Vanderbilt Journal of Transnational Law

Volume 24
Issue 3 *Issue 3 - 1991*

Article 6

1991

International Transactions and Claims Involving Government Parties: Case Law of the Iran-United States Claims Tribunal

Richard M. Mosk reviewer

Nils Mangard reviewer

Koorosh H. Ameli reviewer

BOOK REVIEWS

Editor's Note: Because the book reviewed in this volume concerns the Iran-United States Claim Tribunal, the following book reviews are provided to present several views of arbitrators who sit on the Tribunal. The reviewers are: Judge Mosk, who was appointed to the Tribunal in 1981 by the United States; Judge Mangård, who was appointed to the Tribunal in 1981 as a third-country arbitrator; and Judge Ameli, who was appointed to the Tribunal in 1990 by the Islamic Republic of Iran.

INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL. By John A. Westberg, International Law Institute, Washington, D.C.: 1991. Pp. 412. $125.

Reviewed by Richard M. Mosk*

The 1981 Algiers Declarations provided for the creation of the Iran-United States Claims Tribunal and resulted in the release of the fifty-two United States hostages from Iran. The purpose of the Tribunal was to adjudicate claims brought by United States nationals against Iran, by Iranian nationals against the United States, and by one government against the other.

During the 1970s, as Iran began to develop and to ally itself with the United States, investments in Iran by United States businesses increased dramatically. Indeed, by the late 1970s, there were United States construction companies, architects, accountants, agricultural experts, computer specialists, engineers, and lawyers—including the author, John

* Member of the California Bar; A.B. Stanford; J.D. Harvard; Member of the Iran-U.S. Claims Tribunal 1981-1984; Substitute Member 1984-present.

Westberg—working in Iran. In addition, the United States government and United States defense contractors began to supply Iran with modern weaponry.

During and after the 1979 Iranian Revolution, which culminated in February of that year, United States contractors could not complete services and did not receive payments that they claimed were owing. Accordingly, they commenced litigation against Iran in United States courts and attached Iranian assets. It is unclear whether the United States claimants ultimately would have succeeded in United States courts in view of possible Iranian defenses like sovereign immunity and the act of state doctrine. Also, a number of United States contractors had caused standby letters of credit to be issued in favor of Iranian entities to guarantee performance. These Iranian entities began calling the letters of credit so that the United States companies had to commence legal actions in an attempt to enjoin the enforcement of these letters of credit. There were hundreds of actions brought in United States courts against Iran and entities controlled by the Iranian government.

In November 1979, United States hostages were taken, and President Carter froze or blocked Iranian assets subject to United States jurisdiction in response.[1] The disposition of United States private claims against Iran and the return of frozen Iranian assets became major issues in resolving the hostage crisis that the parties finally concluded by an agreement referred to as the Algiers Accords or Algiers Declarations.[2]

The Algiers Declarations consist of two declarations issued by Algeria and a number of technical implementing agreements, to which the governments of the United States and Iran adhered. The first declaration, the General Declaration, provided for the release of the hostages and for a number of United States undertakings, including the nullification of attachments, the cessation of litigation against Iran in United States courts, and the transfer of Iranian assets. Of the billions of dollars of blocked funds, a large portion satisfied certain United States bank loans; some of the funds went into escrow in connection with the ultimate resolution of disputed interest on these loans; some of the monies were returned to Iran; and one billion dollars was placed in a security account to insure payment of awards in favor of United States claimants before a tribunal to be established by the second declaration. The Algiers Decla-

1. Exec. Order No. 12,170, 44 Fed. Reg. No. 65,729, 65,956-58 (1979), *reprinted in* 18 I.L.M. 1549, 1552-56 (1979).

2. Declaration of the Government of Democratic and Popular Republic of Algeria (General Declaration), January 19, 1981, *reprinted in* 1 IRAN-U.S. CL. TRIB. REP. 3 (1981-82), 75 AM. J. INT'L L. 418 (1981).

rations required Iran to replenish this security account whenever the balance in the account fell below 500 million dollars.

The second declaration, the Claims Settlement Declaration (CSD) provided for the establishment of an international arbitral entity, the Iran-United States Claims Tribunal (the Tribunal), to resolve various claims by the nationals of one state against the other state and the two states against each other. The United States Supreme Court upheld the power of the President both to suspend United States litigation pursuant to the Algiers Declarations and to enter into the declarations.[3]

The Algiers Declarations provided that the Tribunal was to consist of nine members—three to be designated by the United States, three to be designated by Iran, and the final three, presumably from other states, to be chosen by the six government-appointed arbitrators. The Algiers Declarations mandated that the security account be established in the Netherlands Central Bank. In May 1981, the United States and Iran each designated its respective Tribunal members. Thereafter, the six government-appointed members selected third-country members.

Except for claims under 250 thousand dollars, which the governments were to present on behalf of their nationals, individual parties filed their own claims. Most of the claims were those filed by United States companies alleging breaches of contract and expropriations. Iran often counterclaimed for damages, based on alleged defective performance, for return or delivery of equipment, or for non-payment of taxes allegedly due. The governments filed official claims relating to prior commercial and military relations and disputes concerning the interpretation and implementation of the Algiers Declarations. The Algiers Declarations required the filing of claims, but not disputes, within one year.

The Tribunal divided into panels of three to hear cases, although the full Tribunal of nine heard and decided certain important issues. Although the Tribunal has been referred to as an arbitral body, its caseload makes it more nearly resemble a judicial system. The arbitrators often have been referred to as judges.

Despite unfriendly relations between the two governments, the skepticism of United States parties towards the Tribunal, the beliefs of those in Iran that the Tribunal was imposed upon it, the thousands of cases, the difficulties of obtaining evidence, and different languages and laws, the Tribunal continues to function. It developed procedures, held hearings, and rendered reasoned awards that were paid. The Tribunal also facilitated settlements, and most of the major claims have been resolved.

---

3. Dames & Moore v. Regan, 453 U.S. 654 (1981).

Iran and the United States ultimately settled the small claims by a lump sum payment to the United States, which will resolve these claims through the Foreign Claims Settlement Commission.

The Tribunal is an entity formed under public international law with jurisdiction to resolve interstate cases, but it has dealt primarily with private commercial disputes. By virtue of the CSD, the Tribunal had wide latitude in the application of law. The Tribunal applied public international law in connection with issues involving expropriation and nationalization. It sometimes invoked national law after applying choice of law principles, and occasionally applied what it determined to be general principles of law.

Professor Richard Lillich, an expert on international claims tribunals, described the Tribunal as "the most significant arbitral body in history."[4] Judge Abraham D. Sofaer, the former Legal Adviser to the United States State Department, stated that the Tribunal has "produced more international law than any law-making body in the history of mankind."[5] Furthermore, because the Tribunal utilized adaptations of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules,[6] "the Tribunal has encountered and resolved procedural issues . . . that might have taken decades to arise in the normal course of commercial arbitration."[7]

There have been differing views, however, as to the usefulness of Tribunal jurisprudence on substantive issues. Judge Howard Holtzmann has stated that the Tribunal's opinions are a valuable source of information to those involved in international business, referring to the awards as "a gold mine of information for perceptive lawyers."[8] A practitioner has written, "The number of the Tribunal's awards applying 'general principles of law,' as well as the relatively wide availability of the Tribunal's awards, assures that the Tribunal's jurisprudence will influence

---

4. RICHARD B. LILLICH, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 at vii (1984).

5. Voice of America interview with Judge Abraham D. Sofaer (June 12, 1990), *reprinted in* MEALEY'S INTERNATIONAL ARBITRATION REPORT, July 1990, at 15.

6. United Nations Commission on International Trade Law (UNCITRAL) Decision on Arbitration Rules, *reprinted in* 15 I.L.M. 701 (1976).

7. Stewart A. Baker and Mark D. Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran—United States Claims Tribunal*, 1989 Int'l Law. 81, 84.

8. Howard M. Holtzmann, *Some Lessons of the Iran-United States Claims Tribunal*, 1987 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS at 16-5 (J. Moss ed.).

international arbitration for years to come."[9]

On the other hand, some have downplayed the significance of Tribunal decisions because the decisions "involve[] a special type of arbitration."[10] Professor Caron has said that "the Tribunal does not represent a coherent jurisprudence. . . . There are three chambers and they take subtly different approaches to a number of issues. . . . [T]he chambers have changed dramatically over time."[11] There have been suggestions that Tribunal awards represent politically-induced or compromise decisions.[12] Professor Caron has added that he would "speculate that the reluctance of some private international arbitrators to rely on the Tribunal's decisions reflects their intuitive conclusion that the Tribunal involves the classic interstate arbitral process *and* the further intuitive conclusion that the process is therefore particularly politicized."[13]

Some believe that because the third-country chairmen are all from developed and European states, the jurisprudence is distorted. One critic has stated: "International arbitration between a Third World country and a developed nation is inherently hazardous because of the unequal bargaining positions and the former's lack of technical expertise."[14] Others have suggested that "forceful dissenting and concurring opinions tend to limit the authority of the Tribunal awards."[15] Some, particularly Iranians, suggest that various awards were defective or were the result of undue pressure, and therefore should not be considered as authority.

The views questioning the authority of Tribunal decisions are not necessarily valid. All arbitral and judicial entities could be analyzed to question their awards or judgments. For example, United States Supreme Court opinions are not of less weight because justices are appointed by virtue of their philosophy or views on issues. International Court of Justice opinions are not accorded less value because the judges, although

---

9. Grant Hanessian, *"General Principles of Law" in the Iran-U.S. Claims Tribunal*, 27 COLUM. J. OF TRANSNAT'L L. 309, 311 (1989).

10. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT. L. 104 (1990).

11. David D. Caron, *Attribution Amidst Revolution: The Experience of the Iran-United States Claims Tribunal*, PROC. ANN. SOC'Y INT'L L. 65 (1990).

12. *See* Caron, *supra* note 10, at 105 n.4; M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 202 (1986); *see also* Ted. L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-United States Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984).

13. Caron, *supra* note 10, at 105 n.4.

14. RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 258 (1990).

15. *See* Nils Mangård, 24 VAND. J. TRANSNAT'L L. 597, 609 (1991).

appointed by the United Nations, may be affected by the political or legal principles of their home state.

Moreover, in United States appellate courts, opinions often reflect compromises in order to obtain a majority, and sometimes even unanimity. Speculation often occurs that United States courts have tailored a decision to political realities or public opinion. Indeed, a highly respected, retired California Supreme Court Justice, when discussing public and electoral pressures on appellate justices, declared that it is difficult to ignore "a crocodile in the bathtub." This is just a variation on Mr. Dooley's remark that the Supreme Court follows the election returns.

Dissenting and concurring opinions do not necessarily limit the authority of awards. Prior to the Tribunal, there was some degree of unfamiliarity in international adjudication with separate opinions. One must evaluate the differences among the various opinions. For example, a concurring opinion often agrees with the majority opinion on the issue of liability, but may rely on other theories to reach this result or may differ on the amount of damages. Such opinions should not detract from the authority of the award. Moreover, the concurring opinion, or even the dissenting opinion, if well reasoned, can be of assistance in analyzing the case.

Even if, as some suggest, the developed state's influence has an inordinate impact on awards, that again only explains the origin of the authority. This theory does not lead to the conclusion that the authority cannot be utilized in determining the applicable law.

Some have criticized Tribunal decisions for allegedly ignoring certain issues. Just as with appellate decisions in the United States, avoiding an issue may be necessary to obtain a majority or may be prudent to avoid a particularly sensitive issue that is not indispensable to the award.

Whatever the composition of the Tribunal, and no matter how it reached its decisions, each opinion represents a prediction of what one can expect an international tribunal to determine on a particular legal issue. In that respect, Tribunal decisions and awards should be viewed as useful authority with respect to international law and general principles of law.

No one suggests that international arbitration awards are binding. Indeed, even within the Tribunal itself, legal results did not always serve as binding precedent. Because stare decisis is not a universal principle, this is not surprising. Yet, the Tribunal chambers did adhere to principles established by the full Tribunal, and, for the most part, principles enunciated in one award were applied, or at least utilized, in later awards. Additionally, the Tribunal awards reportedly induced settle-

ments in other tribunal cases,[16] which suggests that the parties recognized the effects of and adherence to the awards.

In the United States, arbitration awards in specific fields sometimes are published and later cited in other opinions. This occurs in labor arbitrations. Admittedly, those in the United States resort to authorities and precedent more often than those subject to other legal systems. Nevertheless, because of the paucity of published authorities on many international issues, the Tribunal decisions, which are reported widely, should be utilized extensively.

Also enhancing the usefulness of Tribunal opinions is the fact that each award sets forth a lengthy statement of proceedings, facts, contentions, and a full discussion of factual and legal authorities. Furthermore, there are often lengthy concurring and dissenting opinions, which not only contain a worthwhile exposition of legal issues, but also have compelled the majority to grapple with any purported deficiencies in its reasoning.

One possible defect in Tribunal practice was in its application of the Tribunal and UNCITRAL rules compelling a majority for an award.[17] There is a view that this rule means that for the ultimate award or disposition, a majority of arbitrators must concur.[18] In some cases, however, a Tribunal member would concur in the first part of the award and dissent from the second part, while another member would dissent from the first part and concur in the second part. Consequently, there is no majority for the ultimate award. Nevertheless, the Tribunal has acquiesced in this procedure, thereby affording the chairperson ultimate power. In addition, concurring opinions may disagree with the award, but join in order to form a majority. This probably constitutes compliance with the rule for a majority. The chairperson, however, still has power, but must obtain the acquiescence of one of the other members.

One can speculate how these procedures could affect the decision-making process. On the one hand, it could dilute the value of the authority of the award because a majority is not really a majority. On the other hand, the reasoning is less likely to represent a compromise that might be nec-

16. L. Reed, The Iran-United States Claims Tribunal: Some Lessons in Retrospect, Paper prepared for the Joint Conference of the American Society of International Law and Nederlandse Vereniging-voor International Recht, on "Contemporary International Law Issues: Sharing Pan European and American Perspectives," July 4-6, 1991 at 5 (forthcoming from Kluwer/Martinus Nijhoff, the Netherlands).

17. Article 31(1) of The Final Tribunal Rules of Procedure, *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 405, 433 (1984).

18. Ultrasystems Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 77, 82 (1983) (dissenting opinion).

essary to form a pure majority.

Some members of the Tribunal, including myself, often penned concurring or dissenting opinions. Such opinions demonstrated to the parties that the Tribunal considered all of the issues. These opinions contained arguments and authorities that could be useful to academics, practitioners, and other tribunals. Certainly there was never any surprise in separate opinions, for the arguments contained in them were aired during deliberations. Moreover, separate opinions could inspire care in the preparation of the awards and majority opinions.

The separate opinions, although sometimes strident, provided a fascinating legal debate over significant issues. Often I was struck by the fact that individuals from different legal systems generally operated under the same basic principles and debated only the application of those principles to the particular facts. I found my colleagues, Iranian, European, and American, to be intelligent and able.

The ultimate effect of Tribunal awards depends on the value of their reasoning and persuasiveness. Unlike the product of past tribunals, the awards usually resulted from powerful, vigorous, and skillful advocacy. Additionally, unlike decisions of past tribunals, the awards themselves contained lengthy and detailed expositions of the facts, the relevant authority, and the applicable law. The members of the Tribunal included well-known scholars in international law and arbitration, as well as high government officials, academics, and judges.

The United States agent to the Tribunal recently observed, "Tribunal cases appear prominently in the literature now and, I understand, are valuable as precedents in private commercial arbitrations."[19] Whether tribunal awards actually represent or contribute to what the law is, they should be helpful to one entering into a transaction, as well as to judicial and international bodies.

John Westberg utilizes tribunal awards and decisions to discuss a host of complex issues that may arise in international transactions and adjudications. These issues include applicable law, forum selection, sovereign immunity, act of state, state responsibility, monetary issues, stabilization clauses, expropriations, *force majeure*, contract breaches, and damages. His principal source of material is the awards of the Tribunal issued in contested cases. When the settlements are made accessible, it might be worth studying them in connection with the claims, possibly to derive some generalizations about settlements by government agencies.

The author does not, and cannot, address all of the legal issues that

19. Reed, *supra* note 16, at 6. In addition, Mr. Westberg's book contains a bibliography of writings on the Tribunal.

came before the Tribunal. Rather, he selected those with which he believes the international business lawyer should be familiar. It would take a more comprehensive work to cover all, or even most, of the issues that came before the Tribunal. Yet one could say that if an issue arose, by definition, it might be of significance to those doing business internationally.

There are some issues that the book did not cover, but that could be useful for international claims procedures. These issues include the rights of shareholders, partners, indirect owners, insurance companies, and nonprofit corporations. Other important Tribunal subjects that did not receive significant attention in the book include remedies (such as interim relief), letters of credit, quasi-contract, and illegality. The refusal of the Tribunal to apply some principles also deserves some mention.[20] Some of the evidentiary and procedural decisions that the author did not address could be of value to practitioners in framing dispute resolution clauses and in actually handling claims. It might have been useful if the author listed the various issues with which he did not have to deal in detail.

One could quibble with various points in the book. For example, in the chapter on government control, there is no discussion of the initial precedent-setting cases.[21] Furthermore, the discussion of the *Oil Field of Texas* case[22] may be deficient because it does not point out the full holding of the case. Although the Tribunal did hold in that case, pursuant to unspecified law, that government control or agency did not exist, general principles of law might impose liability on the government for the company's debt as a de facto successor.

The author's discussion of state acts as *force majeure* ignores a key case in the area. The Tribunal's majority opinion in *Blount Bros. Corp. v. Islamic Republic of Iran*[23] provided as follows:

> The position of a state enterprise in circumstances of *force majeure* has been widely discussed. The starting point is acknowledged to be the principle that the separation between a state enterprise and the state itself should be respected, with the result that acts of public authority by the

20. *See, e.g.*, American Hous. Int'l Inc. v. Housing Coop. Soc'y, 5 Iran-U.S. Cl. Trib. Rep. 235, 242, 248 (1984) (dissenting opinion) (noting that the majority did not apply various doctrines such as *culpa in contrahendo*).

21. *See, e.g.*, Rexnord Inc. v. Islamic Republic of Iran, 2 Iran-U.S. Cl. Trib. Rep. 6, 9 (1983); Rayco Wagner Equip. Co. v. Iran Express Terminal Corp., 2 Iran-U.S. Cl. Trib. Rep. 140, 141, 146 (1983) (concurring and dissenting opinions).

22. Oil Field of Texas, Inc. v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 347 (1982).

23. 10 Iran-U.S. Cl. Trib. Rep. 56, 75 (1986).

> state may operate as *force majeure* and excuse the state enterprise from liability.

The Tribunal then discussed the applicable factors and concluded that state action in this case should not preclude the application of *force majeure.* The concurring opinion also dealt with the issue.[24]

In the discussion of foreign exchange controls, the author does not discuss how the Tribunal actually avoided addressing the critical issue of the validity of the exchange controls. The Tribunal did so by holding that a sufficient demand for foreign exchange had not been made, either upon the local bank or upon the central bank.[25] These cases should provide a lesson regarding how to preserve one's claim when that claim involves foreign exchange. Also, the author probably should have discussed the role of insurance, whether private or by the Overseas Private Investment Corporation (OPIC), as an important subject for one conducting business abroad.

The author made every effort to present the subjects clearly, and, for the most part, he succeeded. The use of detailed factual accounts of the cases and lengthy quotes, however, sometimes detracted from the discussion. Generally, the book deals with a large body of law in a well-organized and cohesive fashion.

Certainly, this work will be useful for those preparing for the claims against Iraq arising out of the Persian Gulf War.[26] In addition, as international business transactions continue to accelerate, books such as John Westberg's will be extremely valuable to lawyers and businessmen. The Iran-United States Claims Tribunal exposed the prior tendency of those doing business abroad and with governments to ignore in their contracts many predictable issues. In the future, lawyers and parties should have no excuse for disregarding these issues.

The Tribunal provided an opportunity for many lawyers to become involved with international issues and international arbitration. John Westberg's book can bring much of this experience to those who were unable to participate.

---

24. *Id.* at 82.

25. Hood Corp. v. Islamic Republic of Iran, 7 Iran-U.S. Cl. Trib. Rep. 36 (1984); Schering Corp. v. Islamic Republic of Iran, 5 Iran-U.S. Cl. Trib. Rep. 361 (1984); Blount Bros. Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 95 (1986).

26. Iraqi procedures, however, appear to be different. *See* Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 667 (1991).

INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL. By John A. Westberg, International Law Institute, Washington, D.C.: 1991. Pp. 412. $125.

Reviewed by Nils Mangård*

Introductory Notes

On November 4, 1979, about nine months after the official date of the victory of the Islamic revolution in Iran, a powerful group of armed individuals overran the United States Embassy compound in Tehran. They seized as hostages all diplomats, consular personnel, and other persons present. As a result of negotiations between the Iranian and the United States governments, with the government of Algeria acting as an intermediary, the hostages were freed 444 days later.

The official Algerian resolution that led to the hostages' freedom consisted of two declarations made by the Algerian government on the basis of formal adherences received from Iran and the United States:[1] the General Declaration, recording the central commitments of the parties, and the Claims Settlement Declaration (CSD), which established the Iran-United States Claims Tribunal (Tribunal) as the mechanism envisaged in the General Declaration for facilitating the settlement of claims through binding arbitration.[2]

---

* Retired Judge of Court of Appeal in Stockholm; Former Chairman of the Iran-United States Claims Tribunal, Chamber Three, 1981-1985; University of Stockholm, L.L.B.

1. The two Algerian declarations together with annexed documents are referred to collectively as the "Algiers Accords." J. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 4 (1991).

2. *Id.* For a better understanding of some of the problems within the Tribunal—the sometimes difficult working conditions in a contentious political climate, the extremely low percentage of unanimous decisions—it may be useful to call attention to the composition of the Tribunal. It is composed of nine members: three members appointed by the United States, three members appointed by Iran, and three third-country members appointed by the mutual agreement of the Iranian and United States members, or, failing agreement, by an appointing authority. The nine arbitrators sit in three separate chambers, each consisting of an Iranian, United States, and third-country arbitrator. In all chambers, the third-country arbitrator is the chairperson. The nine arbitrators also sit

The Algiers Accords contained a commitment by Iran of vital importance to the United States. Iran established a special security account containing one billion dollars of unfrozen Iranian assets to be used "for the sole purpose of securing payment of, and paying, claims against Iran in accordance with the CSD."[3] Iran further agreed to maintain the account at a minimum of 500 million dollars until all arbitral awards against Iran had been satisfied.

The Tribunal was set up in The Hague, The Netherlands. The actual work on the approximately 4000 cases submitted to the Tribunal began in the spring of 1982, and the Tribunal rendered the first decisions on the merits at the end of that year. Since then, the Tribunal has issued some 250 awards and decisions in major contested cases.

Mr. John A. Westberg's work reviews the major legal issues impacting the international business community with which the Tribunal has dealt through 1990.[4] Mr. Westberg is an experienced international business lawyer who practices from offices in Washington, D.C. and Falls Church, Virginia. He has worked previously in London and Tehran and has been involved with a large number of claims before the Tribunal and other international tribunals. Therefore, he was well-suited to perform the work he has now accomplished.

In the preface of his book, Mr. Westberg stresses the importance of the Tribunal since that body represents the first collection of readily-available case law of international business. Moreover, the size of the Tribunal's case load assures that it will have addressed most, if not all, of the legal issues that may arise in the context of international business.

An Outline of the Content of the Book

The book presents the material in eight chapters. The text of the Algiers Accords, including ancillary agreements, the Tribunal's Rules of Procedure, and a selective bibliography on the Tribunal are appended.

---

together as a Full Tribunal to decide certain matters. The Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan 19, 1981, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep.9 (1981-2) [hereinafter CSD].

3. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3, 5 (1981-2).

4. The author examines the awards and case law of the Tribunal and not the Tribunal itself. For a more complete description of the Tribunal's organization and work, see, e.g., Nils Mangård, *The Hostage Crisis, the Algiers Accords, and the Iran-United States Claims Tribunal*, in FESTSKRIFT TILL LARS HJERNER: STUDIES IN INTERNATIONAL LAW (1990).

To deal with all the interesting points addressed in the book within the space available for this review is not feasible. For the benefit of a prospective reader, however, a brief survey of the main issues treated in each chapter seems appropriate.

Chapter One, "The Tribunal," is limited to a general description of the Tribunal and certain key provisions of the Algiers Accords. This chapter further deals with the Tribunal's jurisdiction,—the lack of which the respondent normally raises in every claim—the applicable substantive law, and the United Nations Commission on International Trade Law (UNCITRAL) Decision on Arbitration Rules.[5] Additionally, this chapter enumerates certain features that distinguish the Tribunal from earlier international claims tribunals.

In Chapter Two, the author discusses ways in which a drafting lawyer can ensure that a government party is bound to enforce the terms of an agreement at law. As a background, he deals with sovereign immunity and the act of state doctrine. He then proceeds to issues of particular interest before the Tribunal because of its limited jurisdiction, namely state responsibility, agencies, and controlled entities. For example, in the case of United States claimants, the Tribunal has jurisdiction to hear only claims against Iran. Therefore, all United States claimants must prove that Iran, if not itself a party, at minimum controls the entity against which the claim is directed. This question of control is one of the more controversial ones with which the Tribunal has had to deal, and it has been raised in numerous cases. A distinction must be made, however, between government control sufficient to give the Tribunal jurisdiction over a claim, and control that makes the entity the alter ego of the government or otherwise engages the responsibility of the state under international law. Furthermore, the existence of the security account makes it less necessary in many cases to reach the issue of government responsibility. Claims against an entity held to be controlled by the Iranian government also are paid out of the security account. Accordingly, this issue is a sensitive matter for Iran.

Chapter Three of the book raises important issues of applicable law. The author points out that since international business transactions, by definition, engage parties from different states and legal traditions, the law applied to a particular legal question may impact the outcome significantly. The author discerns three different questions falling under the applicable law rubric.[6] In practice, other questions appear even more

5. United Nations Commission on International Trade Law (UNCITRAL) Decision on Arbitration Rules, *reprinted in* 15 I.L.M. 701 (1976).

6. The three questions that Mr. Westberg finds relevant are: (i) What law governs

relevant: First, will an international tribunal in all circumstances uphold a contract's reference to the national, substantive law of one party? Second, what law will apply in the absence of an applicable law clause?

The author dedicates a separate subsection to the issue of applicable law in expropriation claims.[7] The author notes that since these claims do not involve any contract, there normally will not be any applicable law clause to construe, and the validity issue will not arise. Instead, the Tribunal will have to determine what law governs the claim of expropriation in all its aspects, including the fundamental issues of whether an expropriation has taken place and the appropriate remedy. Moreover, expropriation issues always touch the ongoing controversy surrounding the law of expropriation between the capital-exporting industrialized states of the world, and the Third World and socialist states.[8]

In the summary of Tribunal decisions on applicable law, the author notes with regret that these have reflected the general uncertainty that existed before the formation of the Tribunal. Regarding contract claims, however, the author believes that both choice of law clauses and conflict of laws rules will fall by the wayside if their application would provide a manifestly unfair or unjust result. The author further notes that in expropriation claims the Tribunal finally, although hesitantly, recognized the applicability of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran to the questions of whether an expropriation has taken place and the applicable standard for measuring the compensation owed. This has made the Tribunal's task easier, but it does not relieve other tribunals from the duty to research the position of customary international law on these questions when no similar treaties that bind the parties exist.

The author then proceeds to address forum-selection clauses. He notes initially that these clauses have gradually become regarded as enforceable, barring exceptional circumstances. He also points out that the CSD contains a provision that excludes from the Tribunal's jurisdiction any "claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts."[9] Many cases before the Tribunal

---

the validity or binding effect of the contract? (ii) What law will govern procedural issues in an arbitration or litigation? (iii) What law will govern the substantive rights and obligations of the parties. WESTBERG, *supra* note 1, at 60.

7. Expropriation encompasses all forms of the taking of alien property, whether by nationalization, expropriation, or other forms of governmental interference with property rights.

8. *See generally* WESTBERG, *supra* note 1, at 211-51.

9. WESTBERG, *supra* note 1, at 87 (quoting CSD, *supra* note 2, art. II, § I, *re-*

involved contracts containing a similar clause that, according to the Iranian respondent, deprived the Tribunal of jurisdiction.

To establish whether choice of forum clauses met the requirements of the exclusion provision, the three chambers relinquished jurisdiction over nine cases containing nineteen differently worded contractual clauses and asked the full Tribunal to decide "whether claims therein arising out of contracts containing provisions for the settlement of disputes fall within the scope"[10] of that provision. In November 1982, the Tribunal rendered interlocutory awards in all nine cases. The Tribunal deemed some clauses to exclude its jurisdiction, with concurring and dissenting opinions regarding the interpretation of almost every clause. The result was that the Tribunal upheld jurisdiction over thirteen claims, but found no jurisdiction in the remaining six. Two United States arbitrators held that none of the forum selection clauses bound the United States claimants because of changed circumstances in Iran.[11]

Chapter Four, "Liability for Expropriation," is one of the more important parts of the book. The author notes that while the subject has been addressed extensively, all of the commentary thus far has failed to reconcile the contending public positions between the socialist and capital-importing states, and the capital-exporting states. The author then tries to answer certain questions that normally arise when an expropriation occurs by using material from outside the Tribunal and by examining the Tribunal decisions on various expropriation issues.

The last section of Chapter Four raises the issue of other measures effecting property rights. While this concept has been present in the in-

---

printed in 1 Iran-U.S. Cl. Trib. Rep. at 9).

10. Gibbs & Hill, Inc. v. Tavanir, 1 Iran-U.S. Cl. Trib. Rep. 236 (1982) (interlocutory award); Halliburton Co. v. Doreen/IMCO, 1 Iran-U.S. Cl. Trib. Rep. 242 (1982) (interlocutory award); Howard, Needles, Tammen & Bergendoff (HNTB) v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 248 (1982) (interlocutory award); Drucker v. Foreign Transaction Co., 1 Iran-U.S. Cl. Trib.Rep. 252 (1982) (interlocutory award); T.G.S.B., Inc. v. Iran, 1 Iran U.S. Cl. Trib. Rep. 261 (1982) (interlocutory award); Ford Aerospace & Comm. Corp. v. Air Force of the Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 268 (1982) (interlocutory award); Zokor Int'l Inc. v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 271 (1982) (interlocutory award); Stone & Webster Overseas Group, Inc. v. National Petrochemical Co., 1 Iran-U.S. Cl. Trib. Rep. 274 (1982) (interlocutory award); Dresser Indus., Inc. v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 280 (1982) (interlocutory award).

11. Concurring & Dissenting opinions of Howard M. Holtzmann with Respect to Interlocutory Awards in Jurisdiction in Nine Cases Containing Various Forum Selection Clauses, 1 Iran-U.S. Cl. Trib. Rep. 284 (1982); Concurring & Dissenting Opinions of Richard M. Mosk on the Issues of Jurisdiction, 1 Iran-U.S. Cl. Trib. Rep. 305 (1982) [hereinafter Mosk & Holtzmann Opinions].

ternational claims literature for a long time, the express inclusion of other measures effecting property rights in the actions within the Tribunal's jurisdiction represented something new in the international claims practice. In the cases over the years, the Tribunal chambers have reached differing conclusions on what constitutes measures that would give a right to compensation. I personally believe that these measures properly should be defined as acts of governmental interference with legal rights of aliens that do not amount to expropriation. This is because the measures do not result in a taking, but do interfere to the extent they have caused loss.

Chapter Five provides an interesting discussion on contract excuse.[12] As an introduction, the author provides a brief, yet elucidating, analysis of the different concepts and how they have been dealt with in different legal systems. As for the Tribunal awards, the author notes that many contract claims involving pleas of excuse for nonperformance have come before the Tribunal. This was certainly a predictible result of the aftermath of a chaotic revolution. The pleas have come from both sides, from contractors wishing to be excused for not having completed their contracts, and from Iran as an excuse for not making payment in accordance with contract provisions or for ending contracts that it no longer found to be in its interest. In all but a few cases, the excuse pleaded has been that of *force majeure*. The Tribunal awards may give guidance as to what conditions may excuse a party from its contract obligations, and also whether these contracts should be terminated or suspended. Furthermore, the Tribunal also has addressed what remedy to grant a party after a plea of *force majeure* has been accepted.

In his summary of awards involving contract excuse, the author first shows that the Tribunal has found *force majeure* to be a concept recognized in most, if not all, legal systems of the world. Therefore, it is a general principle of law that "does not depend on, or arise out of, an express contractual provision."[13] All awards recognize that the Islamic revolution created *force majeure* conditions, but most of them find that these conditions existed for only a short period of time.[14] In a number of cases in which the parties terminated the contract for *force majeure* rea-

12. These excuses embrace the family of concepts variously referred to as *force majeure*, impossibility, hardship, impracticability, frustration of contract, frustration of purpose, and changed circumstances. WESTBERG, *supra* note 1, at 157.

13. WESTBERG, *supra* note 1, at 181-82 (quoting Anaconda-Iran v. Islamic Republic of Iran, 13 Iran-U.S. Ct. Trib. Rep. 199, 221).

14. *See, e.g.*, Sylvania Technical Services, Inc. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 298 (1985).

sons, the Tribunal followed the rule that the losses resulting from termination must lie where they fell, subject to the Tribunal's equitable discretion to apportion losses.[15] Despite such rulings, the Tribunal still has failed to give unanimous answers to many important questions. Consequently, the law of contract excuse remains a serious problem for the international lawyer.

Mr. Westberg's summary of decisions involving the doctrine of changed circumstances contains a statement with which I must disagree. He states that although the United States government and the United States claimants made changed circumstances arguments in the Iranian forum selection clause cases, the majority essentially ignored these arguments in its decisions.[16] To the contrary, these arguments definitely were not ignored, but were the subject of heated discussions. Moreover, the majority's awards in these cases did not reject arguments that the changes which had taken place in the legal system in Iran as a result of the Islamic revolution constituted such a change in circumstances as to render prerevolutionary Iranian forum-selection clauses unenforceable. Rather, the majority's awards managed to avoid deciding that issue. Therefore, the elegant opinions by Judges Holtzmann and Mosk, recorded in the book, are not quite on point.[17] There is always a risk that the reader may be mislead if majority awards are abridged when compared to per se convincing dissenting opinions.

To understand the Tribunal decisions in this area, 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 as within the Tribunal. The United States government asked permission to submit extensive documentary evidence on contemporary conditions in Iran in support of the United States position.[18] Iran protested vehemently, declaring this action both "hostile" and "political." The Tribunal majority, recognizing its responsibility for the survival of the Tribunal, found an issue in the exclusion clause that provided it with a reason to refuse acceptance of the evidence tendered by the United States.

The Tribunal held that there was insufficient evidence to find that the

---

15. Computer Sciences Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. 269 (1986).

16. WESTBERG, *supra* note 1, at 174.

17. *See* Mosk & Holtzmann Opinions, *supra* note 11.

18. The United States government attempted to submit, *inter alia*, evidence regarding alleged changes in the legal and judicial systems and the cruel penalties applied under the Islamic criminal legislation.

two governments had come to an agreement as to the meaning of the word "binding." Alternatively, it held that the intent of the United States negotiators in including that requirement, which allegedly was to minimize the scope of the exclusion clause in the CSD, had not been made known to the Algerian intermediaries with sufficient clarity. The Tribunal, having attempted to ascertain the meaning of the term in its context, then determined that neither of two possible interpretations, binding as referring either to the choice of forum clause or to the entire contract, contributed any sensible meaning to the term. Therefore, the Tribunal concluded that the word "binding" is redundant.[19] In these circumstances, the Tribunal, "which derives its jurisdiction only from the terms of the Declarations," did not have to reach the question whether changes in Iran may have any impact on the enforceability of forum selection clauses in contracts.[20]

By this politically-wise and legally-correct decision, the Tribunal limited the scope of its conclusions to determine whether certain forum selection clauses excluded its own jurisdiction. Its decisions did not deprive United States claimants of any right to bring their claims to United States courts, where the plea of changed circumstances might be accepted more readily.

In part, Chapter Six addresses the duty to mitigate damages, and particularly the question of whether this duty is absolute or whether only a reasonable effort is required. The book cites an early case, as support for the theory that the duty to mitigate is absolute.[21] The panel in which I was the presiding judge awarded the claimant, an engineer in Iranian governmental service, damages in the amount of fees he would have received under the contract had there not been a breach. We also ruled, however, that he should have sought other employment and deducted an amount for what the claimant could have earned had he sought other employment. My colleague, Judge Mosk, stated in a concurring opinion that the claimant had a duty to take only reasonable steps to mitigate his damages, and that the respondent had the burden of establishing that the claimant had not sufficiently mitigated his damages.[22] In reality, there is no difference of opinion between myself and Judge Mosk. Since it was clear from the pleadings that the defendant had not sought employment, the Tribunal decided that he had not taken reasonable steps to mitigate

19. *See generally* cases cited *supra*, note 10.

20. It should be noted that one of the United States arbitrators, Judge Aldrich, a former State Department official, belonged to the majority.

21. Craig v. Ministry of Energy of Iran, 3 Iran-U.S. Cl. Trib. Rep. 280 (1983).

22. *Id.* at 293-94.

his damages.

I also share the view expressed in *Endo Laboratories*[23] that impossibility or impracticability to mitigate damages should not lead to any reduction of damages. *Alan Craig* illuminates the misunderstandings that may be caused by the frequent practice in the Tribunal of presenting separate opinions some time after the judges sign and register a majority award. At that point, it is too late for the opinions to influence the drafting of the award.

In this chapter, Mr. Westberg also addresses the issue of unjust enrichment, also known as quantum meruit. The Tribunal has recognized that unjust enrichment is a separate cause of action within the Tribunal's jurisdiction. Mr. Westberg has cited the majority award in *Dames and Moore*[24] as a ruling against taking jurisdiction over an unjust enrichment claim on the ground that the contract in the case contained a forum selection clause that fell within the exclusion provision of the CSD. That is only partially correct. Actually, the Tribunal refused to take jurisdiction because one of the essential elements of a claim of unjust enrichment was absent. Specifically, several awards have stated that to claim unjust enrichment, there must be no contractual or other remedy available to the injured party.[25] In *Dames and Moore* there was a valid contract on which the claim could be based, although the Tribunal could not accept the claim because of the forum selection clause. Thus, the claimant was able to pursue his claim in other fora. Judge Mosk's learned dissenting opinion in this case, insofar as it focused upon changed circumstances, also was somewhat beside the point.

In the introduction to Chapter Seven, the author describes the traditional standard of compensation based on the so-called Hull Doctrine's "prompt, adequate and effective" compensation equalling the full value of the property taken.[26] He then notes that the contemporary standard at the time of the Tribunal's creation has been said to be appropriate and just compensation, and that deviations from the full value may be consid-

---

23. Endo Laboratories, Inc. v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 114 (1987).

24. Dames & Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 212 (1983).

25. Sea-Land Service, Inc. v. Islamic Republic of Iran, 6 Iran-U.S. Cl. Trib. Rep. 149 (1984); Ultrasystems, Inc. v. Islamic Republic of Iran, 2 Iran-U.S. Cl. Trib. Rep. 100 (1983); DIC of Delaware, Inc. v. Tehran Redevelopment Corp., 8 Iran-U.S. Cl. Trib. Rep. 144 (1985); Morris-Knudsen Pacific Ltd. v. The Ministry of Roads and Transportation, 7 Iran-U.S. Cl. Trib. Rep. 54 (1984).

26. WESTBERG, *supra* note 1, at 213-14.

ered if exceptional circumstances exist.[27] Because the capital-importing states oppose both standards based on certain resolutions of the United Nations, neither the traditional nor the contemporary standard has enjoyed universal acceptance.

The Tribunal decisions on the subject show that all the chambers have determined that the applicable standard of compensation is full compensation. They have reached that result in two ways: First, by referring to contemporary customary law, and second, by relying on the standard set forth in the Treaty of Amity that reflects the Hull Doctrine. The book value of a company has never been accepted as representing the full value. Instead, chambers prefer to use the concept of fair market value. For an ongoing business, a company is valued as a going concern at the date of taking, which includes goodwill and likely future profitability. In most cases, the question of lawfulness is given no weight. Effects on the property rights of the taking itself or of subsequent events should not be considered, but the impact of changes in the general political, social, and economic conditions that took place prior to the taking should be included.

The Iranian contention is that the standard now applicable under international law is appropriate compensation in view of all the circumstances of the case. This includes, for example, the economic conditions prevailing in the taking state. This standard, according to Iran, normally leads to awards of partial compensation.

The only case that expressly departs from the pattern is *INA Corp. v. Islamic Republic of Iran*,[28] chaired by Judge Lagergren. In that case, the court awarded full compensation based on the Treaty of Amity. The majority award, however, in an *obiter dictum*, stated that in the event of large-scale nationalizations of a lawful character, international law has undergone a gradual reappraisal that may undermine the doctrinal value of any full or adequate standard. In a separate opinion, Judge Lagergren concluded that the current principles of international law required application of the appropriate compensation standard. Utilization of this standard in taking account of all circumstances normally would require discounting the fair market value in cases of lawful large-scale nationalizations by states undergoing a process of radical economic restructuring.

The author concludes that in later awards the Tribunal clearly seems to ignore Judge Lagergren's plea for a flexible approach. A careful reading of *Sedco, Inc. v. National Iranian Oil Co.*,[29] however, reveals that

27. WESTBERG, *supra* note 1, at 221.
28. 8 Iran-U.S. Cl. Trib. Rep. 373 (1985).
29. 10 Iran-U.S. Cl. Trib. Rep. 180 (1986).

the majority limited its holding on the central issue in the case at hand: "a discrete expropriation of alien property."[30] In this manner, it avoided pronouncing on the arguments of Judge Lagergren concerning large-scale nationalizations. Judge Brower, in a concurring opinion, asserted that the limitation of the scope of the majority holding was not warranted and should not encourage any contrary conclusions regarding large-scale nationalizations. He presumed that the chairman would have taken the same position even in a case of large-scale nationalization, once having dictated the award in *AIG*. As the chairman in both cases, I would not have been able to give a definite answer to this question at that time.

The last chapter, "Other Monetary Issues," addresses the issues of interest, costs and lawyers fees, and currency conversion rates. The author notes that the issue pertaining to interest became one of the most significant issues in terms of the compensation realized by successful claimants, especially since the interest awards would double the principal amounts awarded as time passed. On these issues, however, the Tribunal awards demonstrate no common position. Some awards grant a flat rate of between ten and twelve percent, while others are more flexible and seek guidance in the varying investment rates in the United States. Following an unsuccessful attempt in the *Sylvania Technical Services v. Iran*[31] award to lay down basic principles that could be followed by all three chambers, the interest rate issues appeared before the full Tribunal for an authoritative decision in *Case A-19*.[32] The majority of the Tribunal held that the power to award interest—which Iran contested by invoking Islamic law—was inherent in the authority to decide claims on the basis of respect for law. This is because interest customarily has been included in the compensation awarded for damages by international tribunals. On all other issues raised, which included the interest rate and interest period, the full Tribunal declined to set any standard. It reasoned that these were matters for the individual chambers to decide in their discretion on the basis of the particular circumstances of each case. Consequently, the divergence continued to exist.

As for the period for which the Tribunal awarded interest, most awards accept as the starting point the date of the cause of action and award interest up to the full payment. A special formula is used for

30. *Id.* at 187.

31. Sylvania Technical Services, Inc. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 298 (1985).

32. Islamic Republic of Iran v. United States, 16 Iran-U.S. Cl. Trib. Rep. 785 (1987).

payments out of the security account.

The issues pertaining to currency conversion rates are important because of the wide fluctuations of these rates during the past decades. For example, in a case in which the cause of action occurred in 1977 and the award occurred in 1990, the relation between the United States dollar and the rial changed many times. Therefore, the basic issue to be determined is the date as of which the rate is fixed. In contract cases, a substantial majority of Tribunal awards have decided to fix the conversion rate on the date when the obligation or payment became due. In nationalization and expropriation cases, the Tribunal generally has chosen the date when the taking took place, rather than the date of the award or payment, as argued by Iran.

Concluding Comments

The author writes in a clear, unsophisticated style that makes the book easy to read. Most of the chapters and their sections begin with a seemingly accurate statement of the pertinent, prevailing, legal principles of international law. As is apparent from the long list of acknowledgements, the chapters already have been scrutinized by many able jurists. Thus, these introductory notes form a useful background to the Tribunal decisions, allowing readers to develop opinions on whether the Tribunal made new law or merely clarified accepted legal principles.

The presentation of the Tribunal awards is brief, but seemingly accurate, and should be sufficient to make the reader understand the conclusions reached. Only on a couple of points have I found the presentation of majority awards too summary in comparison with lengthy dissenting or concurring opinions recorded. This fact may lead to a misapprehension regarding the majority reasoning.

The surveys of the awards are generally descriptive. The author usually refrains from expressing his approval or dislike of a decision. This, I believe, is the best way to present the vast number of complicated issues that this book contains.

Before concluding this book review, I should like to comment on a subject that, for obvious reasons, Mr. Westberg has not addressed: the sometimes difficult working conditions in the Tribunal and their impact on the decision-making process.[33] Because of their different cultural, religious, and political backgrounds, as well as their differing concepts of law and approach to legal issues, the national arbitrators have difficulty relating when deliberating and adjudicating claims. Unanimous decisions are rare in contested cases; dissenting opinions usually accompany the

33. *See generally* Mangård, *supra* note 4.

awards. It is for the chairman to attempt to negotiate the required majority of two votes, under considerable pressure from the other two arbitrators, and often in an atmosphere of tension and distrust.

The resulting award is not always one that any of the arbitrators among the majority would have rendered if acting alone. For instance, concurring United States arbitrators frequently begin written opinions, which in reality are dissents, with a sentence to the effect that they reluctantly join in the award "only to form the necessary majority," and proceed to severely criticize that same award. The necessity for compromise and the contentious political climate both contribute to rendering a chairman unwilling, or even unable, to innovate in the field of law. The chairman prudently stays within the boundaries of what are commonly accepted rules and principles. In addition, it should be noted that the mission of the Tribunal is, *inter alia*, to "decide all cases on the basis of respect for law, applying such . . . principles of international law as the Tribunal determines to be applicable. . . ."[34] This provision, with its reference to "respect for law," arguably can be construed as limiting the Tribunal's freedom, in its choice of applicable principles, to deviate from current international law. The working conditions mentioned above also may explain, at least in part, why the conclusions reached in certain awards may seem surprising, if not questionable, to legal writers.

Judge Lagergren has pointed out that the many forceful dissenting and concurring opinions tend to limit the authority of the Tribunal awards. Accordingly, he urges that care must be exercised in concluding from the awards that an *opinio juris communis* is emerging. Nevertheless, the possible legal flaws in some of the Tribunal awards do not detract from the merits of the systematic presentation of the awards in this interesting book. Mr. Westberg has undertaken an impressive task and accomplished it in an excellent fashion, benefitting both the international legal community and the international business lawyer.

34. CSD, *supra* note 2, at art. V, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 11.

INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL. By John Westberg, International Law Institute, Washington, D.C.: 1991. Pp. 412. $125.

Reviewed by Koorosh H. Ameli*

Because I generally adopt the views expressed in Mr. Mangård's review,[1] I choose only to add a few words to the points he has covered and a few to those that he has not.

Expropriation Cases

In the opening chapter of his book, Mr. Westberg promises "to examine the awards of the Tribunal and not the Tribunal itself."[2] Despite that promise, the book completely ignores the separate opinions of the Iranian judges, and yet, as has been noted by Mr. Mangård, it records and often elevates the opinion of the United States judges to the status of the Tribunal's actual opinion.

For example, in *INA Corp. v. Iran,*[3] I wrote a declaration, as well as a sixty-eight page dissenting opinion, dealing with the issue of compensation. There, I analyzed the law and practice concerning the issues raised in both the award and in the separate opinions of my two colleagues, President Lagergren and Judge Holtzmann. I also indicated my agreement with President Lagergren's separate opinion and demonstrated why Judge Holtzmann's separate opinion was erroneous in several respects. Mr. Westberg's book fails to analyze my opinion, instead equating Judge Holtzmann's separate opinion with that of President Lagergren and presenting them as "a remarkable example of how two

---

* LL.B. 1973, LL.M. 1975, National University of Iran; LL.M. 1977, Harvard Law School; Ad Hoc Member of the Iran-United States Claims Tribunal 1985-1987; Member of the Iran-United States Claims Tribunal 1990-present.

1. Nils Mangård, *International Transactions and Claims Involving Government Parties: Case Law of the Iran-U.S. Claims Tribunal,* 24 Vand. J. Transnat'l L. 597 (1991).

2. J. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 3 (1991).

3. INA Corp. v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985).

learned and experienced international arbitrators with differing perspectives can find different meaning and draw different conclusions from the same collection of authorities."[4] Thus, I should note that the book's equation of these two judges is inappropriate. In fact, Judge Holtzmann's own opinion demonstrates that he, himself, would not equate his opinion with that of Judge Lagergren.[5]

The substantive law of the *INA* decision and its treatment in the book also merit discussion. In *INA*, I joined President Lagergren in holding that current international law requires appropriate compensation, as opposed to the prompt, adequate, and effective formula of the 1938 Hull Doctrine that has been interpreted as requiring full compensation for lawful nationalizations. "What is required is to start with the compensation methods put forward in the nationalizing state's legislation and subject these to the current requirements of international law that can be proven to be generally accepted."[6] These minimum international law requirements would subject the discretion of the nationalizing state only to some "ideals of fundamental fairness."[7] In determining the appropriate compensation, courts should look at, *inter alia*, whether investors unduly enriched themselves, whether the investments contributed to the economic and social development of the host state, and whether the investors respected the laws of the host state, including its labor law and reinvestment policies. While some have argued that the Treaty of Amity[8] would govern the measure of compensation, its provisions still must be interpreted in light of changes in international law and cannot, by itself, justify an award of compensation greater than that provided under international law.[9]

The book also inaccurately documents the case law surrounding the inclusion of lost profits in Tribunal awards and ignores many Tribunal awards that reject the inclusion of lost profits.[10] Specifically, the author

---

4. WESTBERG, *supra* note 2, at 231 n.89.

5. "Judge Lagergren's eminence commands our attention and impels careful analysis of his views." *INA*, 8 Iran-U.S. Cl. Trib. Rep. at 392.

6. *Id.* at 416.

7. *Id.* 447-50 (citations omitted).

8. Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, 284 U.N.T.S. 93.

9. *See generally* Derek W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRITISH Y.B. INT'L LAW 49 (1988).

10. *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987), nominally supports the inclusion of lost profits. In that case, however, the award granted was relatively low compared to the relief sought or the figure suggested by

places undue reliance upon the nullified award in *Phillips Petroleum v. Iran*[11] in support of including lost profits in Tribunal expropriation awards. The nullification of the original award in *Phillips Petroleum* is mentioned only in a footnote in Chapter Seven, stating that it merely raises "some question as to the status of the original award."[12] Since both the settlement agreement between the parties and the Award on Agreed Terms specifically indicated that the original award "shall be deemed by the parties as null and void and of no effect,"[13] it hardly can be held out as the valid jurisprudence of the Tribunal. Moreover, before the Tribunal issued the Award on Agreed Terms, the Agent of Iran indicated that if the Tribunal sought to make even the slightest change in the terms of the agreement, Iran would reject the agreement. Indeed, if the original award had resolved the dispute and terminated the proceedings or had any final and binding effect, the Tribunal could not render the Award on Agreed Terms in the same case, pursuant to the Tribunal Rules.[14]

Likewise, Chapter Seven does not indicate that the original award in *Phillips Petroleum* resulted in the challenge of Judge Briner, the presiding chairman, for certain irregularities in the making of the award and also resulted in the subsequent revocation proceeding before the full Tribunal in *Case A25*.[15] The book further ignores that the original award was not signed by the Iranian judge, who filed separate opinions concerning problems with the original award.[16]

---

the Tribunal expert in the sense of full compensation. In making adjustments to the figure suggested by the Tribunal expert, the Tribunal reduced the expert's estimate of the project's future income by 92%, leaving only 27 million rials, about $382,000. As suggested in my statement, the Tribunal's acceptance of an additional adjustment for utility charges a day before the filing of the award would easily wipe out the above-referenced positive value that the Tribunal had reached much earlier. *Id.* at 256.

11. Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989) (Original Award).

12. WESTBERG, *supra* note 2, at 233 n.97.

13. Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 285, 286 (1989) (Award on Agreed Terms).

14. "If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms." Final Tribunal Rules of Procedure, art. 34, para. 1, *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 435 (1983).

15. Memorial of the Islamic Republic of Iran and the National Iranian Oil Co., *reprinted in* 1989 IRANIAN ASSETS LITIG. REP. 18232-78; *see also* Islamic Republic of Iran v. United States, 21 Iran-U.S. Cl. Trib. Rep. 302 (1990) (Full Tribunal Termination Order).

16. An arbitrator's refusal to sign an award may have profound consequences on its

Although an award may be nullified in part, the nullification of the original award in *Phillips Petroleum* was total. Moreover, because the nullification decreased the so-called full compensation by as large a figure as nine million dollars, excluding interest, the whole compensation formula and the resulting sum were so altered that neither the award's validity, nor the compensation formula, could be maintained. The Award on Agreed Terms provides a lucid example of how the mechanical calculations of a tribunal can result in such an unreasonable outcome that both parties reject the award in favor of a much lower and more realistic figure.

The book's discussion of *Starrett Housing Corp. v. Iran*[17] is similarly superficial. Chapter Seven makes no mention of my statement or refusal to sign the award. Nor does it provide any critique of the use of discounted cash flow with a twenty-eight percent discount rate, applied on a monthly basis, for a relatively short two-year construction project. The *Starrett* panel's method of valuation has been the subject of criticism since the discounted cash flow method is used typically for the valuation of going concerns with a large future expectancy of continuing business.

The Tribunal issued few awards under conditions that should not be criticized. In many instances, the presiding judge was challenged, but nevertheless persisted in maintaining his position against Iranian protests. Other judges were imposed upon the Tribunal despite vigorous opposition from Iran. Moreover, the high stakes of the Tribunal's decisions have encouraged the United States to adopt an ultra-conservative position on many issues, despite the conflict of these positions with those of several United States scholars. For example, the United States has attempted, with some success, to prevent the codification of the current international law in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES. Professor Oscar Schachter of Columbia University notes that these hostile groups of influential United States lawyers have created obstacles to avoid any risk that a flexible formula would allow the Tribunal to reduce awards of full compensation.[18]

---

validity because this award has not been "decided by a panel [that shall consist] of three members." Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, art. III, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9, 10 (1981-82) [hereinafter CSD].

17. Starrett Housing Corp. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987).

18. Oscar Schachter, *The Question of Expropriation/Compensation in the United Nations Code in the Light of Recent State Policy and Practice* (forthcoming from United

Exemplifying the extreme position taken by these groups of United States attorneys, their British forerunner, Elihu Lauterpacht, does not agree even with the nullified *Phillips Petroleum* award's inclusion of "equitable considerations"[19] in determining compensation for the value of the expropriated property. His view is that any reduction runs contrary to the "full equivalent of the property" standard of the Treaty of Amity.[20] Unfortunately, Mr. Lauterpacht ignores the fact that equitable considerations are the prime justification for excluding post-expropriation events in valuing expropriated property. The Treaty of Amity has no reference to exclusion of post-expropriation events that would reduce considerably the value of the property. Also, the Treaty does not support the claim that compensation payments be made immediately and in cash dollars, nor does it support the claim that such payments include interest from the date of taking. Indeed, as Judge Lagergren stated in *Starrett*, there does not exist "any general obligation in current international law to make payment of compensation immediately on the date of taking."[21] At most "it might be reasonable to allow interest to run only from the date or dates (in case of payments in installments) on which the compensation was to be paid."[22] Consequently, an arbitral tribunal may award the compensation in installment payments with different running methods for any interest that accrues.

Moreover, there are no Tribunal awards actually granting lost profits, a major component of the full compensation formula. Awards that indicate otherwise actually have reduced the full compensation sought by seventy-five to eighty percent. Although book value has not been recognized as the compensation formula in those awards, the United States, based on identical provisions of a similar Treaty of Amity, has sought the book value of the alleged expropriated property in other cases.[23]

Like the present day advocates of the Hull Doctrine, I do not wish to

---

Nations Center on Transnational Corporations, Symposium on the Outstanding Issues in the United Nations Code of Conduct on Transnational Corporations held in The Hague, Sept. 1989).

19. *Phillips Petroleum Co.*, 21 Iran-U.S. Cl. Trib. Rep. at 123.

20. Elihu Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RESOURCES L. 241, 243 (1990).

21. *Starrett Housing Corp.*, 16 Iran-U.S. Cl. Trib. Rep. at 112 n.63.

22. *Id.*; *see also*, Gunner Lagergren, *Five Important Cases on Nationalization of Foreign Property*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No. 5, at 26 (1988).

23. Case Concerning Elettronica Sicula S.p.A. (U.S. v. Italy) 1989 I.C.J. 15 (1989) [hereinafter *ELSI*]. The court's judgment did not reach the compensation issue.

advocate the Calvo Doctrine.[24] One should, however, take into account whether the status of the alien property or investment has been transformed into a domestic investment, either by incorporation or by long term operation in the host state. Indeed, if a state such as the United States considers an alien, permanent resident bound to join its armed forces and to defend its interests in distant places like Vietnam or the Persian Gulf, it may be appropriate to reconsider the alien status of the investment when the host state faces fundamental social and economic changes pursuant to revolution, war, or otherwise. Certainly property should not be put above life, even by capitalists. Judge Oda, in his individual concurring opinion in *ELSI*, indicated that it was possible that the Italian subsidiary could have suffered wrongs that did not necessarily affect the United States parent company. In such a case, an international claim could not have been lodged.[25]

Forum-Selection Clause Cases

Chapters Three and Five deal with nine decisions of the Full Tribunal on the topic of forum-selection clauses. Of the nineteen different contractual forum clauses involved in these cases, the Tribunal only permitted the exclusion of claims based on six such clauses. This represented a very small number and an insignificant amount of claims in those and other cases before the Tribunal. From the outset, it was also clear to the majority of the Tribunal that expropriation claims involving, or even based on, contracts containing unambiguous Iranian-forum clauses still would not be excluded from the Tribunal's jurisdiction.[26]

The *Ford Aerospace v. Iran*[27] test case involved a large number of other major cases before the Tribunal, and thus deserves special attention. This case represented about 300 million dollars in military contract claims, including the IBEX cases. The contract provided, in relevant part:

> All disputes and differences between the two parties arising out of interpretation of the Contract or execution of the Works which can not be settled in friendly way, shall be settled in accordance with the rules provided by the Iranian laws, via referring to the competent Iranian courts.[28]

---

24. WESTBERG, *supra* note 2, at 212 n.7.

25. *ELSI*, 1989 I.C.J. at 86.

26. Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984).

27. Ford Aerospace & Comm. Corp. v. Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 268 (1982).

28. *Id.* at 69.

The Tribunal unjustifiably held that for this clause to deprive the Tribunal of jurisdiction, it must be worded broadly enough to encompass "any" claim arising under the contract. Arguing that it was limited to the interpretation of the contract and the execution of works, the Tribunal asserted jurisdiction over all claims, including those claims that should have been referred to Iranian courts. The Tribunal erroneously held the disputes as to the claimant's certain performance outside of Iran and the respondent's certain performance, such as payment of the invoices, to be outside the scope of the clause. As such, the disputes were found not to prevent the Tribunal from asserting jurisdiction over "all" claims arising under the contract.[29] This is because the CSD excludes "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."[30]

The Tribunal did not distinguish between "any" and "all," even though "any" clearly refers to each unit of the subject, whereas "all" refers to every unit of the subject. Thus, if the clause covered a certain contractual dispute, it should have been excluded from the Tribunal's jurisdiction. Even assuming that "any" and "all" are synonymous, "execution of the works," was clearly broad enough to encompass performance of "actions," "obligations," "duties," and "tasks." The governing Persian version of the contract employed the Persian word "karha," which is synonymous with "actions" and "affairs," for "execution of the works."[31] "Karha" encompasses all the above-stated variations of the word "works."[32]

Disputes as to "execution of works" include nonpayment of invoices for works, regardless of whether certain works are carried out abroad. Moreover, in principle, all municipal courts, including those of Iran, are competent to deal with such ancillary issues if they are competent to deal with the principal matter. Their jurisdiction and competence have even more force when the parties, one of whom is a government, agree by contract to confer jurisdiction upon them.

---

29. *Id.* at 270.

30. CSD, *supra* note 16, at art. II, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9.

31. The Tribunal's consideration of the use of the word "karha" elsewhere in these contracts in *Sylvania Technical Systems, Inc. v. The Islamic Republic of Iran*, 8 Iran-U.S. Cl. Trib. Rep. 298, 306-307 (1985), is also not quite on point.

32. The use of the word "karha," as well as the original Arabic word "omour," in the governing Persian version of the contract reflects the Imperial Army insistence on the use of Persian words when they were available.

Despite the obvious influence of power politics on the *Ford Aerospace* decision, the book fails to criticize that holding. The book's treatment of the Iranian-forum clause cases is similar to the writings of other United States lawyers on this topic.

The book under review, like the two dissenting United States arbitrators in *Ford Aerospace*, has limited its criticism only to the few insignificant cases, such as *Drucker Rice and Cement Contracts*.[33] The Tribunal excluded these cases from its jurisdiction, dismissing the arguments raised by the United States of binding contract and changed circumstances that fundamentally altered the Iranian court system. Without much evaluation of the actual decision, Mr. Westberg argues that the Tribunal should have adhered to the United States position in those cases. Here, as in other sections, the book minimizes the view of the Tribunal majority, instead providing detailed recitations of the dissenting opinions of the two United States arbitrators, as pointing to "persuasive authority to support a contrary conclusion."[34] Furthermore, the book ignores the fact that any fundamental changes in the Iranian court system occurred before the conclusion of the Algiers Declarations by the two governments and were well-known to the United States and its drafters at the declarations. Nevertheless, those same drafters did not provide for a clear term in the CSD or seek the specific agreement of the Iranian side on such an ambiguous understanding of "binding contract" for the intended purpose.

In *Drucker*, the Tribunal allotted four pages to the argument and affidavit of Warren Christopher, the former Deputy Secretary of State who led the United States negotiating team. The Tribunal decided that, unless otherwise specifically provided, "[i]t is not generally the task of this Tribunal . . . to determine the enforceability of choice of forum clauses in contracts."[35] The Tribunal also held that "binding contract" normally refers to the entire contract, rather than only to its forum clause, and noted that a contrary holding would result in a vicious circle.[36] An example of this would be a situation in which the validity of the contract

33. Drucker v. Foreign Transaction Co., 1 Iran-U.S. Cl. Trib. Rep. 252 (1982).

34. WESTBERG, *supra* note 2, at 176. The book also extensively quotes the views of the late Ted Stein in support of the views of the two United States arbitrators, but fails to mention that Mr. Stein worked on these cases as a State Department consultant until the date of the hearing.

35. *Drucker*, 1 Iran-U.S. Cl. Trib. Rep. at 255.

36. *Id.* at 256; Halliburton Co. v. Doreen/IMCO, 1 Iran-U.S. Cl. Trib. Rep. 242, 246 (1982); T.C.S.B. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 261, 266 (1982); Stone & Webster Overseas Group v. Nat'l Petrochemical Co., 1 Iran-U.S.. Cl. Trib. Rep. 274, 277 (1982).

and the Tribunal's jurisdiction have been questioned. In such a case, the word "binding" would be redundant. The redundancy argument here is not against the rule of effective interpretation since one of the claimants in these cases argued that, under Iranian law, the entire contract was permissive rather than binding.[37]

Because the Iranian party insisted upon obtaining a statement from the Tribunal that such claims must be shifted to Iranian courts, and the United States party insisted upon pressing its changed circumstances claim, the Tribunal did not find it necessary to address whether changes in Iran may have an impact on the enforceability of these forum selection clauses. Contrary to Mr. Mangård's suggestion,[38] the United States filed every possible piece of evidence, from translation of the unrelated Islamic Penal Retribution Bill to affidavits of persons such as Professor Coulson, its expert on Iranian law. Iran objected that these were irrelevant to civil cases, as well as to the arbitration cases, under supervision of Iranian courts.

Moreover, neither the book under review, the dissenting opinions of the two United States arbitrators, nor any commentary on the matter, has cited one decision of an arbitral tribunal determining the enforceability of choice of other forum clauses in contracts. Municipal courts do not derive their jurisdiction from a *compromis* such as the Algiers Declarations. A conjectural sentence in the individual opinion of British Judge Fitzmaurice in the *Fisheries Jurisdiction Cases*[39] is certainly not even an *obiter dictum* of the International Court of Justice (the Court), despite the fact that Judge Holtzmann's dissent attempts to elevate it to the status of a Court principle.[40] In the meantime, these critics knew that United States courts had shown enthusiasm to assert jurisdiction in simi-

---

37. Under Iranian law, some contracts are permissive by nature. Thus, they can be revoked at will by either party despite the fact that there is no such provision in the contract. These contracts are revoked involuntarily as well, in cases such as death or insanity. *See* IRANIAN CIVIL CODE arts. 181, 186, 611, 638, 678-83, *reprinted in* THE CIVIL CODE OF IRAN 41, 42, 99, 103, 107-08 (M. Sabi trans. 1973).

38. Mangård, *supra* note 1, at 603.

39. 1973 I.C.J. 33. After stating that he had nothing to add to what is stated in the judgment, Judge Fitzmaurice noted that in his "opinion the only change that could possibly be relevant (if at all) would be some change relating directly to the, so to speak, operability of the jurisdictional clause itself." As a footnote, he added, "[f]or instance if the character of the International Court itself had changed in the meantime so that it was no longer the entity the Parties had had in mind." *Id.* at 33 n.16.

40. Concurring and Dissenting Opinions of Howard M. Holtzmann with respect to Interlocutory Awards on Jurisdiction in Nine Cases Containing Various Forum Selection Clauses, 1 Iran-U.S. Cl. Trib. Rep. 284, 290.

lar cases on the basis of these arguments.[41]

Another deficiency in Mr. Westberg's discussion of forum-selection clauses is that it fails to deal with the impact of third country arbitration clauses that the Tribunal unanimously held to be within its jurisdiction. In *Reading & Bates*,[42] the United States claimant had filed its claim before both the Tribunal and the International Chambers of Commerce Court of Arbitration in Paris (ICC). The Tribunal ordered the claimant to move for a stay of the ICC proceeding.[43] In another case, however, two United States partner claimants had filed no claim with the Hague Tribunal. Therefore, the ICC tribunal unanimously asserted jurisdiction, but only because the other two partner claimants were not United States citizens and the partnership had not been formed under United States law.[44] As such, the CSD did not cover that claim.

Other Changed Circumstances Cases

At the outset of this discussion, I would agree with the book that the Tribunal has used the changed circumstances much less than expected. As to the specific changed circumstances cases, however, I would take issue with the author's suggestion in Chapter Five that Chamber One's *Questech*[45] holding conflicts with Chamber Three's *Mobil Oil*[46] decision,

---

41. *See, e.g.*, Dames & Moore v. Atomic Energy Organization of Iran, No. CV-4918 LEWS [PX] (C.D.Cal. 1981), *reprinted in* 1981 Iranian Assets Litig. Rep., 2391, 2438 (granting the claim although it was based on a contract containing an Iranian forum selection clause). The judgment in the district court was suspended, and the claim was brought to the Tribunal pursuant to the Algiers Declaration. The Tribunal dismissed the claim because of the Iranian forum selection clause. Dames & Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 212, 219-20. Moreover, in *Continental Grain Export Corp. v. Ministry of War-ETKA*, 603 F. Supp. 724 (S.D.N.Y. 1984), a United States court asserted jurisdiction over a company's claim against Iran, despite the fact that it was based on a contract containing an Iranian forum selection clause. The United States Court ignored both the clause and that the Tribunal already had given effect to the clause by dismissing the claimant's case at the Hague. Continental Grain Export Corp. v. Government Trading Corp., 3 Iran-U.S. CTR 319 (1983). The United States court based its finding on the fact that the Iranian defendant had not rebutted the claim that trial in Iran would be "unreasonable and unjust." *Continental Grain*, 603 F. Supp. at 729.

42. *Reading and Bates Corp. v. Islamic Republic of Iran*, 2 Iran-U.S. Cl. Trib. Rep. 401 (1983).

43. This motion subsequently resulted in the termination of the ICC proceeding.

44. GTE Int'l Inc., NEC Corp., Page Comm. Engineers, Inc., Siemens Aktiengesellschaft v. Islamic Republic of Iran, No. 4209 (ICC, Paris, 1985), *reprinted in* 1984 Iranian Assets Litig. Rep., 7912, 8065.

45. Questech, Inc. v. Ministry of Defence of the Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep. 107 (1985).

Chamber Two's *Amoco International Finance*[47] decision, and the nullified *Phillips Petroleum*[48] cases. A careful look at these awards indicates no conflict. In *Rockwell*,[49] Chamber One affirmed *Questech* by holding that contracts may, by themselves, come to an end as a result of changed circumstances, or alternatively, that such changes may justify termination by the parties. In *Rockwell*, Chamber One did "not find, however, that the victory of the Islamic Revolution . . . automatically . . . resulted in a cancellation of all contractual obligations,"[50] and used Chamber Three's *Mobil Oil* decision as support.

Chamber Three's statement in *Mobil Oil* on changed circumstances also should be considered in light of the fact that it did not reach the grant of compensation because the parties later settled the case. Furthermore, the same chamber, when granting compensation in *McCollough*,[51] stated that it found "that general principles of law require the Tribunal to give certain consideration to the effect which the relative value of the Iranian rials to the US dollars may have on the satisfaction awarded the Claimant. This is all the more imperative as the Tribunal is required by Article V of the Claims Settlement Declaration to take into consideration 'changed circumstances.' "[52]

A better reason for recognition of the right of the Defense Ministry to terminate the contract after the Islamic Revolution, however, could be found in the state's inherent power to terminate public contracts in the public interest with no duty to compensate the contractor for lost profits or any consequential damages. This is a general principle of law, as well as of Iranian law.[53] "The most radical of special prerogatives enjoyed by the administration is the right to terminate the contract unilaterally, when the public interest so requires. This drastic power is a widespread feature of national systems of procurement, and is evidently considered

---

46. Mobil Oil Iran Inc. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 3 (1987).

47. Amoco Int'l Fin. Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

48. Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989); Phillips Petroleum Company Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 285 (1989).

49. Rockwell Int'l Systems v. Islamic Republic of Iran, 23 Iran-U.S. Cl. Trib. Rep. 150 (1989).

50. *Id.* at 171. Judge Holtzmann, meanwhile, maintained his *Questech* dissenting opinion. *Id.* at 218 n.3.

51. McCollough & Co., Inc. v. Ministry of Post, Telegraph & Telephone, 11 Iran-U.S. Cl. Trib. Rep. 3 (1986).

52. *Id. at* 32-33.

53. *Bowett, supra* note 9, at 53-59.

necessary in order to maintain the freedom of action of public authorities."[54]

Every public contract implicitly recognizes the right of the state to pass subsequent statutes empowering it to exercise its power of eminent domain or terminate contracts in the public interest. A lawful requisition or termination, rather than breach, of a contract may require only just compensation and not damages for anticipatory profits.[55] As the United States Supreme Court has stated, "[t]he taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."[56] Also, an English Court of Appeal has stated that "a government cannot fetter its duty to act for the public good. It cannot bind itself—by an implication in the contract—not to perform its public duties."[57] In other words, as a matter of constitutional or fundamental law, parliamentary supremacy bars contract stabilization against future legislation, even if a public contract has also been ratified by Parliament.

Mitigation of Damages in Breach of Contract Cases

My remarks on Chapter Six concern the claimant's obligation of damage mitigation, as discussed in *Endo Laboratories Inc. v. Iran*.[58] I principally share Judge Mangård's view that a claimant's obligation to mitigate damages may be discharged by the impossibility or impracticability. For example, in the state in which production occurs, it may not be feasible to repackage and sell products such as pharmaceuticals that have been made for use in another state. Claimants may discharge this obligation by giving the original purchaser proper notice of the impossibility and of any intention to dispose of the products by donation to local charitable organizations. Otherwise, any donation should be made to charitable organizations of the state of the purchaser, rather than of the state of the producer. Any charitable organization in the purchaser's state would

---

54. VII Int'l Encyclopedia of Comp. L. 40 (1982) (reviewing the legal systems of France, West Germany, Italy, the United Kingdom, and the United States).

55. *See, e.g.*, J. McBride & I. Wachtel, Government Contracts, § 30.40 (1976).

56. Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) (citations omitted).

57. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex, [1977] 3 WLR 677, 686 (*per* Lord Denning), *aff'd* House of Lords [1978] 3 WLR 274 (H.L.).

58. Endo Laboratories v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 114 (1987).

be ready to undertake transportation charges, considering the high demand for the pharmaceuticals at the time because of the revolution and war. In any event, at least tax and similar benefits obtained from the donation could reduce the claimant's damages. None of these points have been dealt with in the majority or dissenting opinions of the Tribunal in *Endo Laboratories* or in Mr. Mangård's book review.

Conclusion

In my view, priority should be given to the unanimous awards of the Tribunal when trying to discern the authoritative statements of the law. This priority should also extend to the full Tribunal majority awards, for which there is at least one vote from each block of the arbitrators. Other majority awards should be considered in light of all circumstances of the case, as well as the Tribunal, rather than only in view of the separate opinion of the United States arbitrator.

Despite the foregoing criticisms, the book's lessons for the international business lawyer are valuable to both corporate and government lawyers, although the book's focus is generally on the corporate lawyer. John Westberg has done a valuable work for which I congratulate him and those who assisted him.