

APPLICABLE LAW IN INTERNATIONAL  
ARBITRATION: THE IRAN-U.S. CLAIMS  
TRIBUNAL EXPERIENCE

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1. INTRODUCTION

International commercial arbitration is being enthusiastically promoted throughout the international legal community. Congresses and conferences abound; over three hundred delegates attended the 1988 Tokyo conference of the International Council for Commercial Arbitration. New arbitration journals proliferate.<sup>1</sup> New international arbitration centers compete for business, particularly around the Pacific Rim in such locations as Hong Kong (opened in 1985), Los Angeles (1985), Melbourne (1985) and Vancouver (1986).

Major jurisdictions are adopting new arbitration laws, often for the unabashed purpose of luring international arbitral proceedings. The United Kingdom substantially revised its arbitration legislation in 1979, in part to promote itself as a venue for arbitration.<sup>2</sup> Other important jurisdictions have made similar moves, including France, Belgium, the Netherlands and Switzerland.<sup>3</sup> The Canadian Federal Government and several Canadian provinces have recently adopted new arbitration laws patterned on the UNCITRAL Model Law on International Commercial Arbitration.<sup>4</sup>

The obvious interest in international commercial arbitration partly reflects the growing willingness of states and their commercial entities to agree to arbitration in lieu of insisting on settlement by their national courts.<sup>5</sup> It

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<sup>1</sup> See, e.g., *Journal of International Arbitration* (initiated in 1984); *Arbitration International*, published by the Chartered Institute of Arbitrators (1985); and *International Arbitration Report*, published by Mealey Publications (1986).

<sup>2</sup> See Benti, *Making England a More Attractive Venue of International Commercial Arbitration by Less Judicial Oversight*, 5 J. INT'L ARB. 49 (1988); and Park, *The Influence of National Legal Systems on International Commercial Arbitration: Recent Developments in English Arbitration Law*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 81, 97 (T. Carbonneau ed. 1984) [hereinafter Carbonneau].

<sup>3</sup> Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in Carbonneau, *supra* note 2, at 117. The Belgian Act of Mar. 27, 1985, is reprinted in 25 ILM 725 (1986); the 1986 Netherlands statute, bk. 4 of the Code of Civil Procedure, is reprinted in 26 ILM 921 (1987); and chapter 12 of the 1987 Swiss statute on private international law (dealing with international arbitration) is reprinted in 27 ILM 37 (1988).

<sup>4</sup> See 12 Y.B. COM. ARB. 361-62 (A. J. van den Berg ed. 1987); Noecker & Hentzen, *New Legislation on Arbitration in Canada*, 22 INT'L. LAW. 829 (1988).

<sup>5</sup> See K.-H. BÖCKSTIEGEL, *ARBITRATION AND STATE ENTERPRISES—A SURVEY ON THE NATIONAL AND INTERNATIONAL STATE OF LAW AND PRACTICE* (1984).

testifies to long-standing claims that arbitration provides faster, more economical decisions than litigation in national courts (although the costs and occasional delays of large international arbitrations and associated enforcement proceedings cast some shadows on these claims). The expansion of arbitration may also reflect a judgment that arbitral decision making can better accommodate the interests and expectations of parties from different legal systems and cultures than can national courts. The advocates of arbitration maintain that arbitrators can select or shape legal rules particularly appropriate to transnational settings, sustaining the reasonable expectations of international businessmen without giving undue weight to the technicalities or peculiarities of national legal systems.<sup>6</sup>

How commercial arbitrators actually determine the law they apply in international cases has been difficult to judge. Arbitrations are often confidential; published awards are often summarized or heavily edited.<sup>7</sup> However, the growing body of published decisions of the Iran-United States Claims Tribunal provides new opportunities for analyzing the choice of applicable law in international commercial arbitration. The Tribunal has generated over five hundred publicly available awards since 1981. About 160 are "awards on agreed terms," giving effect to voluntary settlements. Others deciding contested cases range from a few paragraphs to hundreds of pages. The Tribunal's arbitrators have broad discretion to determine the substantive law to be applied in these cases, and they are largely insulated from concerns about review by national courts. This article examines the results.<sup>8</sup>

The Tribunal is a unique international institution, described as "the most significant arbitral body in history."<sup>9</sup> It was created in 1981 as one element of the settlement of the 15-month hostage crisis between the United States and Iran. Its task has always been difficult. It was born out of a grave bilateral crisis and relations between them remain unsettled for both countries. Nevertheless, the Tribunal has successfully addressed an enormous caseload: 542 large claims brought by U.S. or Iranian nationals against the

<sup>6</sup> See, e.g., Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute*, in *UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 169, 189-90 (P. Sanders ed. 1984) [hereinafter Sanders].

<sup>7</sup> For some arbitrators' methods of choosing applicable law, see Lando, *The Law Applicable to the Merits of the Dispute*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 101 (J. Lew ed. 1986) [hereinafter Lew]. Professor Lew's *Applicable Law in International Commercial Arbitration* (1978) [hereinafter APPLICABLE LAW] collects an extraordinary range of materials on individual arbitrations, but his net was cast wide and the catch is difficult to cull.

<sup>8</sup> The Tribunal's awards can be obtained from the Registry of the Tribunal in The Hague for a fee. They can also be found in the *Iran-United States Claims Tribunal Reports* (Grotius Publications, Ltd.) [hereinafter IRAN-U.S. C.T.R.]; in the *Iranian Assets Litigation Reporter* (Andrews Publications) [hereinafter I.A.L.R.]; in *Mealey's Litigation Reports—Iranian Claims* (Mealey Publications); and on WESTLAW.

<sup>9</sup> Lillich, *Preface*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-83*, at vii (R. Lillich ed. 1984) [hereinafter Lillich]. For background on the Tribunal, see *Symposium on the Iran-United States Claims Tribunal*, 16 L. & POL'Y INT'L. BUS. 667 (1984). For a recent bibliography, see Ziade, *Selected Bibliography on the Iran-United States Claims Tribunal*, 2 ICSID REV. 534 (1987).

other Government; 421 claims by U.S. and Iranian banks; 2,795 small claims (claims of less than \$250,000 presented by either the U.S. or the Iranian Government); 74 B cases (intergovernmental claims under contracts for the purchase of goods or services); and 23 A cases (interpretations of and compliance with the Algiers Accords).<sup>10</sup> By contrast, the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris averaged 243 requests for arbitration annually between 1977 and 1981, and constituted approximately two hundred arbitral panels each year. Many of these ICC cases involve less than \$250,000 and would be "small claims" in the Tribunal.<sup>11</sup>

As the Tribunal's task is not completed, this article presents an interim picture. Nevertheless, a substantial majority of the private large claims (those over \$250,000) have been resolved and paid, and the Tribunal is grinding through the remainder of its docket. As of September 20, 1988, it had disposed of 743 of the 963 large claims and bank claims. About two-thirds of the intergovernmental disputes (A and B cases) are completed. Over 2,500 small claims remain; both sides have professed the wish to settle, rather than bear the costs and trouble of arbitrating them. However, the legal issues the small claims present parallel those already decided. Consequently, the main lines of the Tribunal's treatment of applicable law have now been laid down.

The charter of the Tribunal, the Claims Settlement Declaration,<sup>12</sup> permits it to look to a wide range of sources to determine the law it will apply. The arbitrators, all drawn from different legal traditions, thus have broad discretion in defining a common legal framework for deciding particular cases. A majority of the claims have been decided entirely or substantially on the basis of the parties' contracts. Where there is no contract, or where it does not provide sufficient rules, the Tribunal regularly has identified and applied general principles of law. In claims under public international law, such as expropriation, treaty interpretation and expulsion claims, the Tribunal has applied that body of law. The arbitrators' usual pattern has been to decide on the basis of rules that can be characterized as common to the parties (i.e., the contract) or to international commerce generally (i.e., general principles of law). The Tribunal has rarely decided on the basis of national rules, even in cases where the parties might arguably have agreed on them as the rule of decision.

<sup>10</sup> Stewart, *The Iran-United States Claims Tribunal: Accomplishments and Prospects*, in 1984 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984, at 525, 529.

<sup>11</sup> See Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, in Carbonneau, *supra* note 2, at 235, 237-38.

<sup>12</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, DEP'T ST. BULL., No. 2047, February 1981, at 3, reprinted in 75 AJIL 422 (1981), and 20 ILM 230 (1981) [hereinafter Claims Settlement Declaration].

## II. ARTICLE V OF THE CLAIMS SETTLEMENT DECLARATION

Article V of the Claims Settlement Declaration provides: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."<sup>13</sup> Thus, the Tribunal's fundamental obligation is to decide cases "on the basis of respect for law." Because of the primary role given law by Article V, the United States argues that the Tribunal does not have jurisdiction to decide cases *ex aequo et bono* or as an *amiable compositeur* on the basis of nonlegal principles. (The Tribunal seems not wholly convinced. In 1983, over U.S. objections, it retained the language of Article 33(2) of the UNCITRAL Rules permitting it to decide *ex aequo et bono* if the parties to a dispute agreed. The issue remains academic since in no case have both parties agreed to decision *ex aequo et bono*.)<sup>14</sup>

The broadness of the standards found in Article V derived from practical and political necessity. When the Claims Settlement Declaration was negotiated in 1980-1981, the United States and Iran could not have agreed on any system of law or of conflict of laws to govern the claims. The task was too contentious and complex, the time too short. Moreover, the Tribunal potentially faced a wide range of claims. In the circumstances, the negotiators left it all to the Tribunal. Choice of law, a subject of great complexity and importance, was relegated to a single sentence.<sup>15</sup>

The first 13 words of Article V demand that Tribunal arbitration be a legal process, not a mediation or negotiation. This phrase—"the Tribunal shall decide all cases on the basis of respect for law"—appears to have been drawn from Article 15 of the 1899 Hague Convention for the Pacific Settlement of International Disputes. That article (carried forward as Article 37 of the 1907 revision of the Convention) defines the object of international arbitration to be "the settlement of differences between States by judges of their own choice and on the basis of respect for law."<sup>16</sup> Decision "on the basis of respect for law" was intended to curb the perceived disposition of 19th-century arbitrators to decide interstate disputes on nonlegal grounds. Secretary Root's instructions to the U.S. delegation to the 1907 Hague Conference explained:

<sup>13</sup> DEP'T ST. BULL., No. 2047, at 4.

<sup>14</sup> See Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: Private Rights and State Responsibility*, in Lillich, *supra* note 9, at 1, 15-16.

<sup>15</sup> On the negotiation of the Claims Settlement Declaration, see Owen, *The Final Negotiation and Release in Algiers*, in AMERICAN HOSTAGES IN IRAN 297 (P. Kreisberg ed. 1985).

<sup>16</sup> Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, TS No. 392, 1901 Gr. Brit. TS No. 9 (Cmd. 798). Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, Art. 37, 36 Stat. 2199, TS No. 536. Both the United States and Iran are parties to the 1899 Hague Convention. (Iran is not a party to the 1907 Convention.)

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There can be no doubt that the principal objection to arbitration rests upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different . . . .<sup>17</sup>

Comparable considerations influenced the negotiators of the Algiers Accords. Both sides could agree to an objective and principled process of arbitration. However, if either party came to see the Tribunal's decisions as exercises in political mediation or accommodation, the Tribunal's authority and legitimacy would be impaired. The United States also had strong reasons under domestic law for requiring cases to be decided "on the basis of respect for law." The Algiers Accords required U.S. claimants to forgo the pursuit of judicial remedies in U.S. courts and to pursue their claims instead in the Tribunal. In *Dames & Moore v. Regan*,<sup>18</sup> the U.S. Supreme Court affirmed the President's power to accomplish this objective. The Court also decided that the claim by Dames & Moore that suspension of its claims constituted a taking was not ripe, but affirmed the jurisdiction of the Court of Claims to hear such claims.<sup>19</sup> Requiring decision on the basis of respect for law strengthened the position of the United States in responding to any such future taking claims.

Article V establishes a range of possibilities for determining the governing law. The Tribunal can apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable." In contrast with other familiar international arbitration rules discussed below, this formula does not require application of any system of conflict-of-laws rules. The Tribunal is free to select rules of substantive law from whatever sources and through whatever processes it chooses.

Applicable law is to be determined "taking into account relevant usages of the trade, contract provisions, and changed circumstances." This language suggests issues that have not been transparently addressed by the Tribunal (e.g., what does it mean to "take something into account"?). Trade usages have received little attention; contract provisions have been by far the most common source of law. "Changed circumstances" were added at U.S. instigation "specifically to authorize the Tribunal to disregard Iranian law that might give effect to an Iranian-forum clause."<sup>20</sup> However, in 1982 the Tribunal rejected the U.S. argument that it should exercise jurisdiction

<sup>17</sup> Secretary Root to the American delegates to the Hague Conference, May 31, 1907, Dep't of State File No. 40/302A, reprinted in 1907 FOREIGN RELATIONS OF THE UNITED STATES 1128, 1135, 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 61 (1943).

<sup>18</sup> 453 U.S. 654 (1981).

<sup>19</sup> *Id.* at 688-90. See Trimble, *Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317 (1984).

<sup>20</sup> Feldman, *Ted L. Strin on the Iran-U.S. Claims Tribunal—Scholarship par Excellence*, 61 WASH. L. REV. 997, 998 (1986).

notwithstanding choice-of-forum provisions requiring adjudication in Iranian courts.<sup>21</sup> Since the Tribunal rejected the U.S. position in the forum clause cases, the "changed circumstances" language of Article V has had limited use.<sup>22</sup>

In giving the Tribunal broad discretion to determine applicable law, the United States and Iran came down on the predominant side of a lively and continuing debate in the international arbitration community concerning the law to be applied to the substance of disputes.<sup>23</sup> As recently as 30 years ago, a widely held view allowed arbitrators little discretion in selecting the substantive law of the arbitration. As rapporteur of the Institut de Droit International, Professor Sauser-Hall maintained that arbitrators' and arbitral parties' choice of applicable law was bound by the conflict-of-laws system of the forum state. In the absence of a choice of law by the parties authorized by the law of the forum, the arbitrator must apply the conflict rule of the tribunal's forum or seat. This view was adopted by the Institut at its Amsterdam session in 1957 and again at its Neuchâtel session in 1959.<sup>24</sup> Professor Mann expressed a similar view.<sup>25</sup>

The view that applicable law must be determined under the choice-of-law rules of the seat of arbitration retains energetic supporters.<sup>26</sup> Nevertheless, it holds far less sway among theorists and practitioners today than it once did. As a practical matter, it can be difficult to identify the seat of an arbitration. Moreover, this approach dictates that disputes between parties from A and B, heard by an arbitrator from C, sitting for convenience in D, might be decided on the basis of an anomalous substantive rule determined by D's equally unusual conflict-of-laws rule. Alternative approaches have found wider favor.

In the Economic Commission for Europe, negotiators of the European Convention on International Commercial Arbitration of 1961 rejected the Institut's position and adopted an alternative approach that has gained a wide following. The Convention confers primary authority to determine the applicable law on the parties; they need not refer to national legal systems. Arbitrators are given discretion if the parties do not make a choice, but they must act within the limitations of some system of conflict-of-laws rules. Article VII(1) of the Convention thus provides:

The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any

<sup>21</sup> See text at note 107 *infra*.

<sup>22</sup> *But cf.* Questech, Inc. v. Ministry of Nat'l Defense, 9 IRAN-U.S. C.T.R. 107, 122-23 (1985 II), summarized in 80 AJIL 362 (1986).

<sup>23</sup> See Bellet, *Foreword*, 16 L. & POL'Y INT'L BUS. 667, 672 (1984).

<sup>24</sup> See Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613, 617 (1982); J. LEW, APPLICABLE LAW, *supra* note 7, at 245-47; and Sauser-Hall, *L'arbitrage en droit international privé*, 44 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 469 (1952 I), 47 *id.* at 394 (1957 II), and 48 *id.* at 264 (1959 II).

<sup>25</sup> Mann, *Lex Facit Arbitrum*, in LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967).

<sup>26</sup> See, e.g., Klein, *The Law To Be Applied by the Arbitrators to the Substance of the Dispute*, in THE ART OF ARBITRATION 189 (J. Schultsz & A. J. van den Berg eds. 1982).

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almost unlimited freedom in the choice of rules of substantive law to be applied in international commercial arbitration. It clearly permits an international arbitrator to decide a case on the basis of the much debated *lex mercatoria*.<sup>36</sup> Article 1496 of the French Decree of May 12, 1981, provides: "The arbitrator shall decide the dispute in conformity with the rules of law which the parties have chosen; in the absence of such a choice, he shall decide according to the rules he deems appropriate. He shall in every case take into account commercial usage."<sup>37</sup>

There is no mention of conflict rules if the parties do not agree. Arbitrators operating under the French statute may apply any substantive rules they choose, provided they also take into account "commercial usage." Arbitrators' discretion under Article V of the Claims Settlement Declaration is even broader, for the article does not require arbitrators to honor agreements of the parties. The next section examines the exercise of that power.

### III. THE PRACTICE OF THE TRIBUNAL

Inevitably, after 7 years and several hundred decisions, the Tribunal's handling of choice of law has not been wholly uniform. Arbitrators have come and gone; individual members have taken quite different approaches. Moreover, the Tribunal has four distinctive institutional configurations. All nine members sit *en banc* to hear some intergovernmental matters and important common issues. More frequently, the Tribunal sits in Chambers composed of three arbitrators. Each configuration has had its own approaches.

Nevertheless, there are consistent themes. The Tribunal has typically avoided reference to national systems of law as the source of controlling rules. Instead, it has regularly applied non-national principles derived from the parties' contracts, general principles of law or public international law. Indeed, to avoid applying particular national law rules, the Tribunal has sometimes disregarded the principle of party selection of applicable law that is fundamental to the ICC, UNCITRAL and French approaches. *CMI International, Inc. v. Iran* involved a claim for breach of contract arising out of equipment purchase orders that incorporated the laws of the state of Idaho (here, the Idaho U.C.C.). In deciding that it was not bound by parties' choices of law, the Tribunal described its prerogatives in sweeping terms:

It is difficult to conceive of a choice of law provision that would give the Tribunal greater freedom in determining case by case the law relevant to the issues before it. Such freedom is consistent with, and perhaps almost essential to, the scope of the tasks confronting the Tribunal. . . . [T]he Tribunal may often find it necessary to interpret and

<sup>36</sup> See Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, in Lew, *supra* note 7, at 113; Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985).

<sup>37</sup> Decree of May 12, 1981, 1981 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE 1492, translated in 20 ILM 917 (1981). See Audit, *supra* note 3, at 131.

apply treaties, customary international law, general principles of law and national laws, "taking into account relevant usages of the trade, contract provisions and changed circumstances", as Article V directs.

With respect to the assessment of damages, the Tribunal considers its main task to be determining what are the losses suffered by the Claimant and to award compensation therefor. Our search is for justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals.<sup>38</sup>

Second, the Tribunal typically has not given detailed analyses or explanations of its choices of law. There are exceptions, notably Chamber Three's awards in two multimillion-dollar oil company claims rendered on Bastille Day, 1987.<sup>39</sup> Even among claims more modest in scale, a few awards have developed choice-of-law issues. Thus, in *Dic of Delaware, Inc. v. Tehran Redevelopment Corp.*,<sup>40</sup> Arbitrators Mangård, Ansari and Mosk addressed, *inter alia*, the law applicable to the validity of a third party's assignment of claims, contract provisions potentially barring certain assignments of rights and proof of the existence of a purported contract. National law was frequently invoked and applied. The award is generally transparent; premises and legal reasoning can be scrutinized.<sup>41</sup>

These decisions, however, are not characteristic, either in their recourse to national law or in their analysis, to the evident frustration of some arbitrators. Arbitrator Mosk, who joined with the majority in *Dic*, dissented from a second award filed the same day with the following observations:

The majority's opinion in this case . . . might be more comprehensible if it contained a discussion of the source of the law applied. . . . [T]here appear to be choice-of-law issues. Indeed, in the Partial Award, the Tribunal specifically discussed its choice of law with respect to transactions similar to those involved. . . . Yet, in the instant matter, the Tribunal gives little indication that it considered the possibility that different law might apply to different transactions and to different issues involved in the case. One cannot discern from the majority's opinion how the majority derived whatever legal principles it invokes.<sup>42</sup>

<sup>38</sup> 4 IRAN-U.S. C.T.R. 263, 267-68 (1983 III). This characterization of the Tribunal's task as a search for justice and equity has been questioned as inconsistent with the duty to decide on the basis of respect for law. Westberg, *The Applicable Law Issue in International Business Transactions with Government Parties—Rulings of the Iran-United States Claims Tribunal*, 2 ICSID REV. 473, 481 (1987). *CMI* is not unique. See *Parguin Private Joint Stock Co. v. United States*, 13 IRAN-U.S. C.T.R. 261, 268-69 (1986 IV) (interest awarded notwithstanding choice-of-law provisions arguably precluding it); *Atomic Energy Org. v. United States*, 12 IRAN-U.S. C.T.R. 25, 28 (1986 III) (same); Concurring and Dissenting Opinion of Richard M. Mosk, *American Bell Int'l Inc. v. Iran*, 6 IRAN-U.S. C.T.R. 74, 95, 97-98 (1984 II) ("It might be that by virtue of Article V . . . the Tribunal can apply law other than that designated by the parties to the contract").

<sup>39</sup> *Amoco Int'l Fin. Corp. v. Iran*, 15 IRAN-U.S. C.T.R. 189 (1987 II), summarized in 82 AJIL 358 (1988); and *Mobil Oil Iran, Inc. v. Iran*, AWD 311-74/76/81/150-3, I.A.L.R., July 24, 1987, at 14,534, summarized in 82 AJIL 136 (1988); both are discussed *infra*.

<sup>40</sup> 8 IRAN-U.S. C.T.R. 144 (1985 I).

<sup>41</sup> And they have been. See Westberg, *supra* note 38, at 481.

<sup>42</sup> Dissenting Opinion of Richard M. Mosk from Final Award, *Harnischfeger Corp. v. Ministry of Roads & Transp.*, 8 IRAN-U.S. C.T.R. 119, 134, 141 (1985 I). *Accord* Concurring

Such calls for the Tribunal to develop and explain its choices of law in particular claims have rarely been heeded. Typically, the Tribunal has not articulated the rules or principles used to determine the law applied. Instead, it has resorted to its discretion to draw from three recurring sources: the contract, general principles of law and public international law. By far the most important source has been the contract.

#### *The Central Role of the Contract*

Some Tribunal claims have failed on jurisdictional grounds. A large majority of the contested cases in which there was jurisdiction have been decided on the primary or exclusive basis of the terms of the parties' contracts, without substantial reference to any other system of law. In this sense, the Tribunal has frequently given the parties the controlling voice in determining the applicable law. This fundamental role of the contract is the most important reason for the limited use of choice-of-law analysis in the Tribunal's jurisprudence.

Contracts, of course, do not exist in a vacuum; some system of law regulates their formation, interpretation and implementation. However, when faced with such issues, the Tribunal has characteristically addressed them in terms of general principles of commercial law or public international law, but rarely national law. As the *Mobil* award declared, "the Tribunal does not consider it appropriate that such an Agreement be governed by the law of one Party."<sup>43</sup>

*Claims for payment.* Many claims have involved simple demands for payment in sales transactions. In the tumult of the revolution, goods often were shipped, or services provided, while payment was not received. In national systems, such claims might well be resolved through motions for summary judgment or equivalent procedures. In the Tribunal, they generally required simple factual determinations whether the goods were shipped, services performed or payment made. If default was found, the contract standard was applied to establish damages.<sup>44</sup> Some legally simple contract cases involved huge sums. In *R. J. Reynolds Tobacco Co. v. Iran*, the main

Opinion of Richard M. Mosk, *Oil Field of Texas, Inc. v. Iran*, 1 IRAN-U.S. C.T.R. 347, 363, 374 (1981-82). See also Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253 (1988).

<sup>43</sup> *Mobil Oil Iran, Inc. v. Iran*, para. 81, I.A.L.R., July 24, 1987, at 14,543. *Mobil* involved an extraordinary contract, the Sale and Purchase Agreement between a consortium of Western oil companies and Iran, which the Tribunal concluded was governed for most purposes by "the general principles of commercial and international law." *Id.*

<sup>44</sup> See, e.g., *Endo Laboratories v. Iran*, AWD 325-366-3, I.A.L.R., Nov. 13, 1987, at 14,999; *Exxon Corp. v. National Iranian Oil Co.*, AWD 322-154-3, I.A.L.R., Nov. 13, 1987, at 15,011; *Parguin Private Joint Stock Co. v. United States*, 13 IRAN-U.S. C.T.R. 261 (1986 IV); *Oil Field of Texas, Inc. v. Iran*, 12 IRAN-U.S. C.T.R. 308 (1986 III); *McLaughlin Enter., Ltd. v. Iran*, *id.* at 146; *Liton Sys., Inc. v. Iran (Claim I)*, *id.* at 126; *Columbia Univ. v. Iran*, 10 IRAN-U.S. C.T.R. 319 (1986 I); *Lischem Corp. v. Atomic Energy Org.*, 7 IRAN-U.S. C.T.R. 18, 22-23 (1984 III); *Ram Int'l Indus., Inc. v. Iranian Air Force*, 3 IRAN-U.S. C.T.R. 203, 206 (1983 II); and *Intrend Int'l, Inc. v. Imperial Iranian Air Force*, *id.* at 110.

element of a claim of over \$36 million involved tobacco products that the respondent acknowledged had been delivered and not paid for.<sup>45</sup>

All legal systems require payment for goods and services sold; hence, choice-of-law issues simply did not enter into the Tribunal's consideration of these cases. Indeed, the Tribunal has explicitly rejected parties' calls to refer to national law for aid in analyzing simple transactions: "[T]he Tribunal decides that the issues presented in this Case do not require such an analysis and that all questions may be resolved by reference to the practice of the Parties and the relevant provisions of the contract . . ."<sup>46</sup>

*Issues of performance.* Before 1979, many complex, long-term contracts between U.S. and Iranian parties provided for architectural, engineering or other services. Performance was interrupted in 1978 and 1979. The disputes over the character and extent of performance of these transactions are predominantly factual, though sometimes enormously complicated. The Tribunal typically looks to the terms of the contracts to define the parties' legal rights and obligations in such cases.

Two claims involving the same dam are illustrative. *Charles T. Main International, Inc. v. K.W.P.A.*<sup>47</sup> was a claim for engineering work on a powerhouse at Karun Dam in Khuzestan Province. In a preliminary award, the Tribunal found that there was a contract between the parties, but tasked an engineering expert to report whether Main's work satisfied the contract standard of good engineering practice. The expert ultimately reported (and the Tribunal agreed, Arbitrator Aldrich dissenting in part) that the contract standard required suspension of certain work after communications ceased between the parties.

*Richard D. Harza v. Iran*,<sup>48</sup> another contract-based claim for payment for engineering services, grew out of Harza International's work on two large water development projects, including the Karun Dam, site of the powerhouse in the *Main* case. Harza claimed for unpaid fees and expenses; Iran counterclaimed unsuccessfully, alleging engineering defects. The case, particularly the counterclaims, raised complex factual and engineering issues, many of which the Tribunal referred to engineering experts for investigation and report. An illustrative issue concerned the discovery during construction of a large seam of air, water and clay in the right abutment of the dam. This "geological accident" required extensive and expensive remedial works. Iran claimed that the engineer's preconstruction exploration program was inadequate and did not satisfy the contract standard. Thus, the Tribunal had to form judgments about the standards of good engineering practice for specialized geological investigations conducted years before; it concluded that the claimant had met its contractual duties.<sup>49</sup>

<sup>47</sup> 7 IRAN-U.S. C.T.R. 181, 190-91 (1984 III).

<sup>48</sup> *Iran Nat'l Airlines v. United States*, AWD 336-B-12-2, para. 7, I.A.L.R., Dec. 11, 1987, at 15,137, 15,139; accord *Iran Nat'l Airlines v. United States*, AWD 337-B-10-2, I.A.L.R., Dec. 11, 1987, at 15,132.

<sup>49</sup> 11 IRAN-U.S. C.T.R. 259 (1986 II).

<sup>50</sup> 11 IRAN-U.S. C.T.R. 76 (1986 II).  
<sup>51</sup> The following cases are all complex, largely factual inquiries into contract performance, with the contract providing all or most of the controlling law: *Houston Contracting Co. v.*

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*Is there a contract?* Some cases faced the threshold question whether a contract existed between the parties. The Tribunal has reached to find that contracts did exist, but the source of the legal rules governing their formation has rarely been articulated. General principles of law apparently control.<sup>50</sup>

The Tribunal has regularly extended principles discerned in contracts to matters not explicitly agreed. In *Ultrasytems Inc. v. Iran*,<sup>51</sup> the parties terminated their contract and agreed upon a liquidation procedure, which the majority concluded had not been followed. The Tribunal accordingly substituted the provision in the terminated contract on termination for convenience of the employer, although neither party contended that it governed. Similarly, in *American Bell International Inc. v. Iran*, the Tribunal allocated unforeseen pretermination costs on the basis of principles discerned from the "general intent and spirit" of the contract.<sup>52</sup>

The Tribunal has not always found a contract, even when there have been long, close and complex courses of dealing. In *Sea-Land Service, Inc. v. Iran*,<sup>53</sup> the Tribunal, applying Iranian law, concluded that the parties' preliminary agreements, a long and extensive course of dealing, and large capital investments did not give rise to a contract. Arbitrator Holtzmann dissented, believing that the decision "ignores the facts, misapplies the law, and is blind to realities."<sup>54</sup>

*Construing the contract.* A few decisions have rested largely on the Tribunal's constructions of contract language. *First Travel Corp. v. Iran*<sup>55</sup> hinged on a single phrase. The Tribunal explored several possible guides to interpretation but could not find a "plain meaning," any relevant trade usage or any common intention of the parties. Ultimately, it applied the rule of *contra proferentem*, adopting an understanding of the crucial text advanced by an employee of the respondent and relied upon by the claimant in concluding the contract.

Huge cases have sometimes turned on narrow contract phrases. In *International Systems & Controls Corp. v. I.D.R.O.*,<sup>56</sup> the Tribunal found that it lacked jurisdiction over a \$227 million claim solely on the basis of its construction of the claimant's "proposal" (a form of contract between the

National Iranian Oil Co., AWD 378-173-3, I.A.L.R., Aug. 28, 1988, at 16,176; Minnesota Mining & Mfg. Co. v. Iran, AWD 343-423-3, I.A.L.R., Jan. 15, 1988, at 15,255; Bechtel, Inc. v. Iran, 14 IRAN-U.S. C.T.R. 149 (1987 I); Howard Needles Tammen & Bergendoff v. Iran, 11 IRAN-U.S. C.T.R. 302 (1986 II); Computer Sciences Corp. v. Iran, 10 IRAN-U.S. C.T.R. 269 (1986 I); Blount Bros. Corp. v. Ministry of Hous. & Urban Dev., 3 IRAN-U.S. C.T.R. 225 (1985 II); Woodward-Clyde Consultants v. Iran, *id.* at 239; Warnecke & Assocs. v. Bank Mellat, *id.* at 256; Gruen Assocs., Inc. v. Iran Hous. Co., *id.* at 97.

<sup>50</sup> See text at notes 84-92 *infra*. <sup>51</sup> 2 IRAN-U.S. C.T.R. 100, 106 (1983 I).

<sup>52</sup> 12 IRAN-U.S. C.T.R. 170, 188 (1986 III). *Accord* Blount Bros. Corp. v. Ministry of Hous. & Urban Dev., 3 IRAN-U.S. C.T.R. 225 (1985 II).

<sup>53</sup> 6 IRAN-U.S. C.T.R. 149 (1984 II).

<sup>54</sup> *Id.* at 175. *Accord* S.U.N.Y. v. Ministry of Culture (Case B71), 13 IRAN-U.S. C.T.R. 277 (1986 IV).

<sup>55</sup> 9 IRAN-U.S. C.T.R. 360 (1985 II).

<sup>56</sup> 12 IRAN-U.S. C.T.R. 239 (1986 III).

claimant and its creditors, which were not parties before the Tribunal) in a Canadian bankruptcy proceeding.<sup>57</sup>

*Contract termination.* The Tribunal has regularly had to examine and characterize reasons for the deaths of contracts. It has rarely enunciated the process for selecting the law applied, instead proceeding under general principles of *force majeure*<sup>58</sup> or under contract provisions on termination. The Tribunal has sometimes seemed loath to find termination on account of breach, even in factual circumstances perhaps justifying such a determination. As a result, several claims for lost profits have been denied. The Tribunal's approach to contract termination may suggest concern about making public findings suggesting commercial misconduct by a state or its controlled entities.

The Tribunal has frequently found contracts to have been terminated in accordance with their terms or pursuant to separate agreements of the parties. The most spectacular illustration of the latter is the *Mobil* case,<sup>59</sup> in which Chamber Three concluded that the parties had agreed to terminate their contract, subject to further negotiations between them to determine compensation due in respect of the claimants' rights under the 1973 agreement. The Tribunal similarly found contract termination on "no fault" contractual grounds in *Ford Aerospace & Communications Corp. v. Iran*,<sup>60</sup> where it applied a contract clause allowing termination for the employer's convenience, even though the contractual notice requirements had not been met. In *Whittaker Corp. v. Iran* and *Exxon Research and Engineering Co. v. Iran*, the majority again construed communications between the parties as having created an agreement to terminate their contracts.<sup>61</sup> Finally, in *Harris International Telecommunications Co. v. Iran*,<sup>62</sup> where the claimant asserted breach, the Tribunal applied a contract provision allowing termination for *force majeure*, concluding that the claimant's conduct and correspondence indicated an intention to terminate for *force majeure*, and requiring claimant to repay a substantial unamortized down payment.<sup>63</sup>

The pattern described above is not uniform; some awards have found contract termination through respondents' breach and have awarded lost

<sup>57</sup> *Accord* Logos Dev. Corp. v. Information Sys. Iran, 11 IRAN-U.S. C.T.R. 53, 60-62 (1986 II); Computer Sciences Corp. v. Iran, 8 IRAN-U.S. C.T.R. 99, 105 (1985 I).

<sup>58</sup> See text at notes 74-83 *infra*.

<sup>59</sup> I.A.L.R., July 24, 1987, at 14,534 (see note 39 *supra*).

<sup>60</sup> 14 IRAN-U.S. C.T.R. 24, 38 (1987 I). *Accord* FMC Corp. v. Ministry of Nat'l Defense, *id.* at 111, 121 (applying contractual provision authorizing termination for the convenience of the employer; contract authorized damages for lost anticipated profits).

<sup>61</sup> 14 IRAN-U.S. C.T.R. 263 (1987 I) (*Whittaker*); and 15 IRAN-U.S. C.T.R. 3 (1987 II) (*Exxon*).

<sup>62</sup> AWD 325-409-1, I.A.L.R., Nov. 13, 1987, at 14,951.

<sup>63</sup> *Accord* Ammann & Whitney v. Ministry of Hous. & Urban Dev., 12 IRAN-U.S. C.T.R. 94, 103 (1986 III) (claimants pleaded breach, but the Tribunal found termination under *force majeure* clause of contract); Lauth v. Iran, 11 IRAN-U.S. C.T.R. 150, 155 (1986 II) (parties' contract was terminated "through no fault of the claimant" and Tribunal "does not find it necessary to decide whether or not" the Iranian party breached).

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profits. Thus, in *Alan Craig v. Ministry of Energy*,<sup>64</sup> the claimant contracted to provide consulting and engineering services. His fees were not paid and he left Iran. The Tribunal held that nonpayment was a breach giving rise to termination and entitling Craig to damages for lost income.

#### General Principles of Law

Early in the Tribunal's life, a comparative law scholar ventured the hope that the Tribunal might "augur well for the possible elaboration . . . of normative commercial law principles having a transnational legal dimension." He accordingly called on the Tribunal to employ comparative law methodology to produce a "corpus of commercial law principles from the statutory and decisional law of various national legal systems, allowing it to resolve disputes according to a principled substantive consensus among legal systems."<sup>65</sup>

The prediction that the Tribunal would frequently invoke general principles of law was sound; they have been second only to the parties' contracts as a source of legal rules in the private claims.<sup>66</sup> However, for many reasons, the call for rigorous comparative law analysis has been less frequently heeded. The inexorable press of the caseload limits the Tribunal's time and resources. Few arbitrating parties have treated applicable law as a significant part of their presentations; fewer still have provided comparative analyses. Finally, most arbitrators have not been inclined toward a comparative viewpoint, particularly absent urging by the parties.<sup>67</sup>

*Unjust enrichment.* Most of the Tribunal's resorts to general principles involve familiar doctrines. The most significant has been the principle of unjust enrichment, first cited in *Ultrasystems Inc. v. Iran*. Ultrasystems claimed for work performed at Iran's request; the parties disputed whether it fell within the scope of their contract. Without discussion or citation of authority, the Tribunal found that "the request for work, and the performance provided pursuant to that request, rendered Isiran [Information Systems Iran] liable at least in quantum meruit, without regard to the Contract."<sup>68</sup> The Tribunal more fully explored unjust enrichment in *Isaiah v. Bank Mellat*.<sup>69</sup> Isaiah claimed that Bank Mellat had been unjustly enriched

<sup>64</sup> 3 IRAN-U.S. C.T.R. 280 (1983 II). *Accord* William J. Levitt v. Iran, 14 IRAN-U.S. C.T.R. 191, 209 (1987 I) (Tribunal finds breach by Iranian entity in a contract claim, and declares loss of profits "in principle" a proper element of damages for such breach; but lost profits claim rejected for failure to prove potential profitability of venture).

<sup>65</sup> Carbonneau, *The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal*, in Lillich, *supra* note 9, at 104, 105.

<sup>66</sup> On the important role of general principles of law in past international arbitrations, see B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953).

<sup>67</sup> Ironically, in a rare case involving comparative analysis by both parties and the Tribunal, an uncharacteristically high threshold was applied in determining that the relevant legal proposition (that an arbitral award gives rise to an action in contract or tort) was not a "principle of commercial and international law" envisaged by Article V of the Claims Settlement Declaration. Arbitrator Holtzmann dissented. *Bendone-DeRossi Int'l v. Iran*, AWD 352-375-1, I.A.L.R., Mar. 25, 1988, at 15,578.

<sup>68</sup> 2 IRAN-U.S. C.T.R. 100, 111 (1983 I).      <sup>69</sup> 2 IRAN-U.S. C.T.R. 232 (1983 I).

by receiving his funds in exchange for a subsequently dishonored check. Citing a comparative law study of unjust enrichment, the Iranian Civil Code, Whiteman's *Digest* and a treatise on public international law, the Tribunal determined that unjust enrichment was a general principle of law that it could apply, although it also noted that "there is no reason to believe the result would be different if only Iranian law were applied."<sup>70</sup> Similarly, in *Sea-Land Service, Inc. v. Iran*, the Tribunal found that unjust enrichment "is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international Tribunals."<sup>71</sup>

The Tribunal has explored the interplay between unjust enrichment and contractual remedies, since parties with contract claims that fell outside the Tribunal's jurisdiction because of forum clauses often pleaded unjust enrichment. In *T.C.S.B. v. Iran*, the Tribunal concluded that the preponderance of authority bars such claims where the contract remains valid and enforceable, citing U.S., French, English and other materials.<sup>72</sup>

In an unusual recent case, the Tribunal rejected a claim of unjust enrichment, apparently believing that prudent businessmen would not have continued to provide benefits in the circumstances involved. It is not apparent what particular factual considerations underlay this decision.<sup>73</sup>

*Force majeure.* The Tribunal's tendency to analyze contract termination issues in terms not requiring findings of breach by the respondent Government or its controlled entities has been referred to.<sup>74</sup> In addition, the tumultuous circumstances of the Iranian Revolution guaranteed that the doctrine of *force majeure* would play a significant role in the Tribunal's decisions. The Tribunal's applications of *force majeure* have rested entirely (implicitly or explicitly) on general principles. There has been little or no application of national law in this area.

The Tribunal has recognized *force majeure* as a general principle of law authorizing full or partial suspension or termination of a contract even if it does not contain a *force majeure* clause.<sup>75</sup> Beyond this general proposition,

<sup>70</sup> *Id.* at 237.

<sup>71</sup> 6 IRAN-U.S. C.T.R. 149, 168 (1984 II). *Accord* Schlegel Corp. v. National Iranian Copper Indus. Co., 14 IRAN-U.S. C.T.R. 176, 180 (1987 I); Shannon & Wilson, Inc. v. Atomic Energy Org. of Iran, 9 IRAN-U.S. C.T.R. 397, 402 (1985 II); Futura Trading Inc. v. K.W.P.A., *id.* at 46, 57; Dic of Delaware, Inc. v. Tehran Redev. Corp., 8 IRAN-U.S. C.T.R. 144 (1985 I); and Morrison-Knudsen Pacific Ltd. v. Ministry of Roads & Transp., 7 IRAN-U.S. C.T.R. 54, 76 (1984 III).

<sup>72</sup> 5 IRAN-U.S. C.T.R. 160, 171-72 (1984 I). Earlier, Arbitrator Mosk had unsuccessfully pressed for the contrary view. Concurring Opinion of Richard M. Mosk, Chas. T. Main Int'l, Inc. v. Mahab Consulting Eng'rs, Inc., 3 IRAN-U.S. C.T.R. 270, 277 (1983 II).

<sup>73</sup> Lockheed Corp. v. Iran, AWD 967-829-2, I.A.L.R., June 24, 1988, at 15,887.

<sup>74</sup> See text at note 58 *supra*.

<sup>75</sup> See, e.g., Mobil Oil Iran, Inc. v. Iran, para. 117, I.A.L.R., July 24, 1987, at 14,547; Anaconda-Iran, Inc. v. Iran, 13 IRAN-U.S. C.T.R. 199, 211 (1986 IV) ("Under a variety of names, most, if not all, legal systems recognize *force majeure* as an excuse for contractual non-performance. *Force majeure* therefore can be considered a general principle of law. . . . [T]he right to invoke *force majeure* does not depend on, or arise out of, an express contractual provision").

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however, different awards have evidenced quite different approaches to the character and consequences of *force majeure* conditions in Iran. Some cases have taken expansive views of the existence and consequences of such conditions. They have found them to end the parties' contracts, even if neither party invoked *force majeure*, the contract did not authorize such termination or contractual requisites for termination were not met. This tendency is epitomized by *Gould Marketing, Inc. v. Ministry of Defense*,<sup>76</sup> where the Tribunal rejected the parties' reciprocal claims of breach and instead drew broad consequences from the existence of *force majeure* conditions in Iran. The contract provided that California law governed. Both sides denied the existence of *force majeure* conditions affecting performance. The Tribunal, however, applied a general principle that it found in the laws of the United States, the United Kingdom and France,<sup>77</sup> deciding that pervasive and long-lasting *force majeure* conditions obtained in Iran and rendered performance impossible. As a legal consequence, the Tribunal found that the contract was ended by mid-1979 because of frustration or impossibility of performance.

Several Chamber One cases decided under the Chairmanship of Judge Lagergren are comparable. In *International Schools Services, Inc. v. National Iranian Copper Industries Co.*,<sup>78</sup> the Tribunal found on its own motion that *force majeure* conditions in the vicinity of the Sar-Chesmeh copper mine frustrated a contract to operate a school there. As a result, the Tribunal found that both sides were excused from further contract performance, and that losses incurred after termination remained where they fell. A later claim bearing a similar name, *International Schools Services, Inc. v. Iran*,<sup>79</sup> and *Touche Ross & Co. v. Iran*<sup>80</sup> were similar.

Other decisions have taken a narrower and more cautious view of *force majeure*. A leading illustration is *Sylvania Technical Systems, Inc. v. Iran*, where the Tribunal emphasized that *force majeure* defenses "must always be analyzed in the context of the circumstances causing *force majeure*, taking into account the particular party affected by those circumstances and the specific obligations that party is prevented from performing."<sup>81</sup>

Thus, *Sylvania* and like cases involved careful analysis of particular factual circumstances and particular legal obligations in determining the consequences of *force majeure*. Such analyses now seem characteristic of the Tribunal's approach.<sup>82</sup>

One award has addressed the application of *force majeure* where state-controlled entities are prevented from contract performance by their Govern-

<sup>76</sup> 3 IRAN-U.S. C.T.R. 147 (1983 II) and 6 IRAN-U.S. C.T.R. 272 (1984 II).

<sup>77</sup> 6 IRAN-U.S. C.T.R. at 274. <sup>78</sup> 9 IRAN-U.S. C.T.R. 187 (1985 II).

<sup>79</sup> 14 IRAN-U.S. C.T.R. 65 (1987 I). <sup>80</sup> 9 IRAN-U.S. C.T.R. 284 (1985 II).

<sup>81</sup> 8 IRAN-U.S. C.T.R. 298, 309 (1985 I), summarized in 80 AJIL 365 (1986).

<sup>82</sup> See *Exxon Research & Eng'g Co. v. Iran*, 15 IRAN-U.S. C.T.R. 3 (1987 II); *American Bell Int'l Inc. v. Iran*, 12 IRAN-U.S. C.T.R. at 187; *International Technical Prod. Corp. v. Iran* (final award), 9 IRAN-U.S. C.T.R. 206 (1985 II) (inability of American technicians to work in Iran after November 1979 not *force majeure* excusing Iranian nonperformance). Cf. *Amoco Int'l Fin. Corp. v. Iran*, 15 IRAN-U.S. C.T.R. 189 (1987 II) (application of contract standard establishing consequences of *force majeure*).

ment's actions. Starting with a premise (itself apparently derived from general principles of law) that the separation between a state and its controlled enterprises should be respected, the Tribunal held that acts of a state's other public authorities may constitute *force majeure* shielding the state's enterprise.<sup>83</sup>

*Other principles related to contracts.* In light of the fundamental importance of contracts in the Tribunal's decisions, general principles concerning such issues as contract formation, performance and construction, and proof of contracts have played significant roles. The Tribunal has ruled that general principles of law require parties to perform their contracts satisfactorily and with due diligence.<sup>84</sup> They dictate that contracts are to be interpreted so as to give meaning to their texts taken as a whole,<sup>85</sup> and that contracts should be construed *contra proferentem*.<sup>86</sup>

General principles have regularly been applied to find or confirm the existence of contracts. In *Futura Trading, Inc. v. National Iranian Oil Co.*,<sup>87</sup> the Tribunal parsed a convoluted course of dealings, determining that it created a contract; this conclusion appears to rest on general principles. Ironically, after grappling to find the contract, the Tribunal denied recovery because the claimant had been compensated for its injuries through litigation on other grounds against a third party. The Tribunal invoked the maxim *actio non datur non damnificato* in denying recovery.<sup>88</sup>

Many cases apply the rule that performance by one party at the instigation or with the knowledge or acquiescence of the other creates or confirms the existence of a contract. In *Kimberly-Clark Corp. v. Bank Markazi Iran*, the Tribunal found that 2 years of performance by the respondent ratified a disputed contract, even if allegedly signed initially by an unauthorized person.<sup>89</sup> Chamber Three soon reached a comparable result in two related cases: "It is both a general principle of law and a principle embodied in . . . the Civil Code of Iran, that a party may not deny the validity of a contract

<sup>83</sup> *Blount Bros. Corp. v. Iran*, 10 IRAN-U.S. C.T.R. 56, 75 (1986 I); compare *Czarnikow Ltd. v. Rolimpex*, 1979 App. Cas. 351 (same result).

<sup>84</sup> *General Dynamics Corp. v. Iran*, 5 IRAN-U.S. C.T.R. 386, 398 (1984 I).

<sup>85</sup> *CBA Int'l Dev. Corp. v. Iran*, 5 IRAN-U.S. C.T.R. 177, 180 (1984 I).

<sup>86</sup> *First Travel Corp. v. Iran*, 9 IRAN-U.S. C.T.R. 360, 371 (1985 II).

<sup>87</sup> 13 IRAN-U.S. C.T.R. 99 (1986 IV). Accord *Iowa State Univ. v. Ministry of Culture*, 13 IRAN-U.S. C.T.R. 271, 273-75 (1986 IV) (Tribunal finds a contract to pay a student's tuition); *Liton Sys., Inc. v. Iran*, 12 IRAN-U.S. C.T.R. 126, 134 (1986 III) ("In the absence of a formal written contract, the mutual obligations of the parties have to be determined largely by reference to their past course of dealings"); *Cal-Maine Foods, Inc. v. Iran*, 6 IRAN-U.S. C.T.R. 52, 61-62 (1984 II) (Tribunal finds a contract for the sale of shares); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 9 IRAN-U.S. C.T.R. 156, 162 (1983 II).

<sup>88</sup> It is not clear what the Chamber took to be the source of the legal authority of this maxim for purposes of Article V. Civil law maxims have been cited occasionally as authority in arguments, opinions and awards. See, e.g., *Dissenting and Concurring Opinion of Parviz Ansari as to the Interim and Interlocutory Award in Case No. 395*, 8 IRAN-U.S. C.T.R. 216, 228, 231 (1985 I) (*A rubra ad nigrum*). However, *Futura Trading* is the only case in which such a maxim determined the outcome.

<sup>89</sup> 2 IRAN-U.S. C.T.R. 334, 339 (1983 I).

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entered into on its behalf by another if by its conduct, it later consents to the contract."<sup>90</sup>

General principles also have been applied to deny effect to contract provisions. In *Harnischfeger Corp. v. Ministry of Roads and Transportation*, Chamber Three found that "[i]t is a generally accepted principle in various legal systems that an essential error regarding the conditions upon which a party has entered into a contract may relieve that party from liability, at least where the other party knew or should have known about the error."<sup>91</sup> Finally, the Tribunal has applied general principles to aid in determining contract remedies. It has accepted as a general principle the proposition that a party may recover for losses suffered as a consequence of contract breach, whether or not there is also a right to terminate the contract.<sup>92</sup>

*Account stated.* The Tribunal has regularly applied the principle of "account stated," either characterizing it as a general principle or applying it in contexts that so suggest. In *Dames and Moore v. Iran*, Chamber Three declared:

It is a well-established general principle in various legal systems that in commercial relationships one party may be obligated to pay another party, with which it has been doing business, a sum specified in an invoice if it receives the invoice but does not object to it within a certain period of time.<sup>93</sup>

In *R. J. Reynolds Tobacco Co. v. Iran*, Reynolds claimed, inter alia, \$1.9 million for goods delivered and invoiced without contemporaneous objection to the invoices. The Tribunal treated account stated as a rule governing burden of proof. Absent contemporaneous objections to the invoices, the Tribunal placed the burden on the respondent to show it was not obliged to pay.<sup>94</sup>

<sup>90</sup> R. N. Pomeroy v. Iran, 2 IRAN-U.S. C.T.R. 372, 380 (1983 I); and Pomeroy Corp. v. Iran, *id.* at 391, 397. *Accord* Pepsico, Inc. v. Iran, 13 IRAN-U.S. C.T.R. 3, 33 (1986 IV) (any technical defects in the execution of loan documents overcome by respondent's receipt and enjoyment of the loan proceeds); *Dic of Delaware, Inc. v. Tehran Redev. Corp.*, 8 IRAN-U.S. C.T.R. 144, 161 (1985 I) (part performance of an oral contract as evidence of its existence "must be taken to constitute a general principle of law"); *United States v. Iran (Case B29)*, 6 IRAN-U.S. C.T.R. 12, 17 (1984 II) ("The only reasonable inference . . . is that an agreement was concluded between the Parties, and that both Parties manifested their assent to the agreement by their subsequent performances . . ."); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 3 IRAN-U.S. C.T.R. 156, 162 (1983 II) ("An invitation to commence preliminary work creates an obligation to pay for that work"). *Cf.* *Uiterwyck Corp. v. Iran*, AWD 375-381-1, I.A.L.R., July 6, 1988, at 16,095 (parties' course of conduct creates an agency relationship between them, apparently under Florida law).

<sup>91</sup> 8 IRAN-U.S. C.T.R. 119, 133 (1985 I).

<sup>92</sup> *Dic of Delaware*, 8 IRAN-U.S. C.T.R. at 164; *Morrison-Knudsen Pacific Ltd. v. Ministry of Roads & Transp.*, 7 IRAN-U.S. C.T.R. 54, 75 (1984 III).

<sup>93</sup> 4 IRAN-U.S. C.T.R. 212, 221 (1983 III). *Accord* *Houston Contracting Co. v. National Iranian Oil Co.*, para. 73, I.A.L.R., Aug. 28, 1988, at 16,176, 16,185; *Time, Inc. v. Iran*, 7 IRAN-U.S. C.T.R. 8, 11 (1984 III); and *General Dynamics Corp. v. Iran*, 5 IRAN-U.S. C.T.R. 386, 394-95 (1984 I).

<sup>94</sup> 7 IRAN-U.S. C.T.R. 181, 190-91 (1984 III).

*Conflict of laws.* Just as national law has played a limited role in the Tribunal's jurisprudence, so have conflict-of-laws rules. However, in a few cases, general principles of conflict of laws have been applied. *Economy Forms Corp. v. Iran* is an unusual award based entirely on national law, the Iowa U.C.C. The claim involved concrete-forming materials to be manufactured, delivered and paid for in the United States. The Tribunal held that United States law governed the contract and its formation, since "the centre of gravity of these business dealings was in the United States, that being the test under general principles of conflicts of law."<sup>95</sup> *Harnischfeger Corp. v. Ministry of Roads and Transportation*, involving cranes manufactured and delivered F.O.B. in Iowa, applied a similar analysis:

The agreement . . . makes no reference to governing law; however, under general choice of law principles, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties, must be taken to govern in this specific case. . . .

The United States law applicable to this commercial transaction is the Uniform Commercial Code . . . .<sup>96</sup>

*Other matters.* Other legal rules have been identified and applied as general principles of law in individual cases. These include the following propositions:

- "[W]hen a promissory note is given for an obligation, the obligation is, unless otherwise agreed, at least suspended until the note matures."<sup>97</sup>
- "[G]enerally a subcontractor has no direct rights as against the party with whom the contractor has a contract."<sup>98</sup>
- "[L]imitation-of-liability clauses in general will not be given effect for a specific default when that default arose through an intentional wrong or gross negligence on the part of the one invoking the limitation."<sup>99</sup>
- "[N]o one should be allowed to reap advantages from their own wrong, *Nullus Commodum Capere De Sua Injuria Propria*."<sup>100</sup>

<sup>95</sup> 3 IRAN-U.S. C.T.R. 42, 48 (1983 II). For unpersuasive criticism of *Economy Forms*, see *Chen, The Iran-U.S. Claims Tribunal's Application of Commercial Law in the Economy Forms Award*, 4 CHINESE Y.B. INT'L L. & AFF. 137 (1984).

<sup>96</sup> 7 IRAN-U.S. C.T.R. 90, 99 (1984 III). *Accord* *Uiterwyck Corp. v. Iran*, para. 64, I.A.L.R., July 6, 1988, at 16,095, 16,102 (U.S. agency law governs an agency relationship constituted and performed in the United States); *Queens Office Tower Assocs. v. Iran Nat'l Airlines Corp.*, 2 IRAN-U.S. C.T.R. 247, 250 (1983 I) (New York law governs New York real estate transaction).

<sup>97</sup> *Schering Corp. v. Iran*, 5 IRAN-U.S. C.T.R. 361, 373 (1984 I).

<sup>98</sup> *Chas. T. Main Int'l, Inc. v. Mahab Consulting Eng'rs, Inc.*, 3 IRAN-U.S. C.T.R. 270, 274 (1983 II); *but cf.* *Schlegel Corp. v. National Iranian Copper Indus. Co.*, 14 IRAN-U.S. C.T.R. 176, 183 (1987 I) (subcontractor's claim for unjust enrichment allowed against prime contractor's principal).

<sup>99</sup> *American Bell Int'l Inc. v. Iran*, 6 IRAN-U.S. C.T.R. 74, 90 (1984 II).

<sup>100</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 IRAN-U.S. C.T.R. 219, 228 (1984 II).

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- Tax liabilities are created by the public law of a state and cannot be extraterritorially enforced.<sup>101</sup>
- Interest is paid in commercial cases to compensate for delay in payment; it must be reasonable in light of the circumstances; and contractually stipulated rates of interest are normally binding.<sup>102</sup>
- A party that admits of legal conclusions following from the facts of a case "is afterwards estopped from arguing otherwise in the same proceeding."<sup>103</sup>
- A banker's duties to transfer funds on deposit give rise to specific obligations only when a check is presented or a request made for transfer.<sup>104</sup>

Finally, the Tribunal has in one case invoked changed circumstances, *clausula rebus sic stantibus*, as a principle justifying contract termination in limited situations involving sensitive governmental contracts. The Tribunal acknowledged difficulties in determining a common core of this principle through comparative law analysis. However, it applied the doctrine because of the specific reference to changed circumstances in Article V of the Claims Settlement Declaration. Arbitrator Holtzmann disagreed, suggesting that the same result should have been reached under the contract at issue.<sup>105</sup>

As the foregoing discussion illustrates, the Tribunal has treated numerous doctrines as general principles, usually without detailed explanations of their underpinnings. Most are simple and familiar to international commerce and to many legal systems. Nevertheless, the Tribunal's jurisprudence also shows the temptations general principles can offer to arbitrators facing difficult and sensitive issues.<sup>106</sup> An illustration thoughtfully examined by the late Professor Ted Stein concerns the Tribunal's jurisdiction over claims based on contracts containing choice-of-forum clauses.<sup>107</sup> Article II(1) of the Claims Settlement Declaration denies the Tribunal jurisdiction over "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."<sup>108</sup>

<sup>101</sup> Arthur Young & Co. v. Iran, AWD 338-484-1, para. 78, I.A.L.R., Dec. 28, 1987, at 15, 178, 15, 191. Cf. *Aeronutronic Overseas Servs., Inc. v. Iran*, 11 IRAN-U.S. C.T.R. 223, 245 (1986 II); *Computer Sciences Corp. v. Iran*, 10 IRAN-U.S. C.T.R. 269, 287 (1986 I); T.C.S.B., Inc. v. Iran, 5 IRAN-U.S. C.T.R. 160, 174 (1984 I).

<sup>102</sup> *Parguin Private Joint Stock Co. v. United States*, 13 IRAN-U.S. C.T.R. 261, 268 (1986 IV); *McCullough & Co., Inc. v. Ministry of Post, Tel. & Tel.*, 11 IRAN-U.S. C.T.R. 3, 26-30 (1986 II); *R. J. Reynolds Tobacco Co. v. Iran* (final award), 8 IRAN-U.S. C.T.R. 55, 60-61 (1985 I).

<sup>103</sup> *American Bell Int'l Inc. v. Iran*, 12 IRAN-U.S. C.T.R. 170, 175 (1986 III).

<sup>104</sup> *Blount Bros. Corp. v. Iran*, 10 IRAN-U.S. C.T.R. 95, 101 (1986 I).

<sup>105</sup> *Questech, Inc. v. Ministry of Nat'l Defense*, 9 IRAN-U.S. C.T.R. 107 (1985 II) (see note 22 supra).

<sup>106</sup> Compare B. CHENG, *supra* note 66, at xiv: "If . . . the general principles of law are not to run the risk of being exploited as an ideological cloak for self-interest, it is essential that their scope and substance be clearly defined and understood."

<sup>107</sup> Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AJIL 1 (1984).

<sup>108</sup> See note 12 supra. On the meaning of the "Majlis position," see Stein, *supra* note 107, at 5-6.

Choice-of-forum clauses were common in prerevolutionary contracts, and the construction of Article II(1) therefore had widespread importance. In 1982 the Full Tribunal heard nine cases involving 19 different forum clauses as "test cases." The United States argued that the term "binding" in Article II(1), read in light of its negotiating history, obliged the Tribunal to determine whether such clauses in particular contracts were enforceable. The United States contended that they were not, both because the Iranian legal system had changed fundamentally, and because U.S. claimants could not receive fair treatment in Iranian courts.

The Tribunal rejected the U.S. arguments. It held that the word "binding" was redundant and did not authorize consideration of the enforceability of particular forum clauses. I do not intend to reargue the case here; Stein and other perceptive commentators have suggested that the result was perhaps correct and certainly politic.<sup>109</sup> Nevertheless, the process by which the Tribunal arrived at its conclusion was odd. Stein characterized the critical element of the Tribunal's analysis as "a presumption of incompetence"; that element was the assertion that "[i]t is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts. . . . [T]he Tribunal would be reluctant to assume such a task in the absence of a clear mandate to do so in the Algiers Declaration."<sup>110</sup> The Tribunal cited no authority to support this principle. As Stein contended, it seems "in fact contrary to the great weight of authority, both international and municipal."<sup>111</sup> At best, it provided an avenue for a detour around complex and sensitive areas.

#### Public International Law

Public international law constitutes the Tribunal's third significant source of law. It has been applied in a comparatively small number of decisions, although these should take on particular importance because of the rarity of modern interstate arbitrations and the difficulties in documenting contemporary state practice. The Tribunal has recognized the lawmaking significance of these decisions, describing its processes in terms familiar to those schooled in the common law: "[T]he controlling rules have . . . to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered."<sup>112</sup>

The role of public international law reflects the Tribunal's unique mixed jurisdiction, embracing both interstate disputes governed by this body of law, and Iranian or U.S. nationals' claims against the other Government

<sup>109</sup> See Berglin, *Treaty Interpretations and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal*, 21 TEX. INT'L L.J. 39 (1985); Lowenfeld, *The Iran-United States Claims Tribunal: An Interim Appraisal*, in Lillich, *supra* note 9, at 81; Stein, *supra* note 107, at 51-52.

<sup>110</sup> Stein, *supra* note 107, at 12 (quoting *Halliburton Co. v. Doreen/Imco*, 1 IRAN-U.S. C.T.R. 242, 245 (1981-82)).

<sup>111</sup> *Id.* at 16.

<sup>112</sup> *Oil Field of Texas, Inc. v. Iran*, 1 IRAN-U.S. C.T.R. 347, 361 (1981-82).

arising "out of debts, contracts . . . , expropriations or other measures affecting property rights."<sup>113</sup> By their nature, such nationals' claims can rest upon either public international law or private law. Iranian respondents and arbitrators have often urged that U.S. nationals' claims come before the Tribunal only through diplomatic espousal by the United States. It is therefore argued that the Tribunal's jurisdiction is limited to claims arising under public international law and is subject to rules applicable to diplomatic protection and espousal, notably those concerning nationality, and to exhaustion of remedies. The Tribunal has not agreed. It has comfortably applied public international law and private law (and often the two together) in particular cases, without requiring exhaustion of remedies.<sup>114</sup>

*Expropriation and compensation.* The Tribunal's decisions on expropriation and compensation have received the widest attention and comment,<sup>115</sup> which is hardly surprising. The Tribunal is the first international arbitral body in years to confront a docket of substantial and generally well-argued expropriation cases. Thus, its decisions are an important element in the contemporary international law on these issues.

A full examination of the Tribunal's handling of applicable rules in this complex and important area is not possible here, but some issues can be highlighted. The first is that the expropriation cases reflect an interesting evolution in the Tribunal's assessment of the status and character of the investment protection rules contained in Article IV of the 1955 U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights.<sup>116</sup> The International Court of Justice concluded in the 1980 *Hostages* case that the Treaty

<sup>113</sup> Art. II(1), Claims Settlement Declaration, *supra* note 12.

<sup>114</sup> For the view that the Tribunal is an exercise in diplomatic protection, see, e.g., Dissenting Opinion of Member Mahmoud M. Kashani Regarding Order of 15 December 1982, 1 IRAN-U.S. C.T.R. 455, 463, 465 (1981-82). The Tribunal has consistently rejected contentions that claims have been espoused (see, e.g., *Iran v. United States* (Case A21), 14 IRAN-U.S. C.T.R. 324, 330 (1987 I)), or that claimants must exhaust local remedies (see, e.g., *Amoco Int'l Fin. Corp. v. Iran*, 15 IRAN-U.S. C.T.R. 189, 197 (1987 II)). It has similarly refused to characterize the small claims (which are "presented" by the two Governments) as exercises in diplomatic protection. See *Picker Int'l Corp. v. Iran* (decision on request for correction), 12 IRAN-U.S. C.T.R. 306 (1986 III); and *Noah A. Baygell v. Iran* (same), 11 IRAN-U.S. C.T.R. 300 (1986 II). The Tribunal has been urged to articulate clearly which legal system it is operating in when rendering particular decisions. Lloyd Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, in Lillich, *supra* note 9, at 51. It has not consistently done so. See, e.g., *Iran v. United States* (Case B1), 10 IRAN-U.S. C.T.R. 207, 216 (1986 I).

<sup>115</sup> See, e.g., Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW 639 (1987) (the author was a member of the Tribunal, 1984-1988); Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31 (R. Lillich ed. 1987); Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73, 79 (1984); and the summaries of the *Amoco*, *INA* and *SEDCO* cases in 82 AJIL 358 (1988), 80 AJIL 181 (1986) and *id.* at 969, respectively.

<sup>116</sup> Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, 8 UST 899, TIAS No. 3853, 284 UNTS 93. Article IV of the Treaty provides, *inter alia*, that in cases of expropriation, there shall be "just compensation," which shall be "in an effectively realizable form and shall represent the full equivalent of the property taken."

remained in force between the two states as of November 1979.<sup>117</sup> Nevertheless, Iranian parties in the Tribunal generally denied that the Treaty had any effect with regard to the events of 1978-1980. The Tribunal's first three expropriation cases did not decide the status of the Treaty. Instead, each of the Tribunal's three Chambers referred to customary international law as the source of applicable standards. Chambers Two and Three found that customary international law required full value as the measure of compensation in case of expropriation.<sup>118</sup>

In a subsequent Chamber One case, *INA Corp. v. Iran*,<sup>119</sup> the Iranian parties did not contest application of the Treaty. Over the dissent of the Iranian arbitrator,<sup>120</sup> Chamber One applied it as *lex specialis*, requiring full compensation equal to the fair market value of the expropriated property. In dictum, the opinion suggested that the customary rule was different; this pronouncement prompted a notable debate over the standard of compensation under customary international law, carried on through separate opinions by Arbitrators Lagergren and Holtzmann. Lagergren argued for the standard of partial compensation as a rule of customary international law.<sup>121</sup> Holtzmann joined issue with a persuasive case for full compensation as the customary rule.<sup>122</sup>

Later cases have consistently applied the Treaty of Amity and its "just compensation" standard of full compensation; most have also affirmed that the standard of full compensation is the same under both the Treaty and customary international law.<sup>123</sup> Thus, while Lagergren's two Chamber One

<sup>117</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 ICJ REP. 3, 28 (Judgment of May 24).

<sup>118</sup> Chamber Two found that customary international law required full value in *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 IRAN-U.S. C.T.R. 219, 225 (1984 II) ("The claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived"). Chamber Three did so in 1983 in *American Int'l Group, Inc. v. Iran*, 4 IRAN-U.S. C.T.R. 96, 105, 109 (1983 III) (standard of compensation under customary international law in cases of lawful expropriation is the full value of the claimant's expropriated interest, determined on the basis of going-concern value). Judge Lagergren's Chamber One, in *Starrett Hous. Corp. v. Iran*, 4 IRAN-U.S. C.T.R. 122, 157 (1983 III), deferred consideration of the standard of compensation for later proceedings in the case.

<sup>119</sup> 8 IRAN-U.S. C.T.R. 373, 378-79 (1985 I), summarized in 80 AJIL 181 (1986).

<sup>120</sup> Dissenting Opinion of Judge Ameli, 8 IRAN-U.S. C.T.R. at 403. Ameli maintained that the International Court of Justice had exclusive jurisdiction to pass upon claims arising under the Treaty, declaring that in that forum, "the United States . . . would be forced to abide by the rulings of the Judges with whose countries it has been in ideological war." *Id.* at 405.

<sup>121</sup> Separate Opinion of Judge Lagergren, 8 IRAN-U.S. C.T.R. at 385. Ameli joined in Lagergren's opinion. *Id.* at 385 (declaration), 403 (diss. op.).

<sup>122</sup> Separate Opinion of Judge Holtzmann, 8 IRAN-U.S. C.T.R. at 391.

<sup>123</sup> See, e.g., *Starrett Hous. Corp. v. Iran*, AWD 314-24-1, para. 261, I.A.L.R., Aug. 28, 1987, at 14,657, 14,687 (applying only treaty standard); *Mobil Oil Sales Iran, Inc. v. Iran*, para. 74, I.A.L.R., July 24, 1987, at 14,542 (applying treaty standard); *Amoco Int'l Fin. Corp. v. Iran*, 15 IRAN-U.S. C.T.R. at 223, 246-48 (treaty standard and customary international law both require "just" compensation, which at a minimum reflects the full value or full equivalent of the expropriated property); *Sola Tiles, Inc. v. Iran*, 14 IRAN-U.S. C.T.R. 223, 234 (1987 I) ("the same standard [of compensation] would be required in this case by customary law as by

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awards provide full compensation solely on the basis of the Treaty as *lex specialis*,<sup>124</sup> the preponderance of authority of the Tribunal has found the Treaty and customary rules of full compensation to be the same.<sup>125</sup>

A second general observation concerning the Tribunal's decisions on liability and compensation is that, in applying the Treaty and customary international law, each Chamber has adopted quite different approaches or frameworks. Chamber One, in its August 1987 decision in *Starrett Housing*,<sup>126</sup> adopted an essentially economic methodology in applying Article IV of the Treaty. It construed the Treaty as requiring payment of fair market value, in this case the market value of a going concern. The Tribunal determined going-concern value through a detailed economic analysis, substantially adopting a discounted cash flow valuation developed by a Tribunal-appointed expert.<sup>127</sup> In another recent case, *Sola Tiles*, Chamber One likewise assessed market value, although on the basis of a less detailed factual record and with a correspondingly less sophisticated economic analysis.<sup>128</sup>

Chamber Two's docket has presented fewer opportunities to apply the Treaty in expropriation matters. The Chamber's *Phelps Dodge* award<sup>129</sup> seems to proceed from a "plain meaning" analysis of Article IV, without referring to other authority to illuminate the text. The resulting award (for the value of the claimant's investment) has a subjective element, perhaps impelled by the Tribunal's conclusion that the expropriated entity was not a going concern. *Payne v. Iran*,<sup>130</sup> another Chamber Two award applying the Treaty, is similar.

Chamber Three's most notable recent application of the Treaty of Amity takes yet another tack. In *Amoco International Finance Corp.*,<sup>131</sup> the Tribunal decided that the claimant's interest in a joint venture chemical enterprise had been lawfully expropriated and that the Treaty established the standard of compensation. The majority then construed the Treaty standard in the

the direct application of the Treaty itself"); *Sedco, Inc. v. N.I.O.C.*, 10 IRAN-U.S. C.T.R. 180, 184, 187 (1986 I) (both treaty and customary law require full compensation in cases of lawful expropriations); *Phelps Dodge Corp. v. Iran*, 10 IRAN-U.S. C.T.R. 121, 132 (1986 I) (treaty requires full compensation; customary law not discussed).

<sup>124</sup> *Starrett Hous. Corp. v. Iran*, I.A.L.R., Aug. 28, 1987, at 14,657; *INA Corp. v. Iran*, 8 IRAN-U.S. C.T.R. 373 (1985 I) (see note 119 *supra*).

<sup>125</sup> See cases cited in notes 118 and 123 *supra*.

<sup>126</sup> I.A.L.R., Aug. 28, 1987, at 14,657.

<sup>127</sup> See Concurring Opinion of Judge Holtzmann, *id.* at 14,703, 14,704-05.

<sup>128</sup> *Sola Tiles, Inc. v. Iran*, 14 IRAN-U.S. C.T.R. 223 (1987 I). *Sola Tiles* includes an interesting discussion of the meaning of "appropriate compensation" in light of contemporary developments such as the 1986 Seoul Declaration of the International Law Association. (See Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SECOND CONFERENCE HELD AT SEOUL 2, para. 5.5 (1986).) The Chamber concluded that under modern customary law, appropriate compensation can include full going-concern value, including good will and lost future profits.

<sup>129</sup> 10 IRAN-U.S. C.T.R. 121 (1986 I).

<sup>130</sup> 12 IRAN-U.S. C.T.R. 3 (1986 III).

<sup>131</sup> 15 IRAN-U.S. C.T.R. 189 (1987 II).

light of principles of public international law discerned in the Permanent Court's celebrated *Chorzów Factory* Judgment.<sup>132</sup> On the basis of these principles, the Chamber concluded that the Treaty and general principles of international law did not permit application of the discounted cash flow method of valuation (subsequently adopted by Chamber One in *Starrett*) to determine damages for a lawful expropriation.<sup>133</sup> The Chamber's analysis is subject to question.<sup>134</sup> (Another large expropriation case decided by Chamber Three under its previous Chairman a week before *Amoco* did not address valuation of going concerns. The claimants in *Sedco, Inc. v. Iran*<sup>135</sup> did not seek going-concern value, instead requesting and receiving liquidation value for an expropriated enterprise.)

A final comment does not relate to choice of law, but is a reminder of the difficulties and uncertainties of trying to prove international claims. In the past year, several significant expropriation claims have been rejected by Chamber Three on essentially factual, and not legal, grounds. *Mobil* is again illustrative. The claimants alleged, inter alia, that Iran had repudiated a 1973 agreement with a consortium of oil companies for the sale and purchase of Iranian oil and, in so doing, had expropriated valuable contract rights. The Tribunal rejected this claim, finding instead that the parties had agreed to terminate the 1973 agreement and to negotiate compensation as a consequence of the termination. Hence, there was no expropriation claim, but only a contract claim for damages under the new agreement terminating the old one.<sup>136</sup>

In *Houston Contracting Co. v. National Iranian Oil Co.*,<sup>137</sup> the Tribunal again rejected a large expropriation claim on factual grounds. The claimant had left valuable equipment in Iran. The Tribunal decided that some of it had been expropriated, but it dismissed the entire expropriation claim for failure to identify the particular equipment that had been expropriated. In *Motorola, Inc. v. Iran National Airlines Corp.*, the Tribunal found that interference by Iranian officials in the relationship between the claimant and its Iranian subsidiary was not factually sufficient to constitute a taking; dissenting Arbitrator Brower declared that this decision "completely misreads the documentary evidence in the record and ignores the reality of Iran's involvement."<sup>138</sup> Finally, in *Eastman Kodak Co. v. Iran*,<sup>139</sup> the Tribunal again concluded (on the basis of an unusual factual situation) that no expropriation had occurred.

<sup>132</sup> *Factory at Chorzów* (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17 (Judgment of Sept. 13).

<sup>133</sup> *Amoco Int'l Fin. Corp.*, 15 IRAN-U.S. C.T.R. at 258-65.

<sup>134</sup> See the AJIL case note on *Amoco*, *supra* note 39, at 361.

<sup>135</sup> 15 IRAN-U.S. C.T.R. 23 (1987 II).

<sup>136</sup> Arbitrator Brower questioned the finding of a new agreement to terminate, observing that "[a]n unwanted but inevitable fate is no less unilaterally imposed by virtue of its being gracefully accepted." Concurring Opinion of Judge Brower, *Mobil Oil Iran, Inc. v. Iran*, I.A.L.R., July 24, 1987, at 14,534, 14,554, para. 2.

<sup>137</sup> AWD 378-173-3, I.A.L.R., Aug. 26, 1988, at 16,176.

<sup>138</sup> AWD 373-481-3, I.A.L.R., July 29, 1988, at 16,043; *id.*, Concurring and Dissenting Opinion of Judge Brower, *id.* at 16,050, 16,050.

<sup>139</sup> AWD 329-227/12384-3, I.A.L.R., Dec. 11, 1987, at 15,156.

*Treaty interpretation.* The Algiers Accords, despite their unusual format, are treaties under public international law.<sup>140</sup> Thus, in cases construing them, the Tribunal has applied the international law of treaties. The most significant treaty interpretation decisions are those made by the Full Tribunal in "interpretive cases" under Article 17 of the General Declaration<sup>141</sup> and Article VI(4) of the Claims Settlement Declaration.<sup>142</sup> Under Article 17, any dispute between the parties as to the interpretation or performance of the Declaration can be submitted to binding arbitration by the Tribunal. Article VI(4) of the Claims Settlement Declaration is similar. Cases under these articles, denominated "A cases," are argued by counsel for the two Governments, usually before the Full Tribunal. Although they do not consume much of the Tribunal's time now, they were initially a major task. Holdings in these cases can be of limited interest because they concern specialized provisions of the Algiers Accords. However, the Tribunal's process of treaty construction, particularly in applying the rules of the Vienna Convention on the Law of Treaties,<sup>143</sup> is informative.

Both Governments have agreed on the central relevance of the Vienna Convention and have regularly invoked it in their pleadings.<sup>144</sup> The Tribunal has regularly applied the Convention, especially the "ordinary meaning" rule of Article 31(1), as a basis for its interpretations: "the Tribunal finds guidance in the Vienna Convention on the Law of Treaties, . . . which provides that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . . . The Vienna Convention . . . codifies an established principle of international law."<sup>145</sup> Article 31 has been applied notwithstanding frequent argu-

<sup>140</sup> For U.S. domestic purposes, the accords are executive agreements resting upon the President's powers under the Constitution, the International Emergency Economic Powers Act and other statutes. See explanatory statements of the U.S. Department of State, *Hostage Agreements Transmitted to Congress*, U.S. DEPT OF STATE, SELECTED DOCUMENTS, No. 19, March 1981, at 2.

<sup>141</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, DEP'T ST. BULL., No. 2047, February 1981, at 1, reprinted in 75 AJIL 418 (1981), and 20 ILM 224 (1981).

<sup>142</sup> See note 12 *supra*.

<sup>143</sup> *Opened for signature* May 23, 1969, 1155 UNTS 331, reprinted in 63 AJIL 875 (1969), and 8 ILM 679 (1969). The Convention is not in force between the United States and Iran, but it is viewed by the United States as being generally declaratory of customary international law.

<sup>144</sup> See, e.g., Separate Opinion of Members Aldrich, Holtzmann and Mosk on the Issue of the *Disposition of Interest Earned on the Security Account*, Iran v. United States (Case A1, Issues I, III & IV), 1 IRAN-U.S. C.T.R. 200 (1981-82).

<sup>145</sup> *International Schools Servs., Inc. v. National Iranian Copper Indus. Co.*, 5 IRAN-U.S. C.T.R. 338, 341 (1984 I). *Accord* Iran v. United States (Case B1, Claim 4), AWD 382-B1-FT, para. 47, I.A.L.R., Sept. 23, 1988, at 16,343, 16,354; Iran v. United States (Case A21), 14 IRAN-U.S. C.T.R. 324, 328 (1987 I); Iran Customs Admin. v. United States (Case B3), 8 IRAN-U.S. C.T.R. 89, 92 (1985 I); Iran Customs Admin. v. United States (Case B21), *id.* at 93, 95; United States v. Iran (Case A16), 5 IRAN-U.S. C.T.R. 57, 67 (1984 I) ("ordinary meaning of the term in its context and in the light of the object and purpose"). Article 31(1) of the Vienna Convention provides that treaties "shall be interpreted in good faith in accordance with

ments by Iranian parties and arbitrators that the parties' subjective intentions, and not the treaty-texts, should be the starting point for treaty interpretation.<sup>146</sup>

The Tribunal has resorted to other rules in the Vienna Convention. *Esfahanian v. Bank Tejarat*<sup>147</sup> concerned the Tribunal's jurisdiction over dual nationals' claims. Article II(1) of the Claims Settlement Declaration permits only "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." Chamber Two construed this provision on the basis of Article 31(3)(c) of the Vienna Convention, which requires reference to "any relevant rules of international law applicable in the relations between the parties." The Tribunal held the rule of "dominant and effective nationality" to be such an applicable rule of international law, finding jurisdiction because Esfahanian's dominant and effective nationality was that of the United States. Iran vehemently disagreed, bringing an interpretive case challenging jurisdiction over dual nationals' claims. However, the Full Tribunal adopted Chamber Two's analysis and affirmed the controlling effect of dominant and effective nationality.<sup>148</sup>

Case A21 applied the ordinary meaning rule of Article 31, but also examined states' duties to perform treaties in good faith under Article 26 of the Convention.<sup>149</sup> The Tribunal held that conclusion of a treaty entails the obligation to take any domestic measures required to ensure its effectiveness. In the case at issue, the Tribunal found that the parties were obligated to take all domestic steps required to ensure the domestic enforceability of its awards.<sup>150</sup>

The Tribunal has ventured beyond the formulas of the Vienna Convention. Case A2 (the Tribunal's first decision) concerned jurisdiction over Iranian nationals' claims against U.S. nationals. Iran asserted that general provisions in the Algiers Accords created such jurisdiction even if it was not mentioned explicitly. The Tribunal disagreed, declaring that "if there is

the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

<sup>146</sup> See, e.g., Opinion of Members Dr. Mahmoud M. Kashani and Dr. Shafie Shafeiei on the Issue of *Disposition of Interest Earned on the Security Account*, 1 IRAN-U.S. C.T.R. 189, 203, 210 (1981-82) ("The process of interpretation starts with the search for the common intention of the contracting parties").

<sup>147</sup> 2 IRAN-U.S. C.T.R. 157 (1983 I), summarized in 77 AJIL 646 (1983).

<sup>148</sup> Iran v. United States (Case A18), 5 IRAN-U.S. C.T.R. 251 (1984 I), noted 26 HARV. INT'L L.J. 208 (1985), 83 MICH. L. REV. 597 (1984), and 24 VA. J. INT'L L. 695 (1984).

<sup>149</sup> Iran v. United States (Case A21), 14 IRAN-U.S. C.T.R. 324 (1987 I).

<sup>150</sup> *Id.* at 330-31. For other resorts to the Vienna Convention, see, e.g., *Amoco Int'l Fin. Corp.*, 15 IRAN-U.S. C.T.R. at 221 (Art. 32 on "manifestly absurd or unreasonable" interpretations), 215 (Arts. 49, 51 and 52 on duress and fraud), 216 (Art. 53 on *jus cogens* and Art. 62 on fundamental change of circumstances), and 217-19 (also addressing treaty termination under customary law); *McCollough & Co., Inc. v. Ministry of Posts, Tel. & Tel.*, 11 IRAN-U.S. C.T.R. 3, 8-9, 36 (1986 II) (Art. 33 and construction of texts in different languages); *Phillips Petroleum Co., Iran v. Iran*, 1 IRAN-U.S. C.T.R. 487, 489 (1981-82) (Art. 47 on restrictions on the authority of states' representatives).

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any inconsistency, it is a well recognized and universal principle of interpretation that a special provision overrides a general provision."<sup>151</sup>

Some resorts to principles of construction drawn from outside the Vienna framework have provoked collegial dissent. For example, *Grimm v. Iran*<sup>152</sup> involved claims by the widow of an oil company official assassinated in Iran. The Claims Settlement Declaration limits the Tribunal's jurisdiction to claims arising from "debts, contracts, expropriations or other measures affecting property rights." The claimant alleged deprivation of a right to financial support by her husband through Iran's failure to protect him. Thus, jurisdiction hinged on whether Mrs. Grimm had been injured by such "measures affecting property rights." The Tribunal held against jurisdiction: "under the well-known principle of *ejusdem generis* the words 'other measures' in Article II, paragraph 1, ought to be, especially in the context of 'debts and contracts', construed as generically similar to 'expropriations' and the alleged failure to provide protection is in no way similar to expropriations."<sup>153</sup> This principle was reinforced by a second:

[A] provision which establishes the sense of the jurisdiction of an arbitral tribunal should be given a restrictive interpretation.

If the Governments had intended to bring damages to surviving dependents within the ambit of the Tribunal's jurisdiction, it can be assumed that they would have done so by incorporating express language to that effect.<sup>154</sup>

Arbitrator Holtzmann dissented vigorously, arguing that international law recognizes a widow's property right in her husband's support, giving rise to jurisdiction.<sup>155</sup> The principle of restrictive construction of jurisdictional clauses figures in several Chamber One opinions,<sup>156</sup> but the other Chambers and the Full Tribunal have not followed suit. An award by the Full Tribunal noted Lord McNair's criticism of the rule,<sup>157</sup> and other opinions have suggested that it has been undermined by the Vienna Convention.<sup>158</sup>

Most of the Tribunal's treaty cases have interpreted explicit treaty provisions. However, the Tribunal has sometimes supplemented treaty texts with rules created to give effect to the parties' presumed intentions, perhaps elevating object and purpose from aids in construction to sources of govern-

<sup>151</sup> *Iran v. United States (Case A2)*, 1 IRAN-U.S. C.T.R. 101, 104 (1981-82).

<sup>152</sup> 2 IRAN-U.S. C.T.R. 78 (1985 I), summarized in 77 AJIL 649 (1983).

<sup>153</sup> 2 IRAN-U.S. C.T.R. at 79. <sup>154</sup> *Id.* at 80.

<sup>155</sup> *Id.* at 81.

<sup>156</sup> *Iranian Customs Admin. v. United States (Case B16)*, 5 IRAN-U.S. C.T.R. 94, 95 (1984 I); *United States v. Iran (Case B24)*, *id.* at 97, 99 ("It is a well established principle of international law that provisions conferring jurisdiction upon an arbitral tribunal shall be interpreted in a restrictive manner").

<sup>157</sup> *Iran v. United States (Case A1, Issue I)*, 1 IRAN-U.S. C.T.R. 189, 192 (1981-82) (citing A. McNAIR, *THE LAW OF TREATIES* 765 (1961)).

<sup>158</sup> Concurring Opinion of Charles N. Brower, in which Howard M. Holtzmann joins, *United States v. Iran (Case A17)*, 8 IRAN-U.S. C.T.R. 189, 206, 207 (1985 I).

ing rules. Thus, in Case A1, the Tribunal had to decide the disposition of interest earned on the billion-dollar Security Account created to pay certain of its awards. It did not agree with either party's reading of the Algiers Accords, finding that the texts did not resolve the issue and that additional rules were needed:

In order . . . to avoid a denial of justice it is necessary to find a solution either (a) in the common intention of the parties; or (b) in banking usages; or (c) in the object and purpose of the agreements, within the meaning of the Vienna Convention on the Law of Treaties of 1969.<sup>159</sup>

Finding no common intention or governing usages, the Tribunal derived its own rule to attain what it perceived to be the agreements' object and purpose. It decided that the parties' object was to create an equilibrium between Iran's rights in the Security Account and U.S. parties' interest in security for their claims. To maintain this equilibrium, it ordered that interest be kept in a separate account unless Iran and the United States agreed otherwise. Iran could also use the interest to meet its obligation to maintain the Security Account at \$500 million.<sup>160</sup> President Lagergren suggested yet another solution—dividing the interest equally, with half going to Iran and half to the Security Account.<sup>161</sup>

The Full Tribunal has not been uniform in its approaches to dealing with treaty lacunas. In a 1985 case, the Full Tribunal apparently rejected the idea of supplying missing terms, declaring that "the 'object and purpose' do not form any independent basis for interpretation, but rather are factors to be taken into account in determining the 'meaning to be given to the terms of the treaty'."<sup>162</sup> In a 1986 case, however, the Full Tribunal seems to have come close to supplying a vital provision omitted by the parties.<sup>163</sup> A very recent award may also be read as supplying a significant "implicit" obligation on the basis of object and purpose and the subsequent practice of one party.<sup>164</sup>

*International monetary law.* Claimants have regularly questioned the consistency of Iran's currency controls with the Articles of Agreement of the International Monetary Fund or the bilateral Treaty of Amity. It has been difficult to develop factual records that present these claims squarely, and

<sup>159</sup> *Iran v. United States*, 1 IRAN-U.S. C.T.R. at 190.

<sup>160</sup> *Id.* at 191-92.

<sup>161</sup> Dissenting Opinion of President Lagergren on the Issue of the Disposition of Interest Earned on the Security Account, 1 IRAN-U.S. C.T.R. 197 (1981-82). The American arbitrators found yet another answer in the ordinary meaning of the texts. Separate Opinion of Members Aldrich, Holtzmann and Mosk on the Issue of the Disposition of Interest Earned on the Security Account, 1 IRAN-U.S. C.T.R. 200.

<sup>162</sup> *United States v. Iran (Case A17)*, 8 IRAN-U.S. C.T.R. 189, 200 (1985 I).

<sup>163</sup> *Iran v. United States (Case A15, pt. I-G)*, 12 IRAN-U.S. C.T.R. 40, 54 (1986 III), summarized in 81 AJIL 428 (1987).

<sup>164</sup> *Iran v. United States (Case B1, Claim 4)*, para. 66, I.A.L.R., Sept. 23, 1988, at 16,343, 16,359. Arbitrator Holtzmann dissented, criticizing what he saw to be "the Majority's needless stretching and twisting of the terms of the General Declaration in an effort to find an implied treaty obligation." *Id.* at 16,364.

the Tribunal has generally declined to address them.<sup>165</sup> Nevertheless, a few of its cases dip into this area, particularly regarding the IMF Articles.<sup>166</sup> In *Dallal v. Iran*, the Tribunal (after briefing and the hearing ended) decided that in the circumstances of the case, the claimant had the burden of showing that the transaction underlying his claim was not an "exchange contract" contravening Iran's exchange control regulations. (Under Article VIII(2)(b) of the IMF Articles, national courts may not enforce such contracts if they violate properly imposed exchange controls.) The claimant had not made such a showing, and his claim was rejected.<sup>167</sup>

In *Schering Corp. v. Iran*,<sup>168</sup> the claimant alleged that Iran's exchange control regulations were invalid, but the claim was largely dismissed on other grounds. Arbitrator Mosk dissented, arguing that the application of Iran's controls was invalid under both the IMF Articles and the Treaty of Amity. In *Hood Corp. v. Iran*,<sup>169</sup> the claimant again alleged that Iran's exchange controls on current transactions could not properly be applied to it. The Tribunal again declined to pass upon this claim, deeming the transaction at issue to be a capital transaction legitimately subject to controls. (The IMF Articles do not restrict states' control of capital, as opposed to current transactions.) Arbitrator Mosk again dissented, arguing that the transaction was a current one, which could not lawfully be controlled.<sup>170</sup>

*Wrongful expulsion.* In three small claims selected to serve as "test cases," each Chamber has considered the international law applicable to property losses stemming from expulsions of aliens. (As noted earlier, the Tribunal's jurisdiction for purposes of such claims is limited to property losses.) These cases are important to the Tribunal's management of the huge docket of small claims, since perhaps two-thirds of them involve claims for property losses allegedly stemming from wrongful expulsion from Iran; expulsion issues arise in other cases as well.<sup>171</sup>

The expulsion cases have recognized in general that international law limits states' power to expel aliens by, inter alia, barring expulsions that are discriminatory and requiring certain procedural rights, including adequate opportunity to wind up personal affairs. However, the Tribunal has rejected the argument that generalized conditions of threat and hostility encouraged by the revolutionary leadership are internationally attributable to Iran and give rise to "de facto" expulsion.

Instead, the holding by the Tribunal in each test case has turned on the facts, notably its assessment of the cause of departure<sup>172</sup> and its analysis of

<sup>165</sup> See, e.g., *Grune & Stratton, Inc. v. Iran*, AWD 359-10059-1, I.A.L.R., Apr. 29, 1988, at 15,710; *Scott, Foresman & Co. v. Iran*, AWD 313-10712-1, I.A.L.R., Aug. 14, 1987, at 14,582.

<sup>166</sup> See Gold, *The Iran-United States Claims Tribunal and the Articles of Agreement of the International Monetary Fund*, 18 GEO. WASH. J. INT'L L. & ECON. 537 (1985).

<sup>167</sup> 3 IRAN-U.S. C.T.R. 10 (1983 II). Arbitrator Holtzmann dissented. *Id.* at 17.

<sup>168</sup> 5 IRAN-U.S. C.T.R. 361 (1984 I). <sup>169</sup> 7 IRAN-U.S. C.T.R. 36 (1984 III).

<sup>170</sup> *Id.* at 52.

<sup>171</sup> *International Technical Prod. Corp. v. Iran* (partial award), 9 IRAN-U.S. C.T.R. 10, 17-18 (1985 II).

<sup>172</sup> See Straus, *Causation as an Element of State Responsibility*, 16 LAW & POL'Y INT'L BUS. 893 (1984).

whether that cause was attributable to Iran. Iran has not been held responsible for departures motivated by generalized fears of violence, or made for comfort or convenience or at the direction of employers. Only one claimant has thus far been able to show that his departure was caused by conduct attributable to Iran.

The sole case finding wrongful expulsion under international law is *Yeager v. Iran*.<sup>173</sup> After the success of the Islamic Revolution, Kenneth Yeager and his wife were forced from their home and escorted to an evacuation staging area by armed Revolutionary Guards. The Tribunal concluded that these actions gave rise to an expulsion, and that Iran was internationally responsible for the associated property losses.<sup>174</sup> The Tribunal did not find that the causes of departure in the other two test cases were attributable to Iran. In *Short v. Iran*,<sup>175</sup> the claimant left Iran on February 8, 1979, just before the culmination of the revolution. He encountered what the Tribunal found to be an atmosphere of intense and generalized anti-Americanism. However, the Tribunal held that such generalized hostility by revolutionary supporters and the pronouncements of their leaders prior to the success of the revolution were not attributable to Iran. Arbitrator Brower dissented.<sup>176</sup>

In *Rankin v. Iran*,<sup>177</sup> the claimant again could not show that his departure was caused by conduct attributable to Iran, a result that under the facts seems debatable.<sup>178</sup> (There was evidence that on the day when the central events of the case occurred, a person who was or soon became a senior Iranian government official ordered all U.S. nationals who worked for Jack Rankin's employer to leave Iran. Those not previously assembled were thereafter stopped on the streets or taken from their homes by government agents, prior to their ultimate forced departure from Iran.)

*Other issues.* The Tribunal has dealt with other principles of customary or conventional international law. As noted above, it has applied the principle of dominant and effective nationality in determining its jurisdiction in dual nationality cases.<sup>179</sup> It has considered the concept of shareholders' "control" of a corporation under international law for several purposes.<sup>180</sup> It has articulated an innovative international law rule of "de facto control" concerning the obligation of a state with regard to the preexisting contractual or other obligations of an entity assimilated by the state.<sup>181</sup> It has addressed

<sup>173</sup> AWD 324-10199-1, I.A.L.R., Nov. 13, 1987, at 14,991, summarized in 82 AJIL 353 (1988).

<sup>174</sup> *Yeager*, paras. 35-45, I.A.L.R., Nov. 13, 1987, at 14,994-95.

<sup>175</sup> AWD 312-11155-3, I.A.L.R., July 24, 1987, at 14,560, summarized in 82 AJIL 140 (1988).

<sup>176</sup> *Short*, I.A.L.R., July 24, 1987, at 14,563.

<sup>177</sup> AWD 326-10913-2, I.A.L.R., Nov. 3, 1987, at 15,004, summarized in 82 AJIL 353 (1988).

<sup>178</sup> See AJIL case note, *supra* note 173, at 357.

<sup>179</sup> See text at note 148 *supra*.

<sup>180</sup> See, e.g., *Eastman Kodak Co. v. Iran*, I.A.L.R., Dec. 11, 1987, at 15,156; *International Sys. & Controls Corp. v. I.D.R.O.*, 12 IRAN-U.S. C.T.R. 239 (1986 III); *Management of Alcan Aluminum Ltd. v. Ircable Co.*, 2 IRAN-U.S. C.T.R. 294, 297-98 (1983 I); *Concurring and Dissenting Opinion of Richard M. Mosk, RayGo Wagner Equip. Co. v. Iran Express Terminal Corp.*, *id.* at 140, 146.

<sup>181</sup> *Oil Field of Texas v. Iran*, 1 IRAN-U.S. C.T.R. 363 (1981-82).

international law relating to interest<sup>182</sup> and attribution.<sup>185</sup> Finally, an important decision has affirmed the right of partners and joint venturers under international law to present claims with respect to their *pro rata* interests in a partnership.<sup>184</sup>

#### IV. CONCLUSION

Skeptics have viewed international arbitration as a process of compromise in which "strictly legal considerations may have been allowed to be pushed aside for the sake of achieving unanimity among the arbitrators and giving something to both sides."<sup>185</sup> The Tribunal's jurisprudence shows that, at least as to choice of applicable law, the arbitral process can be more conscientious and complex than such shibboleths suggest.

These cases reveal a heavily burdened international tribunal charged with deciding cases on the basis of respect for law, seeking to do so. However, they also demonstrate reluctance to decide on the basis of rules derived from the parties' national legal systems, even where the parties have arguably agreed upon this result. This reluctance is particularly strong in cases potentially subjecting a state or its enterprises to the domestic law of other jurisdictions. In lieu of applying national law, the Tribunal has regularly looked elsewhere for legal principles common to the parties or to international commercial conduct.

Several factors underlie this seeming reluctance to apply national law. Interactions among each Chamber's arbitrators, drawn from European, Iranian and U.S. legal cultures, have surely played a role. Each panel has sought legal solutions common to at least a majority of the arbitrators' legal cultures, or that are at least understandable in legal terms familiar to a majority. The reluctance to apply national law has been reinforced by the perception in many cases that the choice of applicable law is not significant in determining the outcome. Finally, the generally strained nature of U.S.-Iranian relations, and the sometimes strained atmosphere of the Tribunal itself, have perhaps stimulated recourse to solutions that do not give pre-dominance to the law of either arbitrating party.

The Tribunal's experience suggests many lessons for counsel engaged in international arbitration or in structuring transactions potentially subject to

<sup>182</sup> See, e.g., *McCullough & Co., Inc. v. Ministry of Post, Tel. & Tel.*, 11 IRAN-U.S. C.T.R. 9, 27 (1986 II); *Sylvania Technical Sys., Inc. v. Iran*, 8 IRAN-U.S. C.T.R. 298, 320-22 (1985 I); *R. J. Reynolds Tobacco Co. v. Iran*, 7 IRAN-U.S. C.T.R. 181, 191 (1984 III).

<sup>183</sup> See, e.g., *Yeager, Short and Rankin*, the three expulsion test cases, text at notes 173-77 *supra*; *Sea-Land Serv., Inc. v. Iran*, 6 IRAN-U.S. C.T.R. 149, 166, 201-03 (1984 II); *Concurring Opinion of Howard M. Holtzmann, Starrett Hous. Corp. v. Iran*, 4 IRAN-U.S. C.T.R. 122, 159, 165-73 (1983 III); *Gould Marketing, Inc. v. Ministry of Nat'l Defense*, 3 IRAN-U.S. C.T.R. 147, 153 (1983 II).

<sup>184</sup> *Housing & Urban Servs. Int'l v. Iran*, 9 IRAN-U.S. C.T.R. 313, 330 (1985 II); Note, *Partnership Claims before the Iran-United States Claims Tribunal*, 27 VA. J. INT'L L. 307 (1987).

<sup>185</sup> Mann, *The Aminoil Arbitration*, 54 BRIT. Y.B. INT'L L. 213, 214 (1983). Accord *Yates, Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in Carboneau, *supra* note 2, at 230.

arbitration. These lessons are particularly compelling in transactions or arbitrations between private firms and states or state entities, where arbitrators' concerns about subjecting a state to another nation's system of laws may be particularly great. Above all, contract draftsmen may be wise to avoid excessive reliance upon choice-of-national-law clauses as a means of ensuring that future arbitrators will apply particularly important rules of national law.<sup>186</sup> It may be safer to build such rules expressly into the contract. Predictability may be further increased by relying in the contract upon widely accepted international rules, such as the United Nations Convention on Contracts for the International Sale of Goods.<sup>187</sup>

The practice of the Tribunal also offers important pragmatic lessons for advocacy before international arbitral panels. First, choice of law is a significant issue that must be recognized and consciously addressed in formulating and presenting claims and defenses in arbitration. (This observation may seem self-evident. However, I was struck by the frequency with which counsel for parties before the Tribunal failed to identify and consider significant applicable law issues.) The Tribunal's experience suggests that advocates may have greater success if they limit reliance upon particular national rules, whether determined through conflict-of-laws analysis, choice-of-law provisions in the contract, or otherwise. Insofar as a claim or defense can be substantially framed and pleaded on the basis of the contract and without reference to national rules, it may be desirable to do so. Where conflict-of-laws arguments are appropriate, it is advantageous to be able to show a "false conflict," where all relevant conflict rules produce the same result.<sup>188</sup> Finally, it may assist counsel to rest arguments upon rules that have received wide international acceptance, such as those contained in international private law conventions like the UN Sales Convention, or that can be shown to be general principles of law accepted by many legal systems.

<sup>186</sup> *But cf. Branson & Wallace, Choosing the Substantive Law to Apply in International Commercial Arbitration*, 27 VA. J. INT'L L. 39 (1986) (urging inclusion of contractual choice-of-law clauses "in order to secure a neutral and predictable standard for resolving disputes").

<sup>187</sup> United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, UN Doc. A/CONF.97/18 (1980), 52 Fed. Reg. 6262 (1987), reprinted in 19 ILM 671 (1980).

<sup>188</sup> See note 32 *supra*.