

## **A Review of the Iran-United States Claims Tribunal**

Una revisión del Tribunal de Reclamaciones Irán-Estados Unidos

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## A REVIEW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL\* ■

### Una revision del Tribunal de Reclamaciones Irán-Estados Unidos ■

### Uma revisão do Tribunal de Reivindicações Irã-Estados Unidos ■

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## ABSTRACT

This article is intended to analyse the Iran-United States Claims Tribunal by considering its origins and decisions in order to find out to what extent it has been successful in the settlement of international commercial and inter-state disputes between Iran and the United States. The Tribunal work is evaluated to determine whether it has been a workable pattern of Western-style legal institution for further instances of politically changed circumstances. In its arguments and expositions, I will discuss whether the Tribunal is an international arbitral tribunal created to resolve private law disputes or an interstate arbitration body typically established by treaty. I will argue that the Tribunal should be considered as an instrument of public international law, because it is based on an international treaty between sovereign states. Through this study I will examine the question of the Tribunal's jurisdiction and its application of international law as compared with the decisions of other international tribunals. It also considers an internal question to the theory of the governing law to the resolution of disputes.

## KEYWORDS

Scope, nature, applicable law, contractual claim, frustration.

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\* *Artículo de reflexión.*

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## RESUMEN

Este artículo es un intento por analizar el Tribunal de Reclamaciones Irán-Estados Unidos teniendo en cuenta sus orígenes y decisiones con el fin de averiguar hasta qué punto ha sido exitoso en la solución de controversias comerciales internacionales y entre los estados de Irán y Estados Unidos. El trabajo del Tribunal es evaluado para determinar si ha sido un modelo viable de institución jurídica de tipo occidental para otros casos de circunstancias políticamente cambiantes. En sus argumentaciones y exposiciones voy a discutir si el Tribunal es un tribunal arbitral internacional creado para resolver controversias de derecho privado o un órgano de arbitraje interestatal típicamente establecido por tratado. Discutiré acerca de si el Tribunal debe ser considerado como un instrumento de derecho internacional público porque se basa en un tratado internacional entre estados soberanos. A través de este estudio voy a examinar el asunto de la jurisdicción del Tribunal y su aplicación del derecho internacional en comparación con las decisiones de otros tribunales internacionales. También voy a considerar una cuestión interna de la teoría de la ley que rige la resolución de conflictos.

## PALABRAS CLAVES

Alcance; naturaleza; derecho applicable; reclamo contractual; fracaso.

## RESUMO

O objetivo deste artigo é analisar o Tribunal de Reclamações Irã-Estados Unidos, considerando suas origens e decisões, a fim de descobrir em que medida ele tem sido bem-sucedido na resolução de disputas comerciais internacionais e entre estados entre o Irã e os Estados Unidos. O trabalho do Tribunal é avaliado para determinar se tem sido um padrão viável de instituição legal de estilo ocidental para outras instâncias de circunstâncias politicamente alteradas. Em seus argumentos e exposições, discutirei se o Tribunal é um tribunal arbitral internacional para resolver disputas de direito privado ou um órgão de arbitragem interestadual tipicamente estabelecido por tratado. Argumentarei que o Tribunal deve ser considerado um instrumento de direito internacional público, porque se baseia em um tratado internacional entre Estados

soberanos. Por meio deste estudo, examinarei a questão da jurisdição do Tribunal e sua aplicação do direito internacional em comparação com as decisões de outros tribunais internacionais. Também considera questões internas à teoria do direito que rege a resolução de litígios.

## PALAVRAS-CHAVE

Âmbito; natureza; lei aplicável; reclamação contratual; frustração.

## INTRODUCTION

On November 4, 1979 the United States Embassy in Tehran was occupied by the so-called "Muslim Students Following the Imam's Line" and 52 American nationals were taken hostage on the charge of espionage and remained in captivity for 444 days until their re-release on January 20, 1981. The United States government responded by freezing Iranian accounts and assets amounting to \$ 12 billion in the United States and abroad.<sup>1</sup> The un-derlying justification for the freezing of Iran's assets was both to protect the financial in-terests of the United States and to negotiate the release of the American hostages taken in Tehran.<sup>2</sup>

The freezing order was also a response by the United States to a provocative statement by Iran's Finance Minister Bani Sadr to withdraw all of Iranian deposited reserves from the United States banks.<sup>3</sup> It has been argued that a sudden withdrawal of Iranian as-sets could negatively affect the US economy.<sup>4</sup> It was interpreted as

1. *It is submitted that despite what was alleged, the freezing of Iranian assets was not a response to the hostage crisis and it is therefore not considered as a counter-action in the sense of international law. In an interview in November 1979 the US Treasury Secretary denied such connection and said that the purpose of freezing the Iranian assets was to provide the security for the US creditors to vindicate their rights equal to the amount of the claims. See G. Eftikhar Djahromi, Iran-US Claims Tribunal, Law Re-view (in Persian), Vol. 16-17, 1992-1993, p 11. See also Edward Gordon, "Trends: The Blocking of Iranian Assets", International Lawyer, Vol.14, No.4, 1980; Edward Gordon and Cynthia Lichenstein, "Trends: The Decision to Block Iranian Assets-Reexamined", The International Lawyer, Vol.16, No.1, 1982.*

2. *S.H. Amin, Islamic Banking and Finance: The Experience of Iran, Tehran, 1986, p 42.*

3. *Ibid.; Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal, Dordrecht, etc, 1994, p 1; Jahangir Amuzegar, Iran's Economy Under The Islamic Republic, London, etc, 1993, p 169; James A. Bill, The Eagle and the Lion, The Tragedy of American-Iranian Relations, New Haven/London, 1988, p 342.*

4. *Amin, op.cit., pp 42-43.*

a threat to American national security. From international point of view, it is questionable whether the withdrawal of funds by Iran could have been considered a serious threat to the economy and security of the United States justifying its extraterritorial blocking of the Iranian assets held by subsidiaries or branches of American banks outside US jurisdiction.<sup>5</sup>

On November 16, 1979 the US President granted a general license authorizing certain proceedings to be taken before the American courts against Iran including pre-judgment attachment of assets.<sup>6</sup> As a result, more than 440 lawsuits<sup>7</sup> were commenced against the Government of Iran, its agencies and instrumentalities seeking some \$ 3 billion from Iran in payment of contract or commercial agreements including hundreds of incomplete construction projects, expropriation or nationalization of oil, gas and mineral properties, seizure of equipment and plants and incomplete contracts for both military and civilian goods.<sup>8</sup>

In January 1981 after protracted negotiations a settlement-the Algiers Accord was concluded between Iran and the United States. Under the Agreement the two governments agreed to terminate all litigation before their municipal courts and instead to submit them to the binding and impartial jurisdiction of the arbitral tribunal provided for by the Agreement. The purpose of both parties was 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".<sup>9</sup> As a result, the Iran-United States Claims Tribunal was established as

an alternative dispute resolution mechanism for the Iran-US municipal courts.

Between 20 October 1981 and January 1982, 3816 claims have been filed. Of those, over 2,800 were designated as small claims of less than \$ 250,000,<sup>10</sup> 965 large claims and 74 official claims (B-cases)<sup>11</sup> and 25 disputes as to the interpretation or performance of the Algiers Declarations (A-cases).<sup>12</sup> Most of the claims lodged by Iran against the United States with the Tribunal were for breach of contract by US corporations which did not or could not fulfil their contract with Iran. Iran's total value of the claims exceeded \$ 35 bil-lion covering both the claims for breach and claims for set-off in those international con-tracts which were unilaterally nullified by Iran.<sup>13</sup>

The Settlement Agreement signed by Iran and the United States encompassed of two different declarations of commitments. Under the first declaration (the General Declaration or GD)<sup>14</sup> the United States undertook *inter alia*:

- to restore the financial position of Iran in so far as possible to that which existed prior to November 14, 1979. The United States committed itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction.
- 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

5. See Amin, p 43; Mouri, pp 2-3; F.A. Mann, *Further Studies in International Law*, Oxford, 1990, p 62.

6. See C. Chinkin, *The Foreign Affairs Powers of the US President and the Iranian Hostage Agreement: Dames and Moore v. Reagan*, 32 ICLQ (1983) p 606; See also Note, *Prejudgment Attachment of Fro-zen Assets*, 69 California Law Review 837 (1981); Khai-minh Dang, *Prejudgment Attachment of Fro-zen Iranian Assets*, 69 Calif. L. Rev. 837-862 (1981); Cox, *Sovereign Immunity-Iranian Immunity From Prejudgment Attachments Terminated Under International Emergency Economic Power Act*, 14 Vand. J. Transnational L. 623-635 (1981).

7. See Eftikhar, *op.cit.*, p 8.

8. See S.H. Amin, *The Settlement of Iran-United States Disputes*, in J. of Bus. L. 250 (1982).

9. *Declaration of the Government of the Democratic and Popular Republic of Algeria, January 10, 1981, General Principles (B)*, reprinted in 1 Iran-U.S.C.T.R. 3 (1982).

10. By Article III (3) of the Claims Settlement Declaration: *Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or in the case of claims of less than \$ 250,000, by the Government of such national.*

11. According to Article II (2) of the Claims Settlement Declaration the Tribunal has jurisdiction over official claims of one government against the other.

12. By virtue of Article II (3) of the Claims Settlement Declaration: *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.*

13. See S.H. Amin, *Iran-United States Claims Settlement*, 32 ICLQ (1983), p 755.

14. *Declaration of the Government of the Democratic and Popular Republic of Algeria*, see 20 ILM 224 (1981).

termination of such claims through binding arbitration.<sup>15</sup>

- to withdraw all claims pending against Iran, bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national or by persons other than the United States nationals arising from the Iranian revolution
- to freeze and prohibit any transfer of property and assets in the United States within the control of the estate of the former Shah with a view to recovering such property and assets as belonging to Iran.<sup>16</sup>

At the same time Iran agreed (a) to bring about the safe departure of the 52 US nationals detained in Iran (b) to transfer \$ 3.667 billion to the Federal Reserve Bank of New York to pay (1) all loans and credits made by a syndicate of banking institutions (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<sup>17</sup> (c) to retain \$ 1.418 billion in the escrow account for the purpose of securing payment of non-syndicated loans made by US banks.<sup>18</sup>

Meanwhile, the Algiers Accords provide for special payment mechanism with a Security Account to cover claims against Iran by other US corporations and individuals. Iran also agreed to replenish the fund whenever it fell below \$ 500 million until all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement. In this sense, the availability of funds has been assured and

15. *Ibid.*, General Declaration.

16. *Ibid.*

17. On January 15, 1981 the Iranian government declared its readiness to pay off its syndicated bank loans, that is, the loans made to Iranian entities by syndicates of United States and foreign banks. Payment of those loans used up almost \$ 3.7 billion of the approximate \$ 5.6 billion of blocked overseas deposits. Meanwhile, Iran agreed to pay \$ 1.4 billion to the escrow account in order to secure payment of non-syndicated loans made by United States banks and contested interest of about \$ 130 million paid by some US banks on Iran's overseas deposits. On January 20, 1980 Iran ended up with most of its foreign loans paid off, and with a little less than \$ 3 billion in cash (\$ 500 million from the overseas deposits and about \$ 2.4 billion in assets) returned by the Federal Reserves of New York; S.H. Amin, *Iran-United States Claims Settlement*, op.cit., p 249. Ghibson, Christopher S. & Drahozal, Christopher, R., *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, *Journal of International Arbitration*, 23(6)521 (2006).

18. See 20 ILM 229 (1981). At the end of 1985 all major claims were settled by most banks.

the effectiveness of compensation has been guaranteed. According to Judge Kashani, the opening of such a an unusually reliable guarantee subjected Iran and the Iranian treasury to the issuance of un-just compensation awards which have been unprecedented in the history of international law.<sup>19</sup> To gauge the extent of the injustice done to Iran it suffices to note that the establishment of the security account to guarantee the payment of any proven claim was undoubtedly a clear victory for the United States which in its whole history of dispute settlement with other countries, including notably with the Socialist countries, was not able to extract 40 cents to a dollar.<sup>20</sup> No such security account is provided for Iranian parties.<sup>21</sup>

The second declaration (the Claims Settlement Declaration or CSD)<sup>22</sup> provided for the establishment of the Iran-United States Claims Tribunal to resolve the outstanding disputes between the two countries arising out of expropriation or nationalization and uncompleted contracts or other measures affecting property rights.

## METHODOLOGY

The article intended to fill lacunae in the existing literature on the Iran-United States Claims Tribunal by using the interpretative approach. The basic philosophy underlying this need is the fact that the recent studies on the subject so far available are far from being sufficient to show the impact of Tribunal. It is generally acknowledged that the Tribunal operations affect the direction of international trade and investment by widening the scope of arbitration internationally. The objective of this paper is to introduce the Iran - United States Claims Tribunal as an

19. S. M. Kashani, *The Response to the Press Interview of 28 Mordad (Referred to the Iranian Month) of Mr Premier in Connection with the Fourth Election Period of the Presidency*, p 52.

20. See Rahmatullah Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, Dordrecht, etc, 1990, p 258; Aida Avanesian, *Iran-United States Claims Tribunal in Action*, London, etc, 1993, p 318

21. Avanesian, *Ibid.*

22. *Declaration of the Government 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*; See also VII Yearbook of Commercial Arbitration (1982) pp 256-260.

arbitral tribunal that continues to inspire other international claims institutions.

## SECTION 1: THE SCOPE AND NATURE OF ARBITRATION TRIBUNAL

### (a) *The scope of jurisdiction*

An appreciation of the Tribunal's nature depends on some understanding about its jurisdictional objective. The Tribunal's jurisdiction is to be interpreted restrictively, since the jurisdiction of an arbitral tribunal emanates from the consent of the disputing parties and cannot, thus, be wider "than that which was specifically decided by mutual agreement".<sup>23</sup> The Tribunal has itself stated that its jurisdiction limited by arguing that "it can easily be seen that the parties set up very carefully a list of the claims and counterclaims which could be submitted to the arbitral tribunal. As a matter of fact, they knew well that such a Tribunal could not have wider jurisdiction than which was specifically decided by mutual agreement".<sup>24</sup> Article III (1) of the Claims Settlement Declaration states:

The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary ... Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine.

The Tribunal's jurisdiction<sup>25</sup> includes first, claims of the nationals of the United States against Iran and Claims of nationals of Iran against the United States arising out of debts, contracts, expropriations or other measures

23. *Declaration of the Government 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*; See also VII Yearbook of Commercial Arbitration (1982) pp 256-260. See Case A/1, 14 May 1982 and 3 August 1982, 68 ILR 523 (1985), p 532. See also Mouri, p 8.

24. See Aida Avanesian, *op.cit.*, p 8.

25. See further Sohn, *The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law*, in *The Iran-United States Claims Tribunal 1981-1983*, 92-103 (R. Lillich ed. 1984); Dombia-Henry, *The Limits of the Jurisdiction of the Iran-United States Claims Tribunal*, 4 *Arb. Int'l* 228-239 (1988). It is submitted »The Tribunal enjoys a multi-jurisdiction system designed to consistently with its basic mandate to settle different categories of disputes between the two States parties and their nationals.« Mohebi, Mohsen, *International Law Character of The Iran-United States Tribunal*, Brill Publishers, 1999, p 76.

affecting property rights.<sup>26</sup> Second, 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.<sup>27</sup> Third, any disputes between Iran and the United States concerning the interpretation or performance of any provision of the Claims Settlement Declaration.<sup>28</sup> Its jurisdiction also includes the important issues of principle referred to by one of the Chambers with a view to avoiding conflicting decisions between them.<sup>29</sup> Whereas the claims of nationals of one State against the other are regarded to be within the Tribunal's jurisdiction, claims of either of the two States against nationals of the other are considered admissible only if submitted as counterclaim.<sup>30</sup> As a result, Iran and its instrumentalities were deprived to bring most of the claims against the US legal persons and entities, unless they were submitted as counterclaim.<sup>31</sup>

If we consider that the declarations (Declaration of Algiers and the Claims Settlement Declaration) have been concluded between two

26. *Claims Settlement Declaration*, at art. 11 (1).

27. *Ibid.*, at art. 11 (2).

28. *Ibid.*, at art. 11 (3). For the Tribunal's jurisdiction, procedure and jurisprudence see Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal*, The Hague, Kluwer Law International, 1998; George H. Alderich, *The Jurisprudence of the Iran-United States Claims Tribunal*, New York, Oxford University Press/Clarendon Press, 1996; Aida Avanesian, *Iran-United States Claims Tribunal in Action*, *op.cit.*; Wayne Mapp, *The Iran-United States Claims Tribunal, the first ten years 1981-1991*, Manchester, (1993); R. Khan, *The Iran-United States Claims Tribunal*, *op.cit.*; Baker & Davis, *Arbitral Proceedings under the UNCITRAL Rules, The Experience of the Iran-US Claims Tribunal*, 23 *George Washington J. of Int'l Law and Economics* 267 (1989); *Ibid.*, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules*, 23 *Int'l Lawyer* 81 (1989); Mosk, *The Role of a Party-Appointed Arbitrator in International Arbitration: The Experience of the Iran-US Claims Tribunal*, 1 *Transnational Lawyer* 253 (1988); M.H. Bordbar, "Jurisdiction in International Arbitration: A Study on Iran-United States Claims Tribunal", Brussels, Free University of Brussels; G.H. Alderich, *The Jurisprudence of the Iran-United States Claims Tribunal*, Oxford, Clarendon Press, 1996; M. Mohebi, *The International Law Characters of The Iran-United States Claims Tribunal*, Kluwer Law International, The Hague/Boston, 2000.

29. *Hague YIL* 1989, Vol. 2, p 275.

30. Mouri, *op.cit.*, pp 8-9. The Full Tribunal in its Decision in Case A/2, the Interpretation of the Algerian Declarations (Claims Against US Nationals) concluded that "such a right of counter claim is normal for a respondent, but it is admitted only in response to a claim and it does not mean, by analogy, that each State is allowed to submit claims against nationals of the other States". 62 ILR 595 (1982), p 600.

31. Mouri, *ibid.*; after the Tribunal's Decision in Case A/2 Iran was forced to withdraw about 1330 State-ments of Claims, *Ibid.* Kashani, *op.cit.*, p 8.

States with equal sovereignty, then the principle of equality of States requires that the right of pleading and access equally exist for both parties. It is a well-established principle that agreements are to be interpreted on the basis of the intentions of the parties. If the Iranian claims cannot be brought to the Iran-United States Claims Tribunal, the Iranian government “would be put in an unequal and unjust situation for which it has waived a part of its sovereign immunity”.<sup>32</sup> The Claims Settlement Declaration is to be interpreted not in a way that only one party (American companies) benefits from it and the claims of the other party (the Iranian Government and its instrumentalities against US nationals) be excluded. In such a case, the agreement of the parties “would lose its apparent balance and turn into an agreement without cause or with superficial cause”.<sup>33</sup> Although it is argued that Iran may against the claims of American companies file its own counter claims, but it is clear that such counter claims cannot be viewed as sufficient consideration for the Tribunal’s one-sided jurisdiction over claims of US nationals. Since presentation of counter claims is a defensive measure that could only be invoked against the same claimant, it is not helpful in granting jurisdiction to the Tribunal for independent claims of Iran against the American nationals. Counterclaim is a right that every defendant can benefit from it. It is not a right that is to be granted by the Claims Settlement Declaration.<sup>34</sup>

Since the jurisdiction of the Tribunal is related to the time when the claim arose,<sup>35</sup> the Algiers Accords exclude certain claims from the Tribunal’s jurisdiction including:

- claims relating to the seizure of the 52 United States citizens and their subsequent detention.<sup>36</sup>
- claims arising out of the actions of the United States in response to the seizure.<sup>37</sup>

32. See the dissenting opinion of the Iranian Judges in Case A/2, 62 ILR (1982), pp 602-603. It has further been argued that “it is a matter of fair reading that should the American companies be permitted to sue the Iranian Government before this Tribunal a comparable jurisdiction must also be conferred to the Tribunal to deal with the enormous claims of the Iranian Government against the American companies”. *Ibid.*, p 603.

33. *Ibid.*, p 604.

34. *Ibid.*, pp 597, 604.

35. *Avanessian, op.cit.*, p 10.

36. *General Declaration, at para. 11.*

37. *Ibid.*

-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 Majles position.<sup>38</sup>

Jurisprudential issues had significant impact on the work of the Tribunal. Indeed, many factors were central to the complicated jurisdictional issues including whether the claimant had the requisite nationality, whether the defendant was an organ of or owned by one of the governments, whether the claim was outstanding on the date of the Algiers Accords, whether the claim was timely filed, and whether the Tribunal’s jurisdiction was ousted by a contract providing for exclusive jurisdiction of Iranian courts.<sup>39</sup>

With respect to jurisdictional clauses of the Algerian Declaration, Iran’s main argument was presumably based on the absolute theory of sovereign immunity asserting that claims arising under State contracts (contracts with an Iranian State agency or instrumentality) must be within the jurisdiction of the courts of that state. It would mean that unless jurisdiction were expressly conferred, no other tribunal could claim jurisdiction over the disputes between two States. In other words, unless some other forum was specifically chosen, all State contracts provided for the exclusive jurisdiction of the courts of Iran, that is to say, beyond the jurisdiction of the Iran-United States Claims Tribunal. In Iran’s view, “wherever a contract contains a general phrase inferring governance of Iranian laws (which doubtless calls for referral to Iranian courts) or other phraseology which involves Iranian courts in one way or another such as arbitration, then such phrase should be construed as acceptance of the jurisdiction of Iranian courts”.<sup>40</sup>

### **(b) The nature of the Tribunal**

When the nature of the Tribunal is considered, the main question is whether the Tribunal is an inter-State tribunal<sup>41</sup> (between two sovereign

38. *Claims Settlement Agreement, at art. 11 (1).*

39. *Steward Abercrombie Baker & Mark David Davis, The UNCITRAL Arbitration Rules in Practice, The Experience of the Iran-United States Tribunal, Deventer/Boston, 1992, p 104.*

40. *Cited in Ted Stein, Jurisprudence and Jurists’ Prudence: The Iranian-Forum Clause Decisions of the Iran-US Claims Tribunal, 78 AJIL 1 (1984), p 7.*

41. *For interstate arbitration see J.H. Ralston, Law and Procedure of International Tribunals (1926); K.S. Carlston, The*

States) or a private arbitral tribunal<sup>42</sup> (between two private parties or one State and one private party) or it performs both functions. Inter-State arbitration is a conventional matter and derives its strength from the treaties concluded between States.<sup>43</sup> It is argued that “the interstate arbitral process is governed by international law by definition”.<sup>44</sup> Inter-State arbitration is typically created by the will of the sovereign States due to the fact that States cannot be forced to accept arbitration.<sup>45</sup>

Considering the provisions of the Algiers Declaration,<sup>46</sup> it might be argued that the Tribunal is international in character because it has been established by an international treaty binding between Iran and the United States as contracting parties on the one hand and the Government of Algeria as an intermediary on the other hand. The Algiers Declaration is a trilateral intergovernmental treaty governed, by international law.<sup>47</sup> The Tribunal is international, in so far as established by two sovereign States and therefore disputes arising out of interpretation of the Algiers Accords are disputes between these sovereign State parties. It could also be argued that since the Algiers Accords are an international

treaty, they belong to the province of international law and thus an inter-State arbitration body.<sup>48</sup>

Moreover, Article II (1) of the Claims Settlement Agreement refers to Iran-US Claims Tribunal as an international arbitral tribunal “entrusted inter alia with the task of determining the obligations assumed by sovereign states under an international multilateral treaty”.<sup>49</sup> The choice of the Rules of procedure of the Tribunal (UNCITRAL RULES) support the argument that the Tribunal is international in character.<sup>50</sup> The Tribunal itself maintained that the Algiers Accords constitute a treaty under public international law.<sup>51</sup> It might be argued that the Tribunal as a result of the governing treaty instruments has both private and public law dimensions which as such coexist and interact in a way which is unprecedented.<sup>52</sup> It is an intergovernmental institution and a creature of the rules of public international law. Some of the claims of the governments of Iran and the United States are based on contractual agreements and others involve intergovernmental dispute presenting questions of treaty interpretation associated with international tribunals. The Tribunal is also an arbitral body which resembles typical international commercial arbitration, handling ordinary commercial claims between a private entity and a foreign governmental agency.<sup>53</sup>

*Process of International Arbitration (1946); J.L. Simpson & H. Fox, International Arbitration Law and Practice (1959).*

42. For international commercial arbitration see M. Domke, *The Law and Practice of Commercial Arbitration*, New York, 1968; Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England (1982)*; De Vries, *International Commercial Arbitration, A Contractual Substitute for National Courts*, 57 *Tulane L. Rev.* 42 (1982); *Ibid.*, *International Commercial Arbitration: A Transnational View*, 1 *J. Int'l Arb.* 7 (1984); Craig, Park and Paulsson, *International Chamber of Commerce Arbitration (1984)*; Redfern & Hunter, *Law and Practice of International Commercial Arbitration (1986)*; S. Schwebel, *International Arbitration: Three Salient Problems*, Grotius, 1987; Gary, Born, *International Commercial Arbitration, Commentary and Materials*, 2nd ed. Kluwer Law International, 2001, D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Arbitration*, Kluwer Law International 2003; Tiber Varady, John J. Barcelo and Arthur t. Von Mehren, *International Commercial Arbitration*, 2nd ed., Thomson West, 2003..

43. See Rahmattullah Khan, *The Iran-United States Claims Tribunal*, *op.cit.*, p 50; David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 *AJIL* 104 (1990) p 111; F.A. Mann, *Studies in International Law*, Oxford, 1973, p 256.

44. Caron, *Ibid.*, note 29.

45. Khan, p 51.

46. See Principle B of the General Declaration and Article II (1) of the Claims Settlement Agreement.

47. Khan, p 22.

48. *Ibid.*, pp 92-93. The Iranian arbitrators maintained that “the Iran-United States Claims Tribunal is an international forum, established by an international agreement concluded between two States: a tribunal intrinsically a part of public international law. The Algiers Declarations follow a longstanding and recognized practice whereby two states, in exercising their diplomatic protection, establish a mixed arbitral tribunal to settle the claims of their nationals against each other”. See the Dissenting Opinion of the Iranian Arbitrators in Case A/18 (Apr. 6, 1984) Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals Against the Government of Iran, 75 *ILR* 204 (1987), p 264.

49. *Ibid.*, pp 93, 99.

50. Khan, *op.cit.*, p 96; Article III (1) of the Claims Settlement Declaration states: “... 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...” For the analysis of the application of the Tribunal Rules see further J.S. Van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by Iran-United States Claims Tribunal*, 1991..

51. See *Iran-United States, Case A/21, Dec. No. 62-A21-FT*, 14 *Iran-U.S.C.T.R.* at 324-336.

52. Jamison M. Selby & David P. Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 *Int'l Lawyer* 2 (1984), p 217-218.

53. *Ibid.*, p 217.

In one of the test cases on dual nationality (*Esphahanian*) the Full Tribunal described itself as a “substitute forum” and not as any organ of a third State or a tribunal whose claims were espoused by a State and decided by reference to public international law.<sup>54</sup> In the *Anaconda* Case, the Tribunal said that “it is clearly an international tribunal established by treaty.”<sup>55</sup> Some scholars<sup>56</sup> took the position that the Tribunal is characterized as a hybrid meaning that it has both an inter-State and commercial nature. The view of the Iranian Government is that the Tribunal has an international status (inter-State) and is to be governed by the rules of international law.<sup>57</sup> In Iran’s view the Tribunal:

... is truly international since it is called upon to settle a dispute between States, arising from the treatment by one of them of the nationals of the other, the solution to which must be found in public international law and not disputes between one State and Nationals of the other, which could be resolved by the application of private international law.<sup>58</sup>

Moreover, the States parties to the Algiers Accords acted in their international capacity to resolve international disputes of their nationals by espousing those disputes for the benefit of their respective nationals.<sup>59</sup> The Algiers Declarations must be seen as an international treaty between two sovereign States, rather than a mere hybrid one between private and public arbitration. The

54. *Esphahanian v. Bank Tejarat*, Award No. 31-157-2 (Mar.29,1983), Khan, p 80; See also Caron, p 132. In this case the Tribunal held that it “... has been substituted for the national courts of both countries with a flexibility not found in either, consistent with its status as an international tribunal established by treaty”. 72 ILR 478 (1987), p 478.

55. *Anaconda-Iran, Inc v. Iran*, 13 Iran U.S.C.T.R. at p.261(1986), Award No.ITL 65-167-3.

56. See Toope, *Mixed International Arbitration* 265-283 (1990); Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 Int’l L. 217 (1984); Carter, *Iran-United States Claims Tribunal: Observations on the First Year*, 29 U.C.L.A.L.Rev 1076-1103 (1982).

57. See letter from the Iranian agent Eshragh to Dutch Ministry of Foreign Affairs, 5 Iran-U.S.C.T.R. 405-427. See further Mohsen Mohebi, *The International Law Characters of the Iran-United States Claims Tribunal*, op.cit.

58. *Memorial of Islamic Republic of Iran in Case A 18* (Oct.21.1983), cited by Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL (1990), p 132. See also Mouri, op.cit., p 25.

59. See Mouri, op.cit., p 27.

fact that an individual or a private company is party to a dispute before the Iran-United States Claims Tribunal does not deprive the Tribunal of its international legal nature.<sup>60</sup>

## SECTION 2: APPLICABLE LAW IN INTERNATIONAL TRIBUNALS

### (a) Determining the applicable law

The issue of applicable law is one of the basic topics in international arbitrations which plays a crucial role in the adjudication of disputes arising out of international claims. The main question in both theory and practice remains how to determine which law is applicable. The general view is that the parties are free to determine the rules of law to be applied by international tribunals. The freedom of the parties to choose the applicable law is widely recognized. Arbitration differs from judicial settlement in that the parties are free to choose the arbitrators and to lay down the rules that shall be applied, but the awards are binding on the parties to the disputes. In international arbitration, international tribunals deal with two separate laws, namely, the law applicable to the arbitration (the *lex arbitri*) and, the law applicable to the substance of the dispute (the *lex cause*). In international arbitration covering state-to state disputes, it is for the States to determine the procedure to be applied by the tribunal. The states can also agree upon the rules of law upon which the tribunal is to base its awards. By Article 3 (2) of the Claims Settlement Declaration the Iran-United States Claims Tribunal shall conduct its business under the UNCITRAL rules modified by the two Governments (Iran and the United States of America) to meet the Algiers Accords.

Article 37 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 states: International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. The meaning of the phrase “respect for law” is that international arbitration tribunals are not permitted to settle the disputes in the context of applicable law on the basis of equity, unless the parties have expressly agreed to give them the power to decide *ax aequo et bono*.

60. *Islamic Republic of Iran and USA*, Award No.586-AA27-FT. at para.58 (5 June 1998).

The States are free to determine the substantive applicable to the extent that their agreement do not breach the imperative norms of international law (*Jus Cogens*). In the absent of any agreement between States regarding the applicable law, the arbitral tribunal shall apply the rules of public international law.

### **(b) Applicable law regime in the Algiers Declarations**

The Claims Settlement Declaration, permits the Iran-US Claims Tribunal to look to a wide range of sources derived from political and practical necessity as well as principles of substantive commercial and international law to determine the applicable law. Article V of the Claims Settlement Declaration provides: 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 Tribunal determines to be applicable taking into account relevant usages of the trade, contract provisions and changed circumstances.<sup>61</sup>

As may be seen from the foregoing, the wording of Article V is not specific and mandatory. It allows the Tribunal a large degree of discretion to determine the law that will apply. The Article does not require application of any system of conflict-of-law rules. By contrast Article 42 (1) of the International Centre for the Settlement of Investment Disputes (ICSID) provides for mandatory and more specific rules with regard to the choice of law clauses where they exist. When this is not the case, the arbitrators must apply the law of the contracting party and applicable rules of international law. Pursuant to Article 42 (1) of the ICSID “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting party to the dispute (including its rules on the conflict of

laws) and such rules of international law as may be applicable.” In deciding the applicable law issues, the Iran-United States Claims Tribunal has resorted to three different sources: (1) contract, (2) general principles of law, and (3) public international law.

In determining the choice of law by the parties in a given case, the Tribunal examined the relevant legal principles and rules as well as the specific factual and legal circumstances of the case, giving special weight to relevant usages of the trade, the terms of the contract and the change of circumstances.<sup>62</sup> By far, a majority of the claims have been decided on the basis of the parties’ contracts. The contract has been the most important and common source of law. In *Amoco International Finance Corporation v. Iran* while defining the *lex contractus* by reference to the choice-of-law provision (Article 30 of the parties contract), the Tribunal ruled that it “... cannot accept that Iranian law plays a subordinate role, as contended by the Claimant. Nor is the Tribunal convinced that the Khemco Agreement should be characterized as an agreement governed, by nature, by international law. Such a construction is manifestly contrary to the plain meaning of the terms of Article 30, paragraph 1. It is clear that the parties chose Iranian law as the law of the conflict and no reason appears for reading the provisions otherwise.”<sup>63</sup> When a claim was based on alleged breach of contract, the Tribunal stated that first it must determine whether such an alleged breach actually took place.

Such a determination is made by reference to the terms of the relevant contract, but it also may depend upon legal issues to which the provisions of the contract do not provide a solution. Whether certain conduct of a party constitutes a repudiation of the contract or whether certain dealings of the parties constitute an agreement altering the initial contract are examples of such issues. In

61. On the Choice of law see L. Brilmayer, *The Role of the Substantive and Choice of Law Policies on the Formation and Application of Choice of Law Rules*, *Hague Recueil des Cours* (1995) 252, pp 9-112; P.E. Nygh, *The Reasonable Expectations of the Parties As a Guide to the Choice of Law in Contract and in Tort*, *Hague Recueil des Cours* (1995) 251, pp 269-400; S.J. Stein, *The Drafting of Effective Choice of Law Clauses*, 8 *J. Int'l Arb.* 3 (1991); Note, *Choice of Law Decisions in the Iran-US Claims Tribunal*, 4 *Emory Int'l L. Rev.* 157 (1990); Stewart, *The Iran-United States Claims Tribunal: A Re-view of Developments 1983-84*, 16 *L. & Policy Int'l Bus.* 677, 712-15 (1984); Charles W. Reese, *Discussion of Major Areas of Choice of Law*, *Hague Recueil des Cours* (1964-I) 111, pp 171-308.

62. See *Mobil Oil Iran Inc., and Others v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, Award No. 311-74/76/81/150-3 (July 14, 1987), reprinted in 86 *ILR* 230 (1991), p 256.

63. See Nagla Nassar, *Internationalization of States Contracts: ICSID, The Last Citadel*, 14 *J. Int'l Arb.* 3 (1997), p 188. Article 30 (1) of the Khemco Agreement provides: “This Agreement shall be construed and interpreted in accordance with the plain meaning of its terms, but subject thereto, shall be governed and construed in accordance with the laws of Iran”. *Ibid.*, note 18. See 27 *ILM* 1314 (1988), para. 156.

questions of this kind, it becomes necessary to rely upon the law applicable to the contract. This is also the case when the Tribunal must decide upon the alleged liability of an entity other than Iran or the United States, when the entity is not a subject of international law.<sup>64</sup>

Where there was no contract, the Tribunal regularly applied general principles of law as a source of legal rules in the private claims.<sup>65</sup> General principles of law according to McNair's study "share with public international law a common source of recruitment and inspiration, namely, the general principles of law recognised by civilized nations".<sup>66</sup> Hanessian describes the rationale of the Tribunal by referring to general principles of law common to civilized nations as to choose the substantive body of law it finds most appropriate to each commercial case.<sup>67</sup> While the Tribunal in the majority of cases involving commercial cases, referred to general principles of law, it has shown considerable reluctance to

engage in doctrinal disputations over the legal basis of these concepts. Some scholars criticized the Tribunal by derogating from a specific choice of law designated by the parties. They argue that such a derogation may finally lead to uncertainty.<sup>68</sup>

Public international law constitutes the Tribunal's third source of law which has particularly been applied with regard to treaty interpretation, expropriation and expulsion, and contractual claims. Substantial freedom has been given to the Tribunal pursuant to Article 33 of the Tribunal's Rules to refer to principles of international law and commercial law. The significant role of international law in adjudicating Iran-US disputes lies in the fact that it is mainly a by-product of the liberal wording of Article V of the Algiers Accords and the wills of the two States establishing the Tribunal. Thus, the precedential effect of the Tribunal's decisions is qualified by the special status and factual circumstances upon which they are based and also the wide mandate of the Tribunal in respect of defining the governing law under Article V of the Algiers Accords.<sup>69</sup>

The Tribunal rarely has referred to national rules as the source of controlling rules. The rationale behind the Tribunal's approach to make a specific choice of law especially when the parties made their contracts subject to Iranian law, was to avoid the application of certain mandatory provisions of domestic law which could become, otherwise, applicable.<sup>70</sup> In numerous awards in which the issues were addressed, the Tribunal recognized the principle of the primacy of international law over national law, even in cases where the parties have agreed upon the applicable law.<sup>71</sup> The Tribunal's reluctance to choose and

64. See *Mobil Oil Company v. Iran*, 86 ILR 230 (1991), pp 256-257.

65. The most significant resort of the Tribunal to general principles of law have been the principles of unjust enrichment (see i.e. *Isaiah v. Bank Mellat*, Award No. 35-219-2 (Mar. 30, 1983), 2 Iran-U.S.C.T.R. 232, (1981 I) reprinted in 72 ILR 716 (1987) and *force majeure* (see i.e. *International Schools Services, Inc. v. National Iranian Copper Industrial CO.* 9 Iran-U.S.C.T.R. 187, 1985, II); *Force majeure, according to the Tribunal means "social and economic forces beyond the power of the State to control through the exercise of due diligence. Injuries caused by the operation of such forces are not therefore attributable to the State for purposes of its responding for damages".* See *Could Marketing, Inc. v. Ministry of National Defence*, Award No. ITL 24-49-2 3 Iran-U.S.C.T.R. 147 at 153; *Sea-Land, Inc. v. Iran*, 6 Iran-U.S.C.T.R. 149, 168 (1984 II); *Morrison-Knudsen Pacific Ltd. v. Ministry of Roads & Transportation*, 7 Iran-U.S.C.T.R. 54, 76 (1984 III); In *Mobil Oil Iran v. Iran*, the Tribunal took the view that "it is also admitted generally that suspension or termination of a contract, is a general principle of law which applies even when the contract is silent"; (Award No. P 311-74/76/81/150-3, 16 Iran-U.S.C.T.R. at 39); In another case, namely, *Anaconda Iran, Inc. v. Iran*, the Tribunal concluded that "under a variety of names, most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law"; (Award No. ITL 65-167-3, 13 Iran-U.S.C.T.R. at 211); See also *Sylvania Technical System, Inc. v. Iran*, Award No. 180-64-1, 8 Iran-U.S.C.T.R.

66. See Lord McNair, 33 B.Y.I.L. (1957), p 6; For the application of general principles see Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Arbitration and Exercise of State Jurisdiction*, 1946; Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations* (1957), 51 AJIL 277; Mosler, *General Principles of Law*, in 7 *Encyclopedia of Public International Law* 89-105 (1984); B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987).

67. Hanessian, *op.cit.*, pp 323-326; See also Article 38, 1 (C) of the Statute of the International Court of Justice.

68. See Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-84*, 16 L. & Policy of Int'l Bus. 1984; at 712-713; See further D.L. Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 *Virginia J. of Int'l L.* 1984.

69. See Nassar, *op.cit.*, pp 189, 195, 207.

70. See Aida Avanesian, *Iran-United States Claims Tribunal in Action*, *op.cit.*, p 253.

71. See *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran*, Award No. ITL 10-43-FT, 1 Iran-U.S.C.T.R. 347 (Dec. 9, 1982); *CMI International, Inc. v. Ministry of Roads and Transportation and the Islamic Republic of Iran*, Award No. 99-245-2, 4 Iran-U.S.C.T.R. 263 (Dec. 27, 1983); *Alan Craig v. Ministry of Energy of Iran, Water Engineering Service, Khuzestan Water and Power Authority, Khadamat Iran-Zemin Engineering Consultant Services Company*, Award No. 71-346-3, 3 Iran-U.S.C.T.R. 280 (Sep. 2, 1983); *American Bell International Inc. v. Government of the Islamic Republic of Iran, Ministry*

apply a municipal law and its tendency to base decisions on factual rather than sound legal basis does not contribute to the development of law of contractual relations. The lack of common principles in cases where a positive choice is made also reduces the value of the Tribunal's decisions as precedents for solving conflict of law issues by later tribunals.<sup>72</sup> Stein argued that "a tribunal that opts out of the task of normative elaboration makes it more difficult for later tribunals to rely on law as a source of legislation. The law remains embryonic, untextured, calcified".<sup>73</sup>

The Tribunal's rationale has been based on the assumption that the international arbitration involving contracts of an international character should not be governed by the national law of either party.<sup>74</sup> In cases where the parties did not choose by contract the substantive law or the rules of choice of law, the Tribunal accepted the principles of commercial law (*lex mercatoria*) common to most legal systems as mandated by Article V of the Algiers Declarations.<sup>75</sup> In this way the Tribunal proceeded to choose the most appropriate body of law with respect to each dispute. Stating that Article V of the Tribunal Rules creates a novel system of determining applicable law, the Tribunal concluded that pursuant to this system it is not required to apply any particular or international legal system. It was maintained that

the Tribunal is vested with exclusive freedom in determining the applicable law taking seriously into consideration the pertinent contractual choice of law rules. Accordingly, it is not bound to apply these rules if there are good reasons not to do so.<sup>76</sup> The Tribunal based its interpretation on the more expansive version of Article 33 of its rules to use general principles of commercial law. The Tribunal's avoidance to refer to any national system of law as the source of controlling rules could best be understood by its own reasoning in the following manner:

It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with and perhaps almost essential to, the scope of the tasks confronting the Tribunal ... the Tribunal may often find it necessary to interpret and apply treaties, customary international law, "taking into account relevant usages of the trade, contract provisions and changed circumstances" as Article V directs ... our search is for justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals.<sup>77</sup>

### SECTION 3: CONTRACTUAL CLAIMS

#### (a) controversy over forum selection

On January 14, 1981 the Iranian Majles (Parliament) passed a Single Article Act under which the government was allowed to proceed with the settlement of disputes through arbitration vis-à-vis the United States. This provision was incorporated in Article II of the Claims Settlement Agreement whereby all "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 ..." As a consequence, claims based on the other causes of action do not meet the criterion of exclusion provision. In practice choice-of-forum clauses<sup>78</sup>

of Defence of the Islamic Republic of Iran, Ministry of Post, Telegraph and Telephone of the Islamic Republic of Iran and the Telecommunications Company of Iran, Award No. ITL 41-48-3, 6 Iran-U.S.C.T.R. 74 (May 31, 1984); Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran, Award No. 176-255-3, 8 Iran-U.S.C.T.R. 272 (June 29, 1984); DIC of Delaware, Inc., Underhill of Delaware, Inc. v. Tehran Redevelopment Corporation, The Government of the Islamic Republic of Iran, Award No. 176-255-3, 8 Iran-U.S.C.T.R. 144 (Apr.26, 1985).

72. Avanesian, *op.cit.*, p 314.

73. Stein, *op.cit.*, p 48

74. See *Mobil Oil Iran Inc. v. Iran*, 16 Iran-U.S.C.T.R. 3, 27 (1987), Award No. 311-74/76/81/150-3; *CMC Int'l, Inc. v Iran*, 4 Iran-U.S.C.T.R. 263, (1983).

75. With respect to *Lex Mercatoria* see generally Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, Harvard Int'l L. J. 19 (1978); Cremades & Plehn, *The New "Lex Mercatoria" and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. Int'l L.J. 317 (1984); Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 ICLQ (1985); Mustill, *The New Lex Mercatoria; The First Twenty-five Years*, in *Liber Amicorum for Lord Wilberforce*, M. Bos & I. Brownlie (eds.), 1987; B. Goldman, *The Applicable Law: General Principles of Law - The Lex Mercatoria, Contemporary Problems in International Arbitration*, J.D.M. Lew (ed.), Martinus Nijhoff Publishers, 1988; Highet, *The Enigma of the Lex Mercatoria*, 63 Tulane L.Rev. 613 (1989); C.W.O. Stoecker, *The Lex Mercatoria: To What Extent Does it Exist?* J. Int'l Arb. V. 7, No. 1, 1990.

76. See *Anaconda-Iran, Inc v. Iran*, 13 Iran-U.S.C.T.R. 199, 232 (1986), Award No. ITL 65-167-3.

77. 4 Iran-U.S.C.T.R. 263, 267-68 (1983 III).

78. See Hagen 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 Tex Int'l L. J. 39-

were common in pre-revolutionary contracts. Under the above-mentioned clause many contracts between the Iranian State agencies and American corporations were excluded from the jurisdiction of the Tribunal because most of the contracts provided for exclusive Iranian jurisdiction in favour of Iranian law. The Tribunal was consequently confronted with the issues of changed circumstances as a relief from contractual obligations and an adequate and effective system of local Iranian remedies. The question was whether or not forum selection clauses divest the Tribunal of its jurisdiction to hear the cases. According to Kerr unless agreement on the governing law proves to be really impossible, international contracts should always expressly provide for the choice of forum. When this is not the case further complications are obviously liable to arise *in limine*.<sup>79</sup>

The United States argued among other things that the legal system in Iran had undergone such a fundamental change that Iranian law could not be considered to have been chosen by the parties to the contracts and thus American claimants could not receive fair treatment in Iranian courts.<sup>80</sup> Thus, the choice of forum clauses due to drastically change of circumstances in the Iranian judicial system are no longer enforceable. The only fair approach according to the United States was to allow the Tribunal to decide whether a given claim should be adjudicated by an Iranian court rather than the Tribunal itself.<sup>81</sup> Iran responded

by declaring that the State contracts are subject to the jurisdiction of the courts of that State.<sup>82</sup> Unlike the jurisdiction of the municipal courts, the jurisdiction of international tribunals and particularly that of arbitral tribunals is strictly limited to what the parties to a dispute before them have expressly consented to. Therefore, the consent of the disputing parties to submit to the jurisdiction of that tribunal must first be unequivocally established.<sup>83</sup>

So far as the Algiers Declaration is concerned, the argument of the United States to the effect that “there was no evidence that due process of law is guaranteed in Iran” can not be maintained, nor might it be founded on by US private nationals and corporations. The main relevant question was, however, whether the post-revolution Iranian legal and judicial system was an appropriate forum for the settlement of a claim by the United States nationals.<sup>84</sup> Although Iran and the United States have consented to arbitration, Iran argued that it has not thereby agreed to waive the general jurisdiction of its courts. Indeed, the wording of the relevant parts of the Declaration sufficiently demonstrates the determination of the Iranian government to abide by the terms of the Single Article Act of the Majles which exclude from the jurisdiction of the Tribunal those claims arising out of contracts in which the jurisdiction of the Iranian courts was envisaged.<sup>85</sup>

With regard to a restrictive interpretation Iran stated that reasons that justify the requirement for a restrictive interpretation of an agreement conferring jurisdiction on an international tribunal are stronger and persuasive in cases in which a State is a party. On the other hand, the States are, due to their sovereignty, naturally more reluctant to submit to jurisdiction other than that of their own municipal courts. Hence, the requirement of submission by the parties to arbitration and the need for a restrictive interpretation of any instrument allegedly conferring jurisdiction will apply *a priori* in cases of State contracts.<sup>86</sup>

65 (1985); *Ibid.*, *The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal*, 3 *Arb. Int'l* 46-71 (1987); See further Gary Born, *International Arbitration and Forum Selection Agreements, Planning, Drafting and Enforcing*, Kluwer Law International, 1999.

79. Kerr, *International Arbitration v. Litigation*, *J. of Bus. L.* 175 (1980).

80. See *Memorial of the Government of the United States on the Issue of Jurisdiction*; With regard to the allegations of the United States that the legal system of Iran was unfair Iran asserted that they are de-void of any effective legal standing and incorporated an acute political issue which may not be raised before the Tribunal tainting the legal process and leading a tribunal, which is only legally qualified to investigate and determine issues, the political nature of which is an established fact and the legal effects thereof are doubtful and would eventually be ineffective and inconsequential; See *Memorial of the Government of the Islamic Republic of Iran*, August 16, 1982, at 17, Gibbs and Hill, *Inc. v. Iran Power Generation and Transmission Company*, 1 *Iran-U.S.C.T.R.* 236 (1982), cited by Shandor S. Badaruddin, *Choice of Law Decisions in the Iran-US Claims Tribunal*, *Emory International Law Review*.Vol.4.No.1 p 175(1990).

81. See the Declaration of Waren Christopher, Deputy Secretary of State of the United States heading the US negotiating teams in Algiers, at page 18, cited by Badaruddin, *op.cit.*, p 172, note 76.

82. *Ibid.*, at 4.1, cited by Badaruddin, *op.cit.*, p 173.

83. *Ibid.*, at 3.1, Badaruddin, , note 79.

84. S.H. Amin, *The Settlement of Iran-United States Disputes*, *op.cit.*, p 249.

85. *Memorial of Iran*, at 3.4, Badaruddin, p 174.

86. *Ibid.*, at 3.2, Badaruddin, *Ibid.*

Finally, Iran argued that the usage of the term binding to describe a contract is a re-dundancy, because in the legal and customary sense, a contract is presumed to be binding. Therefore, the use of the phrase “binding contract” in the Declaration does not convey any legal difference from the word contract in the Single Article Act of the Iranian Majles.<sup>87</sup> The meaning of the term “binding contract” in Article II (1) of the Claims Settlement Agreement has been the cause of much debate for the Tribunal. It was held that if the words “binding contract” were to be interpreted as referring to the entire business agree-ment, this would leave the Tribunal with a vicious circle. In order to find out whether a contract was binding, it would have to go into the merits of the case and to examine whether it has jurisdiction or not. According to the Tribunal “neither of the two possible interpretations gives any sensible meaning to the word “binding” in the present context. Therefore, the Tribunal concludes that this word is redundant”. The Tribunal declared that it is not the task of this Tribunal to determine the enforceability of choice clauses in agreements.<sup>88</sup>

As a matter of fact, the Tribunal did not support the US argument and held that the word binding in the exclusion clause was redundant with regard to the enforceability of particu-lar choice of forum clauses. In reaching its conclusion the Tribunal considered that there is not sufficient evidence that the governments came to an agreement on the meaning of the word binding.<sup>89</sup> On November 5, 1982 the Tribunal heard nine cases<sup>90</sup> involving 19 differ-ent clause referred

to as test cases. The Tribunal concluded that 13 clauses were within its own jurisdiction. In the Tribunal’s view these choice-of-forum clauses did not specifically provide for Iranian jurisdiction.<sup>91</sup>

In the *Gibbes and Hill Case*, the Tribunal rejected the Iranian forum clauses arose out of two contracts. The Tribunal concluded that the first contract only provides that disputes will be solved through court proceedings and that the disputes will be subject to the law of Iran, whatever the court deals with them.<sup>92</sup> The contract according to the Tribunal does not contain any provision which unambiguously restricts jurisdiction to the Iranian courts.<sup>93</sup> As far as the second contract is concerned, the Tribunal stated that “a contract provision requiring resource to arbitration is not a provision for a “sole jurisdiction” of any court”.<sup>94</sup> The Tribunal considered that while Iranian law provides for a degree of control by the courts of Iran over the arbitral process, such limited jurisdiction falls short of excluding the Tribunal’s

*T.C.S.B., Inc. and Iran., Award No. 152-5-140-FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R., pp 261-267; Ford Aerospace Communication Corp., et al and The Air Force of the Islamic Republic of Iran, et al., Award No. ITL-6-159-FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R., pp 268-270; Zoker International, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. ITL-7-254-FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R., pp 271-273; Stone and Webster Overseas Group, Inc. and National Petrochemical Co., et al., Award No. ITL-8-293-FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R., pp 247-279; Dresser Industries Inc. and The Government of the Islamic Republic of Iran, et al., Award No. ITL-9-466-FT (Nov. 5, 1982), Iran-U.S.C.T.R., pp 280-283.*

91. See S.H.Amin, *Commercial Arbitration in Islamic and Iranian Law*, Tehran, 1988, p 369.

92. See *Gibbs and Hill*, 68 ILR 561 (1985), p 562. Under Article 24 of the contract “All the disputes that may arise between the parties hereto over this Contract or the interpretation of its contents, that cannot be settled through negotiation or correspondence in an amicable manner, shall be referred to a com-mit-tee consisting of the highest authority of the Client (or his Deputy) and the Consulting Engineer for Settlement, and in case they fail to settle the dispute in accordance with this Contract and current regu-lations, the dispute shall be settled through competent courts according to Iranian law.

Until such a time as any disputes have been settled, the Consulting Engineer undertakes to carry out his commitments under this contract, otherwise the Client will take action against the Consulting Engineer according to the Contract in his own judgement. Obviously during the settlement period the Client, too, will perform his commitments according to the stipulations of the Contract in his own judgement”. *Ibid.*, pp 561-562.

93. *Ibid.*

94. *Ibid.*, p 564. Under Article 13 of the contract “Any and all disputes, disagreements or questions which might arise between the parties in connection with interpretation of any provision of this Agreement or the compliance or non-compliance therewith, which cannot amicably be settled by the parties shall be settled by arbitration laws of Iran”. *Ibid.*, p 563.

87. *Ibid.*, at 4.2.3.1, Badaruddin, note 82.

88. See *Halliburton Co., Imco Services (U.K.) Ltd., v. Doreen/ Imco, The Islamic Republic of Iran*, 68 ILR 566 (1985), at 571. at 245.

89. “If the parties wished the Tribunal to determine the enforceability of contract clauses specially pro-viding for the sole jurisdiction of Iranian courts, it would be expected that they would do so clearly and unambiguously. Thus, the Tribunal would be reluctant to assume such a task in the absence of a clear man-date to do so in the Algiers Declaration”; See *Halliburton Co.*, 68 ILR 566 (1985), at 570.

90. These cases included the following: *Gibbs and Hill, Inc. and Iran Power Generation and Transmission Company, et al., Award No. ITL-6FT (Nov.5, 1982), 1 Iran-U.S.C.T.R. pp 236-241; Halliburton Co., Imco Services (U.K.) Ltd. and DOREEN/IMCO, et al., Award No. ITL-251-FT (Nov.5, 1982), 1 Iran-U.S.C.T.R. pp 242-247; Howard, Needles, Tammes and Bergendof (HNTB) and The Government of the Islamic Republic of Iran, et al., Award No. ITL-3-68 FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R. , pp 248-250; George W. Drucker Jr., and Foreign Transaction Co., Award No. ITL-4-121-FT (Nov. 5, 1982), 1 Iran-U.S.C.T.R., pp 252-260;*

jurisdiction under Article II (1) of the Claims Settlement Declaration.<sup>95</sup>

In the *Halliburton Co. case*, a promissory note contained a provision under which “for all matters concerning the interpretation, compliance or judicial request for payment” the maker of the note submitted to the jurisdiction of the competent courts of Iran.<sup>96</sup> According to the Tribunal “the text of the instant clause in the promissory notes makes it clear that it is only *the maker* of the note who submits to the jurisdiction of the Iranian courts. Thus, the borrower has agreed to waive the objections against the jurisdiction of these courts that it otherwise might have invoked, but the clause should not be understood so as to deprive the lender of its right to sue the maker of the note before any competent court outside Iran.”<sup>97</sup>

In the *HNTB case*, the contract included provisions providing that disputes over the contract or its interpretation were to be settled according to the Iranian laws by having recourse to the competent Iranian courts.<sup>98</sup> The Tribunal held that “a plain reading of this article shows that it only provides that disputes, failing settlement between the parties, shall be solved through court proceedings, and that the disputes shall be subject to Iranian law, whatever the court that deals with them.”<sup>99</sup>

In the *George case* the forum selection clause of the contract contained a provision (Article 14)

95. *Ibid.*

96. 68 ILR 566 (1985).

97. *Ibid.*, p 569

98. 68 ILR 573 (1985). Article 21 on the settlement of disputes states: “Any disputes which may arise between the two parties in connection with present contract or change or interpretation of its stipulations and context, which cannot be settled amicably by negotiation or correspondence, shall first be presented for settlement to a committee composed of the Employer’s highest authority (or his deputy) and the Consulting Engineer party to the Contract. In case they cannot settle the disputes based on the Contract and the relevant Articles or regulations the case should be settled according to the Iranian Laws by having recourse to the competent courts. *Ibid.*, pp 574-575.

99. *Ibid.*, p 575. In this case the dissenting opinion of Mr Lagergren and the Iranian judges rightly pointed out that “it is inconceivable that the Iranian Ministry of Roads and Transport would have been willing to accept the jurisdiction of courts anywhere in the world in a contract regarding the construction of a motorway in Iran. Therefore, it is beyond doubt that the parties by the expression “through competent courts according to Iranian law” have intended to confer sole jurisdiction on Iranian courts, applying Iranian procedural law”. *Ibid.*, p 576.

that “Any dispute arising from the performance of this contract, not settled amicably, shall be settled by reference to the legal authorities of Iran”. The Iran’s position was that the expression “Iranian legal authorities” is equivalent to “the competent Iranian courts”. But the Tribunal viewed the reference to the “legal authorities” as to cover such bodies or authorities that exist within the Iranian legal system for the purpose of resolving commercial disputes. The scope of the expression “legal authorities”, the Tribunal argued, “cannot be so wide as to cover governmental or other official bodies or agencies not dealing with disputes settlement. Nor would it be reasonable to read into Article 14 a reference to settlement through arbitration; such an interpretation would not be compatible with the word “authorities” which indicates a body enjoying the status emanating from the State”. For the reasons given, the Tribunal held that “legal authorities” must be understood to have the same meaning as “court” which include both administrative and judicial tribunals.<sup>100</sup>

In *T.C.S.B. Inc. case*, the Tribunal did not accept a forum selection clause that specified that the disputes should be settled pursuant to the Iranian law and if necessary by arbitration or by reference to competent courts. According to the Tribunal such a clause was insufficient to exclude its jurisdiction.<sup>101</sup> The Tribunal was very strict that the designation of Iranian courts should be specific. The Tribunal’s view with respect to contract made it clear that a distinction should be made between the governing law and the dispute settlement provisions of the contract.

In the *Ford Aerospace case*, while for example the governing law of the contract was that of Iran,<sup>102</sup> the disputes included only those “arising out of interpretation of the contract or execution of the works”. Accordingly, the Tribunal held that important aspects of the contract including some of the claimants’ obligations such as payment have been left outside the jurisdiction of the Iranian courts.<sup>103</sup>

100. *Ibid.*, pp 580-581.

101. 68 ILR 587 (1985), p 590.

102. The applicable law reads as follows: “The Governing law of this contract is the Iranian law. This contract is subject to the Laws of the Imperial Government of Iran in every respect”. 68 ILR 594 (1985), p 596

103. *Ibid.*, pp 596-597.

In the *Zoker International case*, the dispute settlement clause of the contract (Article 45) contained a formulation that the disputes are those "... related to the execution of the contractual works or about the interpretation of the Articles of the contract, general conditions of the contract and other contractual document, and if the dispute is not resolved in any amicable way, the same shall be referred to competent judicial authorities and courts and shall be resolved in accordance with the laws of in force in Iran ...". The Tribunal concluded that "this Article does not with sufficient clarity fulfil the requirement laid down in the exclusion clause of Article II, Paragraph 1 of the Claims Settlement Declaration". It would mean that certain aspects of the obligations of parties under the contract were left outside the jurisdiction of Iranian courts.<sup>104</sup>

In the *Stone and Webster Overseas Group, Inc.*, case a construction contract included a provision providing for the submission of all disputes to the courts of Iran.<sup>105</sup> In this connection, the Tribunal held that the wording of this provision fulfils the requirements of Article II (1) of the Claims Settlement Declaration excluding the Tribunal's jurisdiction. But the second contract that contained a clause for arbitration in Paris (International Chamber of Commerce) was not considered to be outside the jurisdiction of the Tribunal.<sup>106</sup>

In the *Dresser Industries, Inc.*, case a contract for the purchase of various compressors envisioned that all disputes shall be referred to arbitration. A provision in the contract stipulated that arbitrators could be appointed by the President of the Supreme Court of Iran. The governing law provision stated that the contract was to be governed by the Iranian law and the parties would submit to the sole jurisdiction of the Iranian Supreme Court. The Tribunal considered that the arbitration provisions of the contract (Articles 23 and 31) do not fall within the scope of the forum clause exclusion contained in Article II (1) of the Claims Settlement Declaration by holding that "the reference to the Supreme Court of Iran cannot be interpreted as a choice of

forum; it can relate solely to the appointment of arbitrators".<sup>107</sup>

While affirming some principles such as the implied reference to the Iranian courts and the lack of adequate coverage of the Iranian courts' jurisdiction regarding disputes as governing the exclusion clause under the Claims Settlement Agreement, the Tribunal held that the exclusion applies only to claims arising under a binding contract. This means that claims based on non-contractual remedies such as expropriation, unjust enrichment, restitution and other measures affecting property rights do not meet the requirement of the exclusion provision. Where a contract provision required recourse to arbitration, the Tribunal held it had jurisdiction. In this regard, the Tribunal considered that while Iranian law provides for a certain degree of control by the Iranian courts over the arbitral process, such control does not deprive the arbitrators of their jurisdiction. Therefore, such limited control falls short of the sole jurisdiction of the Iranian courts needed under Article 2 (1) of the Claims Settlement Declaration. The Tribunal also asserts jurisdiction when the clauses provided for settlement of disputes by competent courts, did not specifically stipulate for the sole jurisdiction of the competent Iranian courts.

### **(c) Contested issue of frustration based on changed circumstances**<sup>108</sup>

In addition to the unexpected situations where performance of contract obligations are rendered impossible, there are the situations in which performance is not impossible but the accomplishment of the purpose of the contract will be presented by an unforeseen change in

104. *Ibid.*, pp 599- 600.

105. *Ibid.*, pp 601-602. The provision regarding the settlement of disputes provides that: "All disputes arising out of or in connection with this Agreement, any performance or non-performance thereof, or the consequences of any of the foregoing shall be settled by a competent Court of Law of Iran". *Ibid.*, p 603.

106. *Ibid.*, pp 602, 606.

107. *Ibid.*, pp 608, 610.

108. For a discussion of the doctrine of changed circumstances see J.L. Brierly, *The Law of Nations* 110 (6th ed.1963); Lissitzyn, *Treaties and Changed Circumstances*, 61 *AJIL* (1967); Schwelb, *Fundamental Changed Circumstances*, 29 *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* (1969); Koeck, *The Changed Circumstances Clause after the United Nations Conference on the Law of Treaties (1968-69)*, 4 *GA.J. Int'l & Comp. L.* 1974; Kearney & Dalton, *The Treaty On Treaties*, 64 *AJIL* 495, (1970); Przetaczniak, *The Clausula Rebus Sic Stantibus*, 56 *Rev. Droit Int'l Sci.Diplomatique & Pol.* 115, (1978); George, *Changed Circumstances and the Iranian Claims Arbitration: Application to Forum Selection Clauses and Frustration of Contract*, 16 *Geo. Wash. J. Int'l L. & Econ.* (1982); Michael E. Wright, *Changed Circumstances*, *Law Institute J.* Vol 59, 1985; John D. Waldis, *The Effects of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, *Georgia Law Review*, Vol.22, No.3. Spring 1988; Major Karl, *Torncello and The Changed Circumstances Rule*, *The Army Lawyer*, Nov.1991.

circumstances.<sup>109</sup> When this is the case, the parties may be deemed to discharge from their obligations to perform. The theory of change circumstances is based on the existence of an implied term according to which the contract should cease to bind in the event of an unexpected circumstances. The International Court of Justice in the *Fisheries Jurisdiction Case* has recognized the importance of the doctrine of changed circumstances. According to the Court, under certain conditions, a fundamental change in the circumstances may give rise to a ground for invoking the termination or suspension of the treaty.<sup>110</sup> The Court further stated that in order to invoke such termination it is necessary that a fundamental change of circumstances has resulted in a radical transformation of the obligation to be performed.

Meanwhile, the change must increase the burden of the obligations to the extent of

109. Article 62 of the Vienna Convention on the Law of Treaties of May 23, 1969 has recognized the doctrine of changed circumstances as follows:

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties may not be invoked as ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If under the foregoing paragraphs a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Vienna Convention on the Law of Treaties, May 23, 1969 entered into force Jan. 27, 1980; U.N.Doc. A/Cont.39/27 (1971), reproduced in 8 ILM 679 (1969); See also 63 AJIL 875 (1969).

The United Nations Commission on the Transnational Corporations has also recognized the changed circumstances in the Draft Code of Contract on Transnational Corporations under which:

"Contracts between governments and transnational corporations should be negotiated and implemented in good faith. In such contracts, especially long-term ones, review or renegotiation clauses should normally be concluded.

In the absence of such clause and where there has been a fundamental change of circumstances on which the contract or agreement was based, transnational corporations acting in good faith, shall/should cooperate with governments for the review or renegotiation of such contract or agreement." See Appendix 11, UN Doc.E/C.101 1983/S/5Rev.1.

110. (1973) ICJ Reports, para 36, p 19.

rendering the performance basically different from that originally undertaken.<sup>111</sup> This would mean that when such a radical change of circumstances has occurred, the contract, if kept alive, would amount to a new and different contract from that originally concluded by the parties.<sup>112</sup> But the question remains whether in cases in which performance would still be possible a fundamentally different situation arises in which the contract ceases to bind. The decisions of the English courts show that the principle of sanctity of contracts is of infinitely higher importance than the requirement of commercial convenience and they will not consider a contract is frustrated if it is still capable of performance.<sup>113</sup>

Concerning the meaning of the changed circumstances the Tribunal in *Questech Inc. v. Ministry of National Defence of Iran* states that "in the context of the Algiers Declaration the inclusion of the term "changed circumstances" means that changes which are inherent parts and consequences of the Iranian Revolution ...".<sup>114</sup> In *Mobil Oil Iran v. Iran* the Tribunal also stated that:

The concept of "changed circumstances" ... can refer only to the dramatic political changes brought about in Iran by the issues of the Revolution and the decision of the Islamic Government to follow a policy radically different from that of the previous Government in the oil industry.<sup>115</sup>

Changed circumstances have been pleaded in few cases before the Iran-US Claims Tribunal. The reference to changed circumstances was made by the United States to ensure among other

111. *Ibid.*, para. 43, p 21; For other claims that a fundamental change of circumstances has occurred see *Free Zones of Upper Savoy Case* (1932) PCIJ Ser. A/B, No. 46, at 96, 156-60; *Alsing Trading Co. Case*, (1956), 23 ILR 633-55.

112. See Clive M. Schmitthoff, *Schmitthoffs' Export Trade, The Law and Practice of International Trade*, op.cit., p 189. The Iranian Civil Code is silent on the doctrine of changed circumstances. Although the Iranian law allows judicial intervention in a contractual dispute in accordance with equitable principles, it would not be justified when there are express contractual arrangements. Therefore the judicial intervention will be limited to exceptional cases where the prevailing equitable principles require the court to interfere in the private arrangements made by the parties. See S.H. Amin, *Commercial Law of Iran, Tehran*, (1986), pp 56-57.

113. Schmitthoff, op.cit., p 190.

114. 9 Iran-U.S.C.T.R. 107 (1985), at 123.

115. *Mobil Oil Iran Inc. and Others v. Government of the Islamic Republic Of Iran and National Iranian Oil Company*, Award No. 311-74/76/81/150-3, (July 14, 1987), 86 ILR 230 (1991), p 270.

things that the Tribunal would take such changes into account in deciding whether to give effect to contractual provisions relating to choice of law and choice of forum.<sup>116</sup> The important question was whether or not the revolutionary changes in Iran may constitute a change of circumstances as to justify termination of contract.

In *Questech*, the Tribunal invoked the doctrine of changed circumstances to justify Iran's termination of an international contract involving the national security. The question before the Tribunal was whether an unforeseeable fundamental change of circumstances can be invoked as a ground to release a government from its contractual obligations. The Tribunal referred to the doctrine of *clausula rebus sic stantibus*<sup>117</sup> and regarded it as a general principle of law which has been incorporated into many legal systems. The Tribunal cited the specific factors such as the political changes as a result of revolution, as constituting the changed circumstances:

The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new government and the new foreign policy especially towards the United States which had considerable support in large sections of the people, the drastically changed, significance of highly military contracts as the present one, especially those to which United States companies were parties, are all factors that brought about such a change of circumstances as

to give the Respondent (the Iranian government) a right to terminate the Contract.<sup>118</sup>

As may be seen from the foregoing, the Tribunal concluded that revolutionary changes may be invoked as an excuse for non-performance of contract obligations. In *Mobil Oil*, involving a claim of expropriation by Iran of a contract for the purchase of Iranian oil by American oil companies, decided under the chairmanship of the late Judge Virally, Iran invoked Article V of the Claims Settlement Agreement and argued *inter alia*, that the performance of contract had been frustrated by changed circumstances. The Islamic revolution, according to Iran, brought about a radically new situation in the oil industry. It has further pointed out that Article V of the Claims Settlement Declaration directs the Tribunal to take into consideration such changes without imposing any limitation on the changes to be considered. In this award, the Tribunal observed that the changed circumstances of Article V has no bearing on the merits of the claim and only denotes one of the elements that the Tribunal is invited to consider when determining the choice of law to be applied in any given case.<sup>119</sup> In this case, the Tribunal evaded the finding in its earlier decision (*Questech*) by stating that the principle of changed circumstances is one of the factors which should be taken into consideration under Article V Claims Settlement Agreement.<sup>120</sup> The award then went on to say:

Changes of such a character and magnitude could not be without consequence to the contractual relationship between Iran and the Consortium. By themselves, however, they could not have had any effect on the validity of the Agreement before materializing in specific measures.<sup>121</sup>

The American Judge Holtzman in his individual dissenting opinion criticized the Tribunal's finding in the *Questech* case. He argued that the majority's reasoning is flawed in two critical respects. First, the new circumstances quoted by the Tribunal as bases for lessening

116. See Declaration of Warren Christopher, Deputy Secretary of State of the United States heading the US negotiating in Algiers, at para.10.

117. For the application of the theory of *rebus sic stantibus* see J. Garner, *The Doctrine of Rebus Sic Stantibus and the Termination of Treaties* (1927) 21 *AJIL* 509; Akos Toth, *The Doctrine of Rebus Sic Stantibus in International Law* (1974), *Jur. Rev.* 56; Haraszti, *Treaties and Fundamental Change of Circumstances*, 146 *Hague Recueil des Cours* 1, (1975 111); To determine the scope of the *clausula rebus sic stantibus* Article 59 of the Draft Articles of the Law of Treaties Adopted by the International Law Commission states:

"A fundamental change of circumstances which has occurred with respect to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withholding from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be found by the treaty; and  
(b) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.  
See (1968) 7 *I.L.M.* 798.

118. See *Questech Inc. v. Ministry of National Defence of Iran*, at 123.

119. 86 *ILR* 230 (1991), pp 265, 270.

120. Award No. p 311-74/76/81/150-3, 16 *Iran-U.S.C.T.R.* at 39.

121. See 86 *ILR* 230 (1991), pp 270-271.

the Iran's liability were in fact changes for which Iran itself is responsible. The contracting party cannot avoid contractual obligations owing to circumstances that it produced or that are within its own control. Second, the award cited no record evidence upon which it based its finding of supposedly changed circumstances, nor could it, because the file does not contain such evidence. Moreover, the Iranian Government in 1979 continued several similar military agreements with American nationals when it found that they are justified from military or strategic point of view. Consequently, in three later awards relating to oil cases the reasoning of Judge Holtzman was followed by the Tribunal. In *Amoco International Finance*,<sup>122</sup> Iran put forward the argument that the Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran (1955) was terminated by the United States' violations of it by taking measures against Iran and by the general changed circumstances. The award, however, recognized that the events which took place during the revolution could not be without consequences upon the implementation of the Treaty. According to the Tribunal, notwithstanding the changed circumstances in Iran the legal relation between the parties to the contract remained in force.

Obviously such a legal and factual context has to be kept in mind in considering the application of the Treaty to specific facts during the period, but it does not necessarily lead to the conclusion that the Treaty was no longer applicable. Since, in the words of the International Court, "[i]t is precisely when difficulties arises that the [T]reaty assumes its greatest importance"... Thus there was no termination by changed circumstances or alleged violations of the Treaty.<sup>123</sup>

In *Phillips Petroleum*, decided in July 1989 the award rejected the argument that the change in oil policy brought about in Iran by the revolution of 1979 constituted changed circumstances. The award stated: "... a revolutionary regime may not simply benefit itself from legal obligations by changing governmental policies, nor take for the public benefit without compensation business operated by foreign private persons under the

previous regime."<sup>124</sup> The majority awards of the Tribunal have thus far demonstrated that the changed circumstances as a result of revolution do not affect the validity of contracts as to entitle the government party to terminate the underlying contracts.

## CONCLUSION

The Iran-United States Claims Tribunal was established in 1981 to resolve the crisis in relations between the Islamic Republic and the United States arising out of the seizure of the American Embassy in Tehran in 1979. Thus, the Tribunal's mandate is based "upon the common intent of the two governments to bring about settlement of the claims of nationals of each country against the government of the other through binding arbitration".<sup>125</sup> It was intended to settle all property claims between the two States and their nationals resulting from the Revolution of 1979. The growing body of published decisions of the Tribunal were mainly focused on the major issues of international law from the angle of case law development. The Tribunal has a wide variety of legal rules to decide all cases on the basis of respect for law and to clarify the law in a systematic fashion. However, its reluctance to decide on the basis of rules of national law demonstrates the interactions among each Chamber's arbitrators, drawn from European, Iranian and American legal cultures, the generally strained nature of the American-Iranian relations and the sometimes strained atmosphere of the Iran-US Claims Tribunal.<sup>126</sup>

Compared with the ordinary commercial tribunals, the Tribunal's jurisdiction is much broader. First of all, it has jurisdiction over private claims of the US nationals against Iran and claims of Iranian nationals against the United States. Secondly, according to Article 2(1) of the Claims Settlement Declaration the Tribunal has 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". Thirdly,

122. *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of July 1987, 27 ILM 1314 (1988).

123. *Ibid.*, para. 96

124. 21 Iran-U.S.C.T.R.79 (1989), para.86.

125. See the Dissenting Opinion of the Iranian Arbitrators in Case A/18 (Apr. 6, 1984), 75 ILR 204 (1987), p 205.

126. John R. Crook, *Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience*, 83 AJIL 278 (1989), p 310.

by virtue of the General Declaration the Tribunal has also jurisdiction over any disputes between Iran and the United States of America concerning the interpretation and performance of any provision of the said declaration (para.17).

Whilst, Article 2 (1) of the Claims Settlement Declaration defined the Tribunal as an international arbitral tribunal, the Tribunal itself has emphasised that it has an important legal nature and it is, therefore, subject to international law. Taken into account the distinguishing characteristics of the Tribunal, it must be accepted that the Tribunal is an intergovernmental institution created by public international law and its work has interstate character. This view is supported by the fact that the Tribunal has adopted the UNCITRAL arbitration rules to be applied to all proceedings before it. The Tribunal is to be regarded as truly international tribunal in that it is concerned with the rights and duties of States under public international law.

The establishment of the Tribunal provided the United States and its nationals with a forum. It was not clear, as far as the cases of claims against the Iranian Government and its instrumentalities are concerned that such a forum would have otherwise been available. The rationale behind this reasoning includes the defences such as sovereign immunity and act of state and the fact that the Iranian forum clauses contained in many of the underlying agreements. Meanwhile, the jurisdictional grant of the Tribunal is such that most Iranian Government claims against American nationals have been excluded. Iran will have to bring such claims in domestic courts, or as counterclaims before the Tribunal, if the American party brings a relevant claim there.<sup>127</sup>

Although the Tribunal's contribution to the law of contract excuse in international commercial transactions has been substantial, its awards thus far have not dealt with the basic question whether it is required under the rules of international law, or general principles of law, that the party claiming excuse has to prove the supervening event or changed circumstances prevented the accomplishment of the purpose or objective of the agreement, or whether proof of impracticability or hardship is enough. Neither

127. Aida Avanesian, *Iran-United States Claims Tribunal in Action*, op.cit, pp 317-318.

the Tribunal elaborated on the decisive factors of foreseeability, control and fault, all of which are of significant importance to agreements with State parties in situations where the possibility of revolution cannot be ruled out.<sup>128</sup>

The Tribunal's treatment in the forum selection clause cases was to refuse to confront the relevant legal issues, and to decline the task of normative elaboration. In fact, the Tribunal's decisions of the issues presented to it was so laconic, uninformative and unexplained that it forces one to regard directly the limits on the role of law in the Tribunal's award.

How is that a Tribunal composed of highly competent individuals, further enlightened by the parties' presentations, can do so woeful a job? ... The institutional characteristics of the claims Tribunal, together with the nature of the issues presented in the Iranian-forum clause cases, now may be seen as important factors explaining the majority's refusal to follow where authority seemed to lead.<sup>129</sup>

The conclusion that can be drawn from our analysis is that Iran's participation in the Tribunal's proceedings as a Western-style legal institution established Iran's reputation in existing system of international arbitration and reintegrated it into the international trade. The Tribunal provided a unique opportunity and a forum for Iran and the United States to meet and to collaborate towards a mutual understanding and peaceful settlement of their highly charged disputes in a different legal systems, cultures and traditions. The work of the Tribunal has been unprecedented in terms of value of claims before it, in the development of international commercial arbitration and in its application of UNCITRAL arbitration rules. The jurisprudence of the Tribunal has enriched the public international law and also provided a good guidance for international lawyers and arbitral tribunals to digest from its case law in the years to come.

128. John A. Westberg, *Contract Excuse in International Business Transactions: Awards of the Iran-United States Claims Tribunal*, 4 *ICSID Rev.-FILJ* 215 (1989), pp 228-229.

129. Ted Stein, *Jurisprudence and Juris' Prudence: The Iranian Forum Clause Decisions of the Iran-US Claims Tribunal*, 78 *AJIL* 1 (1984), p 2, 35-36.

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