can at least partly explain its shortcomings. The effect of these circumstances is also evident in the fact that the parties have essentially referred the question of rules of procedure to the UNCITRAL Arbitration Rules. Ideally, given the peculiar characteristics of the Tribunal, it would have been better for the parties to draft their own rules of procedure in conformity with the institutional and multi-case structure of its function.

Surprisingly, the Tribunal Rules too do not provide any clear guidance as to the rules of nullity, invalidity and revision of the award, and provisions to these effects are generally lacking. It is submitted that the silence on the matter under the UNCITRAL Arbitration Rules is in apparent reliance upon the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[1] It was noted earlier that Article V of the New York Convention provides elaborate provisions regarding the grounds upon which recognition and enforcement of arbitral awards can be rejected by the courts of the relevant

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1 Andrew Glen Weiss, "The Status of UNCITRAL Model Law on International Commercial Arbitration Vis-A-Vis the ICC, LCIA and UNCITRAL Arbitration Rules: Conflict or Complement?", 13 Syracuse J.I.L.C. (1986), 367, p. 387.

national jurisdiction. Although the New York Convention concerns only the recognition and enforcement of the award, it is logical to assume that the same grounds are deemed to constitute bases for an action for setting aside of an arbitral award.[2] Thus, the silence under the UNCITRAl Arbitration Rules does not appear to reflect a desire to derogate from the provisions under the New York Convention by any means- rather, to keep in harmony with that Convention.

In short, the UNCITRAl Rules were primarily drafted for use in commercial arbitration. Although they have chosen to remain silent on the question of the grounds for invalidity of the award, that silence by no means excludes the possibility of challenge of the validity of the award or its revision in the courts of competent national jurisdiction. The UNCITRAl Rules in effect leave the matter to the authorities which are in principle competent to decide on the question[3], these being the courts of the place of arbitration and/or the courts of the country where the recognition and enforcement is sought.

The silence on the question in discussion under the UNCITRAL Rules is not something unusual in view of the fact that the Rules are designed for the use of commercial arbitration. Such is the case with the Rules of the LCIA and of the ICC. It is, however, notable that the ICC and LCIA Rules contain an express provision to the effect that by submitting to arbitration under the respective Rules the parties waive the right to appeal against an award, provided the waiver can be validly made.[4] Nevertheless, even if a waiver of the right to appeal can be validly made, the right to challenge the award is not affected by that waiver. The latter right is generally regarded as not capable of

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2 See also Article VI of the New York Convention.

3 See generally Report by the Special Rapporteur on preparatory work of the UNCITRAL on International Commercial Arbitration, 3 YB.UNCITRAL (1972), 193, pp. 228-231; see also the Commentary appended to the Report of the Secretary-General on the UNCITRAL Arbitration Rules, 12 December 1975, 7 YB.UNCITRAL, 1976, 166, p. 178.

4 Article 24(2) of the ICC Rules of 1988, and Article 16(8) of the LCIA Rules of 1985.

being excluded even by express agreement.[5] Moreover, the question of whether or not a waiver of the right to appeal against the award has been validly made may ultimately be determined by the law of the place of arbitration which governs the arbitral proceedings.[6]

Furthermore, the silence on the matter in discussion under the UNCITRAl Rules does in a way make the issue capable of being subjected to varying interpretations by the courts of different countries to which arguments regarding the validity of the award have been proposed. The idea appears to have been that in the courts of States members of the New York Convention a harmonized policy would exist in relation to the scope of the grounds for challenge or refusal of recognition and enforcement.[7] However, the problem may not even be totally solved in that case. That is why the UNCITRAl Model Law on International Commercial Arbitration of 1985 has not chosen to remain silent on the matter. It has expressly introduced specific grounds on the basis of which the validity of the award can be challenged[8], or its recognition and enforcement may be refused.[9]

In short, despite the controversy which may exist as to the scope of the grounds for invalidity of the arbitral awards made under the UNCITRAl Rules, the Rules do not exclude the procedural remedy of challenge of the validity or revision in the courts of competent national jurisdiction, provided that the arbitration is a non-public international arbitration. However, in circumstances where the right to challenge the validity of the award has been expressly waived, when the challenge could be made, the situation would be different.

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5 Alan Redfern and Martin Hunter, op. cit. p. 318.

6 Andrew Glen Weiss, op. cit. pp. 387-388.

7 Ibid, p. 387.

8 Article 34 of the UNCITRAl Model Law.

9 Ibid, Article 36. See also, Mary E. McNemey and Carlos A. Esplugues, "International Commercial Arbitration: The UNCITRAL Model Law", IX(1) Bos.C.I.C.L.R. (1986), 47, pp. 57-58.

This is not the case with the UNCITRAl Rules which have been adopted as the Rules of the Iran-US Claims Tribunal.

However, there might be other problems connected with the nature of the arbitration between Iran and the United States. This problem may exclude the recourse to national courts for challenge of the award. The question is whether the arbitration between Iran and the United States is a public international arbitration or a private one, or a combination of both. On the first assumption it is unlikely that any national court would be competent to hear a challenge against the validity of a public international award. On the second the answer is in the affirmative. On the third assumption the answer is not totally clear. We will elaborate on this matter only in relation to the question of procedural remedies against the awards of the Tribunal, in the following sub-section.

## II. Character of the Iran-United States Claims Tribunal in Relation to the Procedural Remedies Against its Awards: The Private Law Remedy

The problems concerning character of the Iran-US Claims Tribunal have been discussed adequately elsewhere.[10] Therefore we do not intend to analyse this question in detail. However, some reference to the question is necessary in order to establish its relationship with the problem of procedural remedies against the awards of the Tribunal.

**II(1).** Following the issuance of awards by Chambers Two and Three in the absence of the Iranian members in the Cases discussed in Chapter Five above, Iran attempted to challenge their validity in the Dutch courts. Nine suits

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10 On this see generally, William T. Lake and Jane Tucker Dana, "Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?", 16 L.P.I.B. (1984), p. 755; David Lloyd Jones, "The Iran-United States Claims Tribunal: Private Rights and State Responsibility", 24(2) Virg.J.I.L. (1984), p. 259; L. Hardenberg, "The Awards of the Iran-US Claims Tribunal", Int'l.Bus. Lawyer, September 1984, p. 337; and Albert Jan van Den Berg, "Proposed Dutch Law on the Iran-US Claims Settlement Declaration", Int'l.Bus. Lawyer, Sept. 1984, p. 341.

were filed by Iran in the District Court of the Hague between April and December 1983.[11] Eight of the challenges were based on the non-participation of Iranian arbitrators in the deliberations of these Cases.[12] In the ninth challenge, Esphahanian v Bank Tejarat[13], Iran argued that the Tribunal had failed to consider a defence put forward by Iran that the transaction in question violated Iranian foreign exchange regulations.[14]

The challenge in the Dutch courts by Iran of the Tribunal awards highlighted the question of character of the Tribunal's awards. The question was whether they were public international awards or awards made under and governed by the law of the place of arbitration, namely, the law of the Netherlands. The difference between the two situations is obvious. On the first assumption, the awards are public international awards and national courts cannot normally be expected to be competent to hear against such awards. On the second assumption, however, the law of the place of arbitration is competent to determine whether an arbitral award made in that country is validly made. Moreover, the enforcement of the awards may be facilitated by the national courts with regard to those awards of the Tribunal which are not paid out of the Security Account , if the latter assumption is accepted.

It is notable that under the Dutch Arbitration Law which was in force when the awards of the Tribunal were challenged, an award could be set aside

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11 These Cases were: Raygo Wagner Equip. Co v Star Line Iran Co, (15 Dec. 1982), 1 Iran-USCRT, p. 411; Rexnord v Iran, (10 Jan. 1983), 2 Iran-USCTR. p. 6; Intrend Int'l, Inc v Iranian Air Force, (2 July 1983), 3 Iran-USCTR., p. 110; Gruen Assoc., Inc. v Iranian Housing Co, (27 July 1983), 3 Iran-USCTR. p. 97; Alan Craig v Ministry of Energy of Iran, (2 Sept. 1983), 3 Iran-USCTR. p. 280; John Carl Warnecke & Assoc. v Bank Mellat, (2 Sept 1983), 3 Iran-USCTR., p. 256; Woodward-Clyde Consultants v Iran, (2 Sept. 1983), 3 Iran-USCTR. p. 239; Blount Brothers, Corp v Ministry of Housing and Urban Development, (2 Sept. 1983), 3 Iran-USCTR., p. 225; and Esphahanian v Bank Tejarat, (29 March 1983), 2 Iran-USCTR., p. 157. See also AR 84/85, p. 17.

12 E.g., Writ Contesting Issuance of Enforcement Order in Raygo Wagner Equipment Co. v Star Line Iran Co., Action No. AZ.983.131.51 at 8 (District Court of the Hague, 8 April 1983), as quoted in William T. Lake, and Jane Tucker Dana, op. cit. pp. 759-764.

13 March 29, 1983, 2 Iran-USCTR. p. 157.

14 William Lake and Jane Tucker Dana, op. cit. p. 764.

on ten different grounds.[15] The action to set aside the arbitral award could be brought under that law even if the arbitral award was final and not subject to appeal.[16] It is notable that Article 649(3) of the Dutch Code of Civil Procedure provided that an award could be set aside if it "has been made by some arbitrators who were not competent to render an award in the absence of the others".

While the cases brought by Iran were pending before the Dutch courts in 1983, the Dutch Government for unknown reasons proposed a legislation specifically concerning the awards of the Iran-US Tribunal. The proposed legislation was entitled, "the Bill Regarding the Applicability of Dutch law to the Awards of the Tribunal Sitting in the Hague to Hear Claims Between Iran and the United States".[17]

The proposed Dutch legislation made it clear that Tribunal awards rendered under Article II(1) of the CSD (relating to claims of nationals of Iran and the United States against the other's Government) were arbitral awards within the meaning of Dutch law.[18] Thus this category of awards could be challenged in the Dutch courts. However, the proposed legislation strangely restricted the grounds for challenge of the Iran-US Tribunal awards to only two ambiguous grounds. This was despite the fact that under the Dutch Arbitration Law in force at the time an award could be challenged on ten different and specific grounds. The most surprising provision was that the Bill retroacted

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15 Arbitration Provisions of the Netherlands Code of Civil Procedure, Book III, Title I, Section 3, Article 649, reprinted in Annual Report Period ending 30 June 1983, Annex X; these provisions are also reprinted in 4 Iran-USCTR. pp. 299-304.

16 Ibid, Article 649.

17 The Bill is undated. An English translation of the Bill is reprinted in 4 Iran-USCTR. pp. 306-307. See also Aide Memoire and Explanatory Notes attached to the Bill by the Dutch Government, Ibid, respectively, pp. 305, 308-316. The Explanatory Notes by taking into account dual aspects of the claims decided by the Tribunal, proposed that claims subject to private law could be subjected to Dutch law. Inter-governmental claims of Iran and the United States were not regarded as being subject to Dutch law (Ibid, pp. 310-311). On balance, the Explanatory Notes accept the superiority of the inter-State character of the claims before the Tribunal.

18 Section 2 of the Proposed Bill, Ibid.

enforcement of its provisions to 1 July 1981 (the time when the Tribunal was established), and expressly included proceedings challenging an award of the Tribunal pending on the day of its entry into force.[19]

The two grounds that the proposed Bill permitted for challenge of the awards made under Article II(1) of the CSD were: 1- "That the proceedings leading to the award were conducted in a manner that constitutes a manifest breach of the principles of proper judicial procedure"; and 2- that "the award is manifestly contrary to public order or morals".[20]

It was obvious that the Bill would seriously restrict Iran's right to challenge the validity of Tribunal awards. Upon this consideration the Iranian Agent, M.K. Eshragh, wrote to the Ministry of Foreign Affairs of the Netherlands protesting the legislation.[21] It is also understood that the Agent of Iran and Arbitrator Kashani of Iran appeared before a closed meeting of the Dutch Parliament's First Chamber's Justice and Foreign Affairs Committee to attempt to dissuade the Chamber from passing the Bill. Apparently Iran could find no way of dissuading the Dutch Government other than withdrawing its challenges from the Dutch courts. This Iran did and the enactment of the Bill was suspended in the Dutch Parliament.[22] The proposed Bill was never enacted.

It is notable that the Netherlands, in a general attempt to update its Arbitration Law, enacted new Arbitration provisions for its Code of Civil Procedure in July 1986.[23] The New Statute on Arbitration has restricted the

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19 Ibid, Section 7(1) and (2).

20 Ibid, Section 4.

21 Letter from Mohammad K. Eshragh to the Ministry of Foreign Affairs of the Netherlands (24 Feb. 1984), reprinted in 5 Iran-USCTR. p. 405.

22 See W.T. Lake and J. Tucker Dana, op. cit. pp. 786-787. See also AR 84/85 p. 17 and Ar 86/87, pp. 16-17.

23 Netherlands New Statute on Arbitration, 2 July 1986, 26 ILM, p. 921.

grounds for challenge of arbitral awards to five[24], from the ten grounds under its earlier regulations.

**II(2).** It is notable that Iran's action in submitting the above-mentioned challenges to the Hague District Court implicitly recognized that awards of the Tribunal were governed by Dutch law and therefore were not fully public international awards. Ironically, the letter of 24 February from the Agent of Iran protesting the proposed legislation argued that the awards of the Tribunal were public international awards and could not be subject to Dutch law.[25] Explaining this inconsistency, the Agent of Iran said that "referral to the Dutch courts to prevent issuance of exequaturs on some void awards of the Tribunal and to safeguard Iran's right, which was done out of necessity, cannot be the determining factor of the nature of the Tribunal or of the claims pending before it."[26]

Iran's position presented in the Letter of her Agent was that the proposed legislation defined extremely limited grounds for challenging the Tribunal awards in the Dutch courts.[27] He argued that the proposed Bill "... subjects the Tribunal awards to Dutch law, thus excluding the arbitration from public international law, and thereby facilitating the enforcement of the Tribunal awards against Iran in other countries pursuant to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards".[28] It also said that "It denies Iran the advantages of the applicability of Dutch law which is the automatic subjection of the Tribunal awards to all provisions of

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24 Ibid, Article 1065, and generally Articles 1064-1068.

25 Letter from Eshragh of 24 Feb. 1984, op. cit. pp. 405-407.

26 Ibid, p. 408.

27 Ibid, p. 409. Eshragh also argued that Iran was the party against which most of the awards were rendered. Thus provisions of the proposed Bill were in practice directed against Iran. (Ibid,)

28 Ibid, p. 410.

the Dutch Arbitration Law, particularly the provisions concerning the challenging of arbitral awards".[29]

According to the Agent of Iran, the proposed legislation effectively accommodated two "contradictory wishes" of the United States by conferring Dutch nationality on the arbitral awards- thereby facilitating their enforcement under the New York Convention- and by limiting the jurisdiction of the Dutch courts with respect to challenges of awards".[30] The Agent of Iran also attached to his letter the Memorial of the Government of Iran on the Issue of Dual Nationality[31] in which a detailed argument in support of the public international character of the Tribunal claims was presented.[32]

The outline of the arguments advanced in support of the inter-State nature of the Tribunal are as follows: (a)- The Tribunal is created by a Treaty concluded between Iran and the United States: (b)- It is adjudicating claims

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29 Ibid.

30 Ibid. See also generally pp. 410-413.

An apparent problem with Eshragh's arguments with regard to the New York Convention is that due to the existence of the Security Account the awards rendered against Iran by the Tribunal are paid out of that Account. Thus, recourse to the New York Convention by the American claimants may not be needed at all, provided that there are enough funds in that Account. On the other hand, the awards rendered against American nationals or the American Government are not secured by any such account. Therefore, in principle, it is Iran which might have benefited from the applicability of the New York Convention. However, it must be noted that Iran is not a party to the New York Convention and because of the application of the rule of reciprocity required under that Convention its application in favour of Iran might have been a problem any way. (See Article I(3) of the New York Convention.) In practice also, it is Iran which is facing greater difficulties regarding the enforcement of the Tribunal awards rendered against American nationals even in the courts of the United States. First, because of the inapplicability of the New York Convention due to the fact that Iran is not a party to it- regardless of the uncertainty as to whether that Convention applies to the awards of the Tribunal at all. Second, because of the doubts raised by the American courts as to the applicability of the Algiers Declaration as the law of land in the United States. (On this see generally, Robert P. Lewis, "What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-United States Claims Tribunal in the United States?", 26 Col.J.T.L. (1988), p. 515, and pp. 529-539).

31 For the main case of dual nationality see Case A/18, 5 Iran-USCTR. p. 251. For the Dissenting Opinion of the Iranian Arbitrators see, Ibid, pp. 275-337. See also Esphahanian v Bank Tejarat, 2 Iran-USCTR. p. 157. For the Dissenting Opinion of Dr Shafeiei, the Iranian Arbitrator, see Ibid, p. 178.

32 For the text of the attachment to Eshragh's letter of 24 Feb. 1984, see 5 Iran-USCTR. pp. 413-427.

based upon the exercise of diplomatic protection by the Parties to this Treaty. Thus the presence of individuals before the Tribunal is explained in that context; (c)- The Tribunal is specifically charged with deciding inter-State claims, as well as disputes concerning the interpretation and application of the Algiers Declarations; (d)- The designation of arbitrators and payment of relevant expenses are to be borne both by Iran and the United States; (e)- The aim of the Algiers Declarations was to resolve a conflict between Iran and the United States; (f)- The function of the Security Account can only be understood in the context of the inter-State nature of the Tribunal, etc.[33]

The arguments advanced in relation to the private nature of the main category of claims decided by the Tribunal, namely claims of nationals, can be outlined as follows: (a)- The circumstances of the creation of the Tribunal as regards the termination of the claims of US nationals in US courts suggest that the Tribunal was assumed to have the role of a national court; (b)- There are references in the General Declaration and the CSD which indicate that the Tribunal was established for the purpose of deciding and terminating claims of nationals of each government against the other[34]; (c)- The presence of individuals before the Tribunal supports the private law nature of the Tribunal; (d)- The applicable law to the substance of the dispute envisaged by the parties includes commercial law and relevant usages of trade, as well as international law.[35]

The American Government for its part has hinted on occasion that the presence of individuals before the Tribunal represented a direct exercise of their right before an international tribunal and was not taking place as a result of the exercise of diplomatic protection.[36] The Tribunal has also indicated that

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33 See generally, Ibid. See also David Lloyd Jones, "Private Rights and State Responsibility", op. cit. pp. 267-273; and L. Hardenberg, op. cit. pp. 337-440.

34 See Principle B of the GD and Article II(1) of the CSD.

35 See Lloyd Jones, op. cit. pp. 264-267; and A. Van Den Berg, op. cit. pp. 341-344.

36 Case A/18, 6 April 1984, 5 Iran-USCTR. 251, p. 258.

the claims of private claimants were not adjudicated as a result of the traditional exercise of diplomatic protection.[37]

In our view, the arguments in support of the private law nature of the above said category of the Tribunal awards can hardly undermine the overwhelming public international aspect of the Tribunal's function. Moreover, it is questionable whether a combination of both functions are possible. However, the resultant dichotomy has obscured the real character of the Tribunal, leading to the suggestion that the Tribunal exercises a dual, public and private law, function.[38]

In this regard there are further developments, subsequent to the withdrawal by Iran of is challenges to the Tribunal awards, which merit some brief attention. Notably, a former member of the Tribunal's staff, Spaans, sued the Tribunal before the County Court of the Hague contesting the validity of his dismissal and claiming his fees.[39] The Court noted that the Government of The Netherlands had granted the Tribunal the usual immunity of international organizations, as expressed in a letter from the Foreign Ministry of the Netherlands to the Secretary-General of the Tribunal.[40] The Court did accept public international character of the Tribunal. However, it made a distinction between its acts of *jure imperii* and acts of *jure gestionis*.[41] The Court decided that the claim fell within the second category and declared itself competent to hear the claim.[42]

The decision of the Hague County Court was appealed by the Tribunal to the District Court of the Hague.[43] The District Court accepted the public

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37 Ibid, p. 261. See also, Esphahanian v Bank Tejarat, 2 Iran-USCTR. 157, p. 165.

38 Lloyd Jones, op. cit. pp. 27-277.

39 Reported in AR Period ending 30 June 1984, Annex VI, pp. 1-3.

40 Ibid, pp. 1-2. For the statements made by the Dutch Government regarding the legal personality and immunity of the Tribunal see, Supra, Chapter 3, pp. 95-96.

41 AR period ending June 1984 (AR 83/84), Annex VI, pp. 1-3.

42 Ibid, p. 3.

43 Ibid, p. 4.

international character of the Tribunal. However, it rejected that the above-mentioned distinction made by the County Court was applicable to the Case. It held that "... lack of legal protection for employees of the Tribunal does not make the Netherlands' judiciary competent yet, once the Tribunal's immunity based on public international law has been recognized".[44]

Spaans appealed and brought the Case before the Supreme Court of the Netherlands.[45] The Supreme Court upheld the District Court's decision and the appeal by Spaans was dismissed.[46]

The courts of England have also had the opportunity to declare on the character of the Tribunal awards. In Dallal v Bank Mellat[47], the plaintiff had his claim dismissed before by the Iran-US Claims Tribunal. Therefore he re-instituted his claim in England against the respondent which had its place of business there. The Court held that:

> The jurisdiction and authority of the Tribunal at the Hague was created by an international treaty between the United States and the Republic of Iran, and was within the treaty-making powers of the governments of each of those Countries. Each of the parties was respectively within the jurisdiction and subject to the law-making powers of one of the parties to the treaty. Further, the situs of all the relevant choses in action are within the jurisdiction of one or other of the two States which are parties to the treaty. Again, the municipal legal systems of each of the relevant States recognises the competence of the tribunal at the Hague to decide the relevant disputes. Accordingly, the arbitration proceedings at the Hague are recognised as competent not only by competent international agreement between the relevant States, but also by the municipal laws of those States. It would be a surprising result if the courts of this country felt constrained to hold that the proceedings were nevertheless incompetent. I do not consider that one is forced to that conclusion".[48]

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44 Ibid, pp. 5-6.

45 22 November 1985, reported in AR 85/86, Annex VIII, pp. 74-88.

46 Ibid, pp. 87-88.

47 2 W.L.R. (1986), p. 745.

48 Ibid, p. 760.

**II(3).** With the withdrawal of the challenges to the awards of the Tribunal in the Dutch courts and the ensuing developments it is almost certain that the procedural remedy of private law, mainly the courts of the place of arbitration, cannot be resorted to for the purpose of challenge or revision of the Tribunal awards. Indeed, the problem is not so much that national law cannot be used for the purpose of challenging the Tribunal awards. It is rather that there are no other forms of procedural remedies available at all. It might be true that the submission to a public international arbitration necessarily implies that there is no automatically available forum outside the Tribunal for rectifying any deficiencies in its awards. In other words, the existence of such a rectification could primarily depend on whether the parties themselves have made a provision for a system by which the validity of the award could be checked.

On the other hand, the need for finality of international arbitral awards and expediency of the proceedings may well argue against the employment of such a mechanism in the parties' agreement. However, given the particular multi-case function of the Tribunal, involving thousands of claims, the possibilities for rendering of deficient awards are far greater than with the usual ad hoc, single-case arbitrations. This fact could well argue the need for the provision of a system permitting the challenge of the validity of an award on certain specific and limited grounds.

Ironically, with the existence of the Security Account, out of which the awards made against Iran are paid, the need for the judicial review of the Tribunal awards on the basis of a challenge is more than ever warranted. Because with the existence of that Account, which unequally applies only to

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It is significant that the Court in recognizing the award of the Tribunal relied on not only the fact that it was created by a treaty but also the recognition that the municipal laws of Iran and of the US accorded with the Tribunal's proceedings. (For a discussion on this see generally, Hazel Fox, "States and Undertaking to Arbitrate", 37 ICLQ, (1988), 1, pp. 24-29.

awards made against Iran, the right to challenge the validity of the award becomes practically meaningless. As we noted earlier, theoretically, a party to a public international arbitration has the right to challenge the validity of the award. In addition, the existence of the Security Account can by no means be interpreted as being intended to be a waiver of that right.

Moreover, because of the existence of the Security Account Iran is deprived of the possibilities available in practice in public international arbitration- though not necessarily acceptable in principle- of bargaining and negotiating over the enforcement of certain controversial awards. This has always been a reality in public international arbitration. Indeed, the American nationals against whom the counterclaim awards of the Tribunal have been rendered, do fully exploit the above said practical possibility of refusing to enforce the awards.[49] Moreover, they effectively exercise their right to

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[49] This complicated situation has partly been created by the fact that the Tribunal has refused to recognize a fully public international character for its awards and to hold the American Government responsible for the payment of the counterclaim awards rendered against its nationals. In Case A/21 (4 May 1987, 14 Iran-USCTR. p. 324), Iran filed a request for interpretation of the Algiers Accords concerning the commitment of the United States to satisfy awards rendered in favour of Iran against U.S. nationals. Iran contended that the US was obliged to satisfy awards rendered by the Tribunal against US nationals. Iran argued that the obligations undertaken by the two governments under the Accords were a "reciprocal system of commitments". (Ibid, p. 326). She also argued that "relying on the international character of the Tribunal, the United States has espoused the claims of its nationals, and that it carries with it the obligation to satisfy Tribunal awards against such nationals." (Ibid,).

The United States denied that it had undertaken such obligations. (Ibid,p. 327). The Tribunal held that the Accords contained no obligation, express or implied, on the part of the United States to pay awards rendered by the Tribunal against its nationals. (Ibid, pp. 328-329). The Tribunal also rejected Iran's argument that the Accords established a reciprocal system of commitments in regard to the problem at issue. It said that "... Iran's contention would ignore the express provisions of the Declarations which, in establishing a Security Account as the source for payments of awards against the Government of Iran and its controlled entities and in not imposing an identical obligation of payment upon the United States, clearly contemplated something other than parity of the treatment of the two States as regards enforcement mechanisms". (Ibid, p. 329).

However, the Tribunal added that:

> ... if no enforcement procedure were available in a State Party, or if recourse to such procedure were to eventually result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations under the

challenge the validity of these awards before the American courts, where Iran has to seek their enforcement.[50]

For instance, in Gould Marketing, Inc v Ministry of Defence (Iran)[51] the Tribunal had issued an Award of over three million in favour of Iran on the basis of the latter's counterclaim against the American claimant.[52] Iran brought an enforcement action before the District Court of California against Gould.[53] Details of this Case have been analysed elsewhere.[54] However, it is worth noting that this Case raised a complexity of legal issues regarding the enforcement of Tribunal awards in United States courts. These issues included Iran's standing before U.S. courts, the latters' subject matter jurisdiction, the applicability of the Algiers Accords as the law of land in the United States and several other questions; all these being raised by the American nationals to argue against the enforcement of Tribunal awards.[55] The consequences are that the American nationals can in practice exercise a right to challenge the enforcement of Tribunal awards via the relevant municipal legal system. In short, because of these circumstances most of the counterclaim awards made in favour of Iran remain unsatisfied.[56]

Furthermore, the practical possibility of negotiating over the enforcement of awards has been fully available to the United States with regard

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> Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. (Ibid, p. 331)

50 See generally R.P. Lewis, op. cit. pp. 523-542.

51 Cases Nos. 49 and 50, Award No. 136-49/50-2, 22 June 1984, 6 Iran-USCTR. p. 272.

52 Ibid, p. 288. See also the Interlocutory Award of 27 July 1983 in this Case in 3 Iran-USCTR. p. 147.

53 Iran v Gould, Case No. 87-036773 (CD. Cal. filed July 1987), as quoted in R.P. Lewis, op. cit. p. 517.

54 See generally R.P. Lewis, op. cit. pp. 523-551.

55 See Ibid, pp. 523-550.

56 Ibid, p. 516.

to the awards rendered against the latter. First of all, theoretically speaking, in the event of the refusal by the US Government to enforce such awards, Iran has to seek their enforcement in the courts of the United States, or other national courts. Although the Claims Settlement Declaration provides that awards of the Tribunal against either Government are enforceable in the courts of the two countries and of any other nations in the world[57], with the kind of confusion that the courts of the United States have created over the issue with regard to the counterclaim awards, it may take years to achieve the enforcement of these awards.

Moreover, the courts of third countries are under no obligation- possibly other than by the New York Convention, whose applicability is doubtful- to enforce these awards. What is, however, most of all significant and relevant to our discussion with regard to the question of procedural remedies is that with the need for the application for enforcement of this category of awards in the courts of the US, or of third countries, a theoretical possibility may be created for the United States, and her nationals, to argue against the validity of the award in question as a ground for the refusal of enforcement. That is to say, a certain form of procedural remedy against the awards of the Tribunal is available to the US Government and its nationals. These remedies in the case of awards made against Iran are in practice, and unequally, non-existent.

The circumstances in which the Awards of the Tribunal in Case (A/15)[58] were rendered[59], and enforced, clearly carry practical implications such as the need for negotiations and bargaining over the enforcement of the award. In this Case those realities were clearly present. The United States has

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57 Article IV(3) of the CSD.

58 Case A/15, Awards dated 20 August 1986 and 4 May 1987, respectively, 12 Iran-USCTR, p. 40, and 14 Iran-USCTR. p. 311.

59 See generally Supra Chapter 4, Section A, pp. 132-140.

finally paid the amount of the Award in that Case.[60] Nevertheless, all the circumstances indicate the presence of the above said realities in this Case involving all forms of negotiations and manoeuvering by the loser party.[61]

Perhaps these circumstances reveal some other unforeseen implications of the existence of the one-sided Security Account for the payment of awards. Under such circumstances the Security Account turns out to be not merely a mechanism for the enforcement of awards. It clearly upsets the balance in the judicial structure and decision-making process, particularly by leading to the actual exclusion of any forum for challenging awards, which exclusion could operate only to the detriment of the provider of the funds for the Security Account.

In the circumstances described above it would have been useful for the Parties to provide for the possibility, on very limited grounds, for challenging the validity of the awards of the Tribunal. This kind of provision could be made either before the International Court of Justice or a separate body within the framework of the Tribunal itself similar to what already exists under Article 52(3) of the ICSID Convention. Such a body could be composed exclusively of three or five neutral arbitrators, other than the members who have made the award, with a true representation of as many forms of different legal systems as possible in its composition.

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60 The United States Agent indicated in a letter of 20 April 1988, that an amount of $454,390,207.71 had been transferred to Iran on 17 May 1987 and an amount of $37,900,000.00 had been transferred on 15 April 1988. (AR 87/88, p. 27.)

61 Apparently the President of the Tribunal conducted negotiations with the two Governments regarding the arrangements for the payment of the Award and in relation to the discharge and indemnity of the United States' obligations regarding its earlier refusal to return the assets involved in this Case. (See AR 87/88, pp. 13-14.)

## III. Remedies Within The Tribunal System

### III(1). The Relationship between the Full Tribunal and the Chambers

The classification of the Tribunal as either the Full Tribunal or the Chambers makes it an interesting subject of study, since the relationship between these two bodies is relevant to our question in this Chapter. The question concerns the extent to which the Full Tribunal has in practice been utilized as a body for reviewing the decisions of the Chambers. The Claims Settlement Declaration does not expressly provide for any such role for the Full Tribunal. It merely indicates that "claims may be decided by the Full Tribunal or by a panel of three members".[62] Moreover, the Full Tribunal is merely composed of members of all three Chambers. Therefore the assumption of a true role of a review body would not be realistic.

However, given the fact that a full panel of nine members- which naturally carries a greater weight than the Chambers- has been introduced in the CSD, it is important to understand if and how the system has been utilized for the purpose of a review body. Moreover, in practice, disputes referred to in Article II(3) of the CSD regarding the interpretation or performance of the General Declaration, as well as questions of the interpretation or application of the CSD referred to in Article VI(4) of that Declaration (all coded "A" Cases)- all these are assigned to the Full Tribunal.[63] The importance of the point is that these cases involve interpretation and application of the Algiers Accords.[64] Therefore decisions of the Tribunal on these cases may have a harmonizing

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62 Article III(1) of the CSD.

63 AR 86/87, p. 21. See also Presidential Order No. 8, Ibid, p. 68.

64 E.g., see the following Cases: Case A/1, 1 Iran-USCTR. pp. 144, 189; Case A/2, Ibid, p. 101; Case A/16, 5 Iran-USCTR. p. 57; Case A/18, Ibid, p. 251; Case A/20, 11 Iran-USCTR. p. 271; Case A/21, 14 Iran-USCTR. p. 324; and Case A/15, 12 Iran-USCTR. p. 40 and 14 Iran-USCTR. p. 311.

effect on the policies of the Chambers and may in effect imply a confirmation or rejection of a certain decision adopted by the Chambers.

Iran appears to have used this opportunity as a mechanism for review of the awards made by the Chambers, though with very limited success. This is because the Tribunal itself has shown no desire to take up such a role, partly because of its composition and partly on the assertion that the awards of the Tribunal are not subject to review.

**a-** Following the hearing by Chamber Two of the Tribunal of some cases of dual nationality, particularly Esphahanian v Bank Tejarat[65], it became obvious to Iran that the majority of the Chamber members tended to favour the application of the principle of effective nationality in deciding its jurisdiction with regard to this category of claims. The Chamber did actually favour this principle in this Case. Consequently, the Government of Iran filed a request for interpretation of the Claims Settlement Declaration concerning the issue.[66] It is obvious that an adverse decision by the Full Tribunal on the matter could have effectively undermined the validity of the Award of Chamber Two in the Esphahanian Case. This in effect proves the potential existing in the Tribunal for the practical exercise of the role of a review body. However, in the above Case the Full Tribunal did have the same opinion regarding the matter which had already been adopted by Chamber Two in the Esphahanian Case; that is, the principle of effective nationality was the applicable rule.[67] Obviously, the question for interpretation of the Algiers Accords is not taken up by the Full Tribunal normally as an exercise of the role of a review body. However, the Tribunal is clearly aware of the implications of its decisions. In fact, in our view it is the composition of the Full Tribunal, as being exclusively composed

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65 2 Iran-USCTR. p. 157.

66 Case A/18, 5 Iran-USCTR. p. 251.

67 Ibid, pp. 259-266.

of the same members of the Chambers, which has principally prevented the adoption of a more flexible approach in adopting the role of a review body.

**b-** In Case (A/20)[68] the Full Tribunal was asked by Iran to give "the proper criteria for the proper application of Article VII of the Claims Settlement Declaration concerning the evidence required to establish the nationality of corporate claimants".[69] Apparently, by filing this request Iran intended to question the validity of an earlier Order made by Chamber One in Flexi-Van v Iran[70] and in General Motors v Iran.[71] Such a result, however, depended upon the question of whether the Full Tribunal would give an interpretation contradicting those Orders.

The Full Tribunal avoided Iran's question somehow, giving the impression that it did not favour questioning the propriety of the Chambers' decisions. The Tribunal said:

> It would seem that the request of Iran arises out of its dissatisfaction with the content of the Flexi-Van Order, and to a certain extent, its confirmation in the General Motors Order.
>
> Iran presents this Case as a question concerning the interpretation or application of the Declaration, raised pursuant to Article VI, paragraph 4. It is obvious, and both parties are in full agreement, that neither Article VI, paragraph 4, nor the Tribunal Rules provide for any kind of review by the Full Tribunal of Orders or Awards made by Chambers. To the contrary, Article IV, paragraph 1, which applies equally to actions by the Full Tribunal and the Chambers, states that "all decisions and awards of the Tribunal shall be final and binding". The only exception to this rule of finality are those contained in Articles 35 and 36 of the Tribunal Rules, dealing with interpretation and correction, which clearly do not apply here.
>
> In so far as Iran's case might be interpreted as a request for that Full Tribunal lay down a uniform rule of evidence applicable to the establishment of corporate nationality, the

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68 11 Iran-USCTR. p. 271.

69 Ibid.

70 Order of 15 December 1982, Chamber One, 1 Iran-USCTR. p. 455. See Dissenting Opinion of Judge Kashani, Iranian Arbitrator, Ibid, pp. 463-482.

71 Order of 18 January 1983, 3 Iran-USCTR. p. 1.

> Tribunal holds that the request does not pose a question concerning the interpretation of the Declaration...[72]

With regard to Iran's request for interpretation of the term "capital stock" in Article VII, Paragraph 1 of the Claims Settlement Declaration, the Tribunal held that it included both voting and non-voting stock.[73] It is notable that in the Flexi-Van Order Chamber One had in fact issued a set of tests and criteria for the purpose of determining nationality of juridical persons.[74] In the same Order Chamber One indicated that only voting stock was taken as a basis for the purpose of determining corporate nationality.[75]

As the Iranian members in their Separate Opinion[76] noted, the significance of the Full Tribunal's interpretation of "capital stock" as including both voting and non-voting stock was that it cast doubt on the validity of the earlier criteria laid down in the Orders made in the Flexi-Van and General Motors Cases.[77]

In general the attitude of the Full Tribunal in the above Case indicates its unwillingness to take up any kind of review of the decisions made by the Chambers. It might be true that the governing provisions of the Tribunal do not permit any kind of review of its decisions. On the other hand, the parties have a right to, and the Tribunal is bound to give its opinion on, a request for interpretation of the Algiers Accords. The fact that any such interpretation may effectively turn out to be a review of the Chambers' decisions, especially when

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72 11 Iran-USCTR. pp. 273-274.

73 Ibid, p. 275.

74 1 Iran-USCTR. 455, pp. 456-463.

75 Ibid, p. 463.

76 Separate Opinion Ansari, Bahrami and Mostafavi, Case A/20, 11 Iran-USCTR. pp. 277-282.

77 Ibid, p. 278.

It is notable that Judge Brower, the American arbitrator, in his Separate Opinion pointed out that Iran's request was clearly nothing more than a request that the Full Tribunal overturn the Orders of Chamber One in Flexi-Van and General Motors. He argued that the CSD and the Tribunal Rules did not permit any such appeal. (Ibid, pp. 276-277.)

it is in conflict with the decision of a particular Chamber, should not prevent the Tribunal from exercising its duties.

c- A further example exists to show that the Tribunal has actually considered the propriety of an earlier decision made by Chamber Two. This Chamber gave the interpretation that after the resignation of a party-appointed member following a hearing (Cases 39 and 55) Article 13, Paragraph 5 of the Tribunal Rules [78] did not require the continued participation of the member who had resigned.[79] The majority of the members of Chamber Two[80] argued that "in view of all the circumstances, including the latter's [arbitrator's] own plans and the presence of his successor, to require such continued participation would not advance the orderly functioning of the arbitral process in Cases concerned".[81] The Chamber, while expressing the belief that such a decision was most properly made by it, and noting a similar decision taken by the Full Tribunal[82], nevertheless by memorandum of the Chairman addressed to the President requested the Full Tribunal to decide whether the decisions made and communicated to the parties in these Cases were within its jurisdiction. The Chairman's memorandum further declared that if the Tribunal were to decide that any of those decisions were not within the Chamber's jurisdiction, the Chamber would request the Tribunal to take the necessary decisions on any such matters.[83]

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78 Article 13(5) of the Tribunal Rules provides that:

> "After the effective date of a member's resignation he shall continue to serve as a member of the Tribunal within respect to all cases in which he had participated in a hearing on the merits, and for that purpose shall be considered a member of the Tribunal instead of the person who replaces him."

79 Annual Report 87/88, p. 9.

80 The Iranian Member of the Chamber dissented from the decision., Ibid.

81 Ibid, p. 10.

82 For the Report regarding this Decision of the Full Tribunal see, Ibid, p. 9.

83 Ibid, p. 10.

The Full Tribunal decided on 8 November 1988 without meeting[84] that the decisions made and communicated to the parties in Cases 39 and 55 were decisions within the jurisdiction of Chamber Two.[85]

It is obvious from the consideration of these Cases that the Full Tribunal has implicitly exercised the function of a review body regarding the decisions of the Chambers. However, it has not been willing to accept and broaden explicitly and effectively the exercise of that role.

## III(2). Revision of the Award

Articles 35, 36 and 37 of the Tribunal Rules make provisions for interpretation, correction and additional award respectively. Under Article 36 the provision for the correction of award covers errors in computation, any clerical or typographical errors, or any errors of a similar nature. The provision for additional award is intended to cover claims presented in the arbitral proceedings but omitted from the award.[86]

Given the limited scope and somewhat administrative nature of the above-mentioned provisions, the Tribunal Rules obviously lack a comprehensive provision for revision of the award on relevant grounds such as discovery of some new and important fact regarding the award. This again arises from the fact that the UNCITRAL Rules by implication of their nature have intended to leave these matters to the courts of competent national jurisdiction. In the case of the Iran-United States Claims Tribunal such a forum is not available for the reasons already explained.

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84 The Iranian members dissented from the decision of the Full Tribunal, Ibid.

85 Ibid.

86 Article 37 of the Tribunal Rules.

It is notable that the inclusion of a provision for the revision of award is recognized even in public international arbitration. For instance, Article 29 of the Draft Convention of the ILC provides that:

> An application for the revision of the award may be made by either party on the ground of discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.[87]

It is significant that the above provision has been adopted along with the provision for the validity of the award to be challenged before the ICJ. That is, two separate remedies, though with different characteristics and fora, are provided under the ILC's Draft Convention. Any such provisions are lacking under the governing provisions of the Iran-US Claims Tribunal.

In the absence of such provisions in the Tribunal's governing instruments and the non-availability of any forum outside the Tribunal, at least as far as the awards made against Iran are concerned, it is necessary to analyse the extent to which the Tribunal has been willing to utilize the provisions regarding interpretation, correction and additional award for the purpose of revision of the award if need be.

In Morris v Iran[88], the Claimant had moved Chamber One for "reconsideration" of its Award in which the Chamber had earlier dismissed his claim.[89] The Tribunal noted that:"... the Tribunal Rules do not permit such reconsideration in the circumstances present here. In order to promote the

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87 See also Article 38 of the Model Rules of the ILC for a similar effect; and Article 51 of the ICSID Convention for the provision regarding the revision of the award on grounds similar to Article 29 of the ILC Draft Convention. Article 51(3) of the ICSID Convention provides that the request for revision "shall, if possible, be submitted to the tribunal which rendered the award. If this shall not be possible, a new tribunal shall be constituted in accordance with Section 2 of the Chapter".

88 16 September 1983, 3 Iran-USCTR. p. 364.

89 Ibid.

finality of Awards, the Tribunal Rules limit the powers of the Tribunal after an Award has been issued. Following issuance of an Award, the arbitrators may only" give an interpretation of their Award, or correct any errors in computation, any clerical or typographical errors, or any errors of similar nature, or make an additional Award as to claims presented in the arbitral proceedings but omitted from the award.[90] In the Tribunal's view Mr Morris's motion was not based on any of the circumstances covered by Articles 35, 36 and 37 of the Tribunal Rules.[91]

Chamber One further gave the opinion that "... no procedure for appeal from a Chamber to the Full Tribunal is provided in the Algiers Accords or the Tribunal Rules".[92] However, the Chamber hinted that the Tribunal might have an inherent power to review and revise an Award under exceptional circumstances, despite the absence of any express provision, e.g., when an Award was based on forged documents or perjury.[93] However, the Chamber pointed out, this was not the case before it.[94]

In Chas T. Main v Khusestan Water and Power Authority[95], Chamber Two ruled that the Tribunal Rules did not provide for substantive reconsideration or revision of awards.[96] Similarly, in Dallal v Bank Mellat[97] the Claimant asked for "reconsideration" of the Award. In this Case[98] Chamber Two decided that there was no provision for the revision of, or appeal from, an

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90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid, p. 365.

94 Ibid.

95 Order of 23 Nov. 1983, 4 Iran-USCTR. p. 60.

96 Ibid.

97 Decision of 10 January 1984, 5 Iran-USCTR. p. 74.

98 Ibid.

Award of the Tribunal, or for the re-hearing of a Case in which an Award had been rendered, under the Tribunal Rules.[99]

In Dames and Moore v Iran[100], on 20 December 1983, Chamber One rendered an Award against Iran for the payment of $108,435 to the Claimant.[101] Shortly after the Award was rendered the Government of Iran asked the Chamber to re-open the Case and reconsider the Award in the light of the Respondent's post-hearing submissions and on the grounds that the evidence and testimony upon which the Award of the Tribunal was based were perjured, and false.[102] Chamber One rejected the Respondent's reliance on Articles 15(1) and (2), 29(2), 35 and 37 of the Tribunal Rules as a proper basis for its request.[103] The Tribunal noted that none of these Articles constituted a grant of authority for the Tribunal to act as was requested.[104] Nevertheless, the Tribunal noted in dictum that:

> In the absence of an express grant of authority to the Tribunal to reopen and reconsider cases on the merits after issuance of an award, the question has been posed as to whether an "inherent power" to do so may exist under "exceptional circumstances", at least where an award "was based on forged documents or perjury" the implied or inherent power" of an international claims tribunal in this area is an issue which has been subject to learned analysis and limited judicial scrutiny, with wholly inconsistent results. The instant request for reopening and reconsideration, however, falls well short of justifying any such effort to ascertain the precise balance struck between finality of the Tribunal dispositions, on the one hand, and the integrity of its process on the other."[105]

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99 Ibid. See also Woodward-Clyde Consultants v Iran (Ibid, p. 73) for a Case in which request for an additional Award was denied.

100 4 Iran-USCTR. p. 212.

101 Ibid.

102 Decision of 17 April 1985, 8 Iran-USCTR. 107, pp. 113-114.

103 Ibid, p. 115.

104 Ibid.

105 Ibid, p. 117 (footnotes omitted).

Further, the Tribunal noted that the Respondent's reference to "forged documents" and "perjury" did not raise justified concern that the processes of the Tribunal had been subverted.[106]

In a more recent Case the Tribunal reaffirmed its earlier position on the matter.[107] The Respondent argued that the Interim Award made by Chamber One was based on an invalid consideration of law, in that it failed to give effect to the provisions of Article VII, Paragraph 2 of the CSD.[108] The motion was denied on the ground that there was no basis in the Tribunal's Rules of Procedure or elsewhere for review of an award on such grounds.[109]

In short, the practice of the Tribunal in these respects mostly favours the rule of finality of the award. The indication regarding the inherent power of arbitral tribunals to re-open the case in exceptional circumstances is a significant development. However, the Tribunal has not made any serious attempt to resolve the problems concerning the lack of relevant provisions for the revision of the award arising from the adoption of the UNCITRAL Arbitration Rules.

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106 Ibid, pp. 117-118.

107 Panacaviar, S.A. v Iran, (10 Feb. 1987), 14 Iran-USCTR. p. 100.

108 Ibid, pp. 100-101.

109 Ibid, p. 101.

For a similar decision and decisions concerning cases of interpretation, correction and additional Award, see generally: PepsiCo, Inc. v Iran, 19 December 1986, 13 Iran-USCTR. 328, p. 329; Behring International, Inc. v Iranian Air Force, 3 May 1984, 6 Iran-USCTR. p. 30; Westinghouse Electric Corp, v Iran, 17 October 1986, 13 Iran-USCTR. p. 93; Trustees of Columbia University v Iran, 1 July 1986, 11 Iran-USCTR. p. 283; Kochler v Iran, 3 July 1986, Ibid, p. 285; Maccollough and Company v Ministry of Post, 7 July 1986, Ibid, p. 287; and Bagell v Iran, 7 August 1986, Ibid, p. 300.

## IV. The Role and Function of the Escrow Agent with Regard to the Validity of the Award

It is now clear that in the course of the challenge of the Awards in the Dutch courts mentioned in Section B(II) of this Chapter, Iran tried to block the payment of these awards out of the Security Account. In other words, Iran tried to persuade the Banque Centrale d'Algerie, which is acting as the Escrow Agent for the Security Account, to refuse to forward payment instructions in these Cases.[110] to the N.V. Settlement Bank, in which the Security Account is held.[111] Apparently, Iran succeeded in delaying the payments for some months but at the end the Escrow Agent made the payments to the Claimants.

Iran's argument put to the Escrow Agent appears to have been that these awards lacked the formal requirements for the validity of awards and therefore they should not be enforced. On another occasion Iran raised technical objections with the Escrow Agent regarding the voting and therefore the validity of the Decision of the Tribunal, i.e. in Case A/1 regarding the interest accrued on the Security Account. The Banque Centrale d'Algerie held up payments for approximately three months, until it convinced itself that the vote was proper.[112] In Case A/1 the Decision was reached by a majority of 5 to 4. The American Members, who voted with the majority, also filed a Separate Opinion stating that, while they concurred with the majority in order to form a majority, they felt that the interest should be left in the Security Account to pay awards rather than be kept in a separate account as the majority had ruled.[113]

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110 W.T. Lake and Tucker Dana, op. cit. pp. 808-809.

111 See generally, Paragraphs 6 and 7 of the General Declaration and the Technical Agreement of 17 August 1981, among Banque Centrale d'Algerie as Escrow Agent, Bank Markazi Iran, the Federal Reserve Bank of New York as Fiscal Agent of the U.S. and N.V. Settlement Bank of the Netherlands. (1 Iran-USCTR. p. 38). See, particularly, Clause 1(e) of the latter Agreement.

112 W.T. Lake and Tucker Dana, op. cit. pp. 808-809.

113 Case A/1, 1 Iran-USCTR. 189, pp. 200-202. For a discussion on this Case see Supra Chapter 4, Section A, pp. 124-131.

The instances indicated above highlight the question of authority of the Escrow Agent with regard to the formal requirements regarding the validity of awards rendered by the Tribunal. Due to the novelty of the subject and its relationship to the question of review of the award, we will discuss it briefly.

The function of escrow agent in the field of international arbitration as a mechanism for the payment of awards is quite unprecedented. In the field of private law the traditional use of the term "escrow" was defined as:

> A scroll or writing sealed and delivered to a person not a party thereto, to be held by him till some condition or conditions be performed by the party intended to be benefited thereby; and, on the fulfilment of those conditions, to be delivered to such party, and to take effect as a deed to all intents and purposes.[114];

or in simple terms:

> A document which is intended to take effect as a deed when certain conditions have been fulfilled may be executed as an escrow.[115]

Today, however, "escrow" has acquired a much wider application. It may apply to money, company stock, securities and other items of property. It may be "a writing, deed, money, stock, or other property delivered by the grantor, promissor or obligor into the hands of a third party, to be held by the latter until the happening of a contingency or performance of a condition, and then by him delivered to the grantee, promisee or obligee. A system of document transfer in which a deed, bond, or fund is delivered to a third person to hold until all conditions in a contract are fulfilled; e.g., delivery of deed to escrow agent under instalment land sale contract until full payment for land is made".[116]

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[114] John B. Saunders, Mozley & Whitely's Law Dictionary, London Butterworths, 1977, p. 121.

[115] John B. Saunders, Words and Phrases Legally Defined, 2nd Ed., Supplement 1986, London, Butterworths, p. 121.

[116] Ibid, p. 122.

In the field of protection of foreign investment certain discussions have taken place regarding the incorporation of escrow into an investment protection mechanism.[117] However, the practical use and legal aspects of the powers and duties of the escrow agent have not been covered in these discussions. A private law analogy is not encouraging either. Certain cases concerning the issue relate to the traditional concept of escrow and even then do not say much on the topic in question.[118]

The question which arises from the role entrusted to the escrow agent is the nature and extent of the function to be performed by him in determining whether or not the condition or contingency upon which the delivery should take place has been fulfilled. In normal circumstances it may not be a difficult question. However, it may well be that the question of determination of the fulfilment of the conditions required becomes a complex one and involves a process of decision-making, though not necessarily in the judicial sense of the word.

Clause 1(e)(i) of the Technical Agreement of 17 August 1981 provides that:

> The Escrow Agent shall instruct the Depositary to make payments to Federal Reserve as necessary for the execution of arbitral awards rendered in favour of US claimants by the Tribunal, promptly upon receipt from the President of the Tribunal of a notification that the Tribunal has rendered such an award, together with the identifying number of the claim, the name and address of the claimant, the amount of the award, including any interest thereon awarded by the Tribunal, and the identifying number of the award when issuing its instructions to the Depositary the Escrow Agent shall provide this information with respect to each award, and will sequentially number its instructions in the order of receipt of the notices from the Tribunal.

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117 See generally, Michael Kitay and Robert P. Trout, "Escrow: A Private Law Device Adopted for the Protection of Foreign Investment", 13 Virg.J.I.L. (1972), p. 48.

118 E.g. Terrapin International, Ltd. v Inland Revenue Commissioners, [1976] 2 All E.R. 461, pp. 465,466; and Alan Estates, Ltd. v W.G. Stores, Ltd. [1981] 3 All E.R. 481, p. 486.

Clause 1(e)(iv) also provides:

> The escrow Agent may rely on and shall be protected in acting on any award notified to it by the President of the Tribunal in accordance with this clause 1(e) and reasonably believed by it to be genuine and to have been signed or dispatched by the appropriate person or persons of the Tribunal.

Given the function entrusted to the Escrow Agent under the Technical Agreement and in general, the question is whether he has any duty or authority to check the validity of the award as to the formal requirements of making and signing, e.g., the number of signatures needed for the signing of the award.

It is obvious that the Escrow Agent has no authority to verify the contents of the awards or the competence of the Tribunal. What can be inferred from the Technical Agreement is that the Escrow Agent has to have reason to believe that the notification made by the President of the Tribunal is genuine and has been signed and dispatched by the appropriate person or persons of the Tribunal. it is therefore questionable whether the Escrow Agent is authorized to look beyond what is required in that Agreement.

It is beyond any doubt that in the circumstances where the validity of the award is questioned as regards its contents the Escrow Agent has no authority to verify that award. However, the Escrow Agent may be presented with the argument by Iran that the document of the award is lacking in validity as to the formal requirements for signing it by the members of the Tribunal; that is to say, the signature of a member of the Tribunal is absent from the award on the ground of his non-participation in the proceedings. Is the Escrow Agent authorized to test this question against the appropriate Rules of the Tribunal? An affirmative answer to the question entails a degree of authority for the Escrow Agent to interpret the Rules of the Tribunal. It can hardly be assumed that the Escrow Agent has such an authority. His powers appear to be limited to verifying the authenticity of the notification made to him by the President of the Tribunal.

## Conclusion

It is quite clear from the foregoing discussion that the legal possibility of nullity, invalidity and revision of arbitral awards has been, in principle and in practice, accepted in both private law and public international law.

As to the procedural remedy for challenge or revision of non-public international awards, there is a mechanism in private law for setting aside of the award by recourse to the courts of the place of arbitration. Moreover, similar attempts can be made against the award in the courts of the country where recognition and enforcement is sought, in order to argue for the refusal of that request.

In public international law there is no automatic procedural mechanism providing for the challenge or revision of the award within or outside the arbitral tribunal. The question largely depends on the arbitration agreement and the rules of procedure adopted for that purpose. However, many creditable rules do provide for a procedural system regarding the challenge or revision of the award. The ILC's Draft Convention and its Model Rules on Arbitral Procedure and the ICSID system offer significant examples of this kind.

Moreover, given the single-case and ad hoc structure of most of the recent public international arbitration tribunals the absence of a procedural remedy provision may not pose a problem in those cases. However, in view of the multi-case and institutional structure of the Iran-US Claims Tribunal, the need for such provisions is obvious and the absence of them can be regarded as a structural defect.

Furthermore, due to the absence of sanctions system for the enforcement of public international awards, the parties have in practice felt the need to negotiate over the objections of a dissatisfied party regarding the validity of the award, and to reach a settlement. This may not be desirable in principle. It is, nevertheless, a reality of the structure of public international

law. In the case of the Iran-US Claims Tribunal awards, Iran has been deprived of that bargaining position due to the existence of the Security Account. As a result, the American claimants have not felt any need to enter into any such negotiations. This might not have been a problem if there had been a security account equally applicable to the awards rendered against the American parties. This, however, is not the case.

The problems arising from the lack of provisions for procedural remedies against the awards of the Tribunal can be attributed to two major factors: 1- The adoption of the CSD under extraordinary circumstances and within a short period of time, as a result of which the question of rules of procedure was relinquished to the UNCITRAL Arbitration Rules; 2- The UNCITRAL Arbitration Rules are primarily designed for use in private arbitrations in the field of international commerce. It is not surprising that they are silent on the matter, because in arbitrations of that nature the lack of stipulation in regard to the remedies against the award does not deprive the party concerned of the right to challenge the award in the courts of the place of arbitration, or argue against its recognition and enforcement before the relevant national court. The adoption of the UNCITRAl Rules, with their inherent private law implications, by the public international structure of the Tribunal has created this gap. As a consequence, the question of procedural remedies against awards of the Tribunal has been left unanswered.

Given the silence of the governing provisions on the matter in question, the Full Tribunal could have shown more flexibility in opening a forum within its structure for a degree of review of the Chambers' awards. The Full Tribunal has expressly refused to undertake that role, although certain examples demonstrate a practical but limited exercise of such a role. In any case, by way of its structure, in consisting of the same members of the Chambers, the Full Tribunal could hardly have qualified as a review body.

It is significant that the Tribunal has implicitly accepted that it may have an inherent power for revision of its awards in exceptional circumstances. In practice it has never conducted a full-scale revision of any one of its awards.

The resultant situation is that due to the existence of the Security Account there is no forum for challenge or revision of the awards rendered against Iran. On the other hand, the American claimants, against whom counterclaim awards have been rendered, can in practice exercise a form of right to challenge the validity of these awards by way of arguing against their enforcement and recognition in the courts of the United States, or of other countries, where Iran has to seek their recognition and enforcement.

# CHAPTER SEVEN

# CONCLUSION

**I.** The historical background to the establishment of the Iran-United States Claims Tribunal demonstrates how the need for the submission of outstanding claims between the two Governments emerged. Not only did this solution help remove a major obstacle to the resolution of the hostage crisis; it also offered a reasonable and practical forum for the settlement of the claims. For in these circumstances of inflamed emotions and huge demands, neither the courts of the United states nor those of Iran could reasonably be expected to offer for totally unprejudiced legal proceedings. Thus the submission to arbitration was the most reasonable and acceptable option. This in itself is a great credit to international arbitration.

However, given the extraordinary circumstances under which the two Governments' agreement to arbitrate was negotiated, many fundamental questions regarding the structure, function and jurisdiction of the Tribunal have been left unanswered. These deficiencies have had later consequences for the policies and function of the Tribunal.

As we have stated earlier, international arbitration is a very complex subject. In a comprehensive arbitration such as the Iran-United States Claims Tribunal, essential issues concerning the arbitration, such as the basis of jurisdiction, the composition of the panel, the qualifications and background of the arbitrators, the designation of the Appointing Authority and the provision for judicial review of awards- all these need to be clearly defined beforehand. It might even be desirable to conclude relevant agreements with the country of

the place of arbitration in order to clarify the nature and nationality of the arbitration.

In the absence of such detailed specifications in the Claims Settlement Declaration, these questions have been left to the UNCITRAL Arbitration Rules and to a certain extent to the Tribunal itself to decide. While the UNCITRAL Rules have acted as a useful basis for regulating the process of arbitration, they have shown a degree of conflict with many public international characteristics of the Tribunal, as regards the designation of the Appointing Authority, the possibility for judicial review of the awards, etc.

Although the Claims Settlement Declaration provided for the possibility of modification of the UNCITRAL Rules by the Tribunal or by the two Governments, such modification by the parties has never taken place. The adjustments made by the Tribunal itself are not and could not be expected to touch upon the structural issues concerning its own composition, the role of the Full Tribunal, the designation of the Appointing Authority and other constitutional issues. These are necessarily matters for the Parties themselves. The failure of the Parties to modify the UNCITRAL Arbitration Rules in relation to the above issues has arisen primarily from the refusal by the American Government to enter into any serious negotiations in this regard, obviously because the present state of the Rules has been more to its own advantage.

In normal circumstances, the adoption of a comprehensive agreement and rules of procedure such as the ICSID system, with possibilities for the role of the President of the ICJ as the Appointing Authority, could have been useful. This belief is based on the fact that the Iran-United States Claims Tribunal and the ICSID arbitration have close similarities. They both have overwhelming public international features and a self-contained structure. The ILC's Model Rules or Draft Convention as a modifiable basis for the Rules of

the Tribunal could also have been a useful set of procedural criteria. It is significant that these Rules are principally designed for use in public international arbitration, provide for the role of the President of the ICJ as the Appointing Authority, and include clear provisions regarding the challenge and revision of the arbitral award.

**II.** Added to its own peculiarities, the practice of the Tribunal throws fresh light on the theoretical arguments regarding the composition of and "politics" engendered by tripartite arbitral tribunals. Quite clearly, there are indications as to the formation of a majority for rendering an award which are dictated by the balancing of three different tendencies within the membership of the Chambers, rather than by purely legal considerations. Traditionally and theoretically, the "politics" dictated by the tripartite composition of arbitral tribunals has been attributed to the need for elliciting the consent of the loser party and providing the ground for the enforcement of the award by that party. That is why, it is argued, arbitration tribunals have usually attempted to explain the reasons for the award more extensively than normal domestic judgements. In the case of the Iran-United States Claims Tribunal the "politics" created by the Tribunal's membership structure has operated to a certain degree. However, in regard to the awards rendered against Iran, because the Tribunal has been less concerned with the enforcement of its awards, due to the existence of the Security Account, the scope of operation of such "politics" has been comparatively limited, confined only to certain occasions concerning serious strategic and politically sensitive decisions.

The assessment of the role of Party-appointed arbitrators of both Iran and the United States again demonstrates the gap between the reality of their function and the theoretical assumptions of especially those who refuse to accept this fact. The attitude, conduct and voting behaviour of the Party-

appointed arbitrators in the Iran-United States Claims Tribunal are by no means on a comparable scale with what could be expected of neutral members. Obviously, this has implications for the judicial nature of the arbitration process as well.

The reality is that States and other arbitrating parties alike have been more willing to submit to an arbitration mechanism composed of a tripartite structure rather than other forms of arbitral tribunals. This should not be regarded as totally undermining the role of law in the arbitral process. However, it should be accepted that the process is to a certain degree influenced by the partisan voting of the party-appointed arbitrators. In an ideal situation the submission to an arbitral tribunal composed predominantly of neutral members might be more desirable. In the absence of that, one should be prepared to accept the implications inherent in the system of tripartite arbitral tribunal.

The theory and practice proves that the cultural-legal training of the international judge is of considerable relevance to the process and outcome of international adjudication. This principle has been reaffirmed by the Statute and practice of the International Court of Justice. Moreover, it is a basic and characteristic feature and an advantage of submission to international arbitration, that judges selected from different legal-cultural environments should decide the dispute.

The above-mentioned principle has clearly not been applied in the Iran-US Claims Tribunal regarding the appointment of neutral members. Despite the frequent changes made in the composition of the neutral members of the Tribunal, all of them have been appointed from Western European countries. In other words, not a single judge from other parts of the world has been allowed by the American Government to be appointed as a neutral member of the Tribunal. Thus it can be safely assumed that by way of legal-cultural

background the Western European members have had closer identity with the American expectations and the American arbitrators than with the Iranian members. Moreover, it implies that in the view of the American Government and of its arbitrators the appointment of an arbitrator with a different nationality and legal-cultural training could have been influential on the outcome of the arbitration. That is, it could have been influential on the adoption of policies possibly other than those already adopted under the present structure of the neutral members.

The success of the American Government in excluding neutral members from parts of the world other than Western Europe lies in the combined effect of the existence of the Security Account and the provision regarding the designation of the Appointing Authority in the UNCITRAL Arbitration Rules. Due to the existence of the Security Account the Iranian Government's bargaining position has been limited, since it has at least partly secured Iran's continued participation in the arbitration. Moreover, the Appointing Authority selected by the Secretary-General of the PCA has not shown any real understanding of the need for diversity of legal-cultural training for the neutral members of the Tribunal.

The instances indicated above and certain other examples referred to in this study clearly demonstrate the effect of the Security Account beyond what it actually was intended for, namely the enforcement of awards against Iran. The existence of the Security Account has, to a certain extent, altered the traditional and characteristic aspects of international arbitration, at least as far as Iran is concerned.

As a consequence of the predominantly Western structure of the Tribunal, through, its neutral members, the awards and decisions of the Tribunal in particularly controversial areas fail to represent a universal view of the problem. For instance, in regard to the various cases of nationalization,

there are no contributions based on recent developments in law in this respect. These decisions are principally representative of the views of the European and American publicists.

**III.** As regards the appropriate remedy against the withdrawal of a party-appointed arbitrator from the proceedings in a tripartite arbitral tribunal, the theory and practice are evenly divided. There is no doubt that the malicious withdrawal of a party-appointed arbitrator on the instructions of his government engages the international responsibility of that State. The question is, however, whether this responsibility confers an automatic right and competence on the remaining members of the arbitral tribunal to continue the proceedings in the absence of a party-appointed arbitrator. This is not clearly established.

Moreover, the historical evolution of the notion of third-party appointment of arbitrators, particularly that of the party-appointed arbitrators, suggests that this solution has been developed in response to the possibility of frustration of arbitration by such actions as withdrawal, resignation etc. This development shows that in almost all of the arbitration agreements made so far the parties have never contemplated the idea of authorizing the remaining members of the arbitral tribunal to continue in the absence of the withdrawing arbitrator. Instead, the parties have developed a system for the third-party appointment and replacement of such arbitrator. This proves that the latter solution has been adopted as a generally preferred alternative to the solution of authorizing the remaining members to continue. In other words, by the adoption of the third-party replacement solution the parties have implicitly rejected the option of authorizing the remaining members to proceed. Moreover, the aim of this replacement mechanism is to maintain the carefully balanced equilibrium in the composition of the arbitral tribunal.

However, we should not take lightly the argument regarding the continuing function and multi-case structure of the Iran-US Claims Tribunal, which is advanced in support of the authority of the remaining members to continue the proceedings in the absence of the withdrawing arbitrator. Nevertheless, the reality is that the decision of the remaining members of the Tribunal to proceed in the absence of the Iranian member of the Chamber concerned has some connection with the existence of the Security Account. In other words, on the assumption of the absence of the Security Account system, the need for cooperation and enforcement of the award by the withdrawing arbitrator's party would have been greater. It is not clear whether in such circumstances the remaining members would have taken the risk of proceeding with the case. In other words, the Iran-U.S. Claims Tribunal's experience in this respect constitutes a special case.

It has to be accepted that in abstract theoretical terms the argument in support of the authority of an incomplete tribunal based on the doctrine of non-frustration and State responsibility is very sound and reasonable. What is important, however, is that the strength of that theory is not fully matched by the practice of arbitration. Moreover, the theoretical argument should be read in connection with the special characteristics and structure of international arbitral tribunals, particularly in regard to the need for equilibrium in the composition of the tribunal with respect to both parties. That is why almost all arbitration instruments have adopted the solution of enforced replacement by a third party in response to the problem of frustration of arbitration.

**IV.** Given the multiplicity of cases involved before the Tribunal appropriate procedural remedies, both inside and outside the Tribunal against its awards are clearly lacking. The need for the finality of the award is understandable. It is acceptable for that reason to restrict the right of appeal

against the award. This does not, however, extend to the remedies against invalid and deficient awards. The lack of such procedural remedies arises partly from the conflict involved in the adoption of a commercial arbitration set of rules for a tribunal which is exercising a public international function and against the awards of which no private law remedies are available.

For the reason explained above, no clear mechanism inside the Tribunal has existed for review of the Tribunal's awards. It is obvious that a review body should be composed of judges other than the Tribunal whose decision is the subject of review. This characteristic has been, in principle, lacking in the Full Tribunal. For the same reason and because the Full Tribunal has not approached the topic of review as liberally as it has done with some similarly ambiguous and difficult questions[1], it has not seriously exercised that role with regard to the awards of the Chambers. The result is that , for instance, while in certain cases it has become obvious that the policy adopted by a Chamber has conflicted with that of the Full Tribunal[2], no possibility has been created to overturn the Chamber's decision.

**V.** Generally speaking, the submission of disputes to arbitration has served a good purpose. Given the continued inter-governmental tension between Iran and the United States, the reference to arbitration is the most conceivable option by which the parties could have resolved these disputes. By the submission of the disputes to arbitration, Iran has been able to get most of its assets released from the American freeze action. Moreover, a large number of outstanding claims between the two countries have been settled which would otherwise have kept the parties engulfed in protracted legal processes in the courts of various countries.

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1 See, for instance, Case A/1, decision regarding interest earned on the Security Account, 30 July 1982, 1 Iran-USCTR. p. 189; and Case A/18, 5 Iran-USCTR. p. 251.

2 See Supra, Chapter Six, pp. 358-359, regarding the Decision in Case A/20.

The fact that the Tribunal has survived the tension during these years is a positive sign. However, its work is by no means over yet. A large bulk of small claims remains unsettled. Further, there are about a hundred sensitive and major claims of dual nationals and a similar number of other important Cases which are still pending.[3] In addition, a number of important intergovernmental claims, "A" and "B" cases remain to be decided. All these may take some years of work for the Tribunal. Most important of all, the biggest test for the Tribunal is still ahead. Notably, in Case (B-1)[4], Iran has sought $11 billion from the United States for military equipment purchases and related services. In fact, in addition to the existence of the Security Account, it is believed that the potential recovery from this claim has contributed to Iran's continued participation in the Tribunal.[5] Given the magnitude of the amount involved and the political circumstances surrounding it, this Case is indeed one of the biggest tests for the Tribunal and for international arbitration. In addition, it is a test for sincerity of the United States as regards its claim of respect for the arbitral processes of the Tribunal.

Finally, despite a number of controversial decisions made by the Tribunal, the role and contribution of the Tribunal in both areas of public international and commercial international arbitration are very significant, and as a whole, representative of a unique experience in contemporary international arbitration.

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3 See Charles N. Brower and Mark D. Davis, "The Iran-United States Claims Tribunal After Seven Years: A Retrospective View from the Inside", 43(4) Arb J. (Dec. 1988), 16, p. 27.

4 See Islamic Republic of Iran and the United States, Interlocutory Award No. ITL 60-B1-FT, (April 4, 1986), 10 Iran-USCTR. p. 207.

5 See Charles Brower and Mark Davis, op. cit. p. 28.

# APPENDIX ONE

# GENERAL DECLARATION

## DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

(General Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable solution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

### General Principles

The undertakings reflected in this Declaration are based on the following principles:

**A.** Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

**B.** It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the

settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgements obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

## POINT I: NON-INTERVENTION IN IRANIAN AFFAIRS

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

## POINTS II AND III: RETURN OF IRANIAN ASSETS AND SETTLEMENT OF U.S. CLAIMS

2. Iran and the United States (hereinafter "the parties" will immediately select a mutually agreeable Central Bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank (hereinafter "the Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this Declaration. All funds placed in escrow with the Central Bank pursuant to this Declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain 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 Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this Declaration,

provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this Declaration. If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this Declaration shall be of no further force or effect.

***Assets in the Federal Reserve Bank***

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

***Assets in Foreign Branches of U.S. Banks***

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

***Assets in U.S. Branches of U.S Banks***

6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements

with the Central Bank, for the establishment of the interest-bearing Security Account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S. $1 billion. After the U.S. $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S. $500 million, Iran shall promptly make new deposit sufficient to maintain a minimum balance of $500 million in the Account. The Account shall be so maintained until the President of the Tribunal established pursuant to the Claims Settlement Agreement has certified the Central Bank of Algeria that all tribunal awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

***Other Assets in the U.S and Abroad***

8. Commencing with the adherence of Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the conclusion of arrangements for the establishment of the Security Account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraphs 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

***Nullification of Sanctions and Claims***

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of 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, (B) their subsequent detention, (C) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

## POINT IV: RETURN OF THE ASSETS OF THE FAMILY OF THE FORMER SHAH

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets belonging to Iran. As to any such defendant,

including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making of the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within the U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3. 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgements relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgement of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgement to the extent that the property or assets exists within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, 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 fulfil such obligation, it shall make an appropriate award in favour of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

## SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as 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.

# APPENDIX TWO

# CLAIMS SETTLEMENT DECLARATION

## DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (Claims Settlement Declaration), 19 January 1981

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

### *Article I*

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

### *Article II*

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counter-claims 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.

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

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

## *Article III*

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

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

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

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

*Article IV*

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

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

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

*Article V*

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of trade, contract provisions and changed circumstances.

*Article VI*

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

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

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

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

## *Article VII*

For the purpose of this Agreement:

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

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided , further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

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

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

## *Article VIII*

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

# APPENDIX THREE

# UNDERTAKINGS

## UNDERTAKINGS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN IN RESPECT TO THE DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

(The Undertakings), 19 January 1981

1. At such time as the Algerian Central Bank notifies the Governments of Algeria, Iran and the United States that it has been notified by the Central Bank that the Central Bank has received for deposit in dollar, gold bullion, and securities accounts in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,917.779 ounces of gold (valued by the parties for this purpose at U.S.$0.9397 billion), and securities (at face value) in the aggragate amount of U.S.$7.955 billion, Iran shall immediately bring about the safe departure of 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph.

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank:

(A) To transfer U.S.$3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

(B) To retain U.S.$1.418 billion in the Escrow Account for the purpose of paying unpaid principal of and interest owing, if

any, on the loans and credits referred to in Paragraph (A) after application of the U.S.$3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid, and for the purpose of paying disputed amounts of deposits, assets, and interests, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing. In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi or the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 days additional days after such reference, by the Iran-United STates Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

(C) To transfer immediately to, or upon the order of, the Bank Markazi all assets in the Escrow Account in excess of the amounts referred to in Paragraphs (A) and (B).

**The Deputy Secretary of State**

**Washington**

Algiers,

January 19th, 1981

Dear Mr Minister,

You have drawn my attention to the omission of the words "not less than" before the figure of U.S.$7.955 in the Declaration of the Governments of Algeria designated: "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".

I agree and authorize you on behalf of the United States to issue this correction.

Sincerely yours,
(Sgd.) Warren M. Christopher

Mr. M. Benyahia

Minister of Foreign Affairs of the Government of the Democratic and Popular Republic of Algeria

# APPENDIX FOUR

# IRAN-UNITED STATES CLAIMS TRIBUNAL RULES OF PROCEDURE

## 3 May 1983

## INTRODUCTION AND DEFINITIONS

1. The Tribunal Rules which follow are organized in the following manner:

- First, as to each Article, the text of the UNCITRAL Arbitration Rules is set forth.

- Second, as to each Article, the text of any modifications to the UNCITRAL Rules made by the Tribunal is set forth. Such modifications have been made within the framework of the Algiers Declarations and specifically pursuant to Article III, paragraph 2 of the Claims Settlement Declaration.

- Third, various Articles include notes to indicate how the Tribunal will implement or interpret the UNCITRAL Arbitrations Rules, as modified.

2. The Tribunal Rules incorporate the UNCITRAL Rules and Administrative Directives 1, 2, 3 and 4 previously issued by the Tribunal, with certain modifications to each.

3. The following definitions apply for the purpose of the Tribunal Rules:

(a) "Algiers Declarations" means the two Declarations of the Government of the Democratic and Popular Republic of Algeria, dated 19 January 1981.

(b) "Arbitral tribunal" means either the Full Tribunal or a Chamber, depending on whichever is seized of a particular case or issue.

(c) "Arbitrating party" means, in a particular case, the party or parties initiating recourse to arbitration (the claimant), or the other party or parties (the respondent). The term "arbitrating party" also means one of the Governments when, in a particular case, it is a claimant or respondent, or when it refers a dispute or question to the Tribunal pursuant to the Algiers Declarations.

(d) "Chamber" means a panel of three members composed by the President of the Tribunal from among the nine members of the Full Tribunal,

pursuant to his powers under Article III, paragraph 1 of the Claims Settlement Declaration.

(e) "Claims Settlement Declaration" means the "Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran", dated 19 January 1981.

(f) "Full Tribunal" means the nine member Tribunal.

(g) "Member" as used in the Tribunal Rules shall have the same meaning as "arbitrator" where used in the UNCITRAL Rules.

(h) "National", "Iran", and the "United States" shall have the same meaning as defined in Article VII of the Claims Settlement Declaration.

(i) "President" means the President of the Tribunal.

(j) "Presiding arbitrator" or "presiding member" means the President of the Tribunal or the Chairman of a Chamber, as the case may be.

(k) "Registrar" means the Registrar of the Tribunal and includes any deputy of, or other person authorized by, the Registrar, the President, or the Full Tribunal to perform a function for which the Registrar is responsible.

(l) "Secretary-General" means the Secretary-General of the Tribunal and includes any deputy of, or other person authorized by, the Secretary-General, the President, or the Full Tribunal to perform a function for which the Secretary-General is responsible.

(m) "Tribunal" means the Iran-United States Claims Tribunal established within the framework of and pursuant to the Algiers Declarations.

(n) "Tribunal Rules" means these Rules, as they may from time to time be modified or supplemented by the Full Tribunal or the two Governments.

(o) "The two Governments" means the Government of the Islamic Republic of Iran and the Government of the United States of America.

(p) "UNCITRAL Arbitration Rules" and "UNCITRAL Rules" mean the Arbitration Rules of the United Nations Commission on International Trade Law which are the subject of Resolution 31/98 adopted by the General Assembly of the United Nations on 15 December 1976.

# SECTION I. INTRODUCTORY RULES

SCOPE OF APPLICATION

ARTICLE 1

## Text of UNCITRAL Rule

Article 1

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

## Modification of UNCITRAL Rule

1. Paragraph 1 of Article 1 of the UNCITRAL Rules is modified to read as follows:

> 1. Within the framework of the Algiers Declarations, the initiation and conduct of proceedings before the arbitral tribunal shall be subject to the following Tribunal Rules which may be modified by the Full Tribunal or the two Governments.

2. Paragraph 2 of Article 1 of the UNCITRAL Rules is maintained unchanged.
3. The following is added to Article 1 of the UNCITRAL Rules as paragraph 3:

> 3. The Claims Settlement Declaration constitutes an agreement in writing by Iran and the United States, on their own behalfs and on behalf of their nationals submitting to arbitration within the framework of the Algiers Declarations and in accordance with the Tribunal Rules.

NOTICE, CALCULATION OF PERIODS OF TIME

ARTICLE 2

## Text of UNCITRAL Rule

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such a period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

## Modification of UNCITRAL Rule

Article 2 of the UNCITRAL Rules is modified to read as follows:

1. All documents must be filed with the Tribunal. Filing of a document with the Tribunal shall be deemed to have been made when it is physically received by the Registrar.

2. All documents filed in a particular case shall be served upon all arbitrating parties in that case through the Agents. The Registrar shall promptly deliver copies to the offices of each of the two Agents. Each Agent shall be responsible for transmitting one copy to each concerned arbitrating party in his country or to the representative designated by each such arbitrating party to receive documents on its behalf.

3. The filing of documents with the Tribunal shall constitute service on all of the other arbitrating parties in the case and shall be deemed to have been received by said arbitrating parties when it is received by the Agent of their Government.

4. Notwithstanding the provisions of paragraphs 1-3 of Article 2, when the arbitral tribunal has so permitted in a particular case, service of written evidence may be effected by actual delivery to the representative of an arbitrating party during a hearing or pre-hearing conference in that case. The Secretary-General shall make a record of such service which shall be signed by him. A copy of each document so served, together with such record of service, shall be delivered by the Secretary-General to the Registrar after the hearing or pre-hearing conference at which service was made.

5. The Registrar may refuse to accept any document which is not received with the required time period or which does not comply with the Algiers Declarations or with the Tribunal Rules. Any such refusal by the Registrar is, upon objection by an arbitrating party concerned within thirty days of notification of refusal, subject to review by the arbitral tribunal.

## Notes to Article 2

1. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when the document is received. If the last day of such period is an official holiday or a non-business day at the seat of the arbitral tribunal, the period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period. The Secretary-General will issue a list of such days.

2. Twenty copies of all documents shall be filed with the Registrar, unless a smaller number is determined by the arbitral tribunal. In the event that there are more than two arbitrating parties in a case, a sufficient number of additional copies shall be filed to permit service on all arbitrating parties in the case. Also, the arbitral tribunal, or the Registrar, may at any time require a party which files a document to submit additional copies.

3. Exhibits and written evidence, other than those annexed to the Statement of Claim or Statement of Defence, shall be submitted in such manner and numbers of copies as the arbitral tribunal may determine in each case based on the nature and volume of the particular exhibit or written evidence and any other relevant circumstances.

4. Upon the filing of a document, the Registrar shall note on all copies the date received. The Registrar shall issue a receipt to the arbitrating party which filed the document. In all instances in which the Registrar is required to deliver copies to the Agents, he will secure a written receipt of such delivery, which will be kept in the case file and available for inspection or copying by any arbitrating party in that case.

5. All documents filed with the Registrar are to be submitted on paper 8 1/2 inches x 11 inches or on A-4 size paper (21 cm x 29.5 cm), or on paper no larger than A-4. If a document, exhibit or other written evidence cannot conveniently be reproduced on paper no larger than A-4, it is to be folded to A-4 size, unless the Registrar permits otherwise in special circumstances.

6. Upon filing a Statement of Claim, the Registrar shall assign an identifying number to the claim, and the case shall be assigned to the Full Tribunal, or by lot to a Chamber. Thereafter, all documents filed in the case, including the award, shall have a caption stating:
(i) the names of the parties,
(ii) the case number of the assigned Registrar and
(iii) the number of the Chamber seized of the case;
otherwise the caption shall state "Full Tribunal."

7. At least two copies in English and two copies in Farsi of all documents mentioned in Article 17, Note 3 and filed with the Tribunal shall be manually signed by the arbitrating party submitting them or by its representative. Exhibits and annexes to documents need not be signed. If a document is presented without signatures, it shall be accepted for filing, but the filing party shall be notified and required promptly to submit two manually signed copies in each language.

NOTICE OF ARBITRATION

ARTICLE 3

## Text of UNCITRAL Rule

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:
(a) A demand that the dispute shall be referred to arbitration;
(b) The names and addresses of the parties;
(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) A reference to the contract out of or in relation to which the dispute arises;
(e) The general nature of the claim and an indication of the amount involved, if any;
(f) The relief or remedy sought;
(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;

4. The notice of arbitration may also include:
(a) The proposals for appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
(b) The notification of the appointment of an arbitrator referred to in article 7;
(c) The statement of claim referred to in article 18.

## Modification of UNCITRAL Rule

No notice of Arbitration pursuant to Article 3 of the UNCITRAL Rules is to be given.

PRESENTATION AND ASSISTANCE

ARTICLE 4

## Text of UNCITRAL Rule

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Article 4 of the UNCITRAL Rules is maintained unchanged.

## Notes to Article 4

1. As used in Article 4 of the UNCITRAL Rules, the term "parties" means the arbitrating parties.

2. For the purpose of a particular case, the two Governments may each appoint representatives in addition to their Agents and each of the other arbitrating parties may appoint representatives. An appointed representative shall be deemed to be authorized to act before the arbitral tribunal on behalf

of the appointing party for all purposes of the case and the acts of the representative shall be binding upon the appointing party. A representative is not required to be licensed to practice law. Parties who appoint a representative shall file with the Registrar notice of appointment in such form as the Registrar may require.

3. Arbitrating parties may also be assisted in proceedings before the arbitral tribunal by one or more persons of their choice. Persons chosen to assist who are not also appointed as representatives are not deemed to be authorized to act before the arbitral tribunal on behalf of the appointing party, to bind the appointing party or to receive notices, communications or documents on behalf of the appointing party. Any such assistant is not required to be licensed to practice law.

## SECTION II. COMPOSITION OF THE ARBITRAL TRIBUNAL

NUMBER OF MEMBERS

ARTICLE 5

### Text of UNCITRAL Rule

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not yet agreed that there shall only be one arbitrator, three arbitrators shall be appointed.

### Modification of the UNCITRAL Rule

Article 5 of the UNCITRAL Rules is replaced by the following:

The composition of the Chambers, the assignment of cases to various Chambers the transfer of cases among Chambers and the relinquishement by Chambers of certain cases to the Full Tribunal will be provided for in orders issued by the President pursuant to his powers under Article III, paragraph 1 of the Claims Settlement Declaration.

# Text of UNCITRAL Rules

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:

(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and

(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from

among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed;

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefore, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under Article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

Articles 6-8 of the UNCITRAL Rules are maintained unchanged.

## Note to Articles 6-8

As used in Articles 6, 7 and 8 of the UNCITRAL Rules, the terms "party" and "parties" refer to the one or both of the two Governments, as the case may be.

CHALLENGE OF MEMBERS

ARTICLES 9-12

## Text of UNCITRAL Rules

Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in Articles 9 and 10 became known to the party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made;

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

## Modification of the UNCITRAL Rules

1. Article 9 of the UNCITRAL Rules is maintained unchanged with the following addition:

When any member of the arbitral tribunal obtains knowledge that nay particular case before the arbitral tribunal involves circumstances likely to give rise to justifiable doubts as to his impartiality or independence with respect to that case, he shall disclose such circumstances to the arbitrating parties in the case and, if appropriate, shall disqualify himself as to that case.

2. Articles 10, 11 and 12 of the UNCITRAL Rules are maintained unchanged.

## Notes to Articles 9-12

1. As used in Articles 9, 10, 11 and 12 of the UNCITRAL Rules, with respect to the initial appointment of a member the terms "party" and "parties" mean one or both of the two Governments, as the case may be. After the initial appointment, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be. Arbitrating parties may challenge a member only on the basis of the existence of circumstances which give rise to justifiable doubts as to the member's impartiality or independence with respect to the particular case involved, and not upon any general grounds which also relate to other cases. Challenges on such general grounds may only be made by one of the two Governments.

2. In applying paragraph 1 of Article 11 of the UNCITRAL Rules, the period for making a challenge to a member of a Chamber to which a case has been assigned shall be fifteen days after the challenging party is given notice of the Chamber to which the case has been assigned, or after the circumstances mentioned in Articles 9 and 10 of the UNCITRAL Rules became known to that party. In the event the case is relinquished by the Chamber to the Full Tribunal, the period for challenging a member who is not a member of the relinquishing Chamber shall be fifteen days after the challenging party is given notice of the relinquishement, or after the circumstances mentioned in Articles 9 and 10 of the UNCITRAL Rules became known to that party.

3. In the event a member withdraws with respect to a particular case or if the challenge is sustained, he shall continue to exercise his functions as a member for all other cases and purposes except in respect of that particular case.

4. In the event that a member of a Chamber is challenged with respect to a particular case and withdraws, or if the challenge is sustained, the President will order the transfer of the case to another Chamber.

5. In the event the Full Tribunal is seized of a particular case and a member is challenged with respect to that case and withdraws, or if the challenge is sustained a substitute member shall be appointed to the Full Tribunal for the purposes of that case in accordance with the procedure set forth in

Article III of the Claims Settlement Declaration as was used in appointing the member being substituted. An appointing authority, if needed, shall be designated as provided in Article 12 of the UNCITRAL Rules.

6. Disclosure statements filed as to each member shall be made available by the Registrar to each arbitrating party in each case.

## REPLACEMENT OF A MEMBER

## ARTICLE 13

### Text of UNCITRAL Rule

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

### Modification of UNCITRAL Rule

Article 13 of the UNCITRAL Rules is maintained unchanged with the following additions:

1. The following is added as the last sentence of paragraph 2:

In applying the provisions of this paragraph, if the President, after consultation with the other members of the Full Tribunal, determines that the failure of a member to act or his impossibility to perform his functions is due to a temporary illness or other circumstance expected to be of relatively short duration, the member shall not be replaced but a substitute member shall be appointed for a temporary period in accordance with the same procedures as are described in Note 5 to Articles 9-12.

2. The following are added as paragraphs 3 and 4:

3. In the event of the temporary absence of the President, the senior other member of the Tribunal not appointed by either of the two Governments shall act as President of the Tribunal and as Chairman at the meetings of the Full Tribunal. Seniority shall be based on the date of appointment, or for members appointed on the same date shall be based on age.

4. A substitute member appointed for a temporary period shall continue to serve with respect to any case in which he has participated in the hearing, notwithstanding the member for whom he is a substitute is again available and may work on other Tribunal cases and matters.

## AMENDMENT TO TRIBUNAL RULES

Article 13 of the Tribunal Rules is amended by the addition of a new paragraph (paragraph 5) as follows:

"5. After the effective date of a member's resignation he shall continue to serve as a member of the Tribunal with respect to all cases in which he had participated in a hearing on the merits, and for that purpose shall be considered a member of the Tribunal instead of the person who replaces him".

(Provisionally applied by decision of the Tribunal on 7 October 1983 at its 86th meeting (FTM 86, paragraph 9) and definitively adopted as an amendment to the Tribunal Rules by decision of the Tribunal on 7 March 1984 at its 90th meeting (FTM 90, paragraph 14) )

## Note to Article 13

Iran may, in advance, appoint up to three persons to be available to act as a substitute member for a temporary period for a specified member, or members, of the Tribunal appointed by Iran; and the United States may, in advance, appoint up to three persons, to be available to act as a substitute member for a temporary period for a specified member, or members, of the Tribunal appointed by the United States. The members of the Tribunal appointed by Iran and the United States may select, in advance, by mutual agreement, a person to act as a substitute for

a temporary period for any of the remaining one third of the members of the Tribunal.

REPETITION OF HEARINGS IN THE EVENT OF REPLACEMENT OR SUBSTITUTION OF A MEMBER

ARTICLE 14

## Text of UNCITRAL Rule

Article 14

If under articles 11 to 13 the sole presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

## Modification of UNCITRAL Rule

Article 14 of the UNCITRAL Rules is modified to read as follows:

If a member of the Full Tribunal or a Chamber is replaced or if a substitute is appointed for him, the arbitral tribunal shall determine whether all, any part or none of any previous hearings shall be repeated.

# SECTION III. ARBTRAL PROCEEDINGS

GENERAL PROVISIONS

ARTICLE 15

## Text of UNCITRAL Rule

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated to the other party.

Article 15 of the UNCITRAL Rules is maintained unchanged.

## Notes to Article 15

1. As used in Article 15 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

2. In applying paragraph 2 of Article 15, an arbitral tribunal shall determine without hearing any written requests or objections of the concerned arbitrating parties with respect to procedural matters unless it grants or invites oral argument in special circumstances.

3. In complying with paragraph 3 of Article 15, an arbitrating party shall follow the procedures set forth in Article 2 of the Tribunal Rules.

4. The arbitral tribunal may take an order directing the arbitrating parties to appear for a pre-hearing conference. The pre-hearing conference will normally be held only after the Statement of Defence in the case has been received. The order will state the matters to be considered at the pre-hearing conference.

5. The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments - or, under special circumstances, any other person - who is not an arbitrating party in a particular case is likely to assist the

tribunal in carrying out its task, permit such Government or person to assist the tribunal in presenting oral or written statements.

PLACE OF ARBITRATION

ARTICLE 16

## Text of UNCITRAL Rule

Article 16

1. Unless the parties have agreed upon the place where the place of arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection

4. The award shall be made at the place of arbitration

Article 16 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 16

As used in Article 16, paragraphs 1 and 2 of the UNCITRAL Rules, the term "parties" means the two Governments. As used in Article 16, paragraph 3 of the UNCITRAL Rules, the term "parties" means the arbitrating parties.

LANGUAGE

ARTICLE 17

## Text of the UNCITRAL Rule

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language agreed upon by the parties or determined by the arbitral tribunal.

Article 17 of the UNCITRAL Rules is maintained unchanged.

## Notes to Article 17

1. As used in Article 17 of the UNCITRAL Rules, the term "parties" means the two Governments.
2 In accordance with an agreement of the Agents, English and Farsi shall be the official languages to be used in the arbitration proceedings, and these languages shall be used for all oral hearings, decisions and awards.
3. In accordance with the provisions of Article 17 of the UNCITRAL Rules, the following documents filed with the Tribunal shall be submitted in both English and Farsi, unless otherwise agreed by the arbitrating parties:
   (a) The Statement of Claim and its annexes
   (b) The Statement of Defence, and any counter-claim, including any annexes
   (c) The reply (including annexes) to any counter-claim.
   (d) Any further written statement (e.g. reply, rejoinder, brief), including any annexes, which the arbitral tribunal may require or permit an arbitrating party to present.
   (e) Any written request to the arbitral tribunal to take action or any objection thereto.
   (f) Any challenge to a member.
4. The arbitral tribunal shall determine in each particular case what other documents, documentary exhibits and written evidence, or what parts thereof, shall be submitted in both English and Farsi.
5. Any disputes or difficulties regarding translations shall be resolved by the arbitral tribunal.

STATEMENT OF CLAIM

ARTICLE 18

## Text of UNCITRAL Rule

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the document or other evidence he will submit.

## Modification of UNCITRAL Rule

Article 18 of the UNCITRAL Rules is modified to read as follows:

1. A party initiating recourse to arbitration before the Tribunal (the "claimant") shall do so by filing a Statement of Claim. Each Statement of Claim shall contain the following particulars:

(a) A demand that the dispute be referred to arbitration by the Tribunal;

(b) The names, nationalities and last known addresses of the parties;

(c) A reference to the debt, contract (including transaction which are the subject of letters of credit bank

guarantees), expropriations or other measures affecting property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to Article II, paragraphs 1 and 2 of the Claims Settlement Declaration;

(d) The general nature of the claim and an indication of the amount involved, if any;

(e) A statement of the facts supporting the claim;

(f) The points at issue;

(g) The relief or remedy sought;

(h) If the claimant has appointed a lawyer or other person for the purposes of representation or assistance in connection with the claim, the name and address of such person and an indication whether the appointment is for purposes of representation or assistance;

(i) The name and address of the person to whom communications should be sent on behalf of the claimant (only such person shall be entitled to be sent communications).

2. It is advisable that claimants (i) annex to their Statements of Claim such documents as will serve clearly to establish the basis of the claim, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Claim quotations of relevant portions of such documents.

3. No priority for the scheduling of hearing or the making of awards shall be based on the date of filing the Statement of Claim.

## Notes to Article 18

1. No claims with respect to which the Tribunal has jurisdiction within the framework of the Algiers Declarations and pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration may be filed before October 20, 1981.

2. All Statements of Claim with respect to matters as to which the Tribunal has jurisdiction pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration which are filed between October 20, 1981 and November 19, 1981 will be deemed to have been filed simultaneously as of October 20, 1981. All such claims filed between November 20, 1981 and December 19, 1981 will be deemed to have been filed simultaneously as of November 10, 1981. All such claims will be deemed to have been filed simultaneously as of December 20, 1981.

STATEMENT OF DEFENCE

ARTICLE 19

## Text of UNCITRAl Rule

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

## Modification of UNCITRAL Rule

Article 19 of the UNCITRAL Rules is modified to read as follows:

1. Within a period of time to be determined by the arbitral tribunal with respect to each case, which should not exceed 135 days, the respondent shall file its Statement of Defence. However, the arbitral tribunal may extend the time-limits if it concludes that such an extension is justified.

2. The Statement of Defence shall reply to the particulars (e), (f) and (g) and include the information required in (h) and (i) of the Statement of Claim (see Article 18, paragraph 1 of the Tribunal Rules). It is advisable that respondents (i) annex to their Statement of Defence such documents as will clearly serve to establish the basis of the defence, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Defence quotations of relevant portions of such documents.

3. In the Statement of Defence, or at a later stage in the arbitral proceedings if the tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, if such counter-claim or set-off is allowed under the Claims Settlement Declaration.

4. The provisions of Article 18, paragraph 1 shall apply to a counter-claim or claim relied on for purpose of a set-off.

## Notes to Article 19

1. In determining and extending periods of time pursuant to this Article, the arbitral tribunal will take into account
(i) the complexity of the case,
(ii) any special circumstances, including demonstrated hardship to a claimant or respondent, and
(iii) such other circumstances as it considers appropriate.
In the event that the arbitral tribunal determines that a requirement to file a large number of Statements of defence in any particular period would impose an unfair burden on a respondent to a claim or counter-claim, it will in some cases extend the time periods based on the above-mentioned factors or by lot.

2. In the event of a counter-claim or claim relied on for the purpose of a set-off, the claimant against whom it is made will be given the right of reply, and the provisions of paragraph 2 of Article 19 of the Tribunal Rules shall apply.

AMENDMENTS TO THE CLAIM OR DEFENCE

ARTICLE 20

## Text of UNCITRAL Rule

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

## Modification of UNCITRAL Rule

The last sentence of Article 20 of the UNCITRAL Rules is modified to read as follows:

> However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal.

## Not to Article 20

As used in Article 20 of the UNCITRAL Rules, the term "party" means the arbitrating party.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

ARTICLE 21

## Text of UNCITRAL Rule

Article 21

1. The arbitral tribunal shall have power to rule on objections that it has no jurisdictions, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

Article 21 of the UNCITRAL Rules is maintained unchanged.

FURTHER WRITTEN STATEMENTS

ARTICLE 22

## Text of UNCITRAL Rule

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Article 22 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 22

As used in Article 22 of the UNCITRAL Rules, the term "parties" means the arbitrating parties.

PERIODS OF TIME

ARTICLE 23

## Text of UNCITRAL Rule

Article 23

The periods of time fixed by the arbitral tribunal for communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

## Modification of UNCITRAL Rule

Article 23 of the UNCITRAl Rules is modified to read as follows:

The period of time fixed by the arbitral tribunal for the communication of written statements (excluding the Statement of Defence) should not exceed 90 days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

## Text of UNCITRAL Rule

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the arbitral tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 24 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 24

As used in Article 24 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

## Text of UNCITRAL Rule

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal

under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearing shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of a written statement signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

## Modification of UNCITRAL RULE

Article 25 of the UNCITRAL Rules is maintained unchanged, except that the period referred to in paragraph 2 shall be at least thirty days.

## Notes to Article 25

1. As used in Article 25 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be, except that, as used in paragraph 4 of Article 25, the term "parties" means the two Governments and the arbitrating parties.

2. The information concerning witnesses which an arbitrating party must communicate pursuant to paragraph 2 of Article 25 of the UNCITRAL Rules is not required with respect to any witnesses which an arbitrating party may later decide to present to rebut evidence presented by the other arbitrating party. However, such information concerning any rebuttal witness shall be communicated to the arbitral tribunal and the other arbitrating parties as far in advance of hearing the witness as is reasonably possible.

3. With respect to paragraph 3 of Article 25 of the UNCITRAL Rules, the Secretary-General shall make arrangements for a tape-recording or sentographic record of hearings or parts of hearings if the arbitral tribunal so determines. If the arbitral tribunal determines that a transcript shall be made of any such tape-recording or sentographic record, the arbitrating parties in that case, or their authorized representatives, shall be permitted to read the transcript.

4. Any arbitrating party in the case may make a sentographic record of the hearings, or parts of the hearings, and, in that event, shall make a transcript

thereof available to the arbitral tribunal without charge. Arbitrating parties are not permitted to make tape-recordings of hearings or other proceedings.

5. Notwithstanding the provisions of paragraph 4 of Article 25, the arbitral tribunal may at its discretion permit representatives of the arbitrating parties in other cases which present similar issues of fact or law to be present to observe all or part of the hearing in a particular case, subject to the prior approval of the arbitrating parties in the particular case. The Agents of the two Governments are permitted to be present at pre-hearing conferences and hearings.

6. In applying paragraph 4 of Article 25 of the UNCITRAL Rules, the following provisions shall determine the manner in which witnesses are examined:

(a) Before giving any evidence each witness shall make the following declaration: "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

(b) Witnesses may be examined by the presiding member and the other members of the arbitral tribunal. Also, when permitted by the arbitral tribunal, the representatives of the arbitrating parties in the case may ask questions, subject to the control of the presiding member.

7. The Secretary-General shall draft minutes of each hearing. After each member of the arbitral tribunal present at the hearing has been given the opportunity to comment on the draft minutes, the minutes, with any corrections approved by a majority of members who were present, shall be signed by the presiding member and the Secretary-General. The arbitrating parties in the case, or their authorized representatives, shall be permitted to read such minutes.

## INTERIM MEASURES OF PROTECTION

## ARTICLE 26

### Text of UNCITRAL Rule

Article 26

1. At the request of either party, the arbitral tribunal may take any written interim measures it deems necessary in respect of the subject-matter of disputes, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Article 26 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 26

As used in Article 26 of the UNCITRAL Rules, the term "party" means the arbitrating party.

EXPERTS

ARTICLE 27

## Text of UNCITRAL Rule

Article 27

1. The arbitral tribunal may appoint one or more experts to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

## Modification of UNCITRAL Rule

Article 27 of the UNCITRAL Rules is maintained unchanged, except that the following is added at the end of paragraph 2:

The expert shall invite a representative of each arbitrating party to attend any site inspection, and, when the arbitral tribunal so determines, a representative of each arbitrating party shall be invited to attend other inspections made by the expert.

## Notes to Article 27

1. As used in Article 27 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

2. Every expert, before beginning the performance of his duties, shall make the following declaration:
"I solemnly declare upon my honour and conscience that I will perform my duties in accordance with my sincere belief and will keep confidential all matters relating to the performance of my task."

DEFAULT

ARTICLE 28

## Text of UNCITRAL Rule

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Article 28 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 28

As used in Article 28 of the UNCITRAL Rules, the term "parties" means the arbitrating parties.

CLOSURE OF HEARINGS

ARTICLE 29

## Text of UNCITRAL Rule

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Article 29 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 29

As used in Article 29 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

WAIVER OF RULES

ARTICLE 30

## Text of UNCITRAL Rules

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objections to such non-compliance, shall be deemed to have waived his right to object.

Article 30 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 30

As used in Article 30 of the UNCITRAL Rules, the term "party" means the arbitrating party.

DECISIONS

ARTICLE 31

## Text of UNCITRAL Rule

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

Article 31 of the UNCITRAL Rules is maintained unchanged.

## Notes to Article 31

1. Any award or other decision of the arbitral tribunal pursuant to paragraph 1 of Article 31 shall be made by a majority of its members.

2. The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret. Only the members of the arbitral tribunal shall take part in the deliberations. The Secretary-General may be present. No other person may be admitted except by special decision of the arbitral tribunal. Any question which is to be voted upon shall be formulated in precise terms in English and Farsi and the text shall, if a member so requests, be distributed before the vote is taken. The minutes of the private sittings of the arbitral tribunal shall be secret.

FORM AND EFFECT OF AWARD

ARTICLE 32

## Text of UNCITRAL Rule

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal Shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

## Modification of UNCITRAL Rule

Article 32 of the UNCITRAL Rules in maintained unchanged, except for the following:

1. The following is added as the last sentence of paragraph 3:

> Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be registered.

2. Paragraph 5 is modified to read as follows:

> 5. All awards and other decisions shall be available to the public, except that upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted.

## Note to Article 32

As used in Article 32 of the UNCITRAL Rules, the term "parties" means the arbitrating parties.

APPLICABLE LAW

ARTICLE 33

## Text of UNCITRAL Rule

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

## Modification of UNCITRAL Rule

Article 33 of the UNCITRAL Rules is modified to read as follows:

> 1. The arbitral 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 arbitral tribunal

determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

2. The arbitral tribunal shall decide ex aequo et bono only if the arbitrating parties have expressly and in writing authorized it to do so.

## Note to Article 33

Paragraph 1 of the modified text of Article 33 corresponds to Article V of the Claims Settlement Declaration.

SETTIEMENT OR OTHER GROUNDS FOR TERMINATION

ARTICLE 34

## Text of UNCITRAL Rule

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraph 2 and 4 to 7, shall apply.

Article 34 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 34

As used in Article 34 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

INTERPRETATION OF THE AWARD

ARTICLE 35

## Text of UNCITRAL Rule

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, Paragraph 2 to 7, shall apply.

Article 35 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 35

As used in Article 35 of the UNCITRAL Rules, the Term "party" means the arbitrating party.

CORRECTION OF THE AWARD

ARTICLE 36

## Text of UNCITRAL Rule

Article 36

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiatives.

2. Such corrections shall be in writing, and the provisions of article 32, paragraph 2 to 7, shall apply.

Article 36 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 36

As used in Article 36 of the UNCITRAL Rules, the term "party" means the arbitrating party.

ADDITIONAL AWARD

ARTICLE 37

## Text of UNCITRAL Rule

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

Article 37 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 37

As used in Article 37 of the UNCITRAL Rules, the term "party" means the arbitrating party.

## Text of UNCITRAL Rule

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. the term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

## Modification of UNCITRAL Rule

Article 38 of the UNCITRAL Rules is modified to read as follows:

1. The arbitral tribunal shall fix the costs of arbitration in its award. the term "costs" includes only:

(a) The costs of expert advice and of other special assistance required for a particular case by the arbitral tribunal;

(b) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(c) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

2. The Full Tribunal shall fix the fees and expenses of the Tribunal which, in accordance with Article VI, paragraph 3 of the Claims Settlement Declaration, shall be borne equally by the two Governments.

## Note to Article 38

As used in Article 38 of the UNCITRAL Rules, the term "party" means the arbitrating party.

## Text of UNCITRAL Rules

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitration in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraph 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 39 of the UNCITRAL Rules is maintained unchanged.

## Note to Article 39

As used in Article 39 of the UNCITRAL Rules, the terms "party" and "parties" mean one or both of the two Governments, as the case may be.

## Text of UNCITRAL Rules

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under article 35 to 37.

## Modification of UNCITRAL Rule

Article 40 of the UNCITRAL Rules is maintained unchanged, except for the following:

1. The first sentence of paragraph 1 of Article 40 of the UNCITRAL Rules is modified to read as follows:

> Except as provided in paragraph 2, the costs of arbitration referred to in paragraph 1(a) and 1(b) of Article 38 shall in principle be borne by the unsuccessful party.

2. The reference in paragraph 2 of Article 40 of the UNCITRAL Rules to "Article 38, paragraph (e)" is modified to read "Article 38, paragraph 1(c)."
3. Paragraph 3 is changed to read as follows:

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings, it shall fix the costs of arbitration referred to in article 38 in the text of that order.

## Note to Article 40

As used in Article 40 of the UNCITRAL Rules, the terms "party" and "parties" mean the arbitrating party or parties, as the case may be.

DEPOSIT OF COSTS

ARTICLE 41

## Text of UNCITRAL Rule

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the requests, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

## Modification of UNCITRAL Rule

Article 41 of the UNCITRAL Rules is modified to read as follows:

1. During the course of its proceedings the Full Tribunal may from time to time determine the costs referred to in paragraph 2 of Article 38 and may request each of the two Governments to deposit equal amounts as advances for such costs.

2. The arbitral tribunal may request each arbitrating party to deposit an amount determined by it as advances for the costs referred to in paragraph 1(a) of Article 38.

3. If the required deposits are not paid in full within the time fixed by the arbitral tribunal, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings or may take such action to permit continuation of the proceedings as is appropriate under the circumstances of the case.

4. The Secretary-General shall transmit monthly, quarterly and annual financial statements to the Full Tribunal and to the Agents. The accounts of the Tribunal shall be audited annually by an independent qualified accountant approved by the Full Tribunal. The Secretary-general shall transmit copies of the audit report to the Full Tribunal and to the Agents. At the request of either Agent, the annual audit shall be reviewed by an audit Committee composed of three professionally qualified persons, one appointed by each Agent and one by the President. The Audit Committee shall submit its report to the Full Tribunal, to the Agents, and to the Secretary-General.

3. After the termination of the work of the Tribunal, it shall, after a final audit render an accounting to the two Governments of the deposits received and return any unexpected balance to the two Governments.

## Note to Article 41

1. As used in paragraph 3, insofar as it refers to the deposits made pursuant to paragraph 1 of Article 41 of the UNCITRAL Rules, the term "parties" means the two Governments; insofar as it refers to deposits made pursuant to paragraph 2 that term means the arbitrating parties.

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