



Cooperation and Conflict
Between Iran and America
At The Iran-United States Claims Tribunal

Submitted by Maryam Moradi to the University of Exeter as a Dissertation for
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Abstract

This dissertation aims to examine The Iran-U.S. Claims Tribunal, the largest mechanism in the history of international arbitration, located in The Hague. The central thesis considered is the unique nature of the Tribunal as embodying elements of both conflict and cooperation at a time of considerable and ongoing hostility between Iran and the United States over various issues. Iran and America, following World War II, set up a unique relationship. This close cooperation resulted in antagonism after the Islamic Revolution in 1979; the American diplomats were taken hostage, and a number of multi-billion dollar contracts and transactions were terminated. Several avenues were sought to resolve the problem. Finally, the Algerian government stepped in as an intermediary to resolve the issue. Iran and the United States agreed to establish the Tribunal in 1981. The level of confrontation between Tehran and Washington was so strong that the Tribunal suspended its operation for months. The Tribunal not only managed to survive, but it also made it possible; as a safe haven, as a legitimate forum and as a joint embassy for the parties, to extend their day-to-day cooperation for almost thirty years.

How and under what conditions have Iran and America, labelled by each other as the "Axis of Evil" and the "Great Satan" been able to cooperate in the absence of diplomatic relations? How do the Agents of an allegedly "World-devouring America" and the "Terrorist sponsoring Iran" meet face to face in an institution which itself is the product of severe enmity? All such questions could be answered by the unique nature of the Tribunal: its decisions are based upon "political exigency" and cultural expediency "rather than legal foundations." Two simultaneous forces of conflict and cooperation have been in process: at a time when the American navy was raiding the Iranian oil platform in the Persian Gulf, a big case amounting to billions of dollars was being negotiated at the Tribunal forum through an out-of court settlement process. At the time when this dissertation is produced,

the same contending forces of discord and collaboration are in operation: on the one hand there exists Iran-US nuclear standoff on the international level, and on the other hand certain multi-billion dollar oil and Foreign Military Sales (FMS) are decided at the Tribunal.

The Tribunal premises have been used as a forum for "deliberation" on major legal and political disputes. It has been both praised and blackballed. At one extreme, it has been regarded as "a gold mine of information" and at the other extreme its rulings are not considered to be applicable in other financial disputes because of the "political compromise within the Tribunal." Iran and America have found it necessary, under the condition of uncertainty, to make concessions to ensure the integrity of the Tribunal and the latter in turn has equipped itself with a proper strategy of survival by establishing its own rules and procedures. Around four thousand cases have been brought before the Tribunal, with each case involving various conflicts of interest. In all of those issues, the forces of cooperation have prevailed. By resolving those cases, the Tribunal has achieved its fundamental objectives: conflict resolution by peaceful means. The Tribunal will cease to exist only when Iran and America open diplomatic relations.

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TABLE 1

US-Iran Trade (figures in millions of dollars): Export & Imports

TABLE 2

U.S. Military Sales to Iran: 1950-1980 (dollars in thousands)

Abbreviations

AAA: The American Arbitration Association

ADR: Alternative (or Alternate) Dispute Resolution

AIOC: Anglo-Iranian Oil Company

AJIL American Journal of International Law

APC: Anglo-Persian Company

AWACS: Airborne Warning and Control System

BILS: Bureau for International Legal Services

BITs: Bilateral Investment Treaties

CBMs: Confidence Building Measures

CCCLN: Claims Commissions Council of the League of Nations

CFP: French Compagnie Francaise de Petrole

CIETAC: China-International Economic and Trade Arbitration Commission

CMTD's: Claims of More than Two Hundred and Fifty Thousand US Dollars

CSBMs: Security and Confidence Building Measures

DCF: Discounted Cash Flow

FBIS: Foreign Broadcast Information Centre

FCSC: Foreign Claims Settlement Commission

FDI: Foreign Direct Investment

FMS: Foreign Military Sales

FNC: Friendship Navigation and Commerce

FPI: Foreign Portfolio Investment

HCCNL: Hague Convention on the Conflict of Nationality Laws.

HKIAC: The Hong Kong International Arbitration Centre

IACI: Corporation and Iran Aircraft Industries

ICC: International Chamber of Commerce

ICDR: The International Centre for Dispute Resolution

ICJ: International Court of Justice

ICLQ: International and Comparative Law Quarterly

ICSID: International Centre for Settlement of Investment Dispute North American

NAFTA: Free Trade Agreement

ICSID: International Court for Settlement of Investment Disputes

IEEPA: International Emergency Economic Powers Act

IOEPC: Iranian Oil Exploration and Producing Company

IOP: Iranian Oil Participants

IORC: Iranian Oil Refining Company

Iran-U.S.C.T.R: Iran-United States Claims Tribunal Reports ASIL

J. INT'L ARB: Journal of International Arbitration

LAPCO: Lavan Petroleum Oil Company

LCIA: London Court of International Arbitration

LCIA: The London Court of International Arbitration

MAT: Mixed Arbitral Tribunals

MIG: Meli Industrial Group

MOU: Memorandum of Understanding

NATO: The North Atlantic Treaty Organization

NIOC: National Iranian Oil Company

NIOI: Organization of Nationalized Industries of Iran (General Counsel)

OEPC: Oil Exporting Countries

OSCO: Oil Service Company of Iran

REMP: Rules for Emergency Measures of Protection (Optional Emergency Rules) ICDR:
International Centre for Dispute Resolution

SBMs: Security Building Measures

SCC: Special Coordinating Committee

SEDCO, SEDIRAN, SISA,

UNCITRAL: United Nations Commission on International Trade Law

UNOCAL: Union Oil Co. of California

WIPO: World Intellectual Property Organization

Chapter One

Introduction

I The structure of the study

This introduction aims basically to set the scene for my examination of the Tribunal. The setting embodies both time and place. It covers the period beginning from January 1979 till July 2010. However, a brief flashback to the historical interaction of Iran and America will be provided. The place is the Iran-US Claims Tribunal (“the Tribunal”) in The Hague, the Netherlands. The central question considered is the unique nature of the Tribunal as embodying elements of both conflict and cooperation at a time of considerable and ongoing hostility between Iran and the United States over various issues.

The structure of the dissertation centres around one introduction, three focuses of analysis and one conclusion. The introduction, in the form of Chapter One, consists of the organization of the dissertation including the following: problem statement, objectives, major and minor questions, central thesis, a short background to the Tribunal’s establishment, methodology or theoretical approaches, explanation of the selection of cases, research limitations, and literature review. The key focuses deal with (i) the historical background which elaborates on the history of the Islamic Revolution as well as the roots of the Tribunal, its nature and international arbitration detailed as Chapter Two: historical context, Chapter Three: Tribunal formation, Chapter Four: development of arbitration and Tribunal’s nature (ii) an examination of the forces of conflict at the Tribunal, examined in Chapter Five: conflict over Judges; and Chapter Six: further conflicts, and (iii) an examination of the evolving process of cooperation between Iran and America within the Tribunal elaborated in Chapter Seven: cooperation par I, and cooperation part II. The Conclusion is a summing up of the dissertation as a whole.

It is necessary to labour the point that the Tribunal has been functioning for the past thirty years on a full time basis, hiring thousands of lawyers, legal authorities, expertise, businessmen, and engineers from different walks of life to provide their professional opinions on cases. It has been an unprecedented institution in the history of international and commercial arbitration. For the same reason, it has been asked to rule in cases where there seems to be no legal precedent at all.

The Tribunal is believed to step into a wide range of issue areas. For the past thirty years it had to devise certain means and mechanisms which could render solid judgements in the cases concerned. It has been a time consuming job for the Tribunal to consider multi-billion-dollar cases for thirty years. Each case involves several “hearings”. Each hearing may pertain to an “interpretation hearing”, a “Statement of Claim”, “Counterclaim”, “Rebuttal”, an “Affidavit”, “legal briefs”, “exhibits”, etc. As a result, the Three Chambers of the Tribunal as well as the Full Tribunal have produced an immense literature on the forces of conflict and cooperation at the Tribunal. No wonder it has been called a “Gold mine of information”.

Originally, the dissertation confined itself to one chapter on conflict and another chapter on cooperation. Due to the magnitude of the materials produced by the Tribunal, each chapter became very voluminous. On the advice of my supervisor, the materials on conflict were divided in two separate chapters, and the same structural change was adopted with respect to cooperation to be discussed separately.

II Statement of the problem

Following the outbreak of the Islamic Revolution of Iran in 1979, American diplomats in Tehran were taken as hostages, Iranian assets in the United States were frozen by President Carter's presidential order and almost all contractual agreements were terminated or left inactive. A number of claims were instituted before the US Federal courts as well as in Iran's domestic courts. Iran and the United States agreed to end the crisis and

settle all financial disputes among themselves as well as their institutions, corporations and individuals. This desire resulted in prolonged negotiations which led to the establishment, on 19 January 1981, of the Iran-US Claims Tribunal (the Tribunal) under the Algiers Declarations (or the Algiers Accords). All claims pending before Iran-US national courts were switched to the Tribunal. Further claims, altogether around four thousand cases, were filed before the Tribunal. Accordingly, the largest international tribunal ever established was authorized to resolve the conflicts.

III Objectives

The present dissertation purports to examine the forces of conflict and cooperation between the two potential enemies-Iran and the United States- at the Tribunal. It is my intention to show that firstly: cooperation is possible even between two antagonistic actors. Secondly, such cooperation can be facilitated by international institutions. Thirdly, the principles, norms, and rules of these international institutions, rooted in national and international social values and culture, have been invoked by the Tribunal to materialize and coordinate the process of cooperation in the disputes brought before the Tribunal. It is not my intention to provide a cultural study of the Tribunal. Rather, I would like to argue that both conflict and cooperation between Iran and the United States at the Tribunal have been influenced by certain legal principles, norms and rules that stem from *three sources of power*: (i) the power of states as emphasized by realist theories of International Relations; (ii) the power of multinational corporations and of the Tribunal as an institution, as emphasized by neo-liberal institutionalist theories; and (iii) the power of widely held legal norms in themselves: essentially a cultural element, as discussed by Hedley Bull. Major State actors like Iran, America, Algeria, the Netherlands and the United Kingdom have specific roles in this scenario. Similarly, a number of non-state actors such as multinational corporations are either claimants or respondents. Both Iranian Respondents and American

Claimants believe in capitalist values. Both are after their material incentives. Yet, both believe in the universally accepted norms relating to standards of compensation.

After having submitted a historical background of the Tribunal and the Islamic Revolution, I have attempted to show how cooperation, immensely influenced by the said three sources of power, has prevailed over conflict, I have selected certain issue areas such as the contending approaches of Iran and the United States over the appointment of the arbitrators and the challenges of such arbitrators for being allegedly impartial; cases involving dual nationality, compensation, Terms of Accords, Finance and Banking, Settlements Agreements (Awards on Agreed Terms), Small Claims, Interim Measures, Lump Sum Settlements, Security Account, Awards in favour of Iran or its nationals, Indirect Claims, Jurisdictional Effect of Iranian Forum Selection Clauses, The Shah's Assets, U.S. Hostages v. Iran, Strategic Cooperation & the Iran-Contra Affair, and counter claims. The integrity of the Tribunal especially in the early years was challenged, but the Tribunal managed to survive and eventually made decisions that lubricated the course of mutual cooperation, ending thousands of conflicts between Iran, America and their corporations or individuals. The Tribunal survived because all claimants and respondents, the state and non-state actors, wanted it to do so. All of the said three sources of power made it possible.

IV Major Question

How is it possible for Iran and the United States who call each other "evil" and "Great Satan" to get engaged in a constructive interaction by an interstate institution? How and under what conditions have they been able to mitigate their self interest over material incentives in cases which involve billions of dollars?- Do legal principles, norms, rules and procedures derived from culture matter in this process of conflict resolution? The news broadcast on a daily basis by contemporary news agencies and mass media is replete with Iran-US conflict over issues such as Iran's nuclear or missiles programs, terrorism, human

rights, the Islamic threat, and Iran's dissenting position on the Israel-Palestine peace process. Why is it that none of these disputes has impeded the course of the cooperation? None of them has barred Iran and America from close collaboration at the Tribunal.

V Main sub-research questions

How did Iran and America, due to the geo-strategic position of Iran and its financial and security needs, come to form an alliance in 1955? Why did Iran and the United States who had established a unique relationship under the Shah sever their bonds of amity in 1979? To what extent did culture play a role in this respect? If the Islamic Revolution may be seen, in part, as a Cultural Revolution what was its role in this respect? Why was the Tribunal dominated by conflict in the early years of its establishment? What was the role of the Revolution in those years? Why was the Tribunal suspended during the Mangard episode in 1984? Why and how did both Iran and America, in spite of such conflicts, adhere to the Algiers Declarations and agree to fund and organize an institution which could resolve their disputes by invoking certain principles, rules and norms that take their sources from both international and domestic laws of the two countries? Are such laws irrelevant to cultural considerations? Accordingly, in order to answer all these questions, specific chapters have been designated to clarify the circumstances that led to the establishment and the function of the Tribunal: how conflicts arose at the Tribunal and how such conflicts were resolved.

VI Central thesis and assumptions

The central question considered is the unique nature of the Tribunal as embodying elements of both conflict and cooperation at a time of considerable and ongoing hostility between Iran and the United States over various issues. In other words, my argument is that cooperation is possible even between the two most hostile nations. Unlike common perceptions held by the learned and the laymen alike all over the world, the Iran-US relationship is not dominated solely by animosity and enmity. They both have worked in an

institution which embodies all the characteristics of a joint embassy in the absence of diplomatic relations. States, non-state actors and values play a significant part in conflict resolution. The conflict arising out of the hostage crisis between Iran and America which was dragging Iranian revolutionary guards and American marines into a bloody war and which led to the institution of thousands of claims before the US Federal Courts as well as Iranian courts has been resolved at the Tribunal through peaceful means without resorting to force. It was made possible because the actors- states and multinational corporations or entities wanted to manage the crises. The Tribunal has been used as a forum for direct talks between the two Agents of the two countries. However, the Tribunal as an institution has also been keen to perform its unique function. Through the so-called “deliberation” and the give and take process, the Tribunal applied the same principles, norms, rules and common values rooted in the cultures of both Iran and America.

While both Iran and the US may be seen as “rational”, pursuing their own objectives, they do so within a larger context that may, loosely, be described as “cultural”, where “culture” refers to “the totality of meanings, values, custom, norms, ideas and symbols relative to a society”¹ Culture is important to the study of Iran-US relations. The United States of America introduced modernization to Iran under the Shah. The package of modernization so introduced was economic in nature, wrapped up in a western model of development. Economic development was seen as an independent variable from Islamic values and culture. The Islamic Revolution was in part a reaction to this package of Western modernization. My assumption is that the Tribunal which was a product of the Islamic Revolution was established following the conclusion of the Algiers Declarations, which was primarily based on cultural notions. The four points proposed to Iranian Parliament by Imam Khomeini for the release of hostages were cultural in nature (appendices). Accordingly, the Algiers Declarations, at least from an Iranian perspective, were negotiated under cultural concepts. Mention could be made of Iran’s insistence on the incorporation by

the United States of a pledge in the Declarations, promising “not to interfere in Iranian affairs from now on”. This phrase worded in the Algiers Declarations points to the CIA engineered coup against Prime Minister Dr. Mohammad Mossadeq in 1953. The episode has darkened Iran’s relations with the United States.

VII The background to the establishment of the Tribunal

America’s actual presence in Iran started in the aftermath of the 1953 coup. In the pre-World War II period, Iran-US relations were insignificant and America was regarded as non-interventionist; its limited presence in Iran was welcomed due to the Russian-British rivalry. Unlike Britain and Russia which had divided Iran into two zones of influence in 1907, the United States seemed to have no territorial ambitions in Iran. As late as 1941, the United States had no position in Iran. After the 1953 coup, its position and influence "had become such that she was able to almost completely control the course of internal events in Iran. In 1941, Iran hardly needed United States financial assistance, but by 1954, she had become so dependent on American aid that she was not able to take one constructive step without it." ² By 1977 a unique commitment made between the two countries under the Nixon Administration led to a highly complex relationship that was only severed after the Revolution, leaving behind enormous economic consequences.

The Americans were initially seen as better options than the British and Russians. The Russians had partitioned Iran following two major wars and refused to evacuate Iran after Iran was occupied by the Allied forces. Iran was trapped between Russo-British rivalry and was badly damaged during World War II. During the War, the support that the United States provided resulted in the withdrawal of Russian troops from Iran. However, Americans squandered any advantages by 1979 because they were too associated with the Shah especially when they orchestrated a coup against Mossadegh. Since then, the United States made an alliance with the Shah which brought a wave of anti-American feelings

among Iranian nationalists. The coup cultivated the seeds of a cultural animosity in Iran against America.

The treaty of Amity concluded between Iran and America following the coup laid the foundation of Iran-US cooperation in almost all developmental sectors, including the oil and military spheres. The oil revenues were devoted to military expenditures and the social, political and cultural aspects were ignored. Countless numbers of contracts were signed and not all of them were accomplished under the terms and conditions stipulated in such contracts. The Islamic Revolution shocked the world, the American diplomats were taken hostages for 444 days; and many of those contracts were abandoned. To settle the ensuing disputes, Iran and the United States opted to go for third party arbitration. Around four thousand cases, involving claims and counterclaims amounting to billions of dollars required that the two antagonist actors should cooperate in The Hague to resolve those cases.

VIII Methodology, concepts and theoretical approaches

This dissertation makes use of a confluence of three clusters of theories: realism, neo-liberal institutionalism and cultural theories that draw on Hedley Bull's concept of an "international society" with shared principles, norms and rules. My dissertation is not inclined to adopt a culturally deterministic view of international politics. Neither does it cover a wider range of cultural theories, and social norms as portrayed in the influential work of Alexander Wendt's *Social Theories of International Politics*. Rather it tries to employ the historical influence of legal power in Iran-US relations envisaged in certain treaties and contracts, like the Treaty of Amity, the Algiers Declarations, the UNCITRAL Rules as amended and adopted by the Tribunal.

The 1955 Treaty of Amity, for instance, is one of several treaties that the United States as a world superpower signed with many developing countries in the 1950s. Iran, too as a regional oil exporting power signed the Treaty of Amity and the ensuing oil revenues

brought huge military equipment under the US Foreign Military Sales Program (FMS), contributing to Iran's role as a pillar of stability. Furthermore, conflict as a manifestation of realist theories has been an overwhelming force between Iran and America both in and out of the Tribunal. That being said, the dissertation, therefore, tends to adopt a realist approach to power. Here, too, the study is in line with Hedley Bull's understanding of power against those of Edward H. Carr's *The Twenty Years' Crisis*, Hans J. Morgenthau's *Politics Among Nations*, Kenneth N. Waltz's *Theory of International Politics* and John Mearsheimer's *The Tragedy of Great Powers' Politics*.

In addition to realism, neo-liberal institutional theories help to explain the behaviour of institutions and the non-state actors. Most of claimants before the Tribunal are non-state actors such as corporations and individuals. Similarly, cooperation as a manifestation of neo-liberal institutional theories has been a parallel force at the Tribunal.

The third cluster of theories, based on culture, has played dual function: integrative and disintegrative. Culture, like nationalism, works both ways. The Islamic Revolution as a cultural revolt against American interests has served as disintegrative force in Iran-US relationship. At the same time, Islamic laws respect fundamental property rights, the right of individuals to ownership, compensation, and the loss of profit. Iran strongly believed that it should pay compensation for the damages done to the claimants plus interest thereon as of the date of expropriation, nationalization and the takings of those properties. This cannot be explained without strong belief in fundamental tenets of Islam.

As for the first part of my argument, realism, culture and conflict, the international community has now come to appreciate the fact that the Islamic Revolution of Iran was a revolt against the American social norms and values caused by, inter alia, the American coup and intervention in Iran after World War II. As one American observer who visited the US Embassy compound in Tehran and interviewed the militants who had detained American diplomats as hostages wrote later, "one poster with the following saying of

Ayatollah Khomeini read, 'Our population is 35 million and many of them wish martyrdom. We will come to the battle front with 35 million and after we all martyred, you can do anything you want with Iran. We do not fear this, we are men of war.' ”³ The author then predicts that:

Fundamentalism appears to be on the rise in the Middle East, the Shiite communities in Iraq, the other (Persian) Gulf States and Lebanon seem to be more susceptible to Khomeini's messages especially since they have a long historical association with Iranian Shiism. There are also signs that fundamentalism is growing stronger in Arab countries such as Egypt and Tunisia where Shiism is not a factor. It remains to be seen whether Iran's Islamic –Shiite revolution can be repeated elsewhere in the Middle East.⁴

Kenneth M. Pollack, in his chapter, "At war with the world", writes that Iranians "demanded the export of the revolution and the liberation of Iraq, and all of the (Persian) Gulf States, and on some days, all of the Islamic World from secularism, Westernization and autocracy." They then, according to Pollack "provided money, advice, and support " to radicals in "Bahrain, Kuwait, Saudi Arabia, Lebanon and Iraq, calling Saudi's "bunch of pleasure-seekers and mercenaries", asking all Muslims "How long must Satan rule in the house of God" (pointing to Mecca). The revolution had had also an internal course. A process of Islamization of Iranian society was under way, leading to the eradication of secularism of in Iran by *Shari'a v. Urf*. In fact, this was an internal revolt of social norms and values based on *Sharia*.

As a result, Iran was perceived by Saddam Hussein and Arab countries in the Persian Gulf as a country in turmoil whose army "is debilitated by desertions and purges after the revolution that Iraq's armed forces would be able to sweep it aside with ease." On September 22, 1980, Saddam invaded Iran. In the early years, the Americans remained "aloof", and many of them reasoned "the only bad thing about the war was that someday it would have to end". Over time the view began to change and America sided with

Saddam Hussein because "Iran was an aggressive threat to America's vital interests." In February 1982 the Reagan Administration removed Iraq from its list of terrorism-supporting states, "passing high-value military intelligence to help it fight the war", and providing economic aid to Iraq in the form of "Commodities Credit Corporation guarantees." In March 1985, America issued Saddam high-tech export licenses which proved crucial to his weapons of mass destruction (WMD) programs "This helped Saddam acquire chemical weapons from Germany" and use it against Iranian forces and against Iraqi Kurds. Iranians were outraged because they knew that Saddam "was acquiring vast amount of equipment, know-how, and supplies for weapons of mass destruction from America's allies (particularly Germany) and even some from America itself."⁵

More recent American conflict with Iran has centred around four principal concerns; Iran's alleged support for terrorism, its opposition to Arab-Israeli peace, its nuclear program and the issue of human rights. All these four issues, in fact, stem from the Islamic Revolution and are aspects of a cultural clash. The scope of this clash has been so broad that American officials have never refuted the possibility of a military strike against Iran. The issue has always been "on the table."

Therefore, Iranians saw themselves in an endless war with the United States on the international level which had an overwhelming impact on the Tribunal. This clash and conflict of law within the Tribunal is culture oriented. Mir Hussein Musavi, the then Prime Minister and presently the leader of the 'green revolution' once angered by a Tribunal decision on a dual nationality case, issued a statement against the Tribunal saying that

if "One day the Hague Court (The Tribunal) were to decide to continue its work under U.S. pressure...., that day the United States would face our decisive and revolutionary response by every possible means. After all its disgraceful defeat and failure in Iran, the United States should have learned that the Islamic Republic is prepared to go as far as

necessary in order to obtain its rights. It is really surprising that the United States has forgotten the episode of the occupation of the nest of spies so soon and forces the court to play dangerous games." ⁶

It is absolutely within this conflicting realm that the Tribunal enunciated its mission. The tribunal was trapped between a superpower and a revolutionary Islamic regional power. To understand the course of events between the two powers, one should look at the balance of power between them. Hereinafter, I shall take two steps. At the outset, I shall have a brief reference to the literature on the theory of balance of power in international relations, covering the works of Carr, Morgenthau, Waltz, Mearsheimer, and Bull. Applying Hedley Bull's version of the balance of power, I shall endeavour to show how the two powers have been engaged in conflicting interactions at the Tribunal. Inasmuch as the scope of conflict is so broad, this chapter will be devoted to the challenge to arbitrators or one party's push for the resignation of the arbitrators. Secondly, inequality in the distribution of legal power at the Tribunal has been a fact not fiction.

In his *The Twenty Years' Crisis*, Edward H. Carr argues that conflict arises where there exists politics. Carr does not address directly the term of 'the balance of power.' However, in his chapter 'Power in International Politics', he divides political power into three categories: "(a) military power, (b) power over opinion (c) economic power." ⁷ He cites an old song "We've got the ships, we've got the men, we've got the money too"⁸. He then goes on to say that politics does not apply "to all activities of the state, but to issues involving a conflict of interests".⁹ Where there is politics, there is conflict. To Carr, cooperation is a technical arrangement and does not involve politics. Accordingly, conflict is an integral part of a given political system. More importantly, he goes on to say that the specific issues involved in a conflict are not significant at all. What is important is that we should see who the conflicting parties are.

Who are the actors in a dispute? If a dispute arises between “Nicaragua and the Great Britain” and the same conflict arises between “Japan and the Great Britain”, one clearly expects two different outcomes while the issue of conflict remains the same in both cases. The same analysis could be argued in the nuclear issue among the United States on the one hand and the so-called three members of the 'Axis of Evil', Iraq, Iran and North Korea on the other hand. The subject matter of conflict is the same in all three cases, but the US method of dealing with the issue is different in each case: Iraq under Saddam is removed from the scenes of life, stick and carrot diplomacy is offered to Iran and still more and more compromise with North Korea is on the table. Therefore, what matters is the distribution of power and not the nature or type of the conflict. As a result, the role of unequal distribution of power in political structures is very crucial to our understanding of the outcome.¹⁰

Of the three categories of power described by Carr, 'power over opinion' matters in so far as it could be employed to the role of the inequality of man power between American and Iranian arbitrators, their legal assistants and advisors. Carr's military power is irrelevant in the case of the Tribunal. His economic power is balanced at the Tribunal because both America and Iran equally share the costs of the Tribunal. I could not find Morgenthau's balance of power very much relevant to my study of the Tribunal. As Hoffman argues, 'Morgenthau's balance of power is a mechanistic view of international affairs' in which the 'statesman's role consists of adjusting national power to' an almost unchangeable external force. He ignores the 'forces of change'¹¹ and therefore the 'nature of international politics is fixed and unchanging'¹² Within the context of the Tribunal I have shown how international institutions have established sets of norms and rules and that such rules and norms in turn have, in a gradual manner, brought about change in international relations. It explains how the concept of compensation has historically changed from 'beatings' and 'killings' to the payment of remedies in financial terms such as 'full' compensation.

Waltz's balance of power is explained 'by the logic of small numbers'¹³ of great powers, particularly those who have weaponized. His international system has no logic or principle other than anarchy. There is little room for domestic values and social forces. Small countries, like Iran, do not play any part in a Waltzian balance of power. He ignores Bull's "local balance of power". His theory cannot explain the role of Iran in Tribunal's establishment. The Tribunal is a product of both America and Iran. Iran's revolution, rooted in cultural and social values was also important in Tribunal's formation.

Mearsheimer's offensive realism is not able to explain the Iran-US relationship either. If it "would be a mistake for the United States to persist in its constructivist engagement with China and that 'structural imperatives' will probably force the United States to conform to realist prescriptions"¹⁴, then one could plausibly infer from Mearsheimer's prescription that the United States should have aggressively attacked Iran many times by now. This has not materialized. Although Iran is not a world power like China, its ideological influence in the Islamic world has been remarkable. The pace of events between Iran and the United States is similar to that witnessed in the complex history of the Cold War, which witnessed both constant conflict but also cooperation and détente between superpowers. The US strategy in each case has been a combination of discord and collaboration, containment and rapprochement, stick and carrot, propaganda and promise; love and hate. I have found much insight from Hedley Bull's *Anarchical Society* which better fits my theoretical approach: indeed the very title of the book implies the essential paradox of conflict (anarchy) coexisting with cooperation (society)

When Bull speaks of the balance of power, he points among other things to institutional power which is defined in terms of social norms and rules. Wendt, Katzenstein and Jepperson describe Bull's view of norms and show how states participate in international society in orders "to adhere to norms and rules in a variety of issue areas. Material power matters, but within a framework of normative expectations embedded in

public and customary international law”¹⁵ The underlying causes of sectarian violence are rooted in conflicting values, norms and identities but, in the words of Katzenstein, “longstanding violent conflicts...are now finding negotiated settlements.”¹⁶ Bull’s voice is very well reflected in Michael Sheehan’s prescription for the future of the balance of power concept “But for international society, it is the Grotian image which offers by far the greatest possibility for achieving a future in which the incidence of war and the threat of war are significantly diminished and a more mature version of ‘anarchy’ prevails which support the continuing development of the societal element of the international system.”¹⁷

The Iran-US Claims Tribunal has considered, to use Bull’s words, “the individual human beings” as the subject of international law by granting its forum, floor and jurisdiction to thousands of US claimants. Just as “evidence of such instruments as the charters of the Nuremberg and Tokyo Crimes Tribunals”¹⁸ and more recently the criminal Tribunals arising out of the Balkan’s conflict highlight, individual human beings and their shared values are becoming more and more important. The three generations of human rights are shared by our contemporary international society; all giving one single message: Human beings, women and men matter. Yet, the “preponderant powers are, as Vattel perceives, in a position to ‘lay down the law to others’”¹⁹ At the Tribunal it has been impossible for Iran to ‘lay down the law to’ the United States.

Inequality at the Tribunal manifests itself in many ways: the American legal and expertise power, the sources of international law which are the reflection of the power of the American and European countries, the composition of the Tribunal which is dominated by European lawyers, the dominant language at the Tribunal which is English although all documents must be filed in Farsi as well, the wording of the Algiers Declarations which was written by the Americans based on the four conditions of Ayatollah Khomeini which was ratified by Iran’s Parliament, *Majlis*; the terms and conditions of the Treaty of Amity concluded between Iran and the United States under the Shah which, among other things,

provided for "full compensation in the cases of nationalization and expropriation" in contrast to the position of the developing countries which favour, for instance, "just/fair or partial compensation," the weakness of Iranian legal and expertise power. Perhaps the driving force behind Iran's slow development is the problem of what Jeol Migdal would term its 'strong society' versus its 'weak state'.

In his Weberian approach of state-society relations in the Third World, Migdal argues that the state in the Third World is weak *visa-vis* its society because it is not able to eradicate the blocs of power which derive their strategy of survival directly from the society. The state cannot penetrate its own society and remains dependent on those power blocs. The state may be rich in natural resources and may have a large army, yet it may not be able to mobilize its social forces.²⁰ Iranian social forces have historically been preoccupied by its internal power struggle. Iranians failed to develop an institutional coalition when the industrial revolution was emerging in the West in the 18th century. In the words of Barrington Moore, the struggle for power in developing countries can account for their late development. The underlying origins of dictatorship and democracy in such countries could be traced to their own domestic structures.²¹ This has led to the formation of a weak state *visa-vis* Iran's strong society. Added to this weakness is the role of American power.

It seems that, the American pressure has resulted in Iran's frustration, which has given an added psychological element at times to the Tribunal's proceedings. The Mangard episode, involving a physical clash in the Tribunal which will be studied in detail, must be viewed within the context of Leonard Doob and John Dollard's "frustration-aggression" hypothesis: aggressive human behaviour usually is induced by "frustration" which is defined as "substantial interference with or blocking of goal-directed activity." When strongly frustrated, most actors, like humans, "experience a natural build-up of blocked energy that seeks release."²² Similar types of frustration can generate different reactions-

some violent, some non-violent, fighting in one case, running away in another, and still negotiating in another. This is the prominent feature of the Iran-US relations after the Islamic Revolution. It incorporates in itself not only the Tribunal but also the two countries' conflict over nuclear issues.

In the case of the Tribunal, conflict has arisen in many issue areas such as the challenge to arbitrators, nationality of the claims and the like. On the surface, one sees legal niceties, rules and procedures. At the bottom, however, one can realize how politics is involved and how the unequal distribution of power matters and how disputes over incompatible interests arise. Iran and the United States have both compatible and incompatible interests in both international relations and at the Tribunal. At the Tribunal, just like in both Afghanistan and Iraq, they have compatible and incompatible interests.

As Kegley and Wittkopf have argued, "conflict may be seen as inevitable and occurs when two parties perceive differences between themselves and seek to resolve those differences to their own satisfaction... and may be generated by religious, ideological, ethnic, economic, political ...issues." ²³ Iran and the United States faced enormous differences from cultural, political, ideological, and economic viewpoints. Each tried to use its influence to obtain proper awards to its own satisfaction. It seems that the United States has been happy with the status quo while Iran has tried to change the course of events at the Tribunal in many ways, like challenging the arbitrators. Such serial conflicts must not be regarded as simply destructive in that they laid the foundation of cooperation between the two potential enemies and paved the way for conflict resolution which is in fact in line with the literature on discord and collaboration in international relations.

As Robert Keohane puts it in *After Hegemony*, conflict and cooperation generate each other. ²⁴ Coser shows how conflict can promote social solidarity, creative thinking, learning and communication. To Coser, such factors are critical to the resolution of disputes and the cultivation of cooperation. ²⁵ As we shall see in my chapter on cooperation, all these

conflicts were handled with utmost care by the Tribunal and helped Iran and the United States to redefine their selfish interests.

My examination of the Tribunal's nature has shed light on my theoretical perspective. There are three schools of thought with respect to the nature of the Tribunal. A first school sees the Tribunal as 'international' or 'interstate' established under an international treaty by the two states as major actors. This perspective favours realist approaches, with their emphasis on the struggle for power between states. A second school holds that the nature of the Tribunal is 'commercial' or 'private' because majority of the claimants are multinational corporations in which case major actors are non-state actors, therefore, neo-liberal institutionalism is the most relevant theory.

Both schools seem to be deterministic. The first school denies the role of private parties and the second school is blind to the role of government-to-government claims. A third cluster of scholars have argued that the nature of the tribunal is 'hybrid' or 'mixed' because there are both state and non-state actors. Yet, it also does not consider one significant factor which is missing from the literature on Tribunal's nature. This perspective poses a critical question about the underlying causes of conflict and cooperation and argues that apart from states and non-state actors, the Tribunal's establishment is a matter of certain beliefs, values held in common, and in shared outlooks.

These underlying causes are rooted in cultures and identities. For example, both Iranians and Americans unlike Marxist or socialist nations, historically and earnestly, believed in property rights and ownership and both required the payment of compensation if such properties were affected by some wrongdoings. It is true that both state and non-state actors were involved in the negotiations of the Algiers Declarations, but 'good faith' was the spirit of those negotiations. Moreover, the conflict itself was also a cultural clash.

Therefore, the theoretical approach adopted here is a confluence of three clusters of theories: realism, neo-liberal institutionalism and Hedley Bull's international society. It is

impossible to contend that only one theory is able to explain the process of conflict and cooperation within the Tribunal. My empirical studies show that various considerations by Iran and America have contributed to this process. Realism is relevant because no one can deny the roles of the both states as well as the roles of Algeria, the United Kingdom and the Netherlands in this cooperative behaviour. Politics and the balance of power manifest itself especially in the early years of the Tribunal. Iran and many international scholars have called the nature of the Tribunal as inter-state or international because the agreements have been concluded between Iran, America, Algeria, and Holland and public international law is employed in major cases between the two parties. Moreover, both the Government of Iran and America are equally responsible for the funding of the Tribunal, sharing together all the costs and legal fees.

The literature on neo-liberal institutionalism with emphasis on international institutions is also undeniable. Different institutions are involved at the Tribunal as parties to the disputes. In fact, that is why the United States has described the nature of the Tribunal as a commercial or private body employing largely international private law.

International norms and social values, particularly in its legal ideology and culture step in when one finds that there are various factors, norms, custom and practice within international society that can explain Iran and America's conflict and cooperation. However, in describing such norms and values, this study is more in line with Hedley Bull's international society than Alexander Wendt's complex international society. Within the context of the Tribunal, one cannot rely only on the cultural aspects as emphasized by constructivism. Here power politics and the unequal distribution of legal power as outlined by realism; the distribution of interest and economic factors as emphasized by neo-liberal institutionalism; and cultural and legal rules as illustrated by Hedley Bull go together. As Robert Keohane has argued, constructivism has faced the problem of 'testability'. It is so difficult to explain all of the interactions of Iran and America in cultural terms and put aside

all of the other aspects like the rationality factor. Culture is a part, but not the whole of an interaction package. As Keohane has put it:

Like Alex Wendt, I am hesitant to name a specific debate, and I also think that the rationalist-constructivist debate is not only old but mostly false. A coherent approach to the study of world politics must take into account rationalist, institutionalist, liberal domestic politics, and constructivist insights. The trick is how to synthesize these ways of looking at the world in a coherent way, not to run some sort of phony competition among them. Alex and I and John Mearsheimer were on a panel at the American Political Science Association in 2007 at which we all agreed on this point. So addressing the “isms debate” is not the answer²⁶

Shared values, according to Bull, must be understood as social norms in which great power politics are relevant. As for conflict, the cultural gap between them is very important while their cooperative behaviour could be traced to certain bodies of ideas, norms, custom and practice that are embedded in the international community throughout civilization. For instance, norms such as *pacta sunt servanda*, and *ex aequo et bono*²⁷ have repeatedly been used in the history of civilization for peaceful settlement of disputes. There are few cases before the Tribunal in which such norms have not been invoked. In the “deliberations” within the Tribunal and in “the out-of-court settlements” which take place in Tribunal’s premises, law operates largely through a particular form of discourse. In the words of Johnstone, discourse is “a process of verbal interchange or diplomatic conversation in which the role of legal norms figures prominently ...and that the invocation of legal norms imposes limits on the style of argument or mode of deliberating”²⁸

That being said, I begin with the literature on institutions and then apply it to the Tribunal. This is the driving force behind the formation of the Iran-United States Claims Tribunal. Apparently, the United States was reluctant to use its naval forces to resolve the hostage crisis and by the same token, the Islamic Republic was unwilling to resort to its revolutionary guards to settle the issue. Both wanted to refer the matter to an intervening variable.

However, one must pose a central question with respect to the formation of this arbitration: how and under what conditions was the Tribunal created? What is the

underlying cause of conflict between Iran and America? Is there not a cultural clash between them both within the Tribunal and on the international level between them? Did power play a part in this scenario? Did the parties choose to abandon their self-help systems on a voluntaristic basis? Was the Tribunal—in the course of arbitration—influenced by actors? Did the Tribunal manage to produce its own jurisprudence? It is necessary to provide some reflections on different schools of thought and then to apply them to the case of the Tribunal.

A social theory “examines how the world, and what goes in it, is socially constructed-i.e., constructed by the very ideas that actors share with themselves and other about the world they live in.”²⁹ The ideas are not necessarily located in the actors’ mind but they are found within social life. Membership and participation in an international arbitration can generate a sense of obligation to comply with its rules and norms which have been relied upon for centuries. Once states are engaged in the international legal system, “then the idea of obligation and the normativity of the rules ...acquire a degree of distance from the immediate interests or preferences of states”³⁰ A social theory is relevant, but it cannot, by itself, explain the whole package of conflict and cooperation at the Tribunal. The power element evidently shows up.

In the case of the Tribunal, the power factor is relevant because the flows of American capital into Iran’s economy especially in the oil sector led to huge projects in every sector of Iranian economy, particularly under the Foreign Military Sales Program (FMS). Accordingly, the establishment of the Tribunal could be traced ultimately to the earlier US flows of capital, goods, services and technology to Iran. Similarly Iran's oil was pumped out to invest in projects. Therefore, it was both American and Iranian power that created the Tribunal. They did it primarily for their own interests.

The United States wanted to establish the Tribunal for the safe return of the hostages as well as for the payment of compensation for the damage done to the US

government, its nationals and corporations. This was America's primary concern. Iran, too, wanted to have access to its badly needed assets frozen by the United States, especially because of the outbreak of the Iran-Iraq war. On the other hand, Iran had threatened to withdraw its assets, amounting to billions of dollars, which had already been deposited with US banks—from the United States.

The United States would have faced similar problems if other oil exporting countries—which had obtained billions of dollars in loan from America and had deposited them with their own accounts—had decided to do so. It could have a major impact on US financial system. As a pre-emptive action, the US attempted to freeze Iranian assets under President Carter's Executive Order no. 12170. Gary Sick has said that "...planning efforts were accelerated on November 9 when reports began circulating in international financial circles that Iran intended to pull its deposits out of US banks. All of the preparations had been made to permit the United States to block any such effort, and on November 14, when word was received very early in the morning that Bani-Sadr had announced the intended withdrawal of Iranian assets, the decision was taken."³¹

The deputy director of the State Department's Policy Planning Staff from 1979 to 1980 quotes former Treasury Secretary G. William Miller saying that "The US government had imposed the freeze to forestall Iranian disruptions of financial markets, not to retaliate for the hostage seizure."³² The United States did not want to see another country to duplicate Iran. As put by Warren Christopher, it was a signal to "other host governments" that "the costs to Iran teach a powerful lesson"³³ Iranians wanted the United States to extradite the Shah and to transfer his property back to Iran. This demand was provided for under the Algiers Declarations but "neither the Shah nor his assets were returned to Iran"³⁴

The role of the balance of power in the conduct of the crisis, during the negotiations of the Algiers Declarations, in the composition of the Tribunal is quite apparent. According to Iranians, the balance of power tilts towards the United States. However, it is also obvious

that as the Tribunal produces its own jurisdiction and precedence, the degree of conflict diminishes while the degree of cooperation increases. The role of American power during the negotiations has been portrayed by Behzad Nabavi, Warren Christopher's Iranian counter-part who signed the Algiers declarations on behalf of Iran. He likens Iran's position during the negotiations to a circus show in which the audience is "moved when the circus man intends to get his head into the lion's mouth" He goes on to say that "the hostages had lost their values as a bargaining chip and it was not clear whether or not they were going to be of any value to Reagan except to draw the swords"³⁵

American soft and smart power and its sources in superior information power including legal expertise have been remarkable. The Treaty of Amity in which the Hull formula of 'prompt, adequate and effective compensation' had been envisaged for the payment of compensation (as opposed to just, fair and partial compensation, the compensation standard held by developing countries) apparently favoured the American position. The Tribunal had to rely on the Treaty of Amity as *lex Specilis*. Certain rules of international business law apparently are based on great powers practice. For instance the doctrine of effective nationality which was invoked in the cases of *Esfahanian* and *Golpira* and which laid the foundation of, and legal precedence for the all remaining dual nationality cases favours developed countries because over the past century there has been an out-flux immigrants and refugees from developing countries towards industrialized nations and not vice-versa.

As to the composition of the Tribunal, the fact is that most of the third-party arbitrators come from European countries. Iran has expressed opposition to the Tribunal's composition, saying that the third country arbitrators mostly are hired from European countries; The Tribunal is Euro centrist.

Yet, apart from the power considerations, what makes both Iran and the United States hang together at the Tribunal? The late Michael Akehurst posits that states obey

international law not because of sanctions but because of (1) the absence of legislation (2) the existence of custom and (3) the fact that states are few in numbers and are composed of territory. He goes on to say that in the absence of legislation, states cooperate to make law which is in their interest. “Out of habit, states obey the rule even when it goes against their interests. And legal arguments as well as political arguments are used in disputes about applications of the rule.” A state which breaks the rule may find that it has created a bad precedent which can be used against it in the future. A state “will have to acquire the reputation of being trustworthy”³⁶ because it has to do business with its limited neighbours and will be engaged in a give-and-take process in international society.

In *The Evolution of Cooperation*, Axelrod points very well to the shadow of the future and argues that states extend their cooperation for their future long term interests. A large number of issues have arisen before the Tribunal for which there have been no legal precedent; neither in municipal law nor within customary international law. Both Iran and the United States tried to make new precedents. In spite of the cultural gap and political clash, neither of them wanted to close their last chapter of bilateral relations. The agents of the two antagonist states chose to meet face to face at the Tribunal. When the American navy was raiding Iran’s oil installations at the Persian Gulf, a multi-billion dollar case was being negotiated at the Tribunal. The same Tribunal that was formed by America was in a position after a few years to render a verdict against its founder.

In the case of Iran- and the United States, the American fear was Iran’s Islamic cosmopolitanism. In fact with the outbreak of the Islamic Revolution of Iran as an emerging regional power– which came to challenge the system, particularly after the hostage crises that resulted in Iran’s international isolation, the United States used its power vis-à-vis the Islamic Republic of Iran to contain Iran’s revolt and stabilize the system.³⁷ Iran’s cosmopolitanism was based on what Khomeini had promised:

We are fighting against international communism to the same degree that we are fighting against the western world-devourers led by America, Israel and Zionism...both superpowers have risen for the obliteration of the oppressed nations and we should support the oppressed people of the world...We should export our revolution to the world... Our war is one of ideology and does not recognize borders or geography.³⁸

The passion to establish a world Islamic system was not restricted to politics or to battle fronts. It also pertained to rules and principles governing the international legal structures. David Armstrong argues that: Ayatollah Khomeini challenged not just American power but the prevailing conceptions of international society. He also believes that: “³⁹ if Khomeini had little time for the state itself, he had even less for notion of a society of states with rules, norms of behaviour and institution to which Iran was supposed to adhere.”⁴⁰ In fact, the Tribunal itself was seen a second battle front against imperialism.

In early years, one of Iran’s objectives was to introduce and publicize the Islamic legal principles applicable to world trade, to rid the oppressed countries from the burden of western law and practice. From this perspective Iran’s power is based on ideology. In fact, Khomeini identifies imperialism as the very tool of evil in the Moslem world and regards resistance to imperialist oppression as a sacred of an Islamic government. He argued “Any nonreligious power, whatever form and shape it may take, is necessarily an atheist power, the tool of Satan; it is part of duty to stand in its path and to struggle against its effect.” Khomeini’s remarks focussed on qualitative, soft or ideological power. He believed that Moslems have to take into account the problem of power distribution in the region, for example:

The Moslem of the world must know that as long as the balance of power in the world is not their favour, the interests of foreigners will always take precedence over their interests, and that every day the great Satan or the Soviet Union will provoke some event on the pretext of safeguarding their interests. In deed if the Moslems fail to resolve their

problems with the world devourers in serious manner and if they fail to arrive at least at the borders of a big world power will they be left in peace?⁴¹

Ayatollah Khomeini's political thought reflects some 1300 years of Islamic philosophy and theoretical inquiry into the nature and role of government; its relationship to religious and temporal affairs, and its relationship to social change and social revolution within the Islamic world and beyond. The position of the prophet Mohammad in the early Moslem community as God's appointed religious and temporal representative was a central factor in keeping the Moslem community united politically and religiously. He was of the opinion that alliance must be made within the Moslem *Umma*.

A correct reading of Ayatollah Khomeini's political thought further reflects the Islamic legal ideas and identities that are rooted in Iran's culture. As Roger Cotterell puts it, "An adequate understanding of legal ideas ...is impossible without adopting a sociological perspective...Social theory seeks to explain the nature of the social in general terms. It considers the general character of social relations, social institutions and social change."⁴² If there is a clash between Iran and America, it is a contradiction of ideas, identities and culture. Within the Tribunal the facts are interpreted differently by Iranians and Americans. Each has its own reading of the treaties, of the history of the cases, of the values, of the justice, of the beliefs that they hold about the legal system, of the applicable rules, norms and principle in the cases concerned. Each set of rules are embedded in its own culture and identity.

Friedman posits that each nation maintains a legal culture and "no two are exactly alike". He writes of "Western legal culture", of "an emerging world legal culture".⁴³ Cotterrell adopts Friedman's legal culture and applies it to ideology. *Legal ideology* to Cotterrell means "value elements and cognitive ideas presupposed in, expressed through and shaped by the practice of *developing, interpreting and applying legal doctrine within a legal system*"⁴⁴ (emphasis added).

The power and authority of legal ideology are self-evident in the wordings of Iranian arbitrators Mahmoud Kashani, Shafi Shafeieei, and Parviz Ansari when they argue that "The Islamic Republic shall never allow the infringement of its sovereign rights by a number of Iranian nationals who by resorting to the protection offered to them by the United States seek to evade the relevant Iranian law and jurisdiction and to resurrect a system of "capitulation" that was defeated by the long-lasting struggle of the Third World nations and particularly the Moslem Nation of Iran. As will be discussed in our Dissenting Opinion, the present Decision is void of any credibility".⁴⁵

To Hedley Bull, war or conflict "is not simply a clash of forces; it is a clash between the agents of political groupings who are able to recognize one another as such and to direct their force at one another only because of the *rules that they understand and apply*"⁴⁶ Article 33 of the Tribunal Rules provides the same spirit "The arbitral Tribunal shall decide all cases on the bases of respect for law, applying such choice of law rules and principles of commercial and international as the arbitral tribunal determines to be applicable to" and it "shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing have authorized it to do so". The Tribunal Rules "avoid the application of one law, by leaving the arbitrators free to apply principles of law derived from national, international and commercial law."⁴⁷ As for the national law, however, the nub of the matter is that national laws are different. They are based on different social values, identities, culture, custom, tradition and practice.

The Iran-US conflict over the Forum Selection Clauses and the Choice of Law is a clear manifestation of this conflict of laws, conflict of social values, tradition and culture. As discussed in detail in Forum Selection Clauses and the Choice of Law, The United States has taken a specific position with respect to Iranian courts and its legal system, pointing to *changed circumstances* in Iran after the Islamic Revolution. The United States

has argued that the Islamic Revolution has changed the circumstances in Iran and that its national courts are not competent and its legal system is not reliable any longer.

The same problem arises in regard to the dual nationality cases such as *Esfahanian v. Bank Tejarat*. Iran relies on the doctrine of state responsibility and Iranian laws. Iran further argues that Esfahanian possesses Iranian nationality while the United States favours effective and dominant nationality. With respect to the application of "international and commercial law", too, two contending approaches have been adopted by Iran and America. Such approaches are also rooted in legal ideologies. For instance, Iran and America employ different terminologies for the takings of alien property. The United States tends to use the term "expropriation" while Iran is happy with the term "nationalization". Apart from the terminological contradictions, they have disagreement over the standard of compensation for such takings of alien property. The United States asks for "full compensation" based on Cordell Hull's formula while Iran takes the position of the developing countries and favours "adequate", "just", "fair" and even "partial" compensation.

The freedom "to apply principles of law derived from national, international and commercial law" has granted arbitrators a lot of manoeuvring and flexibility. The development of international trade has led to the "contractual theory" or "*lex mercatoria*" whereby no specific legal system is admissible. Therefore, the arbitrator is faced with various systems of conflicting rules, which rules derive their origins from different social values and culture. One who comes from a Western educational background; born, socialized and grown up in a developed culture, will no doubt tend to choose and apply Western customary rules whether national or international.

In contrast, those who are from developing countries adopt rules after their own fashion. These two contending and conflicting approaches will have dramatic consequences for understanding, interpretation and application of rules: "...the authority of interpretation in comparative legal studies usually comes directly from social sources

in the different networks of community that legal regulation serves".⁴⁸ The Tribunal has faced with the problem of interpretation in a number of issues such as: the interpretation and application of the Algiers Declarations, interpretation of the contractual issues, treaty interpretation and the Vienna Convention on the Law of Treaties, the interpretation and compliance of 'A' Cases.

Judge Aldrich reminds of the problem of interpretation as "the Tribunal's struggle to decide" on contractual claims because "the Tribunal was confronted with disputes relating to contracts that had been concluded many years prior to the consideration of the dispute by the Tribunal. Moreover, the Tribunal lacked effective means of compelling the production of evidence". One of these struggles, according to Aldrich, was in *First Travel Corp. V. the Government of the Islamic Republic of Iran, et al.* A Dissenting Opinion from Judge Mostafavi was filed in this case. As for the treaty interpretation, there has been a severe clash between the United States and Iran within the Tribunal.

For instance, in *Halliburton Co. et al., v. Doreen/IMCO, et al.*, the United States and Iran disagreed over the term "binding" incorporated in the Algiers Declaration. Deputy Secretary of State, Warren Christopher who had negotiated and signed the Algiers Declarations submitted an affidavit to the Tribunal and said that he had proposed adding the word "binding" on January 17, 1981 two days before signing the Algiers Declarations because:

When I reviewed this proposal with Mr. Ben Yahia, he appeared immediately to recognize the importance of the new term included in this provision in that it would leave it open to the Tribunal to decide whether a given contractual provision was "binding" on the parties and the Tribunal, and he specifically asked whether the United States would insist on the word "binding". I replied that we would, that it was essential, and Mr. Ben Yahia made no objection"⁴⁹

People usually cling to "ultimate values they recognize as their own. It is painful to discard them or see them fundamentally challenged. In particular, values are often ambiguous in their implications."⁵⁰ The Tribunal in fact sought to draw analogy between Warren Christopher's affidavit and his values by ruling that "Mr. Christopher says that Mr. Ben Yahia understood 'the importance of the new term' but he does not say that the purpose of the ambiguous wording 'binding contract' in relation to the enforceability of choice of forum clauses was understood and conveyed to the Iranian negotiators"⁵¹

Mention could also be made of a second case in which the United States and Iran provided two contradictory readings of the Paragraph 9 of the General Declaration. The said paragraph provides that "...the United States will arrange, subject to the provisions of US law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs. "In *The Islamic Republic of Iran v. The United States of America*, the Tribunal held that "The affidavits submitted by the parties relating to the negotiations of the Algiers Accords are contradictory, and are, therefore, by themselves inconclusive."⁵²

On the issue of interpretation, Iranian Judges Kashani, Ansari and Shafer were critical of the Tribunal saying that "The present Decision is yet another clear manifestation of a bad faith interpretation rendered by this Tribunal." because of the composition of the Tribunal. He then added that "the so-called neutral arbitrators, itself the result of the imposed mechanism of the UNCITRAL Rules, is so unbalanced as to have made the Tribunal lose all credibility to adjudicate any dispute between the Islamic Republic of Iran, as a Third World revolutionary country, and the United States, as the symbol of the world capitalism." .⁵³

This Third World –Capitalist relationship as understood by Iranian judges itself must be construed within a broader process of historical evolution that Hedley Bull pictured "the rise of the Third World and the clash between North and South. Typically, too, he

[Bull] insisted that these transformations were part of a broader process of historical evolution that he [Bull] labelled the revolt against western dominance." ⁵⁴ As I will discuss in the next chapter, this perception must be set against the transformations produced by the CIA engineered coup that toppled Prime Minister Mossadegh in Iran in 1953.

Few international relationships have had such scenarios. Few of them have had such a romantic beginning as that which characterized U.S.-Iranian frequencies of cooperation, conflict and cooperation. The first stage was their mutual cooperation before the Islamic Revolution. The second stage resulted in conflict after the revolution. The third stage, which is limited to the Tribunal, centres again on cooperation. In spite of these conflict and disputes in international relations as well as within the Tribunal, Iran and the United States, to the surprise of the learned men and the laymen alike, have been collaborating both within the Tribunal and in international relations. Iran-US cooperation and conflict in Iraq and Afghanistan is undeniable now. The burning desires of both Iran and the United States to settle their disputes and normalize their relationship is not deniable either.

Cooperation within the Tribunal is also culture oriented. Iran and America have sought to present themselves as two communities of beliefs, ideas, and identities within a global community of values. Values have worked both ways. By removing contradictions between the two worlds of social rules, they have engaged themselves in a cooperative behaviour to integrate rules of law and apply those rules in the cases concerned.

For realists, cooperation is not impossible but it is highly fragile. For instance, Morgenthau says "Cooperation between states does occur." For him, cooperation is "difficult to achieve" but it is "always difficult to sustain." He posits that "two factors inhibit cooperation: relative gains considerations and concern about cheating." It is possible for states to cooperate and make an alliance "against common enemies" as "Germans and the Soviets did against Poland in 1939. Rivals and allies cooperate. After all, deals can be struck..."⁵⁵ Waltz argues that "The structure of international politics limits the cooperation

of states” and believes that “in a self help-system each of the units spends a portion of its effort, not in forwarding its own good, but in providing the means of protecting itself against others.” In such a self-help system, according to Waltz, states “worry about their survival.” As a result, states will not ask “Will both of us gain?” but will ask “who will gain more?”⁵⁶ Edward Carr draws on international agreements and refers to them as the “inequitable treaties” that are as “instruments of power.” For Carr, the rule *Pacta Sunt Servanda* “is not a moral principle. It is a rule of international law; ..., necessary to the existence of an international society.” He continues to argue that respect for law and treaties are maintained only if those treaties and law are able to recognize the role the political forces play. This is possible “only when these forces are in stable equilibrium” and one can conclude that the law performs its social function without becoming a tool in the hands of the defenders of the *status quo*. The achievement of this equilibrium is not a legal, is a political task.”⁵⁷ Within the context of the Tribunal, I have reason to believe that: first, states are not the only decision-makers at the Tribunal as the literature on the nature of the Tribunal showed, second, the role of the Tribunal as a mediator is not foreseeable.

In contrast, neo-liberal institutionalists argue that “even if one adopts the assumption that states are rational and self-interested actors, institutions can be shown to be important in world politics”⁵⁸ Axelrod points very well to the shadow of the future and argues that states extend their cooperation for their future long term interests⁵⁹ For liberals, international institutions can help redefine states interests, help overcome the problem of anarchy. Robert Keohane argues that international institutions can increase cooperation by: providing information about the behaviour of others, by monitoring, and reporting on compliance, by reducing costs; and by generating the expectation of cooperation among members.⁶⁰ They have shown how negotiation and mediation can serve as confidence and security building measures; how learning matters even in security issue areas such as the Hot-line arrangements between the Soviet Union and the United States of America which

led to the conclusion of a number of arms control agreements between the two enemies.⁶¹ The current Iran-US nuclear standoff, too, is moving towards that direction; conflict and cooperation. The weakness of the institutional approach is in the fact that the role of the Tribunal is exaggerated. The unequal distribution of power between a superpower and a developing country whose National Party government was undermined by America in a twinkling might not be overlooked. It was Americans who laid the law to Iranians in the context of the Treaty of Amity and the Algiers Declarations.

Hedley Bull's arguments, to the extent that is related to this dissertation, depart from both realism and neo-liberal institutionalism. As Hoffmann and Hurrell have shown, "The balance of power remains the most important foundation for Bull's conception of international society" Bull criticized Carr and Morgenthau but "retained many of their concerns, especially, the relationship between power, law and morality." He was critical of those who paid little "attention to the framework of rules, norms, and shared understandings on which international society depends"⁶² Although constructivists also have some parallels with Bull's position on norms, rules and shared values, they differ on other areas. Alexander Wendt says "My argument in this chapter [Three cultures of anarchy] draws directly on Bull's" Yet, he is critical of Bull and neo-realists because they "agree that shared ideas are associated with cooperation"⁶³ Wendt then goes on to say that "The dominant ontology today in mainstream theories of international politics is materialist' but he later rejects the "more radical constructivism."⁶⁴

As far as the Tribunal is concerned, Bull's assumptions are more relevant than those of other IR theorists. Culture is relevant because it may generate both conflict and cooperation. IR scholarship has now admitted that for Bull, the balance of power is a "kind of artefact, something made by human beings....could only come from a society, which is to some degree, culturally homogeneous "⁶⁵ Bull's *Justice in International Relations* portrays it very clearly.⁶⁶ It is undeniable that material incentives were not the only

underlying cause for Iran and America to sit at the negotiation table. Certain norms and social rules had compelled them to do so. American coup and intervention in Iran and the hostage taking of American diplomats contravened Iranian and American historical norms and values. More than 2500 years ago it was Cyrus the Great of Persia that proclaimed the first Charter of Human Rights. Long before Islam was introduced to Persia, Persia's Zoroastrian religion provided for 'Good Thought', 'Good Deed' and "Good Speech' for all humans. Similarly, the founding fathers of America promised freedom for all of the people, all of the world and their institutions, such as the Supreme Court of America have immensely contributed to the institutionalization of Human Rights. No wonder now they are engaged, by resolving their disputes, to produce new precedents in international public and private law. Similarly, the material interests of the United States, its multinational corporations and individuals and Iranian assets blocked in the United States are also important factors. That being said, a confluence of material and cultural influences pulled Iranians and Americans to cooperate. As William James puts it, "Beliefs, in short, are really rules for action"⁶⁷ These moral and material incentives showed up as soon as the negotiations started to release the hostages. An initial cooperation took place with respect to the wording, language, terms and the conditions of the Accords.

IX Explanation of the selection of celebrated cases

Ruling or rendering a verdict or an award at any given tribunal resembles a decision-making procedure where judges, an umpire or arbitrators first examine the fact of the case. A second step is to identify the various issues involved in the case. A third step is to distinguish the major issue of the cases. A fourth stage is the provision of a solid reasoning applicable to the case. The final phase is to provide a holding, i.e. rendering an award. In the case of the Tribunal, decision-making takes place in one of three chambers.

Each chamber is composed of three arbitrators: one American appointed arbitrator, one Iranian appointed arbitrator, and one third country arbitrator.

In important cases like cases involving the interpretation of the Declarations, the Full Tribunal composed of all nine arbitrators must decide. Basically, decision-making takes place through a long process of “hearings” and “deliberations”. Each arbitrator either concurs or dissents over a specific issue. An award on an issue is passed where at least two arbitrators concur. Generally, in case where a decision is made in a chamber, that decision lays down a legal precedent and as a result, subsequent cases of the same nature and characteristic would be decided after the same fashion. This is also called the “jurisprudence” of the Tribunal. Accordingly, the first case that is considered for holding an award will be regarded a pioneer case and a legal precedent. The same method has been employed in the present dissertation. For instance, all dual nationality cases before the Tribunal have been decided based on *Case A-18 Esfahanian v. Bank Tejarat*. In all issues, including cases involving expropriation, interim measures, forum selection clause, indirect claims, stand-by letter of credit etc. the pioneer case has been chosen for examination. Inasmuch as hundreds of cases are involved in a specific subject matter, it is beyond the scope of this dissertation to incorporate all of them. Following the pioneer case which lays the foundation of legal precedent, further sketchy references to similar cases might have been provided just to buttress and support the assumptions.

X Research Limitations

Any academic work on developing countries has its own limitations for various reasons. One is due to the prevalence of the problem of confidentiality or secrecy over the principle of transparency. A second constraint is the strength of strong society versus weak states. A third limitation is the lack of knowledge, expertise and the poor introduction of information technology. My dissertation is not an exception to the case. From the beginning Iran pushed for secrecy at the Tribunal. The United States disagreed. Although millions of

pages have been produced by the Tribunal or with respect to the Tribunal by international lawyers, institutions and publishers; little information and data is available in Farsi in Iran. The Iran-US relation is a very sensitive issue in Iran.

The ruling in each case which usually is publicized is an essential matter. However, what is much more important, which gives light to our understanding of the case, is the fact or history of the case. Theories and assumptions to some extent are based on our experience. Based on that, we all have our own predictions in our daily life: where to drive to skip traffic jams, where to locate a parking lot to park our cars, where to go shopping for a better quality and price etc. These are all based on our past experiences. No history of the cases brought before the Tribunal is available to the public. In absence of an access to the history of cases, my research has been dramatically constrained.

As for the strong society, I must add that in developing countries the state and its machinery are weak visa-vis its society. It is the blocs of power that monopolizes each sector of the country. Following the revolution, Iran's international legal cases were monopolized by certain political group. This monopoly continued to exist for almost twenty five years in international arbitration. Recently, the monopoly has been abolished, but it is rather late as the Tribunal is coming to an end in the coming years. Although the new look changed the pattern of bureaucracy, it had no impact on the problem of secrecy. For security reasons, I have not been able to include all my findings. This is especially true with respect to the interviews conducted with the competent authorities. They have provided their views as anonymous contributors.

A final limitation pertains to the lack of knowledge, expertise and information technology weakness in Iran. My major data has been taken from Western sources, Exeter, London, and The Peace Palace Library in The Hague as well as the official website of the Tribunal. Iranian sources have been limited to the Library of the Legal Bureau of the

Islamic Republic of Iran. It could have been much more fruitful should Iranian or third world country sources have been available extensively.

XI Literature review

As of 1981 when the Iran-US Claims Tribunal (the Tribunal) began to function, a number of primary and secondary sources have been produced on the Tribunal. Primary sources are those that reflect specifically the operation of the Tribunal. Secondary sources are general journals of law, and books that reflect sporadically the Tribunal's function. This dissertation has based its literature on both primary and secondary sources available: in The Hague (the Peace Palace Library and the Iran-US Claims Tribunal), in Iran (The Bureau for International Legal Services, BILS), in the Exeter (Law Library and the Main Library). Two major (twice a week) reports were specifically published in the 1980s and early 1990s- *Iranian Assets Litigation Reporter* and *the Mealey's Litigation Reports*. Both publications reported the Tribunal events. The former was renamed in the late 1990s as *Foreign Assets Litigation Reports*. The latter discontinued. The Tribunal awards, decisions, and orders are collected in *the Iran-United States Claims Tribunal Reports*.⁶⁸ The sheer volume of material of the reports is now 38 volumes. The Tribunal itself has an *Annual Report* issued by the Secretary General. *The Collection of Awards and Decisions of the Tribunal, Yearbook Commercial Arbitration*, (The Hague: Kluwer Law & Taxation Publishers)

There is a long list of issues presented to the Tribunal for adjudication such as: treaty interpretation, challenges to arbitrators, jurisdictional issues, currency conversion, concept of nationality, interest on assets and holdings, force majeure, impossibility, hardship, frustration, exchange controls, wrong expulsion, expropriation, freeze, takings of alien property, affidavit evidence, oral testimony, documentary evidence, interim measures, Security Account issues, nationalization, the standard and measurement of compensation, valuation of business and tangible property, commercial (contract claims, issues of payment, contract conclusion, contract termination, breach, performance, repudiation,

extinctive and acquisitive prescription, omission, etc. A number of major books have been published on the Tribunal. Most of them have been devoted either to substantive (like contractual claims, expropriations and unjust enrichments) or procedural issues (like jurisdiction, standing and admissibility, interim measures of protection, questions of evidence and treaty interpretation) or to both of them.

All of them have adopted legal approaches to the Tribunal's operation. None of them raises the role of politics and culture at the Tribunal though most of them have admitted the "cultural clash", and the "politically controversial" cases (like dual nationality cases) of the Tribunal. Some of them believe that arbitrators "judge on sensitive political issues before the Tribunal".⁶⁹ However, lawyers are usually reluctant to comment on political aspects of the Tribunal. The present dissertation is an attempt to fill this vacuum.

An early book on the Tribunal was offered by Richard B. Lillich. He predicted that the tribunal would be "The most significant international arbitration in history If not in number of claims, then certainly in amount of money and complexity of issues involved, it far exceeds its predecessorsthe largest and most important international arbitration to date, it surely will influence the development of the law of international claims well into the coming century."⁷⁰ In contrast, Brower (a former American arbitrator at the Tribunal) and Brueschke sum up the Tribunal's function as follows:

Loosely grouped, there are four main criticisms of the Tribunal as a potential source of public international law jurisprudence: the awards constitute *Lex Specilis* and therefore are not relevant beyond the Tribunal itself; the at times hostile nature of the relationship between the United States and Iran has so politicized the Tribunal that its decisions are suspect; the third-country Chairmen have been subjected, and have improperly yielded, to intense forms of pressure asserted by the State Party-appointed Members; and finally, the awards of the Tribunal are merely decisions in cases and therefore not worthy of being afforded any significant persuasive weight in international law.⁷¹

Bilder has argued that the Tribunal "presents a distorted picture, because the Iranian judges never vote against the Iranian party, and the American judges rarely vote against the American Claimants. Thus, the effort to reach consensus-I do not say compromise-that in my experience characterizes most international arbitrations has been absent in the Iran-US Claims Tribunal." ⁷² Holtzmann sees the Tribunal as "gold mine of information for perceptive lawyers." ⁷³ Alford regards the importance of the Tribunal's "decisions second to none"⁷⁴

Jacomijn J. Van Hof. Deventer studies the framework of the UNCITRAL Arbitration Rules. Each section begins with the full text of each rule as adopted by UNCITRAL and modified by the Tribunal. The UNCITRAL/Tribunal texts are compared with the corresponding rules of the International Chamber of Commerce and the London Court of Arbitration The author reviews some the Tribunal rulings applying or interpreting each rule and shows how the Tribunal's approaches have evolved over time. She also discusses the Tribunal's key decisions on many important matters, such as the practice of the parties regarding appointment of the third-country arbitrators by agreement or through recourse to the Appointing Authority. The author identifies the cases in which the Tribunal has not been active. Van Hof also offers her view on the problem of the nature of the Tribunal under national law. ⁷⁵

Christopher R. Drahozal⁷⁶ and Christopher S. Gibson's⁷⁷ book (edited) is a collection of awards but has not attracted international lawyers. In the words of George H. Aldrich the title of the collection of studies is slightly "misleading" because it does not "analyze the eight hundred or so awards and decisions made by the Iran-U.S. Claims Tribunal or even to review the history of that most unusual, and continuing, institution that was established in 1981 by the Algiers Accords-the international Agreement that ended the Iranian hostage crisis." ⁷⁸ The authors pick up similar cases decided by the International Centre for Settlement of Investment Dispute (ICSID) ⁷⁹, under Chapter 11 of the North

American Free Trade Agreement (NAFTA), or under Bilateral Investment Treaties (BITs) and compare and contrast them with the awards rendered by the Tribunal

The editors— both are fully familiar with the work of the Tribunal as well as with the issues faced by parties, arbitrators, and counsel involved in ICSID, NAFTA, and BIT cases— identify many issues that were decided by the Tribunal. They posit that an examination of the awards and decisions of the Iran-United States Claims Tribunal "indicates that its Jurisprudence provides a wealth of issue of cotemporary importance." They also provide an interesting statistical analysis of the numbers of Tribunal awards and decisions cited in recent ICSID and NAFTA arbitration.

Particular chapters are the nationality of business association claims by David Bederman, interim measure of relief by Sean Murphy, the transparency of the Tribunal and its awards and decisions by Jack Coe Jr., the consolidation of proceedings by Lucinda Low and Jeffrey Pryce, evidentiary practices by Roger Alford, contract-related claims by Daniel Price, two studies of expropriation claims one by Mark Joelson and one by Andrea Menaker, and a conclusion study by David Caron. Six of the studies attach substantial excerpts from a total of sixteen Tribunal awards and decisions. In an earlier article the same authors had examined the jurisprudential value of Tribunal decisions and awards from both a theoretical perspective and an empirical perspective, finding four factors for assessing the precedential value of awards and decisions of international tribunals.⁸⁰

Rahmatullah Khan discusses the validity of the Algiers Accords particularly from the United States' law perspective. Khan examines certain problems relating to the composition of the Tribunal and the legal circumstances surrounding, and the consequences of, resignations, withdrawals and absences of arbitrators. He discusses two jurisdictional issues, first the "controversy" which arose from the provision in the Claims Settlement Declaration, which excluded claims arising out of contracts which "conferred sole jurisdiction to the competent Iranian courts", and second the question of dual nationality.

The author also studies the problem of state responsibility and in particular, composition for expropriation of property. It is in this area of course, that international law reflects the divergent opinions of what an Italian scholar, Antonio Cassese, has called a “divided world”. Khan says that the expropriation awards are “a can of worms”.⁸¹

Charles N. Brower⁸² and Jason D. Brueschke⁸³ have provided an overview of the establishment and jurisdiction of the Tribunal whereby they examine the Tribunal’s contributions to the practice of international arbitration. They have emphasized the application of the UN Commission on International Trade Law (UNCITRAL) Rules to problems of internal organization and competence of chambers and individual arbitrators.

The Tribunal’s influence on the development of doctrines of public international law, the problems of treaty interpretation, the claims of dual nationals and the wrongful–expulsion cases that were filed before the tribunal and later settled by Iran and the United States have been dealt with. The authors criticize the Tribunal’s inconsistent application of the Vienna Convention on the law of Treaties and find the Tribunal's practice on treaty interpretation inconsistent.

Yet, they find that its jurisprudence on these subjects is “extensive and generally well reasoned”. They also present a clear and detailed discussion of the treatment of claims by dual nationals possessing “dominant and effective nationality” of one of the claimant nations. They then consider the Tribunal's impact on the doctrines of compensation: the standard of compensation under customary international law, the 1955 Treaty of Amity between Iran and America, the quantum of compensation, and the method of measurement which is the most controversial issue in international business law. They call the Tribunal's reasoning on the standard of compensation in *Amoco International Finance Corp.* and in *Shahin Shaine Ebrahimeas* “aberrant” According to the authors the Tribunal is similar “to a dog that can walk on its hind legs”.⁸⁴

An Iranian member of the Tribunal, unlike most Iranians who are critical of the Tribunal, argues that the Tribunal is “justifiably described by some as the most consequential arbitral institution in history”. At the same time he identifies issues the Tribunal seemingly overlooked in a cursory fashion. For instance, according to him, the terms "dominant" and "effective" have been used interchangeably. He adds that effective nationality is the one that has international effect, while "dominant" nationality means the one that has stronger ties to one state- a concept of relativity. He argues that the Tribunal, like earlier claims mechanisms in which claims were espoused by governments, should not permit claims of dual nationals.⁸⁵ In fact the author finds the political cases of dual nationality and government to government cases outside the jurisdiction of the Tribunal.

An American Agent to the Tribunal, John Crook, together with an American legal assistant in the Tribunal delineates the parameters of the U.S. Agent's functions at the Tribunal. They highlight the cooperative arrangements with the Dutch government and the process of selection of arbitrators. From around mid-1982 till late 1991, the Tribunal had its most productive period. In the 1990s the Tribunal's productivity diminished and it began to focus on the most politically controversial cases on its docket, the claims of Iranian-U.S. dual nationals and the government-to- government claims.⁸⁶

An Iranian member of BILS, Mohsen Mohebi, presents some controversial views on the Tribunal, its jurisdiction, the problem of compensation, and the nature of the Tribunal which he calls as a “true international tribunal”. He adds that international Tribunals derive their jurisdiction from intergovernmental agreements, that they apply public international law⁸⁷, and that they resolve disputes between legal persons on the international plane. He concludes that the Tribunal’s application of customary international law and its interpretation of the Treaty of Amity point to “appropriate compensation” as the rule for large- scale nationalizations but suggests that the Tribunal jurisprudence condones the award of “appropriate compensation”⁸⁸ for large –scale nationalizations and in *American*

International Group v. Iran, the Tribunal held outright that customary international law requires “full compensation” for large-scale nationalizations.⁸⁹

Aldrich studies a wide range of issues: jurisdictional issues, including the nationality of claims; interim measures; standing and admissibility; unjust enrichment; choice of law; contractual issues; expropriation; evidentiary issues; currency issues; treaty interpretation; procedural issues, including the regulation of pleadings and claims; and miscellaneous issues, including the treatment of interest costs and the claims between the two Governments.⁹⁰

The Tribunal is a meeting point between two very different legal cultures. As rightly argued by Stephen C. Neffe, Aldrich’s work would have been more readable if he had given more space to discussion of some of the Iranian dissenting judgments. George H. Aldrich was one of the three judges initially appointed by the United States, and he is only member of the Tribunal who was present at the creation. He is very well aware of the political and cultural clashes between the actors. It seems that the secrecy rule, to which I will come later, has been a constraint on his study. Yet, he has no hesitation to express his disagreement with the Tribunal's decisions that he thinks "are wrong"⁹¹

Aldrich gives detailed attention to both substantive and procedural issues. The main groups of substantive issues are contractual claims, expropriations and unjust enrichments. As for non-substantive issues, jurisdiction, standing and admissibility are given full treatment, as are interim measures of protection, questions of evidence and treaty interpretation, as well as a number of matters on the actual procedure of the Tribunal. The inter-governmental claims are covered, as well as the individual ones.⁹² A parallel text is Wayne Mapp's book. Mapp’s treatment is much shorter; but he covers some issues that Aldrich does not, such as enforcement of decisions in State Courts. Mapp is rather more readable; Aldrich is more of a reference work.⁹³

Caplan⁹⁴, Pellonpa⁹⁵, and Caron have examined the Tribunal's jurisprudence in (a) challenges to arbitrators (b) confidentiality, (c) costs and fees. As for the first issue, the authors deal with each aspect of the challenge process, with practical illustrations of successful and unsuccessful challenges, including ten challenge incidents from the Iran-U.S. Claims Tribunal most dramatically, the situation of an assault by two arbitrators upon Judge Mangard With respect to confidentiality, they argue that the rules are silent on the issue. They are not in favour of confidentiality, and hold that the assumption is no longer valid. The costs and fees are studied under four provisions: relating to the costs of the arbitration, arbitrators' fees, appointment of costs, and deposit of costs.⁹⁶

Avanessian examines some of claimants and respondents within the Tribunal's jurisdiction, in particular the awards on dual nationality and the rules on corporate nationality. The Tribunal's approach to terms of "Iran" and "the United States" is compared with the approach of domestic courts to a similar question in the context of state immunity. She discusses the Tribunal's approach to the determination of the law applicable to the merits of the disputes before it; and discusses the application of the New York Convention to the Tribunal's awards.⁹⁷

The foregoing review shows that little attempt has been made to examine politics and culture at the Tribunal. To illustrate the political atmosphere of the Tribunal, especially in the early years - which is missing from the literature on the Tribunal-, I must mention the dissenting opinions of Iranian judges in a dual nationality case under the caption of *A-18*. According to Iranian Judges, the Netherlands, where the arbitration takes place, as a member of the North Atlantic Treaty and hence an ally of the United States, has an influence on the Tribunal in that "The Tribunal is now composed of two Swedish arbitrators, one of whom persists in staying on despite the fact that he was rightly disqualified by the Islamic Republic prior to the commencement of the Tribunal's judicial

proceedings over two years ago, and of an agent of the Dutch Government's Ministry of Foreign Affairs, the NATO military ally of the United States".⁹⁸

Having reviewed the literature on the Tribunal, I have shown that politics and the role of states (represented by realism) and non-state actors (represented by neo-liberal institutionalism) social norms; values and culture (represented by Bull's international society) are missing from the literature on the Tribunal.

XII Conclusion

The present introduction sought to provide a problem statement, the objective of the dissertation, major question, main sub-research questions, the background to the establishment of the Tribunal, methods and theoretical approaches, explanation of the selection of celebrated cases, constraints and limitations of my study, literature review and a conclusion. Once the setting is finalized by the end of this conclusion, an attempt will be made in the next chapter to examine the historical context of Iran-US relations.

In conclusion, my literature review shows that the role of culture and politics is missing from the literature on the Iran-US Claims Tribunal. To fill in this gap is the contribution of this dissertation. States and non-state actors play a major part in this conflict resolution mechanism. Yet the role of culture and identity must also be added to this legal interaction at the Tribunal. In human relationships as well as in the relationships between states and other non-state actors, law is a way of life, a means of interpreting social relationships deeply rooted in culture. Embedded in culture, law is based on shared values, beliefs and understanding. Culture is viewed as a unity of some kind as well as a fragmented diversity of influences, experiences, understandings, expectations and limits. It is expressed in social relationships of international community on a shared commitment to certain ultimate values and beliefs. Both Iran and the United States believed and continue to believe in capitalist values such as ownership, property rights, loss of profit and compensation; a quite distinct approach from socialist countries such as the Cuban-US

model. Following the revolution in Cuba in 1959, American assets and properties were confiscated and no compensation was paid to Americans. No settlement agreement was reached between America and Cuba. Iran and America believed in public and private property ownership. No matter what the measurement of 'compensation' might have been, they both believed in such notions as 'justice', and 'fairness'. These norms and values were a much stronger force for compelling both parties to this commitment.

To this end, chapter two will discuss the historical evolution of Iran-U.S. relations leading to the Islamic Revolution and the cultural clash between Iran and America... Chapter three examines the Tribunal formation. In chapter four I examine the development of arbitration and the nature of the Tribunal. Chapter five explores the forces of conflict; focusing on the issue of Challenge and Replacement of Arbitrators. Conflict, in its second part centering on dual nationality, expropriation and compensation will be covered in chapter six. Chapter seven includes cooperation in financial and banking, settlements agreements based on awards on agreed terms, small claims, interim measures, lump sum settlements, and counterclaims. In chapter eight, the second processes of cooperation will involve enforcement of awards rendered in favour of Iran or its nationals, indirect claims, jurisdictional effect of Iranian forum selection clauses, The Shah's Assets, U.S. Hostages v. Iran, strategic cooperation & Iran-Contra Affair. Finally, a general conclusion will ultimately be submitted.

Notes

- ¹Malcolm Waters, *Modern Sociological Theory* (London: Sage Publications, 1994) 173.
- ²Michael Kahl Sheehan, *Iran: The Impact of United States Interests and Politics 1941-1954* (New York: Theo. Gaus' Sons, 1968) 81
- ³Christos P. Ioannides, *America's Iran: Injury and Catharsis*, (Boston: University Press of America, 1984) 216.
- ⁴Ioannides, 134
- ⁵Kenneth M. Pollack, *The Persian Puzzle, the conflict between Iran and America*, (New York: Random House, 2004) 181-216
- ⁶Statement made by Iran's Prime Minister Mir Hossein Mousavi regarding dual nationality cases on May 6, 1984, *Iranian Assets Litigation Reporter*, (May 11, 1984) 8,369.
- ⁷Edward H. Carr, *the Twenty Years' Crisis, 1919-1939*. (London: Macmillan, 1939) 139
- ⁸Carr, 168
- ⁹Carr, 131
- ¹⁰Carr, 131
- ¹¹Richard Little, *The Balance of Power in International Relations, Metaphors, Myths, and Models*, (Cambridge: Cambridge University Press, 2007) 94
- ¹²Richard Little, 124
- ¹³Richard Little, 191
- ¹⁴Richard Little, 221
- ¹⁵Ronald L. Jepperson, Alexander Wendt, and Peter Katzenstein "Norms, Identity, and Culture in National Security" Peter J. Katzenstein, ed *The Culture of National Security: Norms and Identity in world Politics* (New York: Columbia University Press, 1996) 45
- ¹⁶Jepperson, Wendt and Katzenstein, 3
- ¹⁷Michael Sheehan, *The Balance of Power: History and Theory* (London: Routledge, 1996) 205
- ¹⁸Andrew Hurrell and Stanley Hoffmann, "Foreword, 3rd ed" Hedley Bull, *The anarchical Society 25 Years on*, 139-140
- ¹⁹Hedley Bull, *Anarchical Society: a Study of Order in World Politics*, (London: Macmillan, 1979) 104
- ²⁰For an analysis of Strong Societies and Weak States, see Joel S. Migdal, *Strong Societies and Weak States: states-society relations in the third World*, (Princeton: Princeton University Press, 1988)
- ²¹Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of Modern World* (Boston: Beacon Press, 1966)
- ²²John Dollard, Leonard W. Doob, Niel E. Miller, et al. *Frustration and Aggression* (New Haven: Yale University Press, 1939), Seymon Brown. *International Relations in A Changing Global System*, (Westview: Boulder 1992) 59-60
- ²³Charles W. Kegley JR. and Eugene R. Wittkopf, *World Politics, Trend and Transformation*, (Belmont:: Thomson) 405
- ²⁴Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*. (Princeton: Princeton University Press, 1984)
- ²⁵Lewis Coser, *The Functions of Social Conflict*, (London:Routledge & Kegan Paul, 1956), Kegley & Wittkopf *World Politics, Trend and Transformation*
- ²⁶Robert Keohane, "On Institutions and the Need for Innovation in the Field" *Theory Talks* available at www.theory-talks.org/2008/05/theory-talk-9.html
- ²⁷Max Habicht, *The Power of the International Judge to Give a Decision "Ex Aequo Et Bono"*(London: Constable & Co. Ltd, 1935)
- ²⁸Ian Johnstone, "The Power of Interpretive Communities," Barnett and Duvall, *Power in Global Governance*, ed., (Cambridge: Cambridge University Press, 2005)187
- ²⁹David Armstrong, Theo Farrel, and Helene Lambert, *International Law and International Relations* (New York: Cambridge University Press, 2007)
- ³⁰Andrew Hurrell, "International Society and the Study of Regimes: A reflective approach," Volker. Rittberger, ed. *Regime Theory and International Relations*, (New York: Oxford University Press, 1993) 49
- ³¹Gary Sick, *All Fall Down: America's Fateful Encounter with Iran*, (London: Tauris & Co, 1985) 227
- ³²Karin Lissakars, "Money and Manipulation", *Foreign Policy*, (Fall 1981):111
- ³³Warren Christopher, *American Hostages in Iran: The Conduct of a Crisis* (New Haven: Yale University Press, 1985)
- ³⁴Christopher 14
- ³⁵Behzad Nabavi, "Answers to Critiques of the Algiers Declarations," *Siasate Khareji*, (Tehran: IPIS, 1991-92)
- ³⁶Michael Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Allen and Unwin,

1987) 1-10.

³⁷ See, for instance, John Esposito, ed, *The Iranian Revolution: Its Global impact* (Miami: Florida International University Press: Gainesville, 1990), Jon Esposito, 1992. *The Islamic Threat: myth or reality?* (New York: Oxford University Press, 1992), Francis Fukuyama, *The End of History* (New York: Free Press, 1992). For a classic analysis on Islamic revivalism, see Montgomery Watt., *Islam and Integration of Society*(London: Rutledge, 1961)

³⁸ "Khomeini Issues Message to Religious Authorities," Tehran Radio. *FBIS*, February 23, 1989,40

³⁹ David Armstrong, "The evolution of International Society," John Baylis, and Steve Smith, *The Globalization of World Politics, An Introduction to International Relations*, , (Patricia Owens: Oxford University Press, 2008)

⁴⁰ Armstrong 49.

⁴¹ *FBIS*

⁴² Roger Cotterrell, *Law, Culture and Society* (Hampshire: Ashgate, 2006) 1

⁴³ L. M. Friedman, *The Legal System: A social Science Perspective* (Russel Sage Foundation:1975)

and ' The concept of legal culture: A reply, in D. Nelken(ed), *Comparing Legal Cultures* (1997) 33-9 quoted in Cotterrell , 84

⁴⁴ Cotterrell 88-89

⁴⁵ *Case A-18*, Decision No. Dec 32-A8-FT

⁴⁶ Andrew Hurrell and Stanley Hoffmann, Foreword, *The Anarchical Society 25 Years on*. See also Hedley Bull. "Recapturing the Just War for political Theory", *World Politics* 31, 4 (1979): 595-6

⁴⁷ Jacomijn J. Van Hof, *Commentary on the UNCITRAL Arbitration Rules, The Application by the Iran-US claims Tribunal* (The Hague: Kluwer,1991) 227

⁴⁸ Cotterrell 145

⁴⁹ *Iran-U.S. C.T.R. 1*, 242, 245-6. See also Award No. ITL 2-51-FT (5 Nov. 1982)

⁵⁰ Clotterrell 155

⁵¹ Award No. ITL 2-51-FT (5 Nov. 1982)

⁵² Award No. 382-B1-FT- (31 Aug. 1988), *Iran-U.S. C.T.R.* 19, 273.

⁵³ *Case A-18*, Decision No. Dec 32-A8-FT

⁵⁴ Andrew Hurrell and Stanley Hoffmann

⁵⁵ Hans Morgenthau, *Politics Among Nations, The struggle for Power and Peace*, Revised, Kenneth Thomson and David Clinton, (McGraw Hill: New York, 2006) 573-4

⁵⁶ Kenneth Waltz, *Theory of International Politics* (New York McGraw-Hill: 1979) 105

⁵⁷ Edward H. Carr. *The Twenty Years' Crisis:1919-1939* (MacMillan: London 1939) 243-5

⁵⁸ Robert Axelrod and Robert O. Keohane, "Achieving Cooperation under Anarchy: strategies and institutions" Kenneth A. Oye, ed. *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986) 238

⁵⁹ Robert Axelrod, *The Evolution of Cooperation*.(New York: Basic Books, 1984)

⁶⁰ Robert O. Keohane, *After Hegemony*

⁶¹ See for instance, Joseph Nye, "Nuclear Learning and the Evolution of US-Soviet Security Competition," G. T. Allison and W.L. Ury,eds, *Windows of Opportunity* (Cambridge: 1989) 131-62

⁶² Andrew Hurrell and Stanley Hoffmann, Hedley Bull, *Anarchical Society*; Foreword, viii

⁶³ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press) 253

⁶⁴ Wendt 371

⁶⁵ Chris Brown, *Understanding International Relations*, 2nd ed., (Handmills: Palgrave, 2001) 112

⁶⁶ Hedley Bull, *Justice in International Relations; The Hagey Lectures* (Waterloo: The University of Waterloo, 1984)

⁶⁷ Gary Goertz, *International Norms and Decision Making: A Punctuated Equilibrium Model* (New York: Rowman and Littlefied, 2003) 34

⁶⁸ The Research Centre for International Law in Cambridge

⁶⁹ See Separate Opinion of Kashani and Shafeiei, *Iran-United States Claims Tribunal Reports, Iran-U.S.C.T.R.* 1, 115

⁷⁰ Richard B. Lillich, Remarks, *ASIL PROC.* 5,76 (1982) 5-6

⁷¹ Charles N. Brower and Jason D. Brueschke, *The Iran-US Claims Tribunal* 644 (1998)

⁷² Richard B. Bilder, "Iran-US Claims" rev. and notes, *the American Journal of International Law*, 92. 1998. 150

⁷³ Howard M. Holtzmann, "Some Lessons of the Iran-US Claims Tribunal, in Private Investors Abroad: problems and solutions in International Business" *Janice R. Moss* 16 (1987) 5

⁷⁴ Roger P. Alford, "The American Influence on International Arbitration," *Ohio St. J. On. Disp. Resol.* 19 (2003) 69,86

⁷⁵ Jacomijn J. van Hof. Deventer, "Commentary on the UNCITRAL Arbitration Rules The Application by the Iran-United States Claims Tribunal, " diss., U of Leiden, 1980

⁷⁶ John M. Rounds was a Professor of law, University of Kansas School of law. Professor Drahozal was a legal assistant for George Aldrich at the Iran-United States Claims Tribunal from 1989-1991, *Annual Report* 1992.

⁷⁷ Professor Gibson was an associate Professor of law, at Suffolk University School of Law. He was a legal assistant for the Honorable Richard Allison of the Iran-United States Claims Tribunal from 1988-1989. *Annual Report* 1990

⁷⁸ *The Iran –U.S. Claims Tribunal at 25: The Cases Everyone Needs to know for Investor-State and International Arbitration* (Oxford: Oxford University Press, 2007) The authors note that the “core” of this book originated as papers presented at a Conference of the institute for Transnational Arbitration, co-sponsored by the American Society of International Law, held On March 29, 2006, in Washington, D.C. Doubtless

⁷⁹ A recent study found that 32% of ICSID awards cite precedents of the Iran-U.S. Claims Tribunal. See Christopher S. Gibson & Christopher R. Drahozal, "Iran-United States Claims Tribunal Precedent in Investor-States Arbitration," *J. INT'L Arb.* 23.52 (2006)

⁸⁰ Christopher, Gibson and Christopher, R. Drahozal

⁸¹ Rahmatullah Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution* (Dordrecht: Martinus Nijhoff, 1990). See also J.G. Collier, *The International and Comparative Law Quarterly*, 40, 3 (Jul., 1991) 748-749.

⁸² Charles N. Brower, a former judge of the Tribunal. *Annual Report* 2000

⁸³ Jason, Brueschke, who was a legal assistant at the Tribunal. *Annual Report* 1995

⁸⁴ Jason D. Brueschke and Charles N. Brower *The Iran-United States Claims Tribunal* (The Hague: Martinus Nijhoff, 1998)

⁸⁵ Mohsen Aghahosseini, *Claims of Dual Nationals and the Development of Customary International law: Issues before the Iran-United States Claims Tribunal*, (Leiden: Martinus Nijhoff, 2007)

⁸⁶ David Caron and John Crook, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*. (Washington: ASIL, 2006)

⁸⁷ Mohebi's arguments seems to be based on Ian Brownlie's *Principle of Public International Law* 584-85, 708, 5th ed. (1998); and on *Manley O. Hudson's International Tribunals* 99 (1944) 67-68

⁸⁸ For cases decided under the Treaty of Amity, Mohebi cites *INA* and *Amoco International Finance Corp. v. Iran*, *Iran-U.S. Claims Tribunal Reports*, 15, (1987) 189

⁸⁹ Mohsen Mohebi, *the International law Character of the Iran-United States Claims Tribunal*, (The Hague: Kluwer Law International, 1999) For the Amoco Case, see *Iran-U.S. C.T.R.*4.96.

⁹⁰ See also Vaughan Lowe, *Cambridge Law Journal*, 56, 1 (Mar., 1997)201-202

⁹¹ Stephen Nefe, *The International and Comparative Law Quarterly*, 46, 4 (Oct., 1997) 971-972

⁹² George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An analysis of the Decision of the Tribunal* (Oxford: Clarendon Press, 1996)

⁹³ Wayne Mapp *The Iran-United States Claims Tribunal: The first Ten years, 1981-1991* (Manchester: Manchester University Press, 1993)

⁹⁴ Caplan was attorney-advisor at the Office of the Legal Adviser, Office of International Claims and Investment Disputes, U.S. Department of State.

⁹⁵ Matti Pellonpaa, professor of law at the University of Finland.

⁹⁶ David D. Caron, Lee M. Caplan and Matti Pellonpaa, the *UNCITRAL Arbitration Rules: A Commentary* (Oxford: Oxford University Press, 2006). See also *The American Journal of International law*, 90.3 (Jul., 1996)529-531.

⁹⁷ Aida Avanesian, *Iran-United States Claims Tribunal in Action:* (Dordrecht: Martinus Nijhoff, 1993), See also *International and Comparative Law Quarterly*, 45, 2 (Apr., 1996) 485-486

⁹⁸ *Case A-18*, Decision No. Dec 32-A8-FT

Chapter Two

Historical Context

I Introduction

This chapter poses major questions regarding the ups and downs of the Iran-US relationships as outlined by the central thesis of my dissertation: under what conditions did Iran and America meet together in the international system and how did they build a unique alliance which was totally undermined by the Islamic Revolution? What was the impact of the revolution on their relationship? How was a bond of profound amity replaced by animosity and the waves of conflict became a dominant force in their interaction? More importantly, how did the two actors choose to collaborate in the midst of conflict? What is the relationship between those historical experiences and the subject matters of the Tribunal? To answer these questions, this chapter covers the following topics: the origins of Iran-US relations, their relations both during and after the Second World War, their rapprochement following the collapse of Prime Minister Mosadeq, Carter's human rights policy, and the outbreak of the revolution which had dramatic impact on their relations.

I shall seek to explore the circumstances that established a peripheral relationship beginning from 1800 till World War II; that subsequently created a special relationship between them after World War II and the CIA sponsored coup in 1953, following which the Treaty of Amity was concluded between them. This historical study shows that both cultural and material incentives of actors were crucial from the outset. Cultural ties were a pioneer force between Tehran and Washington via several American religious missionaries to Persia. A combination of strategic security for an emerging superpower; Iran's dire need for financial aid and its territorial integrity considerations, reinforced a cultural relationship that had been initiated from 1800, paving the way for a unique tie between Tehran and Washington after the fall of Mosadeq. However, this unique bond gradually had a shift of meaning from cultural to absolutely military and economic security considerations on the

part of Tehran and Washington. Huge investment especially in the military and oil sectors became the focus of their attention, helping both Tehran and Washington get involved in massive developmental projects. This marriage, however, lasted only for 26 years from 1953 till 1979, the year in which perceptions changed and cultural clash surfaced itself on the international level. Tehran and Washington began to use a harsh language against each other.

To understand the nature of the relationship between actors, Richard Cottam argues that one should look at the terminology that is used by those actors in describing each other. Americans and Iranians have used different terms and metaphors to describe each other.¹ Such metaphors and terminologies are rooted in one's culture, ideas and identities. Americans have seen pre-revolutionary Iran as "Third World, developing, emerging, nation-building, awakening, and modernizing." while the same country has been described after the revolution as "terrorist-sponsoring, backlash, rogue, maniac, and axis of evil." Similarly, Iranians have seen America as "both an idealized image and an Imperialist, world-devouring, or Great Satan." The shift of images is because of the perception of events which have taken place in the course of history.

The shift of meaning and in image rooted in the two different cultures of Iran and America did occur when the non-interventionist image of the United States changed after the fall of Mosadeq. The United States made an alliance with the Shah and this relationship resulted in anti-American feelings in Iran. Those images and metaphors showed continued pathways of confrontation and collaboration between the United States and Iran both in their overall international relations as well as within the context of the Iran-United States Claims Tribunal in The Hague.

Currently, this imagery continues to persist; confrontation and war between them are possible especially given the risks of escalation of conflict over the nuclear issue. In the words of Iranian leadership, a "soft war"² has already started between Iran and America.

Yet, enmity is not eternal, enemies can become friends. To the surprise of the international community, post-revolutionary Iran and the United States have had parallel interests. Although the era of US dominance in Iran has come to an end and the previous special marriage between the two can never happen, it might also be a matter of expediency such as conflict and cooperation in Iraq and Afghanistan that the two nations will ultimately cooperate to rebuild their relations. The Iran-United States Claims Tribunal started in the hey days of conflict but was engaged in unique cooperation.

In order to show how the Tribunal was created, I must first portray a tiny but clear picture of Iran-US interaction in its historical context. It is necessary to examine the ups and downs of the Iran-US relations in pre-and-post World War II periods. I will trace Iran-US relations and show under what conditions the two actors began to build their relations and how they broke up after the Islamic Revolution in Iran. The Tribunal and the Islamic Revolution cannot be studied in isolation. The Tribunal is an outcome of the revolution. One must have a correct reading of ancient Iranian history and its interaction with the international society of states, especially with empires and great powers.

II The origins of Iran-US relations

The history of Iran-US relations is culture oriented. Before the independence of the United States many educated Americans were acquainted with Persian history. Due to the lack of geographic, political or economic ties with Persia, the first American contacts with Iran dates back to the United States missionary activities shortly after 1800. In 1810 certain students in New England established the American Board of Commissioners for Foreign Missions. In March 1830, the Reverends Eli Smith and Harrison Gray Otis Dwight both graduates of Andover Massachusetts Theological Seminary left Turkey to arrive in the near Lake Uromia in north western Persia to examine the possibility of converting to Protestantism the Christian minorities living in the area.³ Culture therefore was a crucial factor from the beginning.

Justin Perkins and Asahel Grant were the first missionaries to be dispatched to Persia in 1834 via the American Board of Commissioners of Foreign Missions. Uromia University's College of Medicine, is another example of pre-diplomatic relations between Persia and the United States. The university was founded by a group of American Physicians in the 1870s. However, Americans were late comers. Russians and the British were already in every nook and cranny of Iranian life. This socially-based relationship continued until a preliminary government-to-government communication started between Persia and the United States.

The road to friendship was bumpy because both neighbors and great powers were already present in Iran: Russia, Great Britain, France, Germany and even Belgium were reluctant to see Americans in Iranian life. During this period, Iran had been divided between two spheres of influence. The Russians mostly operated in the north of Iran, while the British were interested in keeping order and stability in the south. The Russians and the British got permits for banking businesses while the rights to mining and many other services were given to a UK citizen, Rueter. The Persian Charge de-affair writes to the Secretary of State in 1918 stating that the occupation of Persia " has resulted in offending the public feeling and provoking a desperate situation, of which the ravaging famine is but one aspect. In presenting the enclosed data, I beg to state that Persia looks to America to insure her, after the war, against a recurrence of such hopeless conditions, which have afflicted the people of that ancient land"⁴ Until the Second World War Iran and the United States established only a peripheral relationship. As the United States emerged as a major power, Iran turned to Americans for help to confront the Russian and British threats.

This relationship is replete with good times and bad times. Good times began with the friendship treaties and ended in 1979, a date when the bad times in the relationship started and are still in process. The bumpy road in peripheral relations is better identified by the missions of Morgan Shuster (1877-1960) and Millspaugh (first mission 1922-1927,

second mission in 1943). Arthur C. Millspaugh's first mission (1922-1927), who was also an economic advisor, was not successful either because Reza Shah was angered over Millspaugh's efforts to centralize control over expenditures. "The government had preferred to be in difficulties and be independent, rather than be comfortable and be deprived of that independence"⁵

III World War II Period and Iranian-American relations

After World War II Reza Shah was exiled and his 21 years old son Muhammad Reza was put in his place. The United States was involved in Iran as part of the Allied war program. In the same month, the Department of State prepared a memorandum on Iran which decried British and Soviet interventionism in Iran: "Although Russian policy has been fundamentally aggressive and British policy fundamentally defensive in character, the result in both cases has been interference with the internal affairs of Iran, amounting at times to a virtually complete negation of Iranian sovereignty and independence."⁶

In response to Iran's desperate appeal for help, the same year in August, Secretary of State Cordell Hull pushed for US presence in Iran for moral and humanitarian reasons to prevent British and Soviet ambitions, stating that " Likewise, from a more directly selfish point of view, it is to our interest that no great power be established on the Persian Gulf opposite the important American petroleum development in Saudi Arabia."⁷

In line with this strategy five major centers of US influence were established in Iran by the end of 1943: (1) diplomatic legation headed by Lois Drefus, Jr., (2) the Persian Gulf Service Command (PGSC) headed by Gen. Donald Connolly consisting of thirty thousand noncombatant troops to provide wartime supplies; (3) the team of Col. H. Schwarzkopf and 24 police experts who worked as advisers to Iranian gendarmerie; (4) in January 1943 Millspaugh arrived in Tehran to start his second mission which turned out to be highly political in nature and put him into direct conflict with Iranians. His work was also frustrated by persistent Russian opposition; and (5) the fact-finding and advisory trips of

Gen. Patrick J. Hurley as the personal representative of President Roosevelt⁸ Apart from these missions, a number of intelligence gathering missions took place in Iran. All these American missions in Iran began to build centers of influence in Iran's social life. They became predominant in two issue-areas: military establishment and the oil industry.

During the war, viewed from the Iranian perspective, its territorial integrity and independence had been jeopardized by the Allied occupation. Most importantly, The Soviet Union had refused to withdraw from Iran and had subsequently sought to dismember Azerbaijan province through the communist Tudeh Party.

Furthermore, Iran was in dire need of foreign investment to proceed with its developmental program. The United States played a key role in both issue-areas: Russians were forced to leave Iran and the preliminary stage was set for US investment in oil and military sectors. Although the American pre-World War II missions, including those of Shuster's and Millspaugh's failed, they laid the foundations of the subsequent good times in relations which began dramatically after World War II.

At the Tehran Conference (The Tripartite Declaration dated November 28-December 1, 1943,) Churchill, Stalin and Roosevelt issued the Declaration of the Three Powers Regarding Iran and pledged for "the maintenance of the independence, sovereignty, and territorial integrity of Iran." They further acknowledged that World War II had caused special economic difficulties for Iran.⁹ Following this conference, two agreements (trade 1943-44) and (air transport 1945) were signed between Iran and the United States. A further agreement concerning the "Establishment of a Postwar American Military Mission in Iran" was signed on October 6, 1947.¹⁰

IV Post World War II relations

The British were the first foreign power to step in Iranian oil fields. In 1901, when W. K. D'Arcy was granted a 60-year monopoly right to explore for and exploit oil in Iran, with the exception of the five Northern provinces which were within the sphere of

Russian influence. Oil was discovered in Masjid-i-Sulaiman in 1908 and the Anglo-Persian Oil Company—a company entirely owned and controlled by British interests—was formed in 1909. Elwell-Sutton writes that on May 26, 1908, oil came in at a depth of 1,180 feet, so began the industry that was to see the [British] Royal Navy through two wars, and to cause Persia more trouble than all the political maneuvering of the great powers put together."¹¹ Great Britain held firm foothold over Iranian oil in 1909 by the Anglo-Persian Oil Company. In the 1920s, US oil companies had also begun to seek concessions in Iran. Among them were: The Standard Oil Company of New Jersey (Exxon), Sinclair Oil, Amiranian Oil (a subsidiary of the Seabed Oil Company, Standard Vacuum Oil (Mobil). All of them failed because of the British opposition. However, a confluence of Iranian and American mutual interest was a driving force to keep America deeply involved in Iranian life.

During and after World War II, the British interest in the Middle East was gradually replaced by American business interests and new economic centers were established. Three important factors were responsible for the British decline in the Middle East: the rise of America as a superpower, the US conclusion of a number of friendship treaties with developing countries like the Treaty of Amity with Iran, and the British unilateral reluctance to be present in the Middle East—on January 16, 1968 British Prime Minister Harold Wilson signaled the end of British influence in the Persian Gulf.¹² In the oil industry this change had gradually occurred even prior to World War II. Some areas of oil production had already begun in 1934 (Bahrain). Some other areas saw it during the 1940s (Kuwait and Qatar).¹³ In January 1944 the California Arabian Standard Oil, Philips Petroleum, Murphy Oil and Union Oil Company signed some joint ventures with Iran. In the same month, the California Arabian Standard Oil Company, owned jointly by the Standard Oil Company of California and the Texas Company, was re-formed as the Arabian American Oil Company, originally established in the 1930s.

In October 1945 a petroleum refinery opened at Ras Tanura, and two years later work started on the Trans-Arabian Pipeline (Tapline), to connect the Arabian oilfields with ports on the Mediterranean Sea in Lebanon. The Arabian-American Oil Company increased its production to 9.2 million barrels per day by 1977, from 50,000 barrels of crude oil per day in 1945. ¹⁴ On different occasions Iran under the Shah requested economic, financial and military aids from the United States. Between 1953 and 1960, American financial assistance to Iran amounted to \$ 567 million in economic aid and another \$ 450 in military aid.

Iranian exports to the United States in 1969 were 4 percent of its total foreign exports; in 1972, they rose to about 5 percent, and then rose after 1973, reaching 13 percent in 1978. In contrast, the Iranian imports from the United States were 14 percent of its total imports in 1969, which rose dramatically to 22 percent in 1972, and 20 percent in 1978 (Table 1) Iran's exports were mainly oil and its imports were mainly arms. In March 1975, Secretary of State Kissinger signed an agreement with Iran to sell some \$15 billion in nuclear power plant.

TABLE 1

US-Iran Trade (figures in millions of dollars)

	Exports			Imports		
	World	U.S.	%	World	U.S.	%
1938a	153.0	3.3	2.15	57.9	4.9	8.46
1948a	589.8	25.8	4.37	130.8	38.7	29.58
1954a	140.1	19.5	13.91	213.3	50.8	23.81
1958b	879.1	41.9	4.76	411.5	72.2	17.55
1963c	919.1	46.1	5.01	522.6	89.7	17.16
1968d	1,869.7	74.8	4.00	1,393.0	239.3	17.17
1972e	4,158.0	199.0	4.78	2,770.0	614.0	22.16
1973e	6,314.0	344.0	5.44	3,379.0	474.0	14.02
1974e	18,877.0	2,133.0	11.29	5,426.0	974.0	17.95
1975e	18,249.0	1,398.0	7.66	10,346.0	2,051.0	19.82

1976e	20,534.0	1,483.07.22	12,887.0	2,133.0	16.55	
1978e	22,070.0	2,876.0	13.03	19,964.0	4,053.0	20.30
1979e	19,872	2,707.3	13.62	9,738.0	1,121.7	11.51
1980f	13,680	322.0	2.35	10,545.0	25.0	0.23

Sources: (a) Direction of International Trade, 64th Annual Issue, Statistical Papers, Series T, Vol. 9, No. 10, Joint Publication of the United Nations and IMF/ IBRD; (b) *ibid.* 66th Annual Issue, Vol. 11, No. 9; (c) *ibid.* 67th Annual Issue, (d) *ibid.*, 72 Annual Issue; (e) *ibid.* 79th Annual Issue, and (f) *ibid.*, 81st Annual Issue. Reprinted in R. K. Ramazani¹⁵

American private and public economic aid to Iran only in the 1950s included privately sponsored projects of the Near East Foundation, the Ford Foundation, Harvard University, and the American Friends of the Middle East, the Iran Foundation, and the Lafayette College foundation.¹⁶ In 1958, Pan American International, a subsidiary of Standard Oil Company of Indiana, stepped in Iran. In the mid-1960s, Shell Oil, Tidewater, Skelly, Sunray DX, Kerr-McGee, Cities Service, Atlantic-Richfield, and Superior Oil concluded oil contracts with Iran. Further oil agreements were reached in the United Arab Emirates and Oman from the 1960s through the 1970s.

The American dramatic presence in Iran came following the conclusion of the Treaty of Amity. Iran's treaty was more cooperative than similar treaties because it involved huge American investment in Iran's oil industry as a result of which Iran was able to use its petro-dollars to sign further contracts with American multinational corporations.

In 1957, the total Iranian Armed Forces were 152,000. This figure had, by 1973, increased to only 285,000. In contrast, the total military expenditures for the fiscal years 1957-1960 were estimated at \$185 million. This figure for the fiscal year 1973 was \$3,112 million. The military tie concentrated on trade in weapons.¹⁷ Under the FMS Program, the US government transferred highly sensitive military equipment to Iran. Iranian armed forces spent more than US \$20 billion on FMS purchases under some 2800 contracts, or

sales cases as they were called. The years 1973 through 1977 saw an important change in Iran-US arms agreements and the years 1976 through 1979 were significant years in terms of arms deliveries to Iran. The record \$2 billion in arms orders from America in 1972 grew to almost \$4 billion in 1973 and to \$6 billion in 1976. (TABLE 2) (Years later most of those contracts became the subject matter of claims before the Tribunal).

TABLE 2

U.S. Military Sales to Iran: 1950-1980 (dollars in thousands)

Fiscal Year	Military Sales Agreements	Military Sales Deliveries
Cumulative		
1950-70	790,525	365,473
1971	354,613	78,566
1972	455,615	214,807
1973	2,133,680	245,293
1974	3,935,069	648,527
1975	1,290,509	985,822
1976	1,558,797	1,890,913
1977	2,760,650	2,416,591
1978	913,494	1,669,142
1979	35,862	1,413,752
1980	0	0
Cumulative		
1950	14,228,814	9,928,886

Source: Foreign Military Sales and Military Assistance Facts; December 1980, Data Management Division, Comptroller, U.S Department of Defense, Security Assistance Agency (DSAA).¹⁸

The United States did so because of Iran's geo-strategic importance. Iran was considered to be a pillar of stability in the region. Under George Kenan's Soviet policy and

the Marshal Plan, Iran was regarded as the center of the universe. At the same time the Kremlin authorities were trigger happy to see a communist regime in Iran in order to have access to the Persian Gulf warm waters. Similarly the US authorities were determined to frustrate Russian ambitions in Iranian affairs by all means. Iranians themselves had had bad experience from their relations with both the Soviet Union and Tzarist Russia. Under the Gulistan (October 24,1813) and Turkmanchai (February 21, 1828) agreements with Tzarist Russia which were signed after Iran- Russo wars, Iran lost 13 of its provinces to Russia and shortly after World War II the Soviet Union refused to retreat from the territories it had occupied during the war though Iran had declared its neutrality in World War II. All these considerations led both Iran and the United States to establish a special relationship second to none in the Middle East.

Numerous multibillion dollar contracts were concluded not only between the two states and but also between each state with corporations, ministries and entities of the other state and also between the organizations and companies of the two states. Following the revolution and especially after the hostage crisis, all fell down and all of the contracts were abandoned, leading to the rise of thousands of claims between Iran and America. I will now explore the circumstances that engineered the coup against Mosadeq and set the scene for their rapprochement.

V Fall of Mosadeq and beginning of a new era

However, it is significant to show how Mosadeq was overthrown, how the Shah was supported by the United States and the special relationship was constructed. In 1950, the United States had to adopt a clear position on an explosive confrontation between Iran and Britain regarding the Anglo-Iranian Oil Company (AIOC, originally Anglo-Persian Company). The AIOC was paying a small percentage of its enormous income as royalties, and its net profits by 1950 exceeded "33 million pounds sterling, about double its payments for that year to the Iranian Government." ¹⁹ The amount paid by the AIOC to the British

government in taxes was much more than it gave to Iran in royalties. Furthermore, Iranians viewed the AIOC as a tool of British influence in Iran. Iran began negotiations with AIOC for a different concession in 1947 and a "supplemental agreement" was initialed in July 1949. The agreement was unpopular and was not recommended by the oil commission of the National Assembly in November 1950. The 1950 Majles elections had focused on oil and the National Front coalition led by Mohammad Mosadeq scored major gains.

In April 1951, the National Assembly passed a bill for the nationalization of the oil industry and in May Mosadeq became prime minister. On October 1951 the Anglo-Iranian Oil Company was expelled from Iran by the National Front government of Mosadeq, and Iran nationalized its oil industry, an episode that forged the Iranian American alliance and an action that prompted Britain to bring a claim before the International Court of Justice alleging that Iran had seized its company. Iran refused to recognize the court's jurisdiction and the court ruled that it did not have jurisdiction over the case, hence upholding Iran's nationalization policy.

In the beginning of the crisis, the United States supported Iran's position. Secretary of State Dean Acheson stated that "We recognize the right of sovereign states to nationalize provided that there is just compensation."²⁰ Britain considered a military action but later backed off because of, first, a conflict in India, Pakistan and Kashmir, and second, the strong US opposition. Mosadeq visited the United States between 8 October and 18 November 1951, presenting Iran's case before the UN Security Council. He talked to high ranking Americans, including President Truman, Acheson and George McGhee. A proposal of compromise was worked out which said, among other things, that "A national Iranian oil company would be established and would be responsible for the exploration, production and transportation of crude oil."²¹ The British rejected the proposal and Anthony Eden, Britain's Foreign Secretary found the nationalization principle unacceptable.

Mosadeq left New York with nothing resolved, telling Americans that he was better off that way. "Don't you realize that returning to Iran empty-handed, I return in a much stronger position than if I returned with an agreement which I had to sell to my fanatics?"²², he had asked the American translator. The British imposed a collective boycott on Iranian oil operations and exportation. The United States was persuaded by Britain to adopt a tougher position.

Apparently, the British and the Americans made a deal: "In exchange for American support in overthrowing the Mosadeq government, the British grudgingly permitted US companies a 40 per cent interest in Iranian oil."²³ The Americans, who also were concerned about the future of American oil companies and their possible nationalization by host countries, joined the boycott and changed their position: "As time went on, US decision-makers came around to the British idea that the best way to confront the situation was to actively seek the overthrow of the Mosadeq government."²⁴ On August 19, 1953, an Anglo-American coup was launched "Aided by thugs whose services were secured with CIA funds, the Iranian army deposed Mosadeq."²⁵ Following the coup, Mohammed Reza Pahlavi, who had fled the country, was put back into power.

After the 1953 coup, Iran committed itself more and more to these ties with the United States. This activity in the economic and military sphere attracted the attention of US Congress which allowed the executive power to put into effect both strategic and economic incentives. Subsequently, the United States and Iran moved towards rapport-building, establishing twenty years of unique relationship.

In 1954, the Oil "consortium" was approved. Each of five U.S. companies held an 8 percent share (40 per cent in total), British Petroleum holding 40 percent, Shell holding 14 percent and French Compagnie Francaise de Petrole (CFP) holding 6 percent.²⁶ However, the management of the oil industry was handed over to two Consortium companies called the Iranian Oil Exploration and Producing Company (IOEPC) and the Iranian Oil Refining

Company(IORC). Based on the contracts concluded between Iranian National Oil company and these oil companies, years later, a number of claims were taken to the Tribunal, like Texaco Iran, Case 72; Iran Chevron Oil, Case 73; Mobil Oil Iran, Case 74; American Independent Oil, Case 75 San Jacinto Eastern, Case 76; Charter Petroleum, Case 77; Transocean Gulf Oil, Case 78; Sohio-Iran Trading, Case 79;Getty Iran, Case 80; Arco Iran, Case 81;Exxon,Case 150.²⁷

Until the outbreak of the Islamic Revolution, Iran and the United States signed a variety of treaties in the following areas: Agricultural Commodities, Aviation, Commerce, Defense, Disaster Assistance, Economic and Technical Cooperation, Education, Investment Guaranties, Judicial Assistance, Meteorology, Military Missions, Peace Corps, Postal Matters, Publications, Relief Supplies and Packages, Trade, and Visas. Approximately 37 of these treaties, according to the U.S. State Department's list, are still in force.²⁸ As mentioned above, one of those treaties is the Treaty of Amity that has been invoked progressively by the Tribunal. What was the spirit of the treaty?

The United States negotiated such multi purpose agreements with foreign countries primarily to safeguard its own interests. In order to protect, primarily but not solely, the "interests of U.S. members of the Consortium"²⁹ the United States negotiated the "Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran" in 1954. One year later, the treaty was signed on August 15, 1955. By adopting the Hull formula, the treaty provides that:

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

and adequate provision shall have been made at or prior to the time of taking for determination and payment thereof.³⁰ (Emphasis added)

The treaty has been invoked by the Tribunal in numerous cases of choice of law, dual nationality, nationalization, expropriation or takings for which full compensation has been required. The then US Arbitrator in the Tribunal has commented that "The Tribunal's growing jurisprudence has clarified many questions, thereby inducing settlements and the withdrawal of some Claims. Among the important issues settled was one about which I took particular satisfaction—the applicability of the standard of full compensation for expropriated property rights set forth in the 1955 Treaty of Amity between Iran and the United States"³¹

For instance, in the *Philips Case*, Chamber Two decided that the National Iranian Oil Company was obligated under the Treaty of Amity to compensate Philips. In *INA Corp. V. The Government of the Islamic Republic of Iran*, the Tribunal held that the 1955 Treaty of Amity was "a *lex specilis* governing the compensation payable for the nationalization of the claimant's ownership interest in an Iranian insurance company."³² The Treaty of Amity is very broad and it encompasses broader aspects of bilateral relations like trade and consular relations and apparently was not drafted solely for the purpose of oil related interests. However, as one American legal advisor to the Tribunal has argued, "It is equally clear that the interests of U.S. members of the Consortium were, as they should have been, foremost in the minds of both the Iranian and American negotiators of the Treaty of Amity."³³

As the U.S. oil companies stepped in Iran, a number of oil service companies like Southern Drilling Company were also accompanied. A Joint Structure Agreement was reached between the National Iranian Oil Company and Arabian-American Oil Company in 1958. In 1965, the LAPCO Agreement was signed between NIOC and a number of U.S. companies such as Atlantic Richfield Company, Murphy Oil Company, Sun Company, and

Union Company of California. The contract involved Phillips Petroleum of Iran, a wholly owned subsidiary of Phillips Petroleum (a U.S. Company). *Cases Nos., 55, Amoco Iran Oil Company v. The Islamic Republic of Iran.* , 20 *Arco Exploration*, 22 *Murphy Middle East Oil V. National Iranian Oil Company*, 21, *Sun Company*, 23, *Union Oil of California V. National Oil Company*,³⁹ *Phillips petroleum of Iran and the Islamic Republic of Iran*, were instituted before the Tribunal based on those contracts. Such cases, no doubt explain clearly the relationship of those projects with the Tribunal. In other words, the disputes brought before the Tribunal apparently reflect the output of a twenty- six- year-old cooperation as well as a reflection of the Mosadeq episode. As soon as Mosadeq was overthrown, the oil Consortium was established.

Under the Consortium, National Iranian Oil Company agreed to establish the Oil Service Company of Iran (OSCO) which itself came under the ownership of Iranian Oil Participants (IOP), which in turn was owned by some other foreign companies.³⁴ To carry out the business of drilling, treatment fluids, pumping, and geologic works, NIOC and OSCO had to sign several contracts with a number of other U.S. corporations like SEDCO, SEDIRAN, SISA, Oil Fields of Texas, Halliburton, Hood corporation, Seismorgh and Tidewater Inc. *Cases Nos.43.Oil Field of Texas , Inc. V. the Government of the Islamic Republic of Iran, National Iranian Oil Company, and Oil Services Company of Iran*, 51, *Halliburton Co. V. Doreen/IMCO, Hood Corporation V. Iran*, 443, *Seismorgh Service Corporation V. NIO.*, *Tidewater Inc. V. Iran*, were claimed before the Tribunal. Therefore, this huge oil interaction dragged U.S. banks into Iran's financial affairs and later on both these companies, the service corporations and the banks were involved in the litigation.

Iran's oil revenues—US\$22 in1978--were deposited in petro-dollar accounts with U.S. banks' overseas branches, mainly in London³⁵. The dollars were physically³⁶ kept in New York. Iran also had \$1.2 billion in securities and 1.2 million ounces of gold on deposit with the Federal Reserve Bank of New York.³⁷ At the same time, Iran's public and private

institutions borrowed substantial amounts of money from American and foreign banks.³⁸ Hundreds of American banks, either alone or in syndicates of international banks, provided loans to Iran. The Chase- Manhattan Bank paid enormous money.³⁹ Iran's external debt was estimated to be \$5 billion—of which some \$2 billion had been borrowed from American banks—vis-à-vis its roughly \$12 billion of assets to be frozen after the revolution.⁴⁰

In addition to this, the American banks had issued standby letters of credit in favor of Iran. U.S. banks first tried to resolve the hostage crisis, and then brought litigation against Iran. "The revolutionaries developed a list of fifty-one undesirable people in Iran. These undesirable, as it happened, were also the captains of industry in Iran. They were certainly in the forefront in dealing with U.S. banks, as some U.S. banks had extended credit to these individuals, and to their companies."⁴¹ Claims based on standby letter of credits in the amount of more than \$US 200 were asked before the Tribunal. The United States filed *Case No. A16*, and requested the Tribunal to decide whether the Tribunal had jurisdiction over claims by Iranian banks against American banks based upon standby letters of credit.

Privacy, confidentiality and trust are very important both to banks and their clients. In the Iran crisis, the principle of confidentiality was very well recognized by the US Treasury Department in the interest of both bankers and Iran. Karin Lissakars has argued that " in the Iran hostage crisis in 1979 Treasury went so far as to withhold data on Iranian bank deposits from the Iran Consultation Group—high-level senior officials from the Departments of State, Defense, and Energy, the CIA, and the National Security Council staff who wanted to know how vulnerable U.S. banks might be to an Iranian withdrawal of funds or loan default." ⁴²

Two factors played a role in the Iran-US arms trade before the revolution. As discussed above, one was the Cold War and the Soviet threat to Iran and the Persian Gulf which motivated the United States to give extensive financial aid, arms and military advice to any anti-communist regime, especially in Iran which was perceived as having significant

geo-strategic importance. A second factor is the fact that Iranian politicians, even Mosadeq, had long sought to exploit U.S. concerns over Soviet expansionism, probably to establish an Iranian regional power.

For example, *Case B-1* alone (*The Ministry of National Defense of the Islamic Republic of Iran V. The Department of Defense of the Government of the United States of America*) involved a claim in the amount of \$11 billion dollars. Apart from the FMS program, some private corporations were under contract to conduct service and maintenance. Corporations such as E-System, Sylvania Technical, ITEK and Touche Ross, Ford Aerospace, Harris International Telecommunications,⁴³ Rockwell International, and Singer Corporation were hired for that purpose.⁴⁴ They brought their claims before the Tribunal later. These oil and military projects led to a unique relationship as a result of which Americans got overwhelming influence in Iran. For Iranians this relationship brought modernization in two distinct packages: industrial and cultural.

Iranians welcomed the former and denied the latter. Iranians who traditionally had worried about Iran's independence, and its Islamic values, decided to break with the United States once they perceived American power as a potential threat to Iran's sovereignty and values. This dissertation is not to examine the causes of the revolution.⁴⁵ Suffice it to mention, as far as the military relationship and Iran's sovereignty and values are concerned, that on October 13, 1964, the Majlis passed a law that granted American military personnel and their families stationed in Iran full diplomatic immunity, thereby exempting American military personnel from Iranian national law. It was, to use James Bill's phrase, "A policy that clearly represented an assault on Iranian national sovereignty."⁴⁶ On October 26, 1964, Ayatollah Rohollah Khomeini made a powerful speech, saying that a law had been presented to Majlis according to which "...all American military advisors, together with their families, technical and administrative officials, and servants...are to possess legal immunity concerning any crime they may commit in Iran. If the servants of some American

or some cook of some American assassinates your marja' in the middle of the bazaar or run over him, the Iranian police do not have the right to try him. The files must be sent to America so that our masters over there can decide what is to be done." ⁴⁷

Therefore, the revolution was culture oriented. The seeds of the revolutionary values and ideas rooted in Islamic laws, *Sharia*, began to flourish in Iran. *Sharia* (the Islamic law) had been clashing with *Urf* (the state law) for centuries. *Urf* got its power directly from the state and *Sharia* received its power from the society. The state law served mostly the ruling class while the Islamic law placed much emphasis on social justice. ⁴⁸ The United States and Iran began their cooperation under *Urf*, but *Urf* was defeated during the Islamic Revolution and it was replaced by *Sharia*. Under such conditions, President Carter's human rights policy was launched which accelerated the revolution. This is not to say that Carter's human rights policy was the underlying cause of the revolution, but the fact is that his policy left enough room for Iranians to express their cultural aspirations.

VI Carter's human rights policy

Carter had always attacked the shah's human rights record during his election campaign. The Freedom House Organization reported in January 1976 that Iran was not a free country. Jimmy Carter was elected as the president of the United States in November 1976 and in his inaugural address on January 20, 1977, Carter announced that he would give increased emphasis to human rights in foreign affairs and to reducing the sale of American arms abroad. Carter stated "Our moral sense dictates a clear preference for those societies which share with us an abiding respect for individual human rights"⁴⁹ The shah had always more success with Republicans than with Democrats. ⁵⁰ Cooperation in military and economic programs with the United States was critical to the Shah, so he began to establish a different relationship with the Democrats.

Amir Abbas Hoveyda, the long served Prime Minister was fired and a liberal-technocrat Jamshid Amuzegar was replaced in his place. In 1977, The Shah invited in

delegations from the International Committee of the Red Cross, Amnesty International, and the International Commission of Justice to examine the country's social and political conditions⁵¹ The shah moved to decrease the use of torture, to reduce the number of political prisoners and to introduce some basic reforms into judicial system. Carter's deed and speech were contradictory. In spite of the publicly debate on human rights, the first two years of the Carter administration show that the he made a considerable effort to have good personal relations with the Shah and to seek the Shah's cooperation for his own projects. Carter continuously assured the Shah that American- Iranian relations would not suffer because of the human rights and arms sales questions.⁵²

In a sharp contrast to his human rights foreign policy, in May 1977, Secretary of States Cyrus Vance visited Tehran and promised American approval for the sale of another 160 F-16s to Iran at a cost of \$1.8 billion as well as 7 AWACS aircraft (for \$1.23 billion) which at that time were brand-new and had not been sold outside of NATO. The Shah was reassured enough to later increase his order to 300 F-16s.⁵³The administration then fought a hard battle with Congress to get approval for the sale.

In November 1977, the Shah visited the White House. Iranian students in United States used the Shah's appearance to deliver a protest message. A number of anti-shah students began pouring into Washington. The following day cameramen showed President Carter wiping tears from his eyes as he listened to the Shah. On the one hand, Carter exempted the Shah from a crucial aspect of his overall human rights policy: the linkage of arms transfers to human rights conditions and on the other hand the way he had criticized the Shah during his presidential campaign had already undermined the Shah's throne. However, Carter's human rights policy only prompted the pace of the revolution.

VII Islamic Revolution

I shall now examine the circumstances that led to the beginning of modernization in Iran by the United States after World War II. As I stated above, a unique relationship

between Iran and America started following the fall of Iranian Prime Minister Mosadeq in 1953; a series of highly complex financial projects were agreed upon by the two states, their corporations or individuals. It further attempts to demonstrate, how the Islamic Government in Iran was brought to power; how the American hostage crisis was negotiated, how and under what conditions the Tribunal was created to release the hostages and to facilitate cooperation between Iran and the United States by settling thousands of commercial, oil and military cases. The Tribunal, its structure, procedure, jurisdiction, and institutional matters will then be introduced.

As discussed below, post revolutionary Iran took certain actions such as nationalization of banks to carry out its proclaimed social justice programs. The problem of social justice as a primary aim of the revolution has been discussed by many scholars, and a few of them have wrongly attributed the causes of the revolution to economic inequality. My position is that the revolution was based on cultural values.⁵⁴ There is no doubt that Iran took some economic measures that affected certain businesses, insurance companies, heavy industries, concession agreement with oil companies and lands that were seen by the United States as affecting property rights, expressly resulting in expropriation—“nationalizations, taking of tangible assets, interferences with shareholders rights in companies, and blockings of bank accounts and funds”—and breach of contractual agreements.⁵⁵

Due to a *force majeure* situation caused by the outbreak of the Islamic Revolution, some American companies and individuals left Iran in a hurry leaving behind their property; some others were unpaid for their jobs. All commercial, and military relations were disrupted and hundreds of claims arising from the said contracts were brought before U.S., European and Iranian courts .The Tribunal was established and in fact replaced all national courts of Iran, European courts and federal courts of the United States in the task of dealing with multi-billion dollar claims under expropriation, confiscation, seizure, breach of

contract, loss of property, tort, etc. In the early 1970's Iran's economy had been influenced by the oil boom. The economic and military ties between Iran and USA led to the conclusion of many projects. "The legal and financial world has never seen anything like the Iran-United States Claims Tribunal, in part because the political world has rarely seen anything like the relationship between the United States and Iran under the Shah,"⁵⁶

At the outset, I shall study the origins of the revolution and then try to explain how this special relationship broke up, leading to the hostage crisis. Many channels and one rescue mission were, to no avail, tried by the United States. Ultimately, by employing the peaceful settlement of disputes enshrined in the Charter of the United Nations—Algerian mediation and arbitration through UNCITRAL rules as modified—the hostages were released, and all disputes were referred to arbitration. To demonstrate the background to this relationship, I have to submit a historical summary of the facts.

As of the sixteenth century, the *Shi'i ulama* in Iran under the Safavid dynasty sought to challenge the *Urf*, state law, to establish an Islamic government based on *Sharia*, Islamic law.⁵⁷ The Safavi monarchs recruited their followers from Turkic nomads, Syria and the southern Caucasus.⁵⁸

The Saffavis decided to convert the Sunni majority to Shiism. The major problem they faced was the non-availability of Shia scholars in the country.⁵⁹ This was why they began to import Shia Scholars from various Arab countries. The influx of Shia ulama to Iran under Safavi rulers was a major factor responsible for the conversion of Iran to Shiism. In the early safavi period, a number of madras's (equivalent to seminaries) was developed. The Shi'is consider *imamate* or belief in twelve Imams and *adl* or justice also as fundamentals of faith.⁶⁰

Under the Qajar dynasty (1795-1924) the antagonism between the monarchs and the *Ulama* began to surface.⁶¹ Following the Anglo-Iraqi Treaty of October 10, 1922, which, in the eye of *ulama*, had been signed in the interest of Great Britain; many *Ulama* decide to

immigrate to Iran, including Sheikh Abd-Al-Karim Hairi. As a result, Shi'i madrasas similar to those instituted in Iraq began to develop in Iran.

In 1922 the first school, Hauz-ye-Ilmiye, was established in Qum by Hairi where Ayatollah Khomeini, the leader of the Islamic Revolution of Iran studied philosophy and mysticism. Accordingly, Qum became the centre of Islamic scholarship and the emotional base of Islamic Revolution. The social basis of the *Ulama* grew stronger but the kings attempted to curb the power of the *Ulama*. The climax of this clash occurred during Reza Shah's reign followed by the period of his son Mohammad Reza Shah during which the revolution brought *Ulama* to power.

I now study the father and his son's interaction with *ulama* in a time when great power rivalries and World War II began to shift the course of events in Iran. Out of this scenario and following the occupation of northern Iran, Iran asked the United States as an emerging power to help Tehran get back its independence. This is the first real phase of the Iran-American special relationship. The second and the most important phase started after the fall of Prime Minister Mosadeq by a CIA planned coup. This intervention by USA in Iran was a major factor for the outbreak of the revolution and which consequently severed the Iran-US special relations and formed the Tribunal, but first I find it necessary to have a look at the Islamic Revolution.

The Islamic Revolution in Iran, in the eyes of an Islamic scholar is "one of the most important events of the twentieth century whose significance hardly needs underlying."⁶² However, as mentioned above, the social origins of the revolution go back to Reza Shah's period. For sixteen years, Reza Shah sought to establish a secular government. To the *Ulama*, one of his most outrageous actions against Islam was his anti-hejab policy, his attempts to unveil women and lift Iran's traditional chador dress.

A similar policy was adopted by his counterpart Ataturk in Turkey. Reza Shah's secular policy brought harsh reaction from *Ulama*. Imam Khomeini reminds of him later in

his *kashful –asrar* (the uncovering of secrets), and says, “All the orders issued by the dictatorial regime of the bandit Reza Khan have no value at all. The laws passed by his parliament must be scrapped and burned. All the idiot words that proceeded from the brain of that illiterate soldier are rotten and it is only the law of the God that will remain and resist the ravages of time”.⁶³

During the Second World War, Iran was occupied by the Allied powers. All the Allied members, however, left Iran except the Russians. Reza Shah who had opted to support Hitler was deposed, leaving his son as his successor. The Russians occupied the northern part of Iran and Tudeh Party (the party of the masses), a communist party created and financed by Moscow, attempted to partition Iran. The United States and Great Britain, especially the United States gave an ultimatum and eventually the Russians left Iran. After Reza Shah was deposed in 1941, Iran’s civil society became active again.

In the 1950s, the clergy were divided into two groups: a majority who were not active in politics and a politically active minority who supported the nationalization of oil. However, as crisis and conflicts unfolded, division within their ranks widened too. A minority continued to support Prime Minister Mohammad Mosadeq. Relations between the state and the clergy became tense in 1960 when the Shah, on the advice of the United States declared his White Revolution and proposed his land reforms to contain communism. The White Revolution was a package to not only curb any peasant movements but also to prevent proletarian revolution in Iran which had the full support of the Tudeh Party. Ayatollah Brojerdi voiced his objection to the land reform bill drafted by the government. In May 1961, the Shah dissolved the Majlis, which was dominated by landlords and ordered the government to implement a series of reforms.

In October 1962, the Shah passed a law to reform local council throughout the country. The law gave women the right to vote, but did not require voters or candidates to adhere to Islam, nor did it say that elected councillors must take their oath of office on the

Quran. Most clerics saw the law as contrary to Islam and Ayatollah Taleghani, and Ayatollah Khomeini adopted a radical position by criticising the shah's dictatorship and capitulation laws and advocated justice for the poor.⁶⁴

June 1963 coincided with the shi'i ceremony of *Muhharam* and Iran became highly political, turning into political unrest. *Muhharam* is the month in which Imam Hussein, the third Imam in Shi'ism, along with his 72 of his family members and followers were martyred by the *Yazid* army on a day called *Ashura*. For Iranians it is a day of loss and mourning and also it is deemed to be a day of upheaval against tyranny and dictatorship. On the *Ashura* in 1979, Iranians were mobilized against the Shah. After the events of Faidhiyah School which left a large number of people dead Ayatollah Khomeini ascended on the platform of Faidhiyah School, and delivered his famous speech against the Shah:

Any nonreligious power, whatever form or shape it may take, is necessarily an atheistic power, the tool of Satan; it is part of our duty to stand in its path and to struggle against its effects. Such Satanic power can engender nothing but corruption on earth, the supreme evil which must be pitilessly fought and rooted out. To achieve that end, we have no recourse other than to overthrow all governments that do not rest on pure Islamic principles, and are thus corrupt and corrupting and to tear down the traitorous, rotten, unjust, and tyrannical administrative systems that serve them. That is not only our duty in Iran, but it is also the duty of all Muslims in the world, in all Muslim countries, to carry the Islamic political revolution to its final victory.⁶⁵

The clergies demanded:

- (1) The abolition of anti-Islam laws,
- (2) Adherence to the principles of Shia Islam,
- (3) Cabinet members to be of the Shia faith,
- (4) Freedom of expression for clergy and other social classes,

(5) Cancellation of the prohibition against religious preachers,

(6) Correspondence between the national culture, the Quran and the ordinances of Islam.

Against the clergy's demands, the Shah pursued his father's secular policy which became divorced from the interest and needs of society. The oil revenue gradually helped him establish a state which was becoming independent of Iranian social forces. However, he failed to perceive that Iran had a strong society versus a weak state.

As Joel Migdal has argued, in developing countries states are weak vis-a vis their societies because the states are unable to eradicate the survival strategy of the power blocs. The blocs of power feed from social resources.⁶⁶ As the oil revenue was injected to the Iranian state, the state and the Shah grew unresponsive to societal pressures. The Shah failed to perceive the concerns of the power blocs and the opposition groups. Iran's oil and its cliental role also strengthened the Shah's relationship with the United States after the 1953 covert Coup that overthrew Prime Minister Mohammad Mosadeq. Since then the Shah came to be known as "America's Shah," and gave the revolution a highly anti-American perspective

At the same time, the financial position of Iran changed between 1972 and 1979 during the two international oil crises of the 1970s. Oil revenues increased from US\$1.6 billion in 1970 to US\$20 billion in 1978.⁶⁷ Yet, government spending began to outpace the oil revenues that were the source of Iranian wealth.⁶⁸ By 1977, the Shah was pressurized and was forced to dismiss Amir Abbas Hoveida, his prime minister of 13 years. He then appointed in his place Jamshid Amuzegar who pushed through cosmetic reforms. The reforms failed to appease the revolutionary opposition groups that demanded the limitation of the Shah's power. At the same time, Ayatollah Khomeini began to attack the Shah's regime from outside Iran's borders.

In 1963, he attacked the Government from the Qum seminary and was arrested. Following his release later, he was again arrested for calling a boycott of government elections. He was forced into exile in Turkey in October 1964 and then moved to the Shi'ite holy city of Najaf in Iraq in 1965, from where he continued his relentless verbal attack against the Shah. In 1978, he moved again this time to France, where he surrounded himself with intellectuals. In January 1978, when a Government-controlled paper launched an attack against Ayatollah Khomeini, riots in Qum spread across the country. The Shah used the military to curb the riots, leaving many people dead.

As a result a strong political upheaval began against the “America’s Shah” which was led by Shi’i *ulama*, primarily by Ayatollah Khomeini but Iranian intellectuals, merchants and university students also played a major role. Gradually, the revolutionary movement got stronger and on February 11, 1979,⁶⁹ the Islamic Revolution toppled the monarchical system and the whole package of Western modernization values was challenged; most transactions and contracts were affected and nationalization programs began.⁷⁰ This view has been reaffirmed by Professor David J. Armstrong who believes that, “At one level the Iranian revolution may be interpreted as part of the pattern of ‘revolt against the West’ Iran, a country with a rich culture and memories of past glories, has undergone a more recent history of humiliation at the hands of the West”⁷¹. Tilly, Theda Skocpol, and James C. Davies considered a mixture of economic, cultural, ideological and psychological explanations.⁷² However, the term “revolt against the West” portrays a much clearer picture of the revolution and substantiates the promises of constructivism in international relations. It shows how culture and identity are important. In one of his speeches after the revolution, Imam Khomeini said “We didn’t revolt to offer cheaper watermelon,” --watermelon a metaphor for economics. Once established, the Islamic Republic now had to both revolt against the west and to coexist with it as well. This brings me to the problem of recognition.

VIII The Problem of recognition

The Islamic Revolution was granted *de jure* recognition by most third-world countries, by almost all Muslim nations like Egypt which ultimately hosted the Shah's eternal journey, and Iran's neighbouring states as well as great powers like the Soviet Union. The United Kingdom and the United States were the Shah's strongest supporters. Yet, both offered *de facto* recognition. The regime's first Foreign Minister, Sanjabi, argued that Iran's foreign policy would be based on independence and non-alignment. One week later, Iran severed relations with Israel. Tehran severed relations with Egypt in April, as a mark of protest against the Camp David Peace Treaty with Israel the US administration said on February 9, 1979, that it would "attempt to work closely with the new regime".

The Islamic regime was divided with respect to the USA: Mehdi Bazargan's nationalist government attempting unsuccessfully to maintain workable relations, while the radical Revolutionary Council was against any compromise with the "Great Satan". Iran's relations with Western Europe were also damaged. The second wave of revolt against the west and especially against the USA came when the American diplomats were taken as hostages.

Conclusion

I have tried to show the circumstances that created a very peripheral relationship between Tehran and Washington prior to World War II. However, following the fall of Mosadeq in 1953, a unique bond of friendship was set up under the Treaty of Amity. Yet, the US coup flourished a hardy plant in Iranian social forces only to surface itself after the Islamic Revolution. In fact two contending forces were taking place simultaneously. A first one, based on *Sharia*, was taking place inside Iranian social forces backed by the *Ulama*, ruling out the cultural package of American modernization projects. A second one, based on *Urf*, was employed by the state under the Shah, pushing for secular pro American values.

While the seeds of a cultural clash were growing among Iranian social forces against America, America and Iran under the Shah were engaged by massive investment projects that subsequently created a special relationship between them. This historical examination of events showed that both cultural and material incentives of actors were crucial from the outset. A combination of strategic security requirements for an emerging superpower under the Cold War; Iran's dire need for financial aid and its territorial integrity considerations, and America's non-interventionist image in the eyes of Iranians, reinforced a gradually closer tie between Tehran and Washington until the fall of Mosadeq. The unique relations from 1953 till 1979 ceased to exist after the outbreak of the revolution. All those commercial projects were terminated following the hostage crisis. In the next chapter, I shall try to show how this unprecedented crisis was settled by a long process of mediation and negotiations which paved the way for the establishment of the Tribunal.

Notes

¹ Richard W. Cottam, *Iran & the United States: a Cold War Case Study* (Pittsburgh: Pittsburgh University Press, 1988)⁴

² The term "soft war" was used by Iran's leader Ayatollah Khomeini after Iran's presidential election in 2009 which culminated in street riots in Tehran and some other cities. The riots, according to this view, have been organized by the United States and Great Britain who have employed the soft power of media.

³ Benson Lee Grayson, *United States-Iranian Relations* (Washington: University Press of America Inc, 1981) 3-4. Grayson argues that:

"As a result of the favourable report submitted by Smith and Dwight the American Board of Commissioners for foreign Missions moved to establish a permanent missionary presence in Persia. In September 1833 the Reverend Justin Perkins and (a twenty- eight- years- old graduated of Amherst) and Andover Theological Seminary sailed from the United States to open up a mission in Persia. He lived for a time in Tabriz then the largest city in Persia and not far from Lake Uromia until he was joined the following year by Dr. Asahel Grant a medical missionary. In 1835 the two missionaries and their wives opened a Presbyterian Mission School at the town of Uromia by the Lake of the same name.

In the following years the number of American missionaries in Persia continued to increase despite an attack by Turks and Kurds. (Who killed large numbers of Nestorians in 1843) Five years later the missionaries at Uromia began publication of a monthly magazine "Pays of Light" which was one of the first regular publications in the country and which acted to transmit Western concepts and technology. Originally published only in English the magazine was subsequently enlarged to include Persian language materials greatly expanding its readership in the country.

Meanwhile the American missionary activities in Persia grew in both number and influence. Following upon the School in Uromia and other efforts concentrated in the Tabriz region in 1873 Presbyterian missionaries opened an American School for boys in Tehran the capital and the second largest city.

At the outset it accepted only Christian American and Jewish youths to avoid arousing any concern on the part of the Moslem clergy by seeming to attempt to convert their coreligionists. In the late 1880s however the new principal reverend Samuel Lawrence Ward opened the Tehran school to Moslem Students. In 1913, it was expanded to include a high school and in 1925 a college- level program was added."

⁴ Letter from Mirza Ali Kuli Khan to the U.S. Secretary of State, Washington, October 5, 1918, in Yonah Alexander & Allan Nanes *The United States and Iran: a Documentary History*, (Maryland: University Publications of America Inc., 1980) 19

⁵ *Memorandum of an Audience Given to the American Minister (Philip) by Reza Shah Pahlavi* on April 14, 1927, Yonah Alexander and Allen Nanes, 41-44.

⁶ Alexander Yonah and Allen Nanes 19

⁷ Alexander Yonah and Allen Nanes

⁸ James A. Bill, *The Eagle and the Lion*, (New Haven, Yale University Press, 1988)18-20

⁹ "Allied Minute On Iran, 1943-45," Alexander Yonah, 142-3

¹⁰ Alexander Yonah and Allen Nanes 264

¹¹ Laurence Paul Elwell-Sutton: *Persian Oil, A Study in Power Politics* (London: Laurence and Wishart, 1955)

¹² Benson Lee Grayson 141

¹³ Jeffrey Schoesser, *U.S. Policy in the Persian Gulf, Department of State Bulletin*, 87, (1987): 39.

¹⁴ Jeffrey Schoesser

¹⁵ Rouhollah K. Ramazani, *The United States and Iran: The Patterns of Influence*, (New York: Praeger Publications, 1982) 59

¹⁶ James Bill, 120

¹⁷ U.S. Department of Defense, *Foreign Military Sales and Military Assistance Facts* (1978), <http://www.irvl.net/USMI.htm>

¹⁸ Rouhollah Ramazani 48

¹⁹ Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*.(Princeton: Princeton University Press, 1984) 167

²⁰ David S. McLellan, and Dean Acheson: *the State Department Years* (New York, 1976) 387

²¹ James A. Bill and WM. Roger Louis, *Musaddiq, Iranian Nationalism, and Oil* (University of Texas Press, Austin 1988) 272

²² Lytel, *The Origins of the Iranian American Alliance 1941-1953* (New York: Holmes & Meier, 1987) 202

²³ James A. Bill and WM Roger Louis, 275

²⁴ James A. Bill and WM Roger Louis 274

²⁵ James A. Bill and WM Roger Louis 168, There are conflicting statements regarding the exact figure of the payment. Keddie writes that the CIA reportedly spent "less than \$100,000, although Loy Henderson and others have said millions were spent and there may have been British expenses" Nikki R. Keddie, *Roots of*

Revolution (New Haven: Yale University Press, 1981)140

²⁶ Robert Keohane 167

²⁷ David Caron, "The Iran-United States Claims Tribunal And The International Arbitral Process," Caron, and Crook, *The Iran-US Claims Tribunal and the Process of International Claims Resolution* (Washington: ASIL, 2000)

²⁸ United States, United States Department of State, *Treaties In Force : A list of Treaties and other International Agreements of the United States in Force* on (Washington: State Department, January 1,1985) 86-87

²⁹ See David Caron, "The Iran-United States Claims Tribunal And The International Arbitral Process." 22.

³⁰ *Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran*, Article 5, Paragraph 2; US Department of State, *Treaties in Force: a list of treaties and other international agreements of the United States in force* (1985) 21

³¹ George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An analysis of the Decision of the Tribunal* (Oxford: Clarendon Press 1996) 29

³² *Iran-U.S. C.T.R.* 8, 373

³³ This analysis accords with the history of negotiations carried out between the U.S. Administration and the consortium companies. According to Keohane "negotiating with the oil companies was in many respects as difficult as dealing with foreign governments. First, the five major U.S. international companies invited to join the consortium preferred reluctance to do so, whether genuinely (owing to fear of disrupting delicate oligopolistic arrangements, threatened by oversupply, for keeping oil prices high) or as a way of wheedling additional concessions from the American Government." See Robert Keohane 168

³⁴ British Petroleum 40 per cent; Royal Dutch Petroleum, Holland, 14 per cent; Compagnie Francaise de Petrol, France, 6 per cent; Exxon 7 per cent; Gulf Oil 7 per cent; Mobil Oil 7 per cent; Standard Oil of California 7 per cent; Texaco 7 per cent; Tricon Agency Ltd.,which consists of Atlantic Richfield 1 and 2/3 per cent, American Independent Oil 5/6 per cent; Getty Oil 5/6 per cent; Continental Oil 5/12 per cent and Standard Oil of Ohio 5/12 per cent. See *Iranian Assets Litigation Reporter*, May 21, 1982.

³⁵ John E. Hoffman, Jr. "The Bankers' Channel," Warren Christopher, *American Hostages in Iran: The Conduct of a Crisis* (New Haven: Yale University Press, 1985) 236.

³⁶ *Iranian Assets Litigation Reporter*, April 4, 1980, 440

³⁷ John E. Hoffman, Jr., "The Bankers' Channel" Warren Christopher *American Hostages in Iran, The Conduct of a Crisis*, 237

³⁸ Karin Lissakars, "Money and Manipulation," *Foreign Policy*, Fall 1981, 111. She was deputy director of the State Department's Policy Planning Staff, 1979-1980.

³⁹ *Iranian Assets Litigation Reporter*, June 20, April 4, 1980.

⁴⁰ John E. Hoffman, Jr. 236-37.

⁴¹ John Pritchard, "Commercial Aspects of the Iran Crisis: the asset freeze" Robert D. Steele, *The Iran Crisis and International Law*, 55.

⁴² Karin Lissakars, *Banks, Borrowers, And The Establishment* (Basic Books, Harper Collins, 1991) 26

⁴³ *Case No.409 Harris Int'l Telecommunications Inc. V. Iran*

⁴⁴ *Cases Nos.343, 365, The Singer Company V. Iran*

⁴⁵ For the causes of the Revolution, see among others, Nikki R. Keddie, *Roots of Revolution*, Fred Halliday, *Iran: Dictatorship and Development*, (New York: Penguin, 1979), Ervand Abrahamian, *Iran between Two Revolutions*, (Princeton: Princeton University Press, 1982)

⁴⁶ James A. Bill, *The Eagle And The Lion* (New Haven: Yale University Press, 1988) 156.

⁴⁷ James Bill 156

⁴⁸ Hamid Algar, *Religion and State in Iran, 1785-1906*. (Berkeley and Los Angeles: University of California Press, 1969)

⁴⁹ James A. Bill 226

⁵⁰ Gary Sick, *All Fall Down, America's Fateful Encounter with Iran*, (London: Tauris & Co.) 23

⁵¹ James Bill 219-220

For instance in 1977, Iran invited in delegations from the International Committee of the Red Cross, Amnesty International, and the International Commission of Justice to examine the country's social and political conditions.

⁵² Alexander Moens, *Foreign Policy Under Carter: Testing Multiple Advocacy and Decision Making*, (Boulder: Westview Press, 1990)

⁵³ James A. Bill, *The Eagle and the Lion* (New Haven: Yale University Press, 1988) 228.

⁵⁴ Hooshang Amir-Ahmadi, "The State and Territorial Social Justice in Post- Revolutionary Iran" *Iranian Journal of International Affairs*, I, Numbers 2&3, Summer-Fall (Tehran: the Institute for Political and International Studies, 1989) 223-58. He cited three objectives: Democracy, Independence, and Social Justice,

but fails to see that the first one (Western democracy) was questioned as of the start, and the emphasis was placed on Islamic and cultural values. Even attempts to name Iran as “the Islamic Democratic Republic” by the Provisional Government of Bazargan failed simply because Islamic values were given highest priority. These values were Iran’s principle objectives. The Iranian Academics and the Ulama (the clergy) alike paid considerable attention to it in pre-revolutionary literature. Jalal-e- Ale Ahmad’s *Gharb-Zadeghi*, Occidentosis, a plague from the west, translated by R. Campbell, (Berkeley: Mizan Press, 1984) is a prime example.

⁵⁵ John A. Westberg, *International Transactions and Claims Involving Government Parties, Case Law of the Iran-United States Claims Tribunal* (Washington: International Law Institute, 1991) 114

⁵⁶ Tonelson, Alan, *Hostage Aftermath*, 257 *the Atlantic*, 22 (1986), Jacomijntje Janine Van Hof, *Commentary on the UNCITRAL Arbitration Rules, the Application by the Iran-U.S. Claims Tribunal* (The Hague: T.M.C. Asser Institute 1991) 1

⁵⁷ Hamid Algar, *Religion and State in Iran*.

⁵⁸ By the ninth century most Iranians, previously Zoroastrian, had converted to Islam and in the sixteenth century Shi’ism was declared the state religion. This set Iran apart from its Sunni neighbours.

⁵⁹ Hamid Algar, “Iran and Shiism in the Islamic Revolution in Iran”, Kalim Siddiqui, ed *The Islamic Revolution in Iran* (London: Muslim Institute and Open Press. 1980)

⁶⁰ Nikki R. Keddie, *Roots of Revolution* 5-9

⁶¹ Nikki R. Keddie *Roots of the Revolution*

⁶² Hamid Algar, *Roots of the Revolution* 9

⁶³ Hamid Algar 45

⁶⁴ Misagh Parsa, *Social Origins of the Iranian Revolution*, (New Brunswick: Rutgers University Press, 1989) 194

⁶⁵ Tony Hendra, *Saying by the Ayatollah Khomeini*, (New York: Bantam Books, 1980) quoted in Rodee Anderson and Christor Greene, *Introduction to Political Science* (New York: McGraw Hill Book Company, 1983) 323

⁶⁶ Joel Migdal, *Strong Societies and Weak States: state-society relations and state capabilities in the Third World* (Princeton: Princeton University Press, 1988)

⁶⁷ V. Martin, *Creating an Islamic State*, (London: IB Tauris, 2000) 25

⁶⁸ M. J. Gasiorowski, *United States Foreign Policy and the Shah: Building a Client State* (Ithaca: Cornell University Press, 1991) 103. According to Gasiorowski, in 1972 oil revenues were US\$ 1.6 billion, compared with the government spending of US\$5.93 billion. In 1978, oil revenues were US\$20.38 billion, and government spending was US\$50.09 billion.

⁶⁹ 16 January 1979, the Shah left the country. 1 February 1979, Imam Khomeini fled back to Tehran from his 15 years in exile.

After parliamentary elections and a referendum on the Constitution, the Islamic Republic of Iran was officially established on 11 April 1979.

⁷⁰ Riaz Hassan, “Iran’s Revolutionaries: before and after Revolution”, *Third World Quarterly*, 6, (Jul, 1984) 675-885.

⁷¹ David Armstrong, *Revolutions and World Order: the Revolutionary State in International Society*, (Oxford: Clarendon Press, 1993) 188.

⁷² Said Amir Arjomand, “History, structure and Revolution in the shi’ite Tradition in contemporary Iran,” *International political science Review*, 10.2 (1989) 11-119.

Chapter Three

Tribunal Formation

I Introduction

To demonstrate how conflict and cooperation interacted in Iran-US relations which culminated in the formation of the Tribunal, I shall pose several important questions in the beginning of this chapter. Was hostage taking not a serious case of conflict between Washington and Tehran? Were *sharia*, and Shiism rooted in Iran's Islamic culture, not a relevant factor in this conflict? Did the coup of 1953 not play a role in Iranian Anti-Americanism? Were all those diplomatic efforts not a manifestation of an international cooperation to resolve the conflict? Did America not use both diplomatic and organizational pressures, such as the ICJ ruling, against Iran to resolve the crisis? Did the United States and Iran not resort to different channels, from bankers, brokers, third country officials such as Germans and Algerians to mediate in conflict resolution? Why was the Tribunal established? Was it not created to bring Iran and America to a floor of negotiation? Did they not mean to end the hostage crisis and settle around four thousands cases which could otherwise pull them to armed conflict? Did the Tribunal not grant this cooperative forum to both antagonist parties?

I will endeavour in this chapter to demonstrate that the taking of American diplomats as hostages was the peak of Iran-US conflict. Those twenty six years of cooperation came to an end and a fierce battle over the consequences of hostage taking began. The battle of words, propaganda and projection of words continued against each other by Tehran and Washington.¹ The Carter Administration tried, to no avail, to communicate with Ayatollah Khomeini. (See Appendix One). Subsequently, a rescue mission failed in the desert of Tabas and numerous avenues, diplomatic as well as legal approaches, during the 444 days of hostage taking were sought to find a solution. Ultimately, mediation through the Algerians paved the way for the conclusion of the

Algiers Declarations which required the formation of the Tribunal based on the UNCITRAL rules as amended by the Tribunal itself. I shall now elaborate on the questions I posed above, beginning by the climax of crisis in their relations, namely, the takeover of the US Embassy in Tehran.

II American hostage crisis

In the aftermath of the revolution, the provisional Government of Mohandes Mehdi Bazargan did not cut Iran's diplomatic relations with the United States. Some transactions and contracts were resumed and some Americans who had left Iran returned back to Tehran. In late October, a New York hospital admitted the Shah for treatment. On November 1, Bazargan and Ibarim Yazdi met American national Security Adviser Brzezinski in Algiers, but "this meeting alarmed the more revolutionary elements....who saw it as a manifestation of a U.S. resolve to return to a position of influence in Iran." As a result of this meeting, on November 4, 1979, *Daneshjoyane Payrowe Khate Imam* (students following Imam's line) occupied the U.S. Embassy in Tehran and American diplomats were taken².

The Carter administration consistently sought to negotiate for the release of the hostages. At the same time, they simultaneously developed covert strategies for military action which led to the rescue mission in a far-off desert of Iran called Tabas.³

According to Hamilton Jordan, Iranians simply did not believe that the Shah was being admitted for medical treatment. Rather, they believed, it was part of some conspiracy to try to return the Shah to power, as had happened during the Mosadeq era.⁴ Hamilton further notes that Khomeini himself felt the same way. Many in Iran believed the United States would not accept the new regime that Imam Khomeini intended to establish, and that it was only a matter of time before it intervened. A number of causes have been given for the taking of American diplomats as hostages.

A first theory proposes that the hostages were as a “bargaining chip” to try to compel the return of the Shah⁵. A second explanation posits an ideological fanaticism to the students, stemming from their radical Islamic beliefs. According to this account the Embassy was taken mainly because the students “extremists” and “fanatics” caught up. And, thirdly, some inside the Carter administration have long argued that the embassy was taken for mostly instrumental, political reasons.⁶

Sick believed that, the real issue was Ayatollah Khomeini’s constitution and the realization of his vision of an Iranian Republic.⁷ Zibigniew Brzezinski suggests that ‘the issue of the Shah as a person and his wealth was thus a conventional tool ...for radicalizing Iranian politics. The hostage crisis was an externalization of this internal Iranian turmoil⁸, while Lloyd Cutler believes that “if we had not admitted the Shah, within a month the embassy would have been seized and hostages taken away.

The whole things were done for internal political reasons to galvanize and unify the country against the Americans and if they had not had that immediate opportunity they would have found another one.”⁹

In fact, Imam Khomeini was determined that as long as various institutions of the Islamic Republic were not yet constituted, the hostage crisis should not be resolved.¹⁰ Ayatollah Khomeini stated that, the hostages were essentially an insurance policy against a U.S. intervention, since they were not fully convinced of their ability to prevent a dramatic reversal of the revolution and the restoration of the Shah to power- as after all had occurred in August 1953.¹¹ Since all diplomatic initiatives launched by the Carter administration failed, Carter decided to freeze Iranian assets and to operate a rescue mission inside Iran.

III Rescue mission and freezing Iranian assets

Officials from both the American embassy and the provisional government of Bazargan had warned the Carter administration that admitting the Shah might have a tough reaction from Iranians. The US government officials began to meet almost immediately.

The Special Coordinating Committee (SCC) first met the day after the crisis began on November 5. The Carter administration first tried to resolve the crisis by peaceful means. Secretary of State Cyrus Vance tried numerous attempts to open up negotiation channels with Imam Khomeini in Tehran. The Americans brought a list of seven options to consider:

1. Encourage the Shah to leave the United States
2. Negotiate with Imam Khomeini
3. Institute a naval blockade of Iran
4. Launch an air strike on the oil refinery at Abadan
5. Mine the Iranian harbours
6. Seize the oil depots on Khark Island
7. Launch a rescue mission

The American decision-makers had different positions in this list. Brzezinski wanted possible military options, suggesting a number of alternatives which included launching a rescue mission. At the negotiation stage, Carter's approach took a number of different forms. Initially, his strategy was to send someone to talk directly to Khomeini. At Cyrus Vance's instigation, at a SCC meeting on 5 November it was decided to send two emissaries to Iran, former Attorney General Ramsay Clark and Senate Intelligence Committee Staff Director William Miller to negotiate the release of the hostages.¹²

The Iranian authorities didn't admit Clark and Miller, and Carter took a series of steps to increase the diplomatic pressure on Iran. He suspended all oil imports from Iran and two days later issued an order to freeze all Iranian assets held in US banks. In Executive Order -No 12170 blocking all Iranian Government Property subject to US jurisdiction, Carter declared that "I, Jimmy Carter, President of the United States, find that the situation in Iran constitute an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare national emergency to deal with that threat".¹³

The order covered not only Iranian properties, and assets held in US banking and other institutions under the jurisdictions of the United States, but also all deposits held in

foreign branches and subsidiaries of US banks that were outside US jurisdiction. The United States Government position was that the freeze and the release of the hostages were not related. The United States carefully avoided any allegation that it was using Iranian assets as ransom for the hostages. Furthermore, the extraterritorial reach of the freeze order raised concerns for the Western allies of the United States. Criticism in London, where more than half of Iran's frozen overseas bank deposit was located, was widespread. Similar attitudes were raised in Paris and Frankfurt.¹⁴

To have the issue of extraterritoriality decided in the English courts, Bank Markazi of Iran began litigation against major US banks in London. The Iranian Bank also secured a promise from the Bank of England to maintain their banking relationship.¹⁵ As I will discuss later, the banks played a central role not only as a safe creditor for the transfer of a portion of Iranian assets but also as potential international mediators pushed and motivated by their self-interests. At the time of the freeze on November 14, 1979, Iran held a 25 percent equity investment in West German Krupp and in Deutsche Babcock. These investments, in fact, "were to figure in the financial link that led to the bank line of negotiations in 1980".¹⁶

It was because of the direct interests of the bankers that "confidential contacts and negotiations between U.S. bank lawyers and Iranian representatives began shortly after the failure of the Tabas operation. The Tabas rescue operation provided for 90 US commandos to be flown in Hercules C-130 transport aircraft to a disused airstrip near Tabas, 380 miles south of Tehran, from where they would fly by eight helicopters to a second hideout at Damavand, 30 miles of the capital. Two of the helicopters, including one of them carrying vital hydraulic repair equipment, broke down before reaching Tabas. Both aircraft burst into flames, killing eight commandos".¹⁷

On 26 November 1979, the US claimants were allowed to bring their claims against Iran before U.S. Federal Courts. The US government had two main purposes in freezing

Iranian assets: First, the freeze was meant to work as an economic sanction and leverage against Iran in possible negotiations to free the hostages. The second purpose was to use the frozen assets in some form. It is true that the US administration had frozen a country's assets in the pursuit of some foreign and domestic policies but the freeze was unique in many other respects beyond the scope of this dissertation. Suffice to mention that it created a chaotic situation in the international financial markets, and posed new questions with significant implications for international banking and finance, for international law, and for international relations generally. First, the circumstances under which the freeze order was imposed were unprecedented. Secondly, the freeze order was based on International Emergency Economic Powers Act (IEEPA). Thirdly, the extent of the Iranian assets frozen was far in excess of total sovereign assets frozen previously by different American administrations. Fourthly, the freeze order was applied to Iranian deposits in branches and subsidiaries of US Banks outside the United States, creating legal problems that involved many jurisdictions.

The legal and financial implications of the freeze went beyond the US borders and bilateral Iran-US relations.¹⁸ Three main factors enabled the US government to use the freeze in this way. First, Iran had enormous assets and deposits in US financial institutions. At the time of the freeze, in November 1979, Iran had over \$ 12 billion in deposits and assets in US banking institutions and was the first country to be a net creditor, to the tune of over \$10 billion dollars, to the US private and public sectors after the Revolution. Secondly the United States was able and willing to use the financial power of US private banks as a weapon against Iran.¹⁹ Thirdly, as already mentioned, the US administration had a legal framework, the IEEPA, as a basis on which to act. In spite of all those measures, Irani did not release the hostages. This shattered President Carter's prestige in and outside the United States. He then tried to adopt further legal and diplomatic pressure.

IV Further legal and diplomatic pressure

Similarly, at a SCC meeting on 28 November it was decided to increase the economic pressure on Iran. On November 29, the United States filed a suit in the International Court of Justice (ICJ) in The Hague and requested the court for a legal decision that Iran's action violated certain articles of the 1961 Vienna Convention of Diplomatic Relations, the 1963 Vienna Convention of Consular Relations the Convention on the Prevention and Punishment of Crimes against International Protected Persons including Diplomatic Agent, the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, and of the Charter of the United Nations. On 15 December 1979 the ICJ ordered provisional measures to the effect that "The Government of the Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages else-where, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law"²⁰ On 4 December 1979, the Security Council unanimously passed *Resolution No. 457* declaring "urgently call[ing] upon the Government of Iran to release immediately the personnel of the Embassy of the United States of America being held at Tehran , to provide them with protection and to allow them to leave the country."²¹

Iran did not comply with the ICJ's ruling.²² Meanwhile, Bank Markazi reacted to the US freeze order by boycotting the US dollar as a form of payment, converting its dollar reserves to other currencies and buying gold. In early December 1979 the United States managed to convince its Western allies to impose a broad range of economic sanctions, including a multinational embargo on oil orders from Iran. However, the allied States were reluctant to take actions that would in the future adversely affect their relations with Iran. As

a result, in December 1979 the United States and its allies agreed on only limited multilateral measures, including:

- (a) Suspending supplies of military equipment to Iran;
- (b) Refusing to pay any premium for Iranian oil;
- (c) Providing no further deposit facilities and allowing no substantial increase in existing non-dollar account; and
- (d) Suspending any further extensions of credit.²³

A Soviet veto in the Security Council on 13 January 1980 prevented the adopting of any economic sanctions²⁴. The allies of the United States were reluctant to impose sanctions outside the auspices of the United Nations. In contrast to the classical realist theories in which political power is a decisive factor in conflict management, all these legal and diplomatic sanctions failed and the United States returned to a series of negotiation tables, wherever possible, to build channels for negotiation

V Channels to negotiations

As I said, relations had been so badly damaged that it was impossible for Iranians and Americans to negotiate directly. Yet, in December 1979, Richard Cottam travelled to Iran. He had interviewed Imam Khomeini while the Imam was in exile in Paris. Cottam was a friend of Sadegh Ghotbzadeh, the then Iran's foreign minister as well as Ibrahim Yazdi. Cottam began direct talks with Ghotbzadeh but his initiative like those of others did not succeed. The State Department continued to consult with him, but he was not any longer a strong channel between the U.S. and Iran.

By the end of January 1980, the Carter administration began to test another channel. A line of negotiation opened between Hamilton Jordan and the Iranians, mediated by one lawyer and one businessman with whom he had earlier become acquainted during talks on the future of Panama Canal. Christian Bourguet, a French lawyer and Hector Villalon an

Argentine businessman were authorized by foreign minister Banisadr and then by Sadegh Ghotbzadeh when the latter replaced Banisadr in this position to represent the Iranian government in negotiations over the hostage release.

This channel was popularly known as the “French Connection” By March, the plan had failed and the UN Commission was not allowed to see the hostages. The power of secular nationalist forces—belonging to the provisional government of Bazargan, Banisadr and Yazdi was undermined. In contrast, the Clergy's power was intensified because of the anti-American policies they adopted. Yazdi's efforts to release the hostages did not work this time because the political ties had turned against him. By the spring of 1980, Carter had tried every peaceful means he could think of to obtain the release of the hostages. He stopped importing of Iranian oil, broke off diplomatic relations, asked the UN to intervene, and sent a variety of third parties and intermediaries to Tehran but nothing he tried had produced results.²⁵

Another channel through Germany was opened involving Warren Christopher but it was severed after the outbreak of the Iran-Iraq war. The war which started on 22 September probably slowed down the pace of negotiations in the short term because the Iranians were momentarily distracted by the war. However, the war had a role in this issue: Iran wanted the economic sanctions lifted in order to prosecute its war with Iraq.²⁶ Here, it might be argued the realist position explains the fact. War indirectly pressurized Iran to have access to its assets.

VI Money talks

Banking negotiations were also made parallel to diplomatic contacts. Shortly after the failed rescue mission a “bank channel” developed through private bank lawyers. Iran, through its lawyers in Frankfurt, Herbert Wagendorf and Peter Heinemann, approached Citibank to enquire whether the bank was willing to discuss a practical economic solution.

²⁷ The German lawyers representing Iran were authorised to meet John E. Hoffman ²⁸by

Bani Sadr and Ali Reza Nobari, the governor of Iran's central bank. They came forward with a proposal to make a settlement with Citibank which involved acceptance of set-offs made by the bank against Iranian deposits for Citibank's claims in return for lifting the attachments on the Iranian shares in Krupp which was being litigated in German courts. Hoffman immediately, informed his clients, about the suggestions made by Iran's lawyers for a meeting to discuss a settlement with Citibank. The US Government approved the negotiation but warned him of the Logan Act, suggesting that they should contact Washington and the US Treasury must be kept informed.

According to the Logan Act, it is a crime for a private individual to negotiate with a foreign government on issues directly affecting US government policy. Finally Hoffman was informed by Carswell that the White House had given the go ahead, and that he must keep the Treasury informed about his discussion with lawyers representing Iran.²⁹ On May, a meeting was arranged between Hoffman and Iran's German Lawyers in Frankfurt. Hoffman told the German lawyers representing Iran that there were two conditions for unblocking assets. First, there could not be a deal with any individual bank. Secondly, as long as the hostages were in Iran there was no way that the US government would agree to any deal involving the unblocking of the assets.

This was the beginning of a series of secret meetings in different European cities and United States between lawyers representing Iran and John Hoffman. These meetings went on for the next eight months and led to the final agreement between Iran and the United States. Hoffman would give a report to US Treasury officials. He was working together with Iran's lawyers regarding the frozen Iranian bank deposit and US bank's claims against Iranian entities. As we shall see later, the bank played a central role not only as a safe creditor for the transfer of a portion of Iranian assets but also as potential international mediators pushed and motivated by their own self-interests. At the time of the freeze on November 14, 1979, Iran held a 25 percent equity investment in West German

Krupp and in Deutsche Babcock. These investments, in fact, “were to figure in the financial link that led to the bank line of negotiations.”³⁰

It was because of the direct interest of the bankers that “confidential contacts and negotiations between the U.S. banks lawyers and Iranian representatives began shortly after the failure of the “Tabas operation” in April 1980. From the moment the freeze order was announced US banks were at the centre of battle against Iran. They immediately made set-offs of blocked offshore deposits against loans of different Iranian entities. Then the banks applied for the prejudgment attachments of the Iranian frozen assets in the United States. The purpose of attachments was to safeguard the interests of US banks that were competing with other US claimants over these assets.”³¹

These bankers' channels paved the way for an Algerian mediation simply because both Iran and America had decided to end the crisis. The US presidential election was on the way and Carter wanted to end the crisis while he was in office and Iran also wanted to end it because it thought the Reagan administration would be tougher and Iran might not use hostages as a good bargaining chip. So Iranian Majlis acted on the Imam Khomeini's instruction.

VII Iranian political demands and the Algerian Channel

The pace of negotiations was still slow since some in the Majlis seemed determined to stand in the way of a resolution of the issue before the November US Presidential election.³² After these negotiations, Algiers stepped in as a mediator.³³ On 2 November 1980, the Majlis voted in favour of releasing the hostages, The Majlis, according to Imam Khomeini's guideline, set out conditions for releasing the hostages:

Unfreezing of all Iranian assets in and outside the United States. These assets should be put at the disposal of the Iranian government, in order that we may utilize them in every possible way. The US President Order of Nov.14, 1979, that blocks our assets should be

declared null and void by Presidential Order. Financial relations would continue as before this Presidential Order, with the removal of economic blocks and all consequent effects. All legal procedures must be taken to avoid the Presidential Order.... guaranteeing the security transfer of these properties must be made. No private citizen or resident of the US may make a claim against these properties.³⁴

The Majlis nominated Algeria as an intermediary; Algeria was already serving as Iran's "protecting power" in the United States, after the severance of diplomatic relations between Tehran and Washington, and the United States Government had asked for the help of Algerian Ambassador Mohammad Bedjaoui to arrange a meeting in October between Christopher and Rajai. Algeria quickly responded to the Majlis announcement by creating a delegation of foreign minister Mohammad Benyahia, the Algerian Ambassadors to the United States and Iran, and the head of the Algerian Central bank. Earlier the Iranian Prime Minister, Mohammad Ali Rajai, had announced that Algeria would act as the sole authorised channel between the United States and Iran in negotiations for the release of hostages.

Rajai had had a meeting with the Algerian ambassadors, in Washington and the United Nations, during his trip to New York in October when he addressed the Security Council on Iraq's invasion of Iran. On his way back to Iran he had a stop-over in Algeria, and had discussion with the Algerian authorities on the hostage crisis. Thus came about promising parallel negotiations at the government as well as the bank level. Rajai also announced that a committee headed by Behzad Nabavi, the Minister of State for Executive Affairs, working from the Prime Minister's office, would coordinate the Iranian side of the negotiations. Nabavi was authorised by the Majlis to sign the agreement for the release of the hostages on behalf of Iran.

In the United States, Deputy Secretary of State Warren Christopher had been assigned by President Carter to coordinate the negotiations. Christopher formed a small negotiating team with members from the White House staff, the NSC staff, and the Departments of State, Treasury and Justice. In Algeria a team of negotiators was also formed, headed by the foreign Minister, Mohammad Benyahia and included Algeria's ambassadors to Washington and Tehran, Redha Malek and Abdelk arim Gheraieb, and the governor of Algeria's central bank. On 7 January 1981, Christopher, with some members of his team went to Algeria to speed up the process of negotiations³⁵. This was the beginning of fourteen days of continuous negotiations between different parties.

The government of Algeria declared two Declarations which are alternatively called the Algiers Accords. A first Declaration, called the "General Declaration", pertains to certain general principles and the basic commitments of the parties to resolve the crisis (Appendix Two). A second Declaration, the "Claims Settlement Declaration", provided for the formation of the Tribunal as a "binding third party arbitration", its composition, procedure and competence (Appendix Three). Article III of the Claims Settlement Declaration provided for the appointment and the conduct of the business of arbitration in accordance with the arbitration rules of the United Nations Commission on the International Trade Law (UNCITRAL) which were modified by the two Governments or by the Tribunal.

The Claims Settlement Declaration also provided that "any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws".³⁶

Several financial agreements were concluded for the purpose of implementing the two declarations, including Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the

Declaration of the Government of the Democratic and Popular Republic of Algeria, Escrow Agreement and Technical Agreement (Appendix Four).

These interdependent financial agreements were signed by Bank Markazi (central bank) of Islamic Republic of Iran, the United States of America, the Kingdom of the Netherlands, the United Kingdom and the government of the Democratic and Popular of Algeria. These arrangements were: The Escrow Agreement among the United States, The Federal Reserve Bank of New York, Bank Markazi and Banque Centrale d' Algerie of 20 January 1981(the Escrow Agreement) and the so-called Technical Agreements: the Technical Arrangement between Banque Centrale d' Algerie and Governor and company of the Bank of England and the Federal Reserve Bank of New York of 20 January 1981, the Exchange of notes between the kingdom of the Netherlands and the United States of America of 10 July 1981, the Technical Agreement with De Netderlandsche Bank B.V. of 17 August 1981, and certain Supplemental Agreements.

The Algiers Accord were reached within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran, the resolution demanded that, in return for the release of the hostages, the United States must: (a) pledge not to interfere in the Iranian affairs; (b) lift the freeze on Iranian assets and put all these assets at the disposal of Iran; (c) cancel all economic and financial sanctions against Iran, cancel all U.S. Claims against Iran and assume financial responsibility for any claims made against Iran; (d) return to Iran the assets of the Shah and his close family.

According to point I paragraph (1) of the General Declaration: 'the United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or military, in Iran's internal affairs.

Paragraphs 12, 13, 14 and 15 of point IV of the General Principles of the General Declarations deal with the return of the assets of the Shah and his family.

As it was mentioned above, the Accords consist of five documents.

The first document, Declaration of the Government of the Democratic and Popular Republic of Algeria, deals with general principles agreed upon by Iran and the United States. It outlines the commitments made by the two governments for the resolution of the crisis. The second document is the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, the Claims Settlement Declaration. It deals with the settlement of claims of the nationals of one country against the government of the other. It provides a framework for the establishment of an arbitral tribunal to adjudicate these claims.

The third document is the undertaking of the government of the United States of America and the Government of the Islamic Republic Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, the Undertakings. It deals with the transfer of the Iranian offshore deposits and assets held by the Federal Bank, and the way these assets were to be used for the repayment of Iranian entities' liabilities to American banks.

The fourth documents, The Escrow Agreement, is made between the government of the United States, the Federal Reserve Bank of New York acting as fiscal agent of the United States, Bank Markazi Iran, as an interested party and the Banque Centrale d'Algerie acting as escrow agent. It deals with the implementation of the provisions of the General Declaration concerning the establishment of escrow accounts for the transfer of Iranian assets, and subsequent transfer of these funds according to the Undertaking upon the release of the hostages. The fifth documents is the Technical Arrangement, between Banque Centrale d'Algerie as escrow agent, the Governor and Company of the Bank of England

and the Federal Reserve Bank of New York, as fiscal agent of the United States. It deals with holding, investment and distribution of the Iranian assets.³⁷

VIII The Tribunal: structure, procedure, jurisdiction, and institutional matters

a. Structure

The Tribunal, under its rule (UNCITRAL rules as modified) has three chambers; composed of nine arbitrators altogether: three appointed by Iran, three appointed by the United States, and three selected either “by mutual agreement” by the six Iranian and United States arbitrators, or appointed by the “appointing authority” who is designated by the Secretary-General of the Permanent Court of Arbitration if the normal appointment mechanism fails to function.

The three selected arbitrators are usually called the “third country or impartial/neutral arbitrators”. All arbitrators also are called “judge.” Each chamber holds a Chairman.³⁸ One of the Chairmen is appointed “President” of the Tribunal either by the Iranian and United States arbitrators or by the appointing authority if the arbitrators fail to agree. There two agents, Iranian and American, who hold direct face to face meetings at the Tribunal.

Under the Claims Settlement Declaration, the Tribunal could enlarge itself; but the parties never reached an agreement on that. When all arbitrators hold a meeting to deal with interpretive and basic legal issues common to various claims from the three chambers, the Tribunal is called “Full Tribunal”.³⁹ In contrast to traditional international arbitrations in which claims of nationals of states were submitted by their national governments, individual parties, under the Accords, have been allowed to prosecute their claim directly. Claims of less than \$250,000 were presented by the claimant’s government, while claims of \$250,000 or more were presented by the claimants themselves. About four thousand claims have been brought before the Tribunal involving the full range of legal issues in international

arbitration.⁴⁰ The Total value of the claims has not been determined but is has been estimated at \$60 billion.

b. Procedure

The Tribunal Rules of Procedures show how the business of the Tribunal should be conducted. In international relations, as long as there are rules cooperation is regulated. As rules are obeyed by the parties, in a gradual manner legal precedents are shaped. The Tribunal requires four written submission: Statement of Claims, Statement of Defence, Reply and Rejoinder. In many cases it invites the claimants and respondents to a Pre-hearing conference to define the issues and prepare the hearing. If they cannot reach a decision on the documents before the Tribunal, then a hearing will be held. The roles of the two agents are significant⁴¹. Any document filed with the Registrar must be copied and delivered “promptly” to the offices of each of the two Agents in The Hague, and “Each Agent shall be responsible for transmitting one copy to each concerned arbitrating party in his country or to the representative designated by each such arbitrating party to receive documents on its behalf.”⁴²

All exchanges and communications between the two governments are done through their Agents; and the Tribunal’s Registry is responsible for the receiving, filing, processing, distributing, serving of copies, and safe-keeping of original copies of all submissions and documents. When the Agent of a government receives a document, it means that the arbitrating parties have received it. The Secretary-General who is responsible for administrative affairs may deliver the written submissions to the representative of an arbitrating party during a hearing or Pre-hearing conference.⁴³ For example, the list of all official holidays and non-business days is provided by him.⁴⁴ His authority, however, extends beyond the administrative issues, he “may be present” in the secret “Deliberations”.⁴⁵

The secret “Deliberations” are so important and the process of cooperation is usually designed in an absolutely confidential climate. In fact, they are what we call in international relations Confidence Building Measures (CBMS). If one takes for granted the Time magazine’s report on Iran-Contra Affair (Which I shall discuss in my chapter on cooperation where it is argued that the scenario started from the Tribunal in The Hague), then it could be argued that these meetings can also be called Security Building Measure (SBMS) or both: (CSBMS). The Secretary-General has to transmit “monthly, quarterly and annual financial statements” and “copies of the audit report to the Full Tribunal and the Agent.”⁴⁶

Written submissions are registered in the form of a Statement of Claims, Statement of Defence, Reply and Rejoinder. The Registry is “responsible for receipt, processing and safekeeping” of the documents.⁴⁷ A pre-hearing conference is usually held to define the issue before the hearing. If the case is not decided on those documents, then a hearing is held. Each chamber or panel sits separately; however, a panel may relinquish jurisdiction in favour of the Full Tribunal in the absence of a majority decision. This usually happens in important issues. A correct and detailed reading of the Tribunal Rules of Procedure shows that cooperation is a step-by-step way of doing things. At the Tribunal it doesn’t take place here and now but by the passage of time when the rules are applied. Once one case is resolved, similar cases are just invoked. It seems cooperation, because of repetition, has its own frequency. All of these help the Tribunal establish its jurisdiction, to which I shall come now.

c. Jurisdiction

The Tribunal’s Jurisdiction, more specifically defined and delineated by the Claims Settlement Declaration. Before deciding a case, the Tribunal must satisfy itself, that it has jurisdiction over the particular claims before it. The Claims Settlement Declaration confers on the Tribunal Jurisdiction to decide, “on the basis of respect for law”, claims of nationals

of the United States against Iran and of Iranian nationals against the United States arising “out of debts, contracts...expropriation or other measures affecting property rights”.⁴⁸ The Tribunal also empowered to hear certain official claims by one Government against the other “arising out of contractual arrangements between them for the purchases and sale of goods and services”.⁴⁹

All decisions and awards of Tribunal are final and binding, and any award rendered against either government is enforceable in the court of any nation in accordance with its laws. A Claim of less than 25, 000 dollar is in principle presented by the claimant’s Government, while claims of 250,000 dollar or more are to be presented by the claimants themselves. Basically, two types of claims fall within in jurisdiction of the tribunal. First, the claims of one government against the other government and secondly, the claims of nationals of one state against the government of the other state. However, certain claims are excluded from such settlement. For instance, private claims relating to the seizure and detention of American hostages or the occupation of the American Embassy in Tehran are excluded.

The Tribunal’s jurisdiction is further restricted to Claims that arose prior to the date the Algiers Accords entered into force (19 January 1981) and that were outstanding on that date.

In general, the jurisdiction of the tribunal covers four areas:

(1) Claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaims which arise out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claims.

(2) Official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

(3) Disputes over whether the United States has met its obligations undertaken in connection with the return of property of the family of the former Shah of Iran.⁵⁰

(4) Other disputes concerning the interpretation or application of the Algiers Accords.⁵¹

Matters excluded from the Tribunal's jurisdiction were claims related to the seizure of the American embassy in Tehran and injury to US nationals or either property as a result of popular movements in the course of the Islamic Revolution which were not acts of the Government of Iran, and claims arising out of contracts that specifically provided for the sole jurisdiction of the Iranian courts.⁵²

d. Institutional matters

The Claims Settlement Declaration provided that "Claims may be decided by the Full Tribunal or by a panel of three members as the President shall determine". As mentioned above, disputes between the two Governments relating to the interpretation or application of the Algiers Declaration are in practice heard only by the Full Tribunal, which also deals with important issues of principles referred to it by a chamber. A chamber will also relinquish jurisdiction in favour of the Full Tribunal if a majority decision can not be reached.⁵³ A chamber may also relinquish jurisdiction to the Full Tribunal if the resolution of an issue might result in inconsistent decisions by the Tribunal. English and Farsi are the official languages to be used in the arbitration proceedings, and these languages shall be used for all oral hearings, decisions and awards⁵⁴

IX Conclusion

Before concluding this chapter, I want to have a flashback to the previous chapter and recall that for almost a decade after overthrowing Mosasdeq's government in 1953, the Shah ruled Iran without major problem. His relations with the *ulama*, including the Ayatollah Brujerdi were not hostile. After Brujerdi, Imam Khomeini's outspoken criticism

of the Shah's regime regarded the Shah's policy of separating religion from politics and his westernization of Iranian society as a "plot by imperialists and Zionists for controlling Iran." The Shah's changes in the late 1960s of the Iranian Constitution affected the Islamic laws. Such changes gradually began to provoke a response that was seen as a *Jihad* against an American puppet. The revolution by promising freedom, independence and social justice brought to power an Islamic government.

In this chapter I argued that by taking American diplomats as hostages, Iranians demanded the United States extradite the ex-shah and return his wealth as well as that of his relatives. The US short term primary concern was the safe return of the hostages. The second objective was to compensate for the damage done to the US government, its nationals and multinational corporations.⁵⁵

To achieve these objectives the US tried to negotiate with Iranians.

The Americans took a number of measures-- like the freezing of Iranian assets under Iranian assets control regulations--in order to impose both economic and political pressure on Iran to release the hostages. Americans have argued that the freeze had implications because it deprived Iran of access to over \$ 14 billion of assets and properties. They have also said that the freeze restricted Iranian international transactions by closing down the US financial markets to Iran, and by making it impossible for Iran to deal in US dollars in the few first months of the freeze, and that it created a situation whereby Iran was required by many of her trading counterparts to pay in cash for her international transactions despite of her high credit rating. I wouldn't deny the role of sanctions and pressure against Iran . However, the fact is that the ICJ ruling, the sanctions and the rescue mission did not bring an immediate release of the hostages. Simultaneously, mediation and negotiations were going on endlessly.

Finally, the conflict started a flood of litigation in the United States and Europe engaging Iran in an unprecedented legal battle. Furthermore, the Iranian government was faced with hundreds of court cases: over 450 US banks and giant corporations were alleging

that the Iranian government was responsible for the liabilities of all the Iranian public entities.

⁵⁶Conflicts, like any other phenomenon, are not eternal. They are resolved either by war or by peaceful means stipulated in the UN Charter such as inquiry, negotiation, mediation, arbitration, judicial settlement, conciliation, regional arrangements etc. Iran and the United States chose mediation and then arbitration to extend their cooperative behaviour for thirty years. Mediation and arbitration could be traced to the age of chiefdoms when norms like *ex aequa et bono* were used to settle the conflicts.

It was traditional norms, practices and customs embedded in the international society of states—as vividly depicted by Hedley Bull -- that stepped in to resolve the crisis. Mention can be made of mediation which was adopted in this case. Mediation by states like Algeria, bankers and brokers took place to prevent any sort of military action. Both Iran and America did their best to manage the crisis that had been created in the aftermath of the revolution. They established the Tribunal to not only settle the disputes but also to find some avenues to normalize their relations. ⁵⁷ I now find it necessary to study the spirit of international arbitration, and the character of the Tribunal which has come to be known among the lawyers as the 'Nature' of the Tribunal. It is necessary because it illustrates the role of the states as actors, the role of the institutions, the Tribunal's immediate functions, that is to say, its obligation and commitment to manage the conflict and facilitate cooperation between the actors. This takes me to the next chapter.

Notes

¹ This scenario even resulted in a military confrontation in the Persian Gulf when the United States raided Iranian Oil platforms during the Iran–Iraq War.

² On November 4, 1979, as many as 3,000 Iranian students seized the U.S. Embassy in Tehran, taking 66 American hostages in process. The students themselves undertook this attack. Thirteen of the hostages all either black or female were released on November 13 and 19. The remaining 53 were kept for 444 days until their negotiated release on January 20, 1980, about two minutes into the Regan Presidency.

Three students, Ibrahim Asgharzadeh, Abbas Abdi and Mohsen Mirdammad, played an especially central role in the planning. Massoumeh Ebtekar, who acted as an interpreter inside the embassy played a major role both during the invasion and a

fter it had taken place. For more information see: David Farber, *Taking Hostage: the Iran hostage crisis and America's first Encounter with Radical Islam*, (Princeton: Princeton University Press, 2004)

³ The actual rescue mission took place on April 24, 1980. This mission resulted in the death of eight American soldiers, with four additional American injuries, and failed to bring about the release of the hostages. Rose MC Dermott, "Prospect theory in International Relations: the Iranian Hostage Rescue Mission," *Political Psychology*, 13.2.(2004) 239.

⁴ Miller Centre Interviews, "Oral History Interview with Hamilton Jordan," *Carter Presidency Project*, Jimmy Carter Library, (6 November 1981) 6, 81

⁵ The first demand of the militant student, when they took hostages, was the return of the Shah to Iran to stand trial. They also started asking for the formation of an international tribunal to investigate the activities of US administrations in Iran since 1953, including the role of CIA in the *coup d etat*.

⁶ Sick argued that "The Ayatollah Khomeini was at least generally aware of the plans for an attack on the embassy and consciously exploited it for his own domestic political purposes.... the fate of the Shah was never the real issue." Gary Sick, *All fall Down, America's Tragic Encounter with Iran* (New York: Random House 1985)251.

⁷ Sick

⁸ Zbigniew Brzezinski, *Power and Principle: Memories of the National Security Adviser, 1977-1981* (New York: Farrar, Strauss and Giroux, 1983) 471.

⁹ Lloyd Cutler, Exit Interview, 2, March 1981, Jimmy Carter Library, 16.

¹⁰ Zabih Sepehr, *Iran since the Revolution*, (London: Croom Helm, 1982) 53

¹¹ Richard Falk, "The Iran-Hostage Crisis: Easy Answers and Hard Questions," *American Journal of International Law*, 74, (1980) 411-417.

¹² David Patrick Houghton, *Us Foreign Policy and the Iran Hostage Crisis*, (Cambridge: Cambridge University Press, 2001) 81.

¹³ United States, Executive Order No. 12170, Federal Register, 44, (1979) 65, 729, CFR, 3 (1979 Comp.) 457 (14 November 1979). The order broadly blocked: "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are within or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

¹⁴ The jurisdictional concept behind the freeze, as a matter of US law, is contained in the Restatement (Third) of Foreign Relations Law, Section 414 (2) (b). O. Schachter, "International Law in the Hostage Crisis: Implications for Future Cases," Quoted in Lucy Reed, Christopher, and Kreisberg, "Mixed Private and Public International Law Solutions to International Crises," *RECUEIL Des COURSE, The Hague Academy of International Law*, 306 (2003) 253.

¹⁵ Lucy Reed, Christopher, and Kriesberg.

¹⁶ John E. Hoffman, Jr. *The Bankers' Channel*, in Warren Christopher *American Hostages in Iran: The Conduct of a Crisis* (New Haven: Yale University Press, 1985) 237.

¹⁷ Hoffman 235.

¹⁸ United States, *International Emergency Economic Powers Act*, (IEEPA). It is an American statute that was enacted in 1977 and invoked for the first time to freeze Iranian assets. The IEEPA enabled the US President to freeze the assets of any country which, in his judgment, threatened 'the national security economy or foreign policy of the United States.'

¹⁹ Iran was the second largest oil exporter in OPEC after Saudi Arabia; Iran received foreign exchange earnings in dollars and dealt with US banks.

²⁰ International Court of Justice, *United States Diplomatic and Consular Staff in Tehran, provisional Measures, Order of 15 December 1979, ICJ Reports 1979, 7, 21.*

²¹ United Nations, *UN Security Council Res. 457 (1979)*, Para., 1

²² On 30 November 1979, the President of the Court informed the parties that a public hearing would be held on 10 December. Iran decided not to be represented at the hearing. Iranian Minister of Foreign Affairs Sadegh Ghotbzadeh advised the court by telegram on 9 December that Iran refused to recognize its jurisdiction over the case. Despite this Iranian claim, the International Court of Justice decided that it had jurisdiction over

the matter, and on 15 December issued a “provisional” decision condemning the hostage seizure as a violation of International law and ordering the release of the Hostages along with the return of the property. See UN Security Council Res. 457

²³ For more information see Hossein Alikhani., *Sanctioning Iran: Anatomy of a failed policy*. (London and New York: I.B. Tauris, 2000)

²⁴ United Nations, *UN Security Council Resolution, 2191 ST MTG.*(13 January 1980) paras. 44-56

²⁵ David Patrick Houghton 107.

²⁶ The German intervention had two phases. The first phase failed because in that phase Iranian negotiators wanted to settle the freeze of Iranian assets separately from the hostage crisis while the United States pushed for the linkage. The second channel resulted in Warren Christopher’s direct discussions with an Iranian emissary in Bonn.

²⁷ On 2 May, nine days after the abortive military operation, Hoffman was contacted by Citibank’s West German Lawyers informing him that Herbert Wagendorf and Peter Heinemann, two West German lawyers representing Iran had been asking if the American bankers in New York would be willing to discuss an economic solution to the hostage crisis.

²⁸ John E. Hoffman was one of the top New York lawyers who were working on Iranian assets litigation.

²⁹ Lucy Reed, Christopher and Kriesberg, 257-9

³⁰ Hoffman 237.

³¹ Hoffman.235

³² The US election was scheduled for 4 November, which incidentally was the anniversary of the hostage taking.

³³ The Algerian Embassy in Washington had been representing Iran’s interests in the United States ever since April 1980, after President Carter’s severance of diplomatic relations with Iran.

³⁴ U.S.-Iran Negotiations 1980-81: “Iran Conditions for Release of Hostages (November 2, 1980),” in Andreas F. Lowenfeld & Charles L. Denison, *Trade Controls for Political Ends ,International Economic Law*, vol. III, Second edition,(New York: Matthew Bender,1983)p. DS-809, paragraph 4.

³⁵ Some members of his team including Robert B. Owen, the legal adviser to the Secretary of State, Harold Saunders, Assistant Secretary of State for the Near East and South Asia , and Arnold Raphel, senior assistant to the Secretary of State. In the United States there were teams in the State and Treasury Departments, the Federal Reserve Bank of New York, and the White House working on different aspects of the agreements.

³⁶ *Claims Settlement Declaration, Article IV, Para 3.*

³⁷ For all of these documents, see the appendices.

³⁸ The third-country judges have come from Poland, Italy, Finland, France, Sweden, the Netherlands, Germany, Switzerland and Argentina.

See *Claims Settlement Declaration Article III (1)*.

³⁹ Most of the Tribunal’s cases are decided by one of the three Chambers. The ‘Full Tribunal’ consists of all nine judges and decides disputes between the two Governments, as well as important questions referred to it by the Chambers.

⁴⁰ Based on the latest update report, there were a total of 3,953 cases filed with the Tribunal in the following categories:

“A” Cases 33

“B” Cases 75

CMTD’s 961 (Claims of More than Two hundred and fifty thousand US Dollars).

CLTD’s 2,884 (Claims of less than Two hundred and fifty thousand US Dollars).

The work of Tribunal is nearly completed. Only 17 cases remain.

⁴¹ Each government has designated an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or nationals in connection with proceedings before the Tribunal. The expenses of the Tribunal are born equally by the two governments.

⁴² Article 2(2), *Tribunal Rules of Procedure*

⁴³ See Article 2(4), *Tribunal Rules of Procedure*.

⁴⁴ *Tribunal Rules of procedure*, Notes to Article 2 (1).

⁴⁵ *Tribunal Rules of Procedure*, Notes to Article 31.

⁴⁶ *Tribunal Rules of Procedure*, Article 31(4).

⁴⁷ Claims are classified by the Registry of the Tribunal as follows:

“Claims based on Article II, paragraph 1 of the Claims Settlement Declaration (Claims of nationals) and claims of banking institutions based on paragraph 2.B of the Undertakings of governments were given a serial number starting with 1. Claims based on Article II, paragraph 3 of the Claims Settlement Declaration (official claims of one Government against the other) were given a serial number starting with 1, with a pre-fix B (“B” Cases). Disputes referred to in Article II, paragraph 3 of the Claims Settlement Declaration as to the interpretation or performance of the General Declaration as specified in paragraph 16-17 of the General Declarations: as well as questions concerning the interpretation or application of the Claims Settlement

Declaration referred to in Article VI, paragraph 4 of that Declaration were given a serial number starting with 1, with a pre-fix A ("A Cases). Claims of nationals of less than US \$250,000 were given a serial number starting with 10.001."

See Tribunal's Annual Report, Period Ending 30 June 1992. P. 15

⁴⁸ See Claims Settlement Declaration, Art II, Para. 1 reprinted in *1 Iran-U.S.Cl.Trib.Rep.at.9*.

⁴⁹ Claims Settlement Declaration Article II (2).

⁵⁰ General Declaration, Para.16.

⁵¹ Claims Settlement Declaration Article II (3).

⁵² See Ali Z. Marossi, "A Quarter Century Jurisprudence of the Iran –US Claims Tribunal: The Tribunal's Legal Structure, Jurisdiction and Enforcement Mechanism", *AALCO Quarterly Bulletin* 4(2005).

⁵³ For example, see *Case No. A/1* which deals with interest on the Security Account

⁵⁴ Article 17 (2) of the Tribunal Rules of procedure,

⁵⁵ Rohani, E., *Nehzat-e Imam Khomeini*, Tehran, 1979.

⁵⁶ See Warren Christopher. *American Hostages in Iran: The Conduct of a crisis* (New Yale University Press, 1985)

⁵⁷ Gary Sick, *Military options and Constraints*, in Warren Christopher. *American Hostages in Iran: The Conduct of a crisis* (New Yale University Press, 1985) 146.

Chapter 4

Arbitration and the Tribunal's Nature

I Introduction

What is the function of arbitration in international relations? What is the character of the nature of the Tribunal? How does arbitration pertain to conflict resolution? If a conflict is resolved, does it not suggest that the forces of cooperation have prevailed over discord? Is the Tribunal, as noted by Ted Stein, a "tool of diplomacy in the hands of states?" Is it "tainted with political issues, having little to say in the sphere of law? Is it not "derived from a crisis?"¹ If it is a "tool of diplomacy" and not an entity of law, then why? Why does an international lawyer complain that "such ends should be the labour of diplomats and politicians, not of judges and arbitration?" Yet, he acknowledges that the Tribunal generates "some sort of good feelings which could only encourage diplomatic and commercial relations between Iran and various western countries." because some "compromise is essential, even when legal issues are at stake," In fact, "no one.....wishes to see the Tribunal collapse."²

To answer the said questions, this chapter involves two sections. A first section deals with the problem of international arbitration in its historical context as well as its recent development. A second section concentrates on the nature of the Iran-US Claims Tribunal. The former shows how the contemporary economic system in terms of arbitration and peaceful settlement of international disputes has evolved and how the principle of property rights has come to challenge the principle of sovereignty which has long been considered as the core of the modern political system. That is why I have also employed certain theories and materials from international political economy (IPE), because the contracts and subsequently, the claims are the product of economic interaction of the parties. With the rise of the property rights, individuals and consequently their economic, political and cultural interests have become more significant.

The right of individuals must not be viewed as solely contractual based on concrete contracts concluded between the state and the individual; it must also be viewed 'within the context of a specific social relationship'.³ This will be buttressed by a correct reading of the Tribunal's nature in the sense that its nature is mixed, having both interstate and private claims before it. This understanding of the Tribunal's nature, furthermore, sheds light on dual nationality cases brought before the Tribunal by Iranians who had acquired American nationality and whose properties had been taken or affected by Iran. The fact that the Tribunal granted floor to these individuals shows that the role of non-state actors, especially those of individuals are now undeniable. The number of claims raised by private parties is much more than claims brought before the Tribunal by states. Such private claimants were given access to the Tribunal by the rulings of the Tribunal that it had jurisdiction over such claims. However, what means took these actors to arbitration?

The means available for the settlement of international disputes are commonly divided into two groups: political means and legal means. The former, comprising negotiation, mediation, inquiry and conciliation, are termed diplomatic means, because the parties retain control of the dispute and may accept or reject a proposed settlement as they see fit. Arbitration and judicial settlement, on the other hand, are employed when what is wanted is a binding decision, usually on the basis of international law, and hence these are known as legal means of settlement.⁴ However, negotiation, mediation, conciliation and inquiry become an integral part of the legal means, particularly playing a major role in arbitration. For instance, within the Tribunal, 'deliberation' involves some sort of legal compromise in which the actors diminish the quantum of their claims, or in the out-of-court settlements, such actors have constructive engagements to reach a solution. To fully appreciate the Tribunal as a constructive forum, one must flash back to the first section, without which the mission of the Tribunal will be confused.

The first section seeks to demonstrate that certain norms, rules, procedures and values have evolved in the international society of states. The development of legal institutions is the outcome of a social interaction over time of beliefs, of shared understanding. From the *Xerxes- Artabazanes Case* of the Persian Empire to the present cases pending before the Tribunal, various entities and institutions such as the Permanent Court of Arbitration, the International Chamber of Commerce (ICC), and the International Court of Justice were universally created, and in a gradual manner, helped develop cluster of norms and procedures according to which nations respect them and morally find them binding upon themselves as socially agreed upon terms. In a sense, accordingly, the Tribunal is a product of these social norms.

The second section by concentrating on the nature of the Iran- US Claims Tribunal tries to answer very critical questions: does the Tribunal have an interstate, private, hybrid or mixed character? What are the positions of the United States and Iran on the issue? What are the arguments of the legal publicists on this issue? What is inferred from the Algiers Accords? What role does the nature of the Tribunal have on the proceedings? What are the implications of the interpretation of the nature on the fate of cases especially in dual nationality cases which require diplomatic protection of nationals by states? What is the role of politics on the issue? What role does the Tribunal have to play in order to minimize the gap between the so-called 'Great Satan' and the 'Axis of evil'? If social and cultural norms and values matter, can one not argue that the nature of the Tribunal is international society oriented? It will be argued that 'deliberation' at the Tribunal takes some sort of compromise in which the actors mitigate their claims, or in the out-of-court settlements which take place at the Tribunal's premises, claimants and respondents get involved in constructive engagements to reach a solution.

Furthermore, this chapter also shows that there have been conflicts between the two parties over the nature of the Tribunal and that such conflicting positions have been

reflected in the dissenting opinions of the arbitrators. Yet, the Tribunal has tried to survive despite all these tensions in the course of arbitration. These tensions are more likely to happen in arbitration than in judicial dispute settlement.

Judicial settlement involves the reference of a dispute to the international court or some other standing tribunal. Arbitration in contrast, requires the parties to set up, on a consent-based process, the machinery to handle a dispute, or disputes, between them. Historically arbitration was the first to develop and provided the inspiration for the creation of permanent judicial institutions.⁵

However, there is no universal definition of Arbitration. Within different legal systems the arbitration process is carried out in different ways and subject to different legal rules.⁶ Different commentators have defined arbitration differently. However, there are core principles that can be found in all the definitions. The core principles include: the need for an arbitration agreement; dispute reference to a third party for its determination; and an award by the third party.⁷ In the case of the Iran-US Claims Tribunal, the Algiers Declarations serve as an arbitration agreement between the two parties. The process of globalization and global governance has prompted the trend of international trade which, in turn, has increased the number of international trade disputes among states, multinational corporations and individuals. In developing countries, the principle of sovereignty is much stronger than the principle of property rights. As a result, the rights of the individuals are subordinate to state rights. In contrast, in developed countries the rights of the individuals are protected because of, for instance, human rights especially the second generation of human rights which involve social and economic rights. For this reason, prosperous individuals and families tend to seek economic security.

The developed countries, their companies and individuals have acquired better political, economic and social security. As a result, arbitration remains an important means of peaceful dispute resolution. It is a quasi-judicial pattern of cooperation among actors.

However, it does not take place in a vacuum. The economic, and more importantly the political aspects of cooperation play significant parts: that the actors seek to resolve their disputes, in some cases their crisis, by negotiation and conciliation. In the case of the Iran-US relations, a number of actors are engaged in a negotiation process called "Deliberation" where they launch their bargaining chips.

II The origins of dispute resolution

The origins of the peaceful settlement of disputes between states can be traced as far back as antiquity. ⁸Westermann finds the most authoritative treatment of the subject of arbitration as old as the Persian Empire. Quoting the works of Merignhac, he argues that two categories of arbitration have been developed in history. First, arbitration in the East and Greece; and second arbitration under the Roman Empire: The first and " the only cases, two in numbers, which he [Merignhac] cites from the Easter nations deal with the Persian Empire in the time of Darius. The first is that mentioned by Herodotus in the Seventh Book where Darius decides a dispute as to the throne between his two sons, Artabazanes and Xerxes. The decision favours Xerxes as the legitimate heir, he being grand son of Cyrus the Great, through his mother the Queen Atossa. This descent gives him the stronger claim to the throne.... The second instance also taken from Herodotus" concerns certain states..."subject to Persia are to submit their local differences to reference"⁹ Arbitration, the principal form of international dispute resolution, has a long history in the world of Islam as well. After the Treaty of Medina in 622 A.D., the Prophet Muhammad called for arbitration of any dispute among Medina's Muslims, non-Muslims Arabs and Jews. The Prophet himself resorted to arbitration in his conflict with the tribe of Bani Quaray-sha. ¹⁰ However, for an understanding of contemporary dispute settlement, it is sufficient to trace the development of the process in a chronological order, beginning from 1794. ¹¹

Historically, one can observe some preliminary endeavours made to set up a framework for dispute resolution by producing and providing certain legal precedents. Such

precedents have been derived both from the practice of states and the shared values and norms of the then international society which clearly illustrates Hedley Bull's theoretical underpinnings. In this study of arbitrations I am interested in three themes: (1) the composition of these conflict or dispute settlements, (2) the role of negotiations and dialogues, and (3) under what names are such arbitrations known, i.e., international or interstate, commercial or private, mixed or hybrid. This has come to be known as the 'Nature of Arbitration.' The manner in which the nature of arbitration is defined will have implications on the manner in which that arbitration is carried out. The prominent features of these arbitrations are negotiation, mediation, good offices and cooperation. In this respect one can mention the rulings and the decisions of The Anglo-American Arbitrations; The Alabama Claims Arbitration in 1872, The Hague Peace Conferences in 1899-1907, The Permanent Court of Arbitration, The Mixed Arbitral Tribunals and Claims Commissions following The War of 1914-18, and the International Court of Justice.

The Anglo-American Arbitration concerns the General Treaty of friendship, Commerce and Navigation concluded, in 1794, between the UK and the U.S. called 'the Jay Treaty.' It was a new starting point for the development of international arbitration. It had mixed composition, consisting of one or two commissioners appointed by each party, who were together or choose a third or fifth by agreement or by drawing lots. The outcome of this arbitration was a triumph for the diplomatic, rather than strictly judicial approach. This outcome meant that the mixed commission worked best, "where the subject-matter of the dispute allowed or encouraged the commissioners to act to some extent as negotiators rather than as judges, to temper justice with diplomacy, to give a measure of satisfaction to both sides."¹² This spirit has been materialized at the Iran-United States Claims Tribunal. The Alabama Claims also between the UK and the US gave the process a new life, and introduced a number of rules and practices.¹³

The Hague Peace Conferences of 1899-1907 resulted in the conclusion of the Convention for the Pacific Settlement of International Disputes.¹⁴ When a dispute arises between parties to the convention, which they wish to refer to a tribunal of the Permanent Court of Arbitration, each appoints two arbitrators from the panel. The four arbitrators thus chosen select an umpire. If the four arbitrators are evenly divided on the selection of the umpire, the choice of umpire is entrusted to a third power selected by agreement between the parties. If the parties cannot agree upon the third power, each party chooses a different power and the choice of umpire is made by agreement between the two powers thus chosen.¹⁵ Between 1902 and 1905, recourse was made to the machinery established by the convention of 1899 for the settlement of four disputes.¹⁶ The Convention was a major step in providing a process to resolve disputes between states. It was amended in 1907 and included several levels for dispute resolution: good offices and mediation, International Commissions of Inquiry, and International Arbitration under the Permanent Court of Arbitration.¹⁷

The Permanent Court of Arbitration was established in 1899 at The Hague Peace Conference under the Convention for the Pacific Settlement of International Disputes.¹⁸ In the 1960s the Court addressed its shortcoming and produced, in 1962, Rules of Arbitration and Conciliation for the Settlement of International Disputes between two parties of which only one is a state.¹⁹ In 1992 the Court issued new rules for Arbitrating Disputes between two states. In 1993 it revised its rules for the settlement of international disputes between two parties of which only one is a state. In 1996 it issued Optional Rules for Arbitration involving international organizations and Optional Rules for Arbitration between international organizations and private parties. There are currently ninety-six states which are signatories to the Hague Convention. The Court has established a working group on environmental dispute resolution. This decision was based on principle 26 of the 1992 Rio Declaration on Environment and Development.²⁰

The Mixed Arbitral Tribunals and Claims Commissions (MATCC) were set up following The War of 1914-18. The Treaty of Versailles provided, in Article 304, for the establishment of mixed arbitral tribunals between each of the Allied and Associated powers on the one hand and Germany on the other. Each tribunal consisted of one member appointed by each Government, and a President appointed by the two Governments jointly. If the two Governments failed to agree upon a President, he was selected by the Council of the League of Nations. (CLN)The jurisdiction of the mixed arbitral tribunals included claims by nationals of the Allied or Associated power arising out of exceptional war measures taken by Germany in respect of property, and also, of a large variety of contractual matters, cases between nationals of the Allied or Associated power and nationals of Germany.²¹

Similar provisions with respect to the contractual matters were adopted by the UNCITRAL rules which were modified and applied by the Iran-United States Claims Tribunal.

The International Court of Justice is one of the principal organs of the United Nations established by Article 7 of the United Nations charter and declared by Article 92 to be the principal judicial organ of the United Nations.²² The court is constituted and functions in accordance with the provisions of its statute, which is based upon the statute of the former Permanent Court of International Justice, and is annexed to the charter, of which is forms an integral part. The Court is composed of fifteen judges, but this number may be increased for a particular case by the judges appointed ad hoc by the parties in accordance with the provisions of the statute. The Judges are elected by the General Assembly and by the Security Council. Article 4 of the statute provides for the nomination of candidates. Since it was a creation of the United Nations Charter, every member state of the United Nations is a party to the International Court of Justice.²³

The most recent practice in arbitration concerns the Alternative dispute resolution (ADR) which encompasses a range of procedures other than litigation which are designed to resolve conflict. ADR processes include negotiation, mediation, conciliation, expert determination, adjudication and Arbitration. In the last few decades the use of ADR has become more prevalent within both international and domestic commercial contracts. The reason for this is that the costs of litigation have become prohibitive and the parties to a dispute and their advisers are now considering alternative methods to resolve disputes in the working relationships of the parties. In fact, ADR is a process in which a third party neutral assists the disputants in reaching an amicable resolution through the use of various techniques. ADR describes a variety of approaches to resolve conflict which avoid the cost, delay, and unpredictability of the traditional adjudicatory processes while at the same time imposing workplace communication and morals.²⁴

The growth of international commercial disputes has created a number of dispute settlement institutions. Among them are the International Chamber of Commerce (ICC), The American Association and the International Centre for Dispute Resolution (AAA) (ICDR, The London Court of International Arbitration (LCIA), World Intellectual Property Organization (WIPO), China- International Economic and Trade Arbitration Commission

The International Chamber of Commerce in Paris (the ICC) established the ICC's International court of Arbitration in 1923. ICC arbitration is designed for international commercial disputes and the ICC is generally regarded as the world's leading international commercial arbitration institution. ICC is a private, non-profit, global business organization. Today it represents a membership of thousands of companies and businesses, across all major industrial and economic sectors 150 countries, continues to pursue its founding aims of promoting global trade, investment and free movement of capital.²⁵ As an international non-governmental organization, it has the highest level of consultative status at the United Nations and advocates the interests of global business before influential

international institution and before national governments through its national committees in over 80 countries.

The American Arbitration Association (the AAA) was founded in 1926 and is based in New York. The American Arbitration Association is a not-for-profit public service organization providing dispute resolution services that include mediation and domestic and International Arbitration services. The AAA has established a number of sets of arbitration rules, the most pertinent of which are (1) the commercial arbitration rules (commercial rules), including the supplemental procedures for large, complex commercial disputes and (2) the optional Rules for Emergency Measures of Protection (REMP), Optional Emergency Rules, and the International Arbitration Rules (International Rules), based on the UNCITRAL Rules.²⁶

The AAA administers in excess of 60,000 arbitrations and other forms of ADR each year. In 1996, the AAA established the International Centre for Dispute Resolution (ICDR) as a separate international division to administer international cases. The ICDR International Arbitration provides the arbitral Tribunal with significant powers regarding experts, evidence, documents, and the bifurcation of the proceedings.²⁷

The London Court of International Arbitration (LCIA) is perceived as being the second most popular European arbitration institution after the ICC. (The LCIA justly claims to be one of the longest-established arbitral institutions in the world, having been inaugurated in London just three years after the 1889 Arbitration Act was passed, in response to a growing disenchantment in the business community with the long-winded and expensive procedures of the English courts of the day.)

The World Intellectual Property Organization (WIPO) established its arbitral centre in Geneva, Switzerland in 1994. The dispute resolution processes which WIPO focus on are mediation and arbitration. The WIPO Arbitration Rules are designed for intellectual property disputes and the emphasis within the WIPO Arbitration rule is therefore on issues

which would affect matters relating to intellectual property. WIPO is the leading body for disputes relating to internet domain names, since 1999, when WIPO became involved with 'cyber squatting' causes, it has dealt with over 6,000 disputes.²⁸

The China International Economic and Trade Arbitration Commission (CIETAC) are China's best known International Arbitration Institution and one of the busiest in the world. In 2002 CIETAC had 684 referrals to arbitration with cases originating in more than forty countries. Chinese is the official CIETAC language but the parties can stipulate a different language according to their arbitration agreement.²⁹

The Hong Kong International Arbitration Centre was established in 1985 and is recognized as one of the leading arbitral institution in Asia. HKIAC has adopted the UNCITRAL Arbitration Rules, although parties are free to agree upon alternative rules.³⁰

The Iran-United States Claims Tribunal that has adopted the UNCITRAL Arbitration Rules is the production of the Islamic Revolution, the states of Iran and the United States as well as that of multinational corporations and individuals. To the same degree, it is the by-product of a wide range of principles, norms, and rules that have been evolved in the history of arbitration. The composition of the Tribunal, the bargaining chips, and its characteristic or nature –whether international, commercial, hybrid or mixed, and de-nationalized or a-national--are based on the practices of previous arbitrations in our international society of states. Some of these norms are older than the notion of the state.

III The nature of the Tribunal

Any attempt to examine the forces of conflict and cooperation within the Tribunal must take into account the problem of Tribunal's nature and characteristics. I shall try to synthesize the literature on this subject matter. First, I shall explore the writings of the authors on the notion of the Tribunal's contribution. I will find that there are two contradictory positions. A first position posits that the Tribunal has played a major part in the development of international law. A second argumentation is that the Tribunal is tainted

with political issues, having little to say in the domain of law. Second, I shall provide a literature review on the subject. Third, I will provide my analysis on the issue, holding that the nature of the Tribunal is mixed and that the ingredients of this mixture are: states, corporations, governmental and non-governmental organizations, and individuals. The secrecy rule at the Tribunal is regarded as a major constraint on the development of knowledge. It militates against the rule of transparency.

Finally, my argument in concluding this chapter is that there exist certain sets of social norms and values as a driving force behind conflict and cooperation within the Tribunal. Apart from Iran, the United States, a number of individuals and corporations and institutions, the engagements of the Netherlands, the Bank of England and the Government of Algeria were critical in the debate over the nature of the Tribunal. A large number of scholars have participated in the debate. Mention could be made of Toope, Stein, Caron, Khan, Selby, Stewart, Robinson, Lillich, Badaruddin, Lake, Dana, Van Hof, Jones, Tse-shyang Chen, Rovin, Lowenfeld, King and Tribunal Members. There is less agreement among these writers regarding the nature of arbitration.

a. Contributive and non-contributive nature

Richard B. Lillich has argued that 'the Iran-United States Claims Tribunal is the most significant arbitral body in history.'³¹ A second lawyer has called it a very distinguished international tribunal' with 'an unprecedented body of decisions.'³² Davis R. Robinson, the legal advisor to the US state department, has commented that the Tribunal 'represents one of the most ambitious and complex international claims adjudication programs ever undertaken.'³³ In the words of a Chinese author, "Each lawyer picks out a tree from that forest (Tribunal), which tree provides an insight into unexplored facets of international law."³⁴ Its awards have been regarded by an American member of the Tribunal as 'a gold mine of information for perceptive lawyers.'³⁵

One former American participant, David Caron, has written: 'millions of dollars have been spent for its operation, hundreds of awards rendered, yet an apparently not uncommon perception is that the work of this, in some respect, unique institution is not applicable elsewhere.'³⁶ Ted Stein, as noted above, has written that interstate arbitration is a "tool of diplomacy in the hands of states, and that the Tribunal will play a therapeutic and pedagogic role in bringing the Iranians back into the orbit of a western-style legal system." The Tribunal, to Stein, is "derived from a crisis in which Iranian authorities has demonstrated their disregard for what are probably the most inclusive principles of International Law."³⁷

Toope has argued 'some degree of compromise is essential, even when legal issues are at stake, 'because 'no one...wishes to see the Tribunal collapse.' Another lawyer, has seen the rulings of the Tribunal as "some sort of good feelings which could only encourage diplomatic and commercial relations between Iran and various western countries" but warns that "such ends should be the labour of diplomats and politicians, not of judges and arbitration." One British author, David Jones concluded 'A number of important questions as to the nature and function of the Iran-United States claims Tribunal, and the standards and rules it is to apply remain unanswered...it is hoped that the Tribunal will provide at an early opportunity the clarification that is now urgently required.'³⁸ Toope states that 'so long as practical compromises can be worked out to allow awards to be rendered, providing access to the ready money of the Security Account. The Tribunal may avoid definitive pronouncements.'³⁹ David L.Jones maintained in 1983 that the 'flaw in the jurisprudence of the Tribunal' has offered 'little guidance as to its nature and function and has failed to identify the exact role it is performing. Subsequently, the Tribunal has issued a major decision, where the nature of the Tribunal was a significant issue.'⁴⁰

b. Review of the literature on nature

Four conflicting views of the Tribunal have been presented. First, it is described as international or interstate, which puts it in the realm of public International arbitration. This perspective is traditionally governed by international law by definition and since the major actors are nation-states, however, it is possible for states to move the dispute from the domain of public international law and subject it to a specific national legal system. Tribunal president Gunnar Lagergren saw the Tribunal awards as international.⁴¹ Stein characterizes the Tribunal as international. To him, the *lex fori* of the Tribunal is 'public international law' constituted 'by a treaty between two states.'⁴² Stein has argued that traditional arbitration between states is a 'tool of diplomacy.'⁴³ According to him, the Iran-United States Tribunal fits that description because its existence is due to a diplomatic compromise resolving a complex political and ideological dispute. Khan has stated that "unlike the proceedings before the claims commission, which are quasi-judicial in character, those before the Tribunal are essentially judicial." He argues that special features of the Algiers Accord "distinguish the Tribunal from the mixed claims commissions."⁴⁴ He concludes that Tribunal is international, in so far as it is established by an inter-governmental arrangement."⁴⁵

Second, it is described as commercial or private, which defines its processes as private international arbitration. The actors are usually non-state private parties, but it may also involve one state and one private party. The applicable law generally centres on some national legal system such as that of the place of the arbitration (*Lex fori* or the law of the forum) or as specified in the contract concerned. The traditional law view is that of the *lex arbitri* is the same as the *lex fori*.

The third perspective, hybrid or mixed, sees the Tribunal as a mixture of both interstate and private. Individuals must exhaust local remedies before asking their states to exercise diplomatic protection in respect of injuries to them. Therefore, such individuals

need some time to do so. Toope has described the Tribunal as ‘mixed’ and often times confused ‘because both governmental and private aspects ‘coexist’. In a highly scholarly chapter of his book, Toope elaborates on the nature and function of the Tribunal. He studies the nature of the Tribunal from three perspectives: the Algiers Accords reflecting the status and the effect of the tribunal, the role of the Tribunal as an international institution and finally as an Arbitral Tribunal. He concludes that the Tribunal’s nature is mixed.⁴⁶

Fourth, the Tribunal is described as a-national, delocalized or denationalized. This new school of thought argues that in order to escape the conflict of laws the legal system of the place of arbitration must not be applied. Instead, the legal system where the enforcement of the award is sought should govern. The proponents of this school seek to develop a substantive law that is non-national, known as *Lex Mercatoria*, traditionally a part of the common law which is adopted by commercial or trading nations. It was also called commercial law. This movement has recently led to what is known the ‘contractual theory.’

Lake and Dana, have argued that the awards of Tribunal are a-national. To Lake and Dana, there are compelling reasons for questioning whether Tribunal awards are subject to the Dutch legal system because the Tribunal is based on a treaty and the choice of The Hague must be attributed to Holland’s reputation as a neutral or international country, reflected in its status as the seat of the International Court of Justice. In quoting Paulson, Van Hof argues that nothing prevents floating or a-national arbitrations and awards ‘similarly one Dutch lawyer⁴⁷ has agreed that these Arbitrations’ do not fall under Dutch law while another Dutch commentator has disagreed.⁴⁸ Critics of the a-national approach say that ‘the award floats until enforcement seeks to anchor it within a given legal system.....arbitral awards must have a nationality.’⁴⁹ Caron concludes that ‘the Tribunal proceedings before the Iran-United States Claims Tribunal involving claims of nationals are supervised by the legal system of the Netherlands ‘because Iran and the United States

intended that the Dutch legal system supervise the validity of the Tribunal process and the awards of the Tribunal be enforceable as Dutch awards.⁵⁰

c. Analyzing the nature

It goes without saying that the release of Iranian assets and American hostages was an essential objective of the Algiers Declarations. The resolution of disputes was also a key objective; the creation of the Tribunal was described by Professor Von Mehren as 'an indispensable element of the peaceful solution of the hostage problem'. Noting that there were 'vast claims at stake' and concluding that 'it was highly unlikely that a negotiated settlement between the United States and Iran could have been reached' without an independent mechanism for claims adjudication,⁵¹ he argued that, from the American perspective, the immediate goal was to obtain release of the hostages. The United States sought every avenue to release the hostages, but it seemed almost impossible, so that in public opinion the release of Americans after 444 days was regarded as miraculous.⁵²

The resort to the International Court of Justice on November 29, 1979, the Security Council Resolutions 457 and 461 (on December 4, 1979 and December 31, 1979)" did not bring the crisis to an end. On the contrary, as the Carter Administration was pressurized and criticized by the US public opinion, and in the words of one commentator, almost every country was affected: oil trade and financial markets were disrupted, regional security was imperilled, superpower relations were worsened, major tenets of both public and private international law were challenged and "much of the concern ...particularly in the United States" was "for the safe return of the hostages."⁵³

To attain such an objective, both Iran and America had to make some modifications of the UNCITRAL Rules (Articles 1-3), reflecting the nature of the Tribunal according to Iranians. According to Dore, 'this change can be readily seen to flow from the fact that the entire dispute settlement mechanism was the product of an agreement between the Governments of the United States and Iran...'⁵⁴ It was important to provide some means of

redress for United States nationals with outstanding claims against Iran. On the Iranian side, at a time of intense economic disruption, and with the prospect of an expensive and protracted war with Iraq, it became crucial to regain control of the billions of dollars of Iranian Government assets frozen under an America Executive order.⁵⁵

Under the Algiers Declarations the United States Government agreed to release the Iranian assets held by other United States individuals and institutions. Iran, too, promised to release the fifty-two United States nationals held in Tehran and to extend its cooperation in setting up the Security and Escrow Accounts that were designed to guarantee the payment of Tribunal Awards rendered against Iran.⁵⁶

On the Algiers Declarations, one must emphasize, as pointed out by Toope also that, the Declarations do not indicate the nature of the Tribunal they created. Toope holds that although the agreements are regarded as treaties between the two states ‘fulfilling all customary requirements and the rules of the Vienna Convention on the Law of Treaties,’ just as the Tribunal so held in *Case A-1*, (*The Islamic Republic of Iran V. The United States of America*, claims and disputes between governments as to the interpretation and compliance with the terms of the Algiers Declarations are called *A Cases* and *B Case*) it does not mean that ‘the Tribunal created is an international tribunal’.⁵⁷ States may agree to create and fund a tribunal to settle claims involving private parties as well as cases between the governments themselves.

In a series of interviews conducted in September 1984, Toope asked five of the nine arbitrators then serving⁵⁸ to dwell upon the nature of the Tribunal. The second President of the Tribunal was interviewed by the same author in October 1985. Concerning the international status of the Tribunal George Aldrich, one of the of the arbitrators argued that:

[T]he Tribunal does, of course, have a number of interstate claims, or, more likely, interstate disputes about the Algiers Declarations. It does, in fact, have some really commercial claims between the governments, but those are just like any other commercial

claims which happen to have governments as parties. The great bulk of our work is claims of individuals and companies against entities. Some of which were government agencies, others of which were not at the time the deal was made, but have since become controlled by the government, so that the government under the Algiers Declaration is responsible for the debt, and Article V of the claims settlement Declaration gives us a remarkable degree of flexibility in our choice of law...⁵⁹

The interview highlights that Aldrich sees the Tribunal as having a ‘mixed’ nature, being a creature of public International Law with jurisdiction to consider interstate claims. However, its primary duty has been to adjudicate private commercial disputes. He seems to emphasize one or the other aspect of the Tribunal’s nature depending upon the parties and facts before him. This position, according to the interview, was accepted expressly by the Tribunal’s second President, K-H. Bockstiegel, and by Arbitrators Brower and Mangard as well.

The Tribunal in *Case A-18*,⁶⁰ was to decide as to whether or not it could claim jurisdiction over claims brought by persons who were dual nationals of both Iranian and United States. This served to be a tacit exploration of its own nature. Iran argued that the Tribunal was a creation of public International law and was to be governed by and to apply primarily the rules of public International Law.⁶¹

The outcome of the Iranian approach would have been the application of the traditional rules governing the nationality of claims which might have excluded all claims of dual nationals. A majority of the plenary Tribunal in that case (*Case A-18*) ruled contrary to the Iranian position. The Tribunal realized that it was created by a treaty and was in fact an international institution. However, it argued that most claims ‘involve a private party on one side and a government or government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law.’⁶²

In their dissenting opinion, the three Iranian arbitrators reiterated their position, reasoning that the Accords should be seen within the context of interstate agreements to establish a tribunal that must exercise diplomatic protection between states and must adjudicate 'claims of their national against each other.'⁶³

In the oral hearings of the *Case E-Systems, (E-System Inc. V. the Islamic Republic of Iran)*, Iran argued that claims brought to the Tribunal under the Algiers Declarations should be treated as "true inter-state claims brought before an international tribunal by means of the classic method of diplomatic protection".⁶⁴ The American agent had also argued that the Tribunal had been created by international law and was thus an 'international tribunal'. This position, however, was abandoned in *Case A-18*. Although the American position changed, the majority in *Case A-18* sought to disagree with the specific arguments of the United States that the Tribunal's nature depended on the nature of the specific case before it. Yet, the majority's argumentation concerning the nature of the Tribunal was in accord with the broader American interests. Iran could not preclude claims brought against itself by Iranians who had acquired American nationality.

As Selby, the then Deputy Agent of the United States, and Stewart, an administrator for Iranian claims in the U.S State Department have written, the prevailing view must lie in the fact that both the public and private dimensions of the Tribunal serve as a means of coexistence which suggest that the nature of the Tribunal is mixed:

Also as a result of the governing treaty instruments, the Tribunal has both private and public law dimensions. On one level, it is an intergovernmental institution and a creature of public international law...on the other hand, the Tribunal in many respects resembles typical international commercial arbitration, handling ordinary commercial debt and contract claims.'⁶⁵

In the case of the Iran-US claims Tribunal, all these aspects of decision-making are required, not so much to promote enforcement, as to ensure survival. In a major dissenting opinion, the Iranian arbitrators openly called into question their commitment to the entire enterprise of international arbitration, asserting that western 'political and materialistic motives have permeated the institution.'⁶⁶ The former Prime Minister of Iran, now the leader of the 'green revolution' in Iran, has accused 'the great-Satan; America' of exerting 'its arrogant influence,' thereby 'corrupting' the Tribunal.⁶⁷ Given these political and ideological differences between the 'Great Satan' and the 'Axis of evil', the Tribunal's role and ultimately its nature must also be considered mixed with regard to law and politics.

d. Secrecy rule as a constraint

Due to such a political atmosphere of the Tribunal there has been a demand for confidentiality in order to ensure the survivability of the Tribunal. At the same time the secrecy rule has darkened the Iran-U.S claims Tribunal. Apparently, the rule militates against transparency. It is because of this confidentiality provision that the give and take process in 'deliberations' will remain inaccessible, and the real nature of the Tribunal can never be fully examined. It resembles some sort of hidden diplomacy and the Agent-to-Agent direct contacts cannot be explored. The secrecy rule has put direct constraint on the facts of the cases and in the absence of academic accesses to the history of cases, our attempt to data collection and subsequent judgement on the events will have its limitations. Iran has pushed for more confidentiality within the Tribunal than the United States. It was at the American initiative that the above-mentioned journals have reported the Tribunal rulings.

On November 20, 1981, president Lagergren said that 'the Tribunal has decided to conduct its business in complete secrecy'⁶⁸ and told staff members 'to be closed-mouthed.'⁶⁹ The United States argued that the rule of secrecy favours Iran because it was Iran that had access to the history of projects. America harshly criticized the confidentiality and one its

members at the Tribunal, Arbitrator Holtzmann wrote that "Article 32, paragraph 5-which provides that the award may be made public only with consent of both parties- of the Tribunal rules does not permit indiscriminate grants of secrecy."⁷⁰ In fact, the United States maintained that secrecy would inhibit the coordination of claims. The U.S Agent said that unlike Iran, which has access to greater information of the history, facts and nature of claims, the U.S claimants often have only background knowledge.⁷¹

IV Conclusion

Arbitrations are often confidential, published awards are often summarized or heavily edited. However, the growing body of published decisions of the Iran-United States claims the Tribunal provides new opportunities for analyzing the choice of applicable law in international commercial arbitration. The Tribunal has generated over five hundred publicly available awards since 1981. However, inaccessibility to the history of the cases as described in the 'Statements of Claims', 'Counterclaims', 'legal briefs', 'affidavits', 'Terms of the Contract' etc., has been a problematic for a researcher. The status of the Tribunal has concerned many academic lawyers since its inception. Is the Tribunal a private arbitral created to resolve private law disputes arising under different systems of law and to hear private law claims against Iran and the U.S., or is the Tribunal an international or interstate tribunal charged with ruling on the responsibility of the respondent state under public international law, or is it performing both functions? Academics have sought to answer the above questions by reference to various aspects of the Tribunal's jurisprudence or standing.

One British author, David Jones, has taken the position that the Tribunal's award in the case of dual nationality could be explained only in term of the Tribunal's own understanding of its status.⁷² Whether the Tribunal can be characterized as an International Tribunal established to decide claims of governments and/or claims of their nationals as espoused by them, has been a point of dispute in many instances, particularly in relation to the dual national cases and in the so-called 'small claims.' The parties to the Algiers

Accords thought that characterization of the Tribunal would affect the applicable law and thus the treatment of the claims.

Iran characterized the Tribunal as an international (inter-state) Tribunal, and argued that the fact that the Accords permitted individual claimants to present their claims was intended solely to facilitate the processing of those claims before the Tribunal. Iran also took the position that the claims of individuals are espoused by the respective governments of those individuals and, as a consequence, that the claims of dual nationals with Iranian and United States nationality could not be brought before such an international Tribunal by either of the states, on the ground that this was precluded by the principle of the equality of states and by the principle of non-responsibility of a state under International Law for the treatment of its own nationals. As to the applicable law, Iran's position is that although normal choice of legal rules apply to the underlying private contracts and transactions the rules of public international law and state responsibility should apply to any findings against the governments and agencies and/or instrumentalities involved.

The several positions taken by the United States, on the other hand, appear difficult to reconcile. In many instances, during the early stages of the Tribunal's work, the United States argued that the Tribunal was created by treaty and was therefore, 'a creature of International Law,'⁷³ and further that the United States government was presenting claims 'in continuance of the exercise of diplomatic protection of its nationals, acting as *parens patriae*, trustee, guardian and representative, and on their behalf.

By the time of the proceedings in case *A-18*, the government of the United States adopted the position that 'the general character of the Tribunal does not support Iran's position that the Tribunal's function is to exercise by state of diplomatic protection, and that Iran's assumption concerning the nature of the Tribunal is unfounded.'⁷⁴ Iran and America had clashed over the nature of the Tribunal. In fact the problem of the nature of Tribunal is rather controversial. Some writers like Rahmatullah⁷⁵ Khan, believed that the Iran-U.S

claims Tribunal is international or interstate because the Tribunal is based on a treaty. David Caron thinks that the tribunal is private because the majority of claims involve multinational corporations and companies. He argued that the states have stepped into to support their corporations and private individuals.

David Lloyd Jones concluded 'A number of important questions as to the nature and function of the Iran-United States claims Tribunal, and the standards and rules it is to apply remain unanswered. As far as the nature of the Tribunal is concerned, that urgent need was never met. Therefore, the Tribunal has come under severe criticism from the legal community for not being on the right legal path. The core of the point is just here: if an 'extremely viable method of international dispute resolution 'has been 'tainted' by the Tribunal, it has been so for greater causes, namely (1) International peace and security. (2) To normalize Iran-U.S relations.

All of these considerations with respect to the function of the Tribunal, that is, the unanswered questions regarding the standards and the rules, severe criticism for not being on the right legal path and perhaps more might have been sacrificed for the sake of international peace and security. Viewed from this perspective, the Tribunal must be regarded as an important mechanism functioning as a subsidiary of the United Nations.

Each school of thought attempts to look for some specific governing law. They are either concerned with what law the arbitrators must apply in the Tribunal or 'what positions will be taken by various legal systems' as to the enforceability and validity of the Tribunal's awards. ⁷⁶ For them, the ultimate goal is to choose the applicable law. This is a narrow definition of the nature of the Tribunal as an institution that, according to the same lawyers, has been highly politicized. The history of International arbitrators in general and that of the Iran-United States claims Tribunal in particular records that almost all arbitrators and lawyers, alike, by approaching the facts before them in the same manner, fail to perceive the relationship between underlying structural and political causes.

As already mentioned in this chapter, there has been an academic debate over the 'nature of the Tribunal. In the absence of an express wording of the Algiers Declarations on the nature of the Tribunal and due to the lack of an agreement on such nature, one might conclude according to the foregoing analysis that the nature of the Tribunal is mixed because there are both private and interstate claims. It is also mixed because of its both legal and political aspects.

Practically speaking, there are many government-to-government cases before the Tribunal the amount of which involves billions of dollars. In addition, the Algiers Declarations, and the Technical Arrangements and the financial instruments were signed among several states including Iran, U.S.A., Algeria, the Netherlands and the United Kingdom. All these support the position that the Tribunal's nature is interstate. If so, from a theoretical perspective, realism is right. This will have dramatic consequences for the Tribunal's functions. As the cases indicate, conflict prevails over cooperation and issues become much more politicized. Granted that Iran and the United States have had serious conflict in international relations, the Tribunal has not been immune from this standoff. The mere fact that the Tribunal has had a slow pace, operating for almost thirty years suggests, in addition to its voluminous work, the gravity and magnitude of mutual hostility. The reality that Iran and America wanted to have this last chapter of their relations open in the absence of diplomatic relations is one thing, the fact that they failed to adhere mutually to, like the U.S.-Mexico Claims Settlement, a lump sum settlement mechanism is another. As a matter of fact, initially when the Tribunal started its work, the overall legal issues were handled by Iran's Central Bank. As soon as the Algiers Coordination Office (later changed its name to BILS) was established and the Office of Prime Minister took the responsibility, the whole scenario was politicized. The Tribunal became a second battle front against imperialism, the first front being Iran-Iraq War.

To argue that the nature of the Tribunal is interstate will deny the fact that many of the actors are non-state. Apart from the actors, the issues considered by the Tribunal fall mostly within the ambit of private law. Accordingly, it is safe and fair to argue that the nature of the Tribunal is mixed, having before itself both state and non-state actors, employing both public and private laws. The origins of such laws- whether public or private- date back to certain social norms and values. For instance, there has been a compelling force to pay some remedy for the damage done to someone. More importantly, the payment must not be delayed because in all social systems delay is the enemy of justice. This position is supported in both Iranian and American cultures. It is rooted in legal culture and legal ideology. As a result, a close scrutiny of the motives and behaviours of actors would suggest that all of them did intend to cooperate. Their motivation and behaviour were culture oriented. However, I would not argue that cultural conflict or cooperation can take place in vacuum. I have argued that both material motives as illustrated by realism as well as cultural motive as noted by Bull have been taken for granted by the Tribunal because its nature requires the Tribunal take such a course of action.

Having examined the character of the Tribunal, I must now proceed with the first chapter on the problem of conflict in which the Tribunal's function will be analyzed by the way it handles one of the most controversial issues at the Tribunal, namely, the problem of conflict between America and Iran over arbitrators who sit as judges to decide on conflicting issues. The battle has been so fierce that not only the judges are fired but also the integrity of the Tribunal itself, at least for a couple of months is endangered.

Notes

¹ Ted Stein, "Jurisprudence and Jurists Prudence: The Iranian forum Clause decisions of the Iran-U.S claims Tribunal" 78, *AJIL* 1, (1984) 35, 37, 51

² Richard B. Lillich, *the Iran-United States Claims Tribunal 1981-1983* (Virginia: University Press of Virginia, 1984) 76

³ Mervyn Frost, *Ethics in International Relations, A Constitutive Theory*, (Cambridge: Cambridge University Press, 1996) 138.

⁴ J.G. Merrills, *International Dispute Settlement*, (Cambridge: Cambridge University Press, 2005) 91

⁵ For general reference see J.G. Wetter, *The International Arbitral Process Public and Private*, 5 (New York, 1970), for an outstanding collection of cases and materials, see J.L. Simpson and H. Fox. *International Arbitration: law and Practice*, (London: Bath Press, 1959)

⁶ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial disputes: International and English Law and Practice*. (Oxford: Oxford University Press, 2005) 33

⁷ All these elements can be found in the definition given by Fouchard, Gaillard, and Goldman, *International Commercial Arbitration* (The Hague: Kluwer Law, 1999) who describe arbitration as : 'A device whereby the settlement of a question, which is of interest for two or more persons. Is entrusted to one or more other persons- the. arbitrator or arbitrators- who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement.

⁸ United Nations, *Report of the International Law Commission. Official Records of the General Assembly*, Eight sessions, Supplement No. 9, Para., 16

⁹ W.L. Westermann, "Interstate Arbitration in Antiquity," *Classical Journal*, 1-2.5. (March, 1907) 197-211.

¹⁰ Charles N. Brower and Jeremy K. Sharp" International Arbitration and the Islamic World: the Third phase," *American Journal of International law*, 97 (2003): 643-656

¹¹ *Treaty of Amity, Commerce and Navigation between Great Britain and the United States*, signed on 19 November 1794, in J.B. Moore, *History and Digest of the International Arbitration to which the United States has been a party*, 1,(Washington 1898): 270

¹² This analysis is based on Simpson and Fox, *International Arbitration: Law and Practice*, 8-16.

¹³ 'Alabama Claims Arbitration of 1876,' William W. Bishop, Jr. *International Cases and Materials* (Boston: Little Brown & Company, 1953): 1023

¹⁴ Simpson and Fox, *International Arbitration: Law and Practice*, 12.

¹⁵ The Convention for the Pacific Settlement of International Disputes of 1907 provides that of the two arbitrators appointed by a party to a dispute, only one can be its national or chosen from among the persons selected by it as members of the permanent court. Article 53 of part III empowers the permanent court to settle the compromise if the parties so agree on certain conditions on the application of one of the parties.

A new part IV in the convention of 1907 provides for arbitration by summary procedure. Under these provisions, the Tribunal consists of three members who have power to settle the time-limits within which the parties submit their cases, and the proceedings are entirely in writing. This procedure was invoked in the *Dreyfus Brothers Case* (France and Peru)

¹⁶ *Pious Fund Case (United States and Mexico)*, *Venezuelan Preferential Claims Case* (Germany, Italy, United Kingdom and Venezuela), *Japanese House Tax Case* (France, Germany, United Kingdom and Japan), and *Muscat Dhows Case* (France and United Kingdom). In all these cases, the issues were of secondary importance.

¹⁷ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, (Oxford: Oxford University Press, 2005) 43

¹⁸ For further details on the Permanent Court of Arbitration, See: <http://Pca-cpa.org>

¹⁹ See Oppenheim, II, (7th ed, 1952) 39-41 for a list of matters resolved under the 1889 Hague Convention.

²⁰ Principle 26 states: states shall resolve all their environmental disputes peacefully and by appropriate mean in accordance with the charter of the United Nations. Also see Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, 2005, 44.

²¹ Simpson ad Fox, 16

²² Andrew Tweeddale and Keren Tweeddale, 42

²³ Andrew Tweeddale and Keren Tweeddale, 42

²⁴ ADR techniques fall into two discrete types. Those which seek to persuade the parties to settle and those that provide a decision where a decision is given then that decision may be binding on the parties, it may have an interim binding effect or may simply be a recommendation that the parties can accept or ignore.

²⁵ Andrew Tweeddale and Keren Tweeddale 68

- ²⁶ See *American Arbitration Association (AAA) Commercial Dispute Resolution Procedures (Including Mediation and Arbitration Rules) As Amended and Effective on January 1, 1999*
- ²⁷ Andrew Tweeddale and Keren Tweeddale, 64
- ²⁸ Andrew Tweeddale and Keren Tweeddale, 68
- ²⁹ Andrew Tweeddale and Keren Tweeddale 66
- ³⁰ Andrew Tweeddale and Keren Tweeddale 66
- ³¹ Richard B. Lillich, Preface, vii
- ³² Henry T. King Jr., John A. Westberg, foreword, xi
- ³³ Davis R., Robinson, Recent Developments at the Iran-United States Claims Tribunal,” 17, (1983) 661.
- ³⁴ Frederick Tse-shyang Chen, “The Iran-United States claims Tribunal’s Application of the uniform commercial code in the economy forms case,” *Chinese Yearbook of International Law and Affairs*, 4 (1984) 137
- ³⁵ Holtzman, “Some lessons of the Iran-United States claims Tribunal in private investors abroad: problems and solutions in International Business 16-5 (J. Moss, 1988)
- ³⁶ Caron, 42
- ³⁷ Ted Stein, “Jurisprudence and Jurists Prudence: The Iranian forum Clause decisions of the Iran-U.S claims Tribunal” 78, *AJIL* 1, (1984) 35, 37, 51
- ³⁸ Richard B. Lillich, 76
- ³⁹ Stephen J. Toope, *Mixed International Arbitration*, (Cambridge: University of Cambridge Press, 1990) 282
- ⁴⁰ Jones, “The Iran-United States Claims Tribunal: Private Rights and State Responsibility,” Richard. Lillich, ed., *The Iran- United States Claims Tribunal 1981-1983* (Charlottesville: University Press of Virginia, 1984) 51, 67.
- ⁴¹ *Iranian Assets Litigation Reporter*, April, 13, 1984, 8249. By 1984, the issue of Dutch nationality of the awards had arisen. Lagergren said the Tribunal awards are international awards. They are not Dutch awards.
- ⁴² Ted Stein 78, *AJIL* 1, (1984) 18
- ⁴³ Ted Stein, 78, *AJIL*, 1, (1984) 49, 35
- ⁴⁴ Rahmatullah Khan *The Iran-United States Claims Tribunal: controversies, cases and contribution* (Dordrecht: Martinus Nijhoff & Boston, 1990) 89, 90.
- ⁴⁵ Rahmatullah Khan, 93
- ⁴⁶ Stephen J. Toope, 263-292.
- ⁴⁷ L. Hardenburg, “The Awards of the Iran-U.S Claims Tribunal seen in connection with the law of Netherlands,” *12 International Business law* (1984) 337
- ⁴⁸ Albert Jan Van Den Berg, “Proposed Dutch Law on the Iran-U.S claims settlement Declaration: a reaction to Mr. Hardenberg’s Article,” *12, International Business Law*. 341 (1984)
- ⁴⁹ Caron, 62
- ⁵⁰ Caron, 46, 117
- ⁵¹ Von Mehran, “The Iran-US Arbitral Tribunal” 31, *AJCL* 729 (1983) 729
- ⁵² Richard B. Lillich, ‘Preface,’ vii, vii
- ⁵³ James P. Rutherford, *Iran Crisis and International Law: Proceedings of the John Basset Moore Society of International Law Symposium on Iran*, (Virginia: 1980.) 3.
- ⁵⁴ Isaac Dore, *The UNCITRAL Framework for (Arbitration in Contemporary Perspective* (London & The Hague: Martinus Nijhoff, 1993) 53.
- ⁵⁵ United States, Presidential Executive Order 12170, 14 November 1979, 44. fed, Reg, No 222, (1979) 65729, reprinted in (1979) 18 *ILM* and subsequent regulations reprinted in (1979) 18 *ILM* 1552-6. Estimates of the value of the frozen Iranian Government assets ranged from eight billion to twelve billion U.S dollars.
- ⁵⁶ Claims Settlement Declaration
- ⁵⁷ Toope 267
- ⁵⁸ President Gunnar Lagergren, Judge Nils Mangard, Mr Howard Holtzman, Mr Charles Brower and M. George Aldrich interviewed by Stephen J. Toope. See Toope, 269-70.
- ⁵⁹ Toope
- ⁶⁰ *Case A-18*, 6 April 1984, reprinted in (1984) 23 *ILM* 489 (Iran-U.S CT); and *Iran-U.S CTR*, 5 (1984) 251
- ⁶¹ See, ‘Letter from Mr. Eshragh to Legal Adviser’s Office, Ministry of Foreign Affairs, the Netherlands regarding the applicability of Netherlands Arbitration Law to the Awards of the Tribunal,’ undated, reprinted in *Iran-US CTR*, 5 (1984) 405 (Mr Eshragh was the Iranian Agent before the Tribunal)
- ⁶² *Case A-18*
- ⁶³ *Case A-18*, Dissenting opinion of the Iranian Arbitrators, *Iran-US Claims Tribunal Reports*, 5, (1984) 275

- ⁶⁴ *E-Systems Inc V. The Islamic Republic of Iran, Iran-US C.T.R. 51*
- ⁶⁵ Selby and Stewart, ‘Practical Aspects of Arbitrating claims before the Iran- United States Claims Tribunal,’ *International Lawyer*, 18 (1984) 211.
- ⁶⁶ *Case A-18: Dissenting opinion of the Iranian Arbitrators*
- ⁶⁷ “Statement of the Prime Minister of Iran,” 428-9
- ⁶⁸ *Iranian Assets Litigation Reporter*, November, 20, 1981, 3, 843
- ⁶⁹ *Iranian Assets litigation Reporter*, January 1, 1982, 4. 074
- ⁷⁰ Holtzmann’s Dissent, Awards 56-15-1, 48-19-1, 54-387-1
- ⁷¹ Arthur Rovine, Remarks, *ASIL*, 76, (1982) 1,5
- ⁷² “Decisions of the Iran-United States Claims Tribunal,” *ASIL*, Proceedings, (1984) 226.ff
- ⁷³ Statement of the United States Agent (Arthur Rovine) in the hearing of 10 January 1983, *E-systems, Inc. and the Islamic Republic of Iran*
- ⁷⁴ *Case A-18*
- ⁷⁵ Rahmatullah Khan, 79
- ⁷⁶ Caron, for example claims that he ‘is not concerned with what law the arbitrators must apply, but considers what positions will be taken by various legal systems regarding the validity and enforceability of the arbitrators conducted before the Tribunal. Ultimately, however he satisfies himself with Dutch law.

Chapter five

Conflict over Judges

I Introduction

What are the underlying causes of conflict over judges at the Tribunal? Why has Iran repeatedly challenged the third country arbitrators while the United States has tried to keep the same judges in office and sustain the status quo at the Tribunal? Why have Iran and the United States failed to agree upon the appointment of the third country arbitrators (also called neutral or impartial arbitrators)? Why does the United States favour European arbitrators whereas Iran has pushed for hiring judges from developing countries? In cases where America and Iran fail to agree upon the third country arbitrator, under the Tribunal rules, the appointing authority is requested to appoint unilaterally an impartial arbitrator. Why has Iran, in the said cases, voiced objections to the appointments made by the appointing authority? Similarly, why are almost all neutral judges frustrated by the atmosphere of the Tribunal? Apart from impartial arbitrators, why have there been numerous resignations, and replacements of Iranian and American appointed arbitrators?

In an attempt to respond to the foregoing questions, this chapter seeks to demonstrate that *firstly* there has been and still is a clash between Iran and the United States over material incentives and cultural values. Furthermore, the clash has been in the two countries' relationship on the international level, and that the gravity of conflict has been so high that the Tribunal has been affected by it especially in the early years. *Secondly*, this conflict has taken place in a state of disparity between American and Iranian legal sources of power, and of legal expertise at the Tribunal.

The term 'challenge' as used in this chapter has two meanings. (1) The term is used to connote all the patterns of a counter-strategy of the Islamic Republic of Iran vis-à-vis the United States of America within the Tribunal. The Tribunal is viewed in the eyes of Iran as a second battle front against 'the Great Satan'. Mir Hussein Musavi the then Prime Minister

of Iran has said that " The anti arrogant nature of the Islamic revolution dictates that we should be ready to *fight on every front* that the superpowers have opened up in the contemporary world. Today, no country is as steadfast against the plots hatched by the great Satan, America, as Iran, and America has never been subjected to so much misery and disgrace by any other nation. If the oppressed and deprived peoples of the world consider the Islamic Republic the forerunner of their struggles against arrogance, it is due to the sincerity and lack of compromise of our revolution on all the arenas of conspiracy and corruption by the superpowers...by *signing the Algerian accord*, America...entered another *battlefront*."¹ (Emphasis added) Accordingly, Iran has challenged a number of verdicts rendered by the Tribunal against Iran. This has taken place in the form of dissenting opinions by Iran appointed arbitrators at least.

Iran viewed the Tribunal, at least in the early years, as a political instrument dominated and manipulated by American power. Several documents filed with the Tribunal by arbitrators indicate Iran's dissatisfaction with the proceedings. The conflicting position of Iran is evident in the cases of dual nationality, expropriation, and interim measures. (2) The second sense in which the word "challenge" is used here is in a more specific sense provided for in the Tribunal Rules, where the term 'challenge' signifies the submission of a legal brief—an objection letter called 'challenge' to disqualify an arbitrator for his impartiality-- by one party against any of the nine arbitrators.

In this chapter, I will describe the role of the American power with respect to the selection and conduct of arbitrators. I will show, in between 1981 and 2007, how the United States was in a stronger position at the Tribunal and how Iran challenged that position. This has been and still is a cultural clash between Iran and America. Iran came to revolt against the superpowers, particularly after the hostage crisis that resulted in Iran's international isolation. The United States used its influence to contain Iran's revolt against the dominant international social norms. America feared that the Soviets might seize the moment.

As an immediate reaction at the international level the Carter Doctrine² was initiated to contain Soviet opportunism and to ensure the stability of the system. From the perspective of long term U.S. policy toward Iran, the Algiers Accords were drafted and subsequently the Iran-United States claims Tribunal was established not only to release American hostages and redeem U.S. nationals, its entities and corporations, but also to gradually socialize Iran within the international society of states. The 'battlefront' at the Tribunal started in the early years when the Tribunal started to issue verdicts in several politically sensitive cases whereby a series of challenge to arbitrators began. First I review the challenge provisions and then study Iran-US conflict over arbitrators.

Of the Tribunal Rules, Article 9 through 14 deals with the method by which arbitrators may be changed in the course of the arbitration. Article 9 to 12 regulates challenges. Article 13 governs resignation, death, and removal for failure or inability to act. Article 14 provides rules for the repetition of hearings after the replacement of an arbitrator. The early years of the Tribunal are replete with turmoil and bitter conflict, led by Iranian arbitrators apparently frustrated by the arbitral process.

II The issues of challenge, replacement & resignation

The membership of the tribunal is in fact trilateral; American appointed arbitrators, Iranian appointed arbitrators and the third country arbitrators. Wayne Map says that the actions of individual members of the Tribunal have demonstrated the tensions in a tribunal dealing with disputes between nations harbouring considerable continuing distrust and hostility toward one another.³ The divergence of attitude between the Iranian arbitrators and the United States and neutral arbitrators who have been schooled in Western legal thought and tradition caused substantial difficulty to the smooth operation of the Tribunal, particularly in the early years. It also serves to show the limitations of international arbitration in resolving acute differences between conflicting States. In relation to the membership of the Tribunal these tensions have been most evident in the following issues

to be discussed in this chapter: (a) the appointment of members, (b) challenges to members, and (c) resignation and replacement of arbitrators.

The Rules of Procedure of the Iran-United States Claims Tribunal which are a modified version of UNCITRAL Arbitration Rules, provided that the Secretary-General of the Permanent Court of Arbitration is to designate an “Appointing Authority” to appoint arbitrators. The same procedure is applicable to instances where the parties cannot agree on the appointment of an arbitrator, to replace arbitrators in cases where an arbitrator is unable to fulfil his duties and to replace arbitrators if he or she sustains a party’s challenge of an arbitrator. Since the Tribunal’s creation in 1981, there have been many challenges to arbitrators. (Iranian arbitrators Kashani and Shafeiei withdrew) All other challenges have been dismissed; some were dismissed on grounds of admissibility and some were dismissed as unfounded.

III The challenge procedure

According to the procedure, a party may challenge any arbitrator. A party may challenge the arbitrator he appointed, however, only for reasons of which he becomes aware after the appointment has been made. The claimants and respondents in cases before the Tribunal may challenge an arbitrator only on the basis of circumstances related to their particular case. The two governments may challenge an arbitrator upon general grounds that relate to several cases⁴ Under Article 11 of the UNCITRAL Rules the challenging party must send written notice of the challenge to the challenged arbitrator, the other party, and the other members of the tribunal, stating the reasons for the challenge. For example, in Mangards's challenge, Judge Moons ruled that Iran's challenge was inadmissible.

According to Judge Moons, objections to a duly appointed arbitrator are admissible only if: (a) the party intends to use the legal remedy of challenge as provided in UNCITRAL rules; and (b) the regulations set forth in Article 11 of the rules have been observed. The Appointing Authority determined that Iran had satisfied neither requirement

because its submission did not clearly state the circumstances or actual events that allegedly gave rise to disqualification. Iran therefore had not sufficiently stated a "reason for the challenge" as required by Article 11. The central requirement for a challenge under Article 11 is the 'time' element which requires the challenging party to make the challenge within fifteen days after it has received notice of the appointment or within fifteen days after the party first learns of the circumstances giving rise to justifiable doubts about the arbitrator's impartiality or independence.⁵

The fifteen- day requirement has at least an obvious purpose: to avoid late challenges calculated to cause disruption and expense. In five paragraphs and one note, Article 13 of the UNCITRAL Rules covers four events, other than challenge, that may require the replacement of an arbitrator: death or resignation of an arbitrator, his failure to act or his *de jure* or *de facto* incapacity. Article 13 provides that in each case a new arbitrator must be appointed or chosen according to the procedure applicable in the appointment or choice of the arbitrator being replaced:

In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choose of the arbitrator being replaced..... In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Artcles shall apply.⁶

The Tribunal has lived for almost three decades. Its history is full of frustration for members, not only for the third party arbitrators but also for Iranians and Americans as well, though in the last years the tensions have eased. Nearly every year at least one of the nine arbitrators left the tribunal. In almost all of these resignations political tension was a central factor. I will attempt to examine each case in brief below, but first I provide a short

list of resignations. The first resignation occurred at the Tribunal before the first case was even decided, when Iranian arbitrator Judge Enayat resigned in early 1982 to protest Judge Mangard's continued presence on the Tribunal.⁷ In 1983 Judge Bellet and Judge Sani resigned, and in 1984 Judge Mosk and president Lagergren stepped down.⁸ Judges Riphgan and Mangard left the Tribunal in early 1985; Judges Mostafavi and Bahrami in 1987. Judge Brower left in March 1988; and Judges Virally and Böckstiegel resigned effective December 1988. Judge Briner submitted his resignation as chair of chamber two and Tribunal president in May 1990. Iranian arbitrators Ansari and Khalilian resigned during the summer of 1990.⁹ Judge Ruda, was appointed on February 6, was selected as President of the Tribunal on March 7, 1991. On October 2, 1992, Judge Ruda tendered his resignation; Judge Nouri resigned 3 March 2007 Iranian and American Agents were replaced many times. Judge Ameli and Judge Aghahosseini subsequently stepped down.

Any resignation from the Tribunal presents the potential for disruption and loss of time. For example, the Government of Iran announced Judge Sani's resignation without any advance notice. The United States protested sharply, arguing that once he takes office an arbitrator, even if party appointed, cannot arrange his resignation exclusively with the party that appointed him.¹⁰ At a full Tribunal meeting the Tribunal agreed with the United States and decided that a party appointed arbitrator must present his resignation to the Tribunal itself, not to the government that it would not accept Judge Sani's resignation until a replacement was available to take up his duties, this scenario was repeated in 1987 when Judge Mostafavi resigned and left the Hague before Iran named a replacement.

This time, the two governments were able to agree to the temporary seating of an ad hoc arbitrator to hear cases until a permanent replacement was named.¹¹ The Tribunal Rules Article 15, provide for two fundamental principles of procedure: flexibility and equality. It provides that a tribunal may proceed as "it considers appropriate", as long as "the parties are treated with equality and that at any stage of the proceedings each party is

given a full opportunity of presenting his case".¹² The Rules demonstrate the drafters' belief that "flexibility" during the proceedings and reliance on the expertise of the arbitrators are; important. The drafters have granted the arbitrators broader manoeuvre by modifying the UNCITRAL rules to make it more compatible with the Algiers Declarations. Selby and Stewart have argued that Article 15 of the UNCITRAL Rules is the "backbone of the rules"¹³ because of the flexibility considerations. According to Van Hof., Article 15 contains "two of the hallmarks of arbitration ;" "flexibility during the proceedings and reliance on the expertise of the arbitrators."¹⁴ Baker and Davis point to the social dimensions of arbitration, positing that the judges have been given enough opportunity to take into account the cultural aspects of arbitration: "This was also desirable in order to allow arbitrators sufficient flexibility to accommodate the UNCITRAL Rules to various cultures and legal systems."¹⁵

In applying the Rules to its cases and circumstances, the Tribunal retained the principle of flexibility which had not been stipulated in the UNCITRAL Rules. Some critics believe that the Tribunal did not take full advantage of the flexibility granted by Article 15. In particular, the Tribunal was criticized for relative lack of imagination in developing procedures to expedite its docket. This criticism was raised, for example, in *Alcan Aluminium Ltd. V. Iracable Corp.*, in which Judge Mosk stated that the Tribunal had failed to take advantage of the flexibility.¹⁶

While this criticism is not unfounded, the Tribunal did demonstrate some flexibility in administering its large caseload. For example, in the early weeks when the submission of documents had deadlines and the Tribunal was heavy work loaded, Iranian Judge Eanayat submitted a letter and complained of the voluminous work at the Tribunal. More respite and extensions were granted to the parties after that. Without any formal authorization from the Rules, the Tribunal consolidated cases, scheduled combined briefings and hearings in related cases, invited the parties to participate in pre-hearing conferences, chose

representative cases to serve as precedents for classes of similar cases, encouraged, permitted briefs from non- parties as amici curiae, and ordered limited discovery of evidence held by the opposing party.¹⁷

Originally, the UNCITRAL Rules would have required parties to be treated with absolute equality. The term "absolute" was eliminated because the drafters were concerned that the parties be treated not only equally but also fairly, that is, what would be equal to the parties would not necessarily be fair to them and it was possible to have equality in unfairness. One draft of the Rules added the phrase "and with fairness" to the word "equality", but this was later replaced by the more precise phrase guaranteeing each party the full opportunity to present his case.¹⁸

IV Composition

Current members of the Tribunal are: Krzysztof Skubiszewski (President and Chairman, Chamber Two), Mir Hossein Abedian Kalkhoran, George H. Aldrich, Gaetano Arangio-Ruiz (Chairman, Chamber Three), Bengt Broms (Chairman, Chamber One), Charles N. Brower, Gabrielle Kirk McDonald, Hamid Reza Nikbakht Fini, Jamal Seifi. As already mentioned, immediately following the revolution in Iran a number of claims were pending before Iran and U.S federal courts. The Algiers Declarations were signed on January 19, 1981. Iran and the United States appointed their members of the tribunal in the course of April 1981, and they met each other for the first time in the Peace Palace in The Hague on 18 May 1981. American and Iranian arbitrators (Judge Howard M. Holtzman, Judge George H. Aldrich, and Judge Richard M. Mosk, the United States Mr. Aurthur Rovine as Agent; Judge Seyyed Hossien Enayat, Judge Mahmood Kashani, Judge Shafi Shafiei for the Islamic Republic of Iran and Mr. Mohammad Karim Eshragh as Agent) began meeting in an effort to agree on the selection of third party panel members.

After two full weeks of closed-door meetings at the Hague- the arbitrators failed to agree on the third country judges. Iran wanted to agree upon arbitrators from developing

countries but the United States pushed for European judges. On June 9, after three full weeks of meetings, Justice Pierre Bellet of France, (Judge Bellet was a former chief Judge of the Court de cassation, the highest court in France). Justice Gunnar Lagergren (he was a member of the European Court of the Realm of Sweden), and Justice Nils Mangard were appointed by the American and Iranian arbitrators.

The Tribunal held its first session, which was open to the public, on 1 July 1981. While the first meeting was strictly formal, the Tribunal turned promptly to work on necessary organizational and financial issues, in particular the modifications to be made in the UNCITRAL Rules and a determination of *per diem* fees for the members and the funds to be advanced by certain dates by each Government to cover the costs of the Tribunal. The two agents reported to the Tribunal on their agreement on certain matters, including the official languages of the Tribunal-English and Persian (or Farsi)-and the period during which claims could be filed with the Tribunal- 20 October 1981 to 19 January 1982. The Tribunal also hired its first staff members, Ambassador Christopher Pinto of Sri Lanka as its Secretary General and Hendrik G. Heuzeveldt of the Netherlands as Registrar.¹⁹

The Tribunal quickly decided that all private claims would be assigned to chambers and that the full Tribunal would deal with disputes or questions as to interpretation of or compliance with the Algiers Declarations and with official claims, that is, claims by one of the two Governments against the other arising out of contracts between them. The Tribunal also decided that the President would have the right to transfer cases from one chamber to another and that a chamber could, if it so wished, relinquish Jurisdiction to the full Tribunal in any case where an important issue was raised or where resolution of an issue might result in inconsistent Decisions.²⁰

During the last months of 1981 the Tribunal continued its painstaking review and modification of the UNCITRAL Rules, decided upon its own salaries and costs, began to hire staff, including registry personnel, law clerks, and secretaries, made arrangements to

lease its own office building, and held its first hearing to hear argument in an interpretative request filed by Iran, case No .A/2. On December 15, the Tribunal heard arguments, on the issue in case A/2 (Iran's request for interpretation of the Accords to decide whether or the Tribunal had Jurisdiction over claims by the Government of Iran against U.S. nationals).²¹

The Tribunal issued its Decision in that case on 13 January 1982 which revealed the inherent logic of inequality in the Algiers Declarations.²² The majority ruled that, under the Algiers Accords, Iran could not bring claims against American citizens: "it is decided by a majority of 9 votes to 3 that the Iran- United States claims Tribunal has no jurisdiction over claims to be filed by the Islamic Republic of Iran against United States citizens".²³

In their dissenting opinion the three Iranian arbitrators wrote that Accords were signed between Iran and America with "equal sovereignty. The principle of equality of States requires that in a sole tribunal the right of pleading and access equally exist for both sides".²⁴ Iranian arbitrators pointed to the principle of reciprocity as the main cause of the mutual obligation of the two sovereign states.²⁵ The wording of their dissenting opinion echoed Hedley Bull's interpretation of the term sovereignty: In international relations the most widespread value and sanctified principle is sovereignty, which is the constitutive principle of the present international system: "the idea of sovereignty was bound up with a doctrine of 'natural rights of states' and of rights of self-preservation which were in effect a denial of the idea of 'international society'".²⁶

V Challenge to Judge Mangard & Judge Enayat's resignation

January 19, 1982 was the last day for filing claims. In the beginning of 1982, the tribunal had found its offices, had received most of the claims, and had largely concluded its modification of the UNCITRAL Rules. It was also "discovering that co-operation by the Iranians could not be taken for granted."²⁷ Before signing any award in his Chamber, Judge Mangard reportedly had made remarks concerning the impartiality and operation of the Islamic court system in Iran and Iran's justice system. He reportedly had made remarks

concerning executions in Iran. Iran informally argued that such statements could raise questions about the jurist's own impartiality, and "wanted to settle the case privately, and without legal action, and Mangard refused to resign."²⁸

On 28 December 1981, Judge Mangard was presented with a letter signed by A.F. Kashani of the Iranian Bureau for Co-ordination and Implementation of the Algerian Declaration (renamed later The Bureau for International Legal Services of the Islamic Republic of Iran, BILS), the office in the Hague that supported the Iranian Agent and prepared some of the Iranian filings with the Tribunal. The letter asked Judge Mangard to resign to avoid recourse to the challenge procedure on the ground that he had condemned executions and thereby had prejudged the Iranian political system. Apparently Judge Enayat had told the Bureau that, in the course of a conversation during a coffee break at the Peace Palace, Judge Mangard had made some reference to the fact that Iran had conducted a number of executions since the Revolution.²⁹

The Iranian agent sent a letter to Judge Mangard, with copies to the other members of the tribunal and the American agent, telling Judge Mangard that Iran 'hereby disqualifies' him. The United States Agent refused to accept this challenge to Judge Mangard, and the Full Tribunal discussed the matter at its meetings on 11 and 12 January 1982, in the absence of Judge Enayat and, for the most part, of Judge Mangard. On the 12th, The tribunal decided, first by six votes in favour that it had the power to take decisions in the absence of judge Enayat; secondly, by five votes in favour (Judge Mangard abstaining) that it had the power to adopt by vote a specific decision about Iran's action.³⁰

Iran argued that such statements could raise questions about the Jurist's own impartiality, and "wanted to settle the case privately, and without legal action, and Mangard refused to resign."³¹ The United States used the opportunity and backed Mangard. Judge Kashani and judge Shafiei wrote "we believe that this arbitration process is completely unprecedented in the history of international relations, not only due to the enormous cases

pending before the Tribunal but also because of the political and strategic significance of the matter....We believe the two Governments have in good faith decided to settle their disputes.³²

In fact, both Iran and the United States were aware that they had started a highly sensitive chess-like game. In a letter to Mangard, Iran said his remarks constituted "a groundless prejudgment against a political system whose acts will be brought before you for evaluation and neutral decision. Such political approach on your part morally and legally disqualified you from rendering any fair judgment in connection with acts attributed to the Islamic republic before this tribunal."³³ Iran's judge Enayat resigned from the panel to protest the refusal of Mangard to step down.³⁴ The Full Tribunal in *Re Judge N.Mangard* (Lagergeren, President signed 15 January 1982) considered Iran's challenge to Mangard and rendered its 'Challenge Decision' as follows:

(a) It is decided that, consistent with the Claims Settlement Declaration, the only method by which an arbitrator, once appointed, may be removed from office is through challenge by High Contracting Party and Decision by the Appointing Authority pursuant to Articles 10-12 of the UNCITRAL Rules. It is also decided that the letter of 1 January 1982 and its enclosure from the Agent of Iran to Mr. Mangard constitute a challenge to Mr. Mangard by the Islamic Republic of Iran pursuant to Article 11 of the UNCITRAL Rules.

(b) The foregoing decision of the Tribunal does not deal with questions to be considered by the Appointing Authority, such as *Inter alia*, the validity or timeliness of the challenge.³⁵

In 28 December 1981, Iran informed judge Mangard that the Iranian government no longer believed in his neutrality to "judge on sensitive political issues before the tribunal and wanted to remove judge Mangard on political grounds."³⁶ In a Separate opinion of Mahmoud M. Kashani and Shafie Shafeiei to the Tribunal, Kashani and shafeiei argued that

"The unwarranted decision of the Tribunal could also seriously influence and impede the proper decision to be taken by the Secretary-General of the permanent Court of Arbitration as to whether or not he should proceed with the procedure of designating the appointing authority"³⁷

In his letter dated 7 January 1982 to the tribunal, the U.S. Agent "responded and disagreed with Iran's positions."³⁸ On January 11 1982, the Agent of Iran sent a letter to the president of the tribunal in which he stated that Iran's letter's of 28 December 1981 and 1 January 1982 and a previous note of 7 January should be regarded as "the official challenge" of Judge Mangard.

The tribunal held that Iran's letter of 1 January 1982 and its enclosures indeed constituted "a challenge to Mr. Mangard" but decided that "the only method by which an arbitrator, once appointed, may be removed from office is through challenge by a high contracting party and decision by the appointing Authority pursuant to Articles 10-12 of the UNCITRAL Rules."³⁹ Not only did Iran's attempt to disqualify judge Mangard establish the precedent that the unauthorized absence of a party-appointed member did not prevent the tribunal from acting and all of the members appointed by the other party from voting, it also resulted in the appointment by the Secretary General of the permanent Court of Arbitration, pursuant to Article 6 of the UNCITRAL Rules, of the chief judge of the Netherlands Supreme Court, Charles Moons, as Appointing Authority of the tribunal. This was an important appointment. On a number of occasions throughout the subsequent history of the tribunal, judge Moon's Decisions were essential to the continued viability of the Tribunal.

In the case of the challenge to Judge Mangard, Judge Moons held Iran's objections to Judge Mangard 'not admissible' as not stating the reason for the challenge within the meaning of Article 11 of the UNCITRAL Rules.⁴⁰ By the time the challenge to Mangard was being considered, the Tribunal had faced certain critical questions as to whether or not Iran could collect interest from the Security Account, whether it could use the account to

pay settlements, and who should pay and indemnify the Dutch Bank for the service it rendered as the Account's custodian. These issues too brought further conflict, like the case of the Security Account which will be discussed in the next chapter.

The Tribunal did not attend to the problem of the challenge to Mangard and to the underlying principle of equality that was to appear later in dual nationality and forum selection cases. As for the problem of equality, the Tribunal's jurisdiction was limited because the Algiers Accords themselves are discriminatory and the two states are not seen as equal. For instance, the United States nationals can bring claims against the state of Iran but Iranian nationals cannot do so, that is to say, Iranian nationals are not allowed to bring claims against the United States Government. In fact, this is a one way street.

When in *Case No. A-2* the Tribunal decided that it had no jurisdiction over claims by Iranians against America, Iran withdrew a number of claims. Americans, in order to justify this inequality, have relied on the fact that "Iran could, of course, file counterclaims against US claimants if the counterclaims arose out of the same contract, transaction, or occurrence as the claims, but Iran could not claims against persons who brought no claims or pursue unrelated counterclaims or setoffs against those who did"⁴¹ The slow pace of the Tribunal in this period led the U.S. arbitrators to file strong protests. In *R.J. Reynolds Tabaco Company, Case No35*, Mosk wrote, to delay the resolution of should not be granted simply because a request for one is made."⁴²

VI Physical attack on Judge Mangard

The Iranian members and the Iranian agent had made it plain on many occasions that they were opposed to the Tribunal's decisions on resignations, including the Mosk Rule (the rule ensures at least with respect to voluntary resignations, that hearings will not need repetition since the resigning member will stay through the original hearings), and were very unhappy that presiding members could be appointed without their consent or, indeed could remain in office once they became dissatisfied with them. They disliked Judges

Mangard and Riphagen intensely, and they demonstrated their feeling on many occasions, yet they had not been successful in inducing them to resign.

Moreover, Iranian efforts to persuade the Central Bank of Algeria to refuse to authorize payment from the Security Account of certain Awards (e.g., to dual nationals or when the Iranian Judge refused to sign the Award) had proved unavailing, and their efforts to attack some Awards in Dutch courts had been abandoned after the Second Chamber of the Dutch Parliament had passed legislation in early 1984 that would have limited considerably the bases for any such challenges. As discussed previously, a number of the Tribunal's awards were harshly criticized by Iranian arbitrators and an attempt was made to challenge the awards before the Dutch court. The Dutch drafted a bill that was challenged by high-ranking Iranian authorities. Mir Hussein Musavi, the Prime Minister of Iran commented on the issue, saying that "At present, American influence on the court of Justice has reached a sensitive stage, and the judgement by the court casts serious doubts on its impartiality. The Netherlands Government has presented a bill to the parliament which, will influence the Court of Justice in favour of America ...The Hague Court of Justice has issued verdicts contrary to the Algerian statement and to the principle of international law"⁴³

The Iranian rhetoric in deliberations had become increasingly insulting to Americans-particularly in the heated Full Tribunal deliberations on the dual national issue in *Case No. A18*.⁴⁴ However, The Islamic Republic of Iran's expectations regarding what had happened in the *Case No. A18* and the Judge Mangard issue one by one received dusty answers within the Tribunal. The consequence of repeated rejections and denials had to be psychologically expressed some how, some where and sometime. As sensible as that approach might have sounded to any fact-finding academic, it was hardly the sort of message that the American and third country Tribunal members wanted to hear as they packed their bags to suspend the Tribunal. They failed to properly manage the old problem only to draw the institution into an unprecedented crisis that occurred on September 3, 1984

as a result of the alleged physical attack on Mangard by two Iranian arbitrators Kashani and Shafiei, a crisis that had its roots in the old Mangard episode. One American source wrote:

Iranian Arbitrators Mahmoud Kashani and Dr. Shafei Shafeiei physically attacked Arbitrator Nils Mangard of Sweden in the hall of the Iran-U.S. claims Tribunal in the Hague on Monday, (shouting, that he was not fit to be an arbitrator and did not have the confidence of Iran...Witnesses one arm behind his back and yelled that he had no right to attend the Tribunal meeting.) As they shouted, Shafeiei reportedly pummelled Mangard in his ribs and on his back...A call was made to the local Dutch police, who arrived and escorted Mangard out of the building ⁴⁵

John Crook, the US Agent in his letter of 3, September 1984, wrote to Iranian Agent "I am writing to express the shock and distress of my Government at this morning's vicious physical attack on a member of the Tribunal by Mr. Kashani...by Mr. Shafeiei". The American Agent then referred to previous mutual constructive discussions regarding the political climate of the Tribunal saying that "You and I have spoken before of the destructive effect of violent and coercive language on the atmosphere of the Tribunal"⁴⁶

The US Agent in a lengthy memorandum attached to his letter challenged Iranian Arbitrators Kashani and Shafeiei. The challenge itself seemed to be a legal document certainly recording a precedent in international arbitration. The US Agent provided (I) a factual basis for challenge, (II) legal basis for challenge (III) conclusion in which he argued "this challenge to arbitrators Kashani and Shafeiei should be sustained". In the factual basis for challenge he wrote:

On September 3, 1984, Mssrs. Kashani and Shafeiei physically attacked Mr. Mangard in the entry hall of the Tribunal premises a few minutes before the start of a scheduled meeting of the full Tribunal. The attackers shouted in English that they intended to eject Mr. Mangard bodily from the Tribunal and so prevent him from sitting as an arbitrator. The attack took place at approximately 9:30 a.m. Witnesses reported that Mr.

Kashani and Mr. Shafeiei appeared to be waiting for Mr. Mangard as he descended the Tribunal stairs on his way to the scheduled meeting. When he walked within their reach, they began to yell at him, grabbed him, and began to force him towards the Tribunal's main door. Mr. Kashani held Mr. Mangard at the throat by the necktie and was twisting the necktie and shaking his victim....Mr. Shafeiei was beating Mr. Mangard on the back with his fist.⁴⁷

On 5 September 1984, President Lagergren issued presidential order No. 27 in which he determined that a situation exists in which the conduct of arbitration in an appropriate manner is, for the time being, not feasible and postponed all proceedings: "Taking into account certain disorderly events...and circumstances preceding them and subsequent thereto; ...I postpone all proceedings...until...subsequent orders"⁴⁸ The president also sent a letter to all members of the Tribunal and the two agents in which he said the use of violence was, utterly alien to the spirit of arbitration and that such an incident should not have occurred, and must not be allowed to recur. He said the incident "appears to be without precedent in the history of international arbitration."⁴⁹

On 6 September 1984, the Iranian arbitrators wrote to President Lagergren, referring to his letter of 5 September. They argued that Lagergren had not given a correct account of the incident: "At least, however, you have alluded in your letter to the underlying causes of this event". Iranian arbitrators posited that "in abusing its mandate, this Tribunal has been guilty of inflicting irreparable injustices upon Iran. They argued that analysis of the decisions and awards issued clearly demonstrated just how this Tribunal had invariably extended the province of the Algiers Declarations prejudicially, siding with the United States and against Iran."⁵⁰

They further argued that the Security Account had been "misappropriated" and that "millions of dollars belonging to the Iranian nation- a third world country- have been

illegitimately and illegally paid to American claimants." They reasoned that Mr. Mangard, more than anyone else, had been the cause of these illegal payments. They argued that a couple of times Iran's Agent had met with Mr. Mangard. One of the meetings had taken place in Sweden:

Analysis of the decisions and awards issued clearly demonstrates just how this Tribunal has invariably extended the provisions of the Algiers Declarations prejudicially, in the interests of the United States and against Iran. The fund deposited by the Islamic Republic of Iran as a security deposit for payment of Tribunal awards has been misappropriated, so that millions of dollars belonging to the Iranian nation-a third world country- have been illegitimately and illegally paid out to American claimants by Chambers Two and Three in an unjust manner. Mr. Mangard, more than anyone else, has been the causes of these illegal payments. Three years ago, at the outset of this Tribunal's work, the government of the Islamic Republic of Iran and the Iranian Arbitrators noted that Mr. Mangard was entirely unfit to perform this historical and momentous assignment. He is a totally weak, incapable, and unlearned person. He has neither independence nor character, and he has totally hostile feelings specifically directed against the Islamic Republic of Iran. ...The Agent of the Islamic Republic of Iran once more requested, with the greatest of respect, that Mr. Mangard, under those circumstances refrain from continuing to serve at the Tribunal In response Mr. Mangard began to weep, stating that the position of the Iranian Government in Case Nos. A-18 and B-1 was very good and that he wished to continue his work at the Tribunal for some months more, so that he could render a decision in favour of Iran in those two cases. .. Mr. Mangard's record ...has demonstrated his lack of neutrality and his total submissiveness to the wishes of the United States Government and American corporations...he has voted in favour of the United States Government...he has not taken the least part in the discussions; nor has he been able to produce so much as a single page of independent legal opinion. His activity...an affirmative vote in favour of the United States

Government, or else a negative vote to the detriment of the Islamic Republic of Iran... As a so-called "neutral" presiding arbitrator,...he proceeded in a single day to issue five awards, and to award millions of dollars in judgements against the respondent in the absence of the Iranian arbitrator...It is the conduct of the United States government that is without precedent in the history of international law, since it has brought billions of dollars in claims on its own behalf and on that of its nationals before an arbitral tribunal and at the same time has at its disposal and under its control the very presiding arbitrator who must pass judgement on those claims. ⁵¹

Kashani was subsequently interviewed by French mass media, in which commented on the Mangard episode: "we asked him only to not enter the Tribunal because he did not have the qualities of an arbitrator and had abused Iran's confidence too long. ... Mangard was at the mercy' of the American Government. The Tribunal must work because it has an historic mission to settle the differences that have placed a great progressive state of the Third World in opposition against international capitalism which is too great".⁵²

On 17 September, the United States submitted to the Appointing Authority a challenge to judges Kashani and Shafeiei. At Judge Moon's request, the Secretary General of the Permanent Court of Arbitration relieved him of the responsibility to act on that challenge in view of that reproaches made to him by Dr Kashani in letters and in the Iranian press. In an eleven page statement (the Farsi version was released on 7, October 1984) Kashani and Shafeiei said "Two of the Tribunal's presiding arbitrators have been imposed upon by the Tribunal...the American arbitrators supported the imposed Chairman of Chamber Three...In the process they even resorted to threats against us and stated at times implicitly and other times explicitly, that if we persisted in maintaining our positions, we would face dismissal. Indeed, one of the American arbitrators expressly stated to us: If you stick to your position, we are going to see to it that you are removed' " ⁵³

In the end, the crisis was resolved not by the Tribunal but the two states. The United States challenged both Iranian judges, and not long thereafter Iran withdrew them. Iran eventually named two new arbitrators, and Judge Mangard returned to hear and decide several more cases.⁵⁴ He stepped down from full-time duties in July 1985 at the age of seventy, but he continued to work on cases he had heard during his tenure, finally completing his Tribunal duties in July 1987.⁵⁵ The early Mangard and Kashani challenges were by no means the last invocations of the Rule's challenge procedures. For example, Iran considered, but ultimately did not press, a challenge to the appointment of Judge Virally as a chairman of Chamber Three because of past relationships with claimants in Chamber Three.⁵⁶ Iran also considered two challenges of American arbitrator Charles N. Brower—the first because of his former law firm's relationship to several claimants and the second because he took a leave of absence to work for three months in the White House with President Reagan. However, there have been further cases of challenges, replacements and resignations on which I shall comment, beginning with a French Bellet and an Iranian San.

VII Resignation of Judge Bellet and Judge Sani

The Iranian Judge Enayat, who had resigned over the Mangard case, was replaced by Judge Mostafa Jahangir-e-sani. President Lagergren pointed out that an arbitrator who wished to resign might normally be expected to inform the Tribunal directly and to remain with the Tribunal until the appointment of a successor.⁵⁷ In early March, Judge Enayat's replacement, Judge Jahangire Sani, arrived to take up his duties and the tribunal consequently agreed to make Judge Enayat's resignation effective as of 1 February.⁵⁸

On 1 December 1982, the third country arbitrator Judge Pierre Bellet resigned for "health reasons." He wrote to President Lagergren and asked him to accept his resignation. In the letter, he complained of the unexpectedly large number of cases before the Tribunal and the delays that were making it impossible for him to perform his work with his customary diligence and effectiveness. As a matter of fact, it has been argued that the issue

of 'delay' referred to by Judge Bellet was a wilful strategy by Iran. And Americans criticized it because 'delay' in arbitration would amount to 'inequitable results'. Iran had fixed time-limits to file its supporting documents and always asked for more extension of deadlines.⁵⁹

Apart from the caseload and the delay, Bellet had also complained about the 'scandalous behaviour' of the Iranian agent who, he wrote, 'had visited the previous evening and hold told him that signature by him of Awards without Judge Shafeiei would be an 'illegitimate action' to which his Government would respond with an 'illegitimate action' toward Judge Bellet."⁶⁰ Judge Bellet did not mention Iran's criticism and objection to what, according to Eshragh, had "become political tenor of the (U.S.) argument. Iran had accused the U.S. of politicizing the atmosphere of the proceedings a charge that also drew sharp protest from Rovine in his series of letters.⁶¹ The Americans claimed that in a letter submitted to President Lagergren, Bellet said repeated delays in proceedings prevented him from operating as efficiently as he would prefer and his resignation was further promoted by health and family reasons.⁶²

On 15 December, finally, the full Tribunal met to consider Judge Bellet's letter. The full Tribunal decided by the affirmative vote of the six members present: Accordingly, the Tribunal decided that the resignation of Judge Bellet should be effective 1 June 1983 unless the Tribunal decided, with the concurrence of Judge Bellet, (1) to advance that effective date because his successor had been designated and was available to serve, or (b) to extend that effective date in order to avoid disruption of the work of the Tribunal if his successor had not yet been designated or was not yet available to serve. Until the effective date of Judge Bellet's resignation he was to continue as a member of the Tribunal and as chairman of chamber two. The Tribunal also decided that after the effective date of Judge Bellet's resignation he should continue to serve as a member of the Tribunal with respect to all cases in which he participated in a pre-hearing conference or a hearing and for that purpose should be a member of the Tribunal instead of the person who replaced him. Iranian and

American arbitrators did not agree upon a successor to Judge Bellet. The United States asked the Appointing Authority Judge Moons who named Willem Riphagen from Holland to succeed Bellet.⁶³

As the course of events in this period indicates, serious problems had arisen in relation to the calculation of damages, costs, and interests in a few cases in chamber Three chaired by Mangard (Cases Nos. 30, 17, and 132). In the Case No. 17, Sani wrote:

I was not notified of the deliberative session which resulted in the issuance of an Award in the present case; nor did I happen to be present on the Tribunal premises and, consequently, at the meeting itself, when it was held. In my 'opinion' related to Case No.30, a copy of which I annex hereto, I have already elucidated some elements of the events which resulted in the issuance of the present Award in my absence.

Among other things, Sani in his "The award is rendered without deliberation in my absence on Wednesday 13 December 1982", provided a lengthy argument in 8 pages and argued that "At the same time that I had been requested to return to Tehran to further discuss my resignation tendered in relation to Case No.30, I was confronted by the unanticipated and surprising news that Mr. Mangard and Mr.Mosk had proceeded to issue Awards in Cases Nos.17 and 132."⁶⁴The Iranian Judge Sani wrote in Case No.30 that "I consider the decision by Chamber Three in regard to the awarding of damages and the rate thereof, to be unlawful, and I consequently refuse to sign it."⁶⁵

In case No.17, Judge Mangard and Judge Mosk rendered a ruling and added at the end of the award that "Judge Sani took part in the hearing and deliberation in this case. The Tribunal was informed that he in effect would not sign the Award, and he was not present or available at the signing."⁶⁶ Judge Sani denied it and argued that the award was rendered without deliberation and in his absence. Judge Sani argued that he was in Tehran at that time and that he was confronted by the unanticipated and surprising news that Mr. Mangard and Mr. Mosk had proceeded to issue Award in case Nos. 17 and 132". Judge

Mosk said that Sani had disregarded the tribunal Rules and ethical standards on the secrecy of deliberations and called Sani's statements "unfounded accusations." In the "Comments of Richard M. Mosk with Respect to Mr. Jahangir Sani's Reasons for not Signing the Decision Made by Mr. Mangard and Mosk in Case No. 17" [Signed 3 March 1983; Filed 3 March 1983.], Judge Mosk argued that:

First, it is a violation of Tribunal Rules and generally accepted ethical standards to attempt to divulge the deliberations of an arbitral tribunal. Article 31, Note 2, Provisionally Adopted Tribunal Rules. As one authority has written, 'Art .54(3) of the ICJ Statute, which provides that "the deliberations of the Court shall take place in private and remain secret", represents a practice of such widespread application as to be arguably a general principle of law .1.*Encyc.of Pub. Int. Law* 185 (1981)⁶⁷

In protest of such rulings in Mangard's Chamber, Iranian judge Sani tendered his resignation. The Americans argued that Judge Sani's resignation, so closely following that of Bellet, had been planned to further delay the Award in case No.30. Judge Mangard's Chamber rendered several rulings in Judge Sani's absence, appending in each case an "Explanation for failure of Judge Sani to sign Award's in which Judge Mangard and Judge Mosk relied on Article 32, Paragraph 4, of the Tribunal Rules which provides that "An Award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the Award shall state the reason for the absence of the signature

VIII Resignation of president Lagergren-January 1, 1984

On 10 April 1984, President Lagergren informed his colleagues that he intended to resign. On 27 April 1984, he submitted a letter of resignation to the Full Tribunal. The Full Tribunal accepted the resignation at its 93rd meeting on 7 May 1984 with the Iranian members once again refusing to participate in the vote and with the Iranian agent objecting and declaring the action to be in violation of the Algiers Declarations. Discussion among

the American and Iranian members proved fruitless, as the Iranians refused to consider the possibility of agreeing to a successor to Lagergren alone; they insisted that three persons must be selected and that all three chairmen be replaced, even though only one had resigned. Obviously, the American members could not participate in discussions on that basis. Consequently, on 7 June, the American Agent informed the Appointing Authority that the United States requested him to appoint a successor to president Lagergren.⁶⁸

Of the third country arbitrators, Judges Lagergren came under U.S. criticism for granting respite and extensions to Iranian Respondents from the beginning. According to a letter from Iranian Agent Eshragh to the U.S. Agent John Crook, an "intended assault on the President of the Tribunal by one of the American arbitrators took place to voice U.S. dissatisfaction. From the outset, Lagergren was blamed by the Americans."⁶⁹ In February 1984, unbeknownst to the Iranians at the Tribunal, U.S. Ambassador Bremer to the Netherlands paid a protocol visit to President Lagergren during which he reportedly voiced the distress of the U.S. government over the slow pace of the Tribunal, and especially the schedule in Lagergren's own Chamber one.

Following the meeting, U.S. officials said it was a simple courtesy visit. However, it was argued that "The U.S. has officially protested what officials feel is an extremely slow Tribunal schedule to Lagergren, and the Ambassador's visit was to reinforce that displeasure. Reportedly, the U.S. was complaining to Lagergren at every opportunity, and it had placed efforts to achieve a busier Tribunal schedule at the top of its agenda."⁷⁰ As I mentioned earlier, in early May 1984, the first meeting was held on the appointment of Lagergren's successor.⁷¹ Iran reportedly took the position that it would not discuss the choice of a successor for Lagergren until the U.S. agreed to replace the other two third-country arbitrators, Nil's Mangard and Willem Riphagen (who had replaced Bellet).⁷² As was already mentioned, Iran also strongly opposed the UNCITRAL procedure under which

Varekamp, Secretary- General of the Permanent Court of Arbitration had chosen as the Appointing Authority Charles Moons, President of the Dutch Supreme Court.

IX The Challenges to Judge Briner

The most telling, and disruptive, use of the challenge Procedures ran from late 1988- when Iran launched a seemingly endless series of challenges and protests aimed at third-Country arbitrator (and later President) Robert Briner –until 1990. In September 1988, Iran challenged Judge Briner's continued participation in a pending case, *Amoco Iran V.NIOC*. The case had already been heard and a decision was considered imminent. Iran asserted, however, that it had just learned that Judge Briner had until recently been a director and, member of the board of a Swiss subsidiary of the international investment banking firm Morgan Stanley &Co.

Employees of Morgan Stanley had been important witnesses for the claimant at the hearing of the *Amoco Iran* case before Judge Briner and Chamber Two. Iran asserted that Judge Briner's professional connections with a subsidiary of the corporate employer of the witness, as well as the Judge's failure previously to disclose that relationship to the parties, required his disqualification from that case.⁷³ In *Case No. 55, Amoco Iran Oil Co. v. The Islamic republic of Iran*, involving more than \$1.5 billion-dollar oil claim, Iran argued that because Briner was a member of the board of directors of Morgan Stanley & Co., was used to appraise the value of Amoco's holdings in Iran, amounting to \$1.57billion, he should be disqualified from the Amoco case.

A Morgan Stanley representative was a key witness for Amoco during the Tribunal proceedings. Iran argued that Briner continued to belong to Morgan Stanley & Co. and at the same time he presided over a major hearing in the Amoco case in June of 1977. Iran presented as evidence two volumes of highly confidential documents including written and oral testimony by Morgan Stanley, some of them dating back to 1958.⁷⁴ Iran said Mr. Briner's relationship with Morgan Stanley, given the circumstances, obviously raised

justifiable doubts as to his impartiality and independence and was, thus, a ground for challenge according to the Tribunal's rules and fundamental legal principles governing international arbitration. Iran also argued that Briner had breached his disclosure obligation.

Judge Briner denied any impropriety and refused to withdraw. He stated his belief that there could be no conflict of interest or duty of disclosure because the subsidiary at issue was inactive with no office or staff, because his position was largely titular and involved no contact with Morgan Stanley or any of the individuals involved in the cases, because he took steps to resign his position as soon as he was aware of the problem, and because the rules governed relationships with parties, not witnesses.⁷⁵

The United States and the U.S. Claimant saw no reason for Judge Briner to step aside, and the matter was referred for decision to the Appointing Authority, Judge Moons.⁷⁶ The problem of disclosure not only concerned Briner's former post in Morgan Stanley, but also his mother's American citizenship. In the end, before judge Moons issued a ruling, Judge Briner decided to resign from the Amoco Iran case in order not to disturb the proper functioning of the Tribunal....⁷⁷

In a subsequent case, Judge Briner disqualified himself in similar circumstances. Certain evidentiary documents had been prepared in support of the claim by a U.S. accounting firm; Judge Briner was a director of the firm's Swiss affiliate. He stated his belief that this connection gave rise to no doubts as to his impartiality, but rather than leave open "the possibility of a challenge" he announced his intention to withdraw from the case.⁷⁸ Already tense after the Amoco Iran Challenge, the Tribunal nearly broke up in the summer of 1989, when Judge Briner's Chamber issued a \$110 million award in favour of Philips Petroleum.⁷⁹

The 119- page award set a major Precedent for other pending oil claim cases, especially in its use of a discounted cash flow (DCF) analysis to evaluate contract rights that had been expropriated. This DCF analysis generated a significantly higher valuation than

would have resulted from alternate methodologies prepared by Iran.⁸⁰ Iran expressed outrage that the DCF analysis in the Philips award drew some support from the same Morgan Stanley testimony that prompted the Iranian challenge of Judge Briner in Amoco Iran.⁸¹

This sparked another bitter series of Iranian charges against Judge Briner. Judge Khalilian refused to sign the award, asserting that Briner had rejected Khalilian's request for further deliberations. Khalilian claimed that Briner, being "by nature" a businessman, "could not possibly" think about anything but capital investment and ways and means of accumulating wealth and property.⁸² He went on to claim that Judge Briner had ignored Tribunal precedent and slanted evidence in using DCF analysis.⁸³ In a supplemental memorandum dated July 18, 1989, Khalilian accused Briner of arbitrarily threatening to increase the award by 10 million if the Iranian arbitrator did not stop arguing about the draft award in the chamber's deliberation.⁸⁴

On July 1989, Iran formally requested that Judge Moons remove Judge Briner, charging the arbitrator with a "totally improper course of conduct" in the Phillips award. The United States pushed for Briner and Iran voiced its objections. The Americans argued that Briner was the only third country Judge with Tribunal experience and that he had been efficient in his chamber. Iran said he had breached disclosure obligations particularly that he was born to an American mother.

The Iranian challenge to Briner made five basic allegations:

1- That in making the awards Judge Briner consulted only the American arbitrator and used a secret memorandum from the American arbitrator to arrive at the award.

2- That Judge Briner threatened to increase the amount awarded if the Iranian Judge continued to argue about the award.

3- That because Judge Briner withdrew from Amoco Iran due to an Iranian challenge centering on the Morgan Stanley Study, Briner could not rely on that study in the Philips award;

4- That without sufficient explanation, Judge Briner had ignored Tribunal precedent against using DCF analysis in oil cases; and

5- That, Judge Briner had slanted evidence in order to maximize the value of the Award.⁸⁵

On September 11, 1989 Iran made an additional challenge, stating that it had just learned that Judge Briner made payments of \$200,000 in a "money laundry offense" in violation of the Foreign Exchange Laws of India.⁸⁶ Iran urged that the totality of Judge Briner's conduct be considered in the pending challenge. The Indian press had published lengthy documents regarding Briner's alleged involvement in money-laundering in India under Rajiv Gandhi.⁸⁷ Nobari noted:

According to the attached document, Mr. B.V. Kumar, the Chief of the India's Directorate of Revenue Intelligence, has disclosed that a certain Dr. Briner, who happens to be the same Mr. Briner presently filling the sensitive position of the President of the Iran-United States Claims Tribunal and Chairman of Chamber two thereof, has been the key element in a money laundry scandal in India. We have been informed that Mr. Briner has been the source of illegal foreign exchange payments in the amount of \$ 200,000 that foreign currency exchange has been made in violation of the Indian Foreign Exchange Regulation Act. In the attached document, the chief of the said directorate has referred to the challenged arbitrators a Robert Briner in Switzerland who has 'forked' out \$200,000 as advance payment involve in the foreign exchange offence.⁸⁸

On September 19, 1989 Judge Moons dismissed the challenge on all counts. Concerning the alleged foreign exchange law violation, judge Moons decided that judge

Briner acted in good faith. Therefore, the payments, even if a breach of Indian law did not "give rise to justifiable doubts as to Mr.Brimer's impartiality or independence" in the tribunal. Apparently, Moons did not consider Nobari's letter of September 11. On 27, September judge Khalilian wrote a letter to Moons concerning his dismissal of Iran's challenge to Briner, calling Moons decision "the most grotesque which I have come across so far".

X Judge Ansari and Khalilian resign, challenge of Judge Noori (1990-2000)

In February 1990 the claimant in the case of *Carlson v Iran and. Melli Industrials Group* lodged a challenge to the Iranian arbitrators in chamber one, Mr. Assadolah Noori on the grounds that from 1980 to 1982 he had been the General Counsel of the Organization of Nationalized Industries of Iran (NIOI), which controlled the respondent, Meli Industrial Group (MIG).⁸⁹ Carlson said. "Claimant has learned within the past 15 days that Mr. Nouri was previously General Counsel of the Organization of Nationalized Industries of Iran (NIOI)," and that this give " rise to justifiable doubts as to his impartiality or independence in deciding cases to which NIOI is an interested party and accordingly he should not be permitted to serve as an arbitrator in this case."⁹⁰ The claimant added that "should Mr. Nouri decline to disqualify himself, we reserve the right to supplement this challenge with a more detailed memorial."⁹¹

The challenge was heard by the Appointing Authority, Judge Moons and his decision was handed down in August 1990. Judge Moons noted that when Mr. Noori was appointed to the Tribunal he had disclosed to the President the case in which he had been involved as a legal advisor at the Hague branch of the Bureau for International Legal Services for Iran. He did not disclose his role as General Counsel of NIOI. However, Moons was not convinced " that Mr. Noori as Head of the NIOI legal office or as a member of the NIOI Council or in any other capacity has actually been involved in the management of NIOI or in the control of that Management by NIOI."⁹²

In the conclusion to his decision Moons noted that MIG was one of many companies under the purview of NIOI. As a result Mr. Noori had in no way been involved in case No.248, adviser to any of the respondents in this case. Accordingly Mr. Noori has wrongly been accused of having infringed article 9 of the Tribunal Rules and the challenge was dismissed.⁹³ However, he added that the challenge by the claimant in case 248 against Judge Nouri "is admissible "⁹⁴

XI Challenge of Judge Arangio-Ruiz

On 8 August 1991 Iran asked the Appointing Authority to "excuse" Judge Arangio – Ruiz for failure to perform his arbitral functions. Iran based its case on a dissent to a chamber three order filed by the Iranian member of chamber three, Judge Aghahosseini, in which he accused Judge Arangio- Ruiz of neglecting his duties as chairman of chamber three. (As early as May 1989, Mealey's litigation Reports had mentioned that Italian Judge Arangio had not been "physically present in The Hague. As a result of his inability to sever ties with his university until next September, a lot of substantive work on Awards has been prolonged or delayed...)." ⁹⁵

The United States did not accept the challenge and asserted that Iran's complaints related primarily not to a failure of action but to the way in which Judge Arangio- Ruiz had acted. In his dissent to the order of 26 July 1991 signed by Arangio, a decision denying joint consideration of expropriation claims of four claimants, all of whom claimed to have owned shares in an Iranian corporation which involved case vos.44, 46, 47, and (146).

XII Challenge of Bengt Broms

On December 19, 2000, the Iran- U.S. claims Tribunal issued a decision in case A/28, which concerned the U.S. request for an order against Iran to both replenish the Security Account used to pay Tribunal Awards rendered against Iran, and to maintain it at the required minimum balance of \$500 million until the President of the Tribunal certified that all awards against Iran had been satisfied. In paragraph 95 of its decision, the Tribunal

decided that Iran was required to replenish the Security Account promptly whenever it fell below \$500 million and that Iran had been in non-compliance with this obligation.

Judge Benget Broms- a Finish Third- party judge- issued a "concurring and dissenting opinion" in the case. In his opinion, Judge Broms commented on the Tribunal's decision by stating that Paragraph 95 in its present form was proposed by the President and did not call the members to open further deliberations and the purpose of the two sentences remains unclear. On January, 2001, the United States submitted to the Tribunal's Appointing Authority, Sir Robert Jennings who had replaced Moons, a challenge to Judge Broms on grounds that (1) there were justifiable doubts about his impartiality and independence based upon his breach of Article 31 of the Tribunal's rules of Procedure concerning the secrecy of deliberations, and (2) the performance of his judicial functions was a de facto impossibility as a result of the attitude of partiality demonstrated in his A/28 opinion. After further written submissions by Iran, the United States and Judge Broms to the Appointing Authority, the United States on March 10 raised an additional ground for doubting his independence and impartiality.⁹⁶

According to the United States Judge Broms again inappropriately divulged information about the internal deliberations of the Tribunal and his own conversation with the president about the cases. On May7, Sir Robert issued his decision, noting that the passages in the original opinion "Speak for themselves." Sir Robert stated that they constituted a serious breach of the secrecy of the deliberation.⁹⁷

XIII Second challenge of Judge Broms

On September 30, 2004, Frederica Lincoln Riahi's challenge against Judge Broms was held to be inadmissible for having failed to file the challenge within the time limit prescribed by Article 11(1) of the Tribunals Rules. In the decision of Judge Haak, the then Appointing Authority, over the challenge of Judge Broms of September 2004,(1) it was noted that Ms Riahi's counsel learned through a telephone call to Judge Broms' legal

assistant that Chamber One had met in deliberation on the pending application and on Ms. Riahi's request for a refusal, and also discovered through this telephone call to Judge Broms legal assistant that Judge Broms had presided over the deliberation in respect of the refusal request as Chairman.

The telephone conversation with Judge Broms' legal assistant raised the question of whether the legal assistant breached any duty of confidentiality of deliberations set forth in Article 31 of the Tribunal Rules of Procedure through the conversation with Ms. Riahi's counsel. There is also the question of whether Judge Haak should have considered the telephone conversation as admissible evidence in regard to Ms. Riahi's claim. One of questions facing Judge Haak as Appointing Authority was whether an individual party's challenge to an arbitrator in a case (as opposed to a general challenge initiated by either the government of Iran or United States) could be made following a final and binding award... Judge Broms asserted in his letter of April 3, 2004 that "no challenge could be made with respect to a case that had been adjudicated and ended by final and binding award."⁹⁸

The problem of challenge has been one of the many conflicts to have arisen between the two parties. By the lapse of time, however, this tension has been mitigated. Along with this controversial issue, other areas of conflict arose between the conflicting parties; including but not restricted to dual nationality cases, expropriation cases, cases involving interim measures, forum selection clauses and etc. Chapter Seven will study them and it will provide a general conclusion on conflict at the Tribunal.

XIV Conclusion

The Iran-US interaction at the Tribunal was not taking place in vacuum. International politics had its impact on the Tribunal events. The Islamic Revolution brought with itself excessive hate against Americans. Iran's decision makers who acted in this climate faced a big dilemma. They had to confront America at the second battlefield represented by the Tribunal as depicted by the statements of Iranian high ranking officials.

An additional major underlying factor has been the disparity of power between the two sides.. This, in turn, has several aspects longstanding arbitration procedures and the UNCITRAL rules have been based on the practice of the developed and capital exporting countries. Relevant knowledge and legal expertise are not balanced between Tehran and Washington. Tehran has tried to respond to this disparity by voicing its objection to impartial judges. Judges are authorized to decide in accordance with international conventions, international custom, the general principles of law recognized by civilized nationals. International conventions are the maids-of-all-work in international law while international custom refers to the actual practice of states. The Treaty of Amity serves as an international convention between Iran and the United States. Under the treaty, Iran is a host country and its position is very weak compared to the US status. The United States is a capital exporting country in that treaty. As for international custom, Iran can provide few evidence of customary law while a rough idea of a state practice gathered from published material shows that the United States has been able, as a superpower, to constitute concrete evidence of customary law in its favour. All the American appointed arbitrators, the Iranian appointed arbitrators and the third country arbitrators should rely on such conventions and custom produced by the United States of America, its multinational corporations or individuals.

The ultimate sources of this inequality may be found in the structure of our international system with the rewards it confers upon power. Inequality illustrates itself through verdicts rendered according to the legal precedents already issued in previous cases, or based on the contracts concluded between the actors represented by certain previous individuals. Judges are obliged to act under those precedents and rules, not based on the expectations of the actors represented by current arbitrators. In a sense it may even be argued that judges are somehow victimized at the Tribunal. The Tribunal came into existence out of a cultural clash and has continued to function under the logic of inequality

that derives from the international political and legal systems. First, there is an unequal distribution of legal power, second this pattern of inequality creates its own logic. However, to fight in an ordered inequality is better than resort to war. Even if, for the sake of argument one assumes that there is power parity, the issue of conflict must be recorded at the top of any index on the Tribunal. In this chapter I showed how the conflict between the United States and America occurred over the challenge and replacement of arbitrators. Conflict is not limited to a clash over judges. It will encompass other substantive and procedural subjects to be covered in the next chapter.

Notes

¹ Statement by the Prime Minister of Iran, Mr. Musavi, in *Iran-US C.T.R.* 5, 428-9

² A key passage in President Carter's State of the Union message in January 1980, was dubbed the "Carter Doctrine" by the press:

"Let our position be absolutely clear: Any attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force. United States, U.S. State Department Current Policy, 132, (January 23, 1980)²

³ Wayne Map, *the Iran-United States Claims Tribunal: The First Ten years, 1981-1991*. (Manchester: Manchester University Press, 1993) 39

⁴ UNCITRAL Rules Art.10 (2)

⁵ UNCITRAL Rules Art.11 (2)

⁶ Article 13 remains unchanged but certain provisions are added which clearly refer to the temporary illness or other circumstances expected to be of relatively short duration.

⁷ Iranian arbitrator quits Tribunal to Protest Mangard's Refusal to Resign, *Iranian Assets litigation Reporter*. 4.234 (Feb. 19, 1982).

⁸ For information on those resignations and replacements, see "Dutch International Law Expert Named to be Replaced Bellet," *Iranian Assets litigation Reporter*, 6,849 (July 15, 1983); "Judge Sani Resigns: questions over future of chamber proceedings," *Iranian Assets litigation Reporter*, 37 (Aug. 19, 1983): 7; "Mosk to be Replaced by Brower in January," *Iranian Assets litigation Reporter*, 602 (Dec-16, 1983): 7; "Lagergren Tells Tribunal He will stay on until next September," *Iranian Assts litigation Reporter*, 372 (May11, 1984): 8

⁹ "Ansari Resigns; Khalilian Expected to follow", *Mealey's Litigation Reporter*, 5.10 (June 29, 1990): 9; "Khalilian says he has been told to leave Tribunal," *Mealey's Litigation Reporter* 5.11 (July13, 1990): 3

¹⁰ "Letter of the Agent of the United States, John R. Crook, to Judge Lagergren of August 16, 1983," *Iranian Assets Litigation Reporter*, 7 (September, 2, 1983): 105

¹¹ See Presidential Orders 52 and 54 (April, 1987)

¹² Article 15, Tribunal Rules, Para 1-2

¹³ See Jaycomijin J. Van Hof, 102

¹⁴ Van Hoof, 102.

¹⁵ Stewart Abercrombie Baker and Mark David Davis, "The UNCITRAL Arbitration Rules in practice", the Experience of the IRAN-United States Claims Tribunal, (.The Hague: Kluwer Law, 1992) 75

¹⁶ *Iran-US C.T.R.* 2, 294

¹⁷ *Sedco.Inc. v. National Iranian Oil Company, Iran-US C.T.R.* 2, 294

¹⁸ Park and Davis, 77

¹⁹ George H. Aldrich. *The Jurisprudence of the Iran-United States Claims Tribunal*, (Oxford: Clarendon Press, 1996) 8-9

²⁰ Aldrich.8-9

²¹ Aldrich. 9

²² *Iran- U.S. C.T.R.*1, 701

²³ Iran-United States, *Case A/2*; Full Tribunal, *Iran-US C.T.R. I*

²⁴ Dissenting Opinion: Kashani, Shafeiei, and Enayat.

²⁵ Dissenting Opinion: Kashani, Shafeiei and Enayat 106

²⁶ Hedley Bull, 35

²⁷ Aldrich.9

²⁸ "Fakhr Kashan's Interview with *Iranian Assets Litigation Reporter*," Kashan was director of BCIAD. (Renamed BILLS) *Iranian Assets Litigation Reporter* (February 19, 1982)

²⁹ Aldrich 9-10

³⁰ Aldrich

³¹ "Kashani's Interview with *Iranian Assets litigation Report*." *Iranian Assets Litigation Reporter*, (February 19, 1982)

³² "Separate Opinion, Kashani & Shafiei, Re. Judge N., Mangard, and Challenge Decision" *Iran-United States Claims Tribunal Reports*, 1. 118.

³³ *Iranian Assets litigation Reporter*, (March 19,1982): 4322

³⁴ See *Iranian Assets litigation Reporter*, (Feb.19, 1982)

³⁵ *Iran-US C. T. R. I.* 115

³⁶ See Separate Opinion of Kashani and Shafeiei, *Iran-United States Claims Tribunal Reports*, 1.115

³⁷ Separate Opinion of Kashani and Shafeiei, 117

³⁸ "Re Judge N...Mangard, Majority Decision, signed 15 January 1982," Separate Opinion of Kashani and Shafeiei, 111

- ³⁹ Separate Opinion of Kashani and Shafeiei, 115.
- ⁴⁰ Aldrich 12.
- ⁴¹ Aldrich 9.n.
- ⁴² Richard M. Mosk, "Dissent from Failure to Set Promptly time for Response". *Case No.449, Iran-United States Claims Tribunal Reports*, 1. 158
- ⁴³ "Statement by the Prime Minister of Iran, Mr. Musavi," *Iran-US C.T.R.* 5. 428-9
- ⁴⁴ *Nasser Esphahanian v. Bank Tejarat*
- ⁴⁵ *Iranian Assets Litigation Reporter*, (September 5, 1984): 9, 170. See also both *Mealey's litigation Reports*, and *Iranian Assets and Assets Litigation Reporter*, (September 1984)
- ⁴⁶ "Letter from Mr. Crook, Agent of the United States, to Mr. Eshragh, Agent of the Islamic Republic of Iran," *Iran-US C.T.R.* 7, 281
- ⁴⁷ "Memorandum Re: Challenges to Arbitrators Kashani and Shafeiei By The Government of The United States of America," *Iran-US C.T.R.* 7, 291-301
- ⁴⁸ "Presidential Order No. 27," *Iran-US C.T.R.* 7, 281
- ⁴⁹ "Letter from Mr. Lagergren, 3, September 1984," *Iran-US C.T.R.* 7, 283
- ⁵⁰ "Letter from Iranian Arbitrators to Mr. Lagergren, 6 September, 1984," *Iran-US C.T.R.* 7, 284-89
- ⁵¹ "Letter from Iranian Arbitrators to Mr. Lagergren, 6 September, 1984,"
- ⁵² *Iranian Assets Litigation Reporter*, (September 28, 1984): 9, 273-9, 274.
- ⁵³ "Statement of the Iranian Arbitrators, Mahmoud M. Kashani and Shafi Shafeiei, in connection with the Recent Events at the Iran-US claims Tribunal," *Iran-US C.T.R.* 7, 307 & 314
- ⁵⁴ "U.S. Challenges Iranian Arbitrators," *Iranian Assets Litigation Reporter*. (Sep. 28. 1984):9.271, 9. 343. See also "Tehran Court Judge. Head of BILS likely to succeed Kashani, Shafeiei," *Iranian Assets litigation, Report* (Oct. 26. 1984) 9.505
- ⁵⁵ *Sedco, Inc. V. National Iranian Oil Co, Iran-U.S C.T.R.* 15. 23. (Award No.309-129-3)
- ⁵⁶ Upon his appointment, Judge virally disclosed that he had previously been retained as an independent legal expert in two separate arbitrations to write an opinion of legal issue for two U.S. Oil companies affiliated with Tribunal claimants, Mobil Oil Corporation and Aminoil, whose cases were pending in chamber three. "Letter of Mr. Virally to president Böckstiegel, April 22, 1985, President Böckstiegel" set a deadline for objection of June 28. 1985. Iran requested but was not given, an extension to that date, and ultimately it made no challenge. See "Letters of President Bockstiegel to the Agent dated July 3, 1985.and July 12.1985,"
- ⁵⁷ *Minutes of the Tribunal's 38th Meeting.* 12.
- ⁵⁸ *Minutes of the Tribunal's 38th Meeting,* 2
- ⁵⁹ Stephen Toope, *Mixed International Arbitration: Studies In Arbitration Between States And Private Persons* (Cambridge: Grotius, 1990) 319
- ⁶⁰ Aldrich, 19
- ⁶¹ *Iranian Assets Litigation Reporter*, July 2, 1982
- ⁶² *Iranian Assets Litigation Reporter* December 17, 1982
- ⁶³ Stewart A. Baker & Mark D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (The Hague: Kluwer, 1992) 26
- ⁶⁴ "Mr. Jahangir Sani's Response for not Signing the Decision Made by Mr. Mangard and Mr. Mosk in Case No.17," *Iran-US C.T.R.* I, 415
- ⁶⁵ "The Opinion of Judge Sani," *Case No.30. Granite State Machine Co. v. Iran.* 454
- ⁶⁶ *Case No. 17, Rago Wagner Equipment Co. v. Star Line Iran Co. Inc., Iran-US C.T.R.*1, 411
- ⁶⁷ *Iran-US C.T.R.* 1. 424
- ⁶⁸ The American and Iranian members had agreed upon Dr. Eduardo Jimenez de Arèchaga, the distinguished Uruguayan former president of the International court of Justice as an acceptable president of the Tribunal, but the Iranian refused to go forward with that name except as part of their complete package. In late June the Appointing Authority spoke with de Arèchga and ascertained that he did not accept the appointment.
- ⁶⁹ "Eshragh's Letter dated 6 September 1984", in *Mealey's litigation Reports, Iranian Assets*, September 1, (7, 1984): 269. It commented on Eshragh's letter and his reference to an assault on the president and wrote that Eshragh's reference "to an assault on Lagergren by an American arbitrator apparently referred to an incident at a tribunal session when, during an argument with the President, Richard M. Mosk Said "put up your dukes".
- ⁷⁰ *Iranian Assets litigation Reporter*, (March 2, 1984)
- ⁷¹ *Mealey's litigation Reports*, (May 18, 1984)
- ⁷² *Mealey's litigation Reports*, (May 18, 1984)
- ⁷³ "Memorandum in Support of Challenge to Mr. Robert Briner" 1-3 (Sept.28.1998), 3 *Mealey's Litigation Reporter* 3.18 (Oct. 21.1988): 63 See also "Re Challenge to Mr. Robert Briner , Reply Memorandum of the Government of the Islamic Republic of Iran, et al," p. 5 (Nov.28.1988), *Mealey's Litigation Reporter* 3.22 (December16, 1988): 6
- ⁷⁴ Among the documents is a Morgan Stanley report detailing the joint structure agreement (USA)

entered into between Amoco Iran and national Iranian oil co. (NIOC) in 1958. The report estimates the value of Amoco Iran's holding as of August 1, 1979 at \$1,570,355,273. Under the USA, the report says, Morgan Stanley paid \$25 million to NIOC, along with annual rental payment, to conduct petroleum exploration over a 16,000 – square-kilometre area of Persian Gulf. *Mealey's Litigation Reporter*, 3.22 (December 16, 1988)

⁷⁵ “Letter of Judge Briner to Mr. Eshragh,” September 7, 1988, *Mealey's Litigation Reporter*, 3.22 (December 16, 1988)

⁷⁶ Under the Rules, if the other side agrees to the challenge, the arbitrator must withdraw. UNCITRAL Rules Art.11 (3)

⁷⁷ See “Letter from Judge Briner to Mr. Charles M. J.A. Moons,” at 1-2 (Dec. 6, 1988), reprinted in 3 *Mealey's Litigation Reporter* 3.22, (Dec. 16, 1988): A-12. A rehearing was scheduled in the *Amoco Iran Case* for Fall, 1990 but in June, 1990 the case was settled (along with another pending Amoco Claim) for more than half a billion dollars, one of the largest awards in the history of Commercial arbitration. Amoco Cases resolved for \$600 million in largest Settlement, *Mealey's* 5.9, (June 15, 1990): 31

⁷⁸ “Communication of October 1, 1989 to the Parties,” *Combustion Engineering Inc. v. Iran, Case No. 308*. The Claimants replaced two of the documents with similar evidence by a different Source, and Judge Briner instead Served the Part of the Claim related to that document from the Case, and transferred it for Separate decision by another arbitrator. See Order of Nov. 1, 1989, in *Combustion Engineering, Inc. v. Iran, Case No. 308*, Chamber two.

⁷⁹ *Phillips Petroleum Co, Iran v. Iran, Iran-U.S.C.T.R.* 21. 79 (Award No. 425-39-2). U.S. arbitrator George H. Aldrich submitted a separate concurring opinion. *Phillips Petroleum Co. Iran v. Iran, Iran-U.S.C.T.R.* 21.162 (Award No. 425-39-2, Aldrich, Concurring)

⁸⁰ As one observer stated, DSF valuation produced an award that was “beyond anything the Iranians had been willing to talk about with any oil Companies, Phillips Petroleum Award will require fresh Iranian funds, 4 *Mealey's Litigation Reporter* 4.11, (July. 1989): 3

⁸¹ “Statement by Judge Khalilian, June 30, 1989,” *Mealey's Litigation Reporter* 4.12, (July 21, 1989): H-1. Briner responded on July 14, 1989, and stated that the Chamber had ample time to deliberate over the award. See “Separate statement of Mr. Briner,” July 14, 1989, *Mealey's Litigation Reporter* 4.12, (July 21, 1989): H-39-43

⁸² “Statement by Judge Khalilian,” *Mealey's Litigation Reporter* 4.12,

⁸³ *Mealey's Litigation Reporter* 4.12, H-3, H-6

⁸⁴ See “Supplement to the Statement by Judge Khalilian,” July 18, 1989, *Mealey's Litigation Reporter* 4.12 (July 1, 1989): H-44-47. Judge Khalilian alleged that Judges Briner and Aldrich Secretly decided on 65 million in damages (\$130 million with interest). After discovering a Computation error, Briner lowered the amount to \$55 million (\$110 million with interest). Khalilian argued that the correction should have reduced the award to \$28 million, but Briner allegedly attempted to silence Khalilian by threatening to increase the award to \$60 million (\$120 million with interest).

⁸⁵ *Mealey's Litigation Reports* 4.12

⁸⁶ Stewart Abercrombie Baker and Mark David Davis, *The UNCITRAL Arbitration Rules in practice, the Experience of the IRAN-United States Claims Tribunal*, 45

⁸⁷ *Indian Express*, September 30, 1987, *Mealey's Litigation Reports, Iranian Claims*

⁸⁸ “Letter, the Agent of Iran to the Appointing Authority,” 11 September 1989. *Iran-United States Claims Tribunal Reports*. 21. 380

⁸⁹ “Documents Relating to the Challenge” *Iran-U.S.C.T.R.*, 24.309

⁹⁰ *Iran-U.S.C.T.R.*, 309

⁹¹ *Iran-U.S.C.T.R.*, 311

⁹² *Iran-U.S.C.T.R.*, 323

⁹³ *Iran-U.S.C.T.R.*, 323

⁹⁴ *Iran-U.S.C.T.R.*, 324

⁹⁵ *United States V. Iran*, December, Award No. 130- A28- FT, Para. 95 (Iran- U.S.C.T.R. 19, 200. for a discussion of the case, see *Sean D. Murphy*, “Contemporary Practice of the United States,” *AJIL*. 95 (2001): 414

⁹⁶ Sean D. Murphy, *AJIL* 94 (2000): 378

⁹⁷ “Decision of the Appointing Authority to the Iran-U.S Claims Tribunal,” (May 7, 2000), *Mealey's International Arbitration Reports*. 15 (2000)

⁹⁸ “Decision of the Appointing Authority on the Challenge to Broms Lodged on behalf of Frederica Lincoln Riahi.” (September 30, 2004), *Mealey's International Arbitration Reports*. 19. (2004): 1B

Chapter Six

Conflict over Dual Nationality and Compensation

I Introduction

What are the ingredients of nationality? Can such ingredients be described in terms of the “allegiance owed by an individual to a sovereign and the protection given to such an individual by that state?”¹ How does international law get involved when a state has, in relation to another state, a potential legal interest affected by nationality? How does international law consider the link of nationality between the claimant state and the aggrieved individual as the justification for that state being entitled to bring the claim? What has been the impact of an emerging “global home, a worldwide village of human commonality emphasizing interpersonal bonds rather than territorial borders?”² What have been the consequences of an increase in the right of individuals at the age of globalization? Can the movement of capital and the out flux of immigration from developing countries to industrialized countries be banned? Has it been, so far, possible to guarantee the security of investment in developing countries? If not, then prosperous individuals will be encouraged to move their capital and fortune from unstable developing countries to advanced industrialized countries, but what will be the consequences of such movements? Granted that international law does not exclude the possibility of dual nationality for individuals, dual or multiple nationalities can give rise to difficult questions about obligations of several kinds, such as tax, inheritance, marriage, foreign investment and so on.

The out-flux of immigration from third world countries in search of security and welfare in industrialized states will continue to drain developing countries’ both financial resources and man power. Such individuals will, no doubt, be keen to acquire dual nationality in due course. Similarly, the problem of the less developed countries in certain parts of Asia and most parts of Africa will not be resolved without foreign direct investment

(FDI) or foreign portfolio investment (FPI). As a result, these political economic interactions—whether in the name of globalization, internationalization or global governance—will require further development of conflict resolution by peaceful means. It may necessitate the introduction of the most innovative forms of arbitration tools. The conclusion of bilateral treaties between the developed countries and the third world has made it impossible for international law to generate all-embracing provisions that could contribute to the overall settlement of such conflicts. Given the current circumstances, states and non states parties will continue to live in an unknown domain of international anarchy where the stronger dictate the terms and conditions of the treaties.

In my previous chapter on conflict I studied the problem of challenge embodying two concepts: the literal meaning of the term and the other one in its connotative aspect. The former dealt with the general contending positions of the parties and the latter concerned the challenge to the arbitrators under the Tribunal rules. In this chapter, I will consider two clusters of conflict: a first one with respect to dual nationality cases and a second one in relation to the most controversial issue of international law on expropriation. Both involve political and legal issues that must be settled between the developing countries and the capital exporting countries. Both dual nationality cases and expropriation cases share one element in this chapter: payment of compensation for the aggrieved, whether individual, corporation or state.

II Dual nationality under international law

Professor William Bishop's definition of the term 'nationality' is an established definition of 'nationality' under international law. He posits that the term nationality "does not mean what it says, nor does it say what it means. Etymologically it would mean the condition of belonging to a nation, of being a national. In international law nations are an unknown quality. A nation is a conception of municipal law and means a group of persons who through racial, religious or economic ties, are bound together to follow a common

pursuit.” By this definition, ‘nations’ are viewed through cultural lenses. Bishop views, under international law, certain rules that govern the relationship between the individual and the nation. These are called acquisition, retention, protection, the law of nations and rules of International Court of Justice. In the case of dual national, he has emphasized that the Hague Convention of 1930 on conflict of Nationality shall apply.³ Article 1 of The Hague Convention provides that:

It is for each state to determine under its own law who are its nationals. This law shall be recognized by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality...⁴

Under customary international law, nationality as a legal relationship between the individual and a state should be determined in accordance with the law of the state whose nationality is alleged. The scope of a state to extend its nationality to whomever it wants is unlimited, unless it affects other states. Nationality is a concept of national law, but its implications can appear in the international law area as well. International law cannot as a rule create a nationality. But it can refuse to recognize the legal effects attached to the nationality created by national law. A dual national is defined as a citizen of two or more nations.⁵ Following World War II complex interdependence was responsible for the rise of dual nationals and sovereign nations have used different methods to confer nationality.⁶

Nationality can be acquired by birth, descent, succession of states, naturalization, or in another manner not inconsistent with international law.⁷ Oppenheim posits that such an acquisition can be acquired by “birth, cession, naturalization, option, reintegration, subjugation”⁸ A person may become a dual national at birth, or at any time thereafter. Oppenheim says that a person can acquire “double nationality knowingly or unknowingly, and with or without intention” but alerts that “inconveniences resulting from double nationality” are prominent. Dual nationality causes problems for dual national's sovereigns

in areas such as taxation, military service, national security and international responsibility for harmful conduct to aliens. Dual nationality also causes severe problems for individual dual nationals who are subjected to competing claims by more than one nation.

The United States has recognized the undesirability of dual nationality, and has attempted to limit the incidence of dual nationality. Iran has not recognized dual nationality at all but recently the government has loosened its control over dual nationality. Nevertheless, dual nationality will persist as long as sovereign nations confer nationality independently and do not formulate an international mechanism of granting nationality.⁹ Since dual nationality will continue until an international mechanism of nationality is created, courts will have to focus on how to solve the problems that dual nationality creates.

By pointing to The Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague Codification conference of 1930), Oppenheim holds that the Convention “gives effect to what may be called effective nationality”¹⁰ International judicial Tribunals have subsequently developed and applied the doctrine of effective and dominant nationality to settle conflicts between two or more nations that have a claim upon a dual national. Such Tribunals use the doctrine of dominant nationality to determine whether, under international law, a nation that injures a dual national will be responsible for the injurious conduct.¹¹

A nation may, for example, injure a person by seizing his property. If the person is a citizen of only the injury-causing state, he has no recourse against the state under international law on the grounds of injurious conduct against an alien. If the person, however, is a dual national, he may petition his second nation of citizenship to bring a claim in an international juridical forum on the grounds of injurious conduct against an alien. The latter happened in Iran after the Islamic Revolution. That being said, I now have to examine the notion of dominant and effective nationality under international law, and then discuss the conflict over dual nationality cases before the Tribunal.

III The Principle of dominant and effective nationality

In the period before World War II, the general rule was that nationality laws were governed entirely by each state's domestic law. Situations often arose however, where this rule did not seem appropriate: sometimes the operation of domestic laws led to an individual having more than one nationality and sometimes to an individual having no nationality at all (stateless). The most notable effort to address these problems was the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. The basic approach of the convention was to prohibit states from asserting protection over a dual national against a state. The convention, in fact, recognized only one nationality of a dual national, and would apparently specify in advance whether this would be the nationality of the place where he was "habitually" and principally resident or the nationality of the place to which in the circumstances, he appeared to be in fact most closely connected.¹²

This doctrine of non-responsibility has been codified by incorporation in Article 4 of the 1930 Hague convention on the nationality law, which reads "A state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses."¹³ The Institute of International Law in a resolution adopted in Warsaw in 1965, further confirmed the validity of this doctrine. The theory has been supported by international tribunals and courts, such as the International Court of Justice in its advisory opinion in the Reparation Case, which confirmed its recognition of the theory as a rule of international law by saying that the ordinary practice is that 'a state does not exercise protection on behalf of one of its nationals against a state which regards him as its own national.'¹⁴ This doctrine is based on the Principle of Equal Sovereignty of States and is related to the diplomatic protection institution. The international precedents, the *Salem*¹⁵ and also *Central Rhodope Forests*¹⁶ cases could be singled out as selected examples of the application of the non-responsibility doctrine.

During this time, however, a practice also began to develop in international arbitral tribunals to look, when faced with an actual conflict of nationality laws, for the nationality which was more "real" and effective". Faced with a situation not of dual nationality but diplomatic protection, the International Court of justice adopted this test in *Nottebohm Case*.¹⁷ Months afterward, the Italian-U.S. Conciliation Commission followed the same approach in a situation of dual nationality in *Merge case*.¹⁸ Since then--with only minor exceptions--the *Nottebohm/ Merge* 'dominant and effective nationality' formula has become the settled law for dealing with dual nationality problems among developed countries . In contrast, there is also the doctrine of non-responsibility under international law that prevents the institution of claims by dual nationals against their own governments. This has been supported by developing countries. The United States, representing the former and Iran holding the latter faced this difficulty after the revolution, and hundreds of cases were filed with the three chambers of the Tribunal.

IV Conflict in dual nationality cases

The actors who appear before international tribunals, that is, states, international organizations, or individuals are subjects of international law. However, these represent quite distinct categories of actors since they derive from two quite distinct schools of legal thought. One is based on the principle of sovereignty and the other is based on the principle of property rights. Within the context of the Tribunal, the former favours the interest of the State, and the latter supports individuals and corporations. It follows that the same theoretical clash that surfaced between Iran and the United States with respect to the 'Nature of the Tribunal' was not resolved and continued to dominate the Tribunal.

The former supports the doctrine of 'non-responsibility' according to which a national cannot bring a claim against his or her state before an international arbitral tribunal while the latter argues that international law does not prevent individuals from standing before international tribunals and from looking after their claims against respective states.

The former derives its legal foundations from customary international law while the latter's capacity is a matter of treaty law rather than customary international law, that is, as treaties concluded between the states concerned. The former position was adopted by Iran while the United States held the latter. Therefore, the main question was: who are allowed to stand before the Tribunal? Article II of the claims settlement Declaration sets forth clear provisions specifying for which persons and for the examination of what kind of claims the Tribunal is established. That Article reads as follows:

An International arbitral tribunal (the Iran- United States claims Tribunal) is hereby established for the purpose of deciding claims of nationals of Iran against the United States, and any counterclaims....¹⁹

Under paragraph 3 of Article II of the claims settlement Declaration, there are basically two groups of persons allowed to stand before the Tribunal: nationals of each government against the other government, and government against government. Both categories of parties who can bring their claims before the Tribunal are defined in Article VII of the same Declaration. In 4 paragraphs, this Article determines the meanings of national of Iran or of the United States, claims of national in the context of nationality of claim rule, and 'Iran' and 'the United States' with broad definitions. Article VII reads as follows:

For the purpose of this Agreement:

1- A national of Iran or of the United States, as the case may be means (a) a natural person who is a citizen of Iran or the United States (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories.²⁰

The first category entitled to stand before the Tribunal is nationals of each state party to the Algiers Declarations, who may bring claims against the other state.²¹ The private nationals appear before the Tribunal always as claimants, rather than respondents

because, the Tribunal lacks jurisdiction to decide claims of each state party against nationals of the other, or claims of nationals against nationals. According to the provisions of Articles VII (1) of the claims settlement Declaration, if viewed altogether, nationals of either state could be natural or juridical persons. To have *locus standi*, such persons should not only be direct owners of the claim but it is imperative for both categories to possess the nationality of the appropriate state.²²

Even for the juridical persons, whether they are commercial enterprises or other legal entities, the nationality of their owners also become relevant, because under Article VII (1) (b) such juridical persons might stand before the Tribunal only if they are fifty per cent or more owned by natural persons who have the nationality of respective state.

In addition to the above, under the provisions of paragraph 2 of said Article VII another category of the nationals, whether they are natural or juridical persons are given *locus standi* before the Tribunal, that is, the private indirect owners of the claims of a corporation. However, their standing is subject to two more conditions: first they should control the corporation and second, the corporation itself must not be entitled to stand before the Tribunal. Thus, four groups of nationals of either state party have standing before the Tribunal-natural as well as juridical persons with direct claims, and either of them with indirect claims.²³

Accordingly, the determination of nationality of the claimants has been a crucial factor for the Tribunal. Viewed from the perspective of the pre-revolutionary Iran-US relations, the issue of nationality becomes highly complicated because a number of Iranians had acquired American nationality, whose property had been affected following the Islamic Revolution in Iran. They had brought their claims before the Tribunal. In this chapter, I first point briefly to the roots of the conflict in dual nationality cases and then examine some of those cases.

The origins of the conflict could be traced to Esphahanian's Case, that is, *Esphahanian v Bank Tejarat*.²⁴ As a matter of fact, the Tribunal was caught up with those two contending theories. Accordingly, one of the most crucial areas of conflict at the Tribunal concerns this problem where Iran and the United States have held two contending approaches. According to Iran, claims brought before the Tribunal by Iranian born individuals do not fall within Tribunal's Jurisdiction while the United States holds that such claimants have acquired American nationality and are therefore American nationals. The issue was politicized and led to the Mangard episode, already explained in chapter five.

Here, this dissertation purports to illustrate the conflicting positions of the parties and the Tribunal's holding in this case. This case then laid a legal precedent for all other dual nationality cases before the Tribunal. All the three chambers subsequently adopted the same formula. In closing, this chapter will make some brief references to those cases. However, it is necessary to scrutinize the pioneer case of *Esphahanian* as a celebrated case.

The first Tribunal Decision on this issue was rendered quite early in the history of the Tribunal in the case of Naser Esphahanian V. Bank Tejarat. In this case, (also named Case A-18) the claimant had been born in Iran of an Iranian father. At the age of seventeen he was sent to study in the United States. In 1958 he was naturalized as a United States citizen. He married a United States citizen. From 1947 until 1970 he resided continuously in the United States, participating in cultural, civic and business activities.

However, from 1970 to 1978 he was employed by a United States firm as Middle East area general manager and spent nine months of every year in Iran. To travel to and from Iran he used an Iranian passport. He used his Iranian identity card to open an account with Bank Tejarat in which he deposited part of his income. In addition he held shares as an Iranian nominee in an Iranian subsidiary of United States Company. Esphahanian alleged that the relevant treaty texts were clear and that all persons who were citizens of either country were 'nationals' for jurisdictional purposes, including dual nationals. The

Respondent argued that Iran did not recognize dual nationality and could not be presumed to have accepted it in the Declaration. The Claims Settlement Declaration defined in Article II, Paragraph 1, and the claims over which the Tribunal had jurisdiction. The said paragraph dealt with claims by private individuals and limited the Tribunal's jurisdiction to 'claims by nationals of the United States against Iran and claims of nationals of Iran against the United States'.²⁵

Article VII, paragraph 1, provided that a national of Iran or of the United States as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock.²⁶

The Tribunal although it rejected both arguments, rendered its decision in favour of the American position. On the one hand, the Tribunal pointed out that the claimant's interpretation which was based on the literal meaning of the text, 'leads to an absurd result in that it would permit dual nationals to make claims before the Tribunal against either Government, or both.' On the other hand, Iran's assertion that it did not recognize dual nationality was not accepted by the Tribunal because Iran's assertion 'is not by itself dispositive, particularly as the 1955 Treaty of Amity between Iran and the United States accepted that concept by providing certain specific exceptions for dual nationality'.

In the absence of any reference to this question within the Declaration, the Tribunal relied on Article 31, paragraph 3(c), of the Vienna convention on the Law of Treaties of 23 May 1969, and held that it was authorized to take into account in interpreting the treaty 'any relevant rules of international law applicable in the relations between the parties'. The Tribunal examined (a) the Hague Convention of 12 April 1930 Concerning Certain

Questions relation to the Conflict of National Law’, in particular Articles 4 and 5 thereof, (b) a number of arbitral and judicial precedents dating from 1903 to 1955, and (c) selected writings from recent legal scholars.

The Tribunal rendered that the principle of recognition of the dominant and effective nationality had emerged to guide tribunals in dealing with dual nationals. It invoked the ruling of the International Court of Justice (ICJ) in the *Nottebohm Case* and a subsequent ruling of the Italian-US Conciliation Commission in the *Merge* case. Based on certain factors such as ‘habitual residence, center of interests, family ties ...’ the Tribunal held that the claimant’s dominant and effective nationality during the relevant period was that of the United States. On the same day, the Tribunal applied the same rule of dominant and effective nationality in another case, that is, *Attaollah Golpira V. The Islamic Republic of Iran*.²⁷ The relevance of the *Nottebohm* and *Merge Cases* is, according to Stephen J. Toope, ‘open to some question’:

Points that should perhaps have been treated with reference to the *Nottebohm Case* include: (a) the fact that the *Nottebohm* decision did not involve a problem of dual nationality; and (b) the potentially decisive effect of the Guatemalan arguments which treated *Nottebohm* acquisition of Lichtenstein nationality as fraudulent, arguments to which the International Court did not wish to lend its imprimatur. Similarly, difficult issues arise vis-à-vis the *Merge* case, issues such as: (a) the factual importance of Italy’s status as a defeated Axis power; (b) the nature of the Tribunal which may be seen as a manifestation of traditional post-war ‘victory justice’; and (c) the modest reputations of the members of the Tribunal in no way mitigated by reasoning that is, to put it charitably, woolly (the Tribunal’s attempt to suggest that it was upholding both the traditional rule of non-protection and the *Nottebohm* rule of effective nationality remains unconvincing).²⁸

At any rate, the Tribunal ruled against Iran in both the *Esfahanian* and *Golpira Cases* and made a legal precedent for all other dual nationality cases which caused the

greatest convulsions yet experienced by an international Tribunal. Iranian arbitrators attached a brief Declaration and called the decision a ‘manifestation of a bad faith interpretation’ and alleged that the ruling was ‘rendered merely to demonstrate loyalty to the United States and to damage the prestige of the Islamic Republic of Iran and the Third World’²⁹ American Judges Holtzmann, Aldrcuichich, and Mosk provided their concurring opinions. In his comment on Tribunal’s ruling in this case, Toope posits that the Iranians have found themselves ‘alone in dissent and their isolation, mixed perhaps with anger’, causing them to adopt a ‘vitriolic tone’. They went on to ‘savagely the Tribunal’s holding, and the work of the Tribunal in its entirety on frankly political grounds’³⁰

The statement of the Iranian Arbitrators Mahmoud M. Kashani and Shafie Shafeiei supports Toope’s judgment. The statement suggested that the United States, by using the presiding arbitrators as proxies, had sought ‘to negate and reverse, by the creation of so-called international legal precedents, even those insignificant victories which the Third World nations have gained against the capitalist world’. Furthermore, the Dissenting Opinion of the Iranian Arbitrators in this case blamed harshly their colleagues:

Regrettably, the task has fallen into the hands of a group of professional arbitrators who, forming an exclusive club in the international arena, are automatically brought into almost any major dispute by the operation of predetermined methods. These professional arbitrators are concerned, not with the quality of their decisions, or with the rights and wrongs of the parties, but with the quantity of their decisions, made to satisfy their political and materialistic inclinations. The present award is only a manifestation of the work of a degenerated system.³¹

In Toope’s view, although the position of Iranian arbitrators is offensive, it ‘contains a kernel of truth, as uncomfortable as that may seem to Western observers.’ It is unquestionably true that over the last twenty-five years or so, there has emerged a highly talented corps of international arbitrators, mostly European, whose expertise makes them

valuable members of any tribunal. The first and second presidents of the Iran-US claims Tribunal are good examples. Without casting any aspersions on the professionalism or integrity of such persons, it is fair to comment that, because a central feature of most arbitrations is the appointment of arbitrators by parties, any arbitrator who hopes to continue working in that highly specialized field must hope to be acceptable to at least one of the potential arbitrating parties.

Candidate arbitrators who are from Western states are more likely to be chosen as party-appointed arbitrators by such states or by western corporations. If they then adopt positions radically opposed to the arguments put forward by Western parties, the chances are that they would not be chosen by another party in any subsequent arbitration. ...In any case, given his or her background and training, a Western-appointed arbitrator is almost certain to share Western understandings of appropriate economic organization and trade imperatives. It should be noted that an arbitrator from a developing state is likely to find himself or herself in exactly the same position vis-à-vis his or her potential appointers.³²

Similarly, it is unquestionable that, in the eyes of Iranian arbitrators, Judge Mangard was not deemed to be and could not be value free under the standard that Iranians evaluate. Those standards are based on Iranian social justice in contrast to the Western standards of justice. However, this seems true with respect to all arbitrators, both American and Iranian appointed arbitrators. In elaborating on a major Tribunal decision, the US agent has noted that ‘the final vote of the Tribunal on the issue was 6 to 3 against Iran, which in a sense makes the vote unanimous’. The US Agent argues that Iranian votes are predetermined. Arbitrator Mangard comments on the partiality of Iranian arbitrators and posits that: “The Iranians in Chamber Three openly admit it [a pro-Iranian bias], saying that ‘that is our role, we would act otherwise if we were sitting in an Iranian court as judges, but here we are defending the underdog. The Iranians are always weaker; we have to defend them’”. Judge

Brower has also noted that “My Iranian colleague has announced that he does not live by any rules of neutrality.

Lowenfeld distinguishes a major difference between Iranian appointed arbitrators and American appointed arbitrators and concludes that “In contrast to the Iranian arbitrators, who have voted as a bloc on every significant issue, the American arbitrators appear to be calling the cases as they see them, sometimes for and sometimes against the contentions of the American claimants”. In the eyes of the third-party appointed arbitrators, both Iranian and American appointed arbitrators tend to favour their own side. Judge Mangard argues that Iranian and American appointed arbitrators “really act as the leading counsel for the party in question, for the private party, or the Government party to the particular case. The both do that, no doubt about it, and the Iranians ...admit it... The Americans could not, would not admit it, but they act in the same way,”³³ It seems that distrust, lack of confidence and skepticism among the parties and the arbitrators were the dominant atmosphere in the Tribunal when the ruling in the case *Esfahanian v. Bank Tejarat* was issued. The scope of the conflict went beyond the legal and territorial borders.

The then Prime Minister of Iran, Mir Hossain Musavi who led the “Green Revolution” in recent Iranian presidential election, issued a statement and argued that, despite the ‘clarity of international laws regarding the lack of responsibility of governments toward their subjects before international authorities, the court has deemed itself empowered to review the cases brought forward by some Iranians’ He went on to say that Iran regarded the Decision ‘unlawful and wrong’ and said that Iran would ‘boycott any sessions relating to this matter’. The Prime Minister then accused ‘the great Satan, America’ of exerting ‘its arrogant influence’, thereby ‘corrupting’ the Tribunal. He said Iran expected that Algeria would refuse direct payments from the Security Account in the event of awards in dual nationality cases against Iran. He then launched his threats in the following wording:

...If this situation does not change and is not corrected and if the court decides to review dossiers relating to those who have dual nationality in the absence of representatives of the Islamic Republic of Iran, the Iranian Government will make the necessary decisions to safeguard its financial and spiritual interests and those of the world oppressed. As it has so far been proven, the Islamic Republic of Iran will resort to any lawful measures to attain justice, and will pay any price to achieve this'.³⁴

This case laid an important legal precedent at the Tribunal and a number of subsequent cases were rendered after this fashion. The Iranian Government and its appointed arbitrators, who were outraged by the proceedings, chose not to participate in the hearings and deliberations. In the absence of the Iranian appointed arbitrators; further cases were decided by American appointed and Third Party appointed Arbitrators. Iran filed applications in the Hague District Court challenging ten of the awards of the Tribunal. The challenges were based on the non-participation of the Iranian arbitrators in the “deliberations in which the decision was taken and the finding pronounced” For instance, the *Rago Wagner Equipment Co. v. Iran Express Terminal Corp.*³⁵ and *Rexnord Inc. v. Iran*³⁶ claims were decided in the absence of Iranian appointed Sani. Among the ten cases challenged and submitted to The Hague District Court was the *Esphahanian v. Bank Tejarat* Case, a controversial case at the Tribunal. The challenges remained before the Hague District Court for several months.

The Dutch government presented a Bill to the Dutch Parliament which was intended to change its laws in this respect. Iran was outraged and chose to withdraw its cases of the Tribunal. However, the Tribunal, under its Rules based on UNCITRAL Rules could have been financed by the other party—the United States—and it could have decided the cases in Iran’ absentia, that is, as it happened when Judge Sani and others chose not to attend the hearings. In the words of Joseph Nye, “Ordered inequality is better than anarchy.³⁷” Perhaps Iran deemed it necessary—or had no choice—but to stay at the Tribunal and

fight, rather than step out of the room, the windows of which open to the rules of Jungle. To quote Henry Longfellow: “Stay Home is Better”³⁸

As discussed earlier, according to the General Declarations, disputes between Iran and the United States regarding the interpretation and compliance with the terms of the Algiers Declarations and the FMS program cases against the US Department of Defense were captioned *Case No. BI*. In addition, under Article VI, paragraph 4, and ‘any questions concerning the interpretation of this agreement’ if requested by either Government were given ‘A’ numbers.

Apart from *Case A18*, another case in which an Iranian motion was totally rejected by the majority was *A-2*. In this case direct claims by Iran against the Government of the United States and against American nationals were denied. When the Tribunal did not grant its jurisdiction to Iran's direct claim, Iran was disappointed and voiced its objection. Accordingly, in *Case A-1* the Tribunal adopted a counter strategy for Iran, holding that Iran could bring counter claims if those claims arose ‘out of the same contract, transaction or occurrence that constitutes the subject matter of the national's claim’³⁹

As a result, in *Gould Marketing inc. v. Ministry of National Defense of Iran*,⁴⁰ the Tribunal granted its access to Iran's counter claim. However, this access to the counterclaims of Iran was not unlimited. In *E-Systems, inc. v. the Islamic Republic of Iran*⁴¹, the Tribunal ruled that its jurisdiction to Iran's counterclaims was not ‘exclusive’ because Iran had brought claims in its national courts. The Tribunal ruled that those proceeding should have been suspended. In *Haji Bagherpour v. The Government of the United States of America*⁴², the Tribunal held that it had no jurisdiction to consider an Iranian oil tanker owner whose tanker had been damaged during the American hostage rescue mission in the desert of Tabas.

In *Grimm v. The Government of the Islamic Republic of Iran*, an American widow argued that her husband had been assassinated in Iran in 1978. She reasoned that as a result of her husband's death, her 'property rights' had been 'affected' by Iranian 'measures'. The Tribunal denied its jurisdiction. If in *Grimm and Haji Bagherpour*⁴³ the Tribunal's jurisdiction was denied simply because "it refused in these two cases to delve into issues almost calculated to dredge up antipathies and anger" because the "the political dynamic of the Tribunal" led to "incongruity and inconsistency". In contrast to the Grimm Case, in a similar case, that is, *Yeager, Kenneth. v. Islamic Republic of Iran*⁴⁴, the Tribunal decided "It is true that the Tribunal has found that it lacked jurisdiction over claims arising from personal injury in previous cases.

This does not mean, however, that all torts fall outside the scope of Article II, paragraph I of the Claims Settlement Declaration"⁴⁵ In *Leila Danesh Afra Mahmoud v. The Islamic Republic of Iran*⁴⁶, the Tribunal did not admit the claim of an Iranian national who had acquired US nationality. The American arbitrator filed a dissenting opinion.⁴⁷ In *James M. Saghi , et al. v. The Government of the Islamic Republic of Iran*⁴⁸ outlined a standard list of factors in considering the dominant and effective nationality of Allan Saghi and determined that his dominant and effective nationality was that of the United States.

In *Reza Said Malek v. The government of the Islamic Republic of Iran*⁴⁹, the Tribunal held that Malek was "fully and deliberately integrated into United States society"⁵⁰ In *Steven Joseph Danielpour v. The Government of the Islamic Republic of Iran*⁵¹, the Tribunal ruled that of the Claimant's continued residence and employment in the United States, his dominant and effective nationality was American.⁵² In *Nahid Danielpour Hemmat v. The government of the Islamic Republic of Iran*⁵³, the Tribunal found dominant and effective US nationality for the claimant.⁵⁴ Iranian Judge Ansari submitted his dissenting opinion. The three children of an Ali Ebrahimi and his second wife altogether instituted a claim against Iran: *Shahin Shain Ebrahimi, et al. v. The Government of the*

*Islamic Republic of Iran*⁵⁵, the Tribunal found that all claimants possessed dominant and effective US nationality.⁵⁶ Iranian Judge Ansari wrote his dissenting opinion in this case.

In *Abraham Rahman Golshani v. The Government of the Islamic Republic of Iran*⁵⁷, the Tribunal ruled that the claimant was a dominant and effective US national.⁵⁸ Citing the Golpira and Esphahnian Awards in *Edgar Protiva et al. v. The Government of the Islamic Republic of Iran*,⁵⁹ the Tribunal decided that the centre of the claimants' economic, social, political and family life made him a dominant and effective US national.⁶⁰ In *Katrin Zohrabegian Abrahamian v. The Government of the Islamic Republic of Iran*⁶¹, the Tribunal ruled that the claimant "had become a fully integrated American citizen and her United States nationality predominated over the nationality of her origin"⁶² In *Zaman Azar nourafchan, et al. v. The Islamic Republic of Iran*,⁶³ the Tribunal ruled that both claimants were dominant and effective US nationals.⁶⁴ In *Faith Lita Khosrowshahi, et al. v. the Government of the Islamic Republic of Iran, et al.*⁶⁵ the Tribunal ruled that the American nationality was 'overwhelming'⁶⁶

In *Lilly Mythra Fallah Laurence v. The Islamic Republic of Iran*,⁶⁷ the Tribunal decided that the Islamic Revolution 'further loosened the claimant's remaining ties to Iran' and that the claimant possessed dominant and effective US nationality.⁶⁸ In *Hooshang and Catherine Etezadi v. The Government of the Islamic Republic of Iran*,⁶⁹ the Tribunal stated that the claimant's 'ties to the United States outweighed her ties to Iran'⁷⁰ In *Mohsen Asgari nazari v. the Government of the Islamic Republic of Iran*⁷¹, the claimant's dominant and effective nationality was American because he had been 'integrated into the United States society'⁷² In *Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran*⁷³, the Tribunal found that the claimant's dominant and effective nationality was American despite the fact that she had 'married to an Iranian and had voted in an Iranian referendum in 1979'⁷⁴

Unlike the above mentioned cases, in *Michelle Danielpour v. the Government of the Islamic Republic of Iran*,⁷⁵ the Tribunal denied dominant and effective American nationality to the claimant because of the lack of exposure to American society and culture; “In the view if the Tribunal, given the lack of prior exposure to American society and culture, the short period between the time she arrived in the United States and the relevant period would not have been adequate for the claimant to integrate into American society and to familiarize herself with American culture so as to predominate over her years spent in Iran under the influence of her family and of her society and culture of Iran”⁷⁶ In *Reza and Shahnaz Mohajer-Shojaee v. The Government of the Islamic Republic of Iran*,⁷⁷ the Tribunal ruled that the claimants had failed to provide evidence that they were dominant and effective American nationality. American Judge Holtzmann wrote his dissenting opinion.⁷⁸ Similarly, In *Albert Berookhim, et al. v. The Government of the Islamic Republic of Iran*⁷⁹, the Tribunal decided that the claimant’s ties to Iran outweighed those to the United States.⁸⁰

This review of the dual nationality cases shows that the Western countries, particularly the United States, have attracted a number of the rich nationals and organizations of the developing countries. International law is partly the outcome of the interaction of international society of states in which great powers matter and that such rules as ‘dominant and effective’ nationality favors the industrialized countries.

Within the Tribunal this rule was adopted in the *Esphahanian and Golpira Cases* by relying on the *Nottebohm Case*. All the remaining cases were decided with reference to the ruling rendered in the *Esphahanian*. Most of the claimants were the supporters of the Shah or had left the country after the Islamic Revolution. The Government of Iran was sensitive to their claims. In fact the claimants by relying on their American nationalities against Iranian nationality exacerbated the cultural clash between the United States and Iran. The Tribunal also tried to use a cultural methodology to settle the issues. As an American

arbitrator at the Tribunal argues, the Tribunal employed several cultural ties to the states of Iran and America, including but not restricted to the ‘integration of the dual national in each of the national societies’; and ‘political and social attachments’⁸¹ The prominent features of the Tribunal’s awards in dual nationality cases are based on ‘cultural ties’ of the claimants with Iran or the United States. It is not the military power of the United States that dictates the rulings of the Tribunal. It is not the hard power of the United States that has attracted those dual nationals. Rather it is the cultural soft power of America that tied Iranian dual nationals to American social life.

V Compensation for the taking of alien property

Historians identify the years between 1870 and 1914 as the heyday of European colonial expansionism. ...Intra-European relations in the late 19th century were stabilized by principles of a multipolar balance of power. ...This principle also justified colonial expansion and further supported the norm of compensation. ...In fact, the agendas of periodic international conferences on colonial matters directed discussion toward formulas for compensation. ...Although often difficult to engineer, compensation was considered legitimate and appropriate. ...There has been a profound change in the international regime that governs relations between the weak and the strong. ...Terms of compensation ...were spelled out in treaties that concluded colonial conflicts, and the rights of colonizers and obligations of subjects were also elaborated from time to time in unequal treaties.⁸²

The history of compensation could be traced to the colonial period. As civilization developed, the standard, too, changed. The payment, in amount, of some money replaced killings and beatings. The debates over the duty to compensate and its legal basis go back to the 19th and the early 20th centuries when the Russian and Mexican revolutions occurred. The Calvo Doctrine, named after the 19th Century Argentine jurist and publicist Carlos Calvo posits that national law and jurisdiction should be recognized in expropriation claims on grounds of sovereignty, maintaining ‘that aliens are not entitled to rights and

privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities'. Although this doctrine was never universally rejected, the many tribunal decisions all accept that expropriation claims are the subject of customary international law and that such laws prevail over national laws.⁸³

VI Traditional standard of compensation

The traditional standard of compensation formula is often described by reference to the famous July 21, 1938 letter of Secretary of State Cordell Hull to the Government of Mexico.⁸⁴ In response to a refusal of Mexican government to compensate Americans for properties it had taken, Secretary Hull's letter announced that the Americans were entitled under international law to "prompt adequate and effective compensation". The core of this three-point formulation of the standard, sometimes referred to as the "Hull Doctrine" or the "Hull Rule," was that the compensation must be "adequate". This was interpreted as a "full" compensation principle that had been developed by international tribunals.⁸⁵ The compensation must be paid at or near the time of the taking, and the interest from the date of taking would be payable. The third point of the standard that the compensation be "effective" means that monetary payment must be in a freely convertible currency or some other form that has measurable value and is useable by foreign party.⁸⁶

The proponents of the full compensation argue that this standard is buttressed by treaty practice of states as well as decisions of international tribunals and has remained effective and valid until the present time. They argue that only the old pattern⁸⁷ of the Friendship Navigation and Commerce (FNC)⁸⁸ treaties governing in the pre-war period, as well as the new generation of Bilateral Investment Treaties (BIT), have frequently cited in detail, provisions on compensation against expropriation of the foreign property, employing either the standard of 'prompt, adequate and effective', 'just' or 'full value' compensation. These proponents have also invoked certain international decisions such as the *Chorzow Factory Case*⁸⁹ and the Norwegian Shipowners Claims.⁹⁰

VII Conflict over the traditional standard of compensation

The controversy over the standard of compensation, on the other hand, goes back to the post World War II period, particularly the decolonization period when the newly independent states of the third world, working through U.N. channels, attempted to challenge customary international law such as of expropriation which they did not participate in its formulating.

The rule of compensation was first challenged by Latin American countries. They took the opposite position rejecting any acquired rights of the alien and, thus, any rule of minimum standard of treatment.⁹¹ Moreover, the victories of the Russian and Mexican revolutions in the early 20th century brought new challenges against the supposed traditional rule of compensation. Russians during the 1920s and the Mexicans in the 1930s argued that all states possess full authority over all property within their borders and no international law rule existed that diminished this fundamental principle of sovereignty. This view, however, has never been recognized by international tribunals.

A number of socialist and developing countries came to challenge the traditional standard of full compensation through UN General Assembly resolutions between 1962 and 1974.⁹² Mention could be made of a resolution adopted in 1974 by a vote of 105 to 16, with 15 abstentions which endorsed the 'Charter of Economic Rights and Duties of States'. The charter provided that appropriate compensation should, but not necessarily must, be paid and that any controversy on expropriation 'shall be settled under the domestic law of the nationalizing state and by its tribunals'.

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and in all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals... [

Unless otherwise agreed.] United Nations General Assembly Resolution N. 3281 (xxix), charter of Economic Rights and Duties of States (1974), reprinted at 14 I.L.M 251 (1975)

Since the GA resolutions are not binding, the Charter failed to become a source of international law under the Statute of the International Court of Justice which cites treaties, state practice, and the decisions of international tribunals as primary source of international law. The charter further failed when many of the developing countries signed bilateral treaties with the capital-exporting countries and the United States in which the traditional standard of full compensation was envisaged. Such treaties were mostly concluded between the United States and developing countries during in the 1950s.

VIII Conflict over compensation at the Tribunal

Ironically, as the Tribunal was getting under way in 1981, the standard of compensation to be paid under international law had already become more controversial than before. In the same year the American Second Circuit Court of Appeals, located in New York , in the *Banco Nacional De Cuba v. Chase Manhattan Bank*⁹³ reviewed the history of the literature on compensation, with special attention to the General Assembly Resolution discussed above and adopted both ‘full’ and ‘appropriate’ compensation and went on to argue that “This overview of the actions of members of the General Assembly presents at best a confused and confusing pictures to what the consensus may be as to the responsibilities of an expropriating nation to pay ‘appropriate compensation’ ...It is difficult ...to state...what is the international law now as regards compensation for expropriated alien properties”⁹⁴

Accordingly, at the time when the Tribunal was getting under way, the traditional formula of ‘full compensation’ was being challenged, even the said New York Court of Appeals cast doubt about the validity of a specific formula on the issue at stake. The first award in the Tribunal was issued in American International Group (“AIG) in December 1983 by Chamber Three where the Tribunal held the traditional standard of full

compensation was applicable.⁹⁵ Two years later, Judge Lagergren, the Chairman of Chamber One and a well-known international arbitrator in the case INA,⁹⁶ although relied on the Treaty of Amity as the *Lex Specilis*, decided that the full compensation standard prescribed in international law may have been undermined at least as it applied to large-scale nationalizations of this kind:

In the event of such large-scale nationalizations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' compensation (when used as identical to 'full' compensation standard as proposed in this case).⁹⁷

Judge Holtzman chose to challenge Judge Lagergren's position and both filed lengthy separate opinions on the current status of the traditional standard of full compensation. In citing a number of well-known authorities like sir Hersch Lauterpacht, Judge Lagergren wrote that 'in cases in which fundamental changes in the political system and economic structure of the state or far-reaching social reforms entail interference,...solution must be sought in the granting of partial compensation'. In contrast, Judge Holtzmann wrote emphatically that no change had taken place in the international law standard, that none of the authorities cited by Judge Lagergren supported that conclusion. He then named the Lauterpacht quotation as 'the expression of a search for a future rule, not the description of an established principle of law'. Judge Holtzmann then concluded that:

Thus, it can be seen that whatever 'reappraisal' of customary international law may have occurred in recent years, it has not lead courts or arbitral tribunals to adopt a standard of partial compensation.⁹⁸

A very important award in Phillips Petroleum was rendered by Chamber Two, under the chairmanship of Judge Briner, in which the award held that the Treaty of Amity as a *Lex Specialis* was applicable and that the full equivalent of the property taken must be

granted. Iran's arguments were totally rejected and even its request for a standard less than full was rejected.⁹⁹ In the *Tippet, Abbet, McCarthy, Stratton Case*, the Tribunal awarded that 'The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived,'¹⁰⁰

A close and correct reading of the Tribunal awards on expropriation cases suggest that all three chambers have ruled with almost unanimity that the standard of compensation is 'full' compensation with the exception of the *Sola Tiles*,¹⁰¹ in which the claimant alleged that the Iranian Revolutionary Committee had expropriated its company in Iran. The Claimant formulated the applicable law and the P.C.I.J. judgment in the *Chorzow Factory Case* but made no reference to the Treaty of Amity. The Tribunal in the decision of April 1987 decided that despite the parties' non-reference to the Treaty of Amity, this Treaty must 'form part of the legal background against which the Tribunal decides the case and it could not, therefore, be ignored.'¹⁰² The tribunal concluded that "appropriate" compensation is the applicable standard under customary law but added that this standard is broad enough to include "full" compensation.

There remains one significant question as to why the Tribunal paid little attention to customary international law. As it was discussed in my chapter on the nature of the Tribunal, the Tribunal has a mixed character indicating that both interstate and commercial claims are at stake. Most of the claimants are non-state actors and the issues in private international law outweigh those of public international law. As a result, it seems that the Tribunal has little reason to rely on the principle of sovereignty. One century of customary international law is a clear manifestation that the states were the major actors. The state has not withered away, but it has had a serious setback.

The departure by the Tribunal of customary international law must be attributed to the Treaty of Amity, a bilateral treaty concluded between the United States and Iran under the Shah in which the same traditional standard of full compensation had been incorporated

in 1955. The treaty was relied upon by the United States at the Tribunal and the Islamic Republic of Iran came to oppose it to no avail. The claims before the Tribunal have raised three major substantive issues where there is considerable divergence between Iran and United States, reflecting an ideological difference between Western states and developing countries.

Thus, the most important issues for the Iran-United States Claims Tribunal have been: what constituted expropriation, the limits on the rights of states to expropriate, the legality/lawfulness or illegality/unlawfulness of expropriation, and the standard of compensation, the evaluation and the measurement, i.e., another crucial issue with respect to the 'full compensation' seems to be the problem of its measurement (how full is the full?) the interest thereto and the determination of interest rate, the conceptual problems such nationalization de facto nationalization, confiscation and the taking. It is beyond the scope of this dissertation to cover all the areas of conflict in these issues.

I will limit myself to the standard of compensation. All other standards of 'just compensation', 'fair compensation', 'partial compensation' as well as the expectations of the developing countries with respect to compensation were denied by the Tribunal as irrelevant. For instance, some lawyers from developing countries posit that the payment of compensation must be a depending variable on the development, in developing countries, of a sector in which an investment by a capital exporting country has been made. If such investment has contributed to the development of that sector in the developing country, then the payment of compensation is a must. If not, no payment should be made as compensation.¹⁰³ At the Tribunal none of these observations are taken into account because of the Treaty of Amity and the Algiers Declarations.

Therefore, in examining the Tribunal's practice in the payment of compensation to the damage done to the claimants, one must take into account certain factors which allow special treatment of the cases. A first factor is the issue of flexibility which was discussed

in previous chapter, suggesting that the Tribunal is free to use any law it could find applicable. A second factor is that the Algiers Declarations provided that the Tribunal could have jurisdiction over claims arising both of ‘expropriation’ and ‘other measures affecting property rights’; a third factor is a reference, in the Treaty of Amity to the property rights which include ‘interest in property’. Both the Algiers Declarations and the Treaty of Amity granted two conflicting strategy: flexibility and special arrangement or *Lex Specialis*. I shall now try to examine some of such awards rendered by the Tribunal.

In *Amoco International finance Corp v. The government of the Islamic Republic of Iran*,¹⁰⁴ an American company claimed that Iran had expropriated its rights under the Khemco agreement with Iran’s National Petrochemical Company. Iran in its defense argued that the revolution was a force majeure situation, a statement the Tribunal totally rejected. By relying on the Treaty of Amity, the expropriation was viewed illegal and the claimant was found ‘deprived of its property rights under the Khemco agreement.’¹⁰⁵

As for the interest, the Tribunal started granting interest on American properties from the beginning of its work. Iranian arbitrators opposed the Tribunal’s position and in 1982 filed a request for the interpretation of the Algiers Declaration with respect to the interest on such properties. In *The Islamic Republic of Iran v. the United States of America*,¹⁰⁶ Tribunal viewed ‘interest’ as an ‘integral part’ of the claim ‘on the basis of respect for law’ and that ‘compensation for damages suffered due to delay in payment’ was required by all three Chambers of the Tribunal. In *Sylvania Technical System, inc. v. the government of the Islamic Republic of Iran*, the Tribunal determined the rate of the interest at 12 percent.¹⁰⁷

As for the standard of compensation, one of the pioneer cases to determine the standard of compensation was *Phelps Dodge Corp. et. al. v. the Islamic Republic of Iran*¹⁰⁸ in which Iran argued that the Treaty of Amity was not in force after the Islamic Revolution but the Tribunal found the treaty ‘clearly applicable to the investment’ and held that the

issue was not whether the Treaty was in force.¹⁰⁹ All subsequent awards followed this decision reached in the *Phelps Case*; including *Sedco, Inc., v. National Iranian Oil Co., et al.*,¹¹⁰ *Oil Field of Texas, Inc., v. the Government of the Islamic Republic of Iran.*¹¹¹ Americans clearly have been happy with the standard of compensation. In his concurring opinion in the *Sedco Case*, American Judge Brower wrote ‘It is by now well established at this Tribunal that in a case of expropriation, whether lawful or not, the injured party certainly is to be awarded at least the ‘full value’ of the property taken.’¹¹²

It seems that, given the wording of the Treaty of Amity, the Tribunal stated clearly that the issue of ‘legality-illegality’ or ‘lawful-unlawful’ takings was totally irrelevant. The Tribunal’s position in this issue is self-evident, for instance in the cases of *Starret Housining Corp et al.*¹¹³ and *Phillips Petroluem Co*¹¹⁴ both against the Government of Iran, the Tribunal did not consider the problem of lawfulness or unlawfulness of the takings, simply because of the express wording of the Treaty of Amity.

Another major area of conflict which is not within the scope of this dissertation is hundreds of claims arising out of the Foreign Military Sales Program (FMS), mostly by the Government of the Islamic Republic of Iran against the US Department of Defense. Iran divided its claims into six parts: (1) for refund of a payment that Iran had made to purchase certain aircraft spare parts before the revolution, (2) and (3) payments that Iran had made for certain goods and services which the United States had denied to provide them (4) claims for the return to Iran of certain military equipments that had been sold to Iran but the United States retained them after the hostage crisis, (5) claims arising out of the defective Bell Helicopters that had been sold to Iran and (6) a claim by Iran for damages and a counterclaim by the United States arising out Iran’s failure to protect classified information it had received under FMS program. Parts (2) and (3) involved more than one thousand claims amounting to billions of dollars. Some of these claims have been settled to which I will come in the next chapter and some of them are pending before the Tribunal.

IX Conclusion

This chapter deals with two categories of dispute: conflict in dual nationality and in the controversial issue of compensation for expropriation. As for the first category of disputes, it must be emphasized that the dual nationality cases were more political than legal because Iran was faced with hundreds of claims of Iranian nationals who had acquired American nationality and happened to be the Shah's supporters. Furthermore, by adopting the doctrine of 'dominant and effective nationality', the Tribunal had in fact ruled out customary international law which stressed the principle of sovereignty vis-à-vis the principle of property rights. The principle of sovereignty has been the corner stone of the Islamic Revolution. Iran's 'neither West nor East' policy better conveys this message.

Furthermore, it is highly unlikely for a national of industrialized country to acquire the nationality of a Third World country. Accordingly, the doctrine of 'dominant and effective nationality' favors the export of capital from developing countries to industrialized states. Yet it must be admitted the doctrine has been established in the course of an historical interaction of states, in an international society of states in which institutional norms matter.

In the second category of disputes, that is to say, in the cases of compensation for expropriation, the Third World position was also denied and the Tribunal invoked specific agreements that had been concluded between Iran and the United States. The standard of 'full compensation' provided for in the Treaty of Amity and reiterated in the Algiers Declarations was upheld by the Tribunal, a standard which came to be known as 'Hull formula' following the Mexican Revolution.

Having examined the problem of dual nationality and expropriation under international law, I have shown, in this chapter, how the formulas of "dominant and effective nationality;" and "full compensation" were accepted in international law. The former was adopted following the ruling in *Nottebohm* and *Merge* cases, and subsequently the Tribunal

employed that formula in *Esphahanian/Golpira Cases*. The latter was taken from the “Hull formula” following the revolution in Mexico which was subsequently incorporated in the Treaty of Amity. The Algiers Declarations considered the Treaty of amity as “*Lex Specilis*.” Accordingly, The Tribunal required that “full compensation” must be paid for the damages done to American nationals or corporations. Those Iranians who had acquired “dominant and effective” American nationality became entitled to the “full compensation.” Apparently, Iran tried to voice its objection to all of those formulas. The above mentioned cases showed how Iran and America opposed each other in those cases. It seems that both Iran and the United States, basically, believed in the payment of compensation. What they disagreed was the amount of compensation. Iran favoured “fair”, “just”, and “partial” compensation. However, none of these standards had been incorporated in the Treaty of Amity. As a result, the foregoing cases were a second battle front against the United States in the eyes of Iranians.

Disputes are not eternal. Iran and the United States have clashed in and out of the Tribunal. Simultaneously, as in the case of the Soviet Union and America, Iran and the United States, too, as two actors in an international society of states are destined to cooperate. The very minute that they decide to resolve the conflicts, is the landmark of their mutual cooperation. The fact that Washington and Tehran lived up to their commitments and continued to collaborate in spite of serious antagonism within the Tribunal and on the international level between them, was a major success for all the parties as well as for the Tribunal. As their disputes are gradually resolved, the parties are encouraged by instinct to further beef up their interest through constructive engagements. The next two chapters will be devoted to cooperation.

Notes

¹ R. Jennings and A. Watts, *Oppenheim's International Law*, eds.I.2 (London: Longman, 1992) 378.

² Friederich Kratochwil, "Legal theory and international law," David Armstrong, ed. *International Law* (Oxon: Routledge, 2009)

³ William Bishop, "Nationality in International Law, *Grotius Society*," 28, 151-152.

⁴ Malcom N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University, 1997)

⁵ Under dual nationality theory, an individual may simultaneously possess the rights and responsibilities of citizenship in more than one nation. See *Kawakita. V. United States*, 343, U.S. 717, 734 (1952).

⁶ The United State Government and domestic courts have recognized that dual nationality will persist, see *Rogers v. Bellei*, 401 U.S.815, 827 (1971); *Kawakita v. United States* 343 U.S.717, 734 (1952); *Sadat v. Metes*, 615 F. 2d. 1176. 1185 (7th cir. 1980) available at <http://supreme.justia.com/us/401/815> and at <http://supreme.justia.com/us/343/717/index.html>

⁷ Article 3, "The Draft Articles on Diplomatic Protection," *ILC*, 54th Report, 173

⁸ Lauterpacht, ed, *International Law, A Treatise*, I. Peace, 649,651,656,654,552,656,

⁹ Oppenheim, Lauterpacht 656-666

¹⁰ Oppenheim, 666-7

¹¹ See, e, g., *Mergè Claim*, 22I. L. R. 443, 450-56 (Italian-American Conciliation commission-1955); *Liechtenstein v. Guatemala (Nottebohm case)*, [1955] I.G. J. 4, 22

¹² See for example Article 1, *The Hague Convention* (1930)

¹³ Article 4, *The Hague Convention on Certain Questions Relating to the Conflict of Nationality Law*, (1930)

¹⁴ "Case Concerning Reparation for Injuries Suffered in the Service of the United Nations, Advisory opinion," *I. C. J. Rep.*, 1949, 186, this is a comprehensive review of international cases reflecting the theory of non-responsibility. This has been Iran's position before the Tribunal. See, for instance, the "Dissenting Opinion of the Iranian Arbitrators" (part II. 2), *Case A/ 18*, 4. 348.

¹⁵ *United States V. Egypt (Georg J. Salem Case)*, II, R. I. A. A. 1163. The Tribunal which was established under the 1931 Agreement between the United States and Egypt, held that 'The Principle of the So-called 'effective nationality', the Egypt Government referred to, does not seem to be effectively established in International law, 1187.

¹⁶ Mohsen Mohebi, *The International Law Character of the Iran- United States claims Tribunal*, (The Hague: Kluwer Law International, 1998)165. This is a reflection of Iranian position before the Tribunal.

¹⁷ *Liechtenstein V. Guatemala* known as the *Nottebohm* case, for the case was brought by Liechtenstein to espouse the claims of Ms. Nottebohm against Guatemala.The facts of the case were that Nottebohm was a German national by birth .For most of his life he had lived in Guatemala and he had extensive business interests there. He did not, however, acquire Guatemalan nationality. In 1939 he traveled to Liechtenstein to the exclusion and acquired, on an accelerated basis, the nationality of Liechtenstein to the exclusion of German nationality. Nottebohm returned to Guatemala in 1940, traveling on his Liechtenstein passport. In 1943 Nottebohm was arrested by Guatemala as an enemy alien and interned in the United States. His property was confiscated by Guatemala .In 1946 he was denied re-entry to Guatemala and traveled to Liechtenstein, where he lived for the next several years. In 1951 Liechtenstein instituted proceeding in the International Court of Justice, claiming the right of diplomatic protection. The court considered that although the grant of nationality was a matter of municipal law, the right of diplomatic protection vis-à-vis other states was a question of international law. See Shaw, *International Law*, 725

¹⁸ *United States v. Italy* (known as the *Merge* case, as the case was brought by the United States to espouse the claims of Mrs. Merge, an American national who had acquired Italian nationality by marriage) The *Merge* case decision was given on 10 June 1955, few months after *Nottebohm* case was decided by I.C. J., in 6 April 1955. The facts of *Merge* were that Mme Merge was born in the United States and accordingly was a United States national .She married an Italian diplomat and thereafter resided with her husband expect for a brief stay in the United States in 1947. She had acquired Italian nationality by virtue of her marriage. The United States invoked the Treaty of Peace stating that all United Nations nationals were entitled to claim, irrespective of where they had the nationality of the respondent state. Italy replied that a defeated state could still rely on the Principle of International law in interpreting the Treaty of Peace. See I. Brownlie, *Principles of Public International Law* , 6th ed. (Oxford: Clarendon Press, 2003) 390.

¹⁹ Article II of the Claims Settlement Declaration (Declarations of the government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran.), *Iran- U.S. C.T. R.* 1.3. see also Appendix Two

²⁰ Article VII,

²¹ Article VII (1)

²² Article VII (1) (b)

- ²³ Article VII (2)
- ²⁴ *Esphahanian v. Bank Tejarat, Iran-US C.T.R.*2.157
- ²⁵ For this history, see the Award in *Case A-18*.
- ²⁶ Article VII (a) and (b)
- ²⁷ *Iran-US C.T.R.* 2.171
- ²⁸ Toope, 305
- ²⁹ “Declaration” of Iranian Arbitrators in *Case-18* in *Iran-US C.T.R.* 5.251
- ³⁰ Toope, 309
- ³¹ *Case A-18*, “Dissenting Opinion of the Iranian Arbitrators.”, *Iran-US C.T.R.*, 1.275
- ³² Toope 364
- ³³ Andreas F. Lowenfeld, *The Iran-United States Claims Tribunal : An Interim Appraisal*. Richard B. Lillich 80
- ³⁴ Statement of Prime Minister Musavi” (24 April 1984), 5 *Iran-US C.T.R.* 5.428
- ³⁵ *Iran-U.S.C.T.R.* 2.141
- ³⁶ *Iran-U.S.C.T.R.* 2.6
- ³⁷ Joseph Nye, “The logic of inequality” in *Foreign Policy*, (Summer 1985) 59. 123-131,
- ³⁸ Henry Longfellow Poems
- ³⁹ *Iran-U.S.C.T.R.* 1.141
- ⁴⁰ *Iran-U.S.C.T.R.* 3.147
- ⁴¹ *Iran-U.S.C.T.R.* 2.51
- ⁴² *Iran-U.S.C.T.R.* 2.138
- ⁴³ *Iran-U.S.C.T.R.* 2.78
- ⁴⁴ *Iran-U.S.C.T.R.* 17.92
- ⁴⁵ Toope 319
- ⁴⁶ *Iran-U.S.C.T.R.* 9.350
- ⁴⁷ *Iran-U.S.C.T.R.* 9.350
- ⁴⁸ *Iran-U.S.C.T.R.* 14.3
- ⁴⁹ *Iran-U.S.C.T.R.* 19.48
- ⁵⁰ *Iran-U.S.C.T.R.* 19.52
- ⁵¹ *Iran-U.S.C.T.R.* 22.123
- ⁵² *Iran-U.S.C.T.R.* 22.123
- ⁵³ *Iran-U.S.C.T.R.* 22.129
- ⁵⁴ *Iran-U.S.C.T.R.* 22.129
- ⁵⁵ *Iran-U.S.C.T.R.* 22.138
- ⁵⁶ *Iran-U.S.C.T.R.* 22.134
- ⁵⁷ *Iran-U.S.C.T.R.* 22.155
- ⁵⁸ *Iran-U.S.C.T.R.* 22.155
- ⁵⁹ *Iran-U.S.C.T.R.* 23.259
- ⁶⁰ *Iran-U.S.C.T.R.* 23.259
- ⁶¹ *Iran-U.S.C.T.R.* 23.258
- ⁶² *Iran-U.S.C.T.R.* 23.258
- ⁶³ *Iran-U.S.C.T.R.* 18.88
- ⁶⁴ *Iran-U.S.C.T.R.* 23.307
- ⁶⁵ *Iran-U.S.C.T.R.* 24.40
- ⁶⁶ *Iran-U.S.C.T.R.* 24.40
- ⁶⁷ *Iran-U.S.C.T.R.* 25.190
- ⁶⁸ *Iran-U.S.C.T.R.* 25.190
- ⁶⁹ *Iran-U.S.C.T.R.* 25.264
- ⁷⁰ *Iran-U.S.C.T.R.* 25.264
- ⁷¹ *Iran-U.S.C.T.R.* 26.7
- ⁷² *Iran-U.S.C.T.R.* 7.26
- ⁷³ *Iran-U.S.C.T.R.* 2.80,75
- ⁷⁴ Award NO. ITL 80-485-1
- ⁷⁵ *Iran-U.S.C.T.R.* 22.118
- ⁷⁶ *Iran-U.S.C.T.R.* 22.121-122
- ⁷⁷ *Iran-U.S.C.T.R.* 25.196
- ⁷⁸ *Iran-U.S.C.T.R.* 25.196
- ⁷⁹ *Iran-U.S.C.T.R.* 25.278
- ⁸⁰ *Iran-U.S.C.T.R.* 25.278
- ⁸¹ Aldrich 76
- ⁸² Donald J. Puchala and Raymond F. Hopkins, “International Regimes: lessons from inductive analysis” in Krasner, *International Regimes*, 67-74.

⁸³ D. Shea, *The Calvo Clause* 19 (1955), R. Lillich, “The Valuation of Nationalized property in International Law” John A. Westberg, *International Transactions and Claims, Involving Government parties, Case law of The Iran-United States Claims Tribunal*, (Washington: International law Institute) 7.

⁸⁴ John A. Westberg 21

⁸⁵ The fact of the case is that following the Mexican agrarian reforms in 1917 and oil nationalization in 1938, leading to the expropriation of the American nationals’ properties and interests in Mexico, the government of United States claimed full, prompt, adequate and effective compensation .The Mexican Government responded that any indemnification shall be made in accordance with the Mexican municipal law. See Brownlie, *Principles of Public International Law*. 509.

⁸⁶ Bishop, *International Law, Cases and Materials*, 658-9

⁸⁷ H.Walkwer, “Treaties for the Enforcement and Protection of Foreign Investment.Present: US Practice” *Am.I.L.L.5.* (1956)229

⁸⁸ Mention could be made of the 1977 Egypt-Sudan and the 1976 France-Tunesia treaties.

⁸⁹ *The Charzoe Factory Case (Poland v. Germany)*, *PCIJ Series A*, 17 (1922), 47, available at [http://www.worldcourts.com/pcij/eng/decisions/1927.07.26 Chorzow.7](http://www.worldcourts.com/pcij/eng/decisions/1927.07.26%20Chorzow.7) The *Charzow Factory Case* concerned and unlawful expropriation as Poland had taken the German interests in the Factory in violation of its treaty obligations .The holding of the Court that a restitution in kind ,or if this is not possible ,payment of a sum corresponding to the value which a restitution in kind would bear ‘full compensation ,introduced the standard of compensation for an unlawful taking and not the standard applicable in every and all cases of expropriation.

⁹⁰ The Norwegian Shipowners Claims (*Norway v. the United States*), *1 RIAA*, 1922, .307.399. In the Norwegian Ship-owners Claims, the responsible PCA tribunal determined the ‘just’ compensation in its American sense, i.e. “full”.

⁹¹ *Calvo Doctrine* or *Calvo Clause*, *Enc.P.I.L.8.P.62*. According to Calvo ‘it is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to protection more extended. It is evidence the Calvo doctrine challenges the diplomatic protection institution by invoking the national treatment standard.

⁹² See *Cuba v. Chase Manhattan*, 658 F.2d 889-91

⁹³ *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658F.2d. 875

⁹⁴ Restatement (Second) of Foreign Relations Law of the United States (revised), preliminary draft of introduction, xvi ii (Tent. Draft No. 1, 1980) quoted in *Cuba v. Chase Manhattan Bank*.

⁹⁵ *American International Group, Inc v. Iran*, 93-2-3 (19 December 1983)

⁹⁶ *INA Corp v. Iran, Iran-U.S.C.T.R.* 8.373

⁹⁷ *INA Corp v. Iran Iran-U.S.C.T.R.* 8.378

⁹⁸ Separate opinions of Judges Lagergren and Hotzmann, *INA. Corp, v. Iran*, 386-401

⁹⁹ *Phillips Petroleum Co. Iran v. the government of the Islamic Republic of Iran* Award No. 425-39-21, Separate opinions of Judges Lagergren and Hotzmann, *INA. Corp, v. Iran*, 386-401

¹⁰⁰ *Tippetts, Abbetts, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2,6

¹⁰¹ *Iran-U.S.C.T.R.* 14.23

¹⁰² Article 5.of the Seoul Declaration provides that a state may nationalize, expropriate, and exercise eminent domain.

¹⁰³ C.F. Amerasinghe, “Issues of compensation for the taking of alien property in the light of recent cases and practice.” *International and Comparative Law Quarterly*, (January 1992) 41. 22-65

¹⁰⁴ *Iran-U.S.C.T.R.* 15.189

¹⁰⁵ *Iran-U.S.C.T.R.* 15.189

¹⁰⁶ *Iran-U.S.C.T.R.* 16.285

¹⁰⁷ *Iran-U.S.C.T.R.* 8.298

¹⁰⁸ *Iran-U.S.C.T.R.*10.121

¹⁰⁹ *Iran-U.S.C.T.R.* 10.121

¹¹⁰ *Iran-U.S.C.T.R.* 10.180

¹¹¹ *Iran-U.S.C.T.R.* 12.308

¹¹² *Iran-U.S.C.T.R.* 9.245

¹¹³ *Iran-U.S.C.T.R.* 16.112

¹¹⁴ *Iran-U.S.C.T.R.* 21.79

Chapter Seven

Cooperation on substantive issues

All historical international societies have had as one of their foundations a common culture. On the one hand, there has been some element of a common intellectual culture—such as a common language, a common philosophical or epistemological outlook, a common literary or artistic tradition—the presence of which served to facilitate communication between the member states of the society. On the other hand, there has been some element of common values—such as a common religion or a common moral code—the presence of which served to reinforce the sense of common obligation. (Hedley Bull)¹

Cooperation occurs when actors adjust their behaviour to the actual or anticipated preference of others, through a process of policy coordination. To summarize more formally, intergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of process of policy coordination. (Robert O. Keohane).²

Two important nations have negotiated their way out of serious difficulties by agreeing to arbitration. They have thereby affirmed their belief in what a distinguished lawyer said at the end of the last century, namely, that international controversies may honourably, practically and usefully be dealt with by arbitration. (Judge Lagergren, the first President of the Tribunal)³

I Introduction

Is cooperation necessary in the international political system or international society of states? How can conflicts be managed and resolved? Is it not true that conflict and cooperation generate each other? How can the ongoing process of human life continue on this planet in the absence of cooperation? Man's life has been replete with crosses, conflict, temptations, discord and collaboration. Both conflict and cooperation are the ingredients of

our daily life. In one sense, conflict ceases to exist at a point where cooperation starts. However, the more the two phenomena get closer, the more internal contradictions and the contours of material incentives will surface. As a result, close cooperation will lead to conflict. Iran and the United States worked together for twenty six years, but that era collapsed in 1979, building up to a dramatic climax of unprecedented crisis. Yet, mediation, conciliation, compromise and negotiation were preferred to military confrontation and the Tribunal adopted a strategy based on an amalgam of inter-state and private mechanisms of conflict resolution.

In this chapter, cooperation will cover certain substantive issues raised in thousands of cases brought before the Tribunal either by the claimants or by respondents. These issues are: terms of accords in which I show that an early stage in cooperation takes place to outline, draft and redraft the expressing wording of the accords; cooperation in finance and banking where some technical arrangements needed to be made with several Dutch and British banks to facilitate the transfer of money; settlements agreements whereby the parties already negotiate out of the court but within the Tribunal premises and if they reach an agreement, they file a legal brief ending the litigation before the Tribunal (This is the highest level of cooperation at the Tribunal called Awards on Agreed Terms); small claims which usually include claims less than \$250000 belonging to individuals; and interim measures where an interim ruling is necessary to take a prompt action in a case, for instance when some historical heritage of Iran is put on auction, Iran asks for an interim measure of the /tribunal; lump sum settlements in which the parties agree on a tentative amount to settle the claim (rationality is strongly mitigated in these cases).

I shall endeavour to include the forces of cooperation between Iran and the United States in spite of the mutual hostility that dominated their relationship after the revolution. It is an attempt to demonstrate that cooperation is possible between states; and that such cooperation is not limited to building alliances against a common enemy. More importantly,

cooperation can take place between enemies themselves. On the one hand, cultural differences are prone to conflict, and on the other hand, ‘some element of common culture and values’, as pointed out by Bull can facilitate collaboration among states in international society. First, I shall analyze the cooperative behaviour of Iran and America on the terms and conditions of the Algiers Declarations.

II Cooperation on the terms of Accords

The day the American Embassy was occupied and its diplomats were taken as hostages, various attempts were made to communicate with Mohandes Bazargan’s provisional government in Tehran. When the provisional government failed to help release the hostages, the government-to-government cooperation began at the highest levels. President Jimmy Carter wrote to Ayatollah Khomeini on November 6, 1979:

“Dear Ayatollah Khomeini:

Based on the willingness of the Revolutionary Council to receive them, I am asking two distinguished Americans, Mr. Ramsey Clark and Mr. William G. Miller, to carry letter to you and to discuss with you and your designees the situation in Tehran and the full range of current issues between the U.S. and Iran....The people of the United States desire to have relations with Iran based on equality, mutual respect, and friendship....”⁴

The US-Iran negotiated cooperation started from 1980 in which Iran put four conditions for the release of American diplomats. The Islamic Consultative Assembly, the Majlis, met in November 2, 1980. The special commission on the hostages submitted their report to the Majlis. This report was based upon the proposals made by the Imam (Ayatollah Ruhollah Khomeini) on the subject of hostages. The proposals were: a promise from the United States not to interfere in the internal affairs of Iran, politically, militarily, economically; unfreezing all Iranian assets in and outside the United States; cancellation and annulment of economic and financial actions and legal measures against the Islamic

Republic of Iran; and the properties of the Shah had to be returned. The first American response was issued on November 11, 1980 which read: ‘The Government of the United States has received and has carefully reviewed the resolution adopted on No.2, 1980, by the Islamic Consultative Assembly of Iran. The United States accepts in principle the resolution as the basis for ending the crisis and hereby proposes the following series of Presidential Orders and declarations is to be made public and become effective upon safe departure from Iran of the 52 hostages.’⁵

The United States in response informed Iran that it “is prepared to deliver to the Government of Algeria a copy of a formal declaration signed by the President of the United States in which the United States its policy, which is to refrain from interfering, either directly or indirectly , politically or militarily, in the internal affairs of Iran.” The United States reported that it was prepared to forward to the Government of Algeria a copy of a ‘signed Presidential Order’ which could unblock Iranian assets within the jurisdiction of the United States, located in the U.S. or other countries, “in order to allow the parties to move expeditiously toward *a resumption of normal financial relations as they existed before Nov.14, 1979.*”(Emphasis added). The last emphasized phrases show that both Iran and the United States had agreed to not only resolve the crisis but also to resume their normal relations as existed prior to the revolution. This is important evidence showing that both actors believed in settling all issues including claims against each other. Iran was prepared to pay back its loans and debts. The United States was also prepared to unblock Iranian assets. Accordingly, it is plausible to assert that the states had ‘good intent’ to do so. They shared some values and norms.⁶

To do so, America agreed to order the Federal Reserve Bank of New York to provide Iran with all Iranian assets and properties held by the bank, ‘amounting to approximately \$2.5 billion’; also to remove all restrictions from an additional amount of ‘approximately \$3 billion on deposit with the U.S. banks abroad’; to cancel all judicial

orders and attachments regarding the capital and assets of Iran within U.S. jurisdiction. The United States promised that it was prepared to deliver to the Government of Algeria copies of all signed Presidential Orders regarding each phase of cooperation such as ‘revoking all economic and financial sanctions and all legal prohibitions imposed since the seizure of the hostages against exports to, imports from and transactions with Iran in order to allow trade between the two countries to be resumed on the basis of conditions prior to Nov. 14, 1979.’⁷

All these wide ranges of cooperation are missing from the literature on Iran-US relations. Their relationship is usually depicted, by scholars, as in a “state of total war.” This results from a total academic ignorance. In practice, however, The United States went beyond economic spheres of cooperation by extending its scope of cooperation to absolutely political eras, namely, to prohibit ‘the transfer out of the United States of any properties owned by or derived from the estate of the former Shah.’; to ‘withdraw all claims pending against Iran in the International Court of Justice and to refrain from pursuing any other claims for financial damages on account of injuries or harm emanating from the seizure and detention of the U.S. Embassy and the hostages in Teheran.’ The United States also pledged that ‘that all decrees and judgments of the Government of Iran relating to such property may be enforced in the courts of the United States in accordance with U.S. law.’ Finally, the United States concluded that ‘this response to the decision of the Iranian Majlis represents the completion of the penultimate stage in resolving the hostage issue. The final step, which the United States believes should be taken in the next several days, would be to arrange, through the good offices of the Government of Algeria, release of all hostages.’⁸

Following these arrangements, several comments and four resolutions were exchanged between Iran and the United States which finally resulted in certain steps that had to be taken by the United States and Iran, the most important of which on the part of the United States, were: the U.S. Government, in taking all the legal and administrative steps

necessary for carrying out all of the provisions of the resolution of the Islamic Consultative Assembly, will also take the following measures...The return of \$9,069,000,000 of Iranian assets plus relevant interest at the standard rates, as well as the return of the gold belonging to Iran, deposited with the Federal Reserve Bank of New York, and deliver the above to the central Bank of Algeria before the release of the 52 Americans, hostages of the Iranian nation. Immediately upon the release of the 52 Americans, these assets, after deduction of the amounts mentioned in subsections ...will be placed at the disposal of the Iranian Government by the Government of Algeria.⁹

In return, the steps that had to be taken by the government of the Islamic Republic of Iran, among other things, were:

Concurrent with all the aforementioned steps to be taken by the U.S. Government, the Iranian government pledges to ...settle its bona fide debts to American persons or institutions, the Iranian Government accepts that the claims of American entities and citizens against Iran, and the claims of Iranian nationals and institutions, be settled, in the first stage through agreement between the parties and, failing such agreement, through arbitration acceptable to the respective parties. For the purpose of repaying the above debts, the Government of the Islamic Republic of Iran will deposit with the Algerian Government an initial cash guarantee equal to \$1 billion, or any other guarantee acceptable to the Central Bank of Algeria. In repaying such debts, this guarantee will be adjusted in such a way that it will never drop below \$500 million.¹⁰

Based on those negotiations which reflect some kind of cooperation rooted in material and moral incentives, the Tribunal was formed. Parallel with the conflicting arguments of the two countries, a combination of moral, social values and material incentives compelled Iran and America to cooperate. These incentives were very well perceived by the Tribunal. I will now take a general overview of the cooperation at the Tribunal and then examine the issues involving finance and banking.

Cooperation at the Tribunal has taken place in two forms: private and public. The former usually involved individuals or companies while the latter concerned the states. Private negotiations have been very important at the Tribunal. For instance, during the first seven years, US corporate compensation from private awards exceeded that of public awards. This would seem to confirm what the theories of liberal institutionalism posit, namely that the private sector is most conducive to international cooperation, mainly but not solely because of confidentiality. Private sectors go after their own material incentives. The Swiss banks are unwilling to disclose information on their clients. In addition the private litigator displayed three characteristics that aided settlements. First, American parties involved in private awards were less extreme in their demands. Second, they were very ready to resolve their claims for quick cash rather than go for the long road of arbitration process. Third, they wanted to maintain cordial ties with Iranian customers.¹¹

Similarly, Iranians had learned that, first; US corporations were very well-documented with concrete evidence, were “very well accompanied by highly qualified judges, were very well informed in most cases and concluded that the Tribunal would have eventually ruled in favour of American Companies.”¹² Therefore the shadow of the future and the fear factor were crucial to the negotiations. Second, Iranian negotiators may have wished to continue their business with American Corporations. One private company, Beatrice Foods, agreed to receive \$375000 from Iran for previous shipment while agreeing to deliver an additional \$95000 for previously ordered but undelivered spare parts.¹³ In another award Iran Air paid Singer about \$300,000 for previous flight stimulators while Singer agreeing to sell Iran air the required spare parts and supply maintenance training for Iran Air personnel.¹⁴ As for the second (government-to-government) category of talks, one should mention that the Government of the Islamic Republic of Iran and the United States also have negotiated and settled their claims in cases involving the Foreign Military Sales (FMS) Program. Some Iranian claims were negotiated and settled in an amicable manner.

In *Case BI*(Claim 4) the United States paid Iran \$278 million as compensation for undelivered Iranian –owned U.S-made military equipment held in the United States since the Islamic Revolution in 1979.¹⁵ Here-below, I shall try to review a series of such negotiations and deliberations which took place either during the Tribunal hearings in the cases involved or at the Tribunal premises in various forms docketed as “out of court settlements”, “ settlement agreements”, “agreed terms”, and the like. The issues or legal matters concerned financial, banking, forum selection, interim measures, Security Account, small claims, enforcement of awards issued in favour of Iran, i. e., where should Iran be paid for such awards?, the return of the Shah’s assets, indirect claims, and counterclaims. I start with finance and banking.

III Finance and banking

Money and economic manipulation which result from capital accumulation have been central to both creation and settlement of the Iran-US crisis from the outset. Similarly, monetary issues have been crucial in extending proactive cooperation within the Tribunal. Iran’s financial status changed between 1973 and 1979 during the two international oil crises of the 1970s. Iran’s oil revenue jumped from \$1.6 billion in 1970 to \$20 billion in 1979. Government spending outpaced the revenues and investment in infrastructural projects was accompanied by both dramatic growth in the industrial sector and high inflation in the Iranian economy. The price of accommodation, housing and basic needs increased at a time when most of Iranians lived on fixed salaries. Inflation coincided with recession in the West.¹⁶ History repeats itself for the millennium. In 2009 during the election crisis, Iran faced the same problem: inflation inside the country, which had been a hot issue in the presidential campaign, coincided with recession in the West. In any case, the Iranian government under the Shah adopted deflationary policies that minimized investment and diminished employment in public sector.

The Shah, who was seen as an American agent, was criticized and was forced to replace Prime Minister Hoveida with Amuzegar who adopted superficial reforms which failed to appease the revolutionary demands. Accordingly, the ignorance by the government of financial problems was an important factor in the Iran-US crisis. At the same time, money and banking played a central role as a back channel during the hostage crisis negotiations and in the course of the Tribunal practice. John Hoffman, Jr., of Shearman & Sterling in New York argues that after the failed rescue operation in Tabas, a back channel, or to put it more correctly, a “bank channel” developed through private bank lawyers.¹⁷ Through its lawyers in Frankfurt, Iran approached Citibank Lawyers Herbert Wagendorf and Peter Heinemann to discuss a financial solution. The latter contacted Hoffman who had been coordinating defence litigation in Europe for Citibank arising out of claims by the Iranian Central Bank to lift the US freeze order. There was one problem, however: the Logan Act which makes it a crime for a private US individual to negotiate with an alien government on issues affecting the American policy.

Hoffman then asked permission from Deputy Treasury Secretary, Robert Carswell. The US government approved the negotiations. Since most of Iranian assets were held by US banks, then some financial solution was crucial to the final resolution of the hostage crisis. Although friction inside Iranian politics was problematic- between Mehdi Navab from Iranian Embassy in Bonn who had been receiving instructions from religious faction, Ayatollah Beheshti, and Alireza Nobari the Head of Bank Markazi (Central Bank) who had been acting on behalf of secular faction, Bani Sadr (the then President) in terms of the power struggle in Iran; it seemed that one line continued to remain open when the other line closed. The back channel or better to say “bank channel” ultimately finalized the Algiers Declarations.¹⁸ Ayatollah Beheshti was martyred, Banisadr was sacked and fled the country, and hostages were freed.

To demonstrate how important monetary issues were in lubricating cooperation between Iran and the United States, one has to pinpoint the role of banks, bankers and their lawyers in the countless hours of expert work that they spent to make the Algiers Declarations possible: the Undertakings of the Government of the United States and the government of Islamic Republic of Iran with respect to the Declaration itself, the Escrow Agreement among the United States, the Federal Reserve Bank of New York, Bank Markazi and Banque Central d'Algerie of 20 January 1981, The Escrow Agreement, and the Technical Agreements which included the Technical Agreement between Banque Central d'Algerie and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York of 20 January 1981, the Exchange of Notes between the Kingdom of the Netherlands and the United States of America of 10 July 1981, the Technical Agreement with De Nederlandsche Bank B.V. of 17 August 1981, the Technical Agreement with N.V. Settlement Bank of the Netherlands of 17 August 1981, and certain supplemental agreements. All these individuals and institutions were involved in a collective cooperative behaviour to determine, evaluate, liquidate, set up several escrow accounts, and manage the transfer of gold, gold bullion and security accounts, and fix standards for future negotiations and cooperation that were strong enough to survive for at least thirty years.

Monetary and financial matters played a significant part at the Tribunal as well. After the Revolution in Iran, the Iran-US monetary relationship never severed. The U.S Treasury Department permitted Iran to bring in limited amounts of money all the time. In spite of the freeze and the attachments against Iranian funds, Iranian Bank Melli continued to bring in funds. One of Iranian lawyers that worked in the Tribunal believed that "Iran and the United States were so tightly tied together in monetary issues that they could hardly sever their financial bonds"¹⁹. It is beyond the scope of this dissertation to elaborate on banking claims; however, a quick profile of the tribunal's practice in claims brought by banks before the Tribunal suggests that in 1982 for example, Iranian Central

Bank-Bank Markazi, filed 148 bank claims and 229 letter of credit claims. The United States voiced objection and argued against the Tribunal's jurisdiction against these cases. It argued that Iran could only bring counterclaims against US nationals. The Full Tribunal in *Case A17* decided that it would exercise jurisdiction over Iranian bank claims only insofar as the claims were against Dollar Account No.2. This account was established by the Bank of England under the Technical Arrangement. The Full Tribunal further argued that each chamber would be responsible as for the final decision on its jurisdiction over such claims. However, The Tribunal denied its jurisdiction over standby letters of credit claims. In fact, the Full Tribunal played its interpretative role and in doing so, required that the three chambers should decide as to whether or not they would exercise jurisdiction over bank claims. Neither Iran's position nor the US objection was admitted by the Full Tribunal. In doing so, The Full Tribunal left the door open for further cooperation to settle the bank claims.

IV Settlement agreement

Amongst the out of court settlements between Iran and America claimants, one of the first settlements reported was that of the *Philadelphia –based ARA Services*. They agreed to receive \$416.085 from the Tribunal as an out of court settlement. This sum covers food services provided by ARA's Air La cart division to Iran Air before November 1979, when the Airline stopped services to the United States. According to the Tribunal's report, 'during the financial year 1991/92 a total of 17 settlement negotiations took place at the Tribunal's premises involving 11 cases, as compared with 17 held in the previous financial year, involving 13 cases.'²⁰ These confidential negotiations took place not only between huge multinational corporations and the Government of the Islamic Republic of Iran but also between the latter and the Government of United States.

For instance, in *Cases 20 and 21*, large U.S. oil companies (Sun Co., Atlantic Richfield Co., Lavan Petroleum Co. (a joint venture between the National Iranian Oil

Company (NIOC) and four U.S. Oil companies), Union Oil Co of California (UNOCAL) and Murphy Oil Co. resolved their conflicts by negotiations.²¹ I will now present a detailed study of such negotiations. On 28 June 1991 the agent of the Government of the Islamic Republic of Iran and the Agent of the Government of the United States, pursuant to Article 34 of the Tribunal Rules, submitted a Joint Request for an Arbitral Award on Agreed Terms in *Case Nos. B32, B74, and 12786 through 12892* (the “Joint Request”). Attached to the Joint Request was a Settlement Agreement dated 3 June 1991 between the United States of America, on the behalf of the Claimants in *Case No. B32* and the Respondent in *Case Nos. B74, and 12786 through 12892*, and the Government of the Islamic Republic of Iran on behalf of the Respondent in *Case No. B32* and the Claimants in *Cases Nos. B74, and 12786 through 12892* (the “Settlement Agreement”) In fact, according to this Settlement Agreement the United States and Iran wish to settle claims and disputes which were outstanding or capable of arising in connection with *Cases Nos. B32, B74 and 1286 through 12892*, and their subject matter.²²

Article I Paragraph 1 of the Settlement Agreement states that “In consideration of full and final settlement of all disputes, differences, claims, counter claims and matters directly or indirectly raised or capable of arising out of relationships, transactions, contracts and events related to the subject matter of Cases Nos. B32, B74, and 12786 though 127892, the sum of U.S. \$ 416,000 (Four Hundred Sixteen Thousand Dollars) (“the Settlement Amount”) shall be paid to Iran.” In addition, the Settlement Agreement provides in Article II that “upon the issuance by the Tribunal of the Award on Agreed Terms, the United States and Iran shall cause, without delay, all proceedings in relation to the claims, counterclaims and matters related to *Cases Nos. B32, B74, and 12786 through 12892* in all courts”

V Awards on agreed terms

The Tribunal Rules regarding the settlement and the agreed terms are explicit. Article 34 (1) of Tribunal Rules provides that “if, before the award is made, the parties

agree on a settlement of the dispute, the tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the Tribunal, record the settlement in the form of an arbitral *award on agreed terms*.” (Emphasis added). ... Paragraph 3 of that Article stipulates that “copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the tribunal to the parties”²³, In the practice of the Tribunal a special category of awards has been formed by Awards on Agreed Terms. It is self-evident that awards on agreed terms manifest full cooperation on the part of actors.

So many awards rendered by the Tribunal on agreed terms reflect substantial collaboration between Iran and the United States. This shows how the forces of collaboration can override those of discord. In fact, private settlement agreements between the parties leading to awards on agreed terms have resolved a significant number of claims and account for the bulk of the funds paid out of Security Account. This type of award is regulated by the Decision of the Full Tribunal in *Case A/I* of May 14, 1982. In that decision the Full Tribunal gave some guidance on the standards to be applied for accepting or refusing to record a settlement in an award. Since then awards on agreed terms have given rise within the context of the Iran-US Claims Tribunal works. Through 1, September 1997, 234 Awards on Agreed Terms and 17 partial Awards on Agreed Terms had been finalized by the Tribunal.²⁴ In this situation one can see a process of give and take on different issues.

In *Case No.171*,²⁵ the parties requested that the Tribunal accept and record the settlement as an award on Agreed Terms, pursuant to Article 34 of the Tribunal Rules. As noted above, the settlement was reached on those terms. The Respondent, Iran National Airlines Corporation was obligated to pay to the Claimant, The Singer Company, two Hundred Eighty –One Thousand fifty six United States Dollar (U.S. \$281.056). The payment was to be made out of the Security Account established by paragraph 7 of the

Algeria Declaration. The Agreement was signed on the 18th, November 1981 by and between Iran National Airlines Corporation, a corporation organized under the laws of Iran and the Singer Company a corporation organized under the Laws of the States of New Jersey, United States of America and represented by the Links Flight Simulation Division and the Singer Company (U.K.) Limited, a corporation organized under the laws of the United Kingdom and a wholly –owned subsidiary of Singer (‘LINK –MILES’).

According to the Agreement, Iran Air, Singer and LINK –MILES agreed to resolve all claims and disputes between them relating to or arising from (1) the Agreement dated 5 May 1974 between Iran Air and LINK-MILES for the purchase of one Boeing 707 -3J9C Flight Training Simulator and related items (the “707 Agreement”) and (2) the Agreement dated 21 October 1974 between Iran Air and Singer for the purchase of one B727-200 Digital Flight Simulator and related items (the “ 727 Agreement”). As a matter of fact, under the Agreement, Iran Air, Singer and LINK-MILES agreed to waive any claim in connection with the 707 Agreement and 727 Agreement. They admitted not to bring any claim in any country against each other or against any other real person or legal entity. At the same time, Singer and LINK-MILES obligated to sell Iran Air any spare parts or tools required for both the 707 and 727 simulators, subject to any United States or United Kingdom export regulations.

In *Case No.31*²⁶ the Tribunal held that it had jurisdiction to issue an award on agreed terms. The parties filed with the Tribunal a request for an Arbitral Award on Agreed Terms. Actually, Honeywell Information System Italia S.P.A., and Information system Iran had entered into a Settlement Agreement dated 16 April 1982. The award was issued. On 17 July 1984 United Technologies International, Inc., Hamilton Standard Division on one hand, and Air Force of the Islamic Republic of Iran and the Ministry of Defence of Iran, on the other hand, filed a Joint Request for Arbitral Award on Agreed Terms which attached Memorandum of Understanding (“MOU”), Escrow

Agreement and certain other documents. The parties in their Joint Request asked that the Tribunal treat the Settlement Agreement as confidential until the obligations of the Agreement had been completed. As of October 1984, the Tribunal had approved 101 Awards on Agreed Terms representing some US \$235 million for American claimants.²⁷ A joint request was filed on 13 January 1988, signed by the Agent of the Government of Iran and by the Agent of the Government of the United States on the other hand, requesting that the Tribunal render an Award on Agreed Terms enforcing the Settlement Agreement in *Case No.10973*²⁸, dated 28 November 1987, which provided for certain obligations of the Parties.

In fact this Settlement Agreement was made between Iran Helicopter Support and Renewal Company and Lord Corporation a United States national company, existing and organized under the laws of the States of Pennsylvania, USA, acting for itself and on behalf of its parent companies, affiliates, subsidiaries and distributors.²⁹ On 18 May 1990 Amoco³⁰ international finance Corporation, the Government of Iran, NIOC, National Petrochemical Company and Khemco (“the parties”) submitted a Joint Request for an Arbitral Award on Agreed Terms. Article, paragraph 1 of the Settlement Agreement provides that the sum of sixty million United States Dollars (\$60,000.000) (“the Settlement Amount”) shall be paid to the Claimant on 29 June 1990 out of Security Account. Pursuant to Article 34 of the Tribunal Rules of Procedures, Kem International Co., Inc.,³¹ (“claimant”) and Bank Sepah, Bank Mellat, Bank Melli Iran and the Government of the Islamic Republic of Iran (“Respondents”), jointly requested that the Tribunal issue an Arbitral Award on Agreed Terms that will record and give effect to the attached Settlement reached by the Parties”. The Settlement Agreement which was entered into November 1992 provides that in consideration of the full and final settlement of all disputes, differences, claims, counterclaims, and matters directly or indirectly raised or capable of arising out of relationships, transactions, contracts and events related to the subject –matter of Case

No.626, the sum of two hundred twenty five thousand United States dollar (U.S. \$225, 000, 000) shall paid to the Claimant.

On 28 September 1992, a Joint Request was filed between Atlantic Richfield Company and National Iranian Oil Company. And a settlement Agreement was signed between Atlantic Richfield Company, a Delaware corporation, and the Government of Iran, National Iranian Oil Company(“NIOC”) and Lavan Petroleum Oil Company (“LAPCO”). Under this agreement they agreed to settle all disputes, differences, claims, counterclaims, and matters directly or indirectly raised out of the relationships, transactions, contracts including but not limited to the Service Agreement, and events in any manner related to the subject matter of the Statement of Claim, counterclaims and other submissions by the Parties in *Case No.396*.³² On 3 March 1993 another Settlement Agreement made by and between Fedders Corporation, a corporation organized and existing under the laws of the U.S.A.(“Claimant”) on the one part, and Loristan Refrigeration Industries, General Industrial Corporation of Iran, National Industries Organization of Iran and the Islamic Republic of Iran on the Other part. (“Respondents”)

Claimant and Respondents agreed to settle all claims, counterclaims and disputes which are outstanding or capable or arising in connection with claims and counterclaims in *Case No.250*. The payment obligation specified in the Settlement Agreement in the amount of One Million Five hundred thousand United States Dollars(U.S.\$1,500,0000) shall be satisfied by payment to Fedders Corporation out of the Security Account. On 16 November 1993,*Tai, Inc.* ,and the Government of Iran, The Ministry of Defence of the Islamic Republic of Iran, The Ministry of Post, Telegraph and Telephone of The Islamic Republic of Iran (“PTT”)³³, The National Iranian Company and Bank Tejarat, filed with the Tribunal a Joint Request For Arbitral Award on Agreed Terms (“the Joint Request”), and attached to that, a Settlement Agreement in *Case No.421*.In this case the claimant shall be paid the sum

of (U.S.\$500,000) out of Security Account established pursuant to paragraph 7 of the Algiers Declaration.

Pursuant to Article 34 of the Tribunal Rules, a Joint Request for a partial Award on Agreed Terms was filed on 24 February 2000³⁴(Doc.214) This Settlement Agreement was made between and among Mrs. Frederica Lincoln Riahi³⁵ (“ Claimant”) on the one hand and the government of Islamic Republic of Iran on the Other hand.(“ Respondent”). The parties to this Agreement agreed to settle all of the disputes and differences or capable of arising between them and / or against the Respondent .Article II, paragraph 1.states: In full, complete and final settlement of all disputes and, differences and claims arising out of the rights, interests and relationships and occurrences related to the claim between the claimant, on the one part, and the respondent on the other part, and in consideration of the covenants, promises and other agreements contained herein, the contents of the safe will be delivered to the claimant upon the issuance of the Award on Agreed Terms. On 27 August 2001³⁶, a joint Request for an Arbitral Award on Agreed Terms was filed by (“AVCO”) Corporation and Iran Aircraft Industries (“IACI”).³⁷ The parties submitted a settlement agreement, signed by a representative of the claimant on the one side and by the counsel to the Deputy Minister of Defence in legal Affairs of Iran for the respondent on the other side.

The parties jointly requested that the Tribunal render an Award on Agreed Terms embodying the terms of the Settlement Agreement. The agreement provided for complete disposition of the remaining counter-claims by (1) an effort by AVCO to obtain the requisite U.S. government license for shipment of the items to a place determined by Iran; (2) if such transfer was not possible for continued storage of the items for six years during which time Avco would continue to seek permission to deliver the items to Iran;(3) if after six years permission to deliver the item is not granted by the U.S. government then delivery to Victory Van warehouse which served as Iran’s freight forwarder prior to 1981; and (4)if

such delivery to Victory Van warehouse was not possible then Avco may dispose of the item. Further the agreement provided for the payment by Avco to Iran of U.S. \$ 1.2.million.

The settlement Agreement provides in Article 1: (a): To settle, dismiss and terminate forever and without prejudice all disputes, differences, claims and matters directly or indirectly raised or capable of arising out of the relationships, occurrences, contracts, transactions, rights and interests related to the subject matter of the statement of claims and the counterclaims and / or any past dealing between the claimant and the Respondents in *Case No.261*, subject to terms of Article 2 (a); It must be noted that, between November 1982 and October 1983, the Tribunal issued 80 awards, about 40 of these on agreed terms. As I mentioned earlier under Article 34 of the Tribunal Rules, settlement agreements between the parties are incorporated into awards. US \$90 million was paid from the Security Account, of which some US \$75 million was based on agreed terms. Between the period of 1 November 1983-31 October 1984, the Tribunal finalized 240 large claims, 63 small claims, and also issued 69 awards, of which 34 were rendered on agreed terms.

All in all, the tribunal issued over some hundred awards on Agreed Terms. It must be mentioned that, in considering whether or not to accept these settlements, the Tribunal's principal concern was not public policy, but the jurisdictional limitations that the Algiers Accords imposed. However, Article 32(5) of the Tribunal Rules provided that "all awards and other decisions shall be made available to the public," with no exception for award on agreed terms.³⁸ In later cases, the Tribunal gave up its policy of indiscriminate secrecy for settlements.¹³ Another interesting point is that, Iran took the position that the Tribunal should accept an award on agreed terms whenever the underlying claim appeared, primarily to be within Tribunal's jurisdiction but the United States contended that the Tribunal was required to review the settlement in detail to assure both that the claim was within its jurisdiction and that the settlement represented a reasonable resolution of the claim. Although the arbitrators did not actually participate in the negotiation and drafting of

settlement agreements, they did much to facilitate settlements. They adjusted hearing schedules and suspended proceedings in favour of promising negotiations.

One of the cooperative aspects of the Tribunal in award on agreed terms is confidentiality. However under tribunal rules Article 32 Paragraph 5 (modification of UNCITRAL rules) provides for all Tribunal awards to be made public, but the parties have deleted trade and military secrets. According to the Tribunal Rules: All awards and other decisions shall be made available to the public, except that upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted.⁴⁰ In 1983 the Tribunal granted a request from both parties that Agreed Terms of settlement not be made public.⁴¹ In his dissenting opinion Judge Holtzmann took the position that Article 32 (5) of the tribunal rules permits confidential treatment only for military and trade secrets.⁴² He argued that the Tribunal should limit itself to the deletion of only the identity of the parties and other “identifying facts and trade and military secrets”. Even then, the tribunal should act only when it is satisfied that such action is necessary.⁴³

A primary purpose of the Settlement Agreement is to provide for the payment of Settlements from the Security Account established by the Algiers Declarations. Any withdrawals from the Security Account affect the interest of parties in all cases. It is therefore highly inappropriate that a Settlement Agreement annexed to an Award which triggers such a withdrawal of funds should be cloaked in secrecy.⁴⁴ As I mentioned earlier one of the American concerns over awards on agreements was the Security Account. Since the Security Account was set up for the purpose of securing the payments of, and paying, claims against Iran, the award on agreed terms authorized an unwarranted withdrawal of funds from the Security Account and was clearly inconsistent with the provisions of the Algiers Accords establishing the Account. The Tribunal should, therefore, have scrutinized

the appropriateness of the proposed of settlement.⁴⁵ One lawyer believes that “Mr Hotlzman’s overriding concern is that fairness be seen to be done to all parties before the Tribunal. Because all awards are paid out of the Security Account, parties in all cases have an interest in seeing that those awards based upon claims where the Tribunal would have jurisdiction are extracted from the Account”⁴⁶.

It should be pointed out that if the Tribunal refused jurisdiction and the Settlement Agreement collapsed, the claimant would not formally be left without a remedy, for under President Reagan’s Executive Order Suspending Iranian Litigation, a claimant may re-institute an action in United States courts if the Tribunal has dismissed the claim for lack of jurisdiction.⁴⁷ At any rate, the mere fact that so many awards on agreed terms were issued by the Tribunal shows that Iran, the United States, and their individuals or corporations chose to use the premises of Tribunal as a safe forum to discuss and negotiate. They decided to wait for the final decision of the Tribunal. The Tribunal also provided them with such an opportunity at a time when there was no alternative avenue for Claimants and Respondents. They were reluctant to see their disputes be handled by US marines and Iranian Revolutionary Guards.

VI Small claims

The Claims Settlement Declaration provides that claims by U.S. nationals of less than \$250,000 (“small claims”) would be presented to the tribunal by the U.S. government. Immediately following the conclusion of Algiers Accords, it was agreed that the small claims could be settled by a lump-sum payment by Iran which would then be appropriated to claimants by the United States Foreign Claims Settlement Commission. Despite Iran’s initially favourable reaction to the idea, there was no indication that Iran is now willing to agree to that method of dealing with the small claims. Over the next several years, the United States and Iran continued to negotiate settlement of Small Claims at The Hague. Aimed at reaching a settlement, the US Congress passed legislation in 1985 giving the

Foreign Claims Settlement Commission (FCSC) standby jurisdiction to resolve claims by U.S. nationals against Iran if a lump sum settlement of all claims was ever concluded between the two countries.⁴⁸

As of August 1989, the Tribunal had resolved 82 Small Claims, and 2,200 similar claims were still pending.⁴⁹ In May 1990, without the specific consent of the small claimants, the United States negotiated a settlement agreement with Iran for the Small Claims of U.S. nationals.⁵⁰ In the same month, the US State Department Legal Adviser Abraham Sofaer entered into a series of direct negotiations with Iranian officials at The Hague, the Netherlands and used the Tribunal premises for private talks. The said lump sum settlement was the output of those negotiations. However, both Iran and the United States argued that “Settlements are in no way connected with Western hostages (allegedly) held by the pro-Iranian groups in Lebanon”.⁵¹ The United States also added that the small claims settlements had nothing to do with Iran-Contra Affair. As I have discussed below, the Iran-Contra Affair was a strategic cooperation between Iran and the United States which shattered the Reagan Administration’s prestige. The episode reportedly began from the Tribunal. In any case, the settlement agreement provides, in part, that Iran would pay \$ 105 million in exchange for final termination of all outstanding Small Claims, as well as in settlement of certain claims held by the United States itself in connection with loans made to Iran. The claims of U.S. Nationals against Iran would then be referred to the (FCSC) for adjudication and determination of the final amount.⁵²

The agreement was finalized on June 22, 1990, and according to its terms the Tribunal awarded \$ 105 million to the United States. Under the settlement agreement, the Department of State transferred all of the Small Claims to the FCSC for a determination of their merit.⁵³ Of the \$ 105 million paid by Iran, \$55 million was taken by the Government itself as satisfaction of its own claim against Iran. The remaining \$50 million was located for payment of the small claims referred to the FCSC.⁵⁴ By 1995, the FCSC concluded its

adjudication of the small claims. In total, 1, 075 of the claims it had heard were upheld. It must be noted that many of the Awards rendered by the Tribunal in Small Claims cases have been in the form of Awards on Agreed Terms,⁵⁵ settlement negotiated by the parties and merely approved by the Tribunal, thereby providing access to the Security Account for the purposes of enforcement.

VII. Lump sum settlement

A lump sum settlement involves an agreement arrived at by *diplomatic negotiations between governments* to settle outstanding claims by the payment of a given sum without resorting to international adjudication. Such a settlement permits the states receiving the lump sum to distribute the fund thus acquired among claimants who may be entitled thereto pursuant to domestic.⁵⁶ (Emphasis added). The lump sum settlement, issued as an Award on Agreed terms by the Iran-United States claims Tribunal on June 22, 1990, providing for the “Full” final and effective settlement of certain Small Claims, pending before the tribunal in return for the comprehensive lump sum amount of \$ 105 million.⁵⁷ It also settled U.S. government claims against Iran for the repayment of fifteen loans made as part of United States long-term economic development assistance program in Iran.⁵⁸ This agreement terminated all remaining claims by U.S. nationals against Iran of less than 250,000, as well as *Cases Nos.86, B38, B76, and B77*. In fact for the purpose of lump sum settlement a commission was established. The lump sum settlement states that the Commission “shall apply Tribunal precedent concerning both jurisdiction and merits and shall take into account all issues including counterclaims. Since the lump sum settlement did not provide any additional funds for the government claims, the private claimants had to share the proceeds of the settlement with the government.”⁵⁹

These small claims encompassed approximately 3, 100 claims made by U.S. nationals against Iran that were outstanding on the effective date of the Algiers Accord, (January 19.1981) and arose out of debts, contracts (including transaction which are the

subject of letters of credit or Bank guarantees), expropriation or other measures affecting property rights. The small claims, which were referred to the commission⁶⁰ by Article III (IV) of the lump sum settlement, were further defined by the settlement to include: any and all of the claims of less than \$ 250,000 each have been filed with the Tribunal by the United States on behalf of U.S. nationals,....whether or not the amount of any of such claim is ultimately adjudicated to be more than \$250,000[, and] claims of U.S. nationals for less than \$250,000 which have been submitted to the Department of States but were not timely filed with the Tribunal, as well as claims of U.S. nationals for less than \$ 250,000 which have been either withdrawn by the claimants or dismissed by the Tribunal for lack of jurisdiction.⁶¹ But the point is that what were the legal standards and eligible claimants under lump sum settlement? Under the Iran Claims Act, the commission was required to apply the legal standards prescribed in the lump sum settlement and Algiers Accords.

The Lump Sum Settlement states that the commission “shall apply Tribunal precedent concerning both jurisdiction and the merits, and shall take into account all issues including counterclaims and liens.⁶² It must be noted that claimants were eligible to share in the lump sum settlement if they were U.S. nationals. Dual nationals were eligible to assert claims before the commission if they were able to establish that their dominant and effective nationality was that of the United States. Most of the lump sum settlements concern the payment of compensation for nationalization, expropriation, confiscation or to put it in a neutral wording, takings where little cooperation has taken place compared to other areas. It doesn’t mean that the disputes have not been resolved; it means that the Tribunal has dealt with each case differently. It has not been able to provide a general well-established jurisprudence to handle all cases or a group of cases. It seems that as the chairman of chamber changes, the jurisprudence also alters. However, the fact that the

Tribunal has been able to settle the cases of nationalization, it must be concluded that cooperation has been materialized.

VIII Interim measures

The power of the Tribunal in taking interim measure was one of the most important aspects of the Tribunal.⁶³ The Algiers Declarations make no direct reference to interim measures that the Tribunal might order, but Article III, paragraph 2, of the Claims Settlement Declaration indirectly refers to it by providing that the Tribunal “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade law (UNCITRAL) except to the extent modified by the parties or by the tribunal to ensure that this agreement can be carried out.”⁶⁴ The relevant provision of the UNCITRAL Rules in the Tribunal Rules is Article 26 which provides:

1- At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject –matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2- Such interim measure may be established in the form of an interim award. The Tribunal shall be entitled to require Security for the costs of such measure.⁶⁵

In fact under Article 26, the Tribunal has a wide discretion to order interim measures.⁶⁶ Interim measures are divided into two groups, cases dealing with the conservation of the goods or the subject at stake, and cases dealing with related judicial or arbitral proceedings. The former encompasses the Tribunal’s power to issue provisional relief with respect to litigation or arbitration and the second category pertains to the Tribunal’s power to issue relief concerning the protection from disposal or deterioration of tangible property. Most of the Tribunal’s decisions on interim measures concern the first group.⁶⁷ It must be noted that, from among the first category, the majority of cases dealing

with the interim measures concerns requests of U.S. claimants for a stay of proceedings instituted in Iran by respondents.

Although there is specific reference to deposit of goods or sale of perishable goods; the power of the Tribunal to take interim measures exceeds such actions. It seems that arbitrators have the power to take interim measures, in the light of the conflict of law among national laws. In other words, the practice of the Tribunal shows that it has an “inherent power” even when it does not refer to Article 26 of the Tribunal Rules. For instance, in E-system’s Claims⁶⁸, the Tribunal determined that “It has an inherent power to issue such orders as may be necessary to conserve the respective rights of the parties and to ensure that this Tribunal’s jurisdiction and authority are made fully effective”.⁶⁹ Further, the Tribunal held that since an Iranian court’s findings might be inconsistent with its findings, Iran must stay the proceedings in Iranian courts “in order to ensure the full effectiveness of the Tribunal’s decisions.”⁷⁰ In a concurring opinion, two U.S. arbitrators, Judges Holtzman and Mosk, argued that Article 26 provides independent authority for such a stay.⁷¹ American arbitrators argued that under the General Declaration, Iran and the United States have agreed to determine all litigation between the government of each party and nationals of the other and to terminate claims through binding arbitration.⁷²

They argued that Article 7, 2 of the Claims Settlement Declaration clarified that claims filed before the Tribunal shall be considered excluded from the courts of Iran or of the US or any other court. In *Rockwell International Systems*⁷³ and in *RCA Global Communications Disc*⁷⁴ the Tribunal disposed of Iran’s contention that the Tribunal which has ‘ad hoc jurisdiction’, can not order a stay of proceedings in courts with inherent and general jurisdiction. In *Westinghouse Electric Corp. v. Iran*⁷⁵ the Tribunal found jurisdiction over three counterclaims. It made the following reference to them in the interlocutory Award: The determination that the Tribunal has jurisdiction over the counterclaims in question supersedes the orders of the Tribunal staying proceedings in

Iranian and American courts as an interim measure. Because these counterclaims are within the Tribunal 's jurisdiction, the parties are barred by Article VII, paragraph 2, of the Claims Settlement Declarations from proceeding with their respective suite in the Public Court of Tehran and the Maryland District Court of the United States.⁷⁶

The *Case E-System Inc, v. United States*,⁷⁷ decided by the Full Tribunal, is the most important of these cases; in this case the Tribunal requested one of the parties to move for a stay of proceedings in its national courts. In this case, E-System had brought claims before the Tribunal claiming breach of contract for non-payment and non-delivery of equipment by Iran in respect of electronic equipment aboard aircraft. Iran counterclaimed that E-system had failed to perform its obligations under the contract and deliver the aircraft as required by the contract. As a retaliatory measure, Iran's Ministry of Defence also filed a claim against E-system in the public court of Tehran in 1982, after E-system had brought its claim before the Tribunal. The Iranian Ministry of Defence argued that according to the contract, differences arising from the interpretation of the contract or its performance should be settled under Iranian law in Iranian courts. E-System requested the Tribunal that the proceedings in Iranian court be stayed. It referred to General Principle B of the General Declaration, which stated that the parties intended all claims between the parties to be settled before the Tribunal, and Article VII (1) of the Claims Settlement Declaration, which excluded claims filed with Tribunal from the jurisdiction of the courts of either country.

The Tribunal held that the Algiers Declarations leave the Government of Iran free to institute claims before its courts even where the claim would have been admissible as a counterclaim before the Tribunal. It also said that it has an inherent power to issue such orders as may be necessary to maintain the respective rights of the parties and to ensure that its jurisdiction and authority are made fully effective. As a matter of fact, the Tribunal believed that the Ministry of Defence could pursue its claims in the Tehran public courts once the Tribunal had made its award on the counterclaim, on condition that the Tehran

public court's decision did not conflict with the award of the Tribunal. Judge Aldrich argued that, "it seems clear that the Tribunal relied more on its inherent powers than upon Article 26, not because it found that Article too restrictive, but because it found the integrity of its jurisdiction under challenge, primarily by Iranian parties who were pursuing competing adjudications in Iranian courts."

Interestingly enough, two other judges Holtzman and Mosk in their concurring opinions argued that, apart from the Tribunal's inherent power, which was justified under international law of arbitration, Art. 26 supported the Tribunal's action. Furthermore, although Holtzman and Mosk agreed with the final ruling, they argued that they would have preferred a different analysis of the Algiers Accords. The decision of the Tribunal in *E-Systems* set a precedent to be followed by the Tribunal in a number of claims. In fact numerous examples of the *E-Systems* approach exist, especially early in the life of the Tribunal,⁷⁸ including with respect to proceedings of other arbitral tribunals.⁷⁹ As a counter strategy, the Iranians asked the Tribunal to award interim measures to bar the sale of Iranian property, including items of cultural heritage and other irreplaceable property seized from the Iranian Embassy in Washington by the United States Government. The Tribunal issued interim measures in *Cases A/4* and *A/15*. (In other words, the Tribunal has exercised its power to take measure in these cases). In the *Cases A/4* and *A/15*,⁸⁰ Chamber II issued an interlocutory award after Iran had requested interim measures of protection, to prevent the U.S. from auctioning movable properties of Iran's Embassy and Consulates in the U.S.⁸¹ Iran had referred to the proposed sale, the date and place of the auction, and a list of what it claimed to be "exquisite, historical and national properties" that were to be sold. The Tribunal granted the request staying the sale of the properties that possessed important historical, cultural or other unique feature that were by nature irreplaceable.

In the *Case A/15*, Iran brought to the Tribunal numerous disputes with the United States over interpretation of and compliance with the Algiers Declarations. Among those

disputes was Iran's request for return of its tangible properties in the United States or in the alternative for compensation for the loss of such properties. On December 1983, Iran filed a request for interim relief in these cases to prevent the auction. In an order of 18 January 1984, the tribunal denied the request. . On 31 January 1984, Iran filed a new request and provided evidence that the items were of a cultural nature. The United States disagreed but the Tribunal noted that " it appears to the Tribunal that the items on the list are irreplaceable"⁸² In 1986, Iran filed a request for interim measures of protection in *Case No A 15*, alleging that the Government of the United States had removed two boxes of items from warehouse. Iran requested the return of two boxes that it argued the U.S. had removed forcefully from its original warehouse in Virginia (where other Iranian property was stored). The U.S. argued that the boxes had been moved with Iran's knowledge and stated that it recognized Iran's title to the goods, and assured that it would not change it in any way. The Tribunal denied the request and held that the goods had merely been transferred by the Respondent to a certified warehouse because they had been marked classified. At the end the Tribunal concluded that this action did not cause irreparable harm.⁸³

Judge Aldrich's argument was that in subsequent Awards on the merits in the same case, the Tribunal held that the United States had reserved the right to refuse export to Iran of items " subject to its security export controls."⁸⁴ The United States said that "it was done because the items were classified for security reasons."⁸⁵ As was discussed in the previous chapter, the Tribunal was suspended for some time following the Mangard episode in September 1984. When the Tribunal was suspended temporarily in September 1984, the United States put on sale some of this Iranian property. In all of these legal conflicts, the Tribunal designed a grand strategy not only to grant access to US claimants and Iranian respondents, but also to maximise its power to protect itself from the parties. In two other cases, the Tribunal denied Iran's requests. The Tribunal held that a request to prohibit the United States from selling nuclear reactor fuel that belonged to Iran was

moot, as the fuel had been sold more than four months earlier. In *Behring International, v. Iranian Air force*,⁸⁶ the Tribunal in its interim award ordered the claimant to refrain from selling goods in disputes.⁸⁷

In *Behring International, v. Iranian Air Force*, sophisticated electronic equipment belonging to Iran was being stored in the United States in a warehouse that both parties agreed was inadequate to preserve the goods. Respondents asked for authority to remove the goods to a warehouse of their choice, and the Tribunal deemed “their removal to a more modern air-conditioned facility to be essential to conserve the goods.” The Tribunal granted the respondent’s request after ascertaining that the claimant was not in a position to move the goods to an air-conditioned portion of its own warehouse.⁸⁸ The Tribunal explicitly based its authority to order the transfer to Article 26, but also noted that “it has inherent power” to issue such orders. Sean D. Murphy argues that “Both the U.S. and Iranian governments were ongoing participants in cases before the Tribunal, such that either government’s failure to adhere to the Tribunal’s orders, or to ensure that private claimants adhered to them, posed risks for the ongoing relationship.”⁸⁹

In several Awards the Tribunal suggested that there were certain claims that were not admissible because they raised such political sensitivity that deciding them would require the Tribunal to substitute its judgment for that of government agencies or officials. In *K. Haji-Bagherpour*⁹⁰ the Tribunal dismissed for lack of jurisdiction a claim by the Iranian owner of a tanker truck that had the misfortune to drive into a staging area used by armed force of the United States in the course of the aborted hostages rescue mission on the night of 24 April 1980. Fire from American sentries apparently destroyed the truck. The Tribunal dismissed the claim for lack of jurisdiction, holding that claim arose out of actions of United States in response to the conduct described in General Declarations. In fact the Tribunal had to decide the legality of the Tabas operation (the hostage rescue attempt) as a self-defence measure. Some writers believe that in *Haji-Bagherpour*, the Tribunal was faced

with claims involving highly sensitive political questions. Toope has argued that if the Tribunal agreed to adjudge the claim, the Tribunal would have been called upon to deal with the legality of the American hostages rescue attempt under principles of self-defence and self-help in international law.⁹¹ Toope believes that, two important ideas can be extrapolated.

The first is that, as an arbitral tribunal, the Iran-US Claims Tribunal derives its authority solely from the agreement of the two state parties as expressed in the Algiers Accord. Secondly, because arbitral tribunals derive their authority from the will of the parties to the constituting instrument, some care will normally be taken to avoid offending the sensibilities of the parties.⁹² In *Hoffland Honey Co. v. National Iranian Oil Co.*,⁹³ the Tribunal held that Hoffland's claims is essentially a political claim and thus inherently incapable of judicial resolution. Hoffland's claim was that the respondent had sold oil which had been used to make agricultural chemicals, the use of which in Wisconsin had damaged many colonies of the Claimant's bees. While the Tribunal dismissed the claim on the ground that oil sales were not the immediate cause of Hoff land's losses.

IX Conclusion

I have argued in this chapter that the two nations in the most difficult days of their relations had decided to end the hostage crisis and the financial disputes arising out of the Islamic Revolution. I have selected several areas in which cooperation occurred between Iran and America in practice. Cooperation, in effect, took place in the following areas: when the Algiers Declarations were negotiated, when the role of bankers and financial institutions became as important as the role of states, when the settlement agreement was agreed upon by the parties, when a number of claimants with claims less than \$ 250000 terminated their small claims against Iran through direct cooperation; when a lump sum settlement was agreed upon by the parties; and finally when interim measures were adopted to rule temporarily on important issues. The origins of this intention were rooted primarily in the

religious, moral and cultural beliefs of the two nations though the material incentives of the state and non-state actors played significant roles in this cooperation. This was a fundamental cause of cooperation. Therefore, from a theoretical perspective, both the social theories of Bull which centre around social norms under international law and shared beliefs; and the realist approach are able to explain this cooperation. However, it took a long time for Iran and the United States to institutionalize their pattern of cooperation. The Tribunal as an international public or private institution did not evolve in vacuum. Its jurisprudence evolved through a long process of deliberation and negotiations.

All of the applied norms such as ‘dominant and effective nationality’ and the standard of compensation were discussed, case-by-case and Chamber by Chamber, or within the Full Tribunal. This process of institutionalization is better explained by neo-liberal institutionalism because it took a long time for the Tribunal to institutionalize the forces of cooperation. A very long process of cooperation took place before and after the Tribunal’s formation which is still in process as this dissertation goes to defence. The Tribunal has had a history of gives-and-takes, a history of danger and survival, frustration and praise. In the long run, however, a close reading of the history of cases involving the terms and conditions of the Accords, finance and banking, settlements agreements (awards on agreed terms), small claims, interim measures, and lump sum settlements shows that the Tribunal has made great contribution to both international politics as well as to international law.

Notes

¹ Hedley Bull, *Anarchical Society: a Study of Order in World Politics*, 3rd ed, (Handsmills; Palgrave; 2002 with foreword by Andrew Hurrell and Stanley Hoffmann) 304.

² Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984) 51-52.

³ Gunnar Lagergren, "Speech by His Excellency Gunnar Lagergren of Sweeden at the Inaugural Session of The Iran-United States Claims Tribunal" *Arbitration Journal*, (Dec 1981): 36 n4

⁴ Appendix No. One

⁵ Andreas F. Lowenfeld & Charles L. Denison, "U.S.-Iran Negotiations 1980-81: Iran Conditions for Release of Hostages (November 2, 1980)," in *Trade Controls for Political Ends, International Economic Law*, III, 2nd ed, (New York: Matthew Bender, 1983)

⁶ First American Response (November 11, 1980), Lowenfield & Denison

⁷ Second American Response and U.S. Comments on Its Answers, Lowenfield & Denison

⁸ Amendments Relating to the American Response to Section One of the Resolution of the Islamic Consultative Assembly of Iran, see also the four Resolutions. Lowenfield & Denison

⁹ Section One, Steps to be Taken by the U.S. Government; Executive Procedure of Section Two and Three of Resolution of the Islamic Constitutive Assembly. Lowenfield & Denison

¹⁰ Section Two: Steps to be taken by the government of the Islamic Republic of Iran, Executive Procedure of Section Two and Three of Resolution of the Islamic Constitutive Assembly. Lowenfield & Denison

¹¹ Robert Carswell, "The Economic and Financial Pressures: Freeze and Sanctions" Warren Christopher, *American Hostages in Iran: The Conduct of a crisis* (New Haven, Yale University Press, 1985). See also United States.Cong.House, *Committee On Banking, Finance And Urban Affairs House of Representatives*, 97th Cong, 1st Session, July 1981.

¹² Kate Gillesple, "US corporations and Iran at The Hague" in *Middle East Journal*. 44.1 (Winter, 1990): 29

¹³ *Adams International Division, Beatrice Foods V. Iran*, in *Tribunal Reports*, 6(1984): 1-3

¹⁴ *The singer company v. Iran Air*, in *Tribunal Reports*, 1 (1982): 140-143

¹⁵ On 18 November 1981, the Ministry of National Defence of the Islamic Republic of Iran filed claims against the Government of the United States seeking the return of military equipment originally sold to Iran pursuant to contracts forming part of the United States Foreign Military Sales Program (FMS Program).

¹⁶ V. Martin, *Creating an Islamic State*, (London: Tauris, 2000) 20

¹⁷ Warren Christopher 270

¹⁸ Lucy Reed, *Mixed Private and Public International Law Solutions to International Crises* 257-259

¹⁹ *Iranian Litigation Reporter*, 8 February 1980. See also Abu Mohammad Asgarkhani 'Compromise and Cooperation at the Iran-US Claims Tribunal', *Arbitration International*, 19.2 (2003) 151

²⁰ *Tribunal Annual Report, Period Ending 30 June 1992*, 14

²¹ *Tribunal Annual Report*

²² Asgarkhani 175-6

²³ Article 34 (3) Tribunal Rules

²⁴ *Quarterly Registry Report*, October 1997

²⁵ *The Singer Co. v. Iran Air* Filed 17 May 1982

²⁶ *Honeywell Information System, Inc. v. Isiran* filed 14 July 1982

²⁷ By the end of October 1983, the Tribunal had rendered seventy-five Awards, thirty nine of which were Award on Agreed Terms. *Annual Report* 1, note 72, 17

²⁸ *Award No. 346-10973-2*

²⁹ In this Award the Government of the United States of America presented the Claims of less than U.S. \$250,000 of Lord Corporation against the Government of Iran, and in particular against Helicopter Support and Renewal Company with alleged unpaid invoice.

³⁰ *Amoc International Finance Corporation v. The Government of the Islamic Republic of Iran, et al.*, Partial Award No.310-56-3 (14 July 1987), *Iran-U.S.C.T.R.* 15 (1989)

³¹ *Iran-U.S C. T. R.* 29 (1993), *Case No.629*

³² *Iran-U.S. C. T. R. Case No.396*, Award No.538-396-1 Filed 19 October 1992

³³ *Iran-U.S C. T. R.*, *Case No.421*, Award No. 552-421-1. Filed 29 November 1993

Article XI of the Settlement Agreement provides that the parties should submit the Settlement Agreement together with the Joint Request to the Tribunal within sixty days from the date of the Claimant's signature of the Agreement, provided however that, the Agreement be approved and ratified by Iranian authorities as provided in Article XIV, and that Settlement Agreement is not submitted within the said sixty day period, or as otherwise agreed by the parties, then it shall automatically become null and void, and the parties, without prejudicing their respective rights will be placed in the same position as they were prior to the date of the Settlement Agreement.

³⁴ Filed 24 February 2000, *IRAN-U.S. C.T.R.* 28 ; 176. For the final Award, see *IRAN-U.S.C.T.R.* 37

³⁵ On 18 January 1982, the claimant Frederica Lincoln Riahi filed a statement of claim against the government of Iran for the expropriation of her shareholding in several Iranian companies, as well as other real and personal property in Iran.

³⁶ Settlement Agreement of *Case No.261, Avco –Iran* (May 31, 2001).

³⁷ On 14 January 1982, the claimant, Avco corporation (“Avco”), filed a statement of claim against Iran Aircraft industries (“IACI”), Iran Helicopter support and Renewel company (“IHSRC”), National Iranian Oil company (“ NIOC”) and the Islamic Republic of Iran.

On 14 June 1982, IACI and NIOC filed their statement of Defence and counterclaims. IHSRC and Iran filed their statement on 25 June and 2 August 1982.

³⁸ Opinion of Howard M. Holtzmann Re Three Awards on Agreed Terms, *Iran-U.S.C.T.R.* 3.78: 79-80. Judge Holtzmann wrote: this is a wise and proper policy,

A primary purpose of Settlement Agreements is to provide for payment of settlements from the Security Account established by the Algiers Declarations. Any withdrawals from the Security Account affect the interest of parties in all cases. It is therefore highly inappropriate that a settlement Agreement annexed to an Award which triggers such a withdrawal of funds should be secrecy. At most, any military and trade secrets can be deleted from the text made public.

³⁹ *United Technologies v. Iranian Air Force, Iran-U.S.C.T.R.* 7.210 . In this case, the Tribunal held that “Since the Parties ...have not invoked any special reasons which, in the light of Article Iran 32, paragraph 5 of the Tribunal Rules, would justify the grant of such a request, the request is denied,” see also *Singer Co. v. Iran* 7 *Iran-U.S.C.T.R.* (1984): 236-7 (Award No.151-344/A-9-SC)

⁴⁰ Article 35(5) of the Final Tribunal Rules of Procedure, (3 May 1983), *Iran-U.S.C.T.R.* 2. (1983): 405

⁴¹ See *Upjohn Co. v. Iran*, Award on Agreed Terms No. 45-70-1, 2 *Iran-U.S.C.T.R.*2 (1983): 332

⁴² Opinion of Judge Holtzmann, *Shipside Packing Co. v. Iran*, Award on Agreed Terms No. 102-11875-1, *Iran-U.S.C.T.R.*5: 80,84. See also Opinion of Judge Holtzmann in *Re Three Award on Agreed Terms, VIS Corp. v. Iran*, Case No.15; *Chevron Research Co. v. National Iranian Oil Co.*, Case No. 19; *Carrier Corp. v. Iran*, Case No. 387, *Iran –U.S.C.T.R.* 3 (1983): 78 see also Dissenting Opinion of Judge Holtzmann in *Pan American World Airways, Inc. v. Iran*, Award on Agreed Terms No. 96-488-1, *Iran-U.S.C.T.R.*4 (1983): 205-6

⁴³ *Cases 15, 19 and 387*: Separate Opinion of H.M. Holtzmann (1983) 3 *Iran-U.S.C.T.R.* 78, 79-80; and *the Government of the USA on behalf of Shipside Packing Co. v. The Islamic Republic of Iran* (1984) 5 *Iran-U.S.C.T.R.* 5 (1984):80,82 (Opinion of H.M. Holtzmann, Concurring in Part and Dissenting in Part from Award on Agreed Terms)

⁴⁴ *Cases 15, 19 and 387*: Separate Opinion of H.M. Holtzmann

⁴⁵ Dissenting Opinion of Judge Holtzmann on Award on Agreed Terms in *Pan American World Airways*, 4 *Iran-U.S.C.T.R.*4: 208. Holtzmann explained that the “Security Account is ... in effect a trust fund; the Tribunal is the guardian of that fund, with a duty to ensure that it is used only for purposes that are “appropriate in view of the framework provided by the Algiers Declaration.” (citing *Iran v. United States*, Dec. No. 8-A/1-FT, 1 *Iran-U.S.C.T.R.*1: 144,153

⁴⁶ Toope 367.

⁴⁷ Lowenfeld 80-1, “Commenting upon Executive Order” 12,294 of 24 February 1981, 46 *Fed. Reg.*, No. 3

⁴⁸ Foreign Relations Authorization Act, Fiscal years 1986 and 1987, Pub.L.No.99-93, lit v, 99 stat.405, 437(1985) (50 U.S.C. § 1701 note (1994)

⁴⁹ Abraham Noori, 139 F.3d. 1462.1464

⁵⁰ Settlement agreement in claims of less than \$ 250,000, *Case No.86* and *Case No.B.38*, Award 483, *Iran –U.S.C.T.R.* 25. II:327

⁵¹ *Iranian assets Litigation Reporter*, 14 May 1990, 18874

⁵² Abraham Noori, 139 F.3d. 1464, the settlement agreement also provided for the “transfer to Iran (by quitclaim) of all property interest underlying the small claims.”

⁵³ Richard B.Lillich & David Bederman, *Jurisprudence of the Foreign Claims Settlement commission: Iran claims*, AJIL 91 (1997): 436-7

⁵⁴ Abraham Noori, 139 F.3d. 1464

⁵⁵ *Interaction Research Corp. v. The Islamic Republic of Iran, et al.* See *Iran-U.S.C.T.R.*, 17 (1987): 362.

⁵⁶ Christine D. Gray *Judicial Remedies in International Law*, (Oxford: Clarendon Press. (1987)178

⁵⁷ Article IX (ii) of the Settlement Agreement permitted the FCSC (for a period of up to three years) to address requests for information to Iran, to assist the Commission in its process of deciding claims. The Commission did, indeed, make such requests, see 1992 & 1993 *FCSC Tribunal Annual Reports*.9-10.

⁵⁸ The U.S. government claim was identified in the lump sum settlement by its Tribunal case number B.3. The Lump sum agreements are defined as certain negotiated mechanisms that settle outstanding international claims by the payment of a single amount arrived at by diplomatic negotiations between governments without resorting to International adjudication. The Lump sum settlements have been used since 1802 as an alternative to international adjudication.

The large number of claims arising from war and from nationalizations made a quick method of settling international claims desirable. A lump sum settlement does not necessarily involve the assignment or admission of liability under international law. Most of the lump sum settlements concern the payment of compensation for nationalizations. For more information on lump sum settlement see: Burns H. Weston, Richard B. Lillich and David J. Bederman *International Claims: their Settlement by Lump sum Agreements*, 1875-1995.

⁵⁹ For more information on Lump sum settlement in Iran-U.S. Claims Tribunal: Richard B. Lillich and David J. Bederman, "Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims," *AJIL*, 91 (1997): 437-4

⁶⁰ The Foreign Claims Settlement Commission (commission of FCSC) was granted Jurisdiction to determine the validity and amount of certain claims by U.S. nationals against Iran by the Iran claims Act and the 1990 Settlement Agreement (lump sum Settlement) between the United States and Iran. The FCSC adjudicated the Iran claims program from June 1990 to February 1995 of the approximately 3,100 claims submitted to it, the commission issued 1,066 awards to 1,075 claimants, totalling \$41,570,936.31 in principle and \$44, 984, 31 in interests. Lillich and Bederman

⁶¹ Lump Sum Settlement, Art, I (A)

⁶² Lump Sum Settlement, Art. v

⁶³ It must be noted that, the Tribunal's jurisprudence on interim measures provides support for all international arbitral tribunals (and courts) to issue interim relief, whether or not the tribunal operates under the UNCITRAL rules.

Sean D. Murphy believes that: "The lessons from the Tribunal's jurisprudence should prove influential with future international courts and tribunals confronted with a request for interim measures of protection, whether arising under the UNCITRAL Arbitration Rules or under other institution, such as under Article 47 of the *ICSID Convention*, (Convention on the Settlement of Investment Dispute between States and National of Other States, Mar. 18.1965). Sean D. Murphy, "Interim Measure of Relief: The Continuing Importance of the Iran-U.S. Claims Tribunal's Jurisprudence," *Iran-U.S.C.T.R.* 25: 75-81.

⁶⁴ The relevant provision of the UNCITRAL Rules –which is unchanged in the Tribunal Rules –is Article 26. Under Article 26, a tribunal has a wide discretion to order interim measures.

⁶⁵ UNCITRAL Arbitration Rules, Art.26 (1) (1976)

⁶⁶ Since the Tribunal did not modify this rule, its jurisprudence on interim measures of relief has served, and will continue to serve, as an important reference point for determining the power of an arbitral body to issue provisional relief when operating under the UNCITRAL rules.

⁶⁷ For more information on Interim Measure of relief, see Sean D. Murphy, "Interim Measure of Relief: The Continuing Importance of the Iran-U.S. Claims Tribunal's Jurisprudence," in the *Iran –U.S. C.T.R.L* 25: 75-81

⁶⁸ In the *E-Systems Case*, E-System, Inc. filed a claim with the Tribunal based on a particular contract. The Iranian Ministry of Defence then filed a claim against E-Systems in an Iranian court based on the same contract.

⁶⁹ *E- Systems, Inc. v The Islamic Republic of Iran, et al.*, Interim Award No. ITM-13-388-FT, *Iran-U.S.C.T.R.* 2 : 51

⁷⁰ *E-System, Inc. v. Islamic Republic of Iran*, Award No. ITM 15-59-1, *Iran-U.S.C.T.R.* 2: 51, 57

⁷¹ George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An analysis of the Decision of the Tribunal* (Oxford: Clarendon Press, 1996) 217

⁷² Principle B of the General Declaration, *Iran-U.S.C.T.R* 1 (1983). Iranian national courts also adhered to this principle and terminated all litigations against the United States and its entities.

⁷² *E- Systems, Inc. v The Islamic Republic of Iran, et al.*, Interim Award No. ITM-13-388-FT, *Iran-U.S.C.T.R* 2: 51

⁷² *E-System, Inc. v. Islamic Republic of Iran*, Award No. ITM 15-59-1, *Iran-U.S.C.T.R* 2 (1983): 51,57

⁷² Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 217

⁷² Principle B of the General Declaration, 1 Iran. 3.

⁷³ Interim Award No. ITM 20-430-1 (6 June 1983), *Iran-U.S.C.T.R.*2: 369

⁷⁴ Interim Award No. ITM29-160-1 (31 Oct.1983), *Iran-U.S.C.T.R.* 4: 5, 7

⁷⁵ Interlocutory Award No. ITL 67-389-2 (12 Feb.1987), *Iran-U.S.C.T.R.* 14: 104

⁷⁶ Award Number. ITL 67-389-2 (12 Feb.1987), *Iran-U.S.C.T.R.* 12, 14: 104,110

⁷⁷ Award No. ITM 13-388-FT, *Iran –U.S.C.T.R.*2: 51-57

⁷⁸ *Questech, Inc. v. Islamic Republic of Iran*, Award No.ITM 15-59-1, *Iran-U.S. C.T.R.* 2: 96; *Ford Aerospace & Communications Corp. v. Islamic Republic Int'l Sys., Inc. & Islamic Republic of Iran*, Award No. ITM 17-430-1, 2 *Iran –U.S C.T. R.* 2 : 310

⁷⁹ *Reading & Bates Corp. v. Islamic Republic of Iran*, Award No. ITM 21-28-1, *Iran-U.S.C.T.R.* 2: 410 (concerning proceedings initiated by the claimant before the International Chamber of Commerce)

⁸⁰ Award No.ITL 33-a/4/15-FT, *Iran-U.S.C.T.R.* 5: B1-133.

⁸¹ Earlier, the Tribunal had denied a request for a similar order, arguing that the Iranian request failed

to indicate specific properties, the sale or auction of which would result in a risk of irreparable prejudice not capable of redress by payment of damages. Presidential Order A/4/A/, *Iran U.S.C.T.R.* 15,25: 112-114

⁸² *The Islamic Republic of Iran v. The United States of America*. *Iran-US C.T.R.* 5: 131

⁸³ See also *Fluor Corp v. Iran*, Presidential Order 331-1, *Iran-U.S.C.T.R.* 1 (1983): 121 (holding that there was no basis for an award ordering the Respondent to make possible the re-exportation of some cranes hoisting equipment held in Iran.)

⁸⁴ *The Islamic Republic of Iran v. The United States of America*, Award No.529-A15 (II: A and II: B) FT (6 May 1992) 59. That Award followed the precedent of *The Islamic Republic of Iran v. The United States of America*, Decision No. DEC 85-B1-FT (18 May 1989), *Iran-U.S.C.T.R.* 22 : 105

⁸⁵ Aldrich 154

⁸⁶ Award Number ITM 25 -382-3, *Iran-U.S.C.T.R.* 3: 173-175

⁸⁷ Several Tribunal decision fall into the second category of cases. The best known are a trio of decisions concerning tangible properties owned by Iran, but in the custody of Iran's freight forwarder in the United States, *Behring International, Inc.*

⁸⁸ *Behring Int'l, Inc. v. Iranian Air Force*, *Iran-U.S.C.T.R.* 8: 238,275-78, (Award No .ITM/ITL 52-382-3); see *Iran-U.S.C.T.R.* 4 : 89

⁸⁹ Sean D. Murphy 25.

⁹⁰ Award Number 23.428-2 (26, Jan.1983), *Iran U.S.C.T.R.* 2: 38.

⁹¹ Toope 318

⁹² Toope

⁹³ Award No.22-495-2 (26 Jan.1983), *Iran-U.S.C.T.R.* 2: 4.41, 42-3

Chapter Eight

Cooperation on delicate issues

1 Introduction

Where does cooperative behaviour in arbitration occur easily? In cases where there are legal precedents or in the absence of such precedents? What is the relationship of flexibility and rigidity of rules with cooperation? Decision-makers face difficulty in cases where there are no previous precedents. Yet, the lack of precedents offers them an adequate opportunity to be flexible. The difficulty lies in the fact that they must find a proper strategy which could bring consonance among actors. An analogy could be drawn from a distinction between the British Constitutional law which is based on common law and the American Constitution which is a written document with certain specific amendments. The former is a scattered but flexible body of law while the latter is a concrete but rigid or inflexible body of law. British lawyers have much more room to manoeuvre than the American counterparts.

I tried to show, in Chapter Seven, how and under what conditions the parties to an unprecedented international private and public arbitration began to cooperate in matters and cases involving substantive issues, namely, the terms and conditions of the Accords, finance and banking; settlements agreements (awards on agreed terms), small claims, interim measures; and lump sum settlements. In most of the said issues, there were already some written documents such as the terms and conditions of the accords or there were earlier occurrences of something similar that could be used by judges as an example or rule to authorize and justify a subsequent act of the same or an analogous kind.

Here, I want to examine several other areas of cooperation between Iran and America and the central role that the Tribunal has played in the evolution of this cooperation. In most of these issues, the Tribunal had to exercise extreme caution to avoid being pulled into the danger of grave crises. The cases to be discussed here are Awards in

favour of Iran or its nationals, Indirect Claims, Jurisdictional Effect of Iranian Forum Selection Clauses, The Shah's Assets, U.S. Hostages v. Iran, Strategic Cooperation & Iran-Contra Affair, Counter Claims, and Security Account.

The first area in which the Tribunal made an attempt to design a legal precedent is the awards that were rendered in favour of Iran or its nationals. The Algiers Declarations made no reference to this matter. Apparently, the issue required the construction and interpretation of the wording and language of the Accords. The Tribunal managed to seek some avenues acceptable to the parties.

In contrast, the second cluster of cases, namely, indirect claims were subject to some express wording of the Accords, and therefore the Tribunal found little room to manoeuvre. The Tribunal issued the most conservative rulings when it came to the most controversial cases of forum selection clauses. It refused to rule that Iranian national courts had been affected by the changed circumstances in Iran after the revolution. With respect to the Shah's assets, the Tribunal was unable to grant jurisdiction to Iranian claims and held that the Accords did not obligate expressly the United States to transfer such assets to Iran. Iran was left with another option, that is, to resort to the US courts. A similar position was taken by the Tribunal in claims against Iran, brought by American diplomats who had been taken hostages in Tehran. Since the United States and Iran had agreed to bar all such claims against Iran, the Tribunal, too, denied its jurisdiction over such claims. Not only the Tribunal, but also all US federal courts were not competent to consider such claims because the Algiers Declarations were seen as an international treaty that had been concluded between Iran and America and that the very vital national interests of the United States were involved. The US Government itself paid some compensation to the former hostages.

It seems the level of cooperation has occurred beyond the economic and financial matters, it has sometimes comprised strategic areas. The Iran-Contra Affair reportedly was initiated from the Tribunal's premises which have served as a safe and confidential place.

The Tribunal was also faced with a biased situation in counterclaims because nationals of Iran are entitled to bring direct claims against the United States or its nationals. The Tribunal had no choice but to rule that such claimants could bring indirect claims only if those counterclaims were arising out of the same contracts. Finally, the Tribunal finds that the pathway to conflict resolution goes up and down many big hills where the road is absolutely one way: the Security Account opened for the payments of awards rendered in favour of Americans only. Iranian prosperous claimants should find a hook for the awards issued in their favour because only American claimants are entitled to use the Security Account. I shall now start with the awards issued in favour of Iran or its nationals.

II Awards in favour of Iran or its nationals

As was explained on many occasions, the Algerian Declarations contain no express provisions on the enforcement of awards rendered in favour of Iran or its nationals. Apparently, these awards were to be enforced through some type of national mechanisms. The nature and particulars of such mechanisms were the source of a major legal dispute between Iran and the United States. Iran believed that awards rendered against the United States nationals that remained unpaid had to be satisfied either by the United States itself, or else through a simple authentication process before the United States courts. The United States on the other hand took the position that in the absence of any enforcement commitments on its part in respect of such awards, successful Iranian parties were required to seek enforcement through the United States courts, just like other beneficiaries of foreign arbitral awards. According to the United States the most appropriate means for enforcing Tribunal awards in the United States was the procedure provided by the New York Convention.¹ *Cases Nos. A/21 and A/27* are highly important in this regard.

I will now examine them from the perspective of satisfaction of the awards issued in favour of Iran for which Iran has been on a money hunting trip. On 19 July 1985, the Islamic Republic of Iran filed a request for interpretation by the Full Tribunal of the

provisions of Algiers Declarations “concerning the commitment of the United States to promptly satisfy any award of this Tribunal rendered in favour of Iran against the nationals of the United States”.² Apparently, the case was of an interpretative nature and the Full Tribunal had to decide on that. Ironically, the United States denied the relevance of any point raised by Iran and suggested that Iran should seek enforcement in the United States or other national courts. In its award issued in May 1987, the Tribunal noted that Iran had not previously resorted, in respect of the unpaid awards in question, to the enforcement procedures already available in the United States. Because of that the Tribunal concluded that it was premature to express any view on whether or not those procedures were in conformity with the United States obligations under the Declarations. Following the Tribunal’s ruling in *A/21* Iran instituted before the United States courts two separate enforcement actions against two of the United States corporations relying on the 1958 New York Convention. One of them involved Avco Corp.

In *Avco Corp*³, the Court of Appeals dismissed the enforcement action. The refusal by the United States courts to recognize and order the enforcement of the Avco award prompted Iran to file with the Tribunal a second interpretive case docketed as *Case No. A/27*⁴ the Tribunal was requested to find that the United States was in violation of its obligations under the Algerian Declarations as interpreted by the Tribunal in *Case No. A/21* and to order the United States to compensate Iran in the amount of the Avco award plus expenses incurred in relation to the enforcement efforts.⁵ The United States contested Iran’s arguments and suggested that Iran by simply revisiting its contentions in *Case No. A/21* was in effect seeking a revision of that case.

Finally, the Tribunal concluded that the United States had violated the pertinent provisions of the Algerian Declarations and was thus liable for damages.⁶ The Tribunal again opted not to disrupt collaboration. The game had to go on with at least two players. The Tribunal granted its jurisdiction. In *Case No. A17*, the Tribunal interpreted Paragraph

2B of the Undertakings, which is a separate document from the two Algiers Declarations but still it is a part of the Algiers Accord, and held that Iranian Bank claims against American banks are within Tribunal's jurisdiction 'if they are disputes as to amounts owing from Dollar Account No. 2.'⁷ The Dollar Account No. 2 is one of the three Dollar accounts opened under the Technical Arrangements. This arrangement itself is a cooperative function not only between Iran and America, but also between the Banque Centrale d'Algerie as the "Escrow Agent", the Governor and Company of the Bank of England as the "Bank", and the Federal Reserve Bank of New York as fiscal agent of the United States as the "FED".⁸ These three Dollar accounts facilitate the payments of awards. Both Iran and America were happy with this award in Case No. A17. Neither party raised any objection to the Tribunal's jurisdiction. It was interesting that both Judge Holtzmann and Judge Brower filed their concurring opinion.

The more Iran and the United States continued their cooperation in various cases and issues, the more the Tribunal was encouraged to display its authority and to become more independent. As an example in these Iranian *A Cases* against America, one seems notable. In *Case A19*, the Tribunal held that its authority to award interest 'is inherent' in its authority to decide claims. Neither party raised objection, but when both Iran and America requested the Tribunal that it establish uniform rules with respect to interest, the Tribunal was in a strong position enough to refuse their joint request. In fact the Tribunal gradually found itself in a position to somehow balance the state of inequality between Iran and America. In the words of Joseph Nye, "Ordered inequality is better than anarchy."⁹

The Algiers Declarations do not treat the state of Iran on the one hand and American nationals on the other hand on an equal basis, let alone Iranian nationals in parallel with American citizens. Therefore Iran has been left all alone when it comes to the satisfaction of claims rendered in its favour. There is no doubt that the Tribunal's measure was to set order in a condition of inequality.

III Indirect claims

One other area where Iran's position was denied and access was granted to the Tribunal was that of indirect Claims. These claims were filed by US claimant companies for damages allegedly to have been sustained by foreign subsidiaries. Article VII of the Declaration stated that indirect Claims were Claims of US nationals 'provided that the ownership interests of such nationals, collectively, were sufficient at the time the claims arose to control the corporation'.¹⁰ The Tribunal in *Sedco, Inc., et al. V. National Iranian Oil Co., et al.*,¹¹ nevertheless interpreted the continuity of nationality requirement as requiring such controlling ownership at all times from the time the Claim arose until the date the Algiers Declarations were concluded. The Tribunal also held in the same case that claims owned indirectly by US nationals through ownership interests in Iranian juridical entities were within its jurisdiction in the same way those involving juridical entities of third countries were.¹² The Tribunal also decided that it was not necessary that the claimants themselves owned a controlling interest in the foreign juridical entity provided that all U.S. national owners collectively owned such interests.¹³

This holding was implicit in the Tribunal Decision in the Management of *Aluminium ltd., et.al .v. Iracable Corp*¹⁴., although that claim was dismissed for failure to prove ownership of a controlling interest in Alcan by U.S. nationals. In *Sea Co. v. The Islamic Republic of Iran, et al.*, the claimant corporation proved (a) that it was owned more than 50 percent by U.S. nationals, (b) that it owned directly only a few percent of the stock of a Bermuda corporation through which it was claiming, and (c) that the owners of one corporation were inevitably also the owners of the other corporation.¹⁵

In the *Sea Co case*, the claimant, citing *Harza*, submitted an agreement dated 4 December 1981 in which it committed itself to pay all damages it recovered on its indirect claim to the Bermuda Corporation through which it was claiming. The Tribunal stated in *Harza*: "While the claimants are correct in noting that claims against a corporation

ordinarily may not be asserted against its shareholders, it also is true that shareholders such as the claimants avail, to change the chambers decision through the Full Tribunal.” It did not happen and the Americans argued that “Iran’s interpretation of Article VII (2) finds no support from the Claims Settlement Agreement” and that it had been “refuted by no less than seventeen decisions of this Tribunal.”¹⁶

In sum, the Full Tribunal was not able to accommodate Iran’s request because of the express wording of the Claims Settlement Agreement. All three chambers had supported the US position by relying on the language of the said Agreement. Any compromise based cooperation is better facilitated only when there is no specific rule. Wherever there is a concrete rule, the actor who favours the rule will not be prepared to make a compromise. Both in international and national laws there are two different bodies of law in terms of rigidity and flexibility. Generally speaking, written constitutions like that of the United States embody specific rules.

On the one hand it is a good quality because it provides specific rules. On the other hand it is rigid because the judge has little manoeuvre. However those countries that have unwritten constitutions provide judges with more flexibility. The Common Law of the United Kingdom is an explicit example. In some cases the Tribunal seems to be tied up by rules where it seems extremely difficult to fashion any compromise. The US did not want; and subsequently the Full Tribunal was not in a position to put the US in a position in which it could accept something less than what they really wanted. The Full Tribunal could not do so because of the wording of the Claims Settlement Agreement. In Indirect Claims, the Tribunal had little manoeuvre.

IV Jurisdictional effect of Iranian forum selection clauses

A major issue confronting the Tribunal was how to deal with forum selection clauses¹⁷ contained in the contracts upon which numerous claims filed with the Tribunal were based. Should the clauses be given effect?¹⁸ Or should the Claims Settlement

Declaration alone control the scope of the Tribunal's jurisdiction? Article II, paragraph 1 of the Claims Settlement Declaration specifically excludes from the Tribunal's jurisdiction private claims "arising under a binding contract between the parties specifically providing that any dispute there under shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."¹⁹ With regard to the issue of forum selection clauses, each government took a different view on the application of this provision.²⁰ In this situation the Tribunal was called upon to consider a major question: does it have jurisdiction over claims based on contracts containing choice of forum clauses pointing to adjudication in Iran?

The United States argued that, under the principle of changed circumstances embodied in Article V of the Claims Settlement Declaration, such provisions were no longer binding.²¹ It argued that due to fundamental changes in Iran's legal system as a consequence of the Islamic Revolution it could no longer expect to receive a fair hearing in Iran. First, because of the language of Algiers Declarations; and secondly because the Islamic Revolution had so altered the legal system of Iran that it would be impossible for American claimants to find justice.²² The Iranian government countered the U.S. argument of changed circumstances by asserting that the United States was aware of any changed circumstances at the time the Algiers Accords were concluded and therefore should be stopped from asserting that principle. Iran also relied on the general principles of law and argued that under international law state contracts fall within the jurisdiction of the courts of that state.

In this regard, the Tribunal had to deal with the various forum selection clauses contained in the contracts based upon which numerous claims were filed with the Tribunal.²³ In a series of Interlocutory Awards made in November 5, 1982, the Full Tribunal heard nine arguments from nine different claimants to determine its jurisdiction over contracts with forum selection clauses that specified Iranian

courts as the jurisdiction to decide contract disputes.²⁴ The nine apparently were selected as test cases which contained language ranging from very rigid to fairly ambiguous. The nine claimants were chosen from among companies and individuals: Halliburton Company, Howard Needles, Ford Aerospace, Gibbs and Hill, Dresser Industries and TCSB, Inc., The nine cases involved 19 claims, six of which were excluded from the Tribunal's jurisdiction. For our purposes, the case of *Halliburton*, *Howard Needles* and *Gibbs and Hill* will be examined here.

In *Case No.159, Halliburton Co. IMCO Services (U.K.) Ltd. v. Doreen/ IMCO and Iran*,²⁵ (Claims related to a number of agreements between the claimants and the Iranian military authorities. Under one of these agreements, the claimant undertook to provide equipment and services in connection with installing of certain facilities at two air bases in Iran). In that case the Tribunal held that to exclude its jurisdiction the contractual choice of Iranian court must cover all claims arising under the contract. The Tribunal analyzed forum selection clause as follows:

In the present case, the jurisdiction of the Iranian courts has been expressly limited to disputes arising from the interpretation of the contract and the execution of the works. Important aspects of the contract including some of the Claimant's obligations to be performed outside Iran and all the Respondents' obligation such as payment have been left outside the jurisdiction of the selected courts. Such limitation of the jurisdiction places Article 9 of the contract outside the requirement that the Iranian courts must be solely competent for any disputes arising under the contract. Therefore, the Tribunal is not prevented by Article 9²⁶ of the ...contract from asserting jurisdiction over all claims arising under contract²⁷

The three Iranian arbitrators held that the jurisdiction of the Tribunal was excluded in all nineteen clauses and two of the United States arbitrators, Holtzman and Mosk, who

wrote separate dissenting opinions, held that the jurisdiction of the Tribunal was not excluded by any of the clauses. In the words of Judge Holtzmann:

I am simply unable to understand the statement of the majority that [the Tribunal should not determine the enforceability of forum selection clauses]... In the context of these Cases, a determination of whether the forum-selection clauses are enforceable, i.e., binding, is necessary in order to determine the Tribunal's jurisdiction.²⁸

Judge Mosk was even harsher, asserting that the majority's conclusions were "devoid of factual and legal support"²⁹. Both arbitrators would have interpreted "binding" to refer to the forum-selection clauses themselves. Two of the neutral arbitrators Bellet and Mangard, and the United States arbitrators, Aldrich voted with the Majority in respect of all nineteen clauses. The President, Judge Lagergran joined with three Iranian arbitrators and filed separate dissent in response of two clauses. In the words of one scholar, "Iranians were not entirely alone in challenging the Majority's approach. President Lagergren joined the three Iranian arbitrators in dissent and would have excluded the Tribunal's jurisdiction over contracts which provided that disputes be adjudicated through the competent courts according Iranian law".³⁰

US Judges Holtzman and Mosk argued that forum selection clauses were no longer binding because of the fundamental changes that had occurred in Iran since the conclusion of the contracts, pointing to the decision of the High Judicial Council of Iran cancelling, the Commercial Code and the Civil Procedure Code. At the same time, Judge Holtzman believed that the word "binding" was not redundant since a "Binding contract" is one which is enforceable. That is the ordinary meaning of the term. He also cited the English Court of Appeal decision in *Carvalho v Hull Blyth (Angola) Ltd* as a principal authority in support of his position.

Ironically, in 1991, Judge Mangard, former Tribunal Member, wrote that 'To understand' the Tribunal decision concerning Iranian forum selection clauses, 'one must

appreciate the political impact of this issue. The issue of changed circumstances threatened to cause a serious crisis in the relations between the two governments, as well within the Tribunal.³¹ Judge Mangard later wrote that the United States Governments tried to submit some documents “regarding alleged changes in the legal and judicial systems and the cruel penalties applied under the Islamic criminal legislation but Iran protested ...”³² It seems that in the forum clauses cases the American claimants did not succeed on all issues. The Tribunal denied adopting one argument which, from the perspective of the United States, was decisive in each and every case. Accordingly, the full Tribunal concluded that there was not sufficient evidence to establish that there existed mutually agreed understanding on the effect of, and meaning of the word “binding”, and therefore it became impossible, without beginning to “legislate”, to determine the proper meaning for the word

In *Howard Needles*,³³ the claimants argued that this clause did not specifically provide that any disputes thereunder should be within the sole jurisdiction of the competent Iranian courts. The respondents argued that the Claims Settlement Declaration should be interpreted in a restrictive manner and maintained that Iran’s agreement to refer disputes to arbitration should not be extended beyond what clearly had been intended by the two governments. The respondents further argued that the contract was concluded between an agency of the government of Iranian Civil Code, so that this corporation was mandatorily subject to Iranian law and the jurisdiction of Iranian courts. The respondents concluded that this fact demonstrated that Iranian courts had sole jurisdiction to resolve disputes arising under the contract.³⁴ The Tribunal ruled that Article 21 provided that disputes were to be resolved through court proceedings. And that the disputes would be subject to Iranian law, whichever court might deal with them.

In fact the Tribunal found that this clause did not unambiguously restrict jurisdiction to the courts of Iran. So that Article II, paragraph 1 excludes from the Tribunal’s jurisdiction only claims arising under contracts specifically providing for the sole jurisdiction of the

competent Iranian courts and the Tribunal concluded that Article 21 of the contract did not fall within it.³⁵ The Full Tribunal in *Gibbs and Hill* said that ‘all disputes that may arise between the two parties ... shall be settled through competent courts according to Iranian law’³⁶. The Tribunal ruled the phrase ‘competent courts’ did not bar other courts outside Iran and was not a ‘sole jurisdiction’ clause under the Claims Settlement Agreement. The Tribunal said that, according to the Algiers Agreements, such reference should have been specifically provided in the contract.

As matter of fact in those initial forum selection clause decisions where an effective forum selection clause was found the Full Tribunal stated that the “extent to which the claims asserted in this case are based on this agreement and thus outside the Tribunal’s jurisdiction and the extent to which they are based on other contracts or are not based on contract and thus within the Tribunal’s jurisdiction remain to be determined...”.³⁷ The nub of the matter is that a combination of legal expertise and political power dictates the terms and conditions of a negotiation. Just as a political conflict can change into a legal dispute, so a combination of legal expertise and political coercion can translate itself into legal wording. Most lawyers have seen the Tribunal’s decision as a major compromise. Lucy Reed has emphasised that “The US negotiators were aware that US investors had commonly agreed to the jurisdiction of Iranian courts for disputes arising out of contracts with Iran and instrumentalities.³⁸ As Professor Lowenfeld has noticed: the US negotiators were able to include in the Claims Settlement Agreement the word *binding* before the word contract and also the word *specially* before the words *providing that any disputes*.³⁹ He then goes on to say that: “It seem to me that US negotiators knew very well that Iranian courts were not a useful forum for American claimants when they signed the Claims Settlement Agreement, but if exclusion of some claimants was the price to pay for (1) getting the hostages out, and (2) getting the other claims before an international tribunal presiding over a security fund, they were prepared to pay that price.”⁴⁰

Therefore, paragraph 1 of the Article II of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal: “claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.” This means that those contracts concluded between Iran and US Claimants under the Shah that do not envisage the sole jurisdiction of Iranian courts cannot be decided by such courts.

The then President of the Tribunal, Judge Lagergren later gave his own impression of these claims by saying that the Tribunal “ preferred not to address the question of whether the forum selection clauses (or the contracts) at issue were binding because of the fundamental changes that had occurred in Iran after the signing of the Algiers Declarations (or the conclusion of the contracts), ...As a result neither the American claimants nor the Iranian respondents prevailed completely”⁴¹ As Toope has commented, the American position “would have been completely unacceptable to Iran” and that it was impossible for the Tribunal to “hold expressly that the Iranian Revolution had so altered the legal system of Iran than it would be impossible for US claimants to find justice”⁴² Toope then said “ At the end of the day, ..., the Iranian arbitrators were still sitting, ...no nation’s pride had been offended,...and American claimants had still a forum in which to pursue their claims,... Surely this was not a bad day for a fledgling Tribunal beset by political acrimony”⁴³

V The Shah’s assets

In early 1979 after the overthrow of the Shah, the Islamic Republic of Iran brought several lawsuits in U.S. courts seeking the return of Shah’s assets and the assets of his family.⁴⁴ In concluding the Algiers Accords in January 1981, the United States agreed that it “will freeze, and prohibit the transfer of, property and assets in the United States within the control of the estate of the former Shah or any of close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets belonging to Iran....”⁴⁵ The courts in the United States dismissed all of Iran’s lawsuits. The

dismissals prompted Iran to file claim before the Tribunal, charging that the United States had breached its obligations under the Algiers Accord.

In other words, Iran argued that the object and purpose of the U.S. obligations in the Algiers Accords was the return to Iran all of Pahlavi assets, and that, since no Pahlavi assets were returned to Iran, then the United States was in breach of its obligations. The United States position was that these persons were not “served” for the purpose of Algiers Accord unless the service was “uncontested” or if contested, upheld by the highest court presented with the issue. The Tribunal held that a close relative of the former Shah should be considered “served as defendant”. On April 2000, the tribunal agreed with Iran’s position regarding that United States had breached its obligations, but only with regard to the failure to freeze, and to require reporting about, the assets of the Shah’s wife, three sisters and fifty–nine other relatives served by publication in 1981.⁴⁶

The Tribunal further held that the United States had an implied obligation to require persons to report promptly after the conclusion of Algiers Accords any information concerning the assets of any close relative whom the United States knew previously had served as a defendant in U.S. litigation and to transmit such information to Iran. The United States had taken the position these persons were not “served” for the purpose of Algiers Accords unless the service was “uncontested” or if contested, upheld by the highest court presented with the issue. The tribunal held that the United States had an implied obligation to require persons to report promptly (after the conclusion of the Algiers Accords) any information concerning the assets of any close relative whom the United States knew had previously been served as a defendant in U.S. litigation, and to transmit such information to Iran.⁴⁷

The Tribunal dismissed the claim, holding that “the High contracting parties left it to Iran to bring to United States courts claim for the recovery of Pahlavi assets and that nowhere in the Accords did the United States expressly obligate itself to return a cause to be

returned to Iran any Pahlavi assets-even if Iran were unable to recover them through litigation in United States courts.⁴⁸ It seems that the Tribunal adopted a yes and no approach to the assets. The Tribunal did not possess the appropriate mechanism to dwell upon the suits extensively. Iran's position was weak because of the wording of the Algiers Declarations. As Warren Christopher, who signed the Declarations on behalf of the US government, rejoiced at the happy outcome to the Declarations, "Finally, the hostages were freed and the Shah's assets were not returned."⁴⁹

VI U.S. hostages v. Iran

On December 29, 2000, various U.S. nationals who were hostages or whose spouses or parents were hostages by Iran from November 1979 to January 1981 filed a class action suit in U.S. Federal district court against Iran and Iranian Ministry of foreign affairs for compensatory and punitive damages.⁵⁰ The plaintiffs asserted that the court had jurisdiction over the defendants pursuant to the "Terrorist-States" exception contained in the Foreign Sovereign Immunities Act (FSIA).⁵¹ In August 2001 the court entered a default judgment against Iran and it scheduled proceeding to determine the amount of damages to be awarded to the plaintiffs. In September the U.S government became aware of the case and on October 15, the Government filed motion to intervene in the case, to vacate the judgment and dismiss the claim.⁵² Plaintiffs criticized the U.S. government because of siding with a terrorist state;⁵³ the government asserted that the United States had agreed with Iran under Paragraph 11 of the General Claims Declaration of Algiers.

In fact Paragraph 11 of the General Declaration lists four precluded claims against Iran: those related to the seizure of the fifty-two U.S. nationals, those related to their detention, those related to damage to property within the Embassy compound in Tehran, and those related to injury to 'the United States nationals or their property as a result of popular movements in the course of Revolution in Iran which were not an act of the Government of Iran'. In *Emanuel Too v. Greater Modesto Insurance Associates, et al.*,⁵⁴

the Tribunal dismissed for the lack of jurisdiction a claim for property loss allegedly resulting from the suspension of claimant's entry visa into the United States in 1980. The Tribunal held:

It seems clear that the United States suspended visas issued in Tehran in application of the Presidential Order issued in response to the seizure of its embassy. Consequently, the Tribunal holds that the suspension of the Claimant's visa was an act which arose directly 'out of the actions of the United States in response to the conduct described in' paragraph 11 of the General Declaration, namely the seizure of the United States embassy in Tehran. Therefore, the Tribunal has no jurisdiction over this claim.

In Award *No163*⁵⁵ the Tribunal dismissed for lack of jurisdiction a claim by an Iranian national for damages resulting from his expulsion from the United States pursuant to a Presidential Order issued on 7 April 1980, the date during the hostage crisis on which the United States broke off diplomatic relations with Iran. The Tribunal noted that the President had stated that his action was taken in response to the detention of fifty-two hostages. The United States Government also asked the US District Courts to dismiss, for instance, six suits filed with the District of Columbia and one joint complaint by nine former hostages filed with the Central District of California seeking millions of dollars in damages from Iran because the Government argued, 'in order to secure the release of the hostages, the President determined that relinquishment of claims arising out of their seizure and detention was necessary.'⁵⁶

What the United States wanted was to extend its cooperation with the Islamic Republic of Iran against the former American hostages and its own nationals because of its obligations under the Algiers Accords. Actually, both Iran and the United States transferred to the Tribunal a number of claims brought before their own national courts. No matter what happened in the Tribunal-whether the Tribunal granted its jurisdiction or not, whether the claimants were successful or not-, their good intentions did matter more than anything

else. They sought to respect the principle of *pacta sun servanda* and to continue their collaboration. By the lapse of time both the United States and Iran diminished their inclination to resort to culturally sensitive issues, hence relied more on law than politics in their relations.

VII Strategic cooperation & Iran-contra affair

In a news conference on 1986 the president of United States was asked:

Mr. President ... are you telling us tonight the only shipments with which were involved were the one or two that followedthere were no other shipments which the US condoned.? The President replied: That's right. I'm saying nothing, but the missiles we sold.⁵⁷

Time magazine wrote in a special cover on Iran-Contra Affair shortly after the Iran-Gate scandal that "Iranians, who meet regularly with US representatives at The Hague ..., indicated that some Tehran leaders wanted to talk."⁵⁸ On November 3, 1986, Al-Shiraa, a Lebanese weekly, reported that the United States had secretly sold arms to Iran. Subsequent reports claimed that the purpose of the sales was to win the release of American hostages in Lebanon. These reports seemed unbelievable: few principles of U.S policy were stated more forcefully by the Reagan Administration than refusing to traffic with terrorists or sell arms to Government of the Ayatollah Khomeini of Iran. Although the Administration initially denied the reports, by mid-November it was clear that the accounts were true. "The United States had sold arms and had hoped thereby to gain the release of American hostages in Lebanon"⁵⁹.

For many Americans, the most alarming aspect of Iran-Contra affair was President Reagan's decision to sell arms to Iran when only a few years before, that nation humiliated the United States.⁶⁰ As I discussed in chapter two of this dissertation, from November 1979 to 1981, Iranian mobs in the streets of Tehran chanted slogans calling for the death of president Carter and the destruction of U.S. interests throughout the region. The question is

that what was wrong with the shipment of arms to Iran? In response to the Embassy seizure on November 1979, the United States embargoed all arms shipment to Iran as part of a general embargo on trade and financial transactions. (As discussed in chapter two) Ten months later, the invasion of Iran by Iraq, on September 1980, raised the questions of who might ultimately be punished by this punitive measure.⁶¹ (Iran's armed forces were in disarray. Modern aircraft and naval vessels purchased were badly in need of spare parts and maintenance. The prospect of an Iranian defeat and an increase in Soviet influence in the region was of concern. Reagan's troubles stemmed not only from his willingness to bargain for the hostages, but also from his commitment to the same geopolitical assumptions that underlay U.S. policy toward Iran in the post World War II era. Reagan himself explained the thinking behind his policy:

Iran encompasses some of the most critical geography in the world. It lies between the Soviet Union and access to the warm waters of the Indian Oceans. Geography explains why the Soviet Union has sent an army into Afghanistan...Iran's geography gives it a critical position from which adversaries could interfere with oil flows from the Arab states that border the Persian Gulf. Apart from that geography, Iran's Oil deposits are important to the long-term health of world economy.⁶²

Against this background, the Reagan Administration's Senior International Group (SIG) convened on July 21, 1981, to discuss U.S. policy toward Iran.⁶³

Despite the U.S. embargo, Iran obtained weapons and military support services on the thriving world arms market. Oil was often the medium of exchange in elaborate barter deals, and Persian Gulf trade became an irresistible lure for international arms merchants. The Reagan Administration listed no fewer than 41 countries that had provided Iran with weapons since the start of the war. As a result, some thinkers believed that: by spring 1983 the tide in the Persian Gulf war had turned in favour of Iran.

At this point the Administration decided to initiate operation staunch, a plan seeking the cooperation of other governments in an arms sales embargo against Iran. On December 14, 1983, the United States Department instructed its embassies in countries believed to be involved in arms trade with Tehran to urge their host Governments interest of the international community in achieving a negotiated end to Iran-Iraq war.⁶⁴ In fact, NSC staff was engaged in covert operations through Israel, in summer of 1985, the government of Israel proposed that missiles be sold to Iran in return for the release of American hostages held in Lebanon and the prospect of improved relations with Iran. (However the Secretaries of States and Defence opposed such sales to a government designated by the United States as a supporter of international terrorism. They called it straight arms-for hostages' deal that was contrary to U.S. public policy. They also argued that these sales would violate the Arms Export Control Act, as well as the U.S. arms embargo against Iran.)⁶⁵

Nevertheless, in the summer of 1985 the President of United States authorized Israel to proceed with the sales. Israel shipped 504 Tow anti-tank missiles to Iran in August and September 1985. Although the Iranians had promised to release most of the American hostages in return, only one, Reverend Benjaminweir, was freed. In November U.S. authorized Israel to ship another 80 HAWAK anti-craft missiles in return for all the hostages, with a promise of prompt replenishment by the United States, and 40 more HAWAKS to be sent directly by United States to Iran. Eighteen HAWAK missiles were actually shipped from Israel in November 1985, but no hostages were released.⁶⁶ In early December 1985, President Reagan signed a retroactive finding purporting to authorize the November HAWAK transaction. That finding contained no reference to improved relations with Iran. It was a straight arms for hostages finding.

On December 7, 1985, Reagan and his top advisors met again to discuss the arms sales. Secretaries Shultz and Weinberger objected vigorously once more, and Weinberger argued that the sales would be illegal. After a meeting in London with an Iranian

interlocutor and the Israeli, Macfarlane recommended that the sales be halted. Reagan signed a finding on January 6, 1986, authorizing more shipment of missiles for the hostages. Some thinkers argued that it seems that: “The President decided to go forward with the arms sales to get the hostages back”⁶⁷. Ironically, when the CIA’s General Counsel pointed out that authorizing Israel to sell its U.S.-manufactured weapons to Iran might violate the Arms Export control Act, the President, on legal advice decided to authorize direct shipments of the missiles to Iran by the United States and signed a new finding on January 17, 1986.

In February 1986, the United States sold 1,000 Tows to Iran. The U.S. also provided the Iranians with military intelligence about Iraq. All of the remaining American hostages were supposed to be released upon Iran’s receipt of the first 500 Tows. What paid the United States for the missiles and what it received from Iran was more than \$6 million. After the disclosure of the Iran arms sales on November 1986, the American public was still not told the facts. The President sought to avoid any comments on the ground that it might endanger the chance of release and security of the remaining hostages. In May 1986, the President again tried to sell weapons to get the hostages back. This time, he agreed to ship parts for HAWAK missiles but only on condition that all the American hostages be released first. A mission headed by Robert McFarlane, the former National Security Adviser, travelled to Tehran with the first instalment of the HAWAK parts. McFarlane’s trip ended amid misunderstanding and failure, although the first instalment of HAWAK parts was delivered. (The enterprise was paid more than \$ 8 million).

On July 26, 1986, another American hostage was released. Ironically despite all the arms sales, the second hostage was freed.⁶⁸ In September and October 1986, the NSC staff began negotiating with a new group of Iranian, the “Second Channel,” that Albert Hakim had opened. But this channel like the first one had the same principles and the same arrangement in mind: missiles for hostages.⁶⁹ During the negotiations with the Second

Channel, North and the Second Channel told the Iranians that the President agreed with their position that Iraq's President, Saddam Hussein, had to be removed and further agreed that the United States would defend Iran against Soviet aggression. In his first public statement on the subject on November 6, he said that "the reports concerning the arms sales to Iran had "no foundation". A week later on November 13, he conceded that the United States had sold arms, but branded as "utterly false" allegations that the sales were in return for the release of the hostages.

By the way, over few months, negotiations among the Iranian representatives, the intermediary, and the American officials continued. The pattern established in the 1985 sales would continue. As I pointed above, Iran-Contra Affair involved strategic cooperation between Iran and America. The episode reportedly began from the Tribunal. It is within the Tribunal that the Agents of Iran and America meet each directly. Time magazine wrote in a special cover on Iran-Contra Affair shortly after the Iran-Gate scandal that "Iranians, who meet regularly with US representatives at The Hague ..., indicated that some Tehran leaders wanted to talk."⁷⁰

VIII Counterclaims

It seems that, a major issue before the Tribunal can be traced to the biased wording of the Claims Settlement Declaration. In *Case A-2*, followed by a similar award in *Case A-16*, the Tribunal's majority ruled that direct claims by the Government of Iran against U.S. nationals did not fall within the jurisdiction of the Tribunal. In the *Case A-2*, Iran asked the Tribunal to determine whether the General Declaration and the Claims Settlement Declaration granted the Tribunal jurisdiction over claims by the Government of Iran against American nationals. Iran said that, according to paragraph B of the General Declaration, it was the intention of both parties to terminate all litigation between the government of each party and the nationals of the other. Iran's argument was that, claims by Iran against nationals of the United States were within the jurisdiction of the Tribunal but the

government of United States claimed such claims were not referred to by either of the two Declarations and were not within the jurisdiction of the Tribunal. Ironically, the Tribunal decided that the Declarations did not grant the Tribunal jurisdiction over claims by the Government of Iran against U.S. nationals.⁷¹ This inequality was a one-way street because American nationals could bring direct claims against the Government of Iran while the Government of Iran could not do so against American citizens. Such inequality in the wording of the Algiers Declarations could have jeopardized the integrity of the tribunal if it had not adopted a proper strategy to bridge the gap. This strategy was decided in *Case AI* where the Tribunal reasoned that Iran could bring counterclaims against American claimants if they “arose out of the same contract, transactions or occurrences”.

It was this strategy that rescued the Tribunal from collapsing, and subsequently encouraged Iran to extend its collaboration for mutual interests rather than a stag hunt defection to catch a rabbit. In the following paragraphs I shall show how the Tribunal dealt with counterclaims. Counterclaims are very important from Iran’s point of view in that it is Iran or its institutions that are respondents. The Tribunal should have provided a chance for them. If you disappoint or frustrate your partner all the time, the game will discontinue and cooperation will break up. The Tribunal was abreast of the Iran-US situation. As for the sources of the Tribunal’s power to maintain its jurisdiction over counterclaims, it is to be noted that Article II (1) of the Claims Settlement Declaration states that the Tribunal has jurisdiction over “any counterclaims which arise out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claim”.⁷²

In fact Jurisdiction over a counterclaim depends entirely on the presence of jurisdiction over the claim.⁷³ The Tribunal has made it clear that counterclaims are within the jurisdiction of the Tribunal as long as the claim arose from the same transaction or occurrence of the original national’s claim. In this regard, hundreds of counterclaims have been filed at the tribunal, including, advance payments, service rendered, legal expenses

counterclaims for breach of contract and failure to return items.⁷⁴ (The counterclaims, in the same way as claims, must have been outstanding on January 19, 1981)⁷⁵ As discussed above, in *Case No.388, E-Systems v. Iran*,⁷⁶ the Tribunal considered that the claim of Iran, which had been initiated before the Iranian court, had been acceptable as a counterclaim before the Tribunal. As a matter of fact, the Tribunal found that the Algiers Agreements did not argue that ‘the Tribunal’s jurisdiction over Iran’s counterclaims is exclusive’. Iran relied upon General Principle B of the General Declaration which stated the purpose of both parties to terminate all litigations between the governments of each party and nationals of the other, and to settle all claims through arbitration. (In general, this contract provided that the Islamic Republic of Iran would deliver to E-Systems at its plant in Texas, two Boeing 707 aeroplanes, together with certain equipment to be installed in these planes).

Seventy seven governmental claims, called “B” claims were filed. Of these claims, nine were outstanding as of October 1990, including the massive multi-billion dollar claim, *Case No. B1*. First, I will review this case here.⁷⁷ Judge Aldrich later says the number of these B Cases amounted to 1100.⁷⁸ In the *Case B1, Iran v. United States*,⁷⁹ the United States submitted a counterclaim on March 31, 1982.⁸⁰ The United States asserted that Iran violated its contractual obligations to maintain the security of classified components in defence articles and related classified information. The United States invoked provisions in certain contracts (“ Letters of Offer and Acceptance” or “ LOAs”) dealing with F-14 aircraft and the phoenix missile system that were concluded at various times between 1974 and 1978 under the Foreign Military Sales Program(FMS). According to the United States, the Tribunal indicated that, under customary international law, respondents enjoy a right of counterclaims. Iran raised four preliminary objections to the counterclaim. First, it contended that the Algiers Declaration do not provide the Tribunal with jurisdiction to certain “official counterclaims,” i.e., counterclaims submitted in response to “ 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.”

Accordingly, Iran argued that, instead of a counterclaim, the United States should have filed a claim against Iran before January 19, 1982, the deadline for the filing of official claims before the Tribunal. Secondly, Iran argued that, even if the Tribunal had jurisdiction to hear official counterclaims, such counterclaims had to be outstanding on January 19, 1981, the date of the Algiers Declarations. Iran contended that the United States had not shown that its counterclaim was outstanding on January 19, 1981, it should be dismissed because it did not arise from the contracts that are the basis of Iran’s claims in the *Case No. BI*. Iran argued that it did arise out of a separate agreement, namely the 1974 Agreement. Fourthly, Iran asserted that the counterclaim did not constitute a cognizable claim, as it was not described with sufficient specificity and failed to meet the requirements of Article 18 of the Tribunal Rules of procedure. The Tribunal held that it “has jurisdiction to entertain official counterclaims if outstanding on 19 January 1981 and arising out of the contract(s) that form the subject matter of the claim(s).”⁸¹

In the *Case No. 98, Harza Engineering v. Iran*,⁸² the Tribunal held that it had no jurisdiction over the counterclaim. In this case, the Tribunal said that a counterclaim based on standby letters of credit did not arise out of same contract, and it is not in the jurisdiction of the Tribunal. In this case, Bank Tejarat, argued that the claimant was liable for the amounts due under thirty-three back-up letters of credit issued to bank Etebarate for the account of Hazra Engineering Company International. The Tribunal held that “A letter of credit is a financial instrument embodying obligations which are autonomous and independent of the transaction to which it is a condition”⁸³ he Tribunal decided that the subject matter of the claim and counterclaim were quite distinct and thus denied its jurisdiction. The Tribunal’s idea of granting its access to the parties was a means to facilitate cooperation between the parties. To this end, it sought to accept some but not all of

the late counterclaims. Mention can be made of *Philippe Petroleum Co., V. the Islamic Republic of Iran, et al.*, *ITEL International Corp. V. The Social Security Organization of Iran, et al.*, and *General Electric Co. v. The government of the Islamic Republic of Iran, et al.* In each of these cases, the Tribunal found jurisdiction for the late filing and an absence of prejudice or delay.⁸⁴

IX The Security Account as a satisfaction means

One of the most innovative, interesting and unequal features of the Iran-U.S Claims Tribunal is the means for the enforcement of the decisions and awards of the Tribunal.⁸⁵ To one lawyer, “the Security Account is one of the greatest innovations of the Tribunal’s structure; its existence may be viewed as major inhibiting factor in the general application of Tribunal practice”⁸⁶ In contrast to some others it has been viewed as a “one way street.”⁸⁷ In accordance with Paragraph 7 of the General Declaration, Iran has committed to deposit in a Security Account an initial one billion U.S. dollars, and to maintain the balance in that Account at US\$ 500,000,000, in order to secure the payments of awards rendered by the Tribunal against Iran. Paragraph 7 of the General Declaration stipulates that when the Central Bank notifies Iran that the balance in the Security Account has fallen below U.S. \$500 million, Iran must make new deposit enough to maintain a minimum balance of U.S. 500 million in the Account. According to a subsequent “Technical Agreement”⁸⁸ regarding various banking institutions responsible for the transfer and deposit of Iranian Government assets, the NV Settlement Bank of the Netherlands, a public corporation with registered office in The Hague (as subsidiary of the Dutch Central Bank), agreed to act as “Depositary for the Iranian funds in the United States within the meaning of the Algiers Agreement”.

The Security Account was therefore established in that Bank. The way the awards of the tribunal must be satisfied is unparalleled in modern arbitration because the Security Account is not available to enforce Iranian awards. It has been established solely to satisfy United States claimants. The issue arises, how are awards in favour of Iran and Iranian

nationals satisfied? It has been argued that, “the design of any such security mechanism would, of course, depend upon the amount of claimed, the number of cases to be dealt with, the nature of the parties, and the level of trust that exist between them”.⁸⁹ The Security Account was established under the first Declaration of the Government of the Democratic and Popular Republic of Algeria in January 1981. As Iranian funds were released from the American freeze orders and attachments, one –half of each instalment paid to Iran was placed “in special interest-bearing Security Account in the Algerian Central Bank, until the balance in the Security Account had reached the level of \$ 1 billion”. As Part of the Algiers Accords concluded in January 1981, Iran and United States agreed that one billion dollars of Iranian assets blocked by the United States would be used to secure the payment by Iran of Awards rendered by Iran-U.S. claims Tribunal in favour of the U.S. government or its nationals.⁹⁰ Paragraph 7 of the General Declaration provides the way the transfer must be done.⁹¹ In addition, the account is to be so maintained, until such time as all claims against Iran are satisfied through the present arbitration.

Regarding Iran’s performance of its obligations under this paragraph, the United States has filed some claims against Iran. For instance, on November 5, 1992, the N.V. Settlement Bank informed Iran and the United States that the balance in Security Account had fallen below \$500 million.⁹² Consequently, In case *No A/ 28*⁹³ and later in *Case No A/ 33*, the United States filed claims against Iran regarding Iran’s performance of its obligations under the Algiers Declarations concerning the replenishment of Security Account. In case *No A/ 28* the Tribunal decided that paragraph 7 required Iran to replenish the Security Account promptly whenever it fell below U.S.\$ 500 million, and since Iran had been in non-compliance with this obligation since 1992, the Tribunal further noted that the “Tribunal expects that Iran will comply with this obligation”.⁹⁴

In *Case No/33*, therefore, the United States requested that the tribunal render an order against Iran to replenish the security Account immediately. The Tribunal finally

concluded that “Iran is requested to comply with its obligations to replenish the Security Account, as determined by the Tribunal in its Decision in *Case A/28*.⁹⁵ (As of 31 October 2006, the balance in the Security Account was US \$516,123,840.38.)⁹⁶ In order to extend its cooperation, on each occasion Iran took necessary action and replenished the Security Account. It is necessary to note that, in spite of all those tribunal’s awards and American pressure on the balance of the Security Account Iran and America had started a series of negotiations in this regards. Since early 1981, a series of negotiations had been conducted in Vienna, London, Paris, and Geneva to reach settlement agreements with claimants. In most of these negotiations, the issue of settlement agreement payments out of the Security Account had been discussed. For instance, a settlement was agreed upon between Iran’s Kian Tire Co. and B.F. Goodrich during talks in Vienna in the autumn of 1981. A similar agreement involved a claim by Westinghouse Corp. On November 23, 1981, Iran and the United States filed submissions outlining their positions in four disputes concerning the \$ 1 billion Security Account established to pay awards by the tribunal. There were four questions:⁹⁷

(1) Can Iran pay out-of-court settlement from the \$1 billion Security Account that was established to pay awards made to claimants by the Tribunal? Or what standard should be applied by the Tribunal in recording a settlement as an Award on Agreed Terms? Iran argued settlements could come from the account whereas the U.S. said settlement funds should come from another source. The United States was concerned that the Security Account might be depleted if Iran entered into settlements with private American claimants that went beyond the Jurisdiction of the Tribunal or were excessive when measured against those claims that were within its jurisdictions. Judge Aldrich argued that, the United States thought Iran might use the Security Account to finance new procurement by settling a claim on terms whereby the American claimant would provide additional goods or services.⁹⁸ American arbitrator, H.M. Holtzman, has complained about the case with which Award on

Agreed Terms have been approved. He believed that the Security Account may in some circumstances have been abused. Holtzmann suggested that certain parties have reached agreement on a settlement in order to extract funds from the Security Account which will be used to finance transactions involving goods ordered after 19 January 1981, the date of the Accords. In other words, the money from the Security Account will be available to complete a transaction over which the Tribunal would not have Jurisdiction.⁹⁹

(2)-Does the interest which accrues in the Security Account remain in the account for the sole purpose of paying claims against Iran, or does Iran have the right to withdraw the interest as it accrues? Iran wanted to withdraw the interest while the United States said it should not be withdrawn. In fact Iran argued that it should be paid to Iran, and the United States argued that it should be added to the Security Account. This was an issue of some significance, as interest rates in the early 1980s were 15 per cent or more; consequently, the first year's interest alone was likely to be at least U.S \$150 million. The Tribunal was badly divided, but ultimately decided by five votes to four to 'find a solution within the structure of the agreements themselves.' Such solutions have been considered as 'compromise' by scholars. The American Agent at the Tribunal has called it as a 'Systematic problem...the tendency to compromise...which means ignoring the legal arguments in favour of reaching a political compromise satisfactory to both parties' Toope has harshly criticized the US Agent because he, along with a number of other scholars, believes that "the objection to any degree of compromise is unrealistic and is not in conformity with underlying principles of international arbitration and of law in general" Toope continues to argue that "Iranian bank argued that such interest should accrue to it directly, while the US bank asserted that the interest should remain in the Security Account, to partial fulfilment of the obligation to replenish. Because the Algiers Accords gave no adequate guidance on the question, it was almost inevitable that the Tribunal would reach a compromise result."¹⁰⁰ The Tribunal said that:

The relevant governing principles established by the Parties are recognition of Iran's rights in its assets, along with agreement to resolve disputes by binding arbitration, and the creation of a Security Account consisting of Iranian funds in order to satisfy awards against Iran. In this context, in the Declarations, the interests of Iran, the 'owner' of the funds, were set against those of the United States and its national claimants, who had the benefit of the freeze orders and, in some cases, of judicial attachment of Iranian assets¹⁰¹

The debate was resolved by the plenary Tribunal in the second phase of *Case A-I*, the majority deciding "that the interest must be... credited as it accrues to a separate interest-binding account in the NV Settlement Bank". The funds in the separate account "would be finally remitted to Iran at the same time as any balance in the Security Account".

(3)-Who should be responsible for payment of fees to the N.V. Settlement Bank of the Netherlands? Iran said the U.S. should pay, but the U.S. said Iran should pay. (4)-Who indemnifies the Settlement Bank of the Netherlands if it suffers losses as a result of holding the account? Iran believed that indemnification responsibility rests solely with the U.S., but the U.S. said indemnification should be shared. The Tribunal held that Bank Markazi Iran and the Federal Reserve Bank of New York would each be required to pay one-half of the fees of the depository Bank, and that Iran and the United States were jointly and severally bound to indemnify the Netherlands Central Bank pursuant to the technical agreements. The four issues surrounding the Security Account, like the account itself, were one of the challenging issues in the work of Tribunal.

On May 14, 1982, the Full Tribunal rendered a decision regarding issue (1) in *Case A-I*.¹⁰² Iran asserted that those agreements require all interests to be transferred to Iran as the interest accrues. The United States asserted that those agreements require all interests to be retained in the Security Account available, like the principle, to secure and pay awards against Iran by the Tribunal. Iran contended that all interests should be remitted to Iran as it

accrued because the funds in the Security Account were “Iranian property”, any residue of which, after all claims were resolved, was to be remitted to Iran.

It argued that the Account had a \$1 billion ceiling that would be exceeded, at least prior to the payment of awards, if interest were credited to the Account. Iran also contended that it never agreed to allow more than \$ 1 billion of its property to remain in the Account, and that any interpretation of the Algiers Declarations which would result in the Account’s exceeding the sum would impermissibly place an obligation on Iran to which it, as a sovereign State, had not explicitly consented. Iran asserted that the burden of proving any such consent was on the United States. Iran further argued that, in negotiations in August, 1981 concerning the disposition of interest, United States negotiators put forth a settlement proposal which had allowed the interest to be credited to Iran, and that such earlier position undercut the present one. The United States contended that the \$ 1 billion amount was a ceiling on initial funding only, not on any amounts which might ultimately be contained in the Account due to the accrual of interest.) The Tribunal was very cautious in these procedural issues. It argued that it would record agreements between Iran and the United States for payment out of the Security Account but added that it would reserve its right not to record such settlements if it thought they were in conflict with the Algiers Accord.¹⁰³

The remaining three issues were handled by the Tribunal’s middle-of-road approach: In determining to whom the interest on the Security Account should be remitted as it accrues (2), the Tribunal should ensure that neither party is favoured. Rather, it is necessary to maintain the equilibrium by, in essence, freezing the situation as it has been brought about in the absence of any conferral of power on the Escrow Agent by the parties. The Tribunal therefore concludes that the interest must, as it has been, be created as it accrues to a separate interest-bearing account in the N.V. Settlement Bank unless and until the two Governments agree to a different result.¹⁰⁴ The Tribunal added that, in the absence of such agreement, the funds in this separate account, including interest earned by them,

would be finally remitted to Iran at the same time as any balance in the Security Account. The Tribunal also decided that Iran shall have access to the funds in the separate account in order to help satisfy its replenishment obligation, if the need arises. Since use of those funds for this purpose would facilitate the payment of awards to United States claimants, the funds in the separate account can be used by Iran for replenishment Account without the need for concurrence by the United States.¹⁰⁵

It has been asserted that the tribunal has a deeply politicised atmosphere and typically the American and Iranian arbitrators will not agree on the legal reasoning applicable in any given case. The burden then falls upon the Chairman to conduct chamber business and to author awards, orders, etc. in such a manner that some equilibrium and some rational communication can be maintained. To do so, it will often be necessary to compromise, to play down differences of opinion and to render decisions that are intentionally vague. The Security Account makes such an approach more attractive because its existence precludes the need for separate enforcement proceedings. In other words, given the lack of any review procedure or challenge mechanism, the Iran-US Claims Tribunal can afford to be imprecise, and in order to ensure its own survival it is almost bound to be imprecise. Justice will still to a great extent be done because claimants will benefit from almost immediate, essentially guaranteed enforcement of their awards, a benefit they could hardly have anticipated in the dark days when their contracts were being repudiated and their assets seized.¹⁰⁶

X Conclusion

In this chapter, I have shown that the Tribunal decided not to disappoint Tehran and Washington. The Accords were silent from the perspective of the awards rendered in favour of Iran or its nationals. First, Iran tried the exhaustion of US local remedies, i.e., it tried to bring certain claims before the US courts. Once disappointed before the US Federal courts, Iran again returned to the Tribunal. The

Tribunal, in response, chose not to interrupt its cooperative behaviour. The Tribunal's authority also grew out of the two actors' cooperation. However, Iran's position was denied in Indirect Claims because of the lack of an express language in the Accords. If the Tribunal's jurisdiction was granted to Iran in the Awards rendered in favour of Iran or its nationals, so was in the case of the United States in Indirect Claims where American claimants were granted access to the Tribunal.

The Forum Selection Clauses were the most sensitive issue before the Tribunal. Washington argued that due to the fundamental changes in Iran's legal system as a result of the Islamic Revolution in Iran, it could no longer expect to receive a fair hearing in Iranian national courts, because the Islamic Revolution had so altered the legal system of Iran that it would be impossible for American claimants to find justice. Such changes, according to Washington, were as a consequence of the Islamic law (Sharia), pointing to the so-called cruel penalties under the Islamic criminal legislation. Such statements were both hostile and highly political in the eyes of Iranians. The Tribunal decided not to address the question directly. It was impossible for the Tribunal to hold that the Islamic law of Iran was cruel. The Tribunal ruled that Washington already knew what it was signing on 19 January 1981 (The Accords). Therefore it relied on the will of the parties as the sole source of the Tribunal's jurisdiction. The Tribunal did not decide as to whether or not those changes had altered the legal system of Iran. As a result, neither the American claimants nor the Iranian respondents won the case.

With respect to the Shah's assets, the Tribunal adopted a yes and no approach to the assets because under the Accords, Iran was obliged to bring such claims before the US courts. The Tribunal did not rule out Iran's right to such claims. As for the American hostages against Iran, it must be noted that Washington wanted to extend its cooperation with Tehran against the former American hostages and its own nationals because of its obligations under the Algiers Accords. Both Iran and the United States transferred to the

Tribunal a number of claims, including the claims that had been instituted by the American hostages in their own national courts.

How could the issue of Iran-Contra Affair between two antagonistic parties be explained, the scenario that happened in the case of Tehran and Washington? The Iran-Contra Affair shocked the world in 1986 when it was reported that the United States had secretly supplied arms to Iran. Subsequent reports asserted that the purpose of the sales was to win the release of American hostages in Lebanon. The episode had reportedly been initiated from the Tribunal as discussed above. Another major issue before the Tribunal was the problem of counterclaims by Tehran against Washington. Under the Algiers Declarations, such counterclaims were totally excluded from the Tribunal's jurisdiction. However, the Tribunal found an appropriate strategy which was adopted in *Case A1* where the Tribunal reasoned that Iran could bring counterclaims against American claimants if they arose out of the same contract, transactions or occurrences.

The establishment of the Security Account was a novel idea in the history of international arbitration. Since early 1981, a series of negotiations had been conducted in Vienna, London, Paris, and Geneva to reach settlement agreements with claimants. In most of these negotiations, the issue of settlement agreement payments out of the Security Account had been discussed. Since most of the claimants were American nationals or corporations, it was established to pay for the awards issued in favour of American claimants. Iran had agreed to cooperate within the framework of the said novel design. The interest on the account was decided by the Tribunal according to Iran's expectations. It was credited, as it accrued, to a separate interest-binding account in the NV Settlement Bank. The funds in the separate account were decided to be finally remitted to Iran at the same time as any balance in the Security Account. The Security Account acted as a facilitator of cooperation.

The Iran-US Claims Tribunal came into being around 30 years ago. The Tribunal has been called the most significant arbitral body in history and its awards¹⁰⁷, a gold mine of information for perceptive lawyers.¹⁰⁸ The Tribunal came into existence as one of the measures taken to resolve the crisis between the Islamic Republic of Iran and the United States of America arising out of the detention of 52 United States nationals and the subsequent freeze by the United States of America of the Iranian assets in the United States. The most important question is how the Tribunal survived for nearly three decades in spite of the strong age-old animosity between the two state actors who created it. I strongly believe that since the first week of January 1981, one can notice proactive cooperation between the two antagonists. The lawyers were looking to the rules of the International Centre for the Settlement of Investment Disputes.¹⁰⁹ In fact cooperation had taken place behind a veil of absolute secrecy until 19 January 1981, the day the compromise was translated into legal terms, was signed and made public. Cooperation took place for months in secrecy between the so-called “Axis of Evil” and the “Great Satan”.

It should also be reiterated that secrecy is a strong tradition in arbitration, a tradition based upon wise sensitivity to the concerns of state parties. It may even be a defining feature of the entire process, allowing for behind-the-scenes compromises which lead to mutually acceptable results. Since the severance of diplomatic relations, Iran and the United States have looked to the Iran-United States Claims Tribunal as the only place where their Agents officially meet. Some thinkers, like Gillespie, argue that The Iran-U.S. Claims Tribunal became the only forum for official talks between Iran and the United States during the 1980s. His contention is supported by the Iran-Gate Scandal. Kate Gillespie adds that in 1989 changes in both Washington and Tehran posed new questions concerning a potential rapprochement. An examination of problems and accomplishment of the Iran-US Claims Tribunal may provide a better understanding of the relationship between the two countries.¹⁰⁹ The Tribunal is regarded by Iranian as a safe-haven. However there

have been many occasions upon which observers might have predicted collapse. But in the end, the Tribunal's continued existence must be viewed as its greatest achievement. Toope has argued that: it is the process itself that enhances the Rule of law rather than the substantive content of the Tribunal's awards. Claimants still have an opportunity to gain compensation and, on a higher plane, Iran and the United States, despite intense ideological and cultural dissimilarities, are still engaged in a common pursuit. That is probably all that one could fairly be entitled to expect given the circumstances of the Tribunal's creation and the fine balancing required every day of its operation.

In resolving disputes on the basis of "respect for law", the Tribunal is forced to display enormous flexibility; it must be willing to compromise.¹¹¹ Apparently, in several cases, like *Hoffland, Computer Science Co.*, and *Arthur Young and Co.*, the Tribunal held that there were certain highly sensitive matters that were not admissible because they raised political, non-justifiable questions. Any decision on such issues would require the Tribunal to render a verdict on behalf of some governmental agencies or officials; it would be some sort of intervention in the internal affairs of a country. This tone of statement is clearly reflected in *Hoffland Honey Co. v. National Iranian Oil Co.* The claimant had alleged that the respondent had sold oil which had been used to make agricultural chemicals. The claimant had used them in Wisconsin and that many colonies of the claimant's bees had been damaged. The Tribunal ruled:

Hoffland's claim is essentially a *political claim*, and thus inherently incapable of judicial resolution. Hoffland admits, for example, that the use of the specific agri-chemicals in question has been sanctioned by the United States 'Environmental Protection Agency rulings and Department of Agricultural recommendations.' Hoffland further noted that questions of *national economic policy* may be implicated in any decisions concerning oil imports. While we are sympathetic to Hoffland's ...losses...it is plain that the two

Governments did not contemplate our *intrusion into their political decisions* in order to express our views...¹¹² (Emphasis added)

Since the tribunal has been established and manned, it has acted independently of the States Parties and has carried out its function to the best of its ability to make independent judgements and to carry forward on an independent basis. During the last 30 years we saw many challenges, yet more cooperation in the Tribunal took place. Despite all of those conflicts, already twenty nine years after its establishment it has disposed of almost all of claims submitted to it. Every award to an American claimant has been paid in full, usually with interest. Several cases invoked above involved a number of issue areas such as forum selection clauses, counterclaims, interim measures, indirect claims, security account, financial and banking, agreed terms, lump sum payments, out of court settlement, enforcement of awards rendered in favour of Iran, the Shah's assets, US hostages against US Government, Iran-Contra Affair, jurisdictional issues, settlement agreements and small claims support the present dissertation's central thesis that the so-called "Axis of Evil" and the so-called "Great Satan, World Devouring America" who had once clung to a romantic fantasy of wedded bliss, subsequently engaged in a pattern of love and hate relationship. The love and hate relationship took place not only on the international level such as Iraq, Afghanistan, Lebanon, Palestine, over nuclear issues and Latin America, but also within the Tribunal. The Tribunal's practice records a very long love story.

Notes

¹ *United Nations Convention on the Recognition and Enforcement of foreign Arbitral Awards* (the New York Convention) 10 June 1958, 330 U.N.T.S.3.

² *Case No. A/21 Islamic Republic of Iran v. the United States of America*, IRAN-U.S.C.T.R.14: 324. The request invoked the provisions of Paragraph 17 of the General Declaration, as well as Article II, paragraph III, and Article VI, paragraph 4; of the Claims Settlement Declaration as the basis of the Full Tribunal's jurisdiction in interpret Declarations.

³ Pursuant to a Tribunal partial award in *Avco Corp. v. Iran Aircraft Industries et al* ordering Avco Corp. to pay to certain Iranian parties the sum of U.S. \$ 3,513.086.03 plus interest. IRAN-U.S.C.T.R.19: 200

⁴ Award No586-A27 –FT in *Iran-U.S.C.T.R.*34: 39

⁵ *Case A/27*, 42

⁶ *Case A/27*, 71

⁷ *Iran-US C.T.R.* 8 : 203

⁸ See Appendices, Technical Arrangements

⁹ Joseph Nye, "The logic of inequality" in *Foreign Policy*, 59 (Summer 1985): 123-131

¹⁰ Article VII, Paragraph 2, of the Claims Settlement Declaration defined the "Claims of nationals" to include not only those owned directly by nationals of one of the states parties but also those that are owned indirectly by such nationals.

¹¹ Interlocutory Award No. ITL 55-129-3 (28 Oct. 1985), *Iran-U.S. C.T.R.* 9: 248, 264

¹² See *Iran-U.S.C.T.R.* 9 258-64. This holding was foreshadowed in *William Bikoff, et al. v The Islamic Republic of Iran*, Award No.138-82-2 (22 June 1984), *Iran-U.S.C.T.R.* 7: 1, and it was followed in *computer sciences Corp. v. The Government of the Islamic Republic of Iran*, et al., Award No. 221-65-1 (16 Apr. 1986), 10 *Iran-U.S.C.T.R.* 10: 269, 281; *Iran L. McHarg, et al. v. The Islamic Republic of Iran*, Award No.282-10853/10854/10855/10856-1 (17 Dec.1986), *Iran –U.S.C.T.R.*13: 286, 301; and *George Edwards v. The Government of the Islamic Republic of Iran.et al.*, Award No 451-251-2 (5Dec.1989), *Iran-U.S.C.T.R.* 23: 290, 292.

¹³ *Sedco, Inc. v. The Islamic Republic of Iran, et al*, Interlocutory Award No. IIL 61-260-2 (20 June 1986), *Iran-U.S.C.T.R.*11: 210,213.

¹⁴ Award No. 41-91-3 (3 May 1983), *Iran-U.S.C.T.R.*2: 294.

¹⁵ *George W. Drucker, Jr. v. Foreign Transaction Co., et al.*, Award No 379-(121-2(22 July 1988), reprinted in *Iran-US.C.T.R.*19: 257, 258.

¹⁶ John Crooks letter to Tribunal President Bockstiegel, *Iranian Assets Litigation Reporter*, (22 November 1985): 11, 485.

¹⁷ In international agreements and contracts, it is typically for the parties thereto to include a clause providing, e. g., that all (or certain specified) type of dispute, arising out of, or related to the respective agreement or contract, or of their interpretation or implementation, shall be resolved in a specified court or other designated forum. The forum selection clause is normally also accompanied with a choice-of- law provision. It must be noted that due to the nature and vast amount of the claims, decided by the Tribunal, the Tribunal's Chambers decided in many cases the effect of the forum selection clause to the Tribunal's jurisdiction over the particular contract or agreement at issue.

¹⁸ Among the numerous claims filed with the Tribunal were a group of claims, namely contractual claims, which related to commercial disputes between the enterprises. Several of these commercial claims were also, duo to enormous economic interests involved and the history of the settlement through arbitration-arrangement, highly political disputes.

¹⁹ The "The Majlis Position" was a declaration of the Iranian Parliament issued with respect to the Algiers Accord.

²⁰ The United States position was that these forum selection provisions were entirely unenforceable. The Us State Department legal Adviser, Robert Owen calls:

"We had been forewarned by the Algerians that Iran might insist on literal enforcement of all Iranian-court clauses, but we deliberately drafted the claims settlement declaration in such a way as to allow a U.S. claimant an opportunity to try to persuade the proposed international tribunal that an Iranian-courts clauses should not be treated as binding ..., because the Iranian revolution had effectively destroyed the remedial mechanism to which the parties had agreed. In this and other respects the drafting ... inevitably raised the possibility of new technical disputes..."

²¹ Claims Settlement Declaration, Art .V, *Iran-U.S.C.T.R.* 1: 11. For a thorough discussion of the changed circumstances concept, see "Changed Circumstances and the Iranian Claims Arbitration: Applications to Forum Selection Clauses and Frustration of Contract," *Geo. Wash .J. Int' l L. & Econ.* 16 : 335

²² The United States also presented arguments on the basis of analogy, derived from the U.S.C. and U.S. municipal legislation.

²³ The Tribunal set out the general interpretative principles *Case No 140* to be applied in reviewing forum clauses under Article II, paragraph 1of the Claims Settlement Declaration. The Tribunal stressed that

Article II, paragraph 1 excludes from the Tribunal's jurisdiction only claims arising under contracts "which specifically provide for the sole jurisdiction of the competent Iranian courts. Interlocutory Award No.ITL 2-51-FT, November 5, 1982, *IRAN-U.S.C.T.R.*1: 244

²⁴ Interlocutory Award No.ITL 1-FT, November 5, 1982, *IRAN-U.S.C.T.R.*1; 236. Halliburton Company, *IMCO Services (U.K.) Ltd. v. Doreen/IMCO, et al. Case No.51*, Interlocutory Award No. ITL 2-51-FT, November 5, 1982, *IRAN-U.S.C.T.R.* 1: 242

Haward, Needles, Tammen and Bergendoff v. Govt. of the Islamic Republic of Iran, et al., Case No. 68, Interlocutory Award No .ITL 3-68-FT, November 5, 1982, 1 *IRAN-U.S.C.T.R.*1: 248

George W. Drucker, Jar, v. Foreign Transaction Co., et al., Case No 121, Interlocutory Award No. ITL 4-121-FT, November 5, 1982, *IRAN-U.S.C.T.R.*1: 252; *T.C.SB. Inc. v. Iran*, Interlocutory Award No. 5-140-FT, 5 November 1982; *Ford Aerospace & Communications Corp. et al. V. The Air Force of the Islamic Republic of Iran., Case No 159*, Interlocutory Award No. 6 -159-FT, 5 November 1982; *Zokor International Inc. v. Gov. of the Islamic Rep. of Iran.,, et al., Case No 254*, Interlocutory Award No. 7-254-FT, 5 November 1982; *Stone & Webster Overseas Group, Inc. v. Nat'l Petrochemical Co., et al., Case No 293*, Interlocutory Award No .8-293-FT, 5 November 1983; *Dresser Industries, Inc. v. Gov. of the Islamic Rep. of Iran, et al., Case No 466*, Interlocutory Award No. 9-466-FT. 5 November 1982.

²⁵ *Halliburton Company, IMCO Services (U.K.) Ltd. v. Doreen/ IMCO, et al., Case No.51. Iran-U.S.C.T.R.*6 : 4.

²⁶ Article 9: "All disputes and differences between the two parties arising out of interpretation of contract or execution of the works which can not be settled in a friendly way shall be settled in accordance with the rules provided by Iranian laws via referring to the competent Iranian courts".

²⁷ *Halliburton Co. IMCO Services (U.K.) Ltd v. Doreen/ IMCO and Iran*, Award on Agreed Terms No. 124-51-2, April 27, 1984, *Iran-U.S.C.T.R.*6 : 4.

²⁸ Holtzman Dissenting and Concurring Opinions

²⁹ Mosk, Dissenting and Concurring Opinions

³⁰ Toope, 293-294. See also *Haward, Needles, Tammen & Bergendoff v. The Government of the Islamic Republic of Iran*, President Lagergren also joined the Iranians in dissent in a case in which a majority of the full Tribunal decided that a non-profit, non-stock US Corporation could pursue a claim before the Tribunal *International schools Services, Inc. v. National Iranian Copper Industries Co.* (1984), *Iran –U.S.C.T.R.*5: 338.

³¹ Nils Mangard, "Book Review," *Vanderbilt Journal of Transaction Law* 24.3 (1991): 603.

³² Mangard, 603, notes 18.

³³ *Case No.68 Howard Needles Tammen and Bergendoff (HNTB) v. Iran*, Interlocutory Award No.ITL 3-68-FT, November 5, 1982, *Iran-U.S.C.T.R.*1: 248

³⁴ Article 21-Settlement of Disputes provides that:

"any disputes which may arise between the two parties in connection with the 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 compose of the Employer's highest authority (or his deputy) and the consulting Engineer party to the contract. In the case they cannot settle the disputes based on the contract and relevant Articles or regulations the case should be settled according to the Iranian laws by having recourse to the competent courts."

³⁵ Interlocutory Award No. ITL 3-68-FT (5 Nov. 1983), *Iran-U.S.C.T.R.*1: 249-250.

³⁶ *Gibbs and Hill, Inc v. Iran Power Generation and Transmission Company et al., Iran-USC.T.R.*, 1: 236.

³⁷ See Interlocutory Award No.ITL 5-140-FT (5 Nov.1982), *Iran-U.S.C.T.R.* 1: 261; Interlocutory Award No. ITL 8-293-FT (5 Nov. 1982), *IRAN-U.S.C.T.R.*1: 247. See also Ali. Z. Marossi, "A Quarter Century Jurisprudence of the Iran-US Claims Tribunal: The Tribunal's legal structure, jurisdiction and Enforcement Mechanism," *AALCO. Quarterly Bulletin*, 1 (November, 2005).

³⁸ Reed 279

³⁹ Andreas F. Lowenfeld, "The Iran-United States Claims Tribunal: An Interim Appraisal" in Richard B. Lillich, *the Valuation of nationalized property in International law* (Charlottesville: University Press of Virginia, 1972-75): 80.

⁴⁰ Lowenfeld, 84.

⁴¹ Gunnar Lagergren, *Iran-United States Claims Tribunal: Realism in Law-Making , Essays on International Law in Honor of Willem Riphagen* (The Hague : Martinus Nijhoff Publishers, 1986): 123-124

⁴² Toope, 300

⁴³ Toope

⁴⁴ "Iran-U.S. Claims Tribunal Decision on Shah's Assets," *AJIL*, 94.4 (Oct 2000): 703-705.

⁴⁵ *Declaration of the Government of the Democratic and Popular Republic of Algeria*, Jan. 19, 1981, reprinted in *Iran-US.C.T.R.*1: 3

⁴⁶ *Iran v. United States*, Award No.597 –A11-FT, para.313 (E) (Apr 7 2000)

⁴⁷ *Iran v. United States*, Award No.597, Para. 241, 260

⁴⁸ *Iran v. United States*, Award No.597, Para 186

⁴⁹ Warren Christopher, *American Hostages in Iran*.

⁵⁰ *Roeder v. Iran*, Complaint, No. 1: 00CV03110 (EGS) (D.D.C. Dec. 29, 2000); *Roeder v. Iran*, First Amended Complaint, No. 1: 00CV03110 (EGS) (D.D.C. Feb. 2001).

⁵¹ See Sean D. Murphy, "Contemporary Practice of the United States relating to International Law", *AJIL*, 96 (2002): 493-496.

⁵¹ *AJIL*

⁵² *AJIL*, also see Neely Tucker, "US Seeking to Vacate Judgment against Iran", *Washington Post*, Oct. 16 2001, A2.

⁵³ *AJIL*, 464, see also Barry Rosen, "With Iran, Against Americans," *N.Y. Times*, Dec. 12, 2001, A31

⁵⁴ Award No. 460-880-2 (29 Dec. 1989), *Iran-U.S.C.T.R.* 23: 378, 385.

⁵⁵ *Mohammad Moussavi v. The United States of America*. Award No. 163-949-3 (31 Jan. 1985), *Iran-U.S.C.T.R.* 8: 24.

⁵⁶ *Iranian Assets Litigation Reporter*, (10 March 1981): 2511 and (17 July 1981): 3379.

⁵⁷ Daniel K. Inouye and Lee H. Hamilton, Cong. *Report of the Congressional Committees Investigation the Iran-Contra Affair*, 19.

⁵⁸ *Time*, "Iran Connection," November 17, 1986: 6

⁵⁹ *Time*

⁶⁰ For more information on Iran-Contra Affair see, Jonathan Marshall, Peter Dale and Jane Hunter, *The Iran-Contra Connection, Secret Team and Covert Operation in the Reagan Era*, (Cambridge: South End Press, 1987)

⁶¹ Susan Fayazmanesh, *The United States, Wars and the Policy of Dual Containment*, (London: Routledge, 2008) 59.

⁶² Marshall, Scott and Hunter, 158.

⁶³ Reagan Administration's Senior International Group (SIG) concluded that U.S. efforts to discourage third country transfers of non-U.S. original arms would have only a marginal effect on the conduct and outcome of the war, but could increase opportunities for the Soviets to take advantage of Iran's security concerns and to persuade Iran to accept Soviet military assistance. Marshall and Hunter, 160

⁶⁴ Marshall, Scott and Hunter 169

⁶⁵ For more information see David J. Scheffer "U.S. Law and the Iran-Contra Affair" *AJIL* 81.3 (Jul., 1987) 696-723.

⁶⁶ Marshall, Scott and Hunter 167-186.

⁶⁷ Marshall, Scott and Hunter

⁶⁸ Between August 1985 and November 1987, the Reagan Administration traded a total of just over 2,000 TOW missiles, 18 HAWK missiles, and close to 240 different types of HAWK parts for three American Hostages.

⁶⁹ See Christopher Hammer, "Historical Analogies and the Definition of Interests: The Iranian Hostages crisis and Ronald Reagan's policy toward the hostages in Lebanon", *Political Psychology*, 20.2 (1992): 279.

⁷⁰ *TIME* 6

⁷¹ *Iran v. United States Declaration*, Award No. 1-A2-FT, January 26, 1982, *Iran-U.S.C.T.R.* 1: 101

⁷² Claims Settlement Declaration, Art. II, Para. 1. This language is similar to that of the American federal Rules of civil procedure providing for compulsory counterclaims. Under Rule 13 (a) a party waives unless it asserts "as a counter claim any claim....if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *FED.R.CIV.P.1* (a) In contrast to this Rule, assertion of counter claims at the Tribunal is permissive and failure to make one does not waive any right to assert it elsewhere. However, raising the claim in another forum may provoke interim action staying the other proceedings pending the resolution of those before the Tribunal.

⁷³ On the other hand should jurisdiction over the claim fail, any counterclaim based upon that claim must be dismissed. However, where a claim is withdrawn following the assertion of a counterclaim, the counterclaim may stand alone provided jurisdiction over the claim can be established. See *International Ore & Fertilizer Corp., et al. and Razi Chemical Co., et al.*, Award No. 351-486-3, Paras. 10, 14 (25 Feb. 1988), *Iran-US CTR* 18 (1988): 98, 100-102.

And also see Order of 29 January 1987 in *Behring Int'l, Inc. and Islamic Republic of Iran Air Force, et al.*, Award No. 382 (Chamber Three), *Iran-US CTR* 14: 23. An interesting issue arises when a claim is withdrawn prior to the assertion of a counterclaim by the respondent. It is not clear whether a counterclaim still may be asserted under such circumstances. Cf. Fed. R. Civ. P. 41 (a) (1) (i), which provides for dismissal as of right by the adverse party of an answer of a motion for summary judgment

⁷⁴ The Tribunal's jurisprudence upholds that the Algiers Accord impose very definite jurisdictional limitations on counterclaims. The Tribunal interpreted this Article to exclude counterclaims for income and other taxes, customs, duties, and social security premiums because these obligations arise by operation of law.

⁷⁵ Award No. 518-131-2, March 18, 1992, *Iran-U.S.C.T.R.* 27: 104. See, e.g. *Merrill Lynch & Co., Inc. and Government of the Islamic Republic of Iran*, Award No. 519-394-1 (19 Aug. 1991), *Iran-U.S.C.T.R.* 27:

122,143-4.

⁷⁶ *E-Systems, Inc. v. Government of the Islamic Republic of Iran, Bank Meli Iran*, Award No. ITM 13-388-FT, February 4, 1983, *Iran-U.S.C.T.R.2*: 51

This case raises the important question of whether the Tribunal, in order to protect its jurisdiction and the integrity of its awards, can take action with respect to cases brought in national courts involving issues which already pending before the Tribunal.

⁷⁷ Charles N. Brower, *The Iran-United States Claims Tribunal*, 152-154.

⁷⁸ Aldrich 510

⁷⁹ *Islamic Republic of Iran v. United States*, ITL No.83-B1-FT (Counterclaim) filed September 9, 2004.

⁸⁰ Iran's claim numbered B1 constituted a series of claims that arose from Iran's purchases of military equipment and services from the United States Department of Defence under its Foreign Military Sales ('FMS') Program.

Prior to the Iranian Revolution, the Iranian armed forces had spent more than U.S. \$20 billion on FMS Purchases under some 2,800 contracts or sales cases as they were called. Iran divided its claims B1 in six parts. Part one was for refund of a payment made by Iran after the Revolution for the Purchase of aircraft spare parts. This claim was later settled payment of \$7,800,000 to Iran pursuant to an Award on Agreed Terms. Part two and three involved claims for payments made for goods and services allegedly not provided and for charges that allegedly were not proper.

Part four involved claims for the return to Iran of military equipment originally sold to Iran under the FMS program but which was in the possession of the United States for various reasons during the hostage crisis and remained in the possession of the United States after the conclusion of the Algiers Declarations.

Part five was a claim for damages allegedly resulting from the purchase through the FMS Program of 332 Model 214A Bell helicopters which were allegedly defective. Part six was a claim for consequential damages. It and a counterclaim by the United States for damages allegedly resulting from Iran's failure to protect classified information it received from the United States Under the FMS program.

⁸¹ *Islamic Republic of Iran v. United States*, ITL No.83-B1-FT, Para, 85

⁸² *Harza Engineering Co. v. Islamic Republic of Iran*, Award No. 19-98-2, *Iran-U.S.C.T.R.1*: 499

⁸³ *Iran-U.S.C.T.R.1*: 507

⁸⁴ Respectively Awards Nos. 425-39-2, 479-476-2, 507-386

⁸⁵ According to Article IV, paragraph 1 of the Claims Settlement Declaration, all decisions and awards of the Tribunal shall be final and binding. Paragraph 3 of the same Article states that: "any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws". Further Article 32, paragraph 2 of the Tribunal Rules declares that "[t]he award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay."

⁸⁶ Toope, 369

⁸⁷ Abu Mohammad Asgarkhani "Compromise and Cooperation at the Iran-US Claims, Tribunal" *Arbitrational International*, 19.2, (2003): 149

⁸⁸ Technical Agreement with the NV Settlement Bank of the Netherlands (17 August 1981), reprinted in (1981) *Iran-U.S.C.T.R.1*: 38

⁸⁹ Toope,

⁹⁰ Paragraph 7 of the General Declaration, provides that Iranian funds transferred by the United States handled as follows: "As funds are received by the [N.V. Settlement Bank of the Netherlands].....the Algerian central bank shall directed the [N.V. Settlement Bank] to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security Account has reached the level of U.S. \$ 1 billion. After the U.S. \$ 1Billion balance has been achieved, the Algerian central Bank shall direct all funds received ... to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the Payment of, and paying, claims against Iran in accordance with the claims settlement Agreement. Whenever the [N.V. Settlement Bank] shall thereafter notify Iran that the balance in the Security has fallen below U.S. \$ 500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S. \$ 500 million in the Account. The Account shall be so maintained until the president of the arbitral Tribunal established pursuant to the claims settlement Agreement has certified to the central Bank of Algeria that all arbitral Awards against Iran have been satisfied in accordance with the claims settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran."

⁹¹ The parties later designated the Bank of England as the Central Bank referred to in the General Declaration.

⁹² At various times during the life of the Tribunal, the Security Account fell below \$ 500 million, at which point Iran would replenish the account, Beginning in November 1992, however, Iran stopped replenishing the account, although in February 1996 Iran agreed that a portion of funds paid by the United States as part of a settlement could be deposited in the Security Account.

⁹³ Decision No.130-A 28-FT, December 19, 2000, 26 *Y.B.CoM. ARB.560-77* (2001).The Tribunal

issued its decision in the case. Applying the rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, The Tribunal found that paragraph 7 of the General Declaration was clear and unambiguous and leaves no room for alternative interpretations. In the light of the clarity of the text, the Tribunal turned aside Iran's efforts to argue that the funds remaining in the Security Account were sufficient for fulfilling the "object and purpose" of paragraph 7.

⁹⁴ Decision No: 10-A 28 –FT Filed Dec 19, 2000. Para 95

⁹⁵ Decision No.132-A33-FT. filed September 9, 2000, 30 *Y.B. COM.ARB.* 279-302, para.45-A (2005)

⁹⁶ *Yearbook Commercial Arbitration, International Council for Commercial Arbitration*, 31 (2006)

⁹⁷ Asgarkhani 169-70

⁹⁸ Aldrich 489.

⁹⁹ *The General Tire and Rubber Co. v. Iran Tire Manufacturing Co.* (1983), *Iran-U.S.C.T.R.* 3 (1983): 351, (Dissent of H.M. Holtzman) 358. See also *Pan American World Airways, Inc., et al. v. The Government of Islamic Republic of Iran* (1983) *Iran-U.S.C.T.R.* 4 205.

¹⁰⁰ Toope also argues that compromise is necessary in order to prevent the Tribunal from 'collapse.' He has discussed it in detail. Toope 285-9

¹⁰¹ *Case A1*, signed 30 July 1982, in *Iran-U.S.C.T.R.* 1: 189.

¹⁰² *Case A/1*, The Tribunal has been requested to interpret the agreements between the two governments which respect to the disposition of interest earned by the funds in the Security Account.

¹⁰³ *Iranian Assets Litigation Reporter*, (21 May 1982): 4626

¹⁰⁴ *Iran-U.S.C.T.R.* 1: 189

¹⁰⁵ *Islamic Republic of Iran v. The United States of America*, Decision No. DEC 12-A1-FT. at 4-5, *Iran-U.S.C.T.R.* 1: 191-2.

¹⁰⁶ Toope 369-70

¹⁰⁷ Lillich, *Preface to the Iran-United States Claims Tribunal 1981-1983* (1984) 1, vii

¹⁰⁸ Holtzman, 16-5

¹⁰⁹ *Iranian Assets litigation Reporter*, (2 January 1981) 2086

¹¹⁰ Kate Gillespie, "US Corporations and Iran at The Hague," *Middle East Journal*.44.1 (Winter 1990)

¹¹¹ Toope 383

¹¹² *Iran-US C.T.R.* 2: 41-3.

Conclusion

The central question in my overall argument concerned the unique nature of the Tribunal as embodying both conflict and cooperation at a time of considerable and ongoing hostility between Iran and the United States over various issues. In the absence of diplomatic relations, the Tribunal continued to grow in a grave atmosphere of animosity and served as a special forum for conflict resolution by peaceful means. Chapter one of the present dissertation started with the structure of my study which centred around one introduction and three focuses of analysis, outlining the organization of the dissertation that included the following: problem statement, objectives, major and minor questions, central thesis, a short background to the Tribunal's establishment, methodology or theoretical approaches, explanation of the selection of cases, research limitations and literature review.

The key focuses dealt with (i) the historical background which elaborates on the origins of Iran-US relations as well as the history of the Islamic Revolution detailed as Chapter Two: historical context, Chapter Three: Tribunal's formation, Chapter Four: arbitration and the Tribunal's nature (ii) an examination of the forces of conflict at the Tribunal, examined in Chapter Five: conflict over judges, and Chapter Six: conflict over dual nationality and compensation and (iii) an examination of the evolving process of cooperation between Washington and Tehran within the Tribunal elaborated in Chapter Seven: Cooperation on substantive issues; and Chapter Eight which tried to cover cooperation on delicate issues involving the adoption of highly conservative decisions of the Tribunal. Finally, this conclusion aims to be as a summing up of the dissertation as a whole.

I endeavoured to submit in my over all argument that the Islamic Revolution of Iran, which was a cultural revolt by nature, must be viewed from two levels of analysis: the system level and the unit level. On the system level, it was a revolt against Western

norms and values. The revolt on the unit level-- in the name of *sharia* or Islamic law rooted in Islamic social values—came to militate against the *urf* or state law. It brought to the surface the old conflict between the state and society. The present dissertation dealt with the former, namely, its antagonism against Western norms, rules, values and culture. Revolutions, however, like any other phenomena are not eternal, and as such, do not persist independently from cooperative forces. Conflict and cooperation generate each other. The Islamic revolt itself was a product of the unique cooperation between Iran and the US following the CIA sponsored coup and the conclusion of a number of bilateral agreements such as the Treaty of Amity in 1955. This unprecedented relationship happened to coincide with the increased power of Iranian oil revenues as a result of rapidly rising oil prices and of changes in Iran's contractual relations with American multinational oil companies. This huge wealth attracted American investment companies, institutions and individuals, many of whom opened offices and were present in almost all business activities directly in Iran or otherwise solicited Iranian business.

America as a major supplier of armaments and military training to Iran dramatically increased those efforts to Iran under the Foreign Military Sales program (FMS) both for financial and strategic reasons during the cold war to contain the Soviet influence in the Persian Gulf. The Shah spent billions of dollars to purchase from America the most sophisticated and expensive ships, aircrafts, and other military hardware. The FMS program which was under the control and management of the US Department of Defense, was accompanied by a number of American private manufacturers who sold service and equipment to Iran's military forces on a commercial basis. Along with the American Government, its individuals and corporations were a number of Iranian born prosperous families who had acquired American nationality as well. These dual nationals had substantial influence both in Iran and America. In addition to the military investment, American projects in Iran began to vary from offshore oil drilling in the Persian Gulf to

forestry investment in the Caspian Sea, from apartment, dam and road building to projects involving cement, agriculture, transportation, hotel management, banking, tobacco industry, insurance companies, consumer products, technology transfer etc. The list of cases appended to this dissertation may illustrate the ranges of American-Iranian activities in almost all spheres of life.

Following the revolution, this lovely relationship was replaced by hatred and antagonism which culminated, first, in the suspension; and then in the termination of all those projects and contracts when the American diplomats were taken hostages in US Embassy on November 4, 1979. President Jimmy Carter issued his Presidential Order, froze Iranian assets in America and abroad and imposed sanctions against Iran. These assets estimated to be between U.S. \$8 billion and U.S. \$ 13 billion motivated the American Government, its corporations, American individuals and dual nationals to push for their claims against Iran arising from the termination of their contracts, their forced departures, the loss of their property or loss of profit, the nationalization program of Iran etc. The hostage crisis continued to strain Iran-US relations. The American public opinion pressurized the Carter Administration to release the hostages, and the claimants forced the Administration to do something for the damages done to them. President Carter tried a number of options, including a rescue mission which failed in the Iranian desert of *Tabas*. Iranians also wanted all economic sanctions removed, their assets unfrozen, the Shah's property returned; and a pledge from the United States not to intervene in Iranian internal affairs then on. In return, Iran had a firm belief rooted in its historical and social values that the payment of compensation for the damage done to a contracting party is a must. Therefore, a combination of material and moral incentives of both Iran and America compelled them to adhere to the Algiers Declarations which were concluded on 19 January 1981 after a prolonged negotiations and mediations through many third party intermediaries including the Algerians, the Dutch and the British.

Based on the Algiers Declarations, the American hostages were released, some of Iranian assets were placed in escrow by the United States to be transferred in part to Iran and in part to two other accounts, one with the Federal Reserve Bank of New York and one with the Bank of England, for the payment of principal and interest owed by Iran or any other debts by Iran to U.S. banks. More than U.S. \$ 5 billion of these assets was transferred to those accounts to pay for the debts. Another U.S. \$ 1 billion was transferred to a Security Account to secure the payments of awards rendered against Iran once an arbitration system was in place. Iran committed itself to replenish the Security Account to a minimum balance of 500 million dollars whenever it fell below that level until all claims against Iran are terminated. The Iran-United States Claims Tribunal came into being to settle all these claims and counter claims. In order to demonstrate how the said scenario happened I had to trace the origins of the Iran-U.S. relationship. However, I had to devote my first Chapter to a review of the literature and theories followed by an examination of the Iran-US relationship in its historical context.

I reviewed the literature on the Tribunal and provided my theoretical approach. As for the literature, I argued that the literature is replete with legal analysis, and in principle, it pays insufficient attention to the unique nature of the Tribunal embodying both forces of conflict and cooperation which mostly were culture oriented at the Tribunal. This dissertation is an attempt to fill this gap. In other words, an examination of conflict and cooperation is my main contribution to the literature on the Tribunal. In relation to the theoretical aspect, I argued that a confluence of realism, neo-liberal institutionalism and Bull's assumption of international norms and shared rules and values are relevant. Realism applies because Iran and America are major actors. Rationality in its material motivation for both Iran and America has been a driving force for conflict and cooperation. Neo-liberal institutionalism cannot be denied in that the Tribunal as an institution has played an important role in facilitating the forces of

cooperation. Furthermore, thousands of private actors are present as claimants before the Tribunal. Hedley Bull's shared norms and values deeply rooted in the international society of nations have been underlying factors in both the outbreak of the Islamic Revolution in Iran and its conflict within the Tribunal where, the Tribunal is regarded as a second battle front against the so-called 'Great Satan'. Similarly, the United States has called Iran the so-called 'Axis of evil'. By the same token, it was the shared beliefs and norms that led the two states to negotiate and settle their conflict through negotiations and arbitration. They both believed in property rights.

In chapters Two and Three I simply wanted to illustrate in detail how this special relationship had evolved in its historical context, how the Islamic Revolution played its destructive part in Iran-US relations and under what conditions the Tribunal was established. In the beginning of their original rapprochement, there seemed to be a demand and supply relationship, to put a liberal perspective. Iran badly needed the U.S. support after World War II, for example to oust the Soviet Union out of the occupied territory, to receive financial assistance as a war-torn state. The United States was also keen to be present in Iran for both financial and strategic reasons. Before the Second World War, America was less interested in Iran. Their relationship was limited to some friendship treaties. The Millspaugh and Morgan Shuster's missions were not very productive because of the Russo-British opposition. It was after World War II that the United States seized the moment and became highly involved in Iranian life. I showed how the oil revenues brought fortune to both Iranians and Americans. However, the US engineered coup which toppled Prime Minister Mosadeq's government was a stunning blow to the U.S.-Iran relationship. Apart from this intervention, American modernization brought to Iran certain Western values which contravened the Islamic norms and values.

In Chapter Four, I tried to substantiate that arbitration as a set of common norms, rules, values and beliefs began to evolve with the lapse of time throughout civilization. All of the current conflict resolution institutions have come into being through a give-and-take process in international society to which Hedley Bull repeatedly attached greater importance. Having emphasized the rise of arbitration out of common values, I then began to analyze the nature of the Tribunal-- international/interstate, commercial/private, and hybrid/ mixed--, and conclude that the Tribunal's nature is mixed. This conclusion helps me assert that the role of the principle of property rights is becoming as important as the principle of sovereignty. The latter is conflict prone both in theory and practice. This brings me to Chapter Five.

In Chapter five, I have made an attempt to portray the Iran-US conflict in the issue of 'challenge' to arbitrators, resignations and the replacement of arbitrators. It was established in this chapter that the issues were highly politicized at the Tribunal. One Judge was allegedly attacked by Iranian Judges and other judges were allegedly threatened by American judges. The conflict and disputes continued in other issues such as dual nationality and compensation which were discussed in Chapter Six. The problem of the 'dominant and effective nationality' and the standard of 'full' compensation raised political sensitivity within the Tribunal. The principle of impartiality was infringed because the American appointed arbitrators 'voted in favour of American Claimants' and Iranian appointed arbitrators 'voted in favour of Iranians' at the Tribunal. High ranking officials of the Islamic Republic of Iran criticized the Tribunal. The Tribunal was suspended for some time and it began to struggle for its own survival.

However, at the heart of anarchy and conflict, there is always order. Property rights and private sectors are conducive to cooperation. It is safe to conclude that parallel with those forces of conflict, most of the private claimants had established their

ties with Iran and were anxious to go for the out-of-court settlements. Cooperation has been facilitated largely and mainly because of the private claims.

I tried to test it in Chapter Seven. I have demonstrated the cooperative behaviour of Iran and America in substantive issues involving the terms and conditions of the agreed-upon Accords, finance and banking, settlements agreements (awards on agreed terms), small claims, interim measures, and lump sum settlements. By the passage of time, the Tribunal has produced more precedents and grounds for cooperation. It has extended its forces of cooperation on a wide range of issues in international law and international relations.

Chapter Eight of the present dissertation has confined itself to a certain number of cases involving the awards in favour of Iran or its nationals, indirect claims, jurisdictional effect of Iranian forum selection clauses, the Shah's Assets, U.S. Hostages' claims against Iran, the strategic cooperation of Iran and America in Iran-Contra Affair, counter claims, and the Security Account. The cases examined in this chapter lacked in legal precedence and were highly sensitive. The most conservative rulings of the Tribunal were issued in those matters. In the absence of an express reference, in the Algiers Declarations, to the enforcement of awards issued in favour of the Government of the Islamic Republic of Iran or its nationals, the Full Tribunal was requested by Iran to interpret the Accords. The Full Tribunal considered the request and granted its jurisdiction if the claims were disputes as to amounts owing from Dollar Account No. 2. This was not the case in indirect claims, and the Tribunal did not possess the adequate strategy to accommodate Iran's request. In the Iranian forum selection clauses cases, the United States argued that because of the fundamental changes in Iran's legal system as a result of the Islamic Revolution, the US claimants could no longer expect to receive a fair trial in Iranian courts. Iran opposed the American arguments.

As mentioned in Chapter Eight, the Tribunal settled the issue in a manner that at the end of the day no nation's pride had been offended. With respect to the Iranian claims against the Shah's assets, the Tribunal was unable to accommodate Iran's request while in the claims brought by the American hostages against Iran, the Tribunal did not grant its jurisdiction to the American claimants. In the Iran-Contra Affair, the Tribunal's premises were reportedly used by America and Iran as a safe place for their strategic cooperation. As for the direct claims by Iranians against Americans which were not allowed under the Accords, the Tribunal admitted some of those Iranian claims as counter claims if those claims resulted from the same contracts. In relation to the Security Account, the Tribunal selected several cases for interpretation and found a middle-of-the-road approach in some of them.

The prominent feature and salient trait of the Tribunal is that it has served as a confidence building measures between the two enemies. The relationship resembles that of the Soviet Union and U.S. relationship in which, the lack of trust, animosity; and conflict but also cooperation in preventing global nuclear war were dominant factors. The Tribunal looks like a 'Hot-line' between Tehran and Washington. The technical arrangements between the parties with respect to the Dutch Bank and the Bank of England have been agreed upon and the required mechanisms resembling a 'Hot-line Terminal' have been stationed in Europe; not in Stockholm, but in The Hague. There is a direct line of contact, not between the White House and the *Bayt-e-rahbari* (House of the Spiritual Leadership) but between the two Agents who communicate face to face in the Tribunal's premises. The Hot-line has served for almost thirty years the national interests of both the United States and the Islamic Republic of Iran. The day it terminates its mission, a more conventional form of Iran-US diplomatic relations shall start.

Appendices

Appendix One¹

THE WHITE HOUSE

Washington

November 6, 1979

Dear Ayatollah Khomeini:

Based on the willingness of the Revolutionary Council to receive them, I am asking two distinguished Americans, Mr. Ramsey Clark and Mr. William G. Miller, to carry this letter to you and to discuss with you and your designees the situation in Tehran and the full range of current issues between the U.S. and Iran.

In the name of the American people, I ask that you release unharmed all Americans presently detained in Iran and those held with them and allow them to leave your country safely and without delay. I ask you to recognize the compelling humanitarian reasons, firmly based in international law, for doing so.

I have asked both men to meet with you and to hear from you your perspective on events in Iran and the problems which have arisen between our two countries. The people of the United States desire to have relations with Iran based upon equality, mutual respect, and friendship.

They will report to me immediately upon their return.

Sincerely,

(Signed) Jimmy Carter

His Excellency

Ayatollah Khomeini

Qom, Iran

THE WHITE HOUSE

WASHINGTON

November 8, 1979

Dear Ayatollah Khomeini:

Based on the willingness of the Revolutionary Council to receive them, I am asking two distinguished Americans, Mr. Ramsey Clark and Mr. William G. Miller, to carry this letter to you and to discuss with you and your designees the situation in Tehran and the full range of current issues between the U.S. and Iran.

In the name of the American people, I ask that you release unharmed all Americans presently detained in Iran and those held with them and allow them to leave your country safely and without delay. I ask you to recognize the compelling humanitarian reasons, firmly based in international law, for doing so.

I have asked both men to meet with you and to hear from you your perspective on events in Iran and the problems which have arisen between our two countries. The people of the United States desire to have relations with Iran based upon equality, mutual respect, and friendship.

They will report to me immediately upon their return.

Sincerely,



His Excellency
Ayatollah Khomeini
Qom, Iran

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BY 4041/PT ON 01-07-00

Appendix Two

ALGIERS DECLARATION

Declaration of the Government of the Democratic and Popular

Republic of Algeria

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertaking reflected in these Declarations are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian asset within its jurisdiction, as set forth in Paragraphs 4-9.

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

Point I: *Non-Intervention in Iranian Affairs*

!. The United States pledges that is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's affairs.

Points II and III: *Return of Iranian Assets and Settlement of U.S. Claims*

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the

Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ALGIERS DECLARATION

ASSETS IN THE FEDERAL RESERVE BANK

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold

bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the central Bank in escrow until such time as their transfer to return is required by Paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5. commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in security account has reached the level of \$1 billion. After the \$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for sole purpose of securing the payment of, and paying, claim against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below \$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of \$500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreements has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement , at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account , which arrangements will be concluded within 30 days from the date of this Declaration , the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad , apart from those assets referred to in Paragraph 5

and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange , subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

NULLIFICATION OF SANCTIONS AND CLAIMS

10 . Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11 . Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979 , (B) Their subsequent detention (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3 , 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in

Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of , property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant , including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above , the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state

doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by paragraphs 12-15 , inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by , and in accordance with the provisions of , the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfil such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

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

Initialled on January 19, 1981

by-----

Warren M. Christopher

Deputy Secretary of State

of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the
Government of Algeria.

Appendix Three

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran

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

ARTICLE I

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

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims

are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

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

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

ARTICLE III

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

full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

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

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

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

ARTICLE IV

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

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

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

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

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

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

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

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

ARTICLE VII

For the purposes of this agreement:

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

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

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

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

ARTICLE VIII

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

Appendix Four

Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria

1. At such time as the Algerian Central Bank notifies the Governments of Algeria, Iran, and United States that it has been notified by the Central Bank that the Central Bank has received for deposit in dollar, gold bullion, and securities accounts in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,917.779 ounces of gold (valued by the parties for this purpose at \$0.9397 billion), and securities (at face value) in the aggregate amount of \$7.955 billion, Iran shall immediately bring about the safe departure of the 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraph.

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank:

(A). To transfer \$3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

(B) To retain \$1.418 billion in the escrow account for the purpose of paying the unpaid principal of the interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the \$3.667 billion and on all other indebtedness held by United States banking Institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid and for the purpose of paying disputed amounts of deposits, assets, and interests, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing.

In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the Account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

(C). To transfer immediately to, or upon the order of, the Bank Markazi all assets in the escrow account in excess of the amounts referred to in Paragraphs (A) and (B).

Initialed on January 19, 1981

by-----

Warren M. Christopher

Deputy Secretary of State

of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

Escrow Agreement

This Escrow Agreement is among the Government of the United States of America, the Federal Reserve Bank of New York (the "FED") acting as fiscal agent of the United States, Bank Markazi Iran, as an interested party, and the Banque Centrale d'Algerie acting as Escrow Agent.

This Agreement is made to implement the relevant provisions of the Declaration of the Government of Algeria of January 19, 1981 (the "Declaration"). These provisions concern the establishment of escrow arrangements for Iranian property tied to the release of United States nationals being held in Iran.

1. In accordance with the obligations set forth in paragraph 4 of the Declaration, and commencing upon the entry into force of this Agreement, the Government of the United States will cause the FED to:

(A) Sell, at a price which is the average for the middle of the market, bid and ask prices for the three business days prior to the sale, all U.S. Government securities in its custody or control as of the date of sale, which are owned by the Government of Iran, or its agencies, instrumentalities or controlled entities; and

(B) Transfer to the Bank of England as depositary for credit to accounts on its books in the name of the Banque Centrale d'Algerie, as Escrow Agent under this Agreement, all securities (other than the aforementioned U.S. Government securities), funds (including the proceeds from the sale of the aforementioned U.S. Government securities), and gold bullion of not less than the same fineness and quality as that originally deposited by the Government of Iran, or its agencies, instrumentalities or controlled entities, which are in the custody or control of the FED and owned by the Government of Iran, or its agencies, instrumentalities or controlled entities as of the date of such transfer.

When the FED transfers the above Iranian property to the Bank of England, the FED will promptly send to the Banque Centrale d'Algerie a document containing all information necessary to identify that Iranian property (type, source, character as principal or interest).

Specific details relating to securities, funds and gold bullion to be transferred by the FED under this paragraph 1 are attached as Appendix A.

2. Pursuant to the obligations set forth in paragraphs 5,6 and 8 of the Declaration, the Government of the United States will cause Iranian deposits and securities in foreign branches and offices of United States banks, Iranian deposits and securities in domestic branches United States, to be transferred to the FED, as fiscal agent of the United States, and then by the FED to the Bank of England for credit to the Account on its books, opened in the name of the Banque Centrale d'Alg'erie as Escrow Agent under this Agreement (the Iranian securities, funds and gold bullion mentioned in paragraph 1 above and deposits, securities and funds mentioned in this paragraph 2 are referred to collectively as "Iranian property").

3. Insofar as Iranian property is received by the Bank of England from the FED in accordance with this Agreement, the Iranian property will be held by the Bank of England in the name of the Banque Centrale d'Algerie as Escrow Agent as follows:

_ The securities will be held in one or more securities custody accounts at the Bank of England in the name of the Banque Centrale d'Algerie as Escrow

Agent under this Agreement.

_ The deposits and funds will be held in one or more dollar accounts opened at the Bank of England in the name of Banque Centrale d'Algerie as Escrow Agent under this Agreement. These deposits and funds will bear interest at rates prevailing in money markets outside the United States.

_ The gold bullion will be held in a gold bullion custody account at the Bank of England, in the name of the Banque Centrale d'Algerie as Escrow Agent under this Agreement.

_ It will be understood that the Banque Centrale d'Algerie shall have no liability for any reduction in the value of the securities, bullion, and monies held in its name as Escrow Agent at the Bank of England under the provisions of this Agreement.

4. (a) AS soon as the Algerian Government certifies in writing to the Banque Central d'Algerie that all 52 United States nationals identified in the list given by the United States Government to the Algerian Government in November, 1980, now being held in Iran, have safely departed from Iran, the Banque Centrale d'Algerie will immediately give the instructions to the Bank of England specifically contemplated by the provisions of the Declaration and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, and the Implementing Technical Clarifications and Directions arising therefrom, all three shares of [Deletion by hand, with initials] which are made part of this Agreement. The contraction parties resolve to work in good faith to resolve any difficulty that could arise in the course of implementing this Agreement. [Handwritten addendum, with initials]

(b) In the event that

(i) either the Government of Iran or the Government of the United States notifies the Government of Algeria in writing that it has given notice to terminate its commitments under the Declaration referred to above, and

(ii) a period of 72 hours elapses after the receipt by the Government of Algeria of such notice, during which period the Banque Centrale d'Algerie has not given the Bank of England the instruction described in subparagraph (a) above,

the Banque Centrale d'Algerie will immediately give the instructions to the Bank of England specifically contemplated by the provisions of the Declaration, and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria and the Implementing Technical Clarifications and Directions arising therefrom. [Deletion by hand, with initials]

(c) If the certificate by the Government of Algeria referred to in subparagraph (a) has been given before the United States Government has effectively terminated its commitment under the Declaration, the Iranian property shall be transferred as provided in subparagraph (a) of this paragraph 4.

(d) The funds and deposits held by the Bank of England under this Agreement will earn interest at rates prevailing in money markets outside the United States after their transfer to the account of the Banque Centrale d'Algerie, as Escrow Agent, with the Bank of England, and such interest will be included as part of the Iranian property for the purposes of subparagraphs (a) and (b) of this paragraph 4.

5. On the date of the signing of this Agreement by the four parties hereto, the Banque and the Banque Centrale d'Algerie and the FED will enter into a Technical Arrangement with the Bank of England to implement the provisions of this Agreement.

Pursuant to that Technical Arrangement between the FED, the Bank of England and the Banque Centrale d'Algerie, the FED shall reimburse the Bank of England for losses and expenses as provided in paragraph 10 thereof. The FED will not charge the Banque Centrale d'Algerie for any expenses or disbursements related to the implementation of this Agreement.

6. This Agreement will become effective as soon as it has been signed by the four parties to it and the Banque Centrale d'Algerie and the FED have entered into the Technical Arrangement with the Bank of England referred to in paragraph 5 of this Agreement.

7. Throughout its duration, this Agreement may be amended, cancelled, or revoked only with the written concurrence of all four of the signatory parties.

8. Nothing in this Agreement shall be considered as constituting, in whole or in part, a waiver of any immunity to which the Banque Centrale d'Algerie is entitled.

9. A French language version of this Agreement will be prepared as soon as practicable. The English and French versions will be equally authentic and of equal value.

10. This Agreement may be executed in counterparts, each of which constitutes an original.

In Witness whereof, the parties hereto have signed this Agreement on January 20, 1981

a

Securities, Gold Bullion, and Funds to be transferred by the Federal Reserve Bank of New York

International Bank for Reconstruction

And Development Securities \$35 million (face value)

Gold Bullion 1,632,917.746 fine ounces of gold, good delivery, London
Bars of a fineness of 995 parts per 1,000 or better

Funds Approximately \$1.38 billion

TECHNICAL AGREEMENT

**Technical Arrangement Between Banque Centrale D'Algerie as Escrow Agent
And the Governor and Company of the Bank of England and the Federal
Reserve Bank of New York as Fiscal Agent of the United States**

(January 20, 1981)

This Technical Arrangement is made between the Banque Centrale d'Algerie (hereinafter referred to as the "Escrow Agent") as Escrow Agent, the Governor and Company of the Bank of England (hereinafter referred to as the "Bank"), and the Federal Reserve Bank of New York as fiscal agent of the United States (hereinafter referred to as the "FED").

1. The Bank are [sic] hereby appointed to hold, invest and distribute, in accordance with the terms of this Technical Arrangement, such of the funds and other property (as identified by the FED on its sole responsibility at the time of transfer) as may be transferred to them by the FED and such other funds or property representing such funds and other property as may from time to time be held by the Bank on such accounts or invested by the Bank pursuant to paragraph 4 hereof (all of which funds and property are collectively referred to as the "Escrow Fund"). The Bank shall act as a depositary and shall hold and invest the Escrow Fund in accordance with the arrangements described herein until such time as the Escrow Fund shall have been distributed as provided in paragraph 7 below.

2. The Bank will open in the name of the Escrow Agent the following accounts:

(A) Two securities custody accounts, Securities Custody Account No.1 and Securities Custody Account No.2 (The "Securities Custody Accounts");

(B) Three accounts denominated in US dollars, "Dollar Account No. 1," "Dollar Account No. 2" and "Dollar Account No.3" (the "Dollar Accounts");

(C) A gold bullion custody account (the "Bullion Account") and shall credit the securities to Securities Custody Account No.1, the dollar deposits to Dollar Account No.1 and the gold bullion to the Bullion Account when transferred [sic] to the Bank by the FED for deposit on such accounts, and shall provide the Escrow Agent with a general description of the funds and other property so transferred.

3. The Bank shall

(A) Hold the securities for the time being in the Securities Custody Accounts in accordance with the provisions of this Arrangement;

(B) Hold the gold bullion for the time being in the Bullion Account in accordance with the provisions of this Arrangement; and

(C) Hold the funds for the time being in the Dollar Accounts on a call basis, so as ensure the liquidity of those funds, and in accordance with the provisions of this Arrangement.

4. (a) The Bank shall make a good faith effort under the circumstances to invest and reinvest outside the United States the funds on the Dollar Accounts at market rates with such banks and in such manner as the Bank may determine and will pay by way of interest on the funds on those Dollar Accounts sums equivalent to those received by them, subject nevertheless to the deduction from Dollar Account No.2 of sums equivalent to the amounts of their reasonable costs, charges and expenses in respect of the maintenance and operation of Dollar Account No. 2.

(b) Any interest received on the securities in the Securities Custody Account No.1 shall be credited to Dollar Account No.1 and any interest received on the Securities Custody Account No.2 shall be credited to Dollar Account No. 3.

5. The Bank shall invest all monies representing interest paid in respect of any part of the Escrow Fund in the same manner as any funds for the time being on deposit on the Dollar Accounts.

6. The Bank shall not have or incur any liability by reason of any diminution in value of the securities or gold bullion for the time being held by them in the name of the Escrow Agent on the Securities Custody Accounts and the Bullion Account respectively.

Similarly, the Escrow Agent shall not have or incur any liability by reason of any diminution in value of the securities or gold bullion for the time being held in its name by the Bank on the Securities Custody Accounts and the Bullion Account respectively. Moreover, the Escrow Agent shall not have or incur any liability for any loss arising from investment of the funds held for the Escrow Agent on the Dollar Accounts.

In addition, the Escrow Agent shall not bear nor be liable for any expenses, charges, costs or fees of any kind incurred by the Bank or the FED in performance of their duties under this Arrangement.

7. In the performance of their duties under this Arrangement, the Bank shall not exercise any discretion designed to favour one of the parties to this Arrangement and shall act only on the instructions of the Escrow Agent.

(a) Provided that no previous instruction has been received under subparagraph (b) below, upon receipt of instructions from the Escrow Agent to do so, in the form provided in paragraph 8 below, the Bank shall immediately transfer the funds then held on Dollar Account No. 1 as follows:

(i) U.S. Dollars 3,667,000,000 to the FED, subject to the FED's sole direction;

(ii) U.S. Dollars 1,418,000,000 to Dollar Account No.2; and

(iii) the balance to an account of Bank Markazi Iran opened at the Bank, subject to Bank Markazi Iran's sole direction and transfer the securities and bullion then held in the Securities Custody Account No. 1 and the bullion Account respectively to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction.

(b) Provided that no previous instruction has been received under subparagraph (a) above, upon receipt of instructions from the Escrow Agent to do so, in the form provided in paragraph 8 below, the Bank shall immediately transfer the Escrow Fund to the account of the FED at the Bank, subject to the FED's sole direction, and close all the Accounts opened under paragraph 2 of this Arrangement.

(c) Any funds or securities received by the Bank from the FED for deposit on any of the accounts described in paragraph 2 of this Arrangement, other than Dollar Account No. 2, after receipt and execution by the Bank of the instructions referred to in subparagraph (a) above, shall be credited in accordance with the instructions of the Escrow Agent in the form provided in paragraph 8 below, to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction, and to Dollar Account No.3 and Securities Custody Account No. 2 at the Bank in the name of the Escrow Agent.

Not later than 30 days after the date hereof the Escrow Agent shall instruct the Bank to transfer the funds and securities in these accounts to such bank as the Escrow Agent shall direct, for the account of the Banque Centrale d'Algerie.

(d) Upon receipt by the Bank of instruction from the Escrow Agent to do so in the form provided in paragraph 8 below, the Bank shall, as soon as practicable thereafter

(i) transfer such amount as may be specified in the instructions from Dollar Account No.2 to the FED, subject to the FED's sole direction, if sufficient funds then remain on Dollar Account No. 2 to make such transfer; and/or

(ii) transfer the remaining funds on Dollar Account No.2 to the account of Bank Markazi Iran at the Bank, subject to Bank Markazi Iran's sole direction, and close Dollar Account No.2.

(e) The Escrow Agent shall not be entitled to give the Bank any instruction other than described in this paragraph 7, and the Bank shall be entitled and bound to rely on any instruction falling within this paragraph 7 without further inquiry, and any transfer by the Bank in accordance with any instructions given to them under this paragraph 7 shall constitute a good discharge to the Bank.

8. (a) The Bank and the Escrow Agent will exchange telegraphic keys which will permit the reciprocal validation of messages and payment and transfer orders; however, the instructions set forth in paragraphs 7 (a) and 7(b) shall be in writing, shall be transmitted by hand either

(i) to the Bank or

(ii) to the Deputy Governor of the Bank for and on behalf of the Bank at the British Embassy at Algiers and shall be authenticated as provided in subparagraph (b) below. In the event that a telegraphic test is challenged, the Bank and the Escrow Agent agree to contact each other by telex or other appropriate means as rapidly as possible, in order to

obtain confirmation of the authenticity of the transmission.

(b) The Bank and Escrow Agent shall provide each other with a list, which will be revised whenever necessary, of the names of the persons authorized to execute any written notice or instruction required or permitted under this Arrangement and identify the signatures of such designated persons; all such notices or instructions to the Bank shall be effective on receipt by the Bank; the Bank shall not be obliged to act on any such notice or instruction unless properly so authorised, authenticated and delivered in the manner required by this paragraph.

(9). Except as provided in paragraph 8 (a) above, any advices, written notices, or instruction permitted or required by this Arrangement shall be given to the parties hereto at the respective addresses shown below:

(i) To the Bank at:

Threadneedle Street

London EC2R 8AH

ATTENTION: D.H.F. Somerset

J.G. Drake

W.B. Moule

(ii) To the FED at:

33 Liberty Street

New York, New York 10045

ATTENTION: H. David Willey

George Ryan

(iii) To the Escrow Agent at:

8 Boulevard Zirout Youcef

Algiers, Algeria

ATTENTION: Mr. Mohamed Bessekhoud

Mr. Bachir Sail

Mr. Mohand Kirat

Mr. Lakhdar Benouataf

10. The FED shall indemnify and hold the Bank harmless against and shall reimburse the Bank for any loss or expense that they may incur by reason of their acts or omissions under or in connection with this Arrangement, except for

(A) Any loss or expense resulting from their own negligence or wilful misconduct and

(B) Any loss arising from investment of the funds held for the Escrow Agent on Dollar Accounts No. 1, No. 2 and No. 3.

11. The Bank may rely and shall be protected in acting on any instrument, instruction, notice or direction given by the Escrow Agent in accordance with paragraph 7

reasonably believed by them to be genuine and to have been signed or dispatched by the appropriate person or persons.

12. The Bank shall not be liable for any act or omission unless such act or omission involves negligence or wilful misconduct on the part of the Bank. This paragraph 12 does not apply to any loss arising from investment of the funds held for the Escrow Agent on the Dollar Accounts.

13. (a) The Bank shall advise the Escrow Agent by telex as soon as reasonably practicable thereafter of all changes in balances, deposits, interest earned and withdrawals on the six accounts opened and maintained by the Bank for the Escrow Agent as provided in paragraph 2 of this Arrangement.

(b) The Bank shall provide the FED by telex with a list of all debits and credits to the six accounts referred to in subparagraph (a) above.

14. The Bank and the FED accept that the Escrow Agent is a central bank, whose property is normally entitled to the full immunities of a central bank under the State Immunity Act of 1978 of the United Kingdom. Nothing in this Arrangement shall be considered as constituting, in whole or in part, a waiver of any immunity to which they are entitled.

15. Nothing herein shall require the Bank to violate the laws of England or any court order thereunder; the Bank confirms that none of the provisions of this Arrangement is in violation of the laws of England.

16. The provisions hereof may not be modified or changed except by an instrument in writing duly executed by or on behalf of the Escrow Agent, the Bank and the FED.

17. This Arrangement is written in English and French texts but, in the event of any conflict between the two texts, the English text shall prevail.

18. This Arrangement described herein shall be governed by and construed in accordance with the laws of England.

Dated 20 the of January 1981

BANQUE CENTRALE D'ALGERIE

by Mohamed Bessekhoud

Lakhdar Benouataf

THE GOVERNOR AND COMPANY OF

THE BANK OF ENGLAND

by C.W. McMahon

D.H.F. Somerset

FEDERAL RESERVE BANK OF NEW YORK

AS FISCAL AGENTS OF THE UNITED STATES

by Ernest T. Patrikis

Glossary

Latin, Farsi and Islamic Term

Ashura: means the '10th' in Arabic, The tenth day of the *Muharram* month is called Ashura, on which Imam Hossein, the 3rd Imam, was martyred. It is a mourning day for *Shia* Muslims.

Bayt-e-rahbari: People of the House, or family. Within the Muslim tradition, the term refers to the family of the Islamic Prophet. In Iran it refers to the establishment of the spiritual Leadership.

Daneshjuyan-e payru-ye Khat-e imam: Students Following Imam's Line(policy)

Ex aequo et bono: "according to the right and good") or (from equity and conscience). In the context of arbitration, it refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand.

Gharb-Zadeghi : Occidentosis

Locus Standi: the right of a party to appear and be heard before a court

Madrases: Islamic religious schools

Majlis: Iran's Parliament

Muhharam: the first month of the Islamic calendar, a holy month in which Imam Hossein was martyred.

Parens patriae: Trustee

Per diem: Latin for "per day" or "for each day". It usually refers to the daily rate of any kind of payment.

pacta sunt servanda: agreements must be kept

Sharia: divine law, Islamic law

Shia: followers of Imam Ali

The Tudeh Party: The Communist Party

Ulama: those learned in religious law

Urf: state law

Xerxes: Xerxes the Great, Khshayartya, the fourth King of Kings of the Achaemenid Empire of Persia.

Artabazanes: Elder brother of Xerxes the Great

Bibliography

A Reports on The Iran-US Claims Tribunal

Iranian Assets Litigation Reporter, published twice monthly by Andrews Publications, Inc., Edgemont, PA 19028. The first issue was published on February 8, 1980.

Mealey's Litigation Reports, Iranian Claims, published twice monthly by Mealey Publications.P.O. Box 446. Waye, PA. 19087. The first issue was published on February 3, 1984. The final issue was published on January 25, 1991

The Iran-United States Claims Tribunal Reports (Iran-US C.T.R.) (Cambridge: Cambridge University Press, 38 volumes since 1982)

Yearbook Commercial Arbitration, Kluwer Law & Taxation Publishers, The Hague.

Website: www.irusct.com

Annual Reports (of the Tribunal)

Major Library Sources: The Peace Palace Library, The Hague, The Netherlands; and Bureau for the International Legal Services of Iran (BILL)

B General Sources

Abrahamian, Ervand, 1982. *Iran between Two Revolutions* (Princeton: Princeton University Press)

Aghahosseini, Mohsen, 2007. *Claims of Dual Nationals and the Development of Customary International law: Issues before the Iran-United States Claims Tribunal*. (Leiden: Martinus Nijhoff)

Akehurst, Michael, 1987. *A Modern Introduction to International Law*, 6th ed, (London: Allen and Unwin) 1-10

Aldrich, George H, 1996. *The Jurisprudence of the Iran-United States Claims Tribunal: An analysis of the Decision of the Tribunal* (Oxford: Clarendon Press)

AleAhmad, Jalal-e-, *Gharb-Zadeghi* 1984. *Occidentosis, a plague from the West*. Trans. R. Campbell, (Berkeley: Mizan Press)

Alford, Roger, 2003. "The American Influence on International Arbitration," *Ohio. St. J. On Dispute. Resolution* 19: 69, 86.

Algar, Hamid, 1980. *Iran and Shiism in the Islamic Revolution in Iran*, Siddiqi (ed) (London: Open Press)

Algar, Hamid, 1969. *Religion and State in Iran, 1785-1906*. (Berkeley: University of California Press)

Alikhani, Hossein, 2000. *Sanctioning Iran: Anatomy of a Failed Policy* (London and New York: I.B. Tauris)

Amerasinghe, C.F., 1992. "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice." *International and Comparative Law Quarterly*,

Amir-Ahmadi, Hooshang, 1989. "The State and Territorial Social Justice in Post-

- Revolutionary Iran” *Iranian Journal of International Affairs*, I, 2 & 3, Summer-Fall (Tehran: the Institute for Political and International Studies)
- Arjomand, Said Amir 1989. “History, structure and Revolution in the Shi’ite Tradition in Contemporary Iran”, *International political science Review*, 10.2.
- Armstrong, David and Farrel, Theo., Lambert, Helene, 2007. *International Law and International Relations* (New York: Cambridge University Press)
- Armstrong, David, 2008. “The evolution of International Society,” Baylis and Smith, *The Globalization of World Politics*
- Armstrong, David, 1993. *Revolutions and World Order: the Revolutionary State in International Society*”, (Oxford: Clarendon Press)
- Asgarkhani, Abu Mohammad, 2003. “Compromise and Cooperation at the Iran-US Claims Tribunal,” *Arbitrational International*, 19.2
- Avanessian, Aida, 1993. *Iran-United States Claims Tribunal in Action*: (Dordrecht: Martinus Nijhoff.)
- Axelrod, Robert and Keohane, Robert O., 1985. “Achieving Cooperation under Anarchy: strategies and institutions” *World Politics*, 38.1: 226-254
- Axelrod, Robert, 1984. *The Evolution of Cooperation*.(New York: Basic Books)
- Barnett, Michael and Duvall, Robert, 2005. *Power in Global Governance* ed., (Cambridge: Cambridge University Press, 2005)187
- Baylis, John, and Smith, Steve, 2008. *The Globalization of World Politics, An Introduction to International Relations*, (Patricia Owens: Oxford University Press)
- Bilder, Richard B., 1998. “Book Reviews and Notes,” *AJI* 92
- Bill, James A. and Louis, W.M. Roger, 1988. *Musaddiq, Iranian Nationalism, and Oil* (Oxford: Oxford University Press)
- Bill, James A. 1988. *The Eagle and the Lion* (New Haven: Yale University Press)
- Bishop, William W. Jr., 1953. *International Law, Cases and Materials* (Michigan: Little Brown)
- Bishop, William, 1942. “Nationality in International Law” in *Grotius Society*, 28
- Brower, Charles N. and Brueschke, Jason D., 1998. *The Iran-US Claims Tribunal* (The Hague: Martinus Nijhoff)
- Brower, Charles N. and Sharp Jeremy K., 2003. "International Arbitration and the Islamic World: the Third Phase" *AJIL* 97.3
- Brown, Chris, *Understanding International Relations*, 2001. (Handmills: Palgrave)
- Brown, Henry and Marriot, Arthur 1992 *ADR Principles and Practice* (Sweet and Maxwell)
- Brownlie, Ian, 2003. *Principles of Public International Law*, (Oxford: Clarendon Press)
- Brueschke Jason D. and Brower Charles N, 1998. *The Iran-United States Claims Tribunal* (The Hague: Martinus Nijhoff Publishers,)
- Brzezinski, Zbigniew, *Power and Principle: Memories of the National Security Adviser, 1977-198, 1983*. (New York: Farrar, Strauss and Giroux)
- Bull, Hedley, 1979. "Recapturing the Just War for Political Theory", *World Politics*, 31, 4 (1979): 595-6
- Bull, Hedley, 1979. *Anarchical Society: a Study of Order in World Politics*, (London: Macmillan)
- Bull, Hedley, 1984. *Justice in International Relations; The Hagey Lectures* (Waterloo: University of Waterloo)
- Caron, David and Crook , John, 2000. *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (Washington: ASIL)
- Caron, David D., Caplan Lee M. and Pellonpaa, Matti, 2006. *The UNCITRAL*

- Arbitration Rules: A Commentary* (Oxford: Oxford University Press)
- Carr, Edward H., 1939. *The Twenty Years' Crisis: 1919-1939* (London: MacMillan)
- Carswell, Robert, 1985. "The Economic and Financial Pressures: Freeze and Sanctions," Warren Christopher, *American Hostages in Iran: The Conduct of a crisis* (New Haven: Yale University Press)
- Carter, Jimmy, 1981. "Oral History Interview with Hamilton Jordan," Miller Centre Interviews, *Carter Presidency Project*, 6
- Charistopher, S. Gibson and Christopho, R. Drahozal, 2006. "Iran –United States Claims Tribunal Precedent in Investor-State Arbitration" *Journal of International Arbitration* 23.6: 521-546
- Christopher, Warren, 1985. *American Hostages in Iran, The Conduct of a Crisis* (New Haven: Yale University Press)
- Collier, J.G., 1991. *The International and Comparative Law Quarterly*, 40.3
- Cottam, Richard W., 1988. *Iran & the United States: a Cold War Case Study* (Pittsburgh: Pittsburgh University Press)
- Cotterrell, Roger, 2006. *Law, Culture and Society* (Hampshire: Ashgate)
- Crook, John R. 1994. Rev. Stewart Baker and Mark Davis *AJIL* 88.1
- Deltenre, Marcel M., 1943. *General Collection of the Laws and Customs of War, Text and Comment*, (Bruxelles: Marcel)
- Dermott, Rose M. 1992. "Prospect theory in International Relations: the Iranian Hostage Rescue Mission." *Political Psychology*, 13.2
- Dore, Isaac, 1993. *The UNCITRAL Framework for Arbitration in Contemporary Perspective* (The Hague: Martinus Nijhoff)
- Elwell-Sutton, Laurence P., 1955. *Persian Oil: a Study in Power Politics* (London Laurence and Wishart)
- Eshragh, Abdolkarim, 1984. "Letter from Mr. to Legal Adviser's Office, Ministry of Foreign Affairs, the Netehrlands Regarding the Applicability of Netherlands Arbitration Law to the Awards of the Tribunal," Undated, *Iran-U.S.C.T.R.5*: 405
- Esposito, John, 1990, *The Iranian Revolution: Its Global impact* (Miami: Florida International University Press: Gainesville)
- Esposito, John, 1992. *The Islamic Threat; myth or reality?* (New York: Oxford University Press)
- Falk, Richard, 1980 "The Iran-Hostage Crisis: Easy Answers and Hard Questions," *AJIL*, 74.2
- Farber, David, 2004. *Taking Hostage: the Iran hostage crisis and America's first Encounter with Radical Islam*
- Fouchard, Gaillard, Goldman, 1999. *International Commercial Arbitration, Report of the International Law Commission. Official Records of the General Assembly, Eight sessions, Supplement 19*
- Friedman, L., M., 1975 *The Legal System: A social Science Perspective* (Russel Sage Foundation)
- Frost, Mervyn, 1996. *Ethics in International Relations, A Constitutive Theory*, (Cambridge: Cambridge University Press)
- Fukuyama, Francis, 1992. *The End of History* (New York: Free Press.)
- Gasiorowski, M.J, 1991. *United States Foreign Policy and the Shah: Building a Client State*, (Ithaca: Cornell University Press)
- Gibson, Christopher S. & Drahozal, Christopher R., 2006. "Iran-United States Claims Tribunal Precedent in Investor-States Arbitration," *J. Int'l Arb.*23.521
- Gillesple, Kate, 1990. "U.S. Corporations and Iran at The Hague" *Middle East*

Journal. 44.1

Goertz, Gary, 2003. *International Norms and Decision Making: A Punctuated Equilibrium Model* (New York: Rowman and Littlefield)

Gray, Christine D., 1987 *Judicial Remedies in International Law*, (Oxford: Clarendon Press)

Grayson, Benson Lee, 1981. *United States-Iranian Relations* (Washington: University Press of America)

Habicht, Max, 1935. *The Power of the International Judge to Give a Decision "Ex aequo Et Bono"*(London: Constable & Co.)

Halliday, Fred 1979. *Iran: Dictatorship and Development*, (New York: Penguin,)

Hardenburg, L. 1987. "The Awards of the Iran-U.S Claims Tribunal Seen in connection with the Law of Netherlands, *Int Bus law* 12.337

Hassan, Riaz, 1984. "Iran's Revolutionaries: before and after Revolution", *Third World Quarterly*, 6.3

Hoffman, John E., Jr., 1985 *The Bankers' Channel*, in Warren Christopher. *American Hostages in Iran: The Conduct of a Crisis* (New Haven: Yale University Press)

Holtzmann, Howard M., 1987. "Some Lessons of the Iran-US Claims Tribunal, in Private Investors Abroad: problems and solutions in International Business" Moss, Janice R. ed.

Houghton, David Patrick, 2001. *US Foreign Policy and the Iran Hostage Crisis*, (Cambridge: Cambridge University Press.)

Hurrell, Andrew and Hoffmann, Stanley, "Forward" Hedley Bull, *Anarchical Society 25 Years on* (Columbia: Columbia University Press)

Hurrell, Andrew, 1993. "International Society and the Study of Regimes: A reflective approach." Rittberger, ed, *Regime Theory and International Relations*

Hussein Kuli, A., 1913. "Letter from the Minister for Foreign Affairs to the Persian Minister at Washington," Morgan Shuster, *The Strangling of Persia*. See also Yonah and Nanes, *The United States and Iran, A Documentary History* (Frederick: University Publications of America)

Ioannides, Christos P. 1984. *America's Iran: Injury and Catharsis*, (Boston: University Press of America) 216.

Johnstone, Ian, 2005. "The Power of Interpretive Communities," in Barnett and Duvall, *Power in Global Governance*, ed. (Cambridge: Cambridge University Press)

Jones, 1984. "The Iran-United States Claims Tribunal: Private Rights and State Responsibility" R. Lillich, ed., *The Iran- United States Claims Tribunal 1981-1983*

Kashani, Mahmoud. and Shafeiei, Shafiei, 1983. "Separate Opinion" *Iran-United States Claims Tribunal Reports, Iran-U.S.C.T.R.* 1.115

Kashani, Mahmoud, Shafeiei, Shafie, and Ansari , 1983. "Dissenting Opinion of the Iranian Arbitrators.", in *Case A-18*,

Keddie, Nikki R., 1981. *Roots of Revolution* (New Haven: Yale University Press)

Keohane, Robert O., 1984 *After Hegemony: Cooperation and Discord in the World Political Economy*, (Princeton: Princeton University Press)

Keohane, Robert O., 2008. "On Institutions and the Need for Innovation in the Field" *Theory Talks* available at www.theory-talks.org/2008/05/theory-talk-9.html

Khan, Rahmatullah, 1990. *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution* (Dordrecht: Martinus Nijhoff)

Khomeini, Ayatollah, 1989. "Khomeini Issues Message to Religious Authorities." Tehran Radio, *FBIS*,

Khomeini, The Ayatollah, 1980. *Sayings of the Ayatollah Khomeini*, Tony Hendra (New York: Bantam Books)

Krasner, Stephen, D., 1983. *International Regimes* (Ithaca: Cornell University Press, 1983)

- Lagergren, Gunnar, and Hotzmann, Howard, 1981. "Separate Opinions of Judges" in *Ina. Corp, v. Iran*,
- Lagergren, Gunnar, 1981. "Speech by His Excellency Gunnar Lagergren of Sweden at the Inaugural Session of The Iran-United States Claims Tribunal" *Arbitration Journal*, Dec 36
- Lillich, Richard B. 1982. "Remarks," *ASIL PROC.* 76.5
- Lillich, Richard B. & Bederman, David, 1997. *Jurisprudence of the Foreign Claims Settlement Commission: Iran claims*, 91 *AJIL* 91.38 (1997): 436
- Lillich, "Preface," Lillich, ed., 1984. *The Iran-United States Claims Tribunal 1981-1983*
- Lillich, Richard, B., 1991. "The Valuation of Nationalized property in International Law" John A. Westberg, *International Transactions and Claims, Involving Government parties, Case law of The Iran-United States Claims Tribunal*
- Lissakars, Karin, 1981. "Money and Manipulation", *Foreign Policy* 111
- Lissakars, Karin, 1991. *Banks, Borrowers, And The Establishment* (Toronto: Basic Books)
- Lowe, Vaughan, 1997. *Cambridge Law Journal*, 56, 1: 201-202
- Lowenfeld, Andreas F. & Denison, Charles L., 1983. "U.S-Iran Negotiations 1980-81: Iran Conditions for Release of Hostages, *Trade Controls for Political Ends, International Economic Law*, 3 (New York: M. Sattew Bender)
- Lowenfeld, Andreas F. & Denison, Charles L., 1998. *Trade Controls for Political Ends, International Economic Law*, 3 (New York: Matthew Bender)
- Lytel, Mark Hamilton, 1987. *The Origins of the Iranian American Alliance 1941-1953* (New York: Holmes & Meier)
- Mackie, Karl, Miles, David, Marsh, William, Allen, Tony, 2000. *The ADR Practice Guide: Commercial Dispute Resolution*
- Mapp, Wayne, 1993. *The Iran-United States Claims Tribunal: The first Ten years, 1981-1991* (Manchester: Manchester University Press)
- Marossi, Ali Z., 2005 "A Quarter Century Jurisprudence of the Iran-US Claims Tribunal: The Tribunal's Legal Structure, Jurisdiction and Enforcement Mechanism", *AALCO Quarterly Bulletin* 1.4
- Martin, V., 2000 *Creating an Islamic State* (London: Tauris)
- Max, Habicht, 1935. *The Power of the International Judge to Give a Decision "Ex aequo Et Bono"* (London: Constable & Co.)
- McLellan, David S., and Acheson, Dean, 1976. *The State Department Years* (New York: Dodd Mead & Co)
- Mehran, Von, 1983. "The Iran-US Arbitral Tribunal," 31 *AJCL*
- Merrills, J.G., 2005. *International Dispute Settlement* (Cambridge: Cambridge University Press)
- Migdal, Joel, 1988. *Strong Societies and Weak States: state-society relations and state capabilities in the Third World* (Princeton: Princeton University Press)
- Mirza Kuli Khan, Ali, 1918. Letter from to the U.S. Secretary of State, Washington, Yonah & Nanes, *The United States and Iran: a documentary History*, (Maryland: University Publications of America, 1980)
- Misagh, Parsa, 1989. *Social origins of the Iranian revolution*, (New Brunswick: Rutgers University Press)
- Moens, Alexander 1999. *Foreign policy Under Carter: Testing Multiple Advocacy and Decision Making*, (Boulder: Wetview Press)
- Mohebi, Mohsen 1998. *The International Law Character of the Iran- United States Claims Tribunal*, (The Hague: Kluwer Law International)
- Morgenthau, Hans, 2006. *Policis Among Nations, The struggle for Power and*

- Peace*, Revised by Kenneth Thomson and David Clinton, (New York: McGraw Hill)
- Murphy, Sean D, 2000. "Interim Measure of Relief: The Continuing Importance of the Iran-U.S. Claims Tribunal's Jurisprudence", in David Caron the *Iran –U.S. Claims Tribunal*
- Nabavi, Behzad, 1991. "Answers to Critiques of the Algiers Declarations," *Siasate Khareji*, (Tehran: IPIS)
- Nefe, Stephen 1997. *The International and Comparative Law Quarterly*, 46.4: 971-972.
- Nye, Joseph, 1985. "The logic of inequality," *Foreign Policy*, 59
- Nye, Joseph 1987. "Nuclear Learning" *International Organization*, 41
- Oppenheim, ed, 1955. Lauterpacht *International Law, A Treatise*, 1.2 (London: Longman)
- Oye, Kenneth, A., ed. 1986. *Cooperation under Anarchy* (Princeton: Princeton University Press)
- Pahlavi, Reza Shah;, 1927. *Memorandum of an Audience Given to the American Minister Philip*, Yonah and Nanes
- Puchala, Donald J., and Hopkins Raymond F., 1983. "International Regimes: lessons from inductive analysis," Krasner, *International Regimes*
- Reed, Lucy, 2003. "Mixed Private and Public International Law Solutions to International Crises," *RECUEIL Des COURSE*, (The Hague: Academy of International Law) 306
- Reed, Lucy, 2005. *Mixed Private and Public International Law Solutions to International Crises* (The Hague: Brill Academic)
- Rittberger, Volker ed. 1993. *Regime Theory and International Relations*, (New York: Oxford University Press) 49
- Robinson, Davis R., 1983. 'Recent Developments at the Iran-United States claims Tribunal,'
- Rohani, E., 1979. *Nehzat-e Imam Khomeini*, (Tehran)
- Rovin, Arthur, 1983. "Statement of the United States Agent," *E-systems, Inc. v. the Islamic Republic of Iran*
- Rutherford, James P., 1980. *Iran Crisis and International Law: Proceedings of the John Basset Moore Society of International Law Symposium on Iran*, (Virginia: Virginia University Press)
- Schachter, O. 2006. "International Law in the Hostage Crisis: Implications for Future Cases," Christopher and Kreisberg.
- Schoesser, Jeffrey, 1987. *U.S. Policy in the Persian Gulf*, *Department of State Bulletin*, 87. 2127
- Scott, Macleod, 1999. "Radicals Reborn", *Time*
- Secretary General, 1993. *Tribunal's Annual Report, Period ending 30 June 1992*
- Sheehan, Michael Kahl, 1968. *Iran: The Impact of United States Interests and Politics 1941-1954* (New York: Theo. Gaus' Sons) 81
- Shaw, Malcom N., 1997. *International Law*, (Cambridge: Cambridge University)
- Shea, D., 1955. The Calvo Clause, Lillich, "The Valuation of Nationalized property in International Law" John A. Westberg, *International Transactions and Claims, Involving Government parties, Case law of The Iran-United States Claims Tribunal*,
- Sheehan, Michael Kahl, 1968. *Iran: The Impact of United States Interests and Politics 1941-1954* (Brooklyn: Theo. Gauss' Sons)
- Shuster, Morgan, 1913. *The Strangling of Persia* (London: Unwin)
- Sick, Gary, 1985. *All Fall Down: America's Fateful Encounter with Iran*, (Tauris & Co.: London) 227

Sick, Gary, 1985. *Military options and Constraints*, in Warren Christopher. *American Hostages in Iran: The C*

Simpson, John Liddle, and Fox, Hazel, 1959. *International Arbitration: Law and Practice*, (London: HMSO)

Stein, Ted, 1984. "Jurisprudence and jurist's Prudence: The Iranian-forum Clause decisions of the Iran-U.S Claims Tribunal," *ASIL* 78

Tonelson, 1986. *Hostage Aftermath*, Van Hof, *Commentary on the UNCITRAL Arbitration Rules*.

Toope, Stephen J., 1990. *Mixed International Arbitration*, (Cambridge: University of Cambridge Press)

Tse-shyang, Chen Frederick, 1984. "The Iran-United States Claims Tribunal's Application of the Uniform Commercial Code in the Economy Forms Case," *Chinese Yearbook of International Law and Affairs*,4

Tweeddale, Andrew and Tweeddale, Keren, 2005. *Arbitration of commercial disputes: international and English law and practice*, (New York: Oxford University Press)

United States, 1980. Restatement (Second) of Foreign Relations Law of the United States, revised, preliminary draft of Introduction, Tent, Draft 1

U.S. Department of Defense, 1978. *Foreign Military Sales and Military Assistance Facts*, <http://www.irvl.net/USMI.htm>

Van Hof, Jacomijn J., 1991. *Commentary on the UNCITRAL Arbitration Rules, The Application by the Iran-US Claims Tribunal* (The Hague: Kluwer)

Vaughan, Lowe, 1997. *Cambridge Law Journal*, 56.1

Walkwer, H. 1956. "Treaties for the Enforcement and Protection of Foreign Investment, Present: US Practice," *Am.I.I.L*,5

Waltz, Kenneth, 1979. *Theory of International Politics* (New York: McGraw-Hill)

Watt, Motegomery, 1961. *Islam and the Integration of Society* (London: Routledge)

Wendt, Alexander, 1999. *Social Theory of International Politics* (Cambridge: Cambridge University Press)

Westberg, John A. 1991. *International Transactions and Claims Involving Government Parties, Case Law of the Iran-United States Claims Tribunal* (Washington: International Law Institute)

Westermann, W.L., 1907. "Interstate Arbitration in Antiquity," *The Classical Journal*, 1.2.5

Weston, Burns H., Lillich Richard B., and Bederman David J. *International Claims: their Settlement by Lump sum Agreements, 1875-1995*.

Wetter, J.G., 1970. "The International Arbitral Process Public and Private," 5, (New York: Dobbs Ferry)

Yonah, Alexander and A. Allan, Nanes, 1980. *The United States and Iran: a documentary History*, (Maryland: University Publications of America)

Zabih, Sepehr, 1982. *Iran since the Revolution*, (London: Croom Helm)