Trinity College
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ARBITRATIONS INVOLVING STATES AND FOREIGN PRIVATE PARTIES: A STUDY IN CONTEMPORARY LEGAL PROCESS

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for the degree of Doctor of Philosophy (Ph.D.).

For My Parents

Plainly, the more rules you can invent, the less need there will be to waste time over fruitless puzzling about right and wrong.

- Francis M. Cornford,
Microcosmographia Academica: Being a guide for the young academic politician (1908).

ABSTRACT

Arbitrations involving states and foreign private parties are a complex phenomenon, sharing certain animating values with other forms of adjudication, particularly international arbitrations of private commercial disputes, but reflecting at the same time singular values that must be fostered if the institution is to play a beneficial role in the international community.

A study of institutional forms of arbitration designed primarily to resolve commercial disputes between private parties reveals that their emphasis upon stability and upon the certainty and predictability of rules can make such institutions inappropriate for the arbitration of disputes involving states. Regimes designed specifically to regulate arbitrations between states and foreign private entities may be more successful in displaying sensitivity to the needs and aspirations of both public and private parties, but the work of the largest specialised institution, the International Centre for Settlement of Investment Disputes, is hampered by its governing Treaty for it does not deal adequately with the enforcement of awards against states. Ad hoc arbitration continues to be a useful means of resolving commercial disputes between states and foreign private parties, especially because the parties are free to design or to choose a delocalised procedural law which need not hinder enforcement.

The great difficulty with all forms of arbitration between states and private entities is the substantive law to be applied by such tribunals. Under the principle of the autonomy of the will, the parties are free to choose the governing law, and they may select international law. If they do so, however, the choice does not imply that the foreign private party is assimilated to a state or that the international responsibility of the state party is engaged directly vis-à-vis the private party. The enforcement of arbitral awards is also a troubling problem, but recent municipal case law reveals a growing pro-enforcement bias. Nevertheless, the experience of the Iran-United States Claims Tribunal reveals the significant advantages that accrue to the parties if they agree in advance upon an independent enforcement mechanism.

The political tensions inherent in most "mixed" arbitrations demand flexibility in the application of procedural and substantive rules, and require an approach to dispute resolution that emphasises the value of compromise. As such, the awards that emerge from mixed arbitrations are likely to be idiosyncratic or, at the very least, vague. Nevertheless, if one stresses the importance of process values rather than the elaboration of substantive rules, arbitration between states and foreign private parties can play an important role in the enhancement of the international rule of law.

DECLARATION

This thesis is being submitted to the University of Cambridge in partial fulfilment of the requirements for the Degree of Doctor of Philosophy (Ph.D.). It bears no relation to any work previously submitted for a degree or diploma at any University, nor is it, or any part of it, being submitted concurrently for any such degree or diploma. The thesis also meets all the requirements established by the Faculty Board of Law of the University of Cambridge.

Stephen J. Toope

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LIST OF ABBREVIATIONS

All E.R.	All England Reports
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
Ann. de l'Institut de dr. int'l	Annuaire de l'Institut de droit international
Arb. J.	Arbitration Journal
A.B.A.J.	American Bar Association Journal
A.C.	Appeal Cases (U.K.)
Brit. Y.B. Int'l L.	British Yearbook of International Law
Bus. Law.	Business Lawyer
B.U.L. Rev.	Boston University Law Review
Can. Bar Rev.	Canadian Bar Review
Can. Y.B. Int'l L.	Canadian Yearbook of International Law
Case Western Res. J. Int'l L.	Case Western Reserve Journal of International Law
Col. J. Trans. L.	Columbia Journal of Transnational Law
Col. L. Rev.	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Cornell L.Q.	Cornell Law Quarterly
C.J.Q.	Civil Justice Quarterly
C.L.J.	Cambridge Law Journal
C.L.R.	Commonwealth Law Reports (Australia)
Duke L.J.	Duke Law Journal
Exch.	Exchequer Court Reports (U.K.)
Fordham L. Rev.	Fordham Law Review
F. 2d	Federal Reports (2d Series) (U.S.A.)

F. Supp.	Federal Supplement (U.S.A.)
Ga J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
H.L. Cas.	House of Lords Cases (U.K.)
Indian J. Int'l L.	Indian Journal of International Law
Int'l Law.	International Lawyer
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
Iran-U.S. C.T.R.	Iran-U.S. Claims Tribunal Reports
I.C.J.	International Court of Justice Reports
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
J. dr. int'l	Journal de droit international
J. Indian L. Inst.	Journal of the Indian Law Institute
J. Int'l Arb.	Journal of International Arbitration
J. Law & Soc.	Journal of Law and Society
J. World Trade L.	Journal of World Trade Law
Legal Stud.	Legal Studies
Lloyd's L. Rep.	Lloyd's Law Reports (U.K.)
Lloyd's Mar. & Comm. L.Q.	Lloyd's Maritime and Commercial Law Quarterly
L.N.T.S.	League of Nations Treaty Series
L.R.	Law Reports (U.K.)
McGill L.J.	McGill Law Journal (Revue de droit de McGill)
Mich. L. Rev.	Michigan Law Review

Neth. Int'l L. Rev.	Netherlands International Law Review
Northwestern U.L. Rev.	Northwestern University Law Review
N.E. 2d	North Eastern Reports (2d Series) (U.S.A.)
N.Y.S.	New York State Reports
N.Y.U.J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N.Z.U.L. Rev.	New Zealand Universities Law Review
Oxford J. Legal Stud.	Oxford Journal of Legal Studies
Proc. Conf. Can. Council Int'l L.	Proceedings of the Conference of the Canadian Council on International Law
Proc. Am. Soc. Int'l L.	Proceedings of the American Society of International Law
P.C.I.J.	Permanent Court of International Justice Reports
P.D.	Probate Division Reports (U.K.)
Q.B.	Queen's Bench Reports (U.K.)
Rec. des cours	Recueils des cours (Hague Academy of International Law)
Rev. belge dr. int'l	Revue belge de droit international
Rev. crit.	Revue critique
Rev. crit. dr. int'l privé	Revue critique de droit international privé
Rev. de l'arb.	Revue de l'arbitrage
Rev. dr. int'l et dr. comp.	Revue de droit international et de droit comparé
Rev. dr. McGill	Revue de droit de McGill (McGill Law Journal)
Rev. int'l dr. comp.	Revue international de droit comparé
Rutgers L. Rev.	Rutgers Law Review
R.I.A.A.	Reports of International Arbitral Awards

Stanford L. Rev.	Stanford Law Review
S. Cal. L. Rev.	Southern California Law Review
S.C.R.	Supreme Court Reports (Canada)
Texas Int'l L.J.	Texas International Law Journal
Tulane L. Rev.	Tulane Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Pittsburgh L. Rev.	University of Pittsburgh Law Review
U.C.L.A. L. Rev.	University of California at Los Angeles Law Review
U.N.T.S.	United Nations Treaty Series
U.S.	United States Supreme Court Reports
U.S.C.	United States Code
U.T.L.J.	University of Toronto Law Journal
Va L. Rev.	Virginia Law Review
Va J. Int'l L.	Virginia Journal of International Law
W.L.R.	Weekly Law Reports (U.K.)
Yale L.J.	Yale Law Journal
Y.B. Comm. Arb.	Yearbook of Commercial Arbitration
Y.B. Inst. Int'l L.	Yearbook of the Institute of International Law
Y.B. World Affs	Yearbook of World Affairs

PREFACE

Because this thesis is submitted to a Faculty of Law, I feel only mildly reticent in beginning with a citation to a regulation, specifically to Regulation 7 of the University of Cambridge's Regulations for Degrees in Science, Letters, and Philosophy: "A student, in submitting a dissertation, shall state, generally in a preface ... the sources from which his information is derived, the extent to which he has availed himself of the work of others, and the portions of his dissertation which he claims as his own original work."

Lawyers can lay no claim to true scientific method, so the dictates of Regulation 7 cannot be fulfilled by an in-depth description of my investigative methodology. Indeed, a recital of my approach sounds quite pedestrian. No computers have been involved, no statistically relevant samples have been taken. Instead, I have done those things that lawyers are wont to do. I have read books, and articles and reports. I have traced lines of cases and attempted to evaluate the relationships between various treaties and pieces of legislation. I have also been more adventuresome in interviewing a number of major participants in the process I seek to evaluate. I have done these things on my own, without collaboration.

Of course I have relied upon the work of others, for in international law our scholarly forbears have created law as much as described it. My debt to others is recorded in the many footnotes that dot the text. This thesis incorporates material available as of the end of April, 1986.

I can, however, assert originality, for the purposes of Regulation 7, on a number of scores. The synthesis of sources contained here is almost entirely new. Some of the material, particularly that emanating from the Iran-U.S. Claims Tribunal, has not yet been discussed in any published work. The identification of the potential effects of contemporary trends in commercial arbitration upon the structure of international law is novel, as is the discussion of arbitral remedies in the context of recognition and enforcement. The conclusions and prescriptions are my own.

Before embarking upon my ritual dance of thanksgiving, let me thank the reader in advance for tolerating such a long list. Let me also say that my particular dance of thanksgiving, though a social rite, reflects heartfelt gratitude for the remarkable support I have received over the last three years. The Librarians and staff at the Squire Law Library in Cambridge and the McGill University Law Area Library in Montréal were helpful and cheerful in the face of budget constrictions and chronic staff shortages. The Assistant Secretary-General of the Iran-U.S. Claims Tribunal, Mr W.A. Hamel, organised a very productive visit for me at a very difficult moment in the Tribunal's history. I thank him, the Co-Registrars, and the arbitrators who consented to be interviewed.

The burden of dealing with administrative details was lifted considerably through the competent and expeditious interventions of Miss Hélène Marion, Assistant to the Dean at the McGill Faculty of Law and of Dr M.D. Cowley, the Tutor for

Advanced Students at Trinity College, Cambridge. Mrs Anna Young did a yeoman's service as a fast and expert manipulator of intimidating word processing and printing technologies.

I am deeply grateful to the Canadian and United Kingdom administrators of the Commonwealth Scholarship Programme who granted me the incomparable experience of two years in Cambridge. The Fellows of Trinity College enriched that experience by awarding me an Honourary External Research Studentship and various travel grants. This thesis was completed during my tenure as a Boulton Junior Research Fellow at the Faculty of Law, McGill University. I thank the Boulton Trustees for financial, material and moral support beyond the dreams of a mere graduate student.

Young, aspiring academics need encouragement as well as wise advice. For both I am indebted to Dean R.A. Macdonald and Professors I.A. Vlasic, Yves-Marie Morissette and P.-G. Jobin of the McGill Faculty of Law, and to Dr Kevin Gray and Mr Phillip Allott of Trinity College, Cambridge. Professor Michael Bridge, also of the Faculty of Law at McGill, has put himself in a very dangerous position. His erudition and linguistic abilities are so great that he may soon be thrust into the role of full-time editor and adviser to many of his colleagues. His contribution to the eradication of infelicities and inconsistencies in this work has been enormous.

One of my obligations extends beyond the realm of words. I could not have hoped for a better supervisor than Professor D.W. Bowett of Queens' College, Cambridge. He served alter-

natively, and sometimes concurrently, as guide, researcher, mentor, editor, and adviser, fulfilling each function with vigour. He has been unfailingly supportive, accessible and reliable, and his broad knowledge and critical faculties have saved me from many an error or inexactitude.

Finally, I would like to exalt the value of good friendships during the pursuit of a Ph.D. My sincere thanks go to Alison Evans, Mary Welstead, Stuart Young, and Elizabeth Burr for helping to guard my sanity by encouraging walks in the Clare Fellows' Garden, tea breaks, picnics on the Backs, Evensong at Trinity, playgoing in London, trips abroad and other such essential pursuits.

S.J.T.

Montréal
June 1986.

INTRODUCTION

When legal historians of the twenty-first century and beyond are asked to identify important trends in late twentieth century Western legal thinking, it is safe to predict that they will include on any list the burgeoning interest in so-called "alternative dispute resolution", the use of non-judicial dispute settlement techniques. That growing interest -- which has already spawned an acronym, "ADR", and a specialised journal[1] -- is displayed most strongly within municipal legal systems, particularly that of the United States.[2]

If international lawyers do not seem to have been caught up in the craze, it is only because alternative dispute resolution is nothing new to them. Indeed, a wag might be tempted to say of the international context that there is very little dispute resolution that is not "alternative"; the use of negotiation, mediation, conciliation and arbitration has far outstripped resort to court adjudication. And so, despite the great amount of writing devoted to topics on alternative dispute resolution in the international milieu, most of it lacks the

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1. Negotiation Journal [on the Process of Dispute Settlement], published by the Plenum Press of New York and London. The first issue is dated January, 1985.

2. Recent publications in the field include the best-seller by R. Fisher and W. Ury, Getting to Yes (1983); and S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985). See also the symposium on alternative dispute resolution in (1984) 29 Villanova L. Rev. 1219.

zeal of new conversion so manifest among municipal law disciples.

Moreover, in their laudable effort to upgrade the standing of the International Court of Justice, international lawyers sometimes tend to devalue other means of dispute resolution, perhaps because they do not seem as richly symbolic of a Diceyan Rule of Law.[3] The reverse side of the same coin is the temptation to turn "alternative" forms of dispute settlement into mere surrogates for, or even mirrors of, court adjudication. Underlying that temptation is an assumption that truly "legal" forms of dispute resolution are limited to the judicial models found in the legal systems of Western states. The overriding goal of this study is to challenge that assumption, and through a comprehensive analysis of one "alternative" means of dispute resolution, to demonstrate the need for a variety of mechanisms to resolve the complicated disputes that arise in the international community.

The "alternative" method to be explored is arbitration, specifically arbitration involving states and foreign private parties. Such arbitrations will, as a rule, deal with

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3. This attitude has been recognised and criticised by a number of eminent scholars including Higgins, "The Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth" in R. Higgins & J. Fawcett, eds., International Organization: Law in Movement (1974) 38, 48 and 51; W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 17-9; and Bilder, Some Limitations of Adjudication as an International Dispute Settlement Technique (1982) 23 Va J. Int'l L. 1.

commercial disputes arising out of situations ranging from the breach of a contract for the sale and purchase of goods to the complete expropriation of foreign owned property. Despite the great interest in international commercial arbitration fostered by groups such as the International Chamber of Commerce and the United Nations Conference on International Trade Law, as well as by some influential jurists, and by Western business interests, surprisingly little scholarly effort has been devoted to any synthesis of the experience gained in various arbitrations between states and foreign private parties.[4] Although one of the aims of this study is therefore to synthesise and evaluate that experience, no attempt will be made to compile a list of substantive legal rules emerging from such arbitrations.

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4. No major monograph exists in English and only a few articles have been written which attempt to canvass the entire field. See Delaume, State Contracts and Transnational Arbitration (1981) 75 Am. J. Int'l L. 784; Domke, Arbitration Between Governmental Bodies and Foreign Private Firms (1962) 17 Arb. J. 129; Mann, State Contracts and International Arbitration (1967) 42 Brit. Y.B. Int'l L. 1; and McLaughlin, Arbitration and Developing Countries (1979) 13 Int'l Law. 211. There have been many articles produced which relate to particular topics within the general rubric of arbitration between states and foreign private parties. See, e.g., Böckstiegel, Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce (1965) 59 Am. J. Int'l L. 579; Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of other States (1972) 136 Rec. des cours 331; Jones, The Iran-United States Claims Tribunal: Private Rights and State Responsibility (1984) 24 Va J. Int'l L. 259; Suratgar, Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals (1962) 2 Indian J. Int'l L. 273; and Teson, State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration (1984) 24 Va J. Int'l L. 323.

Indeed, the much vaunted emergence of a new lex mercatoria will be challenged vigorously, at least as it purportedly applies to states. In any case, the confidentiality of many arbitral proceedings ensures that any attempt to articulate widely-accepted substantive rules is bound to produce only a small portion of the whole picture.[5]

The focus will instead be upon the process of arbitration as it operates in relations between states and private entities, for as Mr Wetter has written, "[a]rbitration in its essence is procedure, and as any experienced lawyer knows, procedure governs and shapes substance."[6] Not only does procedure shape substance, it can also reveal the values that underlie a legal system. In a third party adjudication, by examining the process through which authoritative decisions are reached, one can extrapolate fundamental systemic assumptions concerning the role of the disputants, the relative importance of their interests, the proper sources of legal justification, the epistemology of legal knowledge, and the role of the adjudicator.

In arbitrations involving states and foreign private parties, these underlying values are of great practical

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5. See Béguin, Le développement de la Lex Mercatoria menace-t-il l'ordre juridique international? (1985) 30 Rev. dr. McGill 478, 512.

6. J. Wetter, The International Arbitral Process: Public and Private (1979) Vol. 1, xxiii. See also de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts (1982) 57 Tulane L. Rev. 42.

interest. For example, when one party to an arbitration is a public entity with full international legal personality and the other is a body incorporated under a system of municipal law, it becomes necessary to articulate first principles in order to understand the very nature of the process. A number of basic questions arise. Is arbitration between a state and a foreign corporation simply a procedure to adjust private (usually contractual) rights, or is it an international legal process that must recognise the sovereign policy objectives of the state party (and perhaps of the national state of the foreign private party)? What system of substantive law is applicable to parties of diverse international standing? Are the obligations imposed by arbitral tribunals in these types of cases enforceable under international law and if so, by whom?

If the fundamental characteristics of the arbitral process are not articulated, there is a serious danger that the answers to questions such as those posed above will be confused. Such confusion threatens not only the coherence of the arbitral process, but can have adverse consequences for our understanding of the international legal system as a whole. In the course of arbitrations between states and foreign private parties, claims have already been made and decisions rendered that, if widely accepted, would alter radically the structure of public international law. For that reason alone, the process and the product of arbitral tribunals deserve critical attention. The increasing involvement of states and their agencies in international commerce means that the years ahead are likely to see

more commercial arbitrations to which states are party. It is therefore important to investigate the appropriateness of arbitration as a means of dispute resolution and to evaluate the authoritative status of awards rendered in this context.

Before noting briefly the main themes explored in this thesis, it would be helpful, by way of introduction, to outline two contemporary trends affecting all forms of international commercial arbitration. First, a point of semantics must be clarified. The use of the word "international" can cause difficulties in the context of commercial arbitration because it is used to describe processes and relationships that affect or involve parties that are not states. For present purposes, the word should usually be accorded a functional definition, meaning simply "across state boundaries." When a more precise definition is intended, for example, when "international law" is discussed, the context makes that clear.

The most important contemporary trend is the easiest to identify: the number of international commercial arbitrations has increased markedly during the last twenty years.[7] Tongue firmly in cheek, Lord Justice Kerr of the English Court of Appeal has noted that arbitration has become "something of a

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7. See, e.g., Paulsson, The Role of Swedish Courts in Transnational Commercial Arbitration (1981) 21 Va J. Int'l L. 211, 211; Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1979) 13 Int.l Law. 269, 287; Böckstiegel, supra, note 4, 585; and Béguin, supra, note 5, 483.

forensic industry all over the world."[8] The increased use of international commercial arbitration reflects not only the expanding scope of world trade, but demonstrates a growing commitment to arbitration on the part of commentators and business people. Arbitration is widely accepted as a helpful means of coping with disputes arising out of East-West trade[9] and although resistance lingers, many developing nations have recently expressed a willingness to participate in the process.[10] Still, the most vocal proponents may be found amongst Western business interests and their legal advisers. Not surprisingly, Western states have brought forth new

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8. Kerr, "International Arbitration v. Litigation" in C. Schmitthoff, ed., International Commercial Arbitration (1974-1980) 141.

9. See, e.g., Strohbach, "General Introduction" to Part I, National Reports in (1976) 1 Y.B. Comm. Arb. 4; Delaume, "Transnational Commercial Arbitration" in C. Schmitthoff, ed., International Commercial Arbitration (1982), vol. III, 33; and Straus, The Growing Consensus on International Commercial Arbitration (1974) 68 Am. J. Int'l L. 709.

10. For example, the Arab nations, which manifested a strong distaste for international commercial arbitration, have recently displayed a change in attitude and have participated through the Euro-Arab Chamber of Commerce in the drafting of Rules of Conciliation, Arbitration and Expertise (in force 10 January 1983), reprinted in (1985) 24 I.L.M. 1119. For discussions of the attitudes of other developing states, see Abbott, Latin America and International Arbitration Conventions: The Quandry of Non-Ratification (1976) 17 Harv. Int'l L.J. 131; Park, The Lex Loci Arbitri and International Commercial Arbitration: When and Why it Matters (1983) 32 Int'l & Comp. L.Q. 21, 38; Paulsson, Le tiers monde dans l'arbitrage commercial international [1983] Rev. de l'arb. 1; and Ribicoff, Alternatives to Litigation: Their Application to International Business Disputes (1983) 38 Arb. J. 3 (No. 4) 5.

legislation[11] and revised judicial theories[12] to facilitate the growing use of international commercial arbitration.

The other observable trend is the increased reliance of international commercial interests upon institutional forms of arbitration. Many of the leading experts in the field have no hesitation in building and promoting institutional arbitration systems.[13] The immediate result has been that the supervising institutions have promulgated their own sets of procedural rules which typically mirror the judicial systems of procedure that exist in Western democracies.[14] In a related development, many

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11. See, e.g., France. Arbitration Decree of 14 May 1981, Decree No. 81.500, amending Articles 1492-1507 C.p.c., reprinted in (1981) 20 I.L.M. 917; and United Kingdom. Arbitration Act 1979, 1979 (U.K.) c. 42.

12. See, e.g., General National Maritime Transport Co. v. Société Gotaverken Arendel A.B. (21 February 1980, Cour d'appel de Paris), reprinted in (1981) 20 I.L.M. 884 (France); and M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct 1907 (1972), reprinted in (1972) 11 I.L.M. 599 and 832 (U.S.A.).

13. See, e.g., Sanders, International Commercial Arbitration (1973) 20 Neth. Int'l L. Rev. 37, 39; Sanders, "The Unification and Future of International Commercial Arbitration" in C. Schmitthoff, ed., International Commercial Arbitration (1974-1980) 146 (an updated looseleaf system); Straus, supra, note 9, 712; Schmitthoff, "Introduction" to C. Schmitthoff, ed., International Commercial Arbitration (1974-1980) 1, 18-9 (an updated looseleaf system); Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce (1984) 19 Texas Int'l L.J. 33, 92; and Cohn, The Rules of Arbitration of the International Chamber of Commerce (1965) 14 Int'l & Comp. L.Q. 132, 164.

14. One sees a greater and greater emphasis upon formal rules concerning the timely production of documents, about the order of presentation of pleadings, about hearings, and (cont'd.)

proponents of arbitration have begun to argue that the plethora of institutional rules should be homogenized through agreement upon a uniform system.[15] Although no unification of institutional rules has yet occurred, ad hoc arbitral rules promulgated by UNCITRAL[16] were conceived as one means to promote greater uniformity.

Although the trend towards the greater use of arbitration is to be applauded, for it represents a commitment to the fair and flexible settlement of disputes, the trend towards institutionalisation requires careful scrutiny. Indeed, certain observers have already expressed concern that too much attention is being devoted to purely procedural matters. Because arbitral rule systems "are generally drafted with a view to the maximum

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even about the calling of expert witnesses. See, e.g., International Chamber of Commerce, Rules of Conciliation and Arbitration, reprinted in (1976) 1 Y.B. Comm. Arb. 157, arts 3-6 and 14-5.

15. See, e.g., Domke & Glossner, "The Present State of the Law Regarding International Commercial Arbitration" in M. Bos, ed., The Present State of International Law and Other Essays (1973) (Centenary publication of the I.L.A.) 312-4; Lebedev, Developing Effective International Commercial Arbitration: A Keynote Address to the New Delhi Congress (1975) 30 Arb. J. 59 (No. 1); and Straus, supra, note 9, 711-2. Contra R. David, L'arbitrage dans le commerce international (1982) 68 who argues: "Il existe de bonnes raisons pour qu'une variété de règlements soit proposée aux intéressés. Il convient en premier lieu de considérer en effet la variété même des types d'arbitrages qu'il y a lieu d'administrer." Il will become apparent that Professor David's approach is entirely consonant with the spirit of the present study.

16. UNCITRAL [United Nations Conference on International Trade Law], Arbitration Rules, reprinted in (1977) 2 Y.B. Comm. Arb. 161.

possible protection of procedural rights, the full potential of arbitration as an informal, conciliatory form of dispute resolution has not been achieved."[17] Some eminent jurists have also warned against an atavistic reliance upon municipal court procedural models in the international context.[18]

These warnings serve to raise what is perhaps the fundamental question in any evaluation of an arbitral process, that is, why do the parties choose arbitration? If there are, say, three identifiable reasons why parties select an arbitral process, designers of arbitral systems and arbitrators themselves should, if they are rational, seek to enhance the aspects of arbitration that accord with those reasons, while at the same time maintaining systemic integrity. Throughout this thesis, recurrent stress will be placed upon the expectations of states and foreign private parties in choosing arbitration. The conformity of those expectations to actual experience will be evaluated.

Two important assumptions of this work must now be stated. Because of the emphasis placed upon the importance of party

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17. Perlman & Nelson, New Approaches to the Resolution of International Commercial Disputes (1983) 17 Int'l Law. 215, 253. See also Stein, Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal (1984) 78 Am. J. Int'l L. 1, 35.

18. See, e.g., Sir H. Lauterpacht, Private Law Sources and Analogies of International Law (1927) 266; J. Moore, International Adjudications: Modern Series (1929), Vol. 1, xc; Brownlie, The Justiciability of Disputes and Issues in International Relations (1967) 42 Brit. Y.B. Int'l L. 123, 142.

choice in arbitration, one major assumption may already be apparent. Although there persist at least four theories concerning the legal nature of arbitration,[19] the approach taken here is in line with the dominant contemporary theory which roots arbitration in the principle of consent as a manifestation of the autonomy of the will,[20] and not in a subrogation of rights of adjudication from the state.[21] To stress the autonomy of the parties' will does not mean, however, that arbitration can or should be entirely divorced from municipal systems of law, especially at the point of enforcement. Nor does it imply that the parties can grant and withdraw an arbitral tribunal's jurisdiction at will. Arbitration, though based upon party consent, becomes an exercise in autonomous jurisdiction once that consent has been granted, and a subsequent award typically is binding upon the parties even if one has withdrawn from the

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19. See, e.g., J. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978) 52-61; and Carbonneau, supra, note 13, 35, fn. 1.

20. See, e.g., Schmitthoff, "Defective Arbitration Clauses" in C. Schmitthoff, ed., International Commercial Arbitration (1974-1980) 21, 21; Jalet, Judicial Review of Arbitration: The Judicial Attitude (1960) 45 Cornell L.Q. 519, 531; Carbonneau, The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity (1980) 55 Tulane L. Rev. 1, 28; and G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes, re-issue (1985), Vol. II, Ch. 13, 1.

21. The positivist position is articulated forcefully by Mann, Private Arbitration and Public Policy (1985) 4 C.J.Q. 257, 259; and Szaszy, Recognition and Enforcement of Foreign Arbitral Awards (1966) 14 Am. J. Comp. L. 658, 667.

process.[22] That being said, wise arbitrators will make every attempt to retain the confidence and support of the parties throughout the proceedings.[23]

A second major assumption is that the choice by disputants to utilise international commercial arbitration is based upon a complex amalgam of considerations which varies depending upon the nature and status of the relevant party. For example, the motivations of multinational corporations and of states in choosing arbitration are not likely to be identical.

One preliminary comment can be made, however, concerning the motivations of any party that chooses international

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22. See, e.g., Delaume, supra, note 20, Vol. II, Ch. 13, 1; Sanders, Trends in the Field of International Commercial Arbitration (1975) 145 Rec. des cours 205, 233-4; David, supra, note 15, 108; and Schmitthoff, "The Jurisdiction of the Arbitrator" in C. Schmitthoff, ed., International Commercial Arbitration (1980-1983) 13. It should be noted that the distinction between what has been called the "contractual" and the "jurisdictional" aspects of arbitration is not the same as the Italian division between arbitrato libero and arbitrato rituale. The latter distinction is closer to that between contractual adjustment and arbitration per se. Contra Oppetit, Arbitrage juridictionnel et arbitrage contractuel: A propos d'une jurisprudence récente [1977] Rev. de l'arb. 313.

23. Lady Fox has written that continuing consent is "an essential ingredient to the completion of any arbitration". Although, formally, the jurisdiction of an arbitral tribunal can withstand the withdrawal of consent, as a practical matter the co-operation of both parties is a distinct advantage. Moreover, any award rendered without the full argument of both sides is bound to possess less persuasive value than an award emerging from a contested proceeding. See Fox, "Arbitration", in David Davies Memorial Institute of International Studies, Report of a Study Group on the Peaceful Settlement of International Disputes (1966) 91, 92.

commercial arbitration. Contrary to the experience in the municipal sphere, parties to transnational disputes are unlikely to choose arbitration for its speed or low process cost. Indeed, even proponents of international commercial arbitration admit that it can be distressingly slow and extremely expensive.[24] One must search for other motivations for the choice of arbitration, including the neutrality of the forum, the informality and flexibility of the proceedings, the confidentiality of the proceedings, the ability to choose the arbitrator especially if "experts" are required, and the desire to promote a conciliatory atmosphere conducive to continuing business relations. At a very basic level, arbitration may be selected simply because the parties are unable to agree upon any other venue. The parties may have no ideological objection to the use of state courts to resolve their dispute, but the private party may not wish to submit to the jurisdiction of the courts of the state party and the state party may be reluctant to submit to adjudication by the courts of a third state and a

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24. See, e.g., Lalive, Contracts Between a State or a State Agency and a Foreign Company (1964) 13 Int'l & Comp. L.Q. 987, 991; Park, Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979 (1980) 21 Harv. Int'l L.J. 87, 116; de Vries, supra note 6, 61; Delaume, supra, note 20, Vol. II, Ch. 14, 25; McClelland, International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes (1977) 17 Va J. Int'l L. 729, 744; Mann, supra, note 21, 257; and Forrestal, "Examples of and Reasons for Increased Use of International Arbitration" in G. Aksen & R. von Mehren, eds, International Arbitration between Private Parties and Governments (1982) 56 (Handbook No. 399 of the U.S. Practising Law Institute).

fortiori to the jurisdiction of the courts of the private party's national state. It will become apparent that in arbitrations involving states and foreign private parties, all of these factors may condition a decision to resort to arbitration.

Having set out these basic assumptions, it remains only to outline the structure of the thesis. First, it must be emphasised that this thesis is not a comprehensive treatise on arbitration nor an in-depth comparative study of various systems of arbitral rules. The limitations of space and form precluded any such effort. The focus rests solely on one important type of arbitration, that is arbitration between states and foreign private parties. The topics selected for study highlight the unique difficulties that arise in that context. In Chapter One, the role of institutional arbitration in disputes between states and foreign private parties is examined and an attempt is made to explore the difficulties of adjudicating cases involving assertions of both private and public rights and interests. It is suggested that privately sponsored institutional forms of commercial arbitration, such as that administered by the International Chamber of Commerce, may not be appropriate for the resolution of disputes involving states. The arbitral system of the International Centre for Settlement of Investment Disputes, the most comprehensive system designed specifically for the resolution of disputes involving public and private parties, will be evaluated. Chapter Two offers an assessment of ad hoc

arbitration through the optic of the debate over "delocalisation". This approach is useful because it highlights the problems posed for the international legal order by arbitrations involving parties of a different international status. Moreover, the issue of delocalisation concentrates attention upon the central question whether the substantive rights of the parties may be transferred out of the domain of municipal law. The argument is made that the delocalisation of arbitral procedure does not imply that arbitrations between states and foreign private parties are governed by international law.

The Recognition and Enforcement of International Arbitral Awards is the topic of Chapter Three, with emphasis placed not only upon the enforcement procedures of the New York Convention but also upon the much neglected topic of the remedies that can be ordered by arbitral tribunals. Enforcement is, of course, the central concern of most participants in the international arbitral process, and particular problems arise when enforcement is sought against a state. It is suggested that existing law provides solutions to these enforcement difficulties, but that municipal courts in jurisdictions where enforcement is sought must display sensitivity to the special qualities of commercial arbitral awards rendered against states. Chapter Four explores the work of the Iran-United States Claims Tribunal, the most ambitious arbitral tribunal involving states and foreign private parties yet created. The experience of this Tribunal underscores the trends referred to above and demonstrates forcefully

the need for a variety of dispute resolution devices in the international commercial milieu. The potential influence of the Tribunal's awards is evaluated and important aspects of its process are highlighted, especially the independent enforcement mechanism that ensures the enforcement of awards rendered against Iran. In the Conclusion, an effort is made to judge the impact of arbitrations between states and foreign private parties upon our understanding of the structure of international law. A model for assessing the role of such arbitrations is proposed, and consequent suggestions for institutional design are advanced.

CHAPTER I: THE LIMITED ROLE OF PERMANENT ARBITRAL INSTITUTIONS IN COMMERCIAL RELATIONS BETWEEN STATES AND FOREIGN PRIVATE PARTIES

Since the 1960s, the international business community has manifested an increasing interest in arbitration as a dispute resolution mechanism.[1] Concurrent with this increased attraction to arbitration has been the emergence and growth of more and more arbitral institutions promulgating sets of rules and providing facilities and organisational mechanisms for the arbitral resolution of commercial disputes.[2] Commercial

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1. See, e.g., Domke & Glossner, "The Present State of the Law Regarding International Commercial Arbitration", in M. Bos, ed., The Present State of International Law and Other Essays (1973) 307 (a Centenary Publication of the International Law Association); Straus, The Growing Concensus on International Commercial Arbitration (1974) 68 Am. J. Int'l L. 709; Sanders, Trends in the Field of International Commercial Arbitration (1975) 145 Rec. des cours 205; Sanders, "The Unification and Future of International Commercial Arbitration" in C. Schmitthoff International Commercial Arbitration (1974-1980) 146 (an updated loose-leaf system); Perlman & Nelson, New Approaches to the Resolution of International Commercial Disputes (1983) 17 Int'l Law. 215; Coulson, A New Look at International Commercial Arbitration (1982) 14 Case Western Res. J. Int'l L. 359; and Eisemann, Le phénomène de l'arbitrage, son utilité, ses avantages et son rôle (1976) 53 Rev. dr. int'l et dr. comp. 106.

2. These institutions take many forms and promote diverse goals. The arbitral institutions established by local chambers of commerce seem designed primarily as money-spinning schemes, the intention being to attract profitable economic activity to particular locales. Notable examples include the arbitration schemes of the Stockholm Chamber of Commerce and of the London Centre for Commercial Arbitration. Lord Justice Kerr, Chairman of the United Kingdom Law Commission, has noted the economic

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arbitration is not, of course, a phenomenon of the post-sixties period, for it existed long before, but with the increasing scale of international trade, arbitration has very much come into its own. The emerging institutions must be distinguished from the venerable trade association schemes of arbitration which were intended to promote good business relations within a trade, often by resolving disputes purely on the basis of trade

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benefits of attracting commercial arbitration to London. See Kerr, "International Arbitration v. Litigation" in C. Schmitthoff, International Commercial Arbitration (1974-1980) 141 (an updated looseleaf system).

Other institutions have been set up primarily to facilitate the operation of transnational commercial relations, although profits are by no means excluded. See, for example, the discussion of the International Chamber of Commerce, infra, text accompanying notes 15 to 52. A very recent example of an institution intended to facilitate commercial dealing between businessmen from radically dissimilar cultures is the Euro-Arab Chamber of Commerce which has promulgated Rules of Conciliation, Arbitration and Expertise, in force 10 January 1983, reprinted in (1985) 24 I.L.M. 1119.

Finally, an entirely different class of institution has been created specifically to encourage the resolution of commercial disputes between states and foreign private parties. The International Centre for the Settlement of Investment Disputes was created by international treaty. Although other arbitral institutions can be chosen to regulate disputes between states and foreign private parties, ICSID was thought to fill a real need by responding more directly to the special requirements of parties to state contracts. Whether or not it has met that need will be discussed infra, text accompanying notes 197 to 220.

On the increasing use of institutional arbitration, see McClelland, International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes (1977) 17 Va J. Int'l L. 729, 729; and McLaughlin, Arbitration and Developing Countries (1979) 13 Int'l Law. 211, 211 especially fn. 1.

usages and equity.[3] The more recently established or expanded arbitral institutions are said to possess a general mandate to resolve disputes arising in many different economic contexts. Trade association arbitration was concerned almost exclusively with disputes involving contracts for the sale and purchase of goods, and although contemporary commercial arbitration is still employed predominantly to settle such disputes, its advocates assert that its potential ambit is much wider. Arbitrations involving states may be especially complex, being concerned with the breach of joint venture agreements, with the unilateral alteration by the state of investment contracts, and with the expropriation of foreign owned property.

Because of the potential application of contemporary commercial arbitration in many economic contexts and perhaps because of the increasingly large sums of money involved, especially in expropriation claims, one can understand the superficial attraction of institutional arbitration which provides a stable organisational base for an arbitration[4] and,

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3. Examples include the London Corn and Grain Feed Trade Association arbitrations and arbitrations conducted under the auspices of various maritime associations.

4. Sacerdoti notes accurately that:
"[i]n institutional arbitration, the request for arbitration, once it has been accepted by the administering institution, constitutes an agreement between the parties and such institution, under which the latter provides to the parties the services it offers under its rules."

(cont'd.)

more importantly, a set of pre-established procedural rules which should prevent renegotiation during a heated dispute, thereby helping to ensure that the arbitration goes forward even in the face of a recalcitrant party. It is said, therefore, that institutional arbitration enhances the values of certainty and predictability.[5] Delaume asserts that:

> [s]ubmission to the rules of institutional arbitration agencies may make it unnecessary for the parties to have recourse, at least initially, to the courts to seek an order compelling arbitration.[6]

It has also been suggested that by incorporating procedural rules (typically the rules of an arbitral institution) into a contract which provides for the arbitration of disputes, the parties will enhance the likelihood of enforcement,[7] presumably

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Sacerdoti, The New Arbitration Rules of ICSID and UNCITRAL (1977) 11 J. World Trade L. 248. See also Schmitthoff, "Defective Arbitration Clauses" in C. Schmitthoff, International Commercial Arbitration (1974-1980) 21, 32 (an updated looseleaf system).

5. See, e.g., McClelland, supra, note 2, 735-6.

6. Delaume, "Transnational Commercial Arbitration" in C. Schmitthoff, International Commercial Arbitration (1982), vol. III, 58. It should be noted that it is the submission to institutional arbitral rules by the parties themselves that makes such rules binding:

> Arbitration rules per se are thus not law and are always in a state of flux. Arbitration rules become law only when they are part of an enforceable arbitration agreement.

Thompson, The UNCITRAL Arbitration Rules (1976) 17 Harv. Int'l L.J. 141, 153.

7. See Thompson, ibid., 141-2. Although Thompson was writing about the UNCITRAL Rules which were designed primarily for ad hoc arbitration, his assumption must extend a fortiori to the rules of an institutional arbitration.

because the courts in an enforcing jurisdiction will be impressed by the fairness and legality of procedural rules that are not ad hoc or purely contingent. Although this assumption will be challenged,[8] it certainly holds a superficial attraction.

The desire for certainty and predictability is a powerful motivating factor in international commercial relations. Business people are renowned for their self-professed attachment to stability, and no doubt the existence of arbitral institutions is a source of great comfort to foreign investors who would wish to resort to such institutions with their pre-established "rules" in the event of any dispute. In the context of arbitrations involving states and foreign private parties, however, a number of troubling issues arise.

First, one may ask if institutional arbitration is sufficiently attuned to the legitimate political and policy goals of states. With the exception of the International Centre for Settlement of Investment Disputes [ICSID] regime, institutional arbitration is geared primarily to the resolution of commercial disputes between private parties. Assumptions and approaches that may be most appropriate when dealing with contracts of sale between two corporations may not be applicable to arbitrations concerning the expropriation of foreign-owned property. To take only one example, principles governing the awarding of damages

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8. See infra, Chapter III on the Recognition and Enforcement of International Arbitral Awards.

for loss of future profits are not the same in the private and public law contexts.[9] The "expertise" of commercial arbitrators and institutional managers is simply not geared to the resolution of many types of disputes involving states.

A second difficulty with institutional arbitration, at least insofar as states may be involved, is that codified procedures, and an increasing emphasis upon precedent, lend a certain inflexibility to the process of arbitration. The tendency of all institutions is towards formality, perhaps even towards particular brands of formality, and the predominantly Western designers of institutional arbitration show an understandable inclination to mirror the formal structures of domestic courts in liberal democracies. One manifestation of this trend is that the rules of arbitral tribunals tied to institutions have become increasingly detailed with regard to such matters as filing dates for written pleadings.[10] Although this development can be seen to accord with Western, and more particularly American, notions of "due process", it may not be

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9. See infra, Chapter III, text accompanying notes 220 to 286.

10. Thus we see in the Iran-U.S. Claims Tribunal, a highly formal institution (whose institutional Rules, oddly enough, are based on the UNCITRAL Rules, designed primarily for ad hoc arbitration), a pre-occupation on the part of some arbitrators with the rigorous application of fixed delays. See infra, Chapter IV text accompanying notes 228 to 273. It must be noted that the majority of Tribunal members have eschewed such an approach, preferring to extend time requirements in the interest of the full exposition of each case.

sufficiently sensitive to alternative forms of legal ordering represented in the international legal community. Developing states may question an emphasis upon the formally rational values of procedure if there follows a corresponding devaluation of substantive questions of distributive justice. They may view the wrangles that arise concerning the application of a procedural rule as a mere displacement of concern from "real" issues such as long-term colonial exploitation or the improper participation of a foreign corporation in the buttressing of a previous regime which slavishly supported Western interests. The increasing formalisation of arbitral procedure that seems to follow the creation of institutions may in fact hamper the resolution of disputes where developing states are involved because the emphasis upon rigorous procedural rules may not allow for sufficient sensitivity to political concerns and cultural discontinuities.

Even when looking at international commercial arbitration from a purely Western perspective, one may ask if the increased formality, which seems to be attendant upon the creation of arbitral institutions, has allowed for a rich enough variety of approaches to dispute resolution. For example, is the adversarial model replicated in most forms of institutional arbitration clearly superior to the inquisitorial model of adjudication as it exists in various European civil law jurisdictions?[11]

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11. For a recent and powerful defence of the civil law inquisitorial system, see Langbein, The German Advantage in Civil Procedure (1985) 52 U. Chi. L. Rev. 823. Mendes (cont'd.)

These questions are of more than purely theoretical interest for they point to a serious problem for advocates of institutional arbitration. States have demonstrated a striking disinclination to resort to arbitrations conducted under the auspices of institutions in major cases involving questions of the expropriation of foreign owned property.[12] Even when a dispute would not seem to have a crucial effect upon state policy or sovereignty, ad hoc arbitration retains great

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has suggested that the arbitration system of the International Chamber of Commerce bears some relation to an inquisitorial process. See Mendes, International Commercial Arbitration: A Critical Evaluation (1984) Proc. Conf. Can. Council Int'l L. 122, 133. Although there is a limited inquisitorial aspect, the system nevertheless tends to exalt adversarial values. See, e.g., the ICC Rules of Conciliation and Arbitration, reprinted in (1976) 1 Y.B. Comm. Arb. 157, arts 3, 4, 5, 6, 14(1) and 16. The arbitrator's power to decide a case based on written submissions alone, which Mendes uses as his primary example of the inquisitorial nature of ICC proceedings, is in fact a strictly limited power dependent upon the parties' agreement. See art. 14(3).

12. It is no accident that all of the famous "oil arbitrations" in the 1970s and 80s were submitted to ad hoc arbitration. See, e.g., B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic (Merits), decision of 10 October 1973 and 1 August 1974, reprinted in 53 I.L.R. 297; Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 1; Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 19 January 1977, reprinted in 53 I.L.R. 389, 422; and The Government of the State of Kuwait v. The American Independent Oil Co. (Aminoil), Final Award of 24 March 1982, reprinted in (1982) 21 I.L.M. 976. And note the arbitration between British Petroleum and the Government of the Islamic Republic of Iran which is presently taking place (proceedings confidential).

currency.[13] The purpose of this Chapter is to explore representative regimes of institutional arbitration to determine why states remain distrustful. Given the plethora of existing structures, it has been necessary to focus upon the institutions that could potentially play the greatest role in arbitrations between states and foreign private parties. The arbitration structures developed by the International Chamber of Commerce in Paris will be explored first, for the ICC runs the largest and most widely used international commercial arbitration institution. Where particularly helpful, some comparisons will be made with roughly analagous institutions, such as the London Centre for Commercial Arbitration and the system of the American Arbitration Association.[14] The ICSID regime will then be

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13. See, e.g., Benteler v. Belgian State (18 November 1983), reprinted in (1984) 1 J. Int'l Arb. 184; and Hellas International Co. for Garments S.A. v. The Greek State (18 January 1982), reprinted in (1985) 10 Y.B. Comm. Arb. 34.

14. These comparisons have a limited value, for as Paulsson points out:

> [A] valid distinction may, in my view, be made when comparing ICC ... arbitrations and the multitude of other arbitration institutions that are clearly tied to a place. Parties referring to arbitration under the rules of one of the many trade associations in London know they are getting justice as defined, ultimately, by English law; the same is true for Swedish law where they have opted for the Stockholm Arbitration.

Paulsson, Delocalisation of International Commercial Arbitration: When and Why it Matters (1983) 32 Int'l & Comp. L.Q. 53, 56. In other words, the expectations of the parties who choose a clearly "localised" arbitration may be entirely dissimilar to those who choose an institutional arbitration that professes to be independent of any particular locality. On the complicated issue of "delocalisation", see infra, Chapter II.

examined in greater depth, for it is the only arbitral institution designed specifically with state-foreign private party disputes in mind.

A. International Chamber of Commerce Arbitration: Private Disputes and Public Interest

The International Chamber of Commerce [ICC] was created immediately after the First World War, undoubtedly to encourage the re-establishment and the expansion of trading links between the recently pacified European states. Since then, its membership has grown to include affiliates in over eighty states around the world. In 1924, the ICC created a Court of Arbitration which "has become the most important and significant tribunal for disputes arising out of international commerce."[15] Because of this pre-eminence, the ICC is the best exemplar of institutional commercial arbitration systems in the international setting. It is not unique, but serves here as a convenient paradigm. In the following short account of the ICC system, the emphasis will be upon the theoretical problems posed by the possible participation of states in the ICC arbitral process. Although, of course, certain aspects of the ICC Rules of Arbitration will be discussed, no systematic evaluation of the substantive content of the Rules will be undertaken. In any case, that task has already been accomplished in a most sophisticated manner in a recent book by Professors Craig, Park

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15. J. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978) 22.

and Paulsson.[16]

Describing the ICC arbitral institution as a "court" or a "tribunal" is not entirely accurate, for the Court is really an administrative body established to manage arbitrations and to design and refine the ICC Rules of Arbitration. As is stated in art. 1(1) of those Rules: "The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules." And in art. 2(1): "The Court of Arbitration does not itself settle disputes. Insofar as the parties shall not have provided otherwise, it appoints, or confirms the appointments of, arbitrators."[17] Although the ICC itself is headquartered in Paris, the locus of an ICC arbitration may be anywhere in the world. Lew notes, however, that

> [i]n practice ... the ICC fix [sic] the arbitration in a place which is accessible to both the parties and the arbitrators, which is geographically convenient for witnesses and the presentation of evidence, which is legally favourable to both arbitration proceedings and the enforcement of the arbitration awards ... which is politically acceptable to both parties, and which has the basic requirements ... necessary for the conduct of arbitration proceedings.[18]

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16. W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration (1984).

17. International Chamber of Commerce, Rules of Conciliation and Arbitration, reprinted in (1976) 1 Y.B. Comm. Arb. 157 [hereinafter ICC, Rules].

18. Lew, supra, note 15, 23.

When the parties to a dispute have stipulated in their contract or in a subsequent agreement that a dispute is to be submitted to ICC arbitration, they are thereby deemed to have selected the ICC arbitration Rules.[19] As was noted by Lord Justice Kerr in the English Court of Appeal, "[t]he detailed provisions of the [ICC] rules are designed to cover every step in an arbitration conducted under their terms, from the inception of the arbitration to the issue of a final award which is designed to be enforceable against the unsuccessful party".[20] In addition, the Court of Arbitration provides active management throughout the arbitral process,[21] appointing a third arbitrator if the parties fail to agree,[22] ruling on challenges to arbitrators,[23] replacing arbitrators who fail to act expeditiously,[24] and exercising general powers of super-

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19. ICC, Rules, supra, note 17, art. 8(1).

20. Bank Mellat v. Helliniki Techniki SA [1983] 3 All E.R. 428 (C.A.) per Kerr L.J. 433 (Leave to Appeal Refused).

21. See Sacerdoti, supra, note 4, 250.

22. ICC, Rules, supra, note 17, art. 2(4).

23. ICC, Rules, ibid., art. 2(7). See also Raffineries de pétrole d'Homs et de Banias c. Chambre de commerce internationale, Tribunal de grande instance de Paris, 28 March 1984, and Cour d'appel de Paris, 15 May 1985, reprinted in [1985] Rev. de l'arb. 141 (No. 1), a case in which the challenge of an arbitrator was upheld by the ICC Court of Arbitration, prompting litigation in a municipal court.

24. ICC, Rules, ibid., art. 2(8).

vision.[25] The The ICC has also established an International Centre for Technical Expertise to assist in the appointment of experts when they are needed in any ICC arbitration.[26]

The efficiency of pre-established rules of procedure and the support of an institutional structure are the primary advantages held out to parties who select ICC arbitration. It is clear that such an institutional structure with pre-ordained rules responds primarily to the desire for certainty and clarity. Parties who choose ICC arbitration can feel relatively confident that their dispute will ultimately be decided and that the procedure will, broadly speaking, be fair. The value of clarity is underscored by other aspects of the ICC Rules. For example, the Rules state that, before a file is given to an arbitrator, and sometimes even thereafter, the parties may apply to national courts for interim measures of protection. This simple rule precludes endless debate over the residual jurisdic-

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25. See, e.g., ICC, Rules, ibid., arts 18(1)-(3), 21 and 26. Article 21 is of particular importance as a supervisory mechanism, for it requires that "[b]efore signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw attention to points of substance. No award shall be signed until it has been approved by the Court as to its form."

26. See, e.g., Delaume, supra, note 6, 71; and Stein & Wotman, International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules (1983) 38 Bus. Law. 1685, 1686.

tion of municipal courts in such matters.[27] The arbitration rules of the American Arbitration Association and of the London Court of Arbitration expressly empower the arbitral tribunal to order interim measures of protection,[28] but oddly enough, this provision actually leads to less certainty, for arbitral tribunals have no independent power to enforce measures of protection by attaching property. It becomes necessary to resort to municipal courts and their role is unclear in many sets of arbitral rules. The ICC Rules are at least explicit in allowing the parties to apply to municipal courts for interim measures.[29]

Yet, no set of rules is capable of completely pre-empting interpretational disputes. No set of rules will ever ensure full predictability. The ICC Rules of Arbitration are no exception. On many crucial issues, the Rules must resort to very general statements of principle, even to the bold articulation of aspirations. For example, art. 2(4) of the Rules states that

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27. ICC, Rules, ibid., art. 8(5). The question whether the jurisdiction of an arbitral tribunal is exclusive, thereby precluding applications for interim measures of protection before municipal courts, has prompted a serious division of opinion, particularly within the United States judiciary. See infra, Chapter III, text accompanying notes 295 to 309.

28. See, e.g., Stein & Wotman, supra, note 26, 1708; and Branson & Tupman, Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration (1984) 24 Va J. Int'l L. 917, 928.

29. See, e.g., Delaume, supra, note 6, 84-5. For a broader discussion of the issues involved in ordering interim measures, see infra, Chapter III, text accompanying notes 295 to 318.

when a tribunal of three arbitrators is to be appointed, each party-nominated arbitrator is to be "independent of the party appointing him". Such a rule would seem to be very straightforward. It could even be viewed as a prima facie requirement of all third-party adjudication. That is not the case. For example, the Code of Ethics promulgated by the American Bar Association and the American Arbitration Association would allow party-appointed arbitrators in some circumstances to act as advocates for the parties that appoint them.[30] "Independence" is a complicated notion and, in practice, even when expressly required, the "continental theory that even the party-appointed arbitrator is not simply an advocate for his party but must be free of links that may bias his judgment"[31] has not been followed uniformly. In one recent ICC arbitration involving Syrian and Yugoslavian public sector corporations and a Swiss private corporation, the ICC Court of Arbitration was forced to rule upon a charge of bias brought against the Syrian arbitrator. No rule requiring "independence" could prevent the need for such challenges, nor could it in this case preclude further litigation in municipal courts.[32] Rules are very rarely, if ever, "transparent" or auto-interpretive.

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30. See, e.g., Stein & Wotman, supra, note 26, 1701. See also Chapter IV, text accompanying notes 328 to 334.

31. Sacerdoti, supra, note 4, 253.

32. Raffineries de pétrole d'Homs et de Banias, supra, note 23.

Similarly, the rule governing the substantive law to be applied by an ICC arbitral tribunal is very broadly phrased, potentially requiring every tribunal to engage in complicated exegesis. Mirroring the language of art. VII of the European Convention,[33] the relevant ICC Rule states:

> The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.[34]

Perhaps due to difficulties in the bargaining process, parties often do not choose a governing law expressly. When no choice is made, an ICC tribunal will have to determine, first, what conflicts rules to apply and, secondly, what substantive law is brought into operation by the applicable rules of conflict. As will be discussed in detail below,[35] such a process is by no means clear or predictable.

The ICC rule concerning the enforcement of arbitral awards is likewise of limited predictive value. Indeed, it is little more than exhortatory. Article 24(2) states simply that:

> [b]y submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the

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33. European Convention on International Commercial Arbitration, done 16 May 1961, (1961) 484 UNTS 364.

34. ICC, Rules, supra, note 17, art. 13(3).

35. See infra, Chapter II, text accompanying notes 98 to 279.

> resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.[36]

Although it has been estimated that ninety per cent of ICC awards are complied with voluntarily,[37] that rate of success can hardly be due to the transparency of art. 24(2). The waiver of appeal is only required "insofar as such waiver can validly be made", and the validity of a waiver of recourse to appeal can potentially be subject to national court adjudication in every enforcing jurisdiction. As Lord Justice Megaw of the English Court of Appeal noted in the Dalmia Dairy case, "those who turn their minds to the effect of these [ICC] rules will no doubt realise that any award against a person who is unwilling to obey it can be enforced only by the machinery of some system of law."[38] In other words, the apparently clear rule of art. 24(2) will often require municipal court action.

The point is not to offer implicit criticisms of the ICC Rules based upon a supposed lack of clarity or of predictive value. The drafters of these Rules were persons of great experience, possessed of an eminently practical turn of mind.

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36. ICC, Rules, supra, note 16, art. 24(2).

37. See, e.g., Paulsson, Le tiers-monde dans l'arbitrage commercial international [1983] Rev. de l'arb. 1, 20; and Mirabito, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years (1975) 5 Ga J. Int'l & Comp. L. 471, 482.

38. Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyd's L. Rep. 227 (C.A.), per Megaw L.J., 284.

If perfect clarity and certainty have not been achieved, the cause cannot be mere incompetence. The real reason is deeply-rooted in the very nature of rules. Simply put, no rules promulgated by any institution can be designed solely to exalt the values of transparency and predictability. At least two other classes of values must be comprehended within a given set of rules. First, it is necessary to design a system congruent with the policy objectives sought to be pursued and, at least at a basic level, with the social reality in which the rules must operate. Secondly, rules must be created which are rich enough to allow for the drawing of analogies, for if rules are overly specific, it will not be possible for the persons at whom the rules are directed to use them as general guidelines for conduct. The ICC Rules, like all sensible sets of rules, were designed to achieve a balance between the three classes of values although it is obvious that clarity and certainty were the pre-eminent values. The Rules and the institutional structures of the ICC are employed widely, and there can be little doubt that they "work". But for present purposes, an important question remains to be answered. Is the balance struck in the ICC system between the values of clarity and certainty, congruence, and analogical utility a balance which is appropriate in the context of arbitrations between states and foreign private parties?

Not surprisingly, given the complexity of the question posed, the answer is a convenient (but accurate) prevarication -- yes and no. That states are willing to resort to ICC

arbitration is undisputed. Martin Domke and Karl-Heinz Bockstiegel have both reported that the number of ICC cases involving "public authorities" increased sharply in the 1960s.[39] It would appear that the involvement of states in ICC arbitration has remained substantial throughout the 1970s and early 1980s.[40] However, if one examines the type of dispute usually submitted by states to ICC arbitration, an interesting pattern emerges. The vast majority of cases in which a state has agreed to become involved with the ICC system concern what

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39. Domke & Glossner, supra, note 1, 318; and Bockstiegel, Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce (1965) 59 Am. J. Int'l L. 579, 579-80. Professor Bockstiegel goes on to point out, at 582, that in many cases involving states "the Conciliation Committee of the ICC was able to bring about an amicable settlement between parties in the preliminary proceedings. Only a small proportion of the claims submitted thus came to a genuine arbitral decision."

40. See, e.g., the cases of Framatome et al. v. Atomic Energy Organization of Iran, ICC Award, 30 April 1982, [1984] Clunet 58, reprinted (1982) 8 Y.B. Comm. Arb. 94 (translation); and Procureur de la République v. S.A. Ipitrade International, Tribunal de grande instance de Paris, 12 September 1978, reprinted in (1978) 106 J. de dr. int'l 857 (a municipal court action arising out of an ICC arbitration involving the government of Nigeria and a foreign private party). Dispute resolution clauses submitting future disputes to ICC arbitration can also be found in a few contemporary state contracts. See, e.g., Agreement between Government of Qatar and Qatar Petroleum Co. et al. (16 September 1976), reprinted in P. Fisher, ed., A Collection of International Concessions and Related Instruments (Contemporary Series) (1975), vol. IV, art. 10; and Financing Agreement between Three Parties including the Islamic Republic of Mauritania for Establishment of a New Mining Company (14 May 1975), reprinted in P. Fischer, ed., A Collection of International Concessions and Related Instruments (Contemporary Series) (1975), vol. I, art. 22.

may be called "purely commercial matters", that is, contractual disputes involving private law rights and obligations.[41] Moreover, to say simply that "states" are willing to submit to ICC arbitration is not precise enough for, typically, it is not the government of a state that agrees to a contractual clause founding ICC jurisdiction, but a state trading agency or public sector enterprise.[42] One of the clearest examples of this distinction is found in the practice of the Arab Republic of Egypt.

In two important agreements concluded in the mid-1970s, the Egyptian government, an Egyptian state agency, and two foreign contractors negotiated oil exploration concessions. Both agreements stipulated expressly that any contractual disputes between the foreign contractors and the state agency would be submitted to ICC arbitration, but that disputes between

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41. See, e.g., ICC Case Nos. 3099 and 3100, Award of 30 May 1979, reprinted in (1979) 7 Y.B. Comm. Arb. 87 (a sales contract case); ICC Case No. 3896, Partial Award of 23 December 1982 reprinted (1982) 10 Y.B. Comm. Arb. 47 (a construction contract case); ICC Case No. 4237, Award of 17 February 1984, reprinted in (1984) 10 Y.B. Comm. Arb. 52 (a sales contract case); and Raffineries de pétrole d'Homs et de Banias, supra, note 23 (a sale and delivery contract case).

42. See all the cases cited ibid.; and Société des grands travaux de Marseille v. East Pakistan Industrial Development Corp., Award of 5 May 1976, reprinted in (1976) 5 Y.B. Comm. Arb. 177 (a construction contract case but with "development" overtones as the object of the contract is a natural gas pipeline). And see Von Mehren & Kourides, International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases (1981) 75 Am. J. Int'l L. 476, 549, fn. 286.

the Government and the other parties would "be referred to the jurisdiction of the appropriate A.R.E. courts and [would] be finally settled by such courts."[43] The depth of the Egyptian government's reluctance to submit to ICC arbitration was revealed in the case of S.P.P. (Middle East) Ltd. v. Egypt[44] in which the government asserted that it was not bound by an arbitration agreement between a state agency and a foreign investor. Although this argument was rejected by the ICC tribunal, it was accepted by the Cour d'appel de Paris which overturned the award.[45] Nevertheless, a Dutch court agreed to enforce the award.[46]

The SPP award reveals the serious problems that can result when governments (as opposed to state agencies that are engaged in essentially private transactions) are parties to ICC arbitra-

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43. Petroleum Exploration and Production Sharing Agreement Between Arab Republic of Egypt (A.R.E.) and Egyptian General Petroleum Corp. and Chevron Oil Co. of Egypt (22 February 1976) reprinted in Fischer, supra, note 40, vol. II, paras XXIII(a) and XXIII(b); and Petroleum Concession Agreement Between Arab Republic of Egypt, Egyptian General Petroleum Corp., General Development Co. and Egyptian Petroleum Development Co. (16 June 1975), reprinted in Fischer, supra, note 40, vol. I, paras XXXIII(a) and XXIII(b) (the last-named party is a Japanese Development Company).

44. SPP (Middle East) Ltd. v. Egypt, Award of 11 March 1983, reprinted in (1983) 22 I.L.M. 752.

45. Arab Republic of Egypt v. S.P.P., Cour d'appel de Paris, 12 July 1984, reprinted in (1984) 10 Y.B. Comm. Arb. 113; and in (1984) 23 I.L.M. 1048 (France).

46. SPP (Middle East) Ltd. v. Arab Republic of Egypt, District Court of Amsterdam, 12 July 1984, reprinted in (1984) 10 Y.B. Comm. Arb. 487 (The Netherlands).

tion. The ICC system is designed to resolve "business" disputes,[47] and it is widely accepted that good business relations require, above all, stability and predictability. Although, as noted above, no system of rules can promote one value to the exclusion of all others, it is in the interest of most participants in the ICC system that the values of clarity and certainty be emphasised. Private commercial relations require that emphasis. Yet states cannot be concerned solely (or even primarily) with the commercial value of stability and predictable rules. Congruence with their own policy objectives must be a major preoccupation.[48] But the congruence valued by the creators of the ICC Rules was, of course, congruence between the Rules and the ICC's own policy purpose, which is to encourage increased commercial contact by promoting stability and certainty. For the institution of the ICC, then, pursuing the values of congruence with policy objectives and of clarity and certainty in the drafting of rules is complementary. For governmental participants in the process, the values of certainty and congruence with policy may be conflicting. This conflict itself creates a further, systemic, lack of congruity between the institution of the ICC and the social reality it seeks to serve, at least insofar as states are involved in the process.

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47. ICC, Rules, supra, note 17, art. 1(1).

48. The third value, that of useful analogy, is more purely an internal process value which will not commonly lead to conflicting approaches in the circumstances here described.

The ICC and its Rules pursue a policy objective which may come into direct conflict with the needs of one class of clients -- states. A concrete example will help to point the problem.

Professor Carbonneau is a leading proponent of ICC arbitration, primarily because he believes that arbitration within an institution is the best means of generating a consistent body of arbitral law that will amount to a new lex mercatoria.[49] For this reason, Professor Carbonneau advocates the publication of awards, and would insist upon fully articulated reasons. Interestingly, Professor Bockstiegel believes that one of the primary reasons that state agencies have agreed to submit disputes to ICC arbitration is "the remarkably confidential nature of the proceedings."[50] No loss of prestige or adverse public reaction will flow from a confidential award. Even the existing confidentiality has not been enough to prompt states to submit highly politicised or policy-sensitive disputes to ICC arbitration. An insistance upon published, reasoned awards would make the submission of such disputes even less likely.

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49. Carbonneau, Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions (1985) 23 Col. J. Trans. L. 579 [hereinafter Rendering Awards]. See also Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce (1984) 19 Texas Int'l L. J. 33 [hereinafter Carbonneau, Arbitral Adjudication].

50. Bockstiegel, supra, note 39, 584.

The very idea of the "emerging lex mercatoria" underscores the true nature of the ICC system, which is a system designed to resolve private law disputes. State agencies can submit to such a process because their disputes are often almost entirely commercial in nature. The underlying assumptions of the parties and of the arbitral tribunal will be congruent. All those engaged in the system would recognise and pursue similar ideals: clarity of the process, speed of resolution, certainty of result, congruence with the needs of international commerce. The needs and ideals of governments do not fit within this neat schema, especially when issues of public policy and sovereignty are involved as in the case of the expropriation of foreign owned property. The goals of promoting international commerce and of encouraging the development of a lex mercatoria will be of little importance to a developing state seeking to expropriate the assets of a foreign oil company that it believes has been gaining excessive profits for many years.[51] ICC arbitration will probably not be capable of sufficient sensivity and subtlety in such cases. Indeed, it is simply not designed to cope with the intense cultural and ideological differences that may emerge in the course of that type of dispute.

Even Professor Carbonneau has admitted that, in his conception of the lex mercatoria, the rules developed in the

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51. For a broader critique of the concept of the lex mercatoria, see infra, Chapter II, text accompanying notes 264 to 279.

course of ICC arbitrations "would be valid at least for advanced Western commercial parties who regularly submit to ICC arbitration."[52] The inappropriateness of ICC arbitration in cases involving governments wishing to assert justifications of public policy and sovereignty is typical of any institutional arbitration designed to settle private commercial disputes. Entirely similar problems would confront arbitration under the auspices of the American Arbitration Association or the London Centre for Commercial Arbitration, to take but two examples. In the 1960s the difficulty was recognised by administrators within the World Bank who therefore commissioned the design of arbitral and conciliation systems geared specifically to the needs of governments and foreign private parties whose disputes would tend to become politicised. The conciliation process is beyond the scope of the present work, but ICSID arbitration is of central importance.

B. ICSID Arbitration: Preventing the Politicisation of Disputes

The drafters and the subsequent promoters of the ICSID Convention assert forcefully that the primary goal of the ICSID arbitral regime is to "maintain a careful balance between the interests of investors and those of host States".[53] In a recent

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52. Carbonneau, Rendering Awards, supra, note 49, 596.

53. International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), reprinted in (1965) 4 I.L.M. 524, 526. See also Broches, The Conven- (cont'd.)

award, an ICSID arbitral tribunal took pains to promote the same ideology:

> [t]he Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries.[54]

A great effort has been made to create a public perception that the Convention is equally favourable to the interests of developed and developing states.

Despite the fact that the World Bank undertook extensive consultations and oversaw rigourous negotiations before the conclusion of the ICSID Convention,[55] the assertion of a complete balancing of interests is, at best, disingenuous. In a similar manner, the Executive Directors of the World Bank have suggested that the ICSID Convention would "strengthen the partnership between countries in the cause of economic development". Such strengthening would occur because:

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tion on the Settlement of Investment Disputes Between States and Nationals of Other States (1972) 136 Rec. des cours 331, 348; and Delaume, Le CIRDI et l'immunité des États [1983] Rev. de l'arb. 143, 144. Both Messrs Broches and Delaume have served as Secretaries-General of ICSID.

54. Amco Asia Corp. v. Republic of Indonesia, ICSID Award on Jurisdiction of 25 September 1983, reprinted in (1985) 10 Y.B. Comm. Arb. 61, 66.

55. See, e.g., International Bank for Reconstruction and Development, supra, note 53; and United States. Senate. Committee on Foreign Relations, 29 March 1966, reprinted in (1966) 5 I.L.M. 649 (in his Statement before the Committee, the Under Secretary of the Treasury, Joseph W. Barr noted, at 651, that over eighty-six states had participated in the drafting of the Convention during four regional meetings held in Addis Ababa, Santiago, Geneva and Bangkok in 1963-4).

> [t]he creation of an institution designed to facilitate the settlement of disputes between states and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.[56]

Although, at first glance, the analysis is attractive, purporting to reflect an equitable equilibrium between the interests of capital exporting and importing states, a number of the tacit assumptions and assertions made by the promoters of the Convention are open to challenge. First, one legitimately may ask whether, given the wide variety of economic systems that must co-exist in the contemporary world, a "larger flow of private international capital" is universally desired. It is at least worth exploring the possibility that developing states are more comfortable with investments channeled through state foreign aid agencies or international organisations. It is certainly true that in the post-colonial era many states are suspicious of private foreign investors. One commentator has noted in addition that "[t]he bargaining power between the parties has also changed. The private investors, confronted by newly independent states aware of their economic power, no longer dictate the investments in the same manner as in the past."[57] For that reason, it is fair to say that the "climate for private investment is very different from what it was when

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56. International Bank for Reconstruction and Development, ibid., 525.

57. Gopal, International Centre for Settlement of Investment Disputes (1982) 14 Case W. Res. J. Int'l L. 591, 593.

ICSID was conceived."[58] In other words, for many states or for large segments of the population of some states, the desire to develop may be tempered by a wish to avoid the perceived negative influences of large infusions of foreign private capital.[59]

Even for states that are open to foreign private investment, the statement of the Executive Directors of the World Bank reveals a second and in this case, simplistic, assumption. The creation of a specialised dispute resolution mechanism is said to encourage the flow of capital "into those countries which wish to attract it". In the attempt to establish the equally beneficial effect of the Convention, the Directors have asserted a degree of free will that is not always present. Despite the enormous increase in the political power of developing states adverted to above, it is still the case that many resource- and capital- poor states may believe that they have no choice but to encourage foreign private investments, in spite of the possible negative consequences.

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58. Ibid.

59. Those "perceived negative influences" may include a lessening of public control over the domestic economy, possibilities for the undue influence of expatriot managers over internal politics, and the likelihood of profits being removed from the host state. Elites that remain outside the domestic power structure may view foreign private capital as essentially anti-revolutionary for it can serve to prop up tyrannous dictatorships. See also Gopal, ibid.

The final challengeable assertion of the Executive Directors is that the ICSID Convention promotes an atmosphere of "mutual confidence"[60] between foreign investors and potential host states, thereby encouraging the international flow of capital. The whole idea of "confidence" in an economic context is linked inexorably to Western, market-oriented, conceptions of economic organisation. In no sense does the ICSID Convention increase a developing state's "confidence" that a foreign private investor will behave in a manner consistent with public policy or national aspirations. The only real increase in "confidence" that may be experienced by the host state is derived from the fact that, under the ICSID regime, confidentiality is assured, so that disputes can be settled without negative publicity. Otherwise, the foreign investor is the only party whose level of confidence is enhanced significantly.

Investor confidence in the security of his position is undoubtedly an important ingredient in international commerce. Such confidence is no doubt increased by the possibility of third-party adjudication in a neutral forum. As Broches has pointed out, the "fear of political risks operates as a deterrent to the flow of private foreign capital to developing countries".[61] The possibility of a neutral forum for the

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60. That phrase was repeated as recently as 1984 by the ICSID bureaucracy. See International Centre for Settlement of Investment Disputes, Annual Report (1984) 6.

61. Broches, supra, note 53, 343. See also United States, Senate. Committee on Foreign Relations, 29 March 1966, reprinted in (1966) 5 I.L.M. 649, 669.

resolution of disputes probably decreases that fear. Schmidt has suggested that

> [f]rom the standpoint of the investor, any method of resolving conflict with the host state must display three characteristics to be meaningful: easy access to the decisional forum, opportunity to air the merits of a claim, and reasonable probability of enforcement of a decision in the investor's favour.[62]

A neutral forum, removed from the influence or control of the host state will undoubtedly enhance the possibilities for attainment of the first and second of these desiderata. As will be discussed below,[63] the ICSID regime is designed to provide facilitated accomplishment of the third goal -- enforcement -- as well. It is therefore common ground amongst most independent observers that ICSID arbitration promotes investor security, and investor "confidence".[64] But to take the argument a step further, as some do,[65] to suggest that ICSID increases the

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62. Schmidt, Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica (1976) 17 Harv. Int'l L.J. 90, 104.

63. See infra, text accompanying notes 166 to 196.

64. See, e.g., de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts (1982) 57 Tulane L. Rev. 42, 60; and Lew, supra, note 15, 20-1.

65. Apart from the words of the Executive Directors cited supra, note 56, see Moore, International Arbitration Between States and Foreign Investors - The World Bank Convention (1966) 18 Stanford L. Rev. 1359, 1360; and United States. Department of State. Statement of Andreas F. Lowenfeld, Deputy Legal Adviser [Regarding ICSID], 28 June 1966 before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives, reprinted in (1966) 5 I.L.M. 821, 821-2 [hereinafter Lowenfeld Statement].

"confidence" of host states in foreign investment is nothing more than a politically motivated justification designed to encourage the involvement of developing states in the ICSID process.

To question the assertion of increased "mutual confidence" is not to argue that the ICSID regime is merely a Western ploy or that developing nations should not be involved. The point is simply that to encourage greater state participation in ICSID, an issue that will be addressed in more detail at the end of the present chapter, proponents should not rely upon disingenuous assertions of equality. Developing states may indeed find great advantages within the ICSID system, but increased confidence is not one of them. Moreover, it is most difficult to make out the case that developing states have just as much to gain from ICSID as do foreign investors. A Deputy Legal Adviser to the U.S. Department of State was refreshingly honest when he testified before a House of Representatives Sub-Committee:

> As the country with the greatest amount of international investment, and the greatest stake in the development and wide acceptance of international law standards regarding protection of private property, the United States stands to gain substantially from the [ICSID] convention.[66]

Investors will tend to be better protected under ICSID than under the legal system of a developing state.[67] The state will

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66. Lowenfeld Statement, ibid., 822.

67. The increased protection is due primarily to the neutrality of the forum. As will be discussed infra, text accompanying notes 113 to 165, the foreign private investor will not necessarily escape the application of the municipal law of the host state simply through the use of the ICSID regime.

tend to lose the ability to give rein to auto-interpretive notions of sovereignty. The quid pro quo may be increased foreign private sector investment,[68] although, as pointed out above, that result is neither automatic, nor necessarily desired. But perhaps such a rigidly instrumentalist argument is not, ultimately, the best justification for ICSID. From the perspective of the international lawyer (as opposed to the business professional) ICSID is a process that can serve to depoliticise disputes by emphasising their commercial origins and by discouraging the resort to state-to-state methods of dispute resolution, i.e. the espousal of claims, except in extreme cases. For that reason, it will be argued below that ICSID arbitration should be viewed primarily as a method of resolving essentially private disputes but from a perspective that is sensitive to the public policy goals of state parties. The ICSID process should not be viewed as an international process wedded to international law; its enormous potential value -- not yet realised -- lies precisely in ICSID's ability to prevent private commercial disputes from becoming international disputes. To evaluate that potential fully, it is first necessary to explore in some detail the structure of the ICSID regime.

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68. It has been argued that the mere adherence to the ICSID Convention may increase a state's "credit-worthiness". G. Schwarzenberger, Foreign Investments and International Law (1969) 142. See also G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes, re-issue (1985), vol. II, ch. 15, 11.

i. The Jurisdiction of ICSID

ICSID arbitration proceedings are administered by the ICSID Secretariat (the Centre). The arbitration itself is conducted by arbitrators who are appointed within the terms of the Convention. The jurisdiction of a particular tribunal is defined by art. 25 of the ICSID Convention.[69] Mr Aron Broches, first Secretary-General of ICSID, has offered a complete gloss on the article which bears repeating in full, for it precludes the necessity for yet another description of ICSID jurisdiction:

> Proceedings under the auspices of the Centre must meet four tests set out in Article 25. The first and most important one is that both parties must have consented to have recourse to the Centre. However, once this requirement of consent, which has been called the cornerstone of the jurisdiction of the Centre, has been met, the consent becomes irrevocable and cannot be unilaterally withdrawn. The second test concerns the quality of the parties. One party must be a Contracting State, or one of its constituent subdivisions or agencies, and the other must be a national of another Contracting State. ... In addition to the requirement of consent and the nationality requirement for establishing jurisdiction ratione personae, two further tests must be met under the heading of jurisdiction rationae materiae: the dispute must be a 'legal dispute' and it must arise directly out of an 'investment'. Neither term is defined in the Convention.[70]

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69. International Bank for Reconstruction and Development, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (done 18 March 1965; entered into force 14 October 1966) 575 U.N.T.S. 160 [hereinafter ICSID Convention].

70. Broches, supra, note 53, 340-1. See also Kemby, Jurisdiction - Sovereign Immunity (1983) 24 Va J. Int'l L. 217, 224-5 who lists only three "factors" governing jurisdiction, by combining the requirements of a "legal dispute" and an "investment".

Each of these requirements has been the subject of limited judicial interpretation and fairly extensive doctrinal comment.

As Broches pointed out, the over-riding jurisdictional requirement for ICSID is party consent. To be more precise, it is not party consent alone that is required. In fact, consenting to the jurisdiction of an ICSID tribunal is best seen as a two-stage process. The first step is that both the host state and the national state of the foreign investor must become party to the ICSID Convention. The precise timing of ratification does not appear to be a crucial issue, as long as it occurs before an arbitral clause is invoked. In the very first arbitration held under the auspices of ICSID, the Tribunal held that the national state of a foreign investor need only have ratified the Convention at the time of the application of the arbitral clause, not at the time of its drafting.[71] Although adherence to the Convention compels neither the host state[72] nor the private foreign investor[73] to use ICSID arbitral facilities, "it was nevertheless felt", at least by the Executive Directors of the World Bank, "that adherence to the Convention might be

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71. Lalive, The First 'World Bank' Arbitration (Holiday Inns v. Morocco) - Some Legal Problems (1980) 51 Brit. Y.B. Int'l L. 123, 146. See also Delaume, supra, note 68, vol. II, ch. 15, 10.

72. Delaume, ibid., 7; and Vuylsteke, Foreign Investment Protection and ICSID Arbitration (1974) 4 Ga J. Int'l & Comp. L. 343, 348.

73. Broches, "Arbitration in Investment Disputes" in C. Schmitthoff, International Commercial Arbitration (1974-1980) 8 (an updated looseleaf system).

interpreted as holding out an expectation that Contracting States would give favourable consideration to requests by investors for the submission of a dispute to the Centre."[74]

The second stage in the process of consent to the jurisdiction of an ICSID arbitral tribunal is the submission of a particular dispute by specific parties. The Executive Directors of the World Bank have called the second stage of consent "the cornerstone of the jurisdiction of the Centre."[75] Because the proximate consent of the parties is required, one may presume that submission of the dispute is not an unfriendly act[76] and in consequence that the freely expressed will of the parties will be given effect.[77] For that reason alone, the state party should be discouraged from advancing preliminary arguments opposing jurisdiction that are based upon a supposed interference with the sovereignty of the state. As Professor Lalive has suggested, the response to such arguments is clear and cogent: "by ratifying the 1965 Washington Convention and agreeing ... to ICSID arbitration ... [the state has] exercised

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74. International Bank for Reconstruction and Development, supra, note 53, 528.

75. Ibid., 527. See also Broches, "Arbitration clauses and institutional arbitration: ICSID: a special case" in Associazione Italiana Per L'Arbitrato, Commercial Arbitrations: Essays in Memoriam Eugenio Minoli (1974) 69, 79.

76. See, e.g., Broches, supra, note 53, 365.

77. See, e.g., Broches, supra, note 75, 79.

its sovereignty and not 'alienated' it.[78] That response is obviously consistent with the spirit of the ICSID Convention which establishes that consent, once given, may not be withdrawn unilaterally. Thus, in the case of Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica,[79] the ICSID tribunal "unanimously asserted jurisdiction over an investment disputes by giving effect to an agreement to arbitrate despite the host state's failure to attend the proceedings and its purported unilateral withdrawal of consent to ICSID arbitration."[80]

The only formal requirement is that the consent of the parties be expressed in writing.[81] Commonly, this written consent will be contained in an arbitration clause submitting to ICSID's jurisdiction,[82] but it is clear that no particular form is required. In the words of the Tribunal in Amco Asia Corp. v. Republic of Indonesia:

> [s]uch consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices

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78. Lalive, supra, note 71, 158.

79. Unpublished, but reported in Schmidt, supra, note 62.

80. Schmidt, ibid., 92-3. Schmidt unfortunately goes on to say that an agreement to arbitrate is an irrevocable international agreement. Although the ratification by state parties of the ICSID Convention is clearly an "international agreement", the submission of a particular dispute to arbitration is an essentially private act made "irrevocable" only by the express words of the governing treaty (concluded by states, not by private parties).

81. Article 25(1) of the ICSID Convention, supra, note 69.

82. As in the Alcoa Minerals of Jamaica case reported in Schmidt, supra, note 62, 103.

> to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID tribunal to have jurisdiction over them.[83]

There appears to be no temporal limitation for consent beyond the obvious necessity that written consent be given before the Tribunal is asked to hear a case. Nor are the parties under any obligation to inform the ICSID Secretariat of any contracts which provide for the settlement of future disputes under ICSID auspices.[84] The Centre need only be notified when a dispute is submitted for arbitration.

The second major requirement to found ICSID jurisdiction relates to the quality of the parties. As already noted, the parties must be a contracting state (or state agency)[85] and the national of another contracting state. Mr Broches has suggested that the necessity to be a "national of another contracting state" does not preclude mixed economy corporations or government-owned commercial entities from benefitting from the ICSID regime unless such a corporation or entity "is acting as an agent for the government or is discharging an essentially governmental function."[86] This interpretation is certainly

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83. Supra, note 54.

84. See, e.g., International Centre for Settlement of Investment Disputes, Annual Report (1967).

85. Article 25(1) of the ICSID Convention, supra, note 69, permits a state party to designate to ICSID any public entities that the state considers to be eligible to be parties to ICSID arbitrations.

86. Broches, supra, note 53, 355.

consistent with the generally flexible approach that has been taken by ICSID tribunals to the question of party standing. For example, in two ICSID awards rendered in 1983, the Tribunals decided that they could assert jurisdiction even though, formally, the investor corporation was a national of the host state, because in each case the corporations were controlled by a parent corporation in another state party to the ICSID Convention.[87] The Convention itself allows, in art. 25(2)(b), that when states require a foreign investor to create a local corporation as the channel for investment, the parties may nevertheless agree that the local corporation will be treated as "foreign" for the purposes of ICSID jurisdiction. But ICSID tribunals seem to be willing to go a step farther, to imply such agreement from the facts, even in the face of state objections.[88]

The last two jurisdictional requirements imposed by the ICSID Convention are that disputes must be "legal disputes" and

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87. In Amco Asia Corp. v. Republic of Indonesia, supra, note 54, the Tribunal relied heavily on the fact that even in the application for incorporation under the laws of Indonesia, the investor corporation was described as a "foreign business". When Indonesia agreed to an ICSID arbitral clause, it knew perfectly well that the business was foreign. The case of Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon, ICSID Award on of 21 October 1983, reprinted in (1985) 10 Y.B. Comm. Arb. 71, involved a joint venture company controlled (fifty-one per cent) by Klöckner. That factual foreign control was held to be sufficient to found jurisdiction. See also Moore, supra, note 65, 1362.

88. Branson & Tupman, supra, note 28, 924.

they must relate to an "investment". Neither of these terms is defined in the Convention, but the lack of definitions has not yet posed any serious problems. As Mr Delaume points out, "the concept of 'legal dispute' can be easily circumscribed."[89] Although the differentiation between "law" and "non-law" (or, to phrase it somewhat differently, between the legally "relevant" and legally "irrelevant") has been the source of great controversy for years, pitting positivists against those of a natural law orientation, in the practice of ICSID no great challenge has arisen to provoke or require rigid differentiation. The explanation of the phrase offered by the Executive Directors of the World Bank has so far proved entirely adequate:

> The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.[90]

Because nearly all disputes submitted to ICSID will be founded in an investment contract, one would be hard put to imagine a case in which a tribunal would decline jurisdiction for the lack of a "legal" dispute, particularly because submission of the dispute in the first case is entirely dependent upon the consent of both parties.

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89. Delaume, supra, note 68, vol. II, ch. 15, 34.

90. International Bank for Reconstruction and Development, supra, note 53, 528.

The question what is an "investment" dispute is somewhat more complicated. Not only is no definition found in the Convention, but even its "legislative history", to adopt an American phrase, fails to provide guidance.[91] It has been argued that the definitional lacuna renders the jurisdiction of any ICSID tribunal "uncertain".[92] But the implication of Aron Broches's explanation is that the lack of certainty is more apparent than real:

> The term "investment disputes" characterises disputes by their subject matter and the area of activity in which they arise. In practice, however, this term is used more particularly to refer to disputes between a State and a foreign investor arising out of investments by the latter in the territories of the former.[93]

The approach is entirely functionalist. One might almost conclude, as did Branson and Tupman, that the simple agreement of the parties to submit a dispute to ICSID would lead to a strong presumption that an "investment" was involved.[94] But that presumption would be incorrect according to the Tribunal sitting in the Alcoa Minerals of Jamaica case.[95] In that case,

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91. Delaume, ICSID Arbitration and the Courts (1983) 77 Am. J. Int'l L. 784, 795.

92. Moore, supra, note 65, 1362.

93. Broches, supra, note 73, 1.

94. Branson and Tupman, supra, note 28, 924: "If the parties designate a particular dispute for ICSID arbitration, then in practice a tribunal may give weight to the parties' intent and not decline jurisdiction on the basis of a technical definition of 'investment disputes'".

95. Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, supra, note 62 (as reported by Schmidt).

the Tribunal held that the foreign company's operations in Jamaica did amount to an investment, but only because they fit the "ordinary meaning" of that term. The Tribunal rejected the argument that the simple consent to ICSID jurisdiction implied that the dispute related to an investment.[96] Schmidt therefore asserts that "[i]t would now seem to be firmly established that an analysis of the parties' actual capital relationship is necessary in each ICSID case".[97]

The apparent rigour of that holding was moderated substantially in a recent ICSID arbitration involving a foreign-owned hotel operation in Indonesia. There the Tribunal held that, when evaluating the jurisdictional requirement that the dispute relate to an investment, it "must only be satisfied that *prima facie* the claim ... is within the jurisdictional mandate of ICSID".[98] On balance, there is a strong likelihood that the great majority of cases involving a state and a foreign private party for which ICSID arbitration is sought will be found to meet the "investment" requirement. That result would seem to accord with the expectations of the ICSID Secretariat. In its *Annual Report* for 1984, the Secretariat strongly defended the decision not to include a definition of "investment" within the *ICSID Convention*:

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96. *Ibid.*, 100.

97. Schmidt, *ibid.*, 100.

98. *Amco Asia Corp.* v. *Republic of Indonesia*, *supra*, note 54.

> [T]he absence of a clear definition of the notion of investment in the ICSID Convention, deplored by certain commentators, has, in effect, been a wise precaution. It permits the Convention to be adapted to changes in the form of cooperation between investors and host States and to respond to the needs of ICSID users.[99]

The goal seems to be the encouragement of broad access to ICSID by providing for flexibility in jurisdictional evaluation. Disputes involving emerging forms of capital investment will not automatically be precluded from ICSID adjudication. Of course, under art. 25(4) of the ICSID Convention, states, when ratifying the Convention, are free to limit their consent to certain classes of disputes or specifically to exclude other classes.[100] At the time of Mr Delaume's survey, only four states had opted to restrict access,[101] and only one other state has since taken that approach.[102]

ICSID itself has undertaken other means of broadening access to its facilities, specifically by relaxing, in certain classes of cases, the requirement that a dispute relate to an "investment". In 1978, the Administrative Council approved

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99. International Centre for Settlement of Investment Disputes, supra, note 60, 9.

100. See, e.g., Delaume, supra, note 68, vol. II, ch. 15, 39; and Moore, supra, note 65, 1376.

101. Saudi Arabia, Guyana, Jamaica and Papua-New Guinea. Delaume, ibid. As noted above, a state is not entitled to restrict access after consent to ICSID arbitration has been given.

102. See Delaume, International Centre for Settlement of Investment Disputes (1984) Proc. Conf. Can. Council Int'l L. 101, 104. That state is Israel.

"Additional Facility Rules" establishing guidelines as to when ICSID would consent to administer an arbitration that would normally fall outside its jurisdiction. With the prior consent of the Secretary-General, ICSID can be used to settle disputes not arising out of an investment as long as one disputant is a party to the Convention and the dispute does not involve an ordinary commercial transaction. Any "fact finding" proceeding can also fall within the scope of the Additional Facility.[103] An arbitration under the Additional Facility is not a standard ICSID arbitration and the Convention does not apply to such proceedings. The main result is that, unlike standard ICSID proceedings, the arbitration is fully subject to the municipal law of the forum. Perhaps this is the reason that the Additional Facility has hardly ever been used.[104]

Finally, it should be stressed that art. 41 of the ICSID Convention reiterates the important general principle that transnational arbitral tribunals are the masters of their own competence, judges of their own jurisdiction.[105]

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103. The most complete discussion of the Addition Facility, which is relied upon in the preceding account is to be found in Broches, The "Additional Facility" of the International Centre for Settlement of Investment Disputes (ICSID) (1979) 4 Y.B. Comm. Arb. 373, 374-6.

104. Delaume, supra, note 68, 81.

105. See, e.g., International Bank for Reconstruction and Development, supra, note 53, 529; Delaume, ibid., 58; and Broches, supra, note 53, 341.

Probably because the jurisdiction of an ICSID tribunal is entirely consensual, the drafters of the Convention were able to insist that the remedies available through ICSID would be exclusive. Article 27 of the Convention excludes concurrent diplomatic protection offered by the investor's national state. Article 26 reiterates that, once chosen by the parties, an ICSID tribunal has sole authority to hear a case and to order remedies.[106] The exclusivity of ICSID remedies was underscored by the French Cour d'appel de Rennes in the Atlantic Triton case.[107]

The only express exception to the rule of exclusivity is that, under art. 26, a contracting state may submit to ICSID jurisdiction but make its consent to a particular arbitration dependent upon the exhaustion of local remedies.[108] It would appear, however, that the Convention allows parties to stipulate other exceptions to the rule of exclusivity, for example, the

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106. ICSID Convention, supra, note 69. See also International Bank for Reconstruction and Development, supra, note 53, 528-9; Delaume, supra, note 53, 145; Vuylsteke, supra, note 72, 350.

107. Revolutionary People's Republic of Guinea et al. v. Atlantic Triton Co., Cour d'appel de Rennes, 26 October 1984, reprinted in (1985) 24 I.L.M. 341 (France).

108. ICSID Convention, supra, note 69. See also Delaume, supra, note 68, vol. II, ch. 15, 46; and Broches, supra, note 53, 349. At the page here cited Delaume notes that the ability to invoke the exhaustion of local remedies rule has been little used in practice. None of the ICSID clauses submitted to the Secretariat required the exhaustion of local remedies, although a number of bilateral treaties did so.

resort to municipal courts for interim measures of protection, an issue that will be discussed presently.[109]

A party dissatisfied with a tribunal award is not left without recourse under the ICSID Convention. Article 50 allows parties to apply for an interpretive ruling by the tribunal in cases where the meaning of the award is unclear. Revision of technical errors is provided for in art. 51. In extreme cases, art. 52 permits parties to apply to the Secretary-General within 120 days of the rendering of a final award for annulment of the award on five enumerated grounds.[110] The application is evaluated by an ad hoc committee with three members, none of whom can have sat on the original arbitral tribunal. One recent award has been challenged under this procedure.[111]

The free consent to ICSID jurisdiction and the attendant exclusivity of its remedies can lead to only one logical conclusion. If a party to a pending ICSID arbitration attempts to circumvent the proceedings by applying for judgment from a municipal court, the court should stay its own proceedings and

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109. Delaume, ibid. See text accompanying notes 120 to 128.

110. ICSID Convention, supra, note 69. The grounds are (1) that the Tribunal was not properly constituted; (2) that the Tribunal manifestly exceeded its powers; (3) that there was corruption on the part of a Tribunal member; (4) that there was a significant departure from a fundamental procedural rule; and (5) that the award failed to state the reasons upon which it was based. See also Branson and Tupman, supra, note 28, 935.

111. It is understood that the Amco Asia award on the merits, infra, note 147, is the subject of an application for annulment filed on 8 March 1985.

direct the parties to pursue ICSID remedies.[112] This conclusion has led some commentators to a further assertion, that ICSID arbitration is a creature of international law. The implications of such a claim must now be explored.

ii. ICSID's "International" Status

There can be no doubt that the ICSID Convention is an international treaty nor that the ICSID Secretariat, as a subdivision of the International Bank for Reconstruction and Development, is an international body. The more difficult questions are whether or not a specific ICSID arbitral tribunal should be viewed as an international tribunal and whether or not the obligations imposed by such a tribunal are international legal obligations. Although a full-fledged discussion of the problems of "internationalisation" or "delocalisation" will be postponed to the next Chapter, some preliminary points must be stressed here.

First, a discussion of the international nature of an ICSID tribunal is not a barren intellectual exercise. If such a tribunal is held to be "international", the practical ramifications are enormous. The applicable substantive law, one would assume, would be international law. The foreign private party would in some manner be transmuted into an international person that could ask for a ruling that the state party was in breach of an investment agreement and responsible for any expropria-

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112. Delaume, supra, note 91, 790.

tion. This second claim would be extra-contractual and would sound directly in international law. In theory such a claim might even be made if there has been no breach under the proper law of the contract. Moreover, one would expect a reciprocity of obligations enforceable, to the extent possible, directly thorough the operation of public international legal principles. Such striking consequences point to the need for careful evaluation of the premise.

A second important point is that, in assessing the international quality of any tribunal, it is best that for the sake of analytical clarity a distinction be drawn between the procedural law and the substantive law to be applied by the tribunal. As will be demonstrated, the simple fact that the procedural law of a tribunal is in some fashion insulated from municipal legal controls is not sufficient to establish that the tribunal operates under international law.[113]

The ICSID arbitral regime was designed to discourage, as far as possible, the intervention of municipal courts in the process of arbitration. Article 44 of the Convention states that goal explicitly, as noted by Professor Carbonneau:

> [A]ccording to article 44 of the Convention, ICSID arbitration, unless the parties provide otherwise, is completely independent of any national legal provisions and free from the possibility of national court intervention or supervision. ICSID

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113. The most intense contemporary debate concerning the international status of a permanent (or at least long-term) tribunal has revolved around the Iran-U.S. Claims Tribunal. The debate is canvassed infra, Chapter IV, text accompanying notes 6 to 70.

> rules are designed to be comprehensive and detailed enough to function as a self-sufficient body of arbitral regulations, leaving problems arising during the proceeding to be resolved by the arbitral tribunal.[114]

The vast majority of commentators are in accord with this view. Mr Delaume has stressed that the ICSID Convention establishes a "self-contained" system which operates "in total independence from domestic laws",[115] even the lex loci arbitri. Professor David has asserted that the ICSID procedure "est complètement détaché de tout ordre juridique national".[116] Mr Broches has written that the Convention itself "constitutes the loi de l'arbitrage and as such excludes the applicability of any national lex fori, except where the Convention itself refers to it."[117]

Mr Broches' statement, it should be noted, recognises a necessary caveat. It would not be accurate to say that national procedural law is excluded from every ICSID arbitration, for the Convention allows the parties to an arbitration to refer to alternative rules of procedure. They are not bound to rely exclusively upon the ICSID system of rules.[118] The Executive Directors of the World Bank have suggested that the parties'

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114. Carbonneau, Arbitral Adjudication, supra, note 49, 95.

115. Delaume, Foreign Sovereign Immunity: Impact on Arbitration (1983) 38 Arb. J. 34 (No. 2) 35. See also Delaume, supra, note 68, vol. II, ch. 15, 41.

116. R. David, L'arbitrage dans le commerce international (1982) 431.

117. Broches, supra, note 73, 6. See also Broches, supra, note 53, 385.

118. ICSID Convention, supra, note 69, art. 44.

ability to modify the procedural law is "[i]n keeping with the consensual character of proceedings under the Convention".[119] Needless to say, the freedom granted to the parties would allow them, if they saw fit, to choose the procedural rules of a national system or of various municipal systems to govern their arbitration. The procedure of an ICSID tribunal, although typically anational, is not necessarily so.

A good example of this potential procedural complexity, one with important practical ramifications, is the ICSID procedural rules governing the awarding of interim measures of protection. At first blush, the "exclusivity" of the ICSID proceedings, adverted to immediately above, would seem to preclude any resort to national courts for orders of interim measures of protection.[120] The Cour d'appel de Rennes adopted that view in the Atlantic Triton case, quashing attachment orders imposed upon three ships that were the subject of a pending ICSID arbitration.[121] The court emphasised that the ICSID Convention and Rules allowed ICSID tribunals to issue protective orders.[122]

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119. International Bank for Reconstruction and Development, supra, note 53, 530.

120. See, e.g., Delaume, Note (1985) 24 I.L.M. 340; and Branson and Tupman, supra, note 28, 929-30.

121. Revolutionary People's Republic of Guinea et al. v. Atlantic Triton Co., supra, note 107, 344.

122. ICSID Convention, supra, note 69, art. 47 (elaborated upon in Rule 39).

Tribunals operating under the auspices of ICSID have ordered provisional measures in two cases, the Holiday Inns case and the AGIP case.[123] In the Amco Asia Corp. case, an application for interim measures was refused.[124] Indonesia had asserted that an article in the Hong Kong newspaper, The Business Standard, had contained information provided by Amco Asia officials that prejudiced the pending ICSID arbitration between Indonesia and Amco Asia and otherwise harmed the Indonesian state. The Government therefore asked the ICSID tribunal to order that the claimants, Amco Asia:

> abstain from promoting, stimulating, or instigating the publication of propaganda presenting their case selectively outside this Tribunal or otherwise calculated to discourage foreign investment in Indonesia.[125]

The Tribunal held that the article printed in Hong Kong "could not have done any actual harm to Indonesia, nor aggravate or exacerbate the legal dispute now put before the tribunal".[126] Moreover, even a continuing press campaign would not affect the rights asserted in the instant dispute, but only the future prospects for foreign investment in Indonesia.[127]

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123. The Holiday Inns v. Morocco case is reported in Lalive, supra, note 71; AGIP Co. SpA v. Government of the Popular Republic of the Congo (1983) 8 Y.B. Comm. Arb. 133. See also Delaume, supra, note 68, Vol. II, ch. 15, 58.

124. Amco Asia Corp. et al v. Indonesia, ICSID Decision of 9 December 1983, reprinted in (1985) 24 I.L.M. 365 (re interim measures).

125. Ibid., 365.

126. Ibid., 367.

127. Ibid., 368.

Although it is likely that a municipal court would also have refused to grant Indonesia the interim measures requested in the Amco Asia Corp. case, there are circumstances where a municipal court would be far more inclined to grant orders of protection than would an ICSID tribunal. The main reason for the difference in attitudes relates to the problem of the enforcement of orders. The Atlantic Triton case points the problem nicely. As noted above, a French court in that case refused to allow attachment orders against three ships because of the exclusivity of ICSID remedies. The party threatened by the dissipation of the assets would have to ask the arbitral tribunal to order interim measures. But an ICSID tribunal has no means of enforcing any order it issues. The attachment of property can only operate through state mechanisms of enforcement which cannot, of course, respond to orders of arbitral tribunals. The tribunal would have to rely on the good faith compliance of the party against whom the order was issued. But orders of interim protection are commonly requested and most needed precisely in circumstances where such good faith is in doubt.[128] The ICSID tribunal sitting in the Atlantic Triton case simply could not enforce any attachment of the ships ad litem.

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128. The issue of interim measures of protection is canvassed in greater detail infra, Chapter III, text accompanying notes 294 to 318. Comparisons are there drawn between the ICSID system and various other systems of arbitral rules.

It would appear, then, that in attempting to "internationalise" the ICSID system, removing any taint of national court involvement, the designers may have precluded sometimes necessary protective orders. And yet, as pointed out above, the procedural system is not quite so simple. In fact, the exclusivity of ICSID is subject to derogations if such derogations are agreed to by the parties explicitly. Mr Delaume has noted that:

> [e]xhaustion of local remedies is the only exception set forth in the Convention to the exclusive character of ICSID proceedings. However, the parties are free to provide additional exceptions to the rule. This may be the case in regard to conservatory measures of protection.[129]

The parties would have to provide for the resort to municipal courts in the agreement to arbitrate. This view was also accepted by the French court in Atlantic Triton which stressed that parties to an ICSID arbitration could not apply to municipal courts for interim measures "unless otherwise agreed by the parties".[130] Of course, the great difficulty is that the parties often do not have the foresight or the political capacity expressly to derogate from the principle of ICSID exclusivity by providing for the possibility of court-ordered interim measures. In all likelihood, an ICSID arbitration will effectively be insulated from the procedural rules of any state. In that sense, ICSID procedure is "international".

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129. Delaume, supra, note 68, vol. II, ch. 15, 46. See also Delaume, supra, note 115, 42.

130. Revolutionary People's Republic of Guinea et al v. Atlantic Triton Co., supra, note 107, 344.

The position with regard to the substantive law to be applied by ICSID tribunals is less certain. The governing rule is contained in art. 42(1) of the ICSID Convention[131] which provides, in effect, for a three tier system of substantive law. Consistent with the over-riding principle of free consent to ICSID jurisdiction, an ICSID tribunal is directed to look first to the express choice of the parties. If the parties have spoken on the issue of substantive law, the tribunal need look no further for guidance. Moreover, the choice of the parties would appear to be unrestricted: they may choose a national system of law, a national system as it exists at a certain date, general principles of law, international law, or any combination of these systems.[132] Article 42(3) also allows the parties to direct an ICSID tribunal to decide a case ex aequo et bono. Such a choice will never be implied.[133] It has been suggested that decisions ex aequo et bono may be very appropriate in the case of long-term investment contracts.[134] One ICSID tribunal has issued such an award.[135]

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131. Supra, note 69.

132. See, e.g., Delaume, supra, note 68, vol. I, ch. 1, 5; Broches, supra, note 53, 389; and Broches, supra, note 73, 5.

133. ICSID Convention, supra, note 69. See also Lew, supra, note 15, 343; and Broches, supra, note 53, 341.

134. Broches, supra, note 73, 11.

135. Benvenuti et Bonfant srl v. People's Republic of the Congo, ICSID Award reprinted in (1983) 8 Y.B. Comm. Arb. 114. See also Delaume, supra, note 68, vol. II, ch. 15, 68.

A former Secretary-General of ICSID has implied that there may be some circumstances in which the express choice of the parties will not be respected fully. If confronted with a situation in which the parties have chosen to apply state law and the state has subsequently altered its law, Aron Broches has suggested that "the application by the Tribunal of international law rules is at least permissible to the extent that these rules are 'the law of the land'."[136] Such an attempt at stabilisation is disingenuous to say the least, for effectively it ignores the expressed will of the parties while purporting to uphold it. Just this technique was employed by the International Chamber of Commerce tribunal in the SPP (Middle East) Ltd. case which is discussed and criticised in a subsequent Chapter.[137] If the parties expressly choose the law of a single state, it must be presumed that they choose the law of that state simpliciter, and not the law of the state plus international law (as incorporated in the municipal law of the state). This presumption is justified if only because the additional reference to international law would lead to great uncertainty in the rules to be applied to a contract with a private party, and this degree of uncertainty is scarcely consistent with the express choice of law made by the parties.

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136. Broches, supra, note 53, 389.

137. SPP (Middle East) Ltd. v. Egypt, supra, note 44. For a critical evaluation, see infra, Chapter II, text accompanying notes 234 to 239.

A useful study suggests that, unfortunately, many clauses submitting disputes to ICSID jurisdiction contain no express choice of substantive law.[138] The ICSID Convention then provides for a second and third tier of rules. In the absence of party choice, art. 42(1) states that an ICSID tribunal is to apply "the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". The intent of the drafters of the ICSID Convention clearly was not to "internationalise" the applicable law completely. The Preamble to the Convention makes this reticence clear, for the drafters seem to assume that many disputes relating to investments would continue to be subject to municipal law processes.[139] No doubt, the Preamble was drafted in part to allay the fears of certain developing nations which had argued throughout the negotiating process that international law should have no application to investment contracts unless the parties had agreed expressly to its application.[140]

Given the directions of art. 42(1), one would assume that an ICSID tribunal, faced with a situation in which no party choice was evident, would employ the following technique. The

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138. Broches, supra, note 53, 390.

139. ICSID Convention, supra, note 69, Preamble. See also Broches, ibid., 349.

140. See, e.g., Majood, Law Applicable in Arbitration of Investment Disputes Under the World Bank Convention (1973) 15 J. Indian L. Inst. 311, 313.

tribunal would look first to the conflicts rules contained in the national legal system of the state party. This second tier of rules would guide the tribunal to the third tier, the applicable substantive law. The difficulty arises because of the inclusion in art. 42(1) of another source of rules of legal justification. The precise relationship between "such rules of international law as may be applicable" and the otherwise controlling system of national law is unclear.[141] Moore has argued that international law is merely "supplementary"[142] to the national law, but that phraseology could lead one unduely to discount the role that international legal principles play in ICSID arbitration. Mr Broches has articulated the better position with cogency:

> My submission as to the relationship between the law of the host State and international law in the second sentence of 42(1) is as follows. The Tribunal will first look at the law of the host State and that law will in the first instance be

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141. See, e.g., Branson & Tupman, supra, note 28, 930.

142. Moore, supra, note 65, 1379. In the agreement submitting their investment dispute to ICSID, AGIP Co SpA and the Congolese government provided that the tribunal was to apply "Congolese Law, supplemented if necessary by any principles of international law". But it is important to remember that such a clause constitutes an express choice of law, and that art. 42(1) itself contains no words which necessarily imply a secondary status for the rules of international law. In the end, the Tribunal found that the nationalisation undertaken by the Congolese government was contrary to Congolese law, so that application of international law was unnecessary. AGIP Co. SpA v. Government of the Popular Republic of the Congo, supra, note 123, especially at 133-4.

> applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law. In that sense ... international law is hierarchically superior to national law under Article 42(1).[143]

The Executive Directors of the World Bank have indicated clearly that they understand the invocation of "international law" in art. 42(1) to refer to the sources of law listed in art. 38(1) of the Statute of the International Court of Justice.[144] It is therefore interesting that when the draft of art. 42(1) was being discussed, and experts from many developing states argued against the application of international law to relations between states and foreign private parties, the objection was met by the response of the future ICSID Secretary-General that in fact "international law" as applied in these cases would comprise only such basic principles as pacta sunt servanda and good faith.[145] It will be argued in a subsequent Chapter that the latter view is essentially correct because international law simply does not contain a well elaborated system of commercial law.[146]

An excellent example of the possible interplay between municipal and international law, and the confusion that may

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143. Broches, supra, note 53, 392.

144. International Bank for Reconstruction and Development, supra, note 53, 530.

145. Reported in Majood, supra, note 140, 315.

146. See infra, Chapter II, text accompanying notes 201 to 263.

result, is found in the Amco Asia case. In 1968, a United States investor entered into a long-term investment in an Indonesian Hotel, concluding as well a separate management contract with an Indonesian corporation that owned the land on which the hotel was built. In 1980, the government withdrew its investment authorisation, citing the investor's failure to perform adequately, and the hotel was seized by the Indonesian corporation in an action that the Tribunal held would not have been imputed to the government had it not been for the army's active participation in the seizure.[147] The parties had not chosen any governing law, so the Tribunal found that it was bound "to apply Indonesian law, which is the law of the Contracting State party to the dispute, and such rules of international law as the Tribunal deems to be applicable",[148] an approach fully consonant with art. 42(1) of the ICSID Convention.

As its governing principle, the Tribunal adopted the well-worn maxim pacta sunt servanda, which was held to be a basic notion common to Indonesian and international law.[149] When greater specificity was required, however, the Tribunal seemed to founder. In looking at the investment contract

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147. Amco Asia Corp. et al. v. Republic of Indonesia (Merits), ICSID Award of 21 November 1984, reprinted in (1985) 24 I.L.M. 1022, 1024-6 [hereinafter Amco Asia].

148. Ibid., 1023.

149. Ibid., 1033-5.

between the government and the foreign corporation, the Tribunal refused to draw an analogy with the French doctrine of contrats administratifs,[150] because that doctrine was not a "general principle of law".[151] But the Tribunal admitted that the investment contract was "not identical to a private law contract, due to the fact that the state is entitled [unilaterally] to withdraw the approval it granted".[152] Falling back on the safe refuge of imprecision, the Tribunal held that the legal relationship was sui generis and only analogous to contract.[153] Whether that sui generis relationship fell within the regime of Indonesian or of international law was, perhaps wisely, not discussed.

International legal principles were employed to assert that there exists a fundamental right to nationalise for a nation's "public interest and welfare", but that when nationalisation occurs, compensation must be paid.[154] Furthermore, it was asserted that:

> the full compensation of prejudice, by awarding to the injured party the damnum emergens and the lucrum cessans is a principle common to the main

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150. For a full discussion of this doctrine, see infra, Chapter III, text accompanying notes 260 to 276.

151. Amco Asia, supra, note 147, 1027-8.

152. Ibid., 1029.

153. Ibid., 1030.

154. Ibid., 1029-30.

> systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law.[155]

If the Tribunal were really applying international law, one might have expected a more fulsome discussion of the authorities in support of this important proposition. In fact, it will be argued in a subsequent chapter that the position in international law regarding the awarding of damages for loss of future profits is much more complicated than this ICSID Tribunal would have us believe. Even in systems of municipal law, there is no consensus that the loss of future profits will be awarded when a state breaches a public contract.[156] The Tribunal's unexplained invocation of "international law" obfuscates rather than clarifies the situation. In a similar vein, the Tribunal "doubted" that restitutio in integrum could be ordered against a sovereign state.[157] Although, for practical reasons, that doubt is probably justified, the point merits some elaboration given that a number of important tribunals have reached a contradictory conclusion, most notably the Permanent Court of International Justice.[158]

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155. Ibid., 1036-7.

156. See infra, Chapter III, text accompanying notes 271 to 274. Interestingly, when the Tribunal made its award for damages, it established only a lump sum, making it impossible to know how much was actually awarded for the loss of future profits. Ibid., 1039.

157. Ibid., 1032.

158. Case Concerning the Factory at Chorzow (Indemnity Merits), P.C.I.J., Ser.A, No. 13 (1928) 47. See also Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 19 January 1977, reprinted in 53 I.L.R. 389, 422.

A lack of precision and some wilful obfuscation may be forgiven in arbitral tribunals, the members of which must struggle to produce a majority opinion, often in the face of great antipathy between the parties. However, in attempting to apply art. 42(1) and to mesh a municipal with the international legal system, the Tribunal in the Amco Asia case fell into at least one dangerous trap. In finding that the seizure of the previously foreign-owned hotel could be imputed to the government because of the involvement of armed forces personnel in the seizure, the Tribunal went on to say that the state's involvement amounted to an internationally wrongful act for which Indonesia was internationally responsible.[159] There is no doubt that such a seizure would prima facie amount to an internationally wrongful act, but the responsibility for such an act is engaged, it must be remembered, vis à vis the national state of the expropriated party. By using the terminology of state responsibility, without caveat, in the context of an arbitration between a state and a foreign private party, the Tribunal muddled the true relationship of the parties. One is a state, the other has been granted by its own state the right directly to pursue a claim that would normally be the object of state espousal. Because ICSID tribunals are given the right to apply international law (in the absence of party choice), it is all too easy to forget the principle of subrogation that underlies that ability. That is not to say that the rights of a state and

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159. Amco Asia, supra, note 147, 1026.

of its national are utterly distinct.[160] The rights arise out of the same facts and the remedies may overlap. But one distinction is essential.

Under basic principles of international law, the remedies for a private investor will typically arise solely from its contractual relationship with the host state. The private party cannot invoke the principles of state responsibility directly. How far does the ICSID regime alter those general principles? Eli Lauterpacht has set the issue clearly:

> The central question here is: to what extent does this paragraph authorize the Tribunal to apply public international law to the disputes brought before it, not simply as a source of rules to be applied by analogy for the interpretation of an agreement, but as if the Tribunal were sitting to consider the matter as an international claim of the investor espoused by his own national State against the State party to the agreement.[161]

The response of some commentators is that the ICSID regime turns the world upside down. Vuylsteke has suggested that one of the most important features of the ICSID Convention is its complete "internationalisation" of the arbitration agreement, the arbitral procedure and of the obligations of the parties.[162] Delaume has called ICSID arbitration proceedings and the sub-

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160. See, e.g., the warning of Lauterpacht, "The World Bank Convention on the Settlement of International Investment Disputes" in Recueil d'études de droit international en hommage à Paul Guggenheim (1968) 660.

161. Ibid., 665.

162. Vuylsteke, supra, note 73, 348 and 349.

sequent awards "truly international".[163] The claim has been advanced most forcefully by Broches:

> Under the Convention, mutual consent has the effect of elevating agreement between a private company and a State to have recourse to ICSID conciliation or arbitration to the level of an international legal obligation, and to that extent the Convention constitutes the private company a subject of international law.[164]

The U.S. State Department's position, as expressed in hearings before a Congressional Committee considering the U.S. legislation to implement the ICSID Convention, would appear to accord with Mr Broches' view. The Deputy Legal Adviser suggested that arbitrations under the Convention would "create a significant new body of international law ... without the restriction of the traditional principle that only states and not private parties are the subject of international law".[165]

It will be suggested that the theories promoting the full international legal status of ICSID arbitrations are mistaken, but to evaluate these striking claims fairly, it is first necessary to examine a final aspect of the ICSID regime, the enforcement of awards, for it is probably the most significant

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163. Delaume, supra, note 91, 784; and Delaume, supra, note 68, vol. II, ch. 15, 70.

164. Broches, supra, note 53, 352. Oddly enough, in a different forum, Broches has argued that "[a]rbitration proceedings under the Convention partake of both public international and private international arbitration". Broches, supra, note 73, 5. It will be argued that this description is more accurate than the theory advanced by Broches that is quoted in the text.

165. Lowenfeld Statement, supra, note 65, 822.

contribution of the designers of ICSID to the law of arbitration between states and foreign private parties. Indeed, the enforcement regime of ICSID can be viewed as the linch-pin of that entire system. At first glance, it is also the strongest argument in favour of the theory of full internationalisation, although it will be argued that the initial impression is misleading.

iii. The ICSID Enforcement Regime

All states party to the ICSID Convention are required, under art. 54, to recognise an ICSID award as binding and to enforce the pecuniary obligations established by the award as if it were a final judgment of a municipal court in the state where enforcement is sought.[166] All that should formally be required is the presentation of a copy of the award, certified as authentic by the ICSID Secretary-General. There are no permissible grounds for challenge before domestic courts. In striking contrast to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[167] even the public policy of the forum where enforcement is sought is excluded from

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166. ICSID Convention, supra, note 69. See also International Bank for Reconstruction and Development, supra, note 54, 530; Broches, supra, note 54, 400; and Delaume, Economic Development and Sovereign Immunity (1985) 79 Am. J. Int'l L. 319, 343.

167. (Signed 10 June 1958; entered into force 7 June 1959) 330 UNTS 38, reprinted in (1968) 7 I.L.M. 1046. For a full discussion of the enforcement regime of the New York Convention, see infra, Chapter III.

application. In other words, an award that would offend the basic public policy of the forum must still be recognised and the pecuniary obligations enforced.[168] Only domestic rules concerning the execution of judgments per se will continue to apply.[169] The sole limitation upon enforcement would appear to be the requirement that only "pecuniary" awards be enforced. Injunctions issued by an ICSID tribunal are not covered by the facilitated enforcement regime.

Such cursory examination of the ICSID Convention could give the impression that execution will be enhanced greatly in all circumstances. In fact, serious enforcement problems remain. These difficulties result primarily from the essential incongruity in the ICSID regime between parties who have different and unequal standing in the international community. Because the ICSID enforcement regime still relies upon the action of municipal courts, the unequal status of the parties causes continuing problems.[170] In the end, parties to ICSID awards may even find that they are required to rely upon

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168. See, e.g., Carbonneau, Arbitral Adjudication, supra, note 49, 95-6; Delaume, supra, note 91, 801; Delaume, supra, note 115, 36; Schmidt, supra, note 62, 105; Vuylsteke, supra, note 72, 358; and Branson & Tupman, supra, note 28, 936.

169. ICSID Convention, supra, note 69, art. 54(3). See also Schmidt, ibid.; and Broches, supra, note 53, 401.

170. These problems underscore the great value of independent enforcement mechanisms such as the one designed for the use of parties before the Iran-United Claims Tribunal. See the discussion, infra, Chapter IV, text accompanying notes 359 to 373.

traditional methods of espousal and diplomacy in order to enforce valid awards.

The most significant problems with enforcement are likely to confront the private investor who has been successful in an ICSID arbitration. The cause of the problems is the distinction allowed in the ICSID Convention between the stages of "recognition" and "enforcement". The effect of that distinction is that, although consent to ICSID jurisdiction can be seen as an irrevocable waiver of a state's traditional immunity from suit,[171] no concurrent waiver of immunity from execution is implied. Indeed, art. 55 of the Convention provides expressly that the rules concerning sovereign immunity from execution that are found in the national law of the enforcing jurisdiction remain applicable.[172] An excellent example of the practical effect of the distinction between recognition and enforcement is found in the Cour d'appel de Paris judgment in the Benvenuti and Bonfant case.[173] The foreign investor had benefitted from a favourable ICSID award rendered in 1980 which it immediately sought to enforce in France. The President of the Parisian

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171. See, e.g., Delaume, supra, note 115, 38.

172. See, e.g., Von Mehren & Croff, "International Arbitration Between Private Parties and Governments: Treaty and Statutory Developments" in G. Aksen & R. Von Mehren, International Arbitration between Private Parties and Governments (1982) (Handbook 399 of the U.S. Practising Law Institute) 101-2; and Delaume, supra, note 166, 343.

173. Benvenuti & Bonfant Co. v. Government of the People's Republic of Congo (Cour d'appel de Paris, 6 June 1981), reprinted in (1981) 20 I.L.M. 878 (France).

court of first instance granted recognition, but made it subject to the following reservation:

> We rule that no measure of execution, or even a conservatory measure, can be taken pursuant to said award, on any assets located in France without prior authorization.[174]

The foreign investor appealed against that reservation and the Cour d'appel struck it down in what would at first seem to be a ringing endorsement of ICSID exclusivity. The Court held that under art. 54 of the ICSID Convention, the role of a domestic court is simply to determine the authenticity of an award as certified by the ICSID Secretary-General.[175] If it is authentic, recognition should be granted. But the Court then made it clear that recognition and enforcement are two distinct stages: the order for recognition did "not constitute a measure of execution but [was] only a decision preceding possible measures of execution".[176] The reservation of the President of the court of first instance was struck down, it would seem, only because it was an unnecessary addition to an order that would have no impact upon the ultimate execution of the arbitral award in any case. When the foreign private party applies for execution per se, it may still be confronted with a sovereign immunity defence that is perfectly allowable under the ICSID regime.

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174. Quoted in ibid., 879.

175. Ibid., 881.

176. Ibid.

Luzzatto points out that the issue of sovereign immunity is a very sensitive one in international law,[177] and it would have been difficult for the drafters of the ICSID Convention to exclude its application at the stage of enforcement. The number of ratifications would probably have been reduced greatly. There can be no doubt, however, that the failure to restrict the sovereign immunity defence to enforcement undermines seriously the gains otherwise achieved in the ICSID Convention.[178] Moore points out that "from the private investor's viewpoint, the Convention does not go far enough in affording execution remedies".[179] Reisman would have preferred that the Convention or a separate protocol contain "a divesting clause, whereby state parties surrender immunity claims for enforcement of awards",[180] but political reality made such a clause unlikely. Nevertheless, if the foreign investor is in a strong bargaining position, it is possible for the parties to an ICSID arbitration to agree in advance that the state will waive its immunity from

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177 Luzzatto, International Commercial Arbitration and the Municipal Law of States (1977) 157 Rec. des cours 9, 99.

178. Even the Executive Directors of the World Bank felt compelled to note that "[t]he doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States". International Bank for Reconstruction and Development, supra, note 53, 530.

179. Moore, supra, note 65, 1378. See also Carbonneau, Arbitral Adjudication, supra, note 49, 97.

180. W.Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 835.

execution.[181]

Mr Delaume has attempted to colour the picture a rosier hue by emphasising the growing acceptance of "restrictive" doctrines of immunity. He believes that as restrictive immunity gains ground "it can only contribute to giving a new practical significance to ICSID awards".[182] Unfortunately, this view is probably too optimistic. Even with the growing acceptance of restrictive theories of immunity, no broad consensus has emerged concerning immunity from enforcement. Cases such as Maritime International Nominees Establishment show that even when states implement legislation founded upon "restrictive" theories of immunity, courts cannot always be convinced to grant enforcement against a state.[183] The issue of sovereign immunity is can-

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181. See, e.g., Delaume, supra, note 68, vol. II, ch. 15, 47 and 75-6.

182. Delaume, ibid., 75; and Delaume, supra, note 91, 800. Mr Delaume believes that the restrictive doctrine of immunity will bolster ICSID awards because it will ease the enforcement of awards against state assets that are destined for commercial use.

183. Maritime International Nominees Establishment v. Republic of Guinea, 693 F. 2d 1094 (D.C. Cir. 1982), reprinted in (1982) 21 I.L.M. 1355 as am. (1983) 22 I.L.M. 86 (cert. den. 104 S. Ct 71 (1983)) (U.S.). The parties had initially provided for ICSID arbitration, but Guinea later refused to submit the dispute, preferring instead to proceed to arbitration under the auspices of the American Arbitration Association. When the award was rendered against Guinea, the state sought to prevent enforcement, claiming sovereign immunity. The claim was rejected by the court of first instance, but was accepted by the Circuit Court of Appeal which therefore ruled that it had no subject matter jurisdiction to confirm the AAA award. The initial agreement upon ICSID arbitration was held not to constitute a waiver of immunity from enforcement.

vassed in detail in a later Chapter[184] but for present purposes only one point need be emphasised: the ICSID Convention does not exclude the application of municipal law theories of sovereign immunity that will commonly frustrate the execution of ICSID awards rendered against states. The system is not as "self-contained" as at first it might appear, nor as "international", if that term is used to mean "beyond the reach of municipal law".

Certain authors have suggested that a state party that invokes sovereign immunity to prevent execution would be in breach of its obligation under art. 53(1) to recognise the "binding" quality of ICSID awards and to give them effect.[185] Although this reading of art. 53(1) is cogent, it is important to note that the Convention here fails to provide any institutional remedies. Indeed, two of the Convention's most vocal supporters have admitted that the only remedies would be the right of diplomatic protection exercised by the national state of the foreign investor (only after the award has been rendered and enforcement frustrated)[186] and, if the dispute related to

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184. See infra, Chapter III, text accompanying notes 132 to 170.

185. Delaume, supra, note 68, vol. II, ch. 15, 77; Carbonneau, Arbitral Adjudication, supra, note 49, 96; and Moore, supra, note 65, 1372.

186. See art. 27 ICSID Convention, supra, note 69, which states that once an ICSID proceeding has been consented to by the parties, the national state of the foreign investor cannot exercise any form of diplomatic protection. The right of (cont'd.)

the interpretation of the Convention, recourse under art. 64 of the Convention to the International Court of Justice.[187] Clearly, when serious issues of public international law are involved, parties to ICSID arbitrations may find themselves thrown back upon pure "international" remedies.

Nor is it solely the foreign private party that may find itself forced to resort to recourses outside the Convention. A state that is a successful party to an ICSID award may also discover that the enforcement system is not truly "self-contained". Again, the problem is caused by the unequal status of the parties in an ICSID arbitration. Vuylsteke has written that "the enforcement of the award is an international obligation not only for both parties to the proceedings but also the award is valid and enforceable in the jurisdiction of all Contracting States".[188] The first part of the statement is quite fundamentally wrong because the nature of the obligations of each

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diplomatic protection springs back to life if the obligations of the parties to respect the award are breached. See generally, Sirefman, The Work Bank Plan for Investment Dispute Arbitration (1965) 20 Arb. J. 168, 175.

187. Delaume, supra, note 68, Vol. II, Ch. 15, 77-8; Broches, supra, note 73, 7; and Broches, supra, note 53, 344. See also United States. Senate. Committee on Foreign Relations, 29 March 1966, reprinted in (1966) 5 I.L.M. 649 (Statement of Joseph W. Barr, Under Secretary of the Treasury) 660.

188. Vuylsteke, supra, note 72, 360.

party is not, strictly speaking, equivalent.[189] The state party has indeed bound itself "internationally" to enforce an award, but the foreign investor is only bound contractually by virtue of the agreement submitting the dispute to ICSID arbitration. It is the national state of the investor, as a party to the ICSID Convention, that is subject to an international obligation to enforce the award, but that obligation is the same as that imposed upon all states party to the Convention.

In the end, if the foreign investor fails to comply with an award, the host state has no international law recourses against the breaching investor. The state must hope that other contracting states fulfill their enforcement obligations.[190] If they do not do so, the remedies available are only those arising from public international law. Again, the ICSID system would prove itself to be far from "self-contained".

It is now possible to evaluate the claims made by certain proponents of ICSID that its processes are part of the system of international law. In support of that proposition one can adduce some solid evidence. First, the ICSID regime is the

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189. Vuylsteke is probably guilty of little more than imprecision in phrasing this statement, for elsewhere he seems to distinguish private and public remedies clearly: "The Convention is designed to replace the classical pattern of diplomatic protection; principles of interstate responsibility do not apply to claimants under it." Ibid., 357.

190. The assumption here, of course, is that the foreign investor does not have enough property in the host state to satisfy the terms of the award. If there is enough property in situe, the host state is in a very strong position.

creature of a multilateral treaty. Secondly, the procedure governing an ICSID tribunal can be fully delocalised (although it is not necessarily so). Thirdly, the Convention provision regarding substantive law provides for the possible application of international law in an ICSID arbitration. Finally, the enforcement regime of ICSID is designed to discourage any involvement of municipal courts or law. An award may not even be challenged on grounds of public policy.

But the preceding discussion has shown that most of these indicia of internationalisation are subject to important caveats. Although the ICSID Convention is an international treaty, the parties to a given ICSID arbitration are not of equivalent status. The foreign investor is simply subrogated in the internationally postulated rights of its national state. Aron Broches has argued a contrary position:

> From the legal point of view, the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.[191]

There are two major problems with this argument. Most important is the essentially inverse reasoning. The "capacity of a private individual or a corporation to proceed directly against a State" remains a limited exception to the first principles of international law. It is only because states agreed in a

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191. Broches, supra, note 53, 349.

multilateral convention to subrogate certain of their rights of action that non-state parties can "proceed directly against a State". It is hard to see how such an exceptional ability is part of a "growing recognition of the individual as a subject of international law."

That assertion reveals another serious problem. Mr Broches has attempted to link the rights of individuals and of corporations, seeming to equate their moral positions. Few people would deny that the second half of the twentieth century has seen a burgeoning recognition of human rights within the international legal order. This development will be discussed in a subsequent Chapter.[192] The growing content of the international law of human rights attests to the heightened status of individuals under international law. That increased status is based upon fundamental principles of human dignity. No equivalent moral position has yet been ascribed to corporations; "corporate dignity" is not yet exalted, even in Western capitalist states, as a fundamental truth. Therefore, to link the strictly limited ability of a corporation to plead a commercial claim directly against a state in an ICSID arbitration (and the vast majority of investors will be corporations) with the "growing recognition of the individual as a subject of international law" is simply incoherent. Corporations and individual investors have been granted an exceptional ability to plead before ICSID tribunals, but they are not therefore equated

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192. See infra, Chapter II, text accompanying notes 241 to 254.

with states. This fact undercuts assertions that ICSID arbitration is a creature of international law.

Any claim of full international status is also contradicted by the limitations that are necessarily placed upon the subrogation of the state's international rights in the private investor. Although art. 27 of the ICSID Convention precludes the national state of the foreign investor from exercising its right of diplomatic protection once a dispute has been submitted to ICSID,[193] if the state party refuses to abide by the ICSID award and if execution becomes impossible, the right of diplomatic protection revives.[194] The private foreign investor itself has no further international recourses and must rely on its national state to espouse its claim.

Other refinements to the general principle that the ICSID system is "self-contained" also challenge the claim of full internationalisation. These refinements have all been discussed

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193. ICSID Convention, supra, note 69, art. 27(1). See also Sirefman, supra, note 186, 175; Schwarzenberger, "The Arbitration Pattern and the Protection of Property Abroad" in P. Sanders, ed., International Arbitration Liber Amicorum for Martin Domke (1967) 313, 317; and Rodley, Some Aspects of the World Bank Convention on the Settlement of Investment Disputes (1966) 4 Can. Y.B. Int'l L. 43, 53. It should be noted that art. 27(2) of the Convention excluded from the definition of "diplomatic protection" any "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

194. The right revives as soon as the state party "shall have failed to abide by and comply with the award rendered in such dispute." ICSID Convention, ibid., art. 27(1). See also Broches, supra, note 53, 371; and Delaume, supra, note 68, vol. II, ch. 15, 45.

above and need merely be rehearsed briefly here. For example, ICSID procedure will not necessarily be insulated from the rules of a national legal system because the parties can agree to be governed by a municipal system of proceedural rules. As concerns the substantive law to be applied by the ICSID tribunal, the general rule is that, in the absence of party choice, the domestic law of the state party will apply in conjunction with principles of international law. No international law tribunal would be called upon to apply municipal law as a fundamental and independent source of legal justification. Finally, and most importantly, when state-sanctioned enforcement is required, the ICSID Convention allows municipal laws governing the defence of sovereign immunity to apply, thereby precluding execution of awards against states in many jurisdictions.

A balanced evaluation of the ICSID regime leads to the conclusion that an ICSID tribunal is a mixed creature, part private and part public. Although, as Julian Lew suggests, the ICSID Secretariat is a public international institution set up by virtue of an international treaty, particular tribunals set up under the auspices of ICSID are not international, but partake of public law and private law principles and structures.[195]

The conclusion that an ICSID tribunal has a mixed vocation is not surprising, given the institutional mandate which is to

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195. See generally Lew, supra, note 15, 21. For a somewhat more extreme formulation of an ICSID tribunal's "mixed" nature, see Schwarzenberger, supra, note 193, 318.

resolve investment disputes between states and foreign private parties. It is ICSID's vocation to be sensitive both to private contractual regimes and to basic principles of international law. Indeed, its pre-eminent concern is to provide a forum that will tend to "depoliticise" disputes that would otherwise be the subject, at first instance, of inter-state claims.[196] To fulfill that role effectively, it may be important that ICSID arbitration is not viewed as an "international" forum. If it is treated as an international process, the full panoply of sovereignty and self-determination issues may be invoked by states to justify non-participation. With this concern in mind, it is now opportune to examine an intensely practical issue: the extremely sparse use of the ICSID regime.

iv. The Under-Utilisation of ICSID

Throughout its relatively short history, ICSID has been plagued by the failure of parties to submit disputes. As noted above, the process of consent to ICSID jurisdiction has two distinct stages, ratification of the Convention by states and submission of concrete disputes. Although the first stage has attracted many adherents, the second stage seems to have presented a barrier for many parties.

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196. See, e.g., Sullivan, Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits (1983) 18 Texas Int'l L.J. 329, 334.

As of 1984, over ninety states had signed the ICSID Convention and fully eighty-eight of those states had become party through ratification.[197] These figures compare most favourably with the ratification statistics of other multilateral arbitration treaties. The most revealing comparison may be drawn with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[198] the only other multilateral arbitral convention designed to apply globally. By 1984, the New York Convention had been ratified by sixty-seven states.[199] Most of the major Western industrial states are party to the ICSID Convention, although Australia has not yet ratified the Convention. Apart from Romania, no COMECON states are party to the Convention.[200] After initially refusing en bloc to become members of ICSID,[201] there has recently been some softening in the Latin American position, with Paraguay and El Salvador ratifying and Costa Rica signing the Convention.[202]

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197. Reported in [1986] Rev. de l'arb. 144 (No. 1).

198. Supra, note 167. For a complete discussion, see infra, Chapter III.

199. Reported in [1986] Rev. de l'arb. 143 (No. 1).

200. International Centre for Settlement of Investment Disputes, supra, note 60, 18-9. Yugoslavia is also a party.

201. See, e.g., Broches, supra, note 73, 8.

202. International Centre for Settlement of Investment Disputes, supra, note 60, 6. See also Kemby, supra, note 70, 225-6.

Despite the widespread ratification of the ICSID Convention, Aron Broches was certainly not overstating the case when he wrote that "advance acceptance of the Centre's jurisdiction has not resulted in a large number of cases."[203] Indeed, from the entry into force of the ICSID Convention in 1966 to the end of the 1983-4 reporting year, only eighteen cases had been submitted to ICSID jurisdiction, two of which were submitted for conciliation. Only eleven of the disputes had been terminated, seven through settlement or discontinuance, meaning that only four awards had been issued.[204] No awards have been made public since the 1984 ICSID Annual Report was released.

ICSID proponents have sought to draw favourable inferences from these statistics. Aron Broches has suggested that:

> both the small number of cases and the high incidence of settlement by mutual agreement after the institution of proceedings are an eloquent demonstration of the strong inducement toward amicable settlement provided by binding arbitration agreements.[205]

In a similar vein, Georges Delaume has argued that the exclusive nature of ICSID arbitration and the facilitated enforcement mechanisms may promote compromise in the wish to avoid proceedings. He opined furthermore that because of:

> the usually protracted duration of investments and the fact that disputes rarely occur in the initial years of association between the host state and

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203. Broches, supra, note 103, 374.

204. ICSID, supra, note 60, 8-9. See also Delaume, supra, note 68, vol. II, ch. 15, 69.

205. Broches, supra, note 103, 374.

investors, it was expected that, in the early years of ICSID, the number of ICSID proceedings should be limited.[206]

Although these explanations no doubt have merit, one senses elements of desperate justification. For example, Broches' suggestion that the "high incidence of settlement by mutual consent after the institution of proceedings" demonstrates ICSID's ability to promote comprise is somewhat strained when one remembers that he is referring to a total sample of only sixteen cases. Delaume's argument that "disputes rarely occur in the initial years of association" also strains credulity when one remembers that ICSID has now been in operation for twenty years. Although it is true that the pace of submission of disputes has quickened somewhat in the 1980s,[207] no overwhelming increase in submissions has occurred. Indeed in 1983-4, only two requests for arbitration were lodged.[208] Despite the fact that a large proportion of contemporary bilateral investment treaties refer to ICSID arbitration,[209] underscoring the apparent willingness of states to accept ICSID jurisdiction in theory, few concrete disputes are submitted. The reasons offered by Delaume and Broches, although plausible,

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206. Delaume, supra, note 68, vol. II, ch. 15, 2.

207. ICSID, supra, note 60, 8.

208. Ibid., 7. One request for conciliation was also submitted.

209. Kemby reports that out of the roughly 200 bilateral investment treaties concluded since 1973, sixty-seven include clauses choosing "ICSID as the proper dispute resolution mechanism". Kemby, supra, note 70, 225-6.

are not exhaustive. It will be instructive to canvass briefly some of the more negative reasons that have been offered to explain ICSID's highly limited case load.

To begin with relatively minor concerns, it has been suggested that ICSID proceedings are too slow. In the first eleven ICSID arbitrations, "the average time for constituting the tribunal was eight to nine months"[210] even though the rules require constitution within a much shorter period. The relative lassitude continued through the process with the average period for completion of an ICSID arbitration being estimated at between two-and-a-half[211] and three[212] years. Such delays can be serious if capital is paralysed.[213] On the other hand, it is difficult to imagine an international method of third party dispute resolution that would inevitably provide speedier justice. Ad hoc arbitration does not tend to be any more expeditious.

Nor are high costs, a charge sometimes levelled at ICSID, a problem limited to institutional arbitration. Indeed, the cost of an ICSID arbitration is quite rigorously controlled. The fee to register a dispute is only $100 (U.S.). As of 1 January 1985, arbitrators' fees were limited to $500 (U.S.)

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210. Branson & Tupman, supra, note 28, 925.

211. Delaume, supra, note 68, vol. II, ch. 15, 50.

212. Gopal, supra, note 57, 594.

213. Ibid.

per day and ICSID charges only its costs as administrative expenses, typically divided equally amongst the parties. The fees and expenses of arbitrators have amounted to no more than five per cent of the value of any ICSID award and have ranged as low as one per cent.[214]

It has also been suggested that one of the reasons for ICSID's lack of activity is that its services are "poorly publicized".[215] The large number of ratifications to the Convention would seem to belie that fact. Moreover, as is apparent from the citations contained here, two Secretaries-General of ICSID, Messrs Broches and Delaume, have made heroic efforts to acquaint the legal public (which is presumably a major pool for investment contract negotiators) with ICSID's services.

The more substantial reasons offered to explain the paucity of ICSID cases are all related, not surprisingly, to particular conceptions of state sovereignty and public policy. Professor Schwarzenberger has commented upon "the unwillingness of most capital-importing States to commit themselves in any binding form to any truly international jurisdiction".[216] Although many capital-importing States may see no cause to worry about ratifying the ICSID Convention, and indeed they may see a

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214. Delaume, supra, note 68, vol. II, ch. 15, 51-2.

215. Gopal, supra, note 57, 597.

216. Schwarzenberger, supra, note 193, 320.

distinct advantage if it increases their "credit-worthiness", the submission of concrete disputes proves more troubling. When confronted with the imminent possibility of ICSID adjudication:

> Many states, especially those from Latin America, object to putting individuals or corporations, either foreign-registered or foreign-controlled, on an equal footing with states.[217]

This objection to ICSID arbitration must be distinguished clearly from antipathies based upon the Calvo Doctrine which emphasises first, the impermissibility of any interference in the internal affairs of a host state through the exercise of diplomatic protection, for which ICSID arbitration may be seen as a surrogate, and secondly, the importance of equal treatment as between nationals and foreign investors which a specialised forum such as ICSID undercuts.[218] The Calvo Doctrine is, in essence, a regional preoccupation in Latin America and has not filtered into more generally applicable international law although that certainly does not mean that "Calvo clauses" per se are without effect.[219]

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217. Rodley, supra, note 193, 49.

218. See the excellent description of the Calvo Doctrine in Szasz, The Investment Disputes Convention and Latin America (1971) 11 Va J. Int'l L. 260, 260-2. See also Abbott, Latin America and International Arbitration Conventions: The Quandry of Non-Ratification (1976) 17 Harv. Int'l L. J. 131.

219. See, e.g., I. Brownlie, Principles of Public International Law, 3d ed. (1979) 546; and D. O'Connell, International Law, 2d ed. (1970) 1060-1. See also, more particularly, Broches, supra, note 53, 373.

The concern to maintain the inequality of status between foreign private investors and host states is not limited to Latin America. Indeed, in the post colonial era it is of great concern to the majority of developing states. Although it is not empirically demonstrable, this concern may be the single greatest inhibition to the increased use of ICSID. There are means of combatting this concern. The first is to emphasise more and more the unique capacity of ICSID to respond not solely to commercial imperatives but to the legitimate public policy objectives of states. Unlike the ICC and comparable institutions, ICSID was designed expressly to cope with both public and private interests. ICSID arbitrators may be expected to display sensitivity to both sets of concerns. Ironically, the best means of reassuring prospective state parties that ICSID arbitration can comprehend and assimilate their legitimate interests[220] is to combat the misguided assertion that ICSID arbitration is "international" in the traditional sense of that term. In fact, ICSID arbitration is not an international legal institution, as the preceding discussion has attempted to demonstrate. But in the pursuit of commercial stability, almost

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220. The proponents of ICSID need not jump through hoops attempting to meet all possible objections of states to third party adjudication. The narrow conceptions of "state interest" and "sovereignty" that have held sway in some quarters in the post colonial era should not be pandered to, but some sensitivity must be displayed to the reasonable fears of newly emergent states which are attempting to buttress their often tenuous hold on governmental authority. Equating states with private corporations can spark legitimate worry.

as an absolute goal, and in reliance upon superficial notions of equality, arguments have been advanced that treat both parties to ICSID arbitration as international persons. Not only do such arguments offend developing states -- and it must be stressed that the same analysis is never applied vis-à-vis foreign investment in developed states -- they also threaten to undercut the greatest contribution that a system such as ICSID can potentially make.

ICSID arbitration is ideally suited to prevent, or at least to lessen, the politicisation of disputes. The ICSID regime provides expressly for the suspension of efforts at diplomatic protection and allows for the third party adjudication of disputes within a proceedurally flexible system that can apply legal rules (or non-legal principles) chosen by the parties. The probability of enforcement, though not guaranteed, is certainly enhanced. The system is designed to ensure that disputes that are predominantly commercial in nature do not become the subject of state claims. But to argue that the private foreign investor is equivalent to a state is to re-introduce the very structure of argumentation that ICSID seeks to preclude. The interests of the host state are seen to be attacked by another state through its surrogate, the private investor. The private party argues that it has "international" rights, that it can assert directly against the host state. An "international" right is bound to be conceived in more politicised terms than a private contractual right. To prevent such

politicisation and to encourage broader participation in the system, ICSID should be described and publicised for what it is: a governing institution created under international law that manages arbitrations of a mixed, public and private, nature. Needless to say, within the ICSID arbitration itself, the parties are treated with equality and the foreign private party can expect to be treated with fairness. But the private party is asserting private (typically contractual) rights which only become international claims if the ICSID process fails to produce its desired result, if the ICSID award is refused enforcement. It is only when ICSID doesn't work, or rather, when states do not abide by their enforcement obligations, that the dispute must move to the plane of international law and become, quite often, fully politicised.

Given the seeming reluctance of states to participate in ICSID arbitration and given the inappropriateness of institutional arbitration under the auspices of groups such as the ICC in the context of disputes between states and foreign private parties, it is not surprising that the alternative of ad hoc arbitration is still widely employed. The next Chapter will be devoted to issues that have arisen primarily in that context.

CHAPTER II: AD HOC ARBITRATION AND THE POTENTIAL APPLICATION OF DELOCALISED LAW

A series of major ad hoc arbitral awards rendered in the 1970s and early 1980s highlighted a dispute that had been percolating through the international legal community. The dispute centred around possibilities for the so-called "delocalisation" of the procedural and substantive law of arbitrations between states and private entities.[1] Indeed, the controversy concerning delocalisation has, in recent years, dominated academic commentary on the subject. Succinctly put, the issue of delocalisation involves two separate questions. First, is it possible to insulate an international arbitration from the application of the procedural rules of the lex loci arbitri? Secondly, is it possible for the parties to agree or, in the absence of agreement, for an arbitrator to apply to the substance of a dispute a system of law divorced from any single national system?[2]

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1. For a recent and most helpful survey of the issues, see Park, The Lex Loci Arbitri and International Commercial Arbitration: When and Why it Matters (1983) 32 Int'l & Comp. L.Q. 21 where the positions adopted are often radically different from those taken here. An approach more sensitive to the concerns of developing (capital importing) nations may be found in Teson, State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration (1984) 24 Va J. Int'l L. 323.

2. Some confusion in terminology is apparent in much of the academic commentary concerning the issue of delocalisation. One often sees the words "delocalisation" and "internationalisation" used interchangeably. On the other hand, some writers tend to use the former word when referring to

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Although the term "delocalisation" has been applied both to the procedure governing an arbitration and to the substantive law to be applied by the arbitrators, the two concepts are entirely distinct[3] and it will be seen that the justifications advanced for each are quite different. In practical terms, the issues tend to arise in different ways. For example, the potential for delocalised substantive law has been emphasised most strongly by foreign investors, traders and resource exploration companies seeking to "stabilise" contractual undertakings with host states

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questions of arbitral procedure and the latter when discussing substantive law. On balance, it seems that the word "delocalisation" is both more forceful and more broadly descriptive. It can be applied to issues of substance and procedure. It is an inclusive word which can comprehend all of the various possible permutations of applicable law. Pace Carbonneau, it does not necessarily signify the complete detachment of arbitral law and procedure from "the procedural and substantive law of any national system." Carbonneau, Book Review, (1984) 24 Va J. Int'l L. 527, 530. "Delocalisation" can refer as well to arbitral systems of law which blend various national systems or which conflate certain national, transnational and international systems. The serious difficulty with the word "internationalisation" is that it connotes a connection with international law per se, a connection which can rarely exist in arbitrations involving a foreign private party and a state. As such, it tends to limit thinking concerning the various options available to parties and arbitral tribunals vis-à-vis the applicable law. More importantly, it obfuscates the true status of private parties in transnational arbitrations, an issue that will be addressed throughout this Chapter. For all these reasons, the word "delocalisation" will be used in preference to the word "internationalisation", except when the latter word is specifically appropriate.

3. For the simple reason that the law applicable to procedure need not be the same as the law governing the substance of a dispute. See, e.g., Mann, "Lex Facit Arbitrum" in P. Sanders, International Arbitration Liber Amicorum Martin Domke (1967) 157, 166.

by expressly removing contracts from the unilateral amending power of the state. On the other hand, arbitrators themselves have often championed the cause of procedural delocalisation as a means of ensuring flexibility and to avoid the application of perhaps idiosyncratic procedural rules of the often fortuitously chosen locus.

The issue of delocalisation has arisen most starkly in ad hoc arbitrations, especially those arising out of breaches of contracts between states and foreign private parties. As far as substantive law is concerned, the need for "stabilisation" is most clearly apparent in such contracts. As for procedure, despite the existence of the UNCITRAL rules designed for ad hoc arbitration, ad hoc tribunals are often left without any express guidance from the parties, and tribunals are enabled to canvass all possibilities. For these reasons, the problems of delocalisation are best explored through a study of ad hoc arbitration, providing the primary focus for this Chapter. On occasion, however, examples may be drawn from the practice of institutional arbitral tribunals when particularly apt.

Although the heyday of "delocalisation" may already be over, especially in relation to substantive law, the debate has raised important theoretical difficulties with regard to contemporary conceptions of international arbitration. In the course of the debate, claims have been asserted, especially on behalf of multinational corporations, which could have a profound effect upon our understanding of international law. For that reason, the debate concerning delocalisation, in both its

procedural and substantive aspects, retains great interest. Understanding the context of that debate will aid in an understanding of the existing and potential role of international arbitration.

It is common ground amongst experts in international arbitral law that there is simply no common ground concerning the possibilities for delocalisation.[4] For some specialists, delocalisation of arbitral procedure or substantive law is a dangerous folly.[5] For others, delocalisation is seen as inevitable in a world where trade and investment cross state boundaries and engage diverse legal systems.[6] Some would preclude the delocalisation of procedure, but allow delocalisation of the substantive law, either through the application of "general principles"[7] or through international law per se.[8]

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4. See, e.g., the comments of Delaume, State Contracts and Transnational Arbitration (1981) 75 Am. J. Int'l L. 784, 791; and Straus, The Growing Consensus on International Commercial Arbitration (1974) 68 Am. J. Int'l L. 709.

5. See, e.g., Park, supra, note 1.

6. See, e.g., Paulsson, Delocalization of International Commercial Arbitration: When and Why it Matters (1983) 32 Int'l & Comp. L.Q. 53.

7. See, e.g., Verdross, Quasi-International Agreements and International Economic Transactions [1964] Y.B. World Affs 230.

8. See, e.g., Mann, State Contracts and International Arbitration (1967) 42 Brit. Y.B. Int'l L. 1. It should be noted, however, that Dr Mann appears to be growing increasingly uncomfortable with the idea of any form of delocalisation. He has always asserted that the procedural law governing an (cont'd.)

The debate, as typically framed, retains a strong academic flavour. Professor Böckstiegel has noted that in his experience with transnational arbitrations, an experience, it must be added, that is rich and wide-ranging, most commercial disputes are settled with little reference to an explicit governing law, either procedural or substantive. Concerning the substantive law, Professor Böckstiegel had this to say:

> [T]he majority of cases is decided exclusively on the interpretation of contracts and the relevance of trade usages so that very little depends on the question of the applicable law and in fact very often that question may be and often is not [sic] expressly decided by the arbitrators.[9]

However, Professor Böckstiegel did modify this evaluation by adding the caveat that in arbitrations involving a state, "the determination of the applicable law plays a much greater role."[10] Even so, and despite the pride of place given to the issue of delocalisation in recent academic commentary, the

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international arbitration cannot be delocalised. His support for delocalisation of the substantive law of state contracts is also waning, but as will be seen below, his late warnings have come to naught.

9. Böckstiegel, "The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises" in International Chamber of Commerce, Court of Arbitration, Documents of the 60th Anniversary Conference (1983) 47.

10. Ibid. But see the Mining concession agreement between the State of Haiti and Société Minière d'Haïti, a subsidiary of Kennecott Copper Corporation (24 March 1976), reprinted in P. Fischer, ed., A Collection of International Concessions and Related Instruments (Contemporary Series) (1975), Vol. III. In that concession agreement, no governing substantive law was established.

survey of international concession agreements compiled by Fischer reveals that the practice of states and foreign private parties when negotiating such agreements is often to provide for the application of delocalised procedural law in any arbitration proceedings, but to retain the national law of the state party to govern the substance of disputes. That was the approach taken in recent concession agreements involving Panama and the American corporation Texasgulf,[11] between the Republic of Liberia and a foreign-owned gold and diamond extraction corporation,[12] between the Islamic Republic of Mauritania and foreign mining interests,[13] between the Republic of Liberia and a consortium of U.S., Japanese and German mining interests,[14] and between the Republic of Indonesia and a Japanese aluminium consortium.[15]

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11. Agreements between the Government of Panama and Foreign Investors for the development of the Cerro Colorado Copper Deposits (25 February 1976), reprinted in Fischer, ibid., Vol. II.

12. Concession Agreement between the Government of the Republic of Liberia and the Liberia Gold and Diamond Corporation (20 September 1976), reprinted in Fischer, ibid., Vol. III.

13. Financing Agreement between Three Parties including the Islamic Republic of Mauritania for the Establishment of a New Mining Company (14 May 1975), reprinted in Fischer, ibid., Vol. I.

14. Financing Agreement between the Government of the Republic of Liberia and LISCO, the Liberia Iron and Steel Corporation (5 June 1975), reprinted in Fischer, ibid., Vol. I.

15. Master Agreement between the Government of the Republic of Indonesia and the Investors for the Asahan Hydroelectric and Aluminium Project (7 July 1975), reprinted in Fischer, ibid., Vol. I.

In other contemporary concession agreements, there is no *prima facie* delocalisation of either the substantive or the procedural law. For example, in a recent concession involving the Republic of Ghana and a foreign-owned diamond company, it was expressly agreed that the contract would "be governed by and construed in accordance with the laws for the time being in force in Ghana." Any eventual *ad hoc* arbitration would operate under the rules established by the *Ghanian Arbitration Act 1961*.[16] Other concessions have provided for the application of national substantive law and for the exclusive jurisdiction of municipal courts.[17] In still other concessions where national substantive law is specified, although the parties have provided for arbitration, there seems to be an assumption that the same national procedural law will govern.[18] Moreover, such agree-

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16. Concession Agreement between the Government of the Republic of Ghana and Amalgamated Diamond Co. (Ghana) Ltd. (1976), reprinted in Fischer, *ibid.*, Vol. IV, arts 32 and 36.

17. See, *e.g.*, Association Contract for Block B of the Cerrejon Coal Project Between Carbones de Colombia, S.A. (CARBOCOL) and International Colombia Resources Corporation (INTERCOR, a subsidiary of EXXON Corporation) (17 December 1976), reprinted in Fischer, *ibid.*, Vol. IV; and Agreement for the Joint Exploration and Development of Uranium Reserves Between the Colombian Instituto de Asuntos Nucleares (IAN) and Total Co. (13 December 1976), reprinted in Fischer, *ibid.*, Vol. IV.

18. See, *e.g.*, Agreement between the Government of Qatar and Holcar Oil Co. of the British West Indies (1 January 1976), reprinted in Fischer, *ibid.*, Vol. II, where the parties seem to assume that the procedure will be regulated by the *lex loci arbitri*. See also the Operating Agreement between Lesotho National Development Corporation and O'Okiep Cooper Co. (1976 draft), reprinted in Fischer, *ibid.*, Vol. IV.

ments may include a clause which allows cases to be stated before the courts of the state party to the concession agreement.[19]

As a question of mere numbers, it seems that there is a trend away from any express delocalisation of substantive law[20] but that the delocalisation of procedure is an increasingly common phenomenon.[21] In any event, the evidence is not sufficient to enable one to pronounce delocalisation a dead letter. The differing trends concerning delocalised substance and delocalised procedure simply highlight the distinct justifications of each and underscore the merit in dealing with the phenomena separately. It must also be pointed out that the delocalisation of substantive law is still an option chosen by some parties to state contracts. In a major concession involving the Arab Republic of Egypt and the Chevron Oil Co., an Egyptian government commercial entity (but not the government per se) bound itself to resort to I.C.C. arbitration in any

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19. See, e.g., the Petroleum Agreement Between the Independent State of Papua New Guinea and ARCO Australia, Ltd. (1976 draft), reprinted in Fischer, ibid., Vol. IV; and Agreement Between the Independent State of Papua New Guinea and Dampier Mining Co. Ltd. Re O.K. Tedi Mineral Deposits (22 March 1976), reprinted in Fischer, ibid., Vol. III.

20. G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes, re-issue, (1985), Vol. II, Ch. 14, 32.

21. J. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978) 17.

dispute with the foreign private contractor.[22] The substantive law was also delocalised. The choice-of-law clause was very sophisticated and hence worthy of note:

> The signatories base their relations with respect to this Agreement on the principles of goodwill and good faith. Taking into account their different nationalities, this Agreement for such arbitration shall be given effect and shall be interpreted and applied in conformity with principles of law common to the A.R.E. and the U.S.A. and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals.[23]

Some other recent contracts between states and state-controlled entities, and foreign private parties have provided for procedurally delocalised arbitration wherein the arbitrators are also directed to act as amiables compositeurs, basing their decisions on principles of equity and on trade usages.[24] In a sense, this is another form of delocalised substantive law, although it is not the choice of a non-national "system". Moreover, even if delocalised substantive law is infrequently chosen, arbitrators

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22. Petroleum Exploration and Production Sharing Agreement between the Arab Republic of Egypt (A.R.E.) and Egyptian General Petroleum Corp. and Chevron Oil Co. of Egypt (22 February 1976), reprinted in Fischer, supra, note 10, Vol. II, art. XXIII.

23. Ibid., art. XXXIII(k).

24. See, e.g., Contract for the Sale and Purchase of Liquified Natural Gas between Société Nationale de Algerie and El Paso Algeria Corp. of Delaware, U.S.A. (28 October 1975), reprinted in Fischer, ibid., Vol. II; and Mining Convention between the Government of Haiti and Société Franco-Haitienne des Mines (15 January 1976), reprinted in Fischer, ibid., Vol. II.

in major cases continue to apply various forms of delocalised proper law, even in the absence of party choice.

The express selection of either form of delocalisation, procedural or substantive, will often depend upon the negotiating strength of the parties to an investment, concession or sales contract.[25] A developing state that is desperate for economic growth may be willing to give away more, in terms of "legal" sovereignty, than a state which finds itself in a relatively stronger economic position. The former states may bow more easily to demands by a foreign investor for delocalisation. On the other hand, a state with greater bargaining power may be able to force agreement for the application of its own procedural and substantive law in the case of subsequent arbitration, or at the very least, may be able to preclude any express choice of delocalised procedure or substance.

Because of their understandable desire to promote contractual stability, foreign investors will undoubtedly continue to press for express delocalisation in their contracts with states. Once a contract is formed, it is probably fair to say that the state party is in the vastly stronger position because of its potential ability to manipulate the internal legal and taxation systems to its own advantage. But during the period of negotiation, the corporation, especially if it is a large transnational

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25. See, e.g., Suratgar, Considerations Affecting Choice of Law Clauses in Contracts Between Governments and Foreign Nationals (1962) 2 Indian J. Int'l L. 273, 276.

corporation facing a developing nation, may be in a relatively stronger position: it can withhold or delay badly needed investment. Corporations will be loathe to give up any protection that they feel could be gained by the bargained-for delocalisation of the applicable substantive law or arbitral procedure.

Proponents of delocalisation commonly ground their support for the concept in the principle of "party autonomy". In the words of Professor Carbonneau:

> The party autonomy principle that underlies arbitration gives the contracting parties the power to fashion a remedial process tailored to their specific needs, limited by fundamental public policy concerns.[26]

Lew goes so far as to suggest that the principle of party autonomy as it applies to international commercial arbitration is without limits.[27] This view frankly caters to the needs of international businessmen who want their "contractual relationship[s], as far as possible, to be governed by really international private law."[28] Western commentators also stress that the stability of commercial relationships is an important factor in encouraging foreign investment and in promoting a world-wide growth in trade.

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26. Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce (1984) 19 Texas Int'l L.J. 33, 36. See also Sanders, Trends in the Field of International Commercial Arbitration (1975) 145 Rec. des cours 205, 262; and Lew, supra, note 21, 111.

27. Lew, ibid.

28. Sanders, supra, note 26, 262.

So important is the theory of party autonomy, for some academic observers, that in the absence of an express choice of delocalised substantive or procedural law, these observers would imply a "will of the parties" to favour delocalisation[29] because this approach allows an arbitrator great flexibility in divining the true intentions of the parties. Although this theory may be justifiable in cases involving commercial contracts between private parties, it should be applied warily in the context of state and foreign private party agreements. One should not presume lightly that a state has bargained away an important aspect of its sovereignty by agreeing tacitly to the delocalisation of substance or procedure.[30] Even less should the mere fact that a contract has international elements be enough to require the delocalisation of substantive or procedural law, particularly when one of the parties is a state or a state agency.[31]

Indeed, a number of influential commentators have attacked the very idea of delocalisation and its theoretical basis in

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29. See, e.g., ibid.

30. In his excellent Hague lectures, Professor Luzzatto pointed out that the 1961 European Convention on Arbitration "represents the most advanced step toward a denationalisation of international arbitration." He added, however, that the Convention had been ratified by few states, which demonstrates that states are not widely committed to the principle of delocalisation. Their tacit acceptance of the principle should not be assumed. Luzzatto, International Commercial Arbitration and the Municipal Law of States (1977) 157 Rec. des cours 9, 30.

31. Pace Professor Sanders, supra, note 26, 262.

party autonomy. Although not rejecting the idea completely, Professor Reisman of Yale has questioned the wisdom of supporting a process of delocalisation because such a process implies "that prescriptive competence for international commercial relations ... should be allocated to international wealth elites."[32] In plainer words, multinational corporations might be allowed to set their own rules. Dr Mann has undertaken a frontal assault by rejecting the independence of arbitration and asserting that it must be controlled through state law. In a lecture delivered in England, he stated categorically:

> The message of this lecture is that it is in the highest interest of the State, that it is a matter of public policy of great import to maintain the principle of judicial review of arbitration not only to develop the law, but also to ensure the administration of justice and thus to avoid the risk of arbitrariness.[33]

Oddly enough, Dr Mann finds himself in agreement with a member of the Hungarian Academy of Sciences who rejected a "primary role" for the will of the parties in any determination of the applicable substantive or procedural law. The relevance of the will of the parties could only be determined, he suggested, by resort to the rules of an existing state legal system.[34]

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32. W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 830.

33. Mann, Private Arbitration and Public Policy (1985) 4 C.J.Q. 257, 267.

34. Szaszy, Recognition and Enforcement of Foreign Arbitral Awards (1966) 14 Am. J. Comp. L. 658, 667.

It should be apparent that the debate concerning the possibility of delocalisation is heated. Arguments brought to bear upon the issue reflect competing desires for commercial stability, for economic efficiency, for principled consistency, for the protection of state sovereignty, and for party autonomy. It may be that these contrary desires are simply incompatible. Professor Weil has suggested that every dispute arising out of a state contract involves two antagonists, generally in good faith, whose interests are radically divergent.[35] Although contracts posit a formal juridical equality between two parties based upon free will, state contracts "constitue à certains égards un corps étranger dans un système de droit public dont l'âme est la puissance publique, voire la souveraineté."[36] Arbitration must cope with these radically contradictory interests and the proponents of delocalisation see in that process a means of coping. In seeking some form of "legal neutrality", those who advocate delocalisation are willing to accept, in Professor de Vries's words, the shattering of "the expeditious unity of forum procedure, substantive rules, and language found in domestic litigation or domestic arbitration".[37]

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35. Weil, Problèmes relatifs aux contrats passés entre un état et un particulier (1969) 128 Rec. des cours 95, 104.

36. Ibid., 101.

37. de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts (1982) 57 Tulane L. Rev. 42, 67.

What must be assessed is the costs involved in the loss of that "expeditious unity". Although delocalisation has not carried the day in quite the manner predicted by its early adherents, it is, as Professor Fragistas noted as long ago as 1960, "a social fact".[38] Moreover, in recent times, various multinational corporations have advocated a significant extension of the possibilities for a delocalised substantive law, arguing that even when parties to a state contract intended that the substantive law of the state party would apply, the substantive law might nevertheless be delocalised through the application of international law as incorporated in the national law of the state.[39] Furthermore, the international responsibility of the state could be engaged directly vis-à-vis the foreign corporation. This argument is the new frontier of the delocalisation debate and it raises important issues concerning the relationship between public and private law in an international setting. But if those issues are to be addressed with any subtlety, it is first necessary to canvass the more conventional claims of the proponents of delocalisation and to evaluate the claims and the

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38. Fragistas, Arbitrage étranger et arbitrage international en droit privé (1960) 49 Rev. crit. 1, 15.

39. See, e.g., the arguments made by the foreign investor in S.P.P. (Middle East) Ltd. v. Egypt (11 March 1983), reprinted in (1983) 22 I.L.M. 752 (I.C.C. Arbitration; Paris) [hereinafter S.P.P.]. It should be noted that the award itself was quashed by the Cour d'appel de Paris, reducing greatly its authoritative value. Arab Republic of Egypt v. S.P.P. (12 July 1984; Cour d'appel de Paris), reprinted in (1984) 10 Y.B. Comm. Arb. 113 and (1984) 23 I.L.M. 1048 (France).

arguments made against them. Before undertaking that task, a preliminary point of clarification is required.

It used to be relatively simple to describe the relationship between procedural law, rules of the conflict of laws and substantive law. Under traditional approaches to arbitration, the procedure was dictated by the lex fori. That procedural law, which included rules governing the arbitrator's jurisdiction, typically instructed the arbitrator to look to the conflicts rules of the forum for guidance in determining the substantive law to apply to the dispute. Contemporary arbitral practice, especially after the advent of the delocalisation debate, has altered that simple schema beyond recognition. As will be discussed below, it can no longer be assumed that the lex fori will govern arbitral procedure. The source of any applicable rules of conflict of laws is therefore entirely contingent. Indeed, one may go so far as to suggest that recent practice, for better or for worse, calls into question the necessary applicability of any state conflicts rules. The source of substantive law is therefore also contingent. Due to this now-complicated schema, the remainder of this Chapter will be divided as follows. First, an examination of the possibilities of delocalised arbitral procedure will be undertaken. The second section will focus upon delocalisation of substantive law, but as a preliminary issue, the role of conflict of laws rules and possible sources for those rules will be explored.

A. Possibilities for the Delocalisation of Arbitral Procedure

The argument concerning delocalised arbitral procedure is primarily a manifestation of the age-old conflict between the desire for certainty, and recognition of the need for flexibility. For many years, the dominant approach to the problem had been to assert that the functioning of an international arbitral tribunal was governed automatically by the lex loci arbitri:

> The traditional view is that the binding nature of an award must necessarily derive from a legal system which is at once (a) exclusively competent and (b) national, and that this legal system must be that of the place of arbitration.[40]

That view was reflected in the 1923 Protocol on Arbitration Clauses which stated, in art. 2, that arbitral procedure "shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."[41] Judge Cavin, the arbitrator in the Sapphire case[42] of 1963 accepted the automatic application of the law of the lex fori and that approach continues to find favour amongst the English

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40. Paulsson, Arbitration Unbound: Award Detached from the Law of its Country of Origin (1981) 30 Int'l & Comp. L.Q. 358, 360.

41. Protocol on Arbitration Clauses (1923) 27 L.N.T.S. 157, reprinted in M. Hudson, International Legislation (1931), Vol. II, No. 98, at 1062.

42. Sapphire International Petroleum Ltd. v. National Iranian Oil Co., decision of 15 March 1963, reprinted in (1967) 35 I.L.R. 136, 164-5 and 169.

judiciary,[43] many English academic commentators,[44] and a scattering of continental observers.[45] The American Supreme Court also assumed that there would be an intimate link between the choice of an arbitral site and the procedural law that would apply:

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43. See, e.g., Bank Mellat v. Helliniki Techniki SA [1983] 3 All E.R. 428 (U.K.), per Kerr L.J., at 431:
> Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law ... .

See also the comments of Lord Justice Kerr in his private capacity as an expert author on English arbitration law: Kerr, "International Arbitration v. Litigation" in C. Schmitthoff, ed., International Commercial Arbitration (1974-80) 141, 152-3 (an updated looseleaf system).

44. See, e.g., Simmonds, "Extraterritoriality and Arbitration Proceedings" in C. Schmitthoff, ed., International Commercial Arbitration (1974-80) 136, 141 (an updated looseleaf system); and Schmitthoff, "Defective Arbitration Clauses" in C. Schmitthoff, ed., International Commercial Arbitration (1974-80) 21, 33 (an updated looseleaf system).

45. See, e.g., Mann, supra, note 8, 6 and 36; and Coing, "The Substantive Law and the Law of Arbitration Procedure" in C. Schmitthoff, ed., International Commercial Arbitration (1974-80), 75, 78-9 (an updated looseleaf system), quoting the German author Raape:
> Parties wish to give legal significance and effect to an award, but this can only be fulfilled on the basis of the positive law of one state .... Therefore parties are obliged to base their arbitration on an individual positive law or legal system. An arbitration court is not enthroned high above the earth. It is not floating in the air. It must land somewhere.

See also the views of Professor Kronstein cited in Jalet, Judicial Review of Arbitration: The Judicial Attitude (1960) 45 Cornell L.Q. 519.

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute.[46]

It was for this reason that the Court was willing to uphold an arbitration clause that derogated from the jurisdiction of United States courts. It had previously allowed such derogations for valid choice of forum clauses that bequeathed jurisdiction upon foreign courts.[47]

The strongest arguments in favour of the traditional view are that it provides certainty (and predictability) and that it may encourage simplified recognition and enforcement of any subsequent award. Certainty of result is enhanced, it is said, because a national system of procedure provides clear rules that are supervised by a national court of the forum.[48] The identity of the supervising court would be known in advance. The parties retain their contractual freedom because they may choose an arbitral forum the procedural law of which conforms to their desires and expectations. Parties could also choose a

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46. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519; 41 L.Ed 2d 270 (1974) (U.S.A.) [hereinafter cited to L.Ed]. See also the comments of Cutler, Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum (1985) 20 Texas Int'l L.J. 97, especially at 98 and 104-5; and Carbonneau, supra, note 26, 35-6.

47. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1; 32 L.Ed 2d 513 (1972), reprinted in (1972) II I.L.M. 599 and 832 (U.S.A.) [cited to L.Ed].

48. See Van den Berg, The New York Convention of 1958 (1981) 30; and Mann, England Rejects 'Delocalised' Contracts and Arbitration (1984) 33 Int'l & Comp. L.Q. 193, 196-7.

neutral forum whose procedural law enhanced the values of flexibility and efficiency.[49]

Recognition and enforcement are aided by the application of the lex loci arbitri, it is suggested, due to the special requirements of the now widely-ratified 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the New York Convention].[50] Problems of recognition and enforcement will be examined in detail below[51] but for present purposes, the argument may be set out as follows: The enforcement-enhancing provisions of the New York Convention can apply only to awards that are final and "binding" in the country of origin (art. V(1)(e)) and the Convention can be invoked in state parties only when the award whose enforcement is sought is "foreign", that is when the award was "made in the territory of a state other than the state where recognition and enforcement ... are sought" (art. I). The issue arises whether an award rendered under

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49. These were the justifications employed by Judge Lagergren for his choice of the lex loci arbitri to govern the procedure of the arbitral tribunal in B.P. v. Libya (Merits), decisions of 10 October 1973 and 1 August 1974, reprinted in (1979) 53 I.L.R. 297. It should be noted, however, that Judge Lagergren did not hold himself to be bound to apply the lex loci arbitri; Danish law was simply sophisticated and convenient and for those reasons was adopted. See also ICC Case No. 4237, Award of 17 February 1984, reprinted in (1984) 10 Y.B. Comm. Arb. 52, where French procedure governing international arbitration was chosen for its convenience and flexibility.

50. (10 June 1958) 330 UNTS 38.

51. See infra Chapter III on the recognition and enforcement of international arbitral awards.

delocalised law can be said to be "binding" under the legal system of the arbitral forum; there is an even greater problem if, for any reason, the award has been set aside under the lex loci arbitri. The question whether a delocalised award is "foreign" is somewhat less troublesome. To be "made in" the territory of another state, there is no need to assume that the award must be rendered under the procedural law of that state.

Moreover, under art. I of the Convention, recognition and enforcement can be accorded also "to arbitral awards not considered as domestic awards in the state where their recognition and enforcement is sought." Although originally intended to cover the case of awards rendered within the state where enforcement is sought and under its procedural law, but under such circumstances that the municipal law would not consider the award to be domestic (eg. where both parties are foreign),[52] this treaty provision can, without violence to the language, be read to include awards rendered under a delocalised procedure. They would not be "considered as domestic" and could be enforced. There might exist a difficulty, however, if the enforcement jurisdiction had bound itself to the Convention only on the basis of reciprocity. In such a case, a court in the enforcing jurisdiction might well hold that because a delocalised award is not supported by any national state, no reciprocal obligation can be posited. Hence a delocalised award would not

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52. Van den Berg, supra, note 48, 37-8.

be enforced. In response, a cogent argument could be put forward along the following lines: All that the reciprocity condition requires is that the award be "made in" the territory of another contracting state. No supervision of that state's legal system is needed. Parties wishing to avoid even a hint of these difficulties might very well desire to anchor their award clearly in the procedural system of a state party to the New York Convention. But it is suggested that no such anchoring is necessary for enforcement under the Convention.

A final justification for the traditional view of the automatic applicability of the procedural law of the lex loci arbitri is to be found in the principles of state sovereignty and state public policy. It has been suggested that states have a legitimate interest in protecting the "integrity of the [state] adjudicatory process" and, as a matter of policy, in protecting the rights of third parties.[53] This interest, it is said, is superior to the party autonomy principle under which delocalised arbitration is commonly justified. As long as the local judge limits his intervention to that which can be justified by sovereign public policy, the compulsory application of the lex loci arbitri is to be commended.[54] This "state interest" approach owes much to contemporary trends in American conflicts law which, at least since Currie, has emphasised state

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53. See Park, supra, note 1, 22.

54. Ibid.

interest as the crucial factor in deciding cases of pure conflict.[55]

In recent years, the applicability of the lex loci arbitri has been challenged by judges, arbitrators and commentators who question the necessary application of any national procedural law in an international arbitration. With the increasing acceptance of the need for jurisdictional flexibility in dealing with international commercial relations,[56] came a new belief that parties should be granted a high degree of autonomy in choosing or molding a procedural law to govern their arbitration.[57] As a practical matter as well, international arbitral tribunals will often sit in more than one place for the sake of convenience, thereby destroying any easy reliance upon a single lex loci arbitri.[58]

French courts took the lead in formulating an approach to arbitral procedure which is radically different from the tradi-

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55. See, e.g., Bauerfeld, Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination? (1982) 82 Col. L. Rev. 1659, 1674. For a critical evaluation of Currie's methodology, see Juenger, Conflict of Laws: A Critique of Interest Analysis (1984) 32 Am. J. Comp. L. 1.

56. See the seminal formulation of this value by the U.S. Supreme Court in Scherk v. Alberto-Culver Co., supra, note 46, per Stewart J. at 281.

57. See, e.g., R. David, L'arbitrage dans le commerce international (1982) 385; and Luzzatto, supra, note 30, 53-7.

58. See Thomas, Arbitration Agreements as a Signpost of the Proper Law [1984] Lloyd's Mar. & Comm. L.Q. 141, 148-9.

tional view. In the famous case of General National Maritime Transport Co. v. Société Gotaverken Arendel A.B.,[59] the Cour d'appel de Paris rejected outright the guiding rule of the lex loci arbitri. In that case, an arbitration conducted under the Rules of the International Chamber of Commerce [I.C.C.] was held to be divorced from and beyond the supervisory jurisdiction of the French national system even though the arbitration had been conducted in Paris. The Court applied Article II of the I.C.C. Rules rigidly; that rule excludes the application of any supplementary national procedural law.[60] Moreover, the Court held, correctly it would appear, that the choice of Paris as the arbitral forum was largely fortuitous: it was chosen simply as the home of the I.C.C. and because of its "neutrality". There did not appear to be any desire to choose French procedural law. As Carbonneau points out, the Gotaverken decision should not have come as a surprise to anyone who had followed modern French case law which generally "has been supportive of the elimination of national legal restrictions on the international arbitral process."[61] The distinguished panel of ad hoc arbitrators in

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59. (Cour d'appel de Paris), decision of 21 February 1980, reprinted in (1981) 20 I.L.M. 884. See also Société AKSA, SA v. Société NORSOLOR, SA (Cour d'appel de Paris), decision of 9 December 1980, reprinted in (1981) 20 I.L.M. 887.

60. Société Gotaverken, ibid., 884.

61. Carbonneau, supra, note 2, 532. See also the comments of the Tribunal in The Government of the State of Kuwait v. The American Independent Oil Co., Final Award of 24 March 1982, reprinted in (1982) 21 I.L.M. 976 [hereinafter Aminoil].

the Aminoil case also recognised the traditional support of the French legal system for international arbitration:

> It must also be stressed that French law has always been very liberal concerning the procedural law of arbitral tribunals, and has left this to the free choice of the Parties who, often, have not had recourse to any one given national system.[62]

Although not uniformly applauded by arbitral experts,[63] the principles of the Gotaverken decision were subsequently codified in the French Arbitration Decree of 14 May 1981,[64] legislation which Professor Carbonneau believes was designed "to give full recognition to the special characteristics of international commercial arbitration and [to] provide regulations for a process that is 'anational' or 'supranational' in character."[65]

The Decree included a very broad definition of "international" arbitration, describing it as any arbitration that "implicates international commercial interests."[66] The Decree went on to establish that the parties to an arbitration possess complete freedom to "define the procedure to be followed in the arbitral proceedings."[67]

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62. Aminoil, ibid., 991.

63. See, e.g., the review of French academic reactions in Delaume, International Arbitration Under French Law: The Degree of May 12, 1981 (1982) 37 Arb. J. 38 (No. 1) 43-5.

64. Decree No. 81.500 amending arts 1492-1507 Code de procédure civil, reprinted in (1981) 20 I.L.M. 917 (translation).

65. Carbonneau, supra, note 26, 78-9.

66. Art. 1492 C.p.c.

67. Art. 1494 C.p.c.

The Gotaverken decision and the subsequent amendments to the Code of Civil Procedure were hailed by the proponents of delocalisation as the heralds of a new age. Indeed the spirit of the Gotaverken decision has inspired French courts in subsequent cases to underscore their reluctance to "interfere" in international arbitration. In the case of the Raffineries de pétrole d'Homs et de Banias c. Chambre de commerce internationale[68] the Cour d'appel de Paris refused to review the ICC's procedure even as it affected such an important question as arbitrator bias. The liberalised French approach to procedural questions in international arbitration has started to affect France's neighbours. In the case of Joseph Muller A.G. v. Bergesen, the Swiss Federal Supreme Court recognised that the dominating importance of the will of the parties "enables [them] to set up their own rules of procedure or to choose already existing private rules of procedure or to choose the rules of procedure of a State." Moreover, "even the mandatory rules of procedure of a State also can be declared inapplicable and they can be substituted with the parties' own rules."[69]

Nevertheless, the theoretical justification for the acceptance of procedural delocalisation remains obscure. The

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68. (Tribunal de grande instance de Paris), decision of 28 March 1984 and (Cour d'appel de Paris), decision of 15 May 1985, reprinted in [1985] Rev. de l'arb. 141 (No. 1) (France), especially at 149-50.

69. 26 February 1982, reprinted in (1984) 9 Y.B. Comm. Arb. 437, 439.

noted expert, Jan Paulsson, grounds his faith in delocalisation on a strong belief in party autonomy and on his perception that international arbitration is essentially a "private" matter:

> The municipal judge necessarily applies the rules of conflict of the forum, which represent the politico-juridical concepts -- particularly as to the territorial limits of legislative power -- of the State from which he derives his authority. The international arbitrator is in a fundamentally different position. Whatever one may think of the contractual (as opposed to judicial) source of an arbitral tribunal's authority as a purely internal matter, it is difficult to consider the international arbitrator as a manifestation of the power of the State. His mission, conferred by the parties' consent, is one of a private nature ... .[70]

Professor Bärman adopts a rather diffrent viewpont, stressing that international arbitration is not so much private as "supranational", and that it should therefore be conducted "under supranational norms and authorities."[71] Mr White has argued along similar lines, suggesting that only some form of "international regime" of procedure "is likely to be sufficiently sensitive to the special problems raised by one party's being a State."[72] Such an international regime may be found in the procedural rules of various arbitral institutions, such as the I.C.C., but even though businessmen seeking stability in their

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70. Paulsson, supra, note 40, 362.

71. Bärmann, "Limits of Arbitral Jurisdiction" in C. Schmitthoff, ed., International Commercial Arbitration (1974-80) 40, 48 (an updated looseleaf system).

72. White, Expropriation of the Libyan Oil Concessions -- Two Conflicting International Arbitrations (1981) 30 Int'l & Comp. L.Q. 1, 7.

relations[73] may prefer an established body of rules, it will be seen below that parties do not always choose institutional rules, and they thereby leave open other possible governing procedural systems. The viewpoint which emphasises the "supranational" aspect of arbitration downplays the element of party autonomy and intensifies the jurisdictional aspect of arbitration. It underscores the jurisdictional imperatives of the arbitral tribunal itself, rather than those of any national legal system.

The relevance of a choice between one or the other of these theoretical justifications for delocalisation is greatest when considering the best approach to procedural law in the absence of party choice. If it is not possible to divine any "will of the parties", express or implied, is delocalisation still possible? Clearly, if one accepts the "supranational" justification, delocalisation remains an option. It would then be up to the arbitrators to choose, perhaps even to create, rules of procedure. One of the earliest and foremost proponents of this approach was, perhaps surprisingly, Lord McNair: "[S]ubmission of a dispute to a tribunal of arbitration involves the acceptance of such system of law as the arbitrators may decide to be the relevant one."[74] Although never carrying the argument quite as far as Lord McNair, even the English House of Lords

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73. See, e.g., Luzzatto, supra, note 30, 49.

74. McNair, The General Principles of Law Recognized by Civilized Nations (1957) 33 Brit. Y.B. Int'l L. 1, 6.

flirted with the notion of limited arbitrator freedom.[75] The power of arbitrators to mold delocalised procedures was recognised expressly by the parties to the Aminoil arbitration,[76] although, in a sense, this recognition can be seen as an express choice of the possibility of delocalisation by the parties, the mechanics of which they left to the arbitrators to design. Here, the "will of the parties" can remain the underlying justification for procedural delocalisation.

A number of recent arbitral awards go further, however, in positing an independent authority vested in arbitrators to establish delocalised rules of procedure in the absence of direction from the parties. The three major ad hoc arbitrations arising out of the nationalisation of various Libyan oil concessions are very much on point. In the LIAMCO case, Sole Arbitrator Mahmassani stated:

> It is an accepted principle of international law that the arbitral rules of procedure shall be determined by the agreement of the parties, or in

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75. Bremer Vulkan Schiffbau und Maschinen - fabrik v. South India Shipping Corp. [1981] A.C. 909, [1981] 1 All E.R. 289 (H.L.) [cited to A.C.], where Lord Diplock held, at 985, that the arbitrator was "the master of the procedure to be followed in the arbitration".

76. See the Arbitration Agreement of 23 June 1979 which established the Aminoil Tribunal:
> Art. IV: Unless otherwise agreed by the Parties, and subject to mandatory provisions of the procedural law of the place in which the arbitration is held, the Tribunal shall prescribe the procedure applicable to the arbitration on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable ...

Reprinted in Aminoil, supra, note 61, 980.

> default of such agreement, by decision of the Arbitral Tribunal, independently of the local law of the seat of arbitration.[77]

Dr Mahmassani did not assert, however, that international law contained its own procedural rules which could govern an arbitration. It would appear that some kind of "general principles" would apply. This debatable proposition will be examined presently.

A parallel approach to arbitral procedure was adopted by Professor Dupuy in the TOPCO arbitration where he held that, in the absence of express agreement of the parties, "the Arbitral Tribunal must determine the law or system of law applicable to the arbitration."[78] He could find "no decisive reason, either theoretical or practical" why the Tribunal should be governed by the procedural law of the seat of the arbitration.[79] Instead, he opted for somewhat ill-defined procedural rules supposedly contained in international law.

Judge Lagergren, in the B.P. Arbitration, was not as sanguine about the practical difficulties that could confront an arbitral award rendered under a delocalised procedure. He believed that recognition and enforcement of a delocalised award could be hampered significantly. For that reason, and not because he felt bound by the weight of authority, Judge

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77. Libyan American Oil Co. v. The Government of the Libyan Arab Republic (merits), decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 42.

78. Texaco Overseas Petroleum Co. v. Libya (merits), decision of 19 January 1977, reprinted in (1979) 53 I.L.R. 422, 431 [hereinafter TOPCO].

79. TOPCO, ibid., 432.

Lagergren held that the lex loci arbitri -- Danish law -- should regulate the B.P. Arbitration.[80]

In so holding, Judge Lagergren expressly rejected the decision in the Aramco Arbitration, a decision approved of and followed by Professor Dupuy in TOPCO, that international arbitrations must be governed by "international" procedural law. In Aramco, the Tribunal had held that because the contract at issue had been signed by a state, it would be an insult to the state's dignity if an arbitration in which it was involved was to be governed by the procedural law of another state. Because no other legal system was applicable, international law must govern.[81] In the B.P. Arbitration, Judge Lagergren put a higher value on efficacy than on state dignity:

> By providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a State, must ... be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality - which it may if the law of the arbitration is international law - generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality.[82]

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80. B.P. v. Libya (merits), supra, note 49, 309. For a clear and cogent reading of the Tribunal decision, see Greenwood, State Contracts in International Law -- The Libyan Oil Arbitrations (1982) 53 Brit. Y.B. Int'l L.27, passim, but especially at 36.

81. Saudi Arabia v. Aramco, decision of 23 August 1958, reprinted in (1963) 27 I.L.R. 117, 154-6.

82. B.P. v. Libya (merits), supra, note 49, 309. This argument for a fixed national procedural law, based upon the importance of easy enforcement, was implicitly rejected by Sole Arbitrator Dupuy in TOPCO v. Libya (merits), supra, (cont'd.)

Although Judge Lagergren's view is eminently practical, he seems to have adopted an overly cautious approach due to a misapprehension of the goals and effects of procedural delocalisation. The first and crucial point is that, as will be argued fully in Chapter Three ,[83] awards rendered under a delocalised procedure are capable of enforcement under the existing rules of the New York Convention of 1958. Moreover, as Mr Paulsson argues so cogently, the essential goal of delocalisation is not, as some detractors fear, to create an "anational" award floating in the firmament of "supranational" law. Rather, the goal is to shift the control function from the state in which the award is rendered to the state in which it is to be enforced.[84] Such a shift is practical and sensible.

In many cases, parties who create an arbitral tribunal do not establish the seat. It may be that the parties simply fail to reach agreement or that they wish to allow the arbitrators to choose a location that is convenient. In any case, it is left to the arbitrators to select a locus; in such circumstances it

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note 78, 432 where it was held that enforcement of an award was a consideration "not within the jurisdiction of the Arbitrator". Formally, this assertion may be true, but it would be a myopic Arbitrator indeed who did not care about the practical value of his award. Nevertheless, for reasons explored in the text, it is fair to say that procedural delocalisation does not open up as many enforcement difficulties as Judge Lagergren imagined.

83. Infra, Chapter III, text accompanying notes 65 to 104.

84. Paulsson, supra, note 6, 54; and Paulsson, supra, note 40, 375.

is clear that the parties have manifested no intention to choose the lex loci arbitri as the governing procedural law. From the parties' perspective, the location of the arbitration is entirely fortuitous. But is the situation necessarily different if the parties choose a seat expressly? Dr Mann would argue that if the parties have chosen a seat they must impliedly be seen to have desired the application of local procedural law.[85] Yet the locus of an international arbitration is often chosen merely for reasons of convenience or neutrality. If the parties know who their arbitrators will be, a seat may be chosen because it has good transportation links with the arbitrators' home countries or because the President of the Tribunal expresses a strong preference. Or a particular city or country may be selected because it is viewed as a "neutral" location. For example, an arbitration between a developing state with a democratic socialist government and a Belgian corporation may take place in Helsinki or Stockholm. If an ad hoc arbitration is taking place under the auspices of an international institution, the chosen seat may be the headquarters of that institution, simply to facilitate communication. Indeed, it is probably quite rare that the parties' choice of a seat is intended to make manifest their intention to choose the procedural rules of the host state. If that is the desired result, it can be stated

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85. Mann, supra, note 3, 163.

explicity.[86] There is no particular reason to foist upon the parties to a freely-negotiated contract rules of procedure which they have not chosen and which they do not want. Even more is this the case if the parties have expressly adopted a set of rules such as those promulgated by the various international arbitral bodies.

If the parties choose a set of institutional rules to govern, those rules should operate. If the parties are silent, the arbitral tribunal should be permitted to establish the rules which are to govern its operations. These rules may be national rules if they should prove useful, as was the case in the B.P. Arbitration, or they may be a compendium of rules from various sources, as long as the sources and their inter-relationship are stated clearly. This last point deserves emphasis in view of contemporary developments in arbitral practice. In two recent oil concession arbitrations, counsel for foreign corporations have argued that no coherent set of procedural rules need be adopted. In Mobil Oil Corp. v. The Government of Libya,[87] and in B.P. v. The Government of Iran,[88] it was suggested that the

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86. As, for example, in the contract discussed in Kuwait v. Aminoil (Final Award), supra, note 61, which provided for the application of French procedural law with certain modifications.

87. The case has been settled and no proceedings have been published. The information has been provided by counsel in the case.

88. The proceedings are confidential. The information has been provided by counsel in the case.

Tribunals possessed complete discretion in molding procedures to suit any contingencies as the cases developed.[89] Such an unprincipled approach to procedure unnecessarily offends legal values such as certainty and prior knowledge (publicity) of rules. Although it is here advocated that, in the absence of party choice, arbitrators should retain a wide discretion to choose or to mold flexible and appropriate rules of procedure, such a discretion should not be allowed to degenerate into mere "ad hocery".

There is, of course, no particular reason why international procedural law must apply to an arbitration in which a state is involved; there is even a legitimate question whether an international law of arbitral procedure exists. For example, the procedural rules designed to facilitate the operation of the International Court of Justice are much too formal to apply in the average ad hoc arbitration. Moreover, whole sets of important questions are not addressed by those rules -- questions such as the appointment and replacement of arbitrators. It could be argued that a more specifically arbitral, yet international, procedure is to be found in the rules established to govern ICSID arbitrations. Yet such rules are institution-specific and they can hardly be said to constitute a customary law of procedure. Parties must still contract into the ICSID

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89. The sole arbitrator in B.P. v. The Government of Iran rejected this contention and adopted the "principes directeurs" of Book One of the French Code of Civil Procedure as the governing procedural system.

system. The UNCITRAL rules have a more legitimate claim to status in international law, but even their use has not been so widespread as to constitute custom, especially for arbitrations involving states and foreign private parties. Probably the best argument that can be put forward is that by comparing various sets of arbitral rules, such as the UNCITRAL, AAA, ICC and Inter-American systems, a core of "international" procedural rules may emerge. But any such core could more accurately be described as an emerging procedural lex mercatoria. The many difficulties involved in the application to states of a lex mercatoria will be discussed below.[90]

For present purposes, the crucial point is simply that the procedural law of an international arbitration is not necessarily governed by the lex loci arbitri,[91] but may be regulated by another system of rules chosen or designed by the parties or, in the absence of choice, by the arbitrators. That system of rules may be another national system, or an institutional system, or a combination of various existing systems. Any such combination is best set out in advance for, in the interests of justice, it is best to avoid any hint of post facto rule "selection".

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90. See infra, text accompanying notes 264 to 278. See also supra, Chapter 1 for a discussion of the difficulties in applying rules designed for private arbitrations to arbitrations involving public entities.

91. See, e.g., Delaume, supra, note 63, 41; and Lynch, Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries (1981) 11 Ga J. Int'l & Comp. L. 669, 686.

The greatest fear of those who object to the principle of delocalised procedure is that there will be no proper control over the abuse of power by the arbitrators. The problem and the locus of responsibility have been identified by Professor Reisman:

> Determining the limits of arbitral power is a many-sided responsibility. There is an obligation to the parties themselves: to determine their objectives in good faith and to give them maximum application. Concomitantly, there is a responsibility to the inclusive community of which the direct participants are a part: to avoid an agreement or award that is alien in its procedure to inclusive standards or detrimental in its effects to community order.[92]

Acceptance of the principle of delocalised procedure in no way lessens the parties' responsibility to act in good faith, nor does it prevent the application of inclusive community standards as a final means of control upon arbitrator excess. It simply shifts the control function from the legal system of the arbitration's host state to that of the prospective enforcement jurisdiction. It remains an obligation for that system to evaluate the essential fairness of the arbitral procedure using standards of "public policy" which are asserted by all national legal systems.[93]

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92. Reisman, supra, note 32, 248.

93. This approach is also advocated by Professor Luzzatto, supra, note 30, 55 and, implicitly, by the drafters of a bill introduced before the Parliament of the Kingdom of the Netherlands. After the creation of the Iran-United States Claims Tribunal, it became necessary for the Dutch Government to define more clearly the relationship between Tribunal awards and the Dutch legal system. Although

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The practicality of this approach can be asserted for three reasons. First, there is no reason why national courts should be entangled in disputes where, as is often the case, the parties are both foreign, the underlying contract has no connection to the host state and enforcement is not sought within the territory of the arbitral forum.[94] Second, it makes sense to impose judicial control upon an international arbitration only when necessary. This principle flows from the very nature of the process, a process which is predicated upon party autonomy and the free choice of an independent and flexible dispute resolution mechanism. It flows also from the importance of neutrality, often the primary reason for the choice of an independent arbitral forum. Judicial supervision is not necessary until the award is to have practical importance -- at the time of enforcement. The award itself does not have the

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suggesting that the awards had to meet "basic requirements of the [Dutch] legal order", the drafters imposed only a requirement of registration. Any further control, based upon principles of public policy, would apply only if the award was to be enforced in the Netherlands. See The Netherlands. Ministers of Justice and Foreign Affairs. Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States: Explanatory Notes, reprinted in (1983) 4 Iran-U.S.C.T.R. 308, 311-12 (The bill seems to have died on the order paper).

94. See, e.g., Park & Paulsson, The Binding Force of International Arbitral Awards (1983) 23 Va J. Int'l L. 253, 255-6.

independent value of a court judgment which may figure, at least in common law jurisdictions, in the crucial process of stare decisis. An arbitral award involving a state and a foreign private party has real meaning only for the parties involved; it is activated at the moment when enforcement is demanded. Therefore, no court should be permitted to intervene until that moment has arrived. The parties have no interest in abstract applications of national law. Their interest is in the finality of the award, an interest that should only be challenged at the moment of enforcement. Opponents of procedural delocalisation profess concern that control may be required at an earlier stage in order to avoid the creation of bad precedents. The argument would run that even if an award never reaches the stage of enforcement, it may be cited as authority. The simple answer is that no award should be accorded great persuasive authority if it is never enforced. This prescription calls for a less abstract appreciation of legal authority.

Another objection to delaying the assertion of control until the stage of enforcement is that the method is likely to prove cumbersome, forcing a party to support the validity of its award in every enforcing jurisdiction. But would the shifting of the control function really alter significantly the enforcement procedure that already exists? It seems doubtful. Under the existing regime of the New York Convention, courts of the recognising and enforcing state may still subject a "binding" foreign award to an evaluation based upon domestic public

policy.[95] National courts can already conduct public policy tests, so openly shifting the control function would only sanction what can presently occur and would remove the extraneous step of applying the particular rules of the arbitral forum.

The third practical reason for discouraging mandatory application of the lex loci arbitri and the consequent supervision of its national courts is that the parties may not wish to enforce their award through municipal courts at all. Even the debatable proposition that "localised" awards may be easier to enforce under the New York Convention then becomes irrelevant.[96] The parties may wish to rely upon good faith, economic pressure or other methods to ensure the efficacy of their arbitral award. They may even choose to design independent methods of enforcement such as security accounts or performance

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95. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra, note 50, art. V(2)(b). See also the Inter-American Convention on International Commercial Arbitration (done 30 January 1975), reprinted in (1975) 14 I.L.M. 336, art. 5(2)(b), which contains almost identical wording. The only multilateral convention which precludes the application of domestic public policy to awards rendered under its terms of reference is the World Bank Convention the Settlement of Investment Disputes between States and Nationals of Other States (done 18 March 1965) 575 UNTS 160, arts. 53-5 , although that interpretation might also be given, in the absence of express provisions, to the COMECON Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation (done 26 May 1972), reprinted in (1974) 13 I.L.M. 5.

96. See Greenwood, supra, note 80, 37.

bonds.[97] In such circumstances, the application of the perhaps idiosyncratic procedural rules of the arbitral forum could become disruptive and potentially destabilising.

The best view, then, is to recognise that the principle of party autonomy and the goals of practicality and efficiency all point towards flexibility as the preferred approach to procedural law. The law of the forum should not of necessity apply, the control function being shifted to the national legal system of the enforcement jurisdiction and then exercised only when enforcement is demanded by one of the parties. Every award for which enforcement is sought would be subject to supervision and no award of practical significance would be left floating in a legal void.

B. Possibilities for the Delocalisation of the Substantive Law in International Arbitration

i. New Approaches to the Conflict of Laws

In order to explore the possibilities for the delocalisation of substantive law, it is first necessary to examine the connection between choice of law rules and the proper law of state contracts. As noted at the outset of this Chapter, the connection used to be viewed as entirely obvious. The

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97. The best contemporary example is the Security Account designed by the negotiators who created the Iran-United States Claims Tribunal. That Account ensures Iranian compliance with awards rendered against it, at least for the foreseeable future. See the discussion, infra, Chapter IV, text accompanying notes 359 to 390.

procedural rules governing an arbitration, thought to be necessarily those of the lex fori, included rules governing the jurisdiction of the arbitrators. These jurisdictional rules told the arbitrators to look to the choice of law rules of the lex fori in order to determine what substantive law to apply in the arbitration.[98] It might be that the conflicts rules of the forum would direct the arbitrator to look first to the express choice of the parties, but such deference to the principle of party autonomy had to be prescribed by the state law of the forum. The leading contemporary exponent of this traditional view is Dr Mann, who asserts that all arbitrations between a state and a foreign private party are founded upon conflict principles of private international law. The conflict rules of the lex fori he sees as mandatory, and it is those rules alone that determine whether or not the law chosen by the parties can operate. A thorough-going state positivist, Dr Mann has encapsulated his position as follows:

> Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the lex fori.[99]

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98. See the descriptions of this traditional approach contained in Luzzatto, supra, note 30, 52; and Lew, supra, note 21, 245.

99. Mann, supra, note 3, 160 (and generally 159-61). See also Mann, comments in the Colloquium, Contrats entre états et personnes privées étrangères (1975) 11 Rev. belge dr. int'l 562, 565.

Dr Mann's position manifests the virtue of simplicity and it has been supported, at least tacitly, in the dicta of several domestic[100] and international[101] tribunals. However, Dr Mann now finds himself preaching in the wilderness, his approach supported by less and less contemporary arbitral or doctrinal authority. The trend, as Dr Mann himself acknowledges and condemns, has been for arbitrators increasingly to ignore the traditional rules of private international law as they seek to determine the proper law of state contracts. Indeed, starting in 1963 with the Sapphire arbitration,[102] the process for selecting the proper law of a state contract has been set on its head.

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100. See, e.g., Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] 1 A.C. 50, 60-5 (H.L.) (U.K.).

101. See, e.g., The Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., Ser.A., nos. 20/21 (Judgment no. 14); and Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), supra, note 76, 32 and 34.

102. In Sapphire International Petroleums Ltd. v. National Iranian Oil Co., supra, note 42, the Tribunal held, at 173, that the contract in question, an oil concession, had a "quasi-international character which releases it from the sovereignty of a particular legal system". No national conflicts rules seemed to apply and the parties were deemed to have chosen "rules of law, based upon reason, which are common to civilized nations" as the proper law of the contract. It should be noted that, standing on its own, the Sapphire arbitration would not constitute highly persuasive authority because its subsequent fate does not lend it great credibility. But Sapphire was only the beginning of a process of change that will be investigated infra.

The first step towards the reversal of classical conflicts theory in the field of international arbitration was the rejection of any necessary conjunction between the procedural law governing an arbitration and the system of conflicts rules that should apply:

> A manifestation, whether express or otherwise, as to the procedural law to be followed at the arbitration, does not show that the parties intend the private international law of the same system to apply.[103]

Once liberated from predetermination, the selection of conflicts rules came to be seen as a matter of free will. This veritable Reformation resulted in the belief that the governing principle should be first and foremost that the parties should be free to choose the law to govern their relations.[104] The right to this free choice, pace Dr Mann, need not derive from any particular state system, but is in fact a "general principle of private international law." Such was the decision of the influential Institut de droit international, taken at its Athens Session in 1979,[105] and it is supported by even a cursory examination of

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103. Lew, supra, note 21, 251.

104. See, e.g., Yntema, 'Autonomy' in Choice of Law (1952) 1 Am.J. Comp. L. 341.

105. Institute of International Law, "Resolutions Adopted by the Institute at its Athens Session 1979", in (1980) 58 Y.B. Inst. Int'l L. 194, 194:

> I ... Considering that in the case of a contract between a State and a foreign private person the parties may, under the general principles of private international law, designate the proper law of the contract and, if such is their intent, withdraw the contract from the exclusive application of any domestic law.

(cont'd.)

various municipal systems of conflicts of law.[106] Julien Lew points out that party autonomy is now such a formidable principle in choice of law that Tribunals sometimes look to

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The Resolutions were adopted by a vote of thirty-eight for, four against and with thirteen abstentions.

In his contribution to the new International Encyclopedia of Comparative Law, Professor Iando also accepted that "the parties' freedom to choose the law which governs their contract seems to be so widely accepted that it must be said to be a 'general principle of law recognized by civilized nations'". However, his positivist beliefs forced Professor Iando to offer the further suggestion that "the exigencies of logic are fully satisfied by the argument .. that the party reference acquires its legal sanction by the conflict rules of the forum". In fact, the very point of the reliance upon "general principles" of conflicts law to found party autonomy is that there need be no logical link with the conflicts rules of the forum. In any case, Professor Iando's theory would collapse if the law of the forum did not, in fact, provide for a primary rule of party autonomy, for then the relationship between "general principles" and the lex fori would be antipathetic and the "exigencies of logic" would not be net. Iando, "Contracts" in "Private International Law", in International Association of Legal Science, International Encyclopedia of Comparative Law (n.d.) vol. III, chap. 24, 33. See also Lew, supra, note 21, 82.

106. Although there has been a long and difficult evolutionary process, and although the issue is not fully settled, most major modern systems of conflicts of law have now adopted the operative principle of party autonomy in the choice of substantive law governing contracts. See, e.g., H. Batiffol & P. Lagarde, Droit international privé, 7ème éd. (1981), t. II, 257 et seq. (France); American Law Institute, Restatement (second) of the Conflict of Laws (1971) §§186-7 (U.S.A.); J. Morris, gen. ed., Dicey and Morris on the Conflict of Laws, 10th ed. (1980), vol. 2, r. 145 (U.K.); J.-G. Castel, Canadian Conflict of Laws (1977), vol. 2, 516 (Canada); Hamlyn v. Talisker (1894) 21 L.R. 21 (H.L.) (Scotland); Code civil du Bas Canada, art. 8 (Québec).

"implied" choices.[107] Such attempts are largely fallacious and often serve simply to mask the arbitrators' independent evaluation of the appropriate substantive law.

This last point raises the crucial issue what is to happen if the parties fail to exercise their new-found free will? Here again, traditional conflicts assumptions have been jettisoned. In the past, the arbitrators would probably have felt bound to apply the conflicts rules of the forum. It now appears that arbitrators, like parties, are possessed of free will. Judge Lagergren was explicit about this point in the B.P. Arbitration. He held that the arbitral tribunal "is at liberty to choose the conflicts of law rules that it deems applicable, having regard

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107. Lew, supra, note 21, 181 et seq. See also Bockstiegel, supra, note 9, 60 who seems to accept the notion of an implied choice of substantive law. Lord McNair had no difficulty with the proposition:

> [I]t is submitted that an entirely adequate basis for he choice by tribunals of an appropriate system can be found in the intention of the parties, manifested either by express provision in their contract, as sometimes happens, or by implication from the terms of the contract and the nature of the transaction envisaged by it.

McNair, supra, note 73, 5.

The "implied" intention is less common in municipal systems of law where courts will instead look most commonly to the law of the closest and most real connection (in England) or to the "policies" and "interests" of the forum (in the U.S.A.). See Thomas, supra, note 58, 308; and Bauerfeld, supra, note 55, 1661-5.

to the circumstances of the case."[108] He proceeded, of course, to choose the conflicts rules of the forum, Denmark, but simply because of their convenience and flexibility. It was probably important that the Danish rules provided for party freedom of choice. One wonders if Judge Lagergren would have adopted the same approach if he had been confronted with a less sophisticated lex fori. If one accepts that, failing party agreement upon a set of conflicts rules, the arbitrators will have to discover some means of selecting an appropriate governing law, the central issue is whether or not their choice is in any way constrained.

If the arbitration has been structured, at the parties' behest, within an institutional regime, the issue may be partly clarified. For example, both the ICC and the UNCITRAL regimes provide for wide discretion vested in a tribunal to apply any conflicts rules that it deems to be applicable.[109] The assumption seems to be that state conflicts rules will be applied. Similarly broad powers were assumed to exist by the drafters of the 1961 European Convention, the only major multilateral

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108. B.P. v. Libya, supra, note 49, 326. See also Béguin, Le développement de la Lex Mercatoria menace-t-il l'ordre juridique international? (1985) 30 Rev. dr. McGill 478, 513. See also Bocksteigel, ibid., 60; Branson and Tupman, Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration (1984) 24 Va J. Int'l L. 917, 930; and Lew, ibid., 584.

109. UNCITRAL, Arbitration Rules, reprinted in (1977) 2 Y.B. Comm. Arb. 161, art. 33(1); ICC, Rules of Conciliation and Arbitration, reprinted in (1976) 1 Y.B. Comm. Arb. 157, art. 13(3).

arbitration convention that deals expressly with the issue of conflicts of law. That Convention provides for the governance of conflict rules "that the arbitrators deem applicable."[110]

If forced to accept the principle of choice, traditional conflicts theory would have limited any such choice to the rules of a given municipal system of conflicts, most commonly the system with which the underlying contract (or relationship) has the closest connection.[111] Recent developments in arbitral practice have called into question that straightforward rule. Two new conflicts methodologies have been advocated by experts and adopted by tribunals.

The first, and least audacious, new conflicts method would permit arbitrators, in the absence of party choice, to apply "conflict of law rules determined by comparative law methods".[112] The arbitrators could look to different conflicts systems to accumulate various accepted connecting factors. They would then apply the substantive law indicated by the preponderant majority of these connecting factors. Alternatively, the arbitrators could attempt to determine a "general" conflicts rule common to many systems and simply apply that rule to deter-

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110. European Convention on International Commercial Arbitration (1961) 484 UNTS 364 (done 16 May 1961), VII(1).

111. This traditional approach was retained by the members of the Institut de droit international in Article 1 of their 1979 Resolutions. Institute of International Law, supra, note 105.

112. Böckstiegel, supra, note 9, 52.

mine the proper law.[113]

In recent times, an even more striking claim has been made by those who would encourage the delocalisation of substantive law. It has been held, or at least suggested, in a number of major arbitral awards involving a state and a foreign private party that, in the absence of party choice, the arbitrator must look to conflicts rules supposedly contained in public international law in order to determine the applicable law. This approach found its most explicit support in Professor Dupuy's decision in TOPCO v. Libya,[114] but Dr Mahmassani also seems to have assumed the existence of public international conflicts rules in the LIAMCO case,[115] although he did not deem it necessary to apply such rules. Distinguished academic commentators have also accepted the proposition.[116]

There exists, however, a profound practical difficulty. In the forthright words of Dr Akehurst: "[A]ttempts to discover choice of law rules laid down by public international law have

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113. See Lew, supra, note 21, 584.

114. TOPCO v. Libya (Merits), supra, note 78, 445. See also the comments of Greenwood, supra, note 80, 40; and Teson, supra, note 1, 333, fn. 50.

115. Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), supra, note 77.

116. Indeed, it may have been the veritable father of delocalisation who first advanced the idea. See Fragistas, supra, note 38, 14-9. See also Böckstiegel, supra, note 9, 52.

not been successful."[117] Purporting to choose the conflicts rules of international law is, in reality, nothing more than a veiled attempt to allow the arbitrators to choose any substantive law they wish, for international law can provide no real guidance. It may be that such an approach allows for appropriate flexibility and that it encourages due sensitivity to the underlying political realities of an arbitration. Indeed, the argument is being advanced increasingly that arbitrators need not rely on any conflicts of law rules in order to determine the applicable law, but that they should choose an appropriate law directly. Lew asks whether it is

> necessary for arbitrators to apply any conflict of laws system? Would it not be preferable for them to make a direct choice of the national law or other standard which their common sense and commercial experience suggest to be most appropriate for the particular circumstances?[118]

This approach was assumed and underscored by the French Arbitration Decree of 14 May 1981 which amended art. 1496 of the Code of Civil Procedure,[119] and arbitrators show an increasing tendency to express complete independence from any conflicts system when choosing substantive law.[120] It is preferable that this approach be adopted openly rather than masked as a choice

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117. Akehurst, Jurisdiction in International Law (1972-73) 46 Brit. Y.B. Int'l L. 145, 222.

118. Lew, supra, note 21, 225.

119. Decree No. 81.500 amending arts 1492-1507 C.p.c., reprinted in (1981) 20 I.L.M. 917 (translation).

120. See e.g., Béguin, supra, note 108, 516.

of non-existent international law conflicts principles, for the role of the arbitrator in shaping the result is more explicit, hence open to critical comment.

It should be stressed that the reason why arbitrators seem tempted to forge out on their own, independently of any established conflicts rules, is the heavy emphasis placed upon delocalisation of the substantive law as a technique of contractual stabilisation.[121] At the insistent urging of foreign investors, some arbitrators have become attracted to the idea of "general priciples of law" which would, it is asserted, prevent the unilateral modification of a contractual regime by the state party. The potential application of general principles will be discussed below.[122] The important point is that, for some arbitrators, the attraction of general principles has led them to disclaim any need for conflicts rules. If one knows in advance that one wishes to apply general principles of law, it may be thought unnecessary to refer to any means of rule selection. For example, in the LIAMCO v. Libya arbitration, Dr Mahmassani invoked "general principles" without any reference to choice-of-law rules,[123] expressly in order to provide for contractual stabilisation.

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121. See, e.g., J. Wetter, The International Arbitral Process: Public and Private (1979), Vol. 1, 407, who describes the principle of contractual stabilisation with great clarity.

122. See infra, text accompanying notes 175 to 200.

123. Supra, note 77.

Given all of the possible approaches to the conflict of laws in international arbitration, it is not surprising that Professor Böckstiegel's empirical studies have revealed "that no single pattern can be found in choice-of-law clauses in contracts with State parties."[124] Nor do resulting arbitrations reveal any clearly dominant attitude towards the conflict of laws.[125]

Of the more flexible approaches to conflicts, the most coherent appears to be the one based upon comparative law methodology. Very little authority supports Dr Mann's proposition that choice of law must be "founded upon and permitted by the private international law of the forum."[126] If the parties are free to choose their conflicts rules, in the absence of such a choice the arbitrators should be permitted to do the same. There is no particular reason why that choice should be limited to the conflicts rules of another single state, although such a choice may often be both appropriate and convenient as it was in the B.P. v. Libya arbitration. To eliminate idiosyncratic rules that might hinder the selection of sensible principles, the arbitrators should be free to employ comparative methodology to establish widely accepted connecting factors or to determine the most sophisticated and sensitive conflicts rules. This approach

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124. Böckstiegel, supra, note 9, 57.

125. Lew, supra, note 21, 581.

126. Mann, Comments in the Colloquium, supra, note 99, 565.

would provide flexibility while at the same time ensuring that the arbitrators are not left without guiding principles.

To suggest that "international law" can itself provide adequate conflicts rules, or to allow arbitrators full authority to pick any law directly are not acceptable methods because they allow the parties absolutely no certainty in their legal relations. In practice, the resort to a supposed body of "international" conflicts rules would almost always result in the application of highly abstract rules such as "good faith". Such an approach is particularly inappropriate when the parties have attempted to construct a complex choice-of-law clause incorporating different systems of law. Such clauses require interpretation simply because they are so complex, but to resort to "international" conflicts rules would emasculate the clauses. The inevitable over-generality of the substantive rules that would be indicated by such an undeveloped conflicts system would mean that the parties' intention would not be fulfilled. If they had wanted their relations to be governed by abstract principles such as good faith, they need not have negotiated a complex choice of law clause in the first place. To say that they could gain certainty in a simpler manner by expressly adopting a single ruling substantive law ignores the political realities and bargaining difficulties that may make such an express choice impossible.

Having explored the means whereby a governing law may be chosen or adopted, it is now possible to investigate the range

of possibilities open to parties and arbitrators seeking to fashion a substantive law. Knowing how they may choose, the obvious issue is what they may choose.

ii. Variations of Delocalised Substantive Law

The fundamental point, and one which has recently been obfuscated, is that the choice of the parties or the arbitrators is limited to the choice of an external legal system. Although the decision to contract is made by the parties alone and is a manifestation of their free will, once that decision has been made, the contract must be placed within a legal context. That context limits the discretion of the parties within their relationship and allows for the enforcement of their mutual promises. In the words of the Aramco arbitral tribunal:

> It is obvious that no contract can exist in vacuo, i.e., without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the Parties. It is necessarily related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the parties.[127]

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127. Saudia Arabia v. Aramco, supra, note 81, 165. It must be admitted that this assertion by the Tribunal is very hard to reconcile with its later holding, at 168, that the "fundamental law" of the contract was the Concession Agreement itself. Perhaps the confusion arises because the Tribunal was unclear in what it meant by "fundamental law". The only coherent explanation is that the underlying system allowed the full operation of party choice, meaning that the contract itself provided the necessary starting point in any evaluation of the parties' legal relationship.

This reality does not preclude the existence of communities governed by implicit norms that are, in a sense, legal.[128] The "system" of law may be a customary system. Nor does it mean that all contracts arise from a pre-supposed system of law (grundlegung). The governing system of law can be freely chosen by the parties. The point is simply that contractual relationships, although they acquire their initial existence through the will of the parties, are subsequently molded by an exterior system of law which upholds the contract and requires its performance. Ideally, this system should be chosen expressly by the parties, but if not, if may be implied.

The crucial importance of an anchoring system of law has been recognised by innumerable jurists of high distinction including Professors Weil,[129] Friedman[130] and

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128. Communities such as social clubs, sports teams, Faculties of Law, or Oxbridge Colleges.

129. Weil, supra, note 35, 181-2:
> Le principe pacta sunt servanda et celui de l'autonomie de la volonté eux-mêmes ne flottent pas dans le vide, et il faut un système de droit pour leur conférer force juridique.

130. W. Friedman, The Changing Structure of International Law (1964) 175.

Seidl-Hohenveldern,[131] and Dr Mann.[132] National courts have reached the same conclusion.[133] The policy underlying the requirement of attachment has been formulated clearly by Professor David:

> [U]n accord général règne pour penser que la volonté des particuliers, pour produire des effets juridiques, doit se rattacher à un système de droit, la vue contraire ne pouvant aboutir qu'à consacrer l'arbitraire ou la force.[134]

The guiding principles of an external system chosen by the parties are required to prevent abuses of power by the parties, and to encourage them to abide by their undertakings. Without a compendium of external control mechanisms, which may be denominated the "Rule of Law" or "community sanction" or whatever, the idea of contract would be reduced to a simple power relationship.

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131. Seidl-Hohenveldern, speaking in the Colloquium, supra, note 99, 569:
> Now most authors agree that a contract cannot be a law to itself. There must be some outside force binding the partners, extraneous to their will.

See also Thomas, supra, note 58, 141.

132. Mann, speaking in the Colloquium, supra, note 99, 562:
> Every contract is necessarily governed by a specific legal order. Or, to put it negatively, an understanding which is not governed by a specific legal system is not a contract.

See also Mann, supra, note 48, 196-7. Dr Mann takes the argument further than is here advocated, for he believes that every contract is governed by a pre-supposed state system of law which may allow or disallow party choice.

133. See, e.g., Orion Compagnia Espanola de Seguros v. Belfort Maatschappi [1962] 1 Lloyd's L. Rep. 257 (Q.B.D.) 264 (U.K.), per Megaw J.

134. David, supra, note 57.

There are those who would advocate exactly that view. Because of the increasing emphasis upon the "autonomy of the will" in twentieth-century arbitral practice, certain authors have denied the necessity for any external legal system to shape the relations of the parties to an international contract. It has been suggested that the parties may choose to be governed simply by the "law" of their own contract. As a matter of principle and practicality, this view should be rejected. Although in the majority of cases Mr Lew might be correct in suggesting that "[t]he actual contract provisions provide the essential ingredients necessary to resolve any dispute between contracting parties,"[135] a supporting system of law will often be required to fill gaps in the contract, to establish underlying principles and to provide means of sanction for non-performance or unsatisfactory performance.

The leading proponent of the contrary view has been Professor Verdross who for many years has argued that the law governing a state contract is uniquely the lex contractus, the law arising from the will of the parties:

> One cannot justify the assertion that every agreement must be based on the legal order of a pre-existing legal community. It is likewise possible that such a legal community is established by the agreement itself.[136]

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135. Lew, supra, note 21, 494.

136. Verdross, The Status of Foreign Private Interests Stemming From Economic Development Agreements with Arbitration Clauses (1958) 18 Zeitschrift für aus. öffen. Recht und Völkerrecht 635 (translation).

He characterised the insistence upon an external system as a "positivist prejudice".[137] But one need not embrace positivist dogma in order to require that the parties to a contract choose a governing system of substantive law. First, such a system need not be a state system. Secondly, and as mentioned previously, it is possible for a system of customary law to provide the necessary foundation. Thirdly, one need not deny that the initial agreement between the parties is a form of law, for any agreement, even a tacit one, constitutes a purposive structuring of human relationships. The assertion is simply that a contract will not be binding and enforceable as those terms are commonly understood, without the support of some legal context exterior to mere party preference. Professor Verdross has argued in reply that the reason that the lex contractus is binding is solely the existence of the principle pacta sunt servanda and related "general principles of law".[138] The content and appropriateness of such general principles will be explored in detail below. For now, one need only point out an odd aspect of Professor Verdross's approach. Although pacta sunt servanda in his view points to the exclusive application of the lex contractus, he admits that law to contain gaps which must be filled by resort to underlying "general principles". In effect, the methodology is very similar to more traditional

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137. See, e.g., Verdross, supra, note 7, 231.

138. Ibid.

approaches, with the simple replacement of an established system by vague "general principles".

The complete detachment of a contract from any supporting system of law has been advocated in some academic commentary[139] and in certain recent arbitrations, primarily by foreign investors seeking desperately to preclude the application of the national law of a state party.[140] The jurisprudential foundation of this approach is to be found in the decision of Judge Pierre Cavin in the Sapphire arbitration. Judge Cavin found that the concession agreement between a Canadian corporation and the National Iranian Oil Co. was not a "normal" contract, that no particular legal system could apply and that any lacunae in the contract could be filled using "principles of law generally recognized by civilized nations."[141] The persuasive value of this award is highly questionable because the award was never enforced. Moreover, in a closely argued judgment of the Court of First Instance of Tehran, rendered in 1963, the court declared the arbitral award to be null and void. In obiter dicta, the Court specifically rejected Judge Cavin's conclusions

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139. See, e.g., Bourquin, Arbitration and Economic Development Agreements [1960] Bus. Law. 860.

140. Reports from the B.P. v. Iran arbitration indicate that British Petroleum has been advancing the argument that no "system" of law is applicable to the concession agreement between the two parties. A similar argument was employed by the Amoco Corporation in its arbitration with Iran. Information from Counsel in the cases.

141. Sapphire, supra, note 42, 175.

concerning the choice of substantive law.[142]

The weight of authority clearly does not support Professor Verdross in his argument that a contract constitutes its own proper law. Pacta sunt servanda is a powerful concept and it is the cornerstone of all major systems of contract. But it is not a system of itself. In the words of Professors Sohn and Baxter:

> No contract or concession exists in a legal vacuum. It draws its binding force, its meaning, and its effectiveness from a legal system, which must be so developed and refined as to be capable of dealing with the great range of problems to which the performance and violation of promises gives rise. 'Pacta sunt servanda' is undoubtedly the basic norm of any system of law dealing with agreements, but the principle speaks on such a high level of abstraction that is affords little or no guidance in the resolution of concrete legal disputes relating to agreements.[143]

A contract, even a state contract, derives its effectiveness from a chosen or implied system of substantive law. The next step in the argument is clearly to evaluate what systems of substantive law potentially are applicable to contracts involving states and foreign private parties, and in arbitrations arising from the breach of such contracts.

Many options are open to parties attempting to select a governing law and to arbitrators seeking to determine a governing law if the parties have failed to make an express choice.

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142. Sapphire International Petroleums Ltd. v. National Iranian Oil Co., decision of 1 December 1963, reprinted in (1970) 9 I.L.M. 1118 (Branch One, Court of First Instance, Tehran) 1123 (Iran).

143. Quoted from the Harvard Draft on the Responsibility of States in Böckstiegel, supra, note 9, 61.

It must be reiterated that, as Professor Böckstiegel's study has shown, it is very often the case that parties to a state contract will not have selected a governing law.[144] This conclusion is supported by Mr Broches's study of ICSID arbitration clauses.[145] The most difficult problems typically arise for arbitrators who have been given little guidance as to the "proper law". The results in such cases also tend to be more unpredictable, for an arbitrator operating post facto is likely to be more audacious in the choice of substantive law than are parties in the heat of negotiations. The only real limitation upon an arbitrator's "creativity", apart from his own role appreciation and good judgment, is the prospect than an overly novel approach to the law may raise difficulties with compliance and enforcement. This fact is yet another reason why, as suggested above, the actual fate of an award -- whether it has ever been complied with or enforced -- is relevant to any assessment of the award's persuasive value.

Assuming the extreme, though not uncommon, case where an arbitrator has been given absolutely no guidance by the parties to a state contract as to the system of substantive law that the arbitrator is to apply to resolve a dispute, what are the options open to him? At the risk of pedantry, it may be wise to

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144. Böckstiegel, ibid., 47.

145. Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of other States (1972) 136 Rec. des cours 331, 390.

set out a comprehensive list of these options before proceeding to a fuller discussion. The list incorporates possibilities suggested by, amongst others, Professors Lalive, Schwarzenberger and Böckstiegel,[146] and by the Institut de droit international.[147] In the absence of specific direction, an arbitrator would be confronted with the following choices. He could apply, either singly or, when not mutually exclusive, in combination:

a. The national law of the state party;

b. The national law of the state of the foreign private party;

c. The national law of another "neutral" state;

d. More than one system of national law or the "principles" common to more than one system;

e. A national law in combination with general principles of law (such as "good faith" or "justice");

f. A national law in combination with international law;

g. The general principles of law recognised by civilised nations;

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146. Lalive, Contracts Between a State or a State Agency and a Foreign Company (1964) 13 Int'l & Comp. L.Q. 987, 992; G. Schwarzenberger, Foreign Investments and International Law (1969) 5; and Böckstiegel, supra, note 9, 58.

147. Institute of International law, supra, note 105, art. 2, at 195. It must be noted, however, that the Institute conceived of its various options as choices that could be made by the parties alone. In the absence of any express choice, art. 5 of the 1979 Resolutions provides that "the proper law of the contract shall be derived from indications of the closest connection of the contract." It will be seen, infra, that contemporary arbitrators have not believed themselves to be bound by any such rule. Indeed, in most major arbitrations, the discussion simply does not focus upon the issue of connecting factors at all.

h. International law;

j. General principles and usages of international commerce, ie. a lex mercatoria.

The same options would, of course, be available to parties negotiating the applicable proper law, and in addition, they could authorise arbitrators to act ex aequo et bono (as amiables compositeurs).[148] It would be highly unlikely for any arbitrator simply to assume that right, for amiable composition is not a common phenomenon in international arbitration.[149] It will not be addressed here both because it is very rare and because, although controversial, especially in the common law world, amiable composition does not raise important theoretical

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148. For a comprehensive discussion of amiable composition, see Simont, "Amiables Compositeurs and their Reasoning" in C. Schmitthoff, International Commercial Arbitration (1974-1980) 109 (an updated looseleaf system).

149. Arbitrators do sometimes seem, albeit very rarely, to ~~aggregate~~ arrogate to themselves the role of amiable compositeur even when it is not expressly granted to them. In a case before the Iran-U.S. Claims Tribunal, a majority in Chamber Two refused to apply the law expressly chosen by the parties to a contract because the result would have been unfair. The Chamber majority stated magisterially: "Our search is for justice and equity". CMI International, Inc. v. Ministry of Roads and Transportation, et al. (1983) 4 Iran-U.S. C.T.R. 263, 268. This feisty attitude may perhaps be explained by the remarkably expansive choice-of-law provision contained in the Treaty establishing the Tribunal and by the unique political considerations which condition its operation. The general rule is rather closer to the situation as described by Mr Delaume:

> [T]he parties to transnational contracts may, by clearly stipulating the law applicable to the relationship between them, have the reasonable expectation that their choice will be left undisturbed.

Delaume, supra, note 20, Vol. I, ch. 1, 1.

difficulties. If arbitrators are told that they may act ex aequo et bono, they will simply decide the issues based upon their notions of fairness. This approach is entirely distinct from the operation of "Equity" as a moderating influence within a system of legal rules. In an arbitration ex aequo et bono, no legal system is relevant, not even the principles contained in the contract itself, if those principles are deemed to have an inequitable result. Whether or not such a process is a "legal" process is a moot point.[150]

The classical attitude towards the choice of substantive law was that the arbitrators in an arbitration arising out of a state contract must perforce apply the substantive law of a single national system, most commonly the law of the state party. The touchstone for this traditional view is the judgment of the Permanent Court of International Justice in the Serbian Loans case, where the Court asserted that all contracts which are not between states (the only subjects of international law, it was assumed) must be founded in a national law.[151] This

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150. The lack of guidance given to arbitrators who are directed to act as amiables compositeurs may have few deleterious effects within a developed and homogenous legal system where there exists a fundamental congruence of values. In such a case, it makes sense to instruct arbitrators, in the manner of the Netherlands Coffee Trade Association, to act "like good men and true". See Arbitration Rules of the Netherlands Coffee Trade Association, Art. 12(1), quoted in Lew, supra, note 21, 225. In an international setting where no basic congruence of values may be presumed, such an instruction is less meaningful.

151. Case Concerning the Payment of Various Serbian Loans Issued in France, supra, note 101.

presumption has received significant academic support. Professor Schwarzenberger, in his major work on the international law of foreign investments, stated explicitly:

> In substance, if not necessarily in form, public contracts are consensual engagements between subjects and objects of international law. The presumption is in favour of these contracts being governed by municipal law.[152]

Professor Lalive has also written that "a domestic system of law chosen by the parties should in principle govern the substance of ... international contracts."[153] One must assume that even without such an express choice, Professor Lalive would favour the application of national law.

There is significant disagreement, however, even amongst proponents of national law, concerning which national law should apply to a transnational arbitration. Some commentators and arbitrators have argued that a state may never be presumed to have submitted to a foreign jurisdiction. Therefore, the only law that may be assumed to apply is the law of the state party. In the Lena Goldfields arbitration, the Tribunal held that any issues that could conceivably fall within the domestic jurisdiction of the Soviet Union had to be decided under that law.[154] Indeed, it would seem that the only reason the Tribunal held

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152. Schwarzenberger, supra, note 146, 5.

153. Lalive, supra, note 146, 993.

154. Lena Goldfields Ltd. v. Union of Soviet Socialist Republics, decision of 3 September 1930, reprinted in (1950) 36 Cornell L.Q. 42.

that it could evaluate certain questions under "general principles of law" was that the Soviet Union had refused to participate in the arbitration.[155] In 1930, the exact nature and rule-content of the Soviet legal system was undoubtedly a mystery to most Western observers. In order to avoid a finding of non liquet,[156] the Tribunal was forced to apply general principles in the absence of pleadings that could have established the content of Soviet law.

Professor Schwarzenberger and Mr Delaume have also argued that a sovereign state cannot be presumed to have subjected a contract to which it is a party to any legal system other than its own.[157] Mr Delaume has taken the argument a step further, by asserting that even when choice-of-law clauses in a contract include reference to national law and to principles such as "good faith", this should not be read as an incorporation of external general principles:

> Failing an explicit reference to international law or to the general principles of law in an agreement between a developed country and a foreign investor, it would occur to no one to construe a reference to

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155. See Nussbaum, The Arbitration Between the Lena Goldfields, Ltd., and the Soviet Government (1950) 36 Cornell L.Q. 31, 36.

156. For a forceful argument as to why international tribunals can and should avoid holdings of non-liquet, see Sir H. Lauterpacht, The Function of Law in the International Community (1933), passim, but especially at 63-5.

157. Schwarzenberger, "The Arbitration Pattern and the Protection of Property Abroad" in P. Sanders, ed., International Arbitration Liber Amicorum for Martin Domke (1967) 313, 317-8; and Delaume, supra, note 20, Vol. 2, ch. 14.

> 'good faith' otherwise than as a reminder of an elementary rule of contract law. Why should a different solution prevail when the contracting state is a developing nation whose law is capable of supplying the basic legal framework of the transaction?[158]

The emphasis placed upon the disparity in attitudes towards contracts involving developing and developed states is an important point that will be treated below.[159]

English courts and commentators have also tended to cling to the notion that state contracts must be governed by the national law of a particular state, but the applicable law is usually presumed to be that of the lex fori, especially when the forum has been chosen by the parties themselves. According to Dicey and Morris:

> When the arbitration clause is part of a contract, there is a very strong presumption that the proper law of the contract (including the arbitration clause) is the law of the country in which the arbitration is to be held.[160]

This approach was expressly adopted by the English Court of Appeal in Tzortzis v. Monarck Line A/B.[161] Professor Park has noted that "English judges traditionally have given the lex loci arbitri greater significance than their French and American brethren."[162] The American brethren recognised this difference

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158. Delaume, ibid., 38.

159. See infra text accompanying notes 230 to 233.

160. Morris, supra, note 106, Vol. 2, 1127.

161. [1968] W.L.R. 406 (C.A.) (U.K.).

162. Park, supra, note 1, 24.

themselves when, in a decision which was calculated to encourage a broader, internationalist approach to arbitration, the Chief Justice noted the contrary English attitude which he described as a "general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with a view that it should apply its own laws."[163] Even in England, however, some case law indicates that the traditional link between the *situs* and the substantive law may be eroding.[164]

Describing the assumption that some form of state law is to apply to international arbitrations as the "classical" or "traditional" view should not be seen as an implication that there are no contemporary adherents to that position. Indeed, in many of the recent concession or investment agreements cited at the outset of this Chapter, the parties expressly opted for the application of the substantive municipal law of the state party.[165] Many developing nations insist upon the application of their own national law to contracts with foreign

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163. *M/S Bremen* v. *Zapata Off-Shore Co.*, *supra*, note 47, 522, fn. 15.

164. See *Cie d'Armement Maritime S.A.* v. *Cie Tunisienne de Navigation S.A.* [1971] A.C. 572 (U.K.). This case is still the only authoritative English decision in which the choice of forum was held not to determine the proper law and the facts were particularly strong in leading to that conclusion. Nevertheless, Thomas believes that the English common law is slowly drifting towards a position of greater flexibility regarding the proper law to be applied in arbitrations. See Thomas, *supra*, note 58.

165. See the agreements cited *supra*, notes 11-19.

investors.[166] For example, a majority of the Latin American nations still manifest a strong distrust of any dispute resolution procedure which removes final legal control from the domestic legal system. "Calvo clauses" which require foreign investors to seek redress of grievances "only through local judicial and administrative remedies" are still employed in many Latin American state contracts.[167] It is, however, less and less common to read assertions that the substantive lex loci arbitri should apply to an international arbitration. It would appear that the primary justification for the application of national law is the sovereign dignity of the state party. That dignity is equally offended by the application of a foreign municipal law as by resort to some form of delocalised law, so although the application of national law remains common, even predominant, in international arbitral practice,[168] it will tend

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166. See Teson, supra, note 1; and Greenwood, supra, note 80.

167. Broches, supra, note 145, 373. For general discussions of the attitude (and some recent changes in attitude) of Latin American nations towards international arbitration, see Abbott, Latin America and International Arbitration Conventions: The Quandry of Non-Ratification (1976) 17 Harv. Int'l L.J. 131; Paulsson, Le tiers monde dans l'arbitrage commercial international [1983] Rev. de l'arb. 1; and Straus, Why International Commercial Arbitration is Lagging in Latin America: Problems and Cures (1978) 33 Arb. J. 21 (No. 1).

168. Professor Böckstiegel, supra, note 9, 64 has suggested that

> [t]he application of national law as the proper substantive law of the contract is of course the most common not only in contracts and arbitrations between

(cont'd.)

to be the national law of the state party that is applied.

Contemporary arbitral practice is rich also in alternative approaches to the substantive law. Although parties and arbitrators are always free to choose a single state law, the variety of attitudes expressed by arbitral tribunals indicates that such a choice is no longer presumed.[169] Indeed, if the parties are silent, given the context of international arbitration, it is difficult to discern any congruent implied intention in the parties. The interests of a state and a foreign investor are often fundamentally contradictory when an investment agreement or concession has collapsed. For this reason, many arbitral tribunals have refused to apply solely the substantive law of the state party, for that law, being within the unique

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private enterprises, but also in international commercial contracts and arbitrations involving states and state controlled corporations.

169. The principles governing state contracts must here be distinguished from those which may apply in cases such as Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] 1 A.C. 50 (H.L.) (U.K.). In that case, the contracting parties (both private entities) had chosen to conclude their contract using what was described by their Lordships as an outdated Lloyd's standard contract of insurance for charterparties. When such an express choice is made, it is fair to assume, as did their Lordships, that English law should apply to regulate the terms of the contract, for the contract has little meaning outside the legal system in which it was created. See Mann, supra, note 48, 193. But Mann would use this case to draw more general propositions against the possibility of delocalisation. The Amin Rasheed facts, however, bear no relation to a situation where two parties, one of them a state, freely negotiate a contract of development or investment. The nature of the contract itself points to no local law. Moreover, the "intention of the parties" is no adequate guide for the reason set out in the text.

control of the state, may be entirely self-serving.[170] This realisation has encouraged the application of various forms of delocalised substantive law.

The selection of a delocalised substantive law either by the parties or by arbitrators must be viewed primarily, then, as a method of "contractual stabilisation".[171] Before exploring in detail the techniques employed to achieve that end, the end itself must be evaluated.

The importance of contractual stabilisation has been emphasised in many of the most important ad hoc arbitral awards rendered in the 1970s and early 1980s. In the Aminoil arbitration, the Tribunal stressed that although a negotiated stabilisation clause could not be presumed to eliminate a state's sovereign right to modify its undertakings, it would bind the state "to respect the contractual equilibrium."[172] Stabilisation was accorded an even more powerful role in the TOPCO and

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170. Delaume, supra, note 4, 790.

171. See, e.g., Van Hecke, Les accords entre un État et une personne privée étrangère (1978) 57 Ann. de l'Institut de dr. int'l, t. II, 106, 110:
> La tendance à soumettre les contrats entre États et personnes privées étrangères à un système de droit autre que celui de l'État contractant s'explique par le désir du contractant étranger d'échapper à une modification unilatéralemnt apportée au contrat par l'État dans l'exercice de son pouvoir législatif ou exécutif."

See also Luzzatto, supra, note 30; Sanders, supra, note 26; Paulsson, supra, note 6; Straus, supra, note 4; and Wetter, supra, note 121, Vol. 1, 407.

172. Aminoil, supra, note 61, 1024.

LIAMCO arbitrations, where the arbitrators held that foreign private parties should be protected against any "unilateral and abrupt modifications of the legislation in the contracting State" to use the words of Professor Dupuy.[173] In the latter two cases, the arbitrators chose to invoke delocalised substantive law proprio motu. Professor Verdross has advocated the application of delocalised law precisely because, in his view, the contractual relationship would not then be "subject to the legislative power of the contracting State and thus [could not] be altered unilaterally."[174]

It will be seen presently that, no matter what form of delocalised law is chosen, it may in fact be impossible fully to "stabilise" the law governing concession or investment contracts between states and foreign private parties. It may be, however, that efficacy is not the primary concern. Delocalisation provides foreign investors with a sense -- even if a false sense -- of security. It is reassuring to know that international or transnational standards will be applied by an arbitral tribunal in evaluating any dispute which arises under a contract. Even if complete stabilisation is not possible, there at least remains a feeling that the state party will not have its own way with total impugnity. An award rendered in a corporation's favour and based upon delocalised legal standards may also have

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173. TOPCO, supra, note 78, 454. See also LIAMCO, supra, note 77.

174. Verdross, supra, note 7, 236-7.

some use as a bargaining chip with the state party and as evidence of the corporation's good faith if it seeks the diplomatic protection of its own government.

a. Applying General Principles of Law

The form of delocalised substantive law that has caused the most controversy in the international legal community is the resort to "general principles of law" which has found its most extreme expressions in the work of Professor Verdross and in Professor Dupuy's holdings in the TOPCO arbitration.

Professor Verdross has long argued that state contracts could not be governed by the law of the state party, nor were they treaties governed by international law. Such contracts formed a special, sui generis class of agreements, "quasi-international", or "transnational" -- the specific name was immaterial. The important point was this: state contracts were not concluded within the context of any pre-existing legal system, but simply "on the basis of the principle pacta sunt servanda and other general principles of law only."[175]

A similar, but not exactly comparable, approach has been recognised by two other jurists of distinction. Professor Lalive, although preferring the application of some municipal substantive law, has suggested nevertheless that general

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175. Ibid., 230-1.

principles "may already be considered as a separate legal system."[176] Lord McNair argued similarly:

> [I]t is submitted that the legal system appropriate to the type of contract under consideration [state contracts] is not public international law but shares with public international law a common source of recruitment and inspiration, namely, 'the general principles of law recognized by civilized nations.'[177]

It is important to note that for Professor Lalive and Lord McNair, "general principles" constituted a system of law whereas Professor Verdross would not view general principles as a system but merely as a set of rules that could be used to fill lacunae in the lex contractus. Professors David and O'Connell also accept the systemic nature of general principles, and have advocated their application in arbitrations involving states and foreign private parties.[178] All of these jurists, with the exception of Professor O'Connell, would agree that "general principles", whether systemic or not, are not equivalent to international law per se. International law could not apply when one of the parties to an investment or concession contract is not a state.[179] Professor O'Connell would reject that analysis simply because, as a practical matter, "general principles" are incorporated into international law under art. 38 of

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176. Lalive, supra, note 146, 992.

177. McNair, supra, note 74, 6.

178. David, supra, note 57, 484; and D. O'Connell, International Law, 2d ed. (1970) 983.

179. See, e.g., McNair, supra, note 74, 10.

the Statute of the International Court of Justice "and the arbitral process is not affected in the slightest by a dispute as to whether the contract is governed by international law or the general principles, or whether the latter be regarded as a system or not."[180] Although Professor O'Connell is probably correct in suggesting that the "arbitral process" will be unaffected by such a controversy, the resolution of the debate concerning the application of international law to state contracts has profound implications for the nature and scope of international law itself. These implications will be discussed at the conclusion of this Chapter.[181]

There exists a body of arbitral authority which supports the application of "general principles of law" (either alone or in conjunction with a national law) to state contracts, but for many reasons, this authority must be judged as weak and unpersuasive. In the Sapphire Arbitration, the Tribunal held that an oil concession agreement between a Canadian corporation and the National Iranian Oil Company was intended to be governed by "principles of law generally recognized by civilized nations."[182] The justifications for his holding were distinctly

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180. O'Connell, supra, note 178, 982.

181. See infra, text accompanying notes 201 to 279.

182. Sapphire, supra, note 42, 175. See also the decision of Lord Asquith of Bishopstone in Petroleum Development Ltd. v. Sheikh of Abu Dhabi, decision of September 1951, reprinted in (1951) 18 I.L.R. 144, 149 where the arbitra- (cont'd.)

idiosyncratic, not to say untenable,[183] but having convinced himself, the arbitrator went on to say that from these general principles he would "try to disentangle rules of positive law."[184] The source and nature of such "positive law" remains distinctly unclear but it was argued that "rules" could be extracted from the notions of pacta sunt servanda and "good faith".[185] It should be reiterated that the Sapphire award was set aside by an Iranian court in a well reasoned judgment.[186]

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tor held, without discussing the possible application of international law per se, that in the absence of sufficient relevant principles in the law of Abu Dhabi, resort should be had to "principles rooted in good sense and common practice of the generality of civilised nations -- a sort of 'modern law of nature.'" This statement appears to be the only express reference to a natural law of arbitration to be found in the extensive literature on the subject.

183. The Sapphire Tribunal employed four justifications for the direct application of general principles of law: (a) a "foreign" arbitrator was provided for in the contract and such a person was unlikely to apply Iranian law; (b) the Agreement was to be carried out under the principles of good faith and good will, rendering incompatible the strict application of any particular national law; (c) the only reference in the Agreement to substantive law was a mention of force majeure which was to be defined by international, not Iranian, law; and, most peculiar of all (d) the Agreement in question was similar to a number of other Iranian concession contracts. These contracts called expressly for the application of general principles of law, so this contract had to be interpreted in the same manner. Sapphire, ibid., 172-4.

184. Sapphire, ibid., 175.

185. Sapphire, ibid., 181-3.

186. Supra, note 141.

The Tribunal in the Lena Goldfields Arbitration also applied general principles but only to issues outside the domestic jurisdiction of the Soviet Union and then only because of the state-party's failure to appear, a failure which inhibited the Tribunal's understanding of Soviet law.[187] In the LIAMCO Arbitration, Sole Arbitrator Mahmassani applied general principles as the substantive law of the contract without any express justification.[188] Professor Dupuy, in his TOPCO judgment, seemed to oscillate between two positions, sometimes implying that he was using general principles as part of an "international law of contract",[189] at other times indicating that general principles constituted an independent system of law[190] which had been chosen expressly by the parties. In either case, general principles were required both to fill gaps in the state law and to allow for stabilisation of the contractual relationship.[191] With respect, the greatest difficulty with the TOPCO award on the merits is its lack of consistency; it is difficult to decipher its coded reasoning. Indeed, it is fair to say that none of these arbitral authorities are strongly persuasive on the point at issue.

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187. Lena Goldfields, supra, note 154, 50.

188. LIAMCO, supra, note 77. See also Greenwood, supra, note 80, 40..

189. TOPCO, supra, note 78, 447-8.

190. TOPCO, ibid., 453-4.

191. TOPCO, ibid., 454.

As one observer has noted, with almost whimsical understatement, "the search for general principles is not easy."[192] Indeed, in the absence of any governing legal system with a structured view of legal sources, the search for "general principles" may be a Sisyphian task. As more and more states with differing socio-economic systems develop sophisticated yet diverse regimes of contract law, it will become increasingly difficult to elaborate principles that are sufficiently common and sufficiently specific to govern factual situations. For example, in the common law world, the anticipatory repudiation of an executory contract typically gives rise to a notional election in which the injured party may elect to terminate the contract unilaterally or may choose to perform and to demand more substantial damages than he would receive if he chose to terminate. In civilian systems, no automatic right of termination ever exists; an application to a court is required. Another example is offered by Nicholas, who demonstrates convincingly that the seemingly close connection between civil law force majeure and common law frustration in fact masks important dissimilarities in the underlying principles.[193] Without any hierarchy of sources, a rational and predictable process of adjudication becomes untenable when confronted with

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192. Lalive, supra, note 146, 1010. See also Verhoeven, Droit international des contrats et droit des gens (1978) 14 Rev. belge dr. int'l 209, 218.

193. Nicholas, Force Majeure and Frustration (1979) 27 Am. J. Comp. L. 231.

conflicting rules. This is not to argue that we should return to the days of "classical" international law when the resolute pursuit of formalism directed all attention to the essentially misplaced concern for the elaboration of rigid hierarchies of "sources" and "participants" in international law. It has been recognised increasingly that the higher goal of international law is to articulate and promote community values. However, the articulation of global community values is not likely, in the short term at least, to provide much guidance in the narrower task of contractual interpretation.

Moreover, state practice may dilute general principles so greatly as to nullify any contractual security sought for the non-state party. If "general principles" alone are to apply, and if the term is to be given its usual meaning so that only those principles generally recognised are to govern, contract principles may increasingly be affected by the national rules of states that have little interest in the ultimate security of international contracts. It is often suggested that all states have a similar interest in the security of contract and property because it is only that security which maintains the flow of foreign investment.[194] But the capital resources of certain developed nations are such that domestic market constraints and the possibilities of high returns prompt investment activity beyond national borders. In addition, the search for cheap labour and supplies of raw material may encourage investment

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194. See, e.g., Broches, supra, note 145, 343.

even where potential contractual insecurity exists. If that be the case, the market constraints upon developing states may not be as significant as has been suggested. The tendency may be to tolerate the evolution of "general principles of law" which unduly discount investor security. The search for stabilisation through general principles may be illusory if "general principles of law" actually allow for the unilateral modification of a state contract by the state party.

The recent Aminoil award reveals in full measure the often illusory "protection" offered by general principles.[195] The Tribunal was confronted with an oil concession that had been abrogated unilaterally by the state party. In its reference to general principles, the Tribunal seems impliedly to have equated state contracts with forms of public contract found in municipal law systems, particularly with the "contrat administratif" of French law.[196] Under the general theory of public contracts, the state is granted authority, because of its special role as guardian of the public interest, unilaterally to require a variation of the other party's obligations and even to abrogate

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195. Aminoil, supra, note 61.

196. See, e.g., Teson, supra, note 1, 346:
> Although the Tribunal carefully avoided the expression, it is clear that it considered the concession agreement, in the form it had taken by virtue of the changes described, to have become something very similiar to an administrative contract.

the contract entirely should the public interest require it.[197] The Tribunal therefore found that, even under general principles of law, a state could unilaterally revoke a contract with a foreign private party. General principles simply failed to serve the function of stabilisation.

A final, more theoretical, objection to the application of "general principles" to govern state contracts is the misleading sleight-of-hand often performed by advocates of that methodology. In almost all of the arbitrations discussed above, the only "general principles" referred to are pacta sunt servanda and "good faith". Professor Verdross also selected these concepts as the key general principles of law. Professor Sanders has written that in his "opinion the generally accepted principle of 'pacta sunt servanda' may be invoked for the binding force of the parties' contract."[198] In a similar vein, a recent ICSID tribunal held that an agreement between a state and a foreign private party was to be construed under "the fundamental principle pacta sunt servanda".[199] The problem with this analysis is that it encourages the confounding of contracts

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197. See the description of the "contrat administratif" contained in the TOPCO arbitration, supra, note 78, 463. For a full discussion of public contracts, including "contrats administratifs", see infra, Chapter III.

198. Sanders, supra, note 26, 263.

199. Amco Asia Corp. et al. v. The Republic of Indonesia, ICSID Award on Jurisdiction of 25 September 1983, reprinted in (1985) 10 Y.B. Comm. Arb. 61, 62.

with international treaties. As it applies to states, pacta sunt servanda is a principle of international treaty law with an attendant body of rules, and although its basic premise -- perform your agreements -- applies equally to contracts, the danger is that by employing the same terminology to cover entirely distinct types of relationships, the distinction itself will progressively be erased. For example, a treaty cannot be terminated unilaterally by one of the parties, but a state contract may be terminated by the state through the sole operation of municipal law. Clearly, pacta sunt servanda does not mean the same thing for treaties and for contracts.[200] If international law is to retain its systemic integrity, the confusion of these two situations should not be encouraged. This problem can be discussed more profitably after exploring the second major means of delocalisation of substantive law, that is the application of international law per se.

b. Applying International Law

The first authoritative advocate of international law as a potential proper law for state contracts was Dr Mann. Although his preference has always been for the application of a "system

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200. Even a strong supporter of the application of international law (including general principles) to state contracts has admitted that pacta sunt servanda "reçoit un contenu différent dans le cas d'un contrat et dans celui d'un traité." Weil, "Droit international et contrats d'État" in Mélanges offerts à Paul Reuter: Le droit international: unité et diversité (1981) 549, 569.

of municipal law chosen by the parties",[201] Dr Mann acknowledged as long ago as 1944[202] that the private law system of conflicts which he assumed must govern every arbitration could authorise the parties to select a delocalised proper law. The only possible delocalised system, according to Dr Mann, was international law.[203] The theoretical justifications he offered for his view are as follows:

> The commercialization of treaties as well as the internationalization of contracts are different aspects of the same fundamental idea. It is no longer attractive to suggest that public international law and private international law respectively have fields of application, which are clearly and perhaps even inflexibly defined and which are determined by a priori or conceptualist reasoning, such as the formula that public international law is applicable only as between international persons or that relationships between international persons are necessarily subject to public international law. Both branches of the law are branches of the same tree. They apply in conformity with the demands of reasonable justice and practical convenience. They overlap and pervade each other. Both are called upon to contribute to the progressive evolution of the law.[204]

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201. Mann, The Proper Law of Contracts Concluded by International Persons (1959) 35 Brit. Y.B. Int'l L. 34, 40 [hereinafter The Proper Law].

202. Mann points out his long association with the theory of delocalisation based upon international law in Mann, supra note 48, 196.

203. Mann, The Proper Law, supra, note 201, passim; Mann, supra, note 8, passim; and Mann, The Aminoil Arbitration (1983) 54 Brit. Y.B. Int'l L. 213, 216.

204. Mann, The Proper Law, ibid., 56.

At a more practical level, Dr Mann has suggested that the "real justification" for "internationalisation" of the substantive law of a state contract "is provided by the requirements of international intercourse"; often, he asserts, no other solution would work.[205]

Prompted by a growing fear that the notion of "internationalisation" was expanding beyond safe constraints, Dr Mann has on occasion attempted to soften, almost to retract, his support for the delocalisation of the substantive law.[206] However, Dr Mann has found it difficult to stop the expanding use of his earlier proposition that substantive international law may be chosen as the proper law of a state contract. That view has received significant doctrinal support, including such eminent observers as Professors Jennings,[207] Weil,[208] David[209] and O'Connell.[210] More importantly, it has been adopted

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205. Ibid., 46.

206. See, e.g., Mann, supra, note 48.

207. Jennings, speaking in the Colloquium, supra, note 99, 592.

208. Weil, supra, note 35, 185-9. Professor Weil states that the sources for an international law of contracts would be identical to the sources of generally applicable international law.

209. David, supra, note 57.

210. O'Connell, supra, note 178, 979. See also Greenwood, supra, note 80, 48 and 79; and the comments of Teson, supra, note 1, 329 who suggests that "the majority of Western writers" support the application of international law to state contracts but that the majority of developing states do not.

implicitly[211] or expressly[212] in a significant body of arbitral tribunal opinion, and has been sanctioned by some domestic tribunals.[213] It is likely that foreign corporations will

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211. In the Aminoil arbitration, supra, note 61, the arbitrators held that although Kuwaiti substantive law applied in general, as "the law most directly involved", that fact did "not carry all-embracing consequences". As a result, international law could apply because of the specific wording of the arbitration Agreement, art. III(2), which referred to "the principles of law and practice prevailing in the modern world" and because the law of Kuwait was so sophisticated that the incorporation of international standards could be presumed. This latter argument is a neat twist on older arguments which allowed for the application of international standards because the domestic law of a, usually developing, state was not sophisticated enough to govern a complex contract. See, e.g., Petroleum Development Ltd. v. Sheikh of Abu Dhabi, supra, note 182. On the Aminoil case, see also Teson, ibid., 336 who notes that

> the [Aminoil] tribunal did not plainly declare the internationalization of the contract, yet concluded that ... domestic and international [law] formed an integrated legal system applicable to the merits of the dispute.

212. As noted, supra, text accompanying notes 190-1, Professor Dupuy in the TOPCO arbitration, although manifesting some confusion on the point, seemed to allow for the application of general principles as part of public international law.

> [I]n this case 'the legal order from which the binding nature of the contract derives' is international law itself and 'the law which governs the contract' is the two-tier system provided for by the parties ... .

TOPCO, supra, note 78, 443. See also Greenwood, supra, note 80, 50. Although less explicitly than did Professor Dupuy, Judge Lagergren in B.P. v. Libya, supra, note 49, also allowed for the potential application of public international law to state contracts if the parties so directed.

213. See, e.g., Orion Compagnia Espanola de Seguros v. Belfort Maatschappij, supra, note 133, 264 (per Megaw J.) where the court stated:

> [I]t may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the

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continue to argue for the "internationalisation" of their contracts with states or state agencies and will attempt to negotiate an express choice of international law at least as a supplementary proper law.[214]

However, the possible application of public international law to state contracts is by no means a universally accepted proposition. Professor Lalive has suggested that any submission to international law would have to be limited to an international law of contractual interpretation and that the inter-

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whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; for example, in a contract to which a Sovereign State was a party.

214. In formulating contractual choice-of-law provisions, the parties are free to negotiate for the application of rules from more than one system, for example a particular national law supplemented by rules of public international law. See e.g., the choice of law clause at issue in Kuwait v. Aminoil, supra, note 61. Professor Lalive has also acknowledged this possibility. Lalive, supra, note 146, 992. See also the comments of Professor Deelen in the Colloquium, supra, note 99, 587: "A contract can be subject to more than one legal order."
Emphasising the principle of the autonomy (severability) of arbitration clauses, it has even been suggested that an arbitration clause "may be governed by a distinct and separate proper law", although English law, at any rate, would allow the proper law to be so split only "in exceptional circumstances." Thomas, Proper Law of Arbitration Agreements [1984] 2 L.M.C.L.Q. 304, 310. Application of a distinct proper law to the arbitration clause itself would seem an unnecessarily complex approach to an already complicated issue and for that reason alone, should be discouraged.

national responsibility of the state could not be engaged.[215] This point is crucial and will be dealt with at length below. An even more fundamental attack on the theory has been undertaken by Luzzato, who has argued that

> [i]n principle, there can be little doubt, if any, that international arbitrations arising from a dispute between States and foreign subjects, under a contractual relationship between the parties, should be put on the same level as arbitrations between two private parties, and not as arbitrations between States which are governed as such by public international law.[216]

The justification for this view is two-fold. First, as a matter of theory, to apply international law to state contracts is to equate foreign private parties with states and this would suggest that the international responsibility of a state could be engaged vis-à-vis a foreign corporation or individual investor. This suggestion raises fundamental policy issues that will be examined near the close of this Chapter.

A second, purely practical, objection to the application of international law is that the corpus of public international law simply does not contain rules that are applicable to the regulation of complex private contractual relationships. It has been suggested that the arbitral decisions which support the "internationalisation" of substantive law have not disclosed

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215. As reported in the Institute of International Law, supra, note 105, 194.

216. Luzzatto, supra, note 30, 87.

many legally relevant principles.[217] It is certainly true that the major arbitral decisions to date have dealt largely with fact patterns involving complete contractual repudiation amounting to fundamental breach. Such cases have not provided an opportunity for the elaboration of detailed contractual rules to govern such problems as contracting inter absentes, anticipatory breach or frustration. A troubling possibility is that such rules simply do not exist in international law. That was the conclusion of Professor Batiffol in his comments before the Institut de droit international.[218] Julien Lew reached a similar conclusion after his study of the law applicable to commercial arbitration: "[P]ublic international law neither aims nor is equipped to regulate the commercial relations and activities of private individuals and organisations in the international arena".[219] Even jurists who support the possibility of "internationalisation" admit that "international law is ill-adapted to the hazards of commercial activity"[220] and that "[à] l'heure actuelle, ce chapitre nouveau du droit international n'a sans doute atteint encore ni une grande richesse ni une réelle

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217. See, e.g., Greenwood, supra, note 80, 64; and Suratgar, supra, note 25, 276.

218. As reported in the Institute of International Law, supra, note 105, 194.

219. Lew, supra, note 21, 403. See also Amerasinghe, State Breaches of Contracts With Aliens and International Law (1964) 58 Am. J. Int'l L. 881, 906.

220. O'Connell, supra, note 178, 976.

précision".[221] A good case in point is the problem of contractual frustration. When has the purpose of a contract become so frustrated that the parties should no longer be held to their mutual promises to perform? The private law of contract, particularly in the common law world, has developed sophisticated and detailed answers to that question, but one would look in vain for applicable principles of public international law.[222]

Some commentators have argued that this practical difficulty -- the paucity of detailed rules -- is less problematic than might at first appear. Mann,[223] Jennings[224] and Seidl-Hohenveldern[225] have all suggested that in the majority of cases

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221. Weil, supra, note 35, 191.

222. The argument is not that there are "gaps" in international law that would preclude a tribunal from giving judgment. Sir Hersch Lauterpacht demonstrated long ago that, as a matter of legal theory, no system of law can be presumed to contain gaps. In particular, one cannot simply divide the problems facing the international community into those that are "legal" and those that are "political" and hence incapable of judicial resolution. Lauterpacht, supra, note 156, 85 and 139. The fact of the matter is that international law is complete within its sphere but that it cannot be made to encompass the entire legal universe. It simply does not apply in certain contexts. To take the extreme case, no-one would argue that customary international law contains rules relevant to a case concerning an application for an alimentary pension upon a divorce in the United Kingdom.

223. Mann, supra, note 201, 34-5.

224. Jennings, State Contracts in International Law (1961) 37 Brit. Y.B. Int'l L. 156, 175.

225. Seidl-Hohenveldern, Comments in the Colloquium, supra, note 99, 569.

that are likely to confront arbitral tribunals, one can successfully compensate for the lack of guiding rules by resort to the general principles that are a recognised source of international law under art. 38 of the Statute of the International Court of Justice. The obvious objection is that if there are in fact no relevant rules in treaties or in customary international law and resort must be had to "general principles", all of the same practical and theoretical difficulties arise as when general principles are argued to operate as a system independent from international law. It would seem that the only advantage in allowing for the application of international law, if indeed it is necessary to fill lacunae with general principles, is that such "general principles" could be evaluated as a component of a system of law. They could therefore be overruled or offset by other sources of international law; an element of control and predictability would be retained.

Whether or not it is necessary to resort to general principles to fill lacunae in the system of customary and treaty law, a significant practical problem remains with the concept of "internationalisation". It would appear that "internationalising" the substantive law of a state contract will simply fail in its primary objective which is contractual stabilisation. To stabilise a state contract effectively using international law, the foreign investor would have to show that international law forbids the unilateral exercise of state legislative power to alter or renounce a contract. This would amount to proving that

international law forbids nationalisation.[226] There is an overwhelming body of authority in contemporary international law supporting the proposition that international law (including general principles) does not preclude the interference with or expropriation of foreign owned property, as long as a public purpose is served, no discrimination is practiced and fair compensation is offered.[227] The only controlling influence that could be asserted by international law is in relation to the standard of compensation, but even here little guidance can be offered because the standard for compensation in international law is the subject of a furious continuing debate.[228]

Despite the unsettled status of the international rules concerning compensation for expropriation, heroic efforts have

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226. See Teson, supra, note 1, 340.

227. See, e.g., the important contribution of a former President of the International Court of Justice, Jiménez de Aréchaga, State Responsibility for the Nationalization of Foreign-Owned Property (1978) 11 N.Y.U.J. Int'l L. & Pol. 179. See also the Declaration on Permanent Sovereignty Over Natural Resources, United Nations G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962); and the Declaration on the Establishment of a New International Economic Order, United Nations G.A. Res. 3201, 6 (Special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

228. The debate surrounding the last draft of the American Law Institute, Restatement (Revised) of Foreign Relations Law (1984) which rejected any customary status for the traditional American formulation of the compensation rule ("prompt, adequate and effective") has been bitter. See, e.g., Clagett, Protection of Foreign Investment Under the Revised Restatement (1984) 25 Va J. Int'l L. 73; Schachter, Compensation for Expropriation (1984) 78 Am. J. Int'l L. 121; and Gann, Compensation Standard for Expropriation (1985) 23 Col. J. Trans. L. 615.

been made by certain arbitrators and by counsel to transnational corporations to argue for the almost automatic application of international law to all state contracts.

The first line of attack, articulated most forcefully by Professor Weil[229] and accepted by Professor Dupuy in the TOPCO arbitration, was to characterise many state contracts as "economic development agreements" to which special, international, rules would apply.[230] If this argument were limited strictly to the issue of finding an implied common intention to choose international law as the proper law of such a contract, it might have some merit. It could be argued that parties to a major development contract might intend their relations to be governed, at least in a supplementary manner, by international law. Even here, such an assumption should probably not weigh heavily in the evaluation, for one could argue with equal force that, especially when major economic agreements are concerned, a state is not likely tacitly to give away legal control over the project. But if the characterisation as an "economic development agreement" is used to justify the automatic application of international law divorced from any intention, the argument becomes both illogical and dangerous in principle. The applica-

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229. See, e.g., Weil, supra, note 200, 580.

230. TOPCO, supra, note 78, 455. The TOPCO award was criticised harshly by Professor Fatouros because of its perceived insensitivity to the needs and aspirations of developing states. Fatouros, International Law and the International Contract (1980) 74 Am. J. Int'l L. 134.

tion of international law would then become dependent upon the overall economic situation of the state party. As Teson points out:

> [I]n the absence of express or implied internationalization, a tribunal should be reluctant to take such a serious step. In particular, the theory that state contracts are "economic development agreements" appears indefensible. It implies that an oil concession contract between, for example, a Saudi investor and the British government would be subject to British law, while a similar contract between the Saudi government and a British investor would benefit from the protection of international law.[231]

Such a result would be, to say the least, odd.

It is clear that an economic development agreement cannot be presumed to be "internationalised". First, and as Teson implies, the argument never even arises that a major foreign investment in a developed nation is governed by international law. Imagine the consternation of the United Kingdom Government if a Saudi Arabian investment in North Sea oil exploration was said to be regulated by international law. Would the Canadian government be any more likely to tolerate such a suggestion if applied to a French-built aluminium smelter in Québec? Would an investor nation even have the temerity to make the suggestion? A Legal Adviser to the U.S. Department of State stated frankly that when a foreign investor comes to the United States "he does so understanding that the U.S. laws are going to apply to him

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231. Teson, supra, note 1, 332.

just as to any other enterpreneur."[232] On principle, a similar argument should apply to all sovereign states, developed or developing. Secondly, even in the developing world, many investment contracts are concluded which specifically call for the application of the municipal law of the host state.[233] There is nothing inherently "internationalised" about an investment contract or development agreement.

Recently, an even broader claim has been advanced by foreign investors who argue for the application of international law to state contracts. Corporations have begun to assert that when a state contracts with a foreign private party, international law will apply automatically because of the nature of the contract, even if the parties expressly have chosen another (usually municipal) system of law to govern their undertakings. Needless to say, in the absence of an express choice of law, the argument would run that "internationalisation" must be presumed. It follows from this claim that the breach of a state contract engages the breaching state in the full panoply of state responsibility under international law and that the foreign private party itself possesses standing to prosecute a claim based upon state responsibility.

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232. United States. Senate. Committee on Foreign Relations, 29 March 1966, reprinted in (1966) 5 I.L.M. 649, 666 (Statement of Leonard C. Meeker, Legal Adivser, Department of State, questioned by Senator Church regarding the effect of the ICSID Convention upon U.S. law).

233. See, e.g., the agreements cited at the outset of this Chapter, supra, notes 11-19.

A small number of arbitral tribunals have been seduced by these arguments. In the Aminoil arbitration, the Tribunal had been granted a wide discretion by the parties to determine the appropriate substantive law.[234] The discretion was employed in a striking manner. Having held that prima facie the concession should be governed by Kuwaiti law, the Tribunal went on to hold that because Kuwait law was a modern system, it incorporated international law and further, that international law incorporated general principles. Hence these "general principles" were the true source of law to be applied by the Tribunal.[235] This methodology was also adopted by the arbitration panel in S.P.P. (Middle East) Ltd. v. Egypt[236] but was applied in an even more extreme manner, for in that case the parties had agreed in their

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234. Article III(2) of the Arbitration Agreement of 23 June 1979 reads as follows:

> The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practices prevailing in the modern world.

Reprinted in Aminoil, supra, note 61, 980.

235. Aminoil, ibid., 1000-1. The only coherent practical explanation for the choice of this methodology was that the Tribunal had not been asked to determine whether or not nationalisation was per se legal. The only issue was the value of compensation and damages (plus interest) due. Perhaps the wide measure of agreement between the parties encouraged the Tribunal to assume that both parties (and particularly the State party) would tolerate the devious application of "general principles".

236. S.P.P., supra, note 39. The award was, of course, quashed in Arab Republic of Egypt v. S.P.P., supra, note 39 by the Cour d'appel de Paris. Its authoritative value is, therefore, minimal.

pleadings that Egyptian law would govern the contract at issue.[237] Like the panel in Aminoil, the S.P.P. Tribunal held that the national law of the state party would apply but that Egyptian law incorporated general principles of law through its incorporation of international law:

> [W]e find that reference to Egyptian law must be construed so as to include such principles of international law as may be applicable and that national laws of Egypt can be relied upon only in as much as they do not contravene said principles.[238]

Other arbitral tribunals have manifested a similarly cavalier attitude toward the choice of a national legal system.[239] The logical conclusion of such decisions is that "internationalisation" is always to be presumed in state contracts and that to prevent it, international law would have to be expressly excluded. Such a position turns international law on its head, for the assumption has long been that a state may never be presumed to have foregone its legal sovereignty.

The common justification for such automatic "internationalisation" is that, in contracting with a foreign private party, the state confers upon that party a limited international

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237. S.P.P., ibid., 768.

238. S.P.P., ibid., 771. Again, the broad measure of party agreement may have emboldened the Tribunal to make such a holding.

239. See, e.g., Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation, AAA decision of 24 August 1978, reprinted in (1978) 17 I.L.M. 1321; and CMI International, Inc. v. Ministry of Roads and Transportation, et al., supra, note 149.

personality.[240] It would be an odd situation indeed if a single member of the international community could singlehandedly bestow international status upon a private individual or group.[241] The large body of rules relating to recognition would be rendered superfluous. Such a major change in the international system cannot lightly be presumed. It is of course true that in recent years the subjects of international law have, for specific purposes, been expanded to include not only states but international organisations and even individuals. Moreover, states are no longer the sole actors in the global process of law formation.[242] The expansion of the role of non-state actors

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240. See, e.g., Schwarzenberger, supra, note 146, 6; and Böckstiegel, supra, note 9, 72-3 and 75.

241. Professor Friedmann found the prospect of "groups of governments and private parties establishing autonomous legal orders of their own" a "frightening" one. Friedmann, supra, note 128.

242. The expanding participation of non-state actors in the international legal process has been acknowledged and applauded by numerous scholars of high distinction including Sir Hirsch Lauterpacht, The Development of International Law by the International Court (1958) 179; Clifford Jenks, The Prospect of International Adjudication (1964) 428; and Elias, "Modern Sources of International Law" in W. Friedmann, L. Henkin & O. Lissitzyn, eds, Transnational Law in a Changing Society[:] Essays in Honour of Philip C. Jessup (1972) 68. Of course, the leading contemporary proponents of an inclusive view of membership in the "international" community are the members of what Professor Falk has called the "New Haven School". For a complete, if somewhat heady, introduction to the work of that school, see M. McDougal, et al., Studies in World Public Order (1960). A more succinct statement may be found in McDougal, Lasswell & Reisman, Theories About International Law: Prologue to a Configurative Juris-

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has been accomplished largely through the vehicle of multilateral treaties. In other words, states themselves collectively have consented to specific alterations in the law. In the realm of human rights, individuals have been granted direct access to international protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms,[243] the American Convention on Human Rights,[244] and most importantly, under the United Nations International Covenant on Civil and Political Rights[245] when read together with its Optional Protocol.[246] Cases brought by individuals contribute to the further development of the law of human rights. International organisations have also contributd widely to the formulation of new legal principles, notably in trade law[247] and in the

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prudence (1968) 8 Va J. Int'l L. 188. The clearest, least jargon-filled, exposition is to be found in Higgins, Policy Considerations and International Judicial Process (1968) 17 Int'l & Comp. L.Q. 58.

243. (Done 4 November 1950) 213 UNTS 222, especially art. 25.

244. (Done 22 November 1969) 36 OASTS 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 6 (English), especially art. 44.

245. United Nations G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in (1967) 6 I.L.M. 368.

246. United Nations G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1967), reprinted in (1967) 6 I.L.M. 383.

247. See especially the work of UNCTAD, UNCITRAL and GATT. For example, UNCITRAL, Arbitral Rules, reprinted in (1977) 2 Y.B. Comm. Arb. 161.

humanitarian law of armed conflict.[248]

It is difficult to point to an exactly comparable role played by transnational corporations.[249] It is true, of course, that two institutions have been set up which do permit corporations to pursue claims directly against states. In both cases, however, this specific capacity was granted under the terms of treaties negotiated between states, treaties which were necessary specifically because international law recognises no such general corporate capacity. The World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States[250] set up an arbitration centre to provide direct access for foreign corporations wishing to sue state contractual partners and it established special enforcement procedures. The Claims Settlement Declaration negotiated between Iran and the United States set up the Iran-U.S. Claims Tribunal to hear, inter alia, claims of foreign private corpora-

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248. Aside from the obvious contributions of the League of Nations and the United Nations, see, e.g., International Committee of the Red Cross, Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts (1978) 206 Int'l Rev. Red Cross 248.

249. For an interesting discussion of the role of corporations in the international legal system, see Charney, Transnational Corporations and Developing Public International Law [1983] Duke L.J. 748. Charney's position is more favourable to an expansive role for corporations than that adopted here.

250. (Done 18 March 1965) 575 UNTS 159.

tions against a state,[251] but it has a "mixed" vocation and certain aspects of the traditional rules of diplomatic protection are retained.[252] But such corporate capacity remains highly exceptional. There has been no burgeoning of "corporate rights" to match the contemporary explosion in individual human rights. It would be a mistake to see in two isolated instances a general trend towards corporate participation in the international lawmaking process.

More importantly, even if corporations, like individuals and international organisations, do possess some strictly limited international personality, they do not gain thereby the right to act as states nor to benefit from obligations which may be owed to states under international law. The first point is that contracts are not to be equated with full-scale treaties.[253] The importance of this principle is manifest. If

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251. Declaration of the Government of the Democratic and Popular Republic of Algeria, Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (19 January 1981), reprinted in (1982) 7 Y.B. Comm. Arb. 255, 257.

252. See Case A-18, Iran-U.S. Claims Tribunal Award of 6 April 1984, reprinted in (1984) 23 I.L.M. 489 and in (1984) 5 Iran-U.S. C.T.R. 251 [hereinafter cited to I.L.M.]; and the discussion infra, Chapter IV, text accompaying notes 1 to 104. See also Jones, The Iran-United States Claims Tribunal: Private Rights and State Responsibility (1984) 24 Va J. Int'l L. 259, 260-1.

253. This was the holding of the International Court of Justice in the Anglo-American Oil Company Case [1952] I.C.J. 112. Even proponents of "internationalisation" are careful not to equate contracts and treaties for all purposes. See, (cont'd.)

a foreign corporation cannot gain the status of a state by contracting with a state, it follows that the remedies available to the corporation are solely those that flow from its contract. A breach would not itself amount to a breach of international law.[254] The contract may, of course, provide that the proper

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e.g., Weil, supra, note 35, 188; and Professor Dupuy in the TOPCO arbitration, supra, note 78, 457. Mr Greenwood interprets Professor Dupuy as deciding merely "that a State may confer upon a private party a measure of capacity vis-à-vis that State." Greenwood, supra, note 80, 49. As noted above, however, no single state possesses authority to grant any international personality.

254. It has been demonstrated supra, Chapter 1, that even resort to specialised institutions such as ICSID does not imply that a contractual relationship between a state and a foreign private party will become fully "internationalised". Even though state parties to the ICSID Convention have agreed to suspend (but not to eliminate) their right of diplomatic protection as far as investment disputes are concerned, municipal rules are not excluded completely. The most notable example is the municipal rules concerning sovereign immunity from execution, which are still permitted to operate even within the ICSID regime. The argument against full international legal status is even stronger in the case of ad hoc arbitration, where no international treaty has modified the traditional rules of state responsibility and diplomatic protection. It is asserted here that even when ad hoc arbitrators are instructed to apply "international law" to a contractual dispute between a state and a foreign private party, that does not imply that the foreign party can itself invoke the international state responsibility of the opposing state. The "international law" to be applied includes, primarily, relevant rules concerning interpretation and, secondly, rules relating to the modalities of contractual performance. The arbitrators need not and cannot evaluate an "international wrong" when one of the parties has no standing to assert such a wrong. For a discussion of these problems in relation to ICSID arbitration, see Benvenuti et Bonfant srl v. People's Republic of the Congo, ICSID award, reprinted in (1983) 8 Y.B. Comm. Arb.

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law is international law or the principles of a particular domestic legal system in common with international law. The corporation then has the right to plead international law for the purposes of obtaining a contractual remedy. If, however, the contractual remedies fail, for whatever reason, even the bad faith of the state-party, the foreign corporation has no capacity to invoke the public international responsibility of that state. The same would be true if the contract contained no reference, express or implied, to public international law. Then the corporation could not even plead public international law in support of its contractual remedies. In either case -- if there is no choice of public international law or if that choice has been made but the remedy fails -- the corporation has no further personality to act or to demand reparations on its own.

The reasons for this limitation are obvious. First, if corporations are not fully subjects of international law, they can have no standing to assert international law rights; indeed they possess no such rights. Secondly, to allow corporations to

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144. In the context of ad hoc arbitration, see, e.g., Amerasinghe, supra, note 219, 897:

> [A] breach of contract by a contracting state is not per se a breach of international law. There must be some other factor, such as the refusal of means to secure redress in a municipal court, to give rise to such a breach of international law.

Indeed, even Professor Dupuy in TOPCO stated explicitly that "unlike a State, the private person has only a limited [international] capacity" and his rights are only those "which he derives from the contract." TOPCO, ibid., 458.

invoke the responsibility of a state party under international law would actually be unjust, because the corporation would be subject to no equivalent burden. Those who advocate the limited international personality of corporations typically limit that personality to the exercise of "rights" without accepting an imposition of correlative "duties". Allowing corporations to invoke the international responsibility of a state party to a state contract is patently unfair because there is no mutuality of obligations.[255] In a sense, the parties would not be governed by the same law. Instead, the corporation must go to its own national government and ask it to press an international claim.[256] Admittedly, the claim then takes on a political nature which the corporation may have wished to avoid,[257] but contemporary international law precludes any other result.

A third argument from principle against any supposed rights of corporations to invoke state responsibility relates to the role of the corporation's own national state. The national state possesses a right of diplomatic protection (unless

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255. See Amerasinghe, ibid., 898 and 905.

256. See, e.g., R. Lillich, International Claims: Postwar British Practice (1967) 1 [hereinafter P.B.P.]. See also Amerasinghe, ibid., 899; Böckstiegel, supra, note 9, 71; and Broches, supra, note 145, 344. For more general discussions of international claims, see R. Lillich, International Claims: Their Adjudication by National Commissions (1962); and R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreement (1975).

257. Lillich, B.P.B., ibid., 132.

suspended under the ICSID regime) and the state may wish to control the prosecution of any "international" claim. It may want to accept a global settlement or to trade off the claim for other negotiated benefits.[258] Moreover, if more than one corporation from a state has been expropriated, the state of nationality may want to adopt its own position regarding the lawfulness of expropriation under international law. That interest will be even greater if there is a question of treaty interpretation involved. To allow corporations to take matters into their own hands and to assert international claims directly could have a disruptive effect upon the policy of their own states.

To phrase the proposition bluntly, corporations simply are not equivalent to states. The United Nations General Assembly has repeatedly emphasised the special status of statehood while underscoring the U.N. Charter goal of the political self- determination of states and peoples.[259] Closely linked to that goal is the declaration of state permanent sovereignty over natural

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258. Of course, if a claim is traded for other benefits, the national state may be responsible under its international constitutional law to indemnify the expropriated party. For a discussion of such issues, see, e.g., Dames and Moore v. Regan, 453 U.S. 654 (1981) (U.S.A.); and Behring International, Inc. v. Imperial Iranian Air Force, 699 F. 2d 657 (3d Cir. 1983) (U.S.A.).

259. United Nations Charter, art. 1(2) and art. 55. See especially the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960).

resources.[260] The New International Economic Order, proclaimed by the General Assembly,[261] stresses the sovereign equality of states and the need for state economic independence. It is widely assumed that states need room to manoeuvre when confronting economic challenges. Only other states have a right to question the decisions made, and then only when their own interests have been damaged directly.

Despite growing challenges from academic commentators who note the increasing factual integration of the world community,[262] the entire tenor of international law still emphasises, for good or ill, the special status due to states under the principle of sovereignty. For example, the much vaunted N.I.E.O., with its almost nineteenth-century state-centrism, is in reality a manifestation of concern for the protection of the fragile state authority of developing nations. Any contextual assessment of the role of the corporation in international law must grapple with this stubborn fact. That is perhaps why, despite the hopes of many -- usually Western -- jurists who have

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260. Supra, note 227.

261. Supra, note 227. And see the Programme of Action on the Establishment of a New International Economic Order, United Nations G.A. Res. 3202, 6 (Special), U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974).

262. See, e.g., McDougal & Reisman, "International Law in Policy-Oriented Perspective" in R. Macdonald & D. Johnston, eds, The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (1983) 103; and Richard Falk's characteristically challenging paper, The Future of International Law (1981) 75 Proc. Am. Soc. Int'l L. 8.

argued that the only adequate protection for corporate investment is to provide for the direct application of international law to state contracts,[263] very little authority can be mustered to support even an attenuated version of the proposition.

c. Applying a "Lex Mercatoria"

Perhaps because of the failure to find effective "stabilisation" through the invocation of general principles or international law,[264] or perhaps because of the enormous theoretical difficulties raised by such attempts, some Western

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263. See, e.g., Böckstiegel, comments in the Colloquium, supra, note 99, 587; and Jennings, supra, note 224, 162, where he argued that:

> there is no reason at all to prevent international law from holding that what is no breach of contract in the proper law is nevertheless deemed to be a breach of contract for purposes of international law.

It must be noted that Jennings appears to have been envisioning a situation where the proper law of a state contract was a system of municipal law alone; he would then suggest that international law might also apply to prevent unilateral contractual modification by the state. It is possible that this result could also be achieved by finding an implied intention to invoke international law rather than holding that international law applies of its own force. But Professor Jennings does not seem to have applied himself to this distinction and his stated approach would lead to great confusion: an act not amounting to breach under the proper law would somehow become a contractual breach under a law which prima facie did not apply. It is submitted that Professor Jenning's suggestion could not be logically consistent unless he were pushed a step further to argue explicitly that international law may apply to state contracts of its own force and independent of any contractual undertaking. It is this logical connection that is resisted vigorously here.

264. See, e.g., Béguin, supra, note 108, 483.

commentators embarked upon a different approach to delocalisation. A number of distinguished jurists have posited the existence of "des règles proprement commerciales, qui forment, d'autre part, une sorte de jus mercatorium, ou de droit international du commerce."[265] Commonly called a lex mercatoria, the term used by Professor Schmitthoff,[266] this body of principles that may be chosen by parties to govern international commercial relations is to be found, it is suggested, in (a) "international" rules of commerce; (b) state law that may apply; and (c) trade usages in each branch of commerce (a "droit spontané").[267] Although the theory has prompted heated debate since at least the 1940s,[268] it has been invoked expressly in some arbitral

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265. Fouchard, L'Arbitrage Commercial International (1965) 401. See also David, supra, note 57, 7; Krishnamurthi, "Some thoughts on a new convention on international arbitration" in J. Schultsz & A. Van den Berg, eds, The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders 12 September 1912-1982 (1982) 211; and Carbonneau, Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions (1985) 23 Col. J. Trans. L. 579.

266. As reported by Goldman, La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives (1979) 106 J. dr. int'l 475, 476.

267. Goldman, ibid., 478-9.

268. See, e.g., Kronstein, Business Arbitration -- Instrument of Private Government (1944) 54 Yale L.J. 36; Béguin, supra, note 108, 479; and Goldman, La bataille judiciaire autour de la lex mercatoria [1983] Rev. de l'arb. 379.

awards.[269] Indeed, proponents of the lex mercatoria place a great reliance on arbitral tribunals as the primary means of articulation for such an international commercial law.[270] They therefore encourage the formulation and publication of reasoned awards.[271]

Some advocates of the application of a lex mercatoria have been even more bold, claiming not only that parties may choose to apply the lex mercatoria, but that when there is no choice,

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269. See, e.g., Pabalk Ticaret Ltd v. Norsolor, S.A., award of 26 October 1979, reprinted in (1984) 9 Y.B. Comm. Arb. 109 (I.C.C. Award 3131) 110, where a distinguished panel including the eminent civilian contracts theorist Professor Ghestin held:

> [T]he Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international lex mercatoria.

The Tribunal found that one of the lex mercatoria's guiding principles was "good faith", hardly a bold or challenging conclusion. The award was rendered in Vienna and a challenge before the Austrian Supreme Court was rejected because in applying "good faith", the Tribunal "applied a principle inherent in the private law systems which in no way is contradictory to strict legal regulations of the country concerned." Norsolor S.A. v. Pabalk Ticaret Ltd, Oberster Gerichtshof, 18 November 1982, reprinted in (1984) 9 Y.B. Comm. Arb. 159 (Austria). One wonders if the court decision would have been the same if the Tribunal had adopted a less cautious attitude in applying the lex mercatoria.

270. See, e.g., Fouchard, supra, note 265, 401; David, supra, note 57, 485; and Kitagawa, "The method of unification of arbitration laws and rules in the light of the increasing importance of technical disputes" in Associazione Italiana Per L'Arbitrato, Commercial Arbitrations: Essays in Memoriam Eugenio Minoli (1974) 257, 259.

271. See, e.g., Carbonneau, supra, note 265, 581; and David, ibid., 455-6.

the mere fact that parties have resorted to international arbitration is enough to indicate an implied choice of that body of rules and principles. Professor Carbonneau has stated that

> [t]he parties' engagement in a transnational commercial venture and invocation of the international arbitral process constitute an implied submission to the law which governs all transnational commercial ventures.[272]

If the point was not apparent before, this type of claim reveals that the entire idea of the lex mercatoria is geared toward the resolution of purely private disputes. Indeed, the lex mercatoria is often described as the law governing the "société internationale des commerçants"[273] or the "community of international merchants".[274] Although it may be true that two private parties to a transnational contract may be presumed to have intended that the usages of their trade and general principles of fairness or equity should govern their relations, no such intention may be imputed to a state,[275] especially when the contract in question is not a simple contract of sale but an

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272. Carbonneau, ibid., 597. See also Goldman, supra, note 266, 480-1. Professor Weil has invoked a similar argument to justify the implied choice of international law as the proper law of an international contract. Weil, supra, note 35, 153-6.

273. Fouchard, supra, note 265, 403.

274. Carbonneau, supra, note 265, 589.

275. It has already been noted that when a contract collapses, the "intentions" of the two parties to a state contract may be entirely distinct. The state may wish to apply its national law whereas the foreign private party will commonly wish to avoid any reference to the state's juridical system.

investment or concession contract that relates to important goals of state policy. Leaving aside, then, the important questions whether one can really point to a coherent body of rules that can be described as a lex mercatoria,[276] or whether such an assertion would present a challenge to the integrity of international law,[277] one can simply say that the so-called lex mercatoria has little application to state contracts because the assumptions upon which it is based do not mesh with the reality of such contracts. States should not be presumed to intend to apply any law but their own. Moreover, the needs and imperatives of states are often entirely different from those of the "community of international merchants." Although invocation of a lex mercatoria probably could serve the function of "stabilisation", it would do so because it cannot be properly sensitive to the whole range of state activity and state interests. The stability and expansion of international commerce are not the only relevant goals of any state's policy, yet they are necessarily the only goals of the lex mercatoria. That simple fact renders any resort to the lex mercatoria simply inappropriate, not to say nonsensical, in most arbitrations

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276. For criticism going to the very foundations of the lex mercatoria, see Weil, supra, note 35, 184; Mann, supra, note 33, 264; and Luzzatto, supra, note 30, 24. See also the discussion of the Tribunal in ICC Case No. 4237, Award of 27 February 1984, reprinted in (1984) 10 Y.B. Comm. Arb. 52, 55 where it stressed that the contents of the supposed lex mercatoria "are not easy to determine."

277. See generally Béguin, supra, note 108.

involving states and foreign private parties.[278]

It is possible now to draw together a number of conclusions from this study of the immensely complicated problem of the delocalisation of substantive law. Using a comparative law methodology to determine appropriate choice of law rules will result in a first principle of party autonomy. The parties to a state contract are free to choose any proper law, including a proper law that is in some manner delocalised. Failing such a choice, no delocalisation of the substantive law should be presumed. This admonition does not in fact cause great hardship to foreign private parties because recent arbitral practice reveals that neither the invocation of "general principles" nor of international law per se can effectively accomplish the primary goal of proponents of delocalised substantive law, that is to "stabilise" the contractual relationship to prevent unilateral modification or termination of the contract by the state.

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278. The situation would, of course, be different if the arbitration involved a state trading agency and a foreign party and concerned simply the breach of a sales contract. A stronger argument may then be made out to support the application of trade usages and general principles. Even here, however, if the abrogation of the contract was due to a shift in state policy based upon rational public policy evaluations, it is difficult to see how the lex mercatoria could react with any sophistication. An approach more in tune with international reality (and theory) would be for the arbitral tribunal to apply (in the absence of party choice) the law of the state party. If that law caused a prejudice to the foreign party, he could seek the aid of his national state in espousing his claim.

If effective stabilisation is not possible, the presumptive application of "international law" or "general principles" should be discouraged because it causes major theoretical difficulties without providing commensurate benefits. Great confusion has already resulted; extravagant claims have been made by foreign corporations who assert that they possess international personality and that breaches of contracts are equivalent to breaches of treaties. The fact nevertheless remains that if contractual stabilisation techniques fail and the state acts unilaterally to the detriment of the foreign private party, refusing furthermore to comply with an arbitral award rendered against it, the foreign corporation may be thrown back upon the protection of its own national government if enforcement under the New York Convention is not possible.[279] That government must press any claim, for the claim will have ceased to be grounded upon the contractual relationship, although it arose out of that relationship; it may instead have been transmuted into an international wrong, calling into play the international responsibility of the state, a responsibility owed, under the existing system of international law, only to other states and not to transnational corporations. Although

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279. It must also be noted that many states have not ratified the New York Convention; its enhanced enforcement regime will not always be applicable. Moreover, the public policy exception to enforcement may be used to prevent the enforcement of an arbitral award, so that the state espousal of a claim will still be required. These issues will be discussed in detail infra, Chapter III, especially in the text accompanying text notes 105 to 131.

this result may appear to be insensitive to the fears of international business people, any other result does extreme violence to the structure of international law, by confounding private rights and public interest, by conflating contract and treaty and by confusing the status of various participants in the international legal system. Moreover, and perhaps most importantly, recognising the implied delocalisation of all state contracts and the international personality of multinational corporations would deprive developing nations of their only effective means of control over economically powerful foreign investors. It could potentially deprive such nations of their justly valued sovereignty over indigenous resources.

CHAPTER III: RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

To anyone acquainted with the law of international arbitration, the reference to "international" awards in the title of this Chapter may seem surprising. Since at least 1958 and the conclusion of the New York Convention,[1] and probably dating back to before the 1927 Geneva Convention,[2] commentators have tended to look at questions of recognition and enforcement in relation to what commonly is called a "foreign" award. It will be argued that this terminology, although officially adopted in the relevant multilateral conventions, is misleading if applied to mixed arbitrations. Awards involving a state and a foreign private party are now enforceable even when they are not "foreign" in the traditional sense. In addition, it will be suggested that the emphasis upon recognition and enforcement by national courts of "foreign" awards has limited unduly the scope of study in this area. In most writings, of both academic commentators and practitioners, the field of vision is limited to the relationship between the arbitral award and its "enforcement" by national courts. But enforcement should be considered in a broader context: it can signify also the specific orders

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1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958; entered into force 7 June 1959) 330 UNTS 38, reprinted in (1968) 7 I.L.M. 1046.

2. Convention on the Execution of Foreign Arbitral Awards (signed 26 September 1927; entered into force 25 July 1929) 92 LNTS 301, reprinted in M. Hudson, ed., International Legislation (1931), Vol. III, No. 183, at 2153.

made by an arbitral tribunal and the myriad means by which a tribunal may seek to bring its judgment into operation. In other words, "enforcement" presupposes some understanding of remedies.

Of course, one should not downplay the question of enforcement within specific national jurisdictions. Such enforcement is a crucial practical issue which concerns all successful parties to an arbitration. The point is simply that one should broaden the scope of inquiry into problems of enforcement by envisioning it as a two-stage process. One must ask initially what it is that is sought to be enforced. Only then does the issue of enforcement by national courts arise, and in that context, one may also wish to investigate independent, non-municipal, enforcement mechanisms. If, as was argued in the previous Chapter, state-foreign private party arbitrations can now be "delocalised", that is, divorced for most purposes from any national rules of procedure,[3] the attempt to treat international awards as "foreign" awards is misconceived. It causes one to look at but a single aspect of enforcement by assuming that the only relevant inquiry relates to the intervention of national courts. The arbitral award itself is treated as a fait accompli, the possibility for careful analysis of arbitral reme-

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3. It was suggested that the principle of autonomy of the will permits the delocalisation of arbitral procedure. Substantive law may be a more difficult problem, in part because of the lack of any relevant international law or general principles which adequately could regulate complex contractual relationships.

dies is ignored, and rigorous study is undertaken only in relation to a potential second stage of the enforcement process -- the mechanics of state-sanctioned enforcement.

This Chapter will begin with an investigation of the problems traditionally emphasised in connection with enforcement, and it will be demonstrated that under existing law, procedurally "delocalised" awards are fully enforceable within national jurisdictions. Special problems confronting national courts in dealing with awards resulting from "mixed" (state versus private party) arbitrations will be canvassed. Then the focus will shift to the prior, and less explored, aspect of enforcement: arbitral remedies. A discussion of the potential for independent, non-municipal enforcement mechanisms will be postponed until the next Chapter when the issues involved in the use of such mechanisms will be highlighted by the experience of the Iran-U.S. Claims Tribunal.

A. The Policy Favouring Recognition and Enforcement of "Foreign" Arbitral Awards

In the twentieth-century, a growing recognition of the exigencies of international commerce has prompted various attempts to support the efficacy of arbitral awards. Primarily, this desire has been manifested in the elaboration of multilateral conventions enhancing the possibility for enforcement of arbitral awards rendered outside the borders of the state where recognition and enforcement are sought. Such conventions were necessary because, under traditional principles of international

customary law, no state was under an obligation to recognise or enforce foreign arbitral decisions.[4]

It should be noted at the outset that, despite the continuing use of both words, recent doctrine has emphasised that there is rarely any practical distinction to be made between the concepts of "recognition" and "enforcement". In 1939, the Permanent Court of International Justice did posit such a distinction, holding that "[r]ecognition of an award as res judicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory."[5] Luzzatto, in his important Hague lectures, referred to this "traditional distinction whereunder recognition signifies solely that an award is binding", whereas enforcement implies "the capability of the award and that enforcement proceedings are initiated upon it."[6] However, Luzzatto went on to point out that the distinction "is devoid of practical significance in the usual practice of international commercial arbitration,"[7] and

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4. Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1972) 136 Rec. des cours 331, 401.

5. Société Commerciale de Belgique, P.C.I.J. Ser. A/B, No. 78 (1939) 176.

6. Luzzatto, International Commercial Arbitration and the Municipal Law of States (1977) 157 Rec. des cours 9, 68.

7. Ibid. The notion of recognition as a concept independent from enforcement may have some meaning in the context of purely "declaratory" awards, but such awards are very rare in cases involving commercial disputes. See infra, note 225.

one could add, in the contemporary practice of national courts. Van den Berg suggests that the retention of the words "recognition and enforcement" in contemporary international conventions is nothing more than the repetition of a traditional clause de style.[8] It may be, however, that the distinction between recognition and enforcement does retain some vestigal meaning with reference to arbitral awards rendered against a state. Due to the possibility of a successful plea of sovereign immunity which will block execution, it may be that an award rendered against a state will be "recognised" by a state court but that "enforcement" will not be possible.[9] It will be argued below that such an interpretation would not accord with the intention of the parties in submitting their dispute to impartial arbitral adjudication and should therefore be rejected.[10] The distinction between recognition and enforcement would then have no currency even in arbitrations involving states. It should be

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8. A. Van den Berg, The New York Convention of 1958 (1981) 244.

9. Von Mehren & Croff, "International Arbitration Between Private Parties and Governments: Treaty and Statutory Developments", in G. Aksen & R. Von Mehren, International Arbitration Between Private Parties and Governments (1982) 94-5 (Handbook 399 of the U.S. Practicing Law Institute). The authors point out, at 102, that the ICSID Convention also emphasises the distinction between recognition and enforcement, in large part because the Convention retains the traditional deference to state rules concerning sovereign immunity vis-à-vis execution against state owned property.

10. See infra, text accompanying notes 132 to 169.

reiterated, however, that this very distinction was retained by the drafters of the ICSID Convention and is that regime's greatest weakness.[11]

Having stated that customary law recognises no duty to enforce foreign arbitral awards, it is fair to ask why it was believed necessary to construct the elaborate framework of multilateral arbitration conventions that now exists. In other words, why is recognition and enforcement by national legal systems thought to be so important? The answer has little to do with any theory of international law and much to do with the entirely practical desire to ensure that an arbitral award will be effective. The framework within which this discussion operates, one must remember, is that of arbitral awards resulting from mixed arbitrations involving a state and a foreign private party. Awards in such cases often involve very large sums of money and, if an award is rendered against a state, it may often be necessary to enforce the award outside the jurisdiction of the state party, for the state may try to prevent enforcement within its own jurisdiction by legislative fiat.

In the absence of any independent, non-municipal, enforcement mechanism, it may become necessary to enforce an award in the territory of other states where the arbitral tribunal will have no power to enforce performance. As Park and Paulsson have put it, "[a] legal system must therefore legiti-

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11. See supra, Chapter I.

mize the arbitrator's authority if the award is to be more than an unenforceable attempt at conciliation."[12] Although this phrasing is infelicitous for it calls into question the "authority" of the arbitrator, an authority which is derived from the will of the parties and not, as implied, from the operation of national law, the basic point remains incontrovertible. It is often necessary to employ the enforcement mechanisms of a national legal system in order to make an award effective. To adopt the language of the English Court of Appeal: "[A]ny award against a person who is unwilling to obey it can be enforced only by the machinery of some system of law."[13] To be more precise, an award can often be enforced only through the machinery of a national legal system unless a specific agreement of the parties has created an independent method of enforcement.[14] This hard fact should come as no surprise to any student of contemporary international or trans-

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12. Park & Paulsson, The Binding Force of International Arbitral Awards (1983) 23 Va J. Int'l L. 253, 253.

13. Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's L. Rep. 227 (C.A.) per Megaw L.J. (U.K.).

14. See also the comments of de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts (1982) 57 Tulane L. Rev. 42, 47; and Van den Berg, supra, note 8, 5. Carbonneau adds one important caveat, however, noting that because "international" arbitration is "essentially autonomous", it is a process that "needs judicial support only when coercive public jurisdictional authority is absolutely essential". Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce (1984) 19 Texas Int'l L.J. 33, 99.

national institutions.

In his seminal study, Professor Falk emphasised the weakness of the central institutions of the international community, especially the judiciary, and he suggested that domestic courts may be required at times to help "to overcome this structural weakness in the international legal system."[15] On the other hand, many lawyers, especially of the common law variety, tend to see a legal system too easily as the mere equation "law equals courts". It would be wise to remember that a system of law may operate without any heavy emphasis upon court structures. For example, de Vries stresses the fact that in private trade association arbitrations, "reliance on the courts to enforce ... is rare. The traditional sanction in self-contained groups for refusal to honor an award is a disciplinary proceeding or even expulsion rather than court action."[16] Similarly, it has been reported that in over ninety per cent of I.C.C. awards, compliance has been voluntary.[17] It is unlikely that such a favourable statistic could be gleaned from the experience of arbitral awards rendered against states. The point remains valid that in contemplating the problems of

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15. R. Falk, The Role of Domestic Courts in the International Legal Order (1964) xi. See also Lillich, The Proper Role of Domestic Courts in the International Legal Order (1970) 11 Va J. Int'l L. 9, 12.

16. de Vries, supra, note 14, 44.

17. Paulsson, Le tiers monde dans l'arbitrage commercial international [1983] Rev. de l'arb. 1, 20.

enforcement, although the role of national courts remains dominant, it should not be treated as exclusive.

It is often observed, in connection with private transnational commercial arbitration, that enforcement is not as enormous a problem as in the case of foreign court judgments because the parties, usually two business entities, "may perhaps be more inclined to obey the award of a tribunal of their own choice than they are to obey the decision of a court."[18] Parties may also fear that they will be injured in their trade reputation if they do not comply with an arbitral award. Both of these considerations apply equally to states that have engaged in commercial arbitration, but the considerations of free choice and the desire to protect reputation do not overcome the fact that for many reasons -- often political or economic rather than strictly legal -- states sometimes do refuse to comply voluntarily with arbitral awards and it does become necessary to institute domestic enforcement proceedings. The enormously expensive multi-state litigation required in the attempt to enforce the award in Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits)[19] is a good example of the difficulties that may arise if a state refuses to

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18. J. Morris, gen. ed., Dicey and Morris on the Conflict of Laws, 10th ed., (1980), vol. 2, 1126.

19. Decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 1.

comply with the terms of an award.[20] Expensive and complicated it may be, but there can be no doubt that at present "[s]tate coercion ... plays an irreplaceable role" in the enforcement of arbitral awards.[21]

State action, then, is often essential, and in order to impose some uniformity in approach, it was thought necessary to negotiate international conventions on the recognition and enforcement of "foreign" arbitral awards. The impact of these conventions will be discussed presently. First, it is important to point out that on questions of enforcement, the conventions concluded do not cover the field entirely. Individual states may still enact rules or negotiate bilateral treaties governing enforcement that are more comprehensive than the regimes established in multilateral treaties to which such states are parties.[22] For example, in the United Kingdom, an arbitral

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20. Enforcement proceedings were instituted in France, Sweden, Switzerland, and the United States. The diversity of the approaches taken by national courts reveals that despite attempts at international codification, enforcement remains a difficult and sometimes unpredictable undertaking. If international arbitration is ever to fulfill its promise as a true alternative to national court adjudication, courts in enforcement jurisdictions will have to approach their role with deference to the decisions of freely chosen arbitral tribunals.

21. Luzzatto, supra, note 6, 66.

22. Article VII (1) of the New York Convention, supra, note 1, provides that parties to international arbitrations have the right to avail themselves of national rules of recognition and enforcement more generous than those set down in the Convention. See also Paulsson, Arbitration Unbound: Award Detached from the Law of its Country of Origin (1981) 30 Int'l & Comp. L.Q. 358, 373; and Van den Berg, supra, note 8, 81-8.

award whose enforcement is not governed by any international convention to which the U.K. is a party may nevertheless be enforceable at common law.[23] In Belgium, the Cour de cassation has held that parties are not deprived of the more favourable enforcement rights set out in bilateral treaties simply because Belgium is also a party to multilateral enforcement conventions.[24] On the other hand, a particular national jurisdiction may interpret its obligations under a relevant convention in such a way as to make enforcement more difficult. As always, the wording of a convention is not the end, but rather the beginning, of the necessary inquiry. Quigley points out that

> the fate of any given international arbitral agreement or award is uncertain. The crucial factor in any controversy will be that of jurisdiction. The court of the country first obtaining jurisdiction will apply its own national policy, within the limitations of its international obligations, to an international arbitral agreement or award brought before it.[25]

In short, any evaluation of the possibilities for enforcement of an international arbitral award must take into account the peculiarities of domestic legal systems and of national court

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23. Morris, supra, note 18, 1124-6.

24. Audi-NSU Auto Union A.G. v. S.A. Adelin Petic & Cie (28 June 1979; Cour de cassation), reprinted in (1980) 5 Y.B. Comm. Arb. 257 (Belgium).

25. Quigley, Accession By the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1961) 70 Yale L.J. 1049, 1055.

interpretations of the governing multilateral conventions.[26]

Are there any general interpretive principles that may be of aid before a detailed examination of the governing conventions is undertaken? A very helpful theoretical framework has been elaborated by Professor Von Mehren in the context of the recognition and enforcement of foreign judgments; it provides useful ordering principles that have equal application to issues involving the enforcement of international arbitral awards.[27] Professor Von Mehren has described the decision whether or not to enforce a foreign judgment as resting, ultimately, upon a balancing of the principles of "correctness and repose":[28]

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26. It is for this reason that Dr Mann has argued so forcefully that it is not possible to separate the law governing an arbitration from the procedural law of a national legal system. See Mann, speaking in the Colloquium, Contrats entre états et personnes privées étrangères (1975) 11 Rev. belge de dr. int'l 562, 589. For the reasons elaborated in the previous Chapter, it is asserted that Dr Mann is wrong to hinge his entire analysis of the procedural law governing international arbitrations on the question of enforcement, but he is no doubt correct in pointing to enforcement as an issue which must be dealt with fully and honestly in any theoretical approach to governing law. But as will be argued infra, text accompanying notes 35 to 199, there is nothing in the solutions which are available to the problems of enforcement which necessarily denies the possibility of "delocalisation" of procedure in arbitrations involving states and foreign private parties.

27. Clearly, for certain purposes, most notably the application of national public policy, there have been significant distinctions between the enforcement of judgments and the enforcement of arbitral awards. However, in attempting to draw out some principles of general relevance, the Von Mehren scheme discussed in the text has application to both fields.

28. Von Mehren, Recognition and Enforcement of Foreign Judgments -- General Theory and the Role of Jurisdictional Requirements (1980) 167 Rec. des cours 9, 22.

> The principle of correctness expresses the concern that legal justice as understood by the society in both substantive and procedural terms, be done; the principle of repose accepts the inherent imperfection of human knowledge and institutions and the need to put to rest quarrels and disputes that have arisen so that the energies of individuals and the resources of society can be devoted to more constructive tasks.[29]

These two principles fit within a larger philosophical problem -- the balancing between ideal justice, and certainty or finality.[30] In the legislative elaboration of national laws governing enforcement of international arbitral awards and in the judicial interpretation of treaty obligations concerning enforcement, these two principles will come into play. With these principles in mind, it may be easier to comprehend the specific choices made by judges and draftsmen.

No doubt, the contemporary trend in the enforcement of international arbitral awards is to place increasingly greater weight upon the principle of repose. Since the adoption of the New York Convention of 1958, the tendency is for "foreign" awards to be enforced without significant re-examination or alteration.[31] "[T]he courts are inclined to grant recognition

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29. Ibid.

30. This "philosophical problem" has practical implications for courts in the day-to-day enterprise of adjudication. See Pioneer Shipping Ltd v. B.T.P. Tioxide Ltd (The Nema) [1982] A.C. 724 (H.L.) (U.K.).

31. See, e.g., the Letter of Submittal from Nicholas DeB. Katzenbach of the United States Department of State to President Johnson recommending accession to the New York (cont'd.)

and enforcement whenever possible. In general, the courts favor international commercial arbitration and it is seldom that recognition and enforcement under the New York Convention is refused."[32]

Convention, reprinted in (1968) 7 I.L.M. 1043; Böckstiegel, Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce (1965) 59 Am. J. Int'l L. 579, 585; Carbonneau, book review, (1984) 24 Va J. Int'l L. 527, 528; Quigley, supra, note 25, 1049; and Paulsson, The Role of Swedish Courts in Transnational Commercial Arbitration (1981) 21 Va J. Int'l L. 211 who, at 230, emphasises that for Swedish courts, "the desire to maintain the integrity of the institution of arbitration predominates and, as a result, every effort is made to give effect to an award". Von Mehren, supra, note 28, 35 suggests that the same emphasis upon "repose" is developing in cases concerning the recognition of foreign judgments. He sees this development as resulting from the wish to protect successful litigants from harassment, though, at 36, he posits a wider "international" justification for giving relatively greater weight to the principle of repose than to the principle of correctness:

> If an international order lacking a supranational administration of justice is to be reasonably efficient and just, plaintiffs must be able to select a forum for litigation without according, in the general run of cases, decisive weight to whether the resulting judgment can, as a practical matter, be enforced locally.

A similar "international" justification for repose can be offered regarding the enforcement of a non-domestic arbitral award: because there is no supranational enforcement mechanism, state courts should do all that is possible to enforce an arbitral award which results from an arbitration undertaken as a result of the free agreement of the parties to a contract. Consensual submission to third party adjudication at the international level (here involving one state and foreign private party) should not be discouraged.

32. Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1979) 13 Int'l Law. 269, 270. Pavlis has pointed out what is probably the basic justification for simplified judicial enforcement of arbitral awards: "Vigorous judicial respect

(cont'd.)

Yet, the New York Convention has not erased all doubts. First, although quite widely ratified, the Convention is by no means universal in application.[33] Secondly, there are important exceptions to the general principle of facilitated enforcement. These exceptions are to be found in art. V of the Convention. Lastly, when examining "commercial" arbitral awards rendered against states, to which the New York Convention clearly does apply,[34] the special issues of sovereign immunity and Act of

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for arbitral awards fulfills the expectations of the contracting parties who choose arbitration, thereby encouraging its use in future international commercial agreements". Pavlis, International Arbitration and the Inapplicability of the Act of State Doctrine (1981) 4 N.Y.U. J. Int'l L. & Pol. 65, 111. In the more politically-charged environment of arbitrations between states and foreign private parties, one might question whether states, in particular, really do want to see awards enforced. It may be that the agreement to arbitrate is a politically sensitive compromise designed solely to avoid the submission of contractual disputes to foreign courts. Nevertheless, it is crucial to uphold the presumed intention of the parties to have their agreement and the resulting award enforced even if that intention is, to some extent, a fiction. Otherwise, no foreign private party would ever agree to arbitration and both contracting parties would be deprived of the option of a flexible dispute resolution mechanism (one which may represent the only politically acceptable jurisdictional arrangement).

33. At present, the Convention is ratified by sixty-seven states, including most industrialised Western nations. See the List of Contracting States to the New York Convention of 1958 in (1984) 9 Y.B. Comm. Arb. 327; and infra, note 62.

34. Van den Berg, supra, note 8, 279. It should be noted, however, that between the CMEA states of Eastern Europe, the Moscow Convention of 26 May 1972 replaces the New York Convention in governing the recognition and enforcement of commercial awards. See Van den Berg at 100-1.

State will arise. It is therefore important to examine the law as established in the New York Convention in greater detail.

B. The Regime of the New York Convention and Some Comparisons With Institutional Regimes of Enforcement

The impact of the New York Convention cannot be doubted. Luzzatto has called it "the true world charter of international commercial arbitration".[35] Troobhoff and Goldstein have pointed out that it

> represents the culmination of efforts by such organizations as the International Chamber of Commerce to secure a multilateral treaty providing businessmen with an effective and trustworthy method of insuring that the manner in which they have chosen to resolve their transnational disputes will be effective.[36]

To understand the seminal importance of the treaty, it is first necessary to glance briefly at the legal position before its conclusion.

Because there was no obligation under international customary law to enforce arbitral awards, and because of the increasing demands of international commerce in the early twentieth-century, the Geneva Convention on the Execution of

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35. Luzzatto, supra, note 6, 19. Harnik has called the Convention "one of the more spectacular success stories in the slowly moving area of creating judicial order and uniformity in the field of private international law". Harnik, Recognition and Enforcement of Foreign Arbitral Awards (1983) 31 Am. J. Comp. L. 703, 703.

36. Troobhoff & Goldstein, Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in U.S. Courts (1977) 17 Va J. Int'l L. 468, 468.

Foreign Arbitral Awards[37] was concluded in 1927. The signatories were, for the most part, European states[38] and subsequent ratifications and accessions were limited largely to the continental states of Europe.

The Convention established, in art. I, that contracting parties should undertake to recognise as binding and therefore enforce "in accordance with the rules of the procedure of the territory where the award is relied upon" any arbitral award covered by the Protocol on Arbitration Clauses of 1923.[39] However, to obtain such recognition it was necessary for the party relying upon the award to prove that the submission to arbitration had been valid under applicable law; that the subject

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37. Supra, note 2.

38. Germany, Austria, Belgium, Great Britain, Denmark, the Free City of Danzig, Spain, Estonia, France, Italy, Luxembourg, the Netherlands, Roumania, Sweden, and Czechoslovakia. The Treaty was also signed by Nicaragua and New Zealand.

39. 27 LNTS 157, reprinted in M. Hudson, ed., International Legislation (1931), vol. II, No. 98, at 1062. In brief, the parties to this Protocol express their willingness to recognise the validity of an agreement to arbitrate between parties under the jurisdiction of different contracting states in relation to contractual disputes or to other matters capable of arbitration (art. 1). They may limit this recognition to arbitration agreements involving commercial contracts. In art. 3, the parties agree "to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory ...." The 1927 Convention was necessary to broaden the scope of enforcement into states where the award was not "made". For a survey of the history of the 1923 Geneva Protocol and a comparison with the provisions of the 1958 New York Convention, see R. David, L'arbitrage dans le commerce international (1982) 199-205.

matter was capable of settlement by arbitration "under the law of the country in which the award is sought to be relied upon"; that the arbitral tribunal had been duly formed; that the award was "final" in the country where it was made; and that enforcement would not be contrary to the public policy of the forum or enforcing state. Under art. IV, it was the duty of the party seeking to enforce the award to adduce all relevant documentary evidence.

Even if all the conditions of art. I had been fulfilled and were proved, art. II of the Geneva Convention authorized courts to refuse enforcement if the award had been annulled where made; if there was no due notice of the arbitration proceedings communicated to the party against whom the award was rendered; or if the award dealt with matters beyond the jurisdiction of the arbitral tribunal. Under art. III, the party challenging the award could also raise any other defence to enforcement based upon improper procedure, but that party would bear the burden of proof concerning such issues.

It should be clear that although the 1927 Geneva Convention was a significant advance upon earlier state practice, it still made enforcement of a foreign arbitral award very difficult for the party seeking to rely upon such an award. To adopt Professor Von Mehren's terminology, the Geneva Convention continued to emphasise the value of "correctness" rather than "repose". No significant advances were made for over thirty years, until the conclusion of the New York Convention.

The single most important change codified in the Convention of 1958[40] was the reversal of the burden of proof. Article V sets out the grounds upon which refusal to enforce may be based and makes it clear that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof" that one of the grounds for refusal is applicable.[41] As Van den Berg notes,

> the party seeking enforcement need only adduce prima facie evidence of the existence of a valid award to which the Convention applies. The challenging party is then required to prove why enforcement should not be granted according to the grounds listed in Art. V.[42]

Luzzatto notes that the Convention has thus granted "a very remarkable procedural advantage [to] the party seeking enforcement."[43] In many instances, the shifting of the burden of proof will increase substantially the likelihood of enforcement.

It has been suggested that the New York Convention marked another significant advance by reducing the number of grounds

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40. Supra, note 1.

41. Broches, supra, note 4, 402 says that "[t]he great improvement brought about by the 1958 New York Convention was to reverse the burden of proof. The moving party merely need furnish a copy of the arbitration agreement and award." See also Luzzatto, supra, note 6, 81; and Quigley, supra, note 25, 1066.

42. Van den Berg, supra, note 8, 247.

43. Luzzatto, supra, note 6.

upon which refusal to recognise and enforce could be based,[44] but a careful comparison of the Geneva and New York conventions must call into question that suggestion. Indeed, although listed in distinctive orders and phrased somewhat differently, the grounds for refusal to enforce are almost identical in both conventions. Because the burden of proof is shifted, the New York Convention grounds for refusal are phrased positively, so the party against whom an award is invoked must prove its grounds for demanding refusal to enforce.[45] But there is no significant reduction in the number of those grounds. Under art. V(1), recognition and enforcement may be refused if it is proved (a) that the parties to the arbitration were not competent or that their agreement to arbitrate was not valid; (b) that no proper notice of the appointment of arbitrators or of the arbitral proceedings was communicated to the party against whom the award is invoked; (c) that the award rendered was beyond the jurisdiction of the arbitrators; (d) that the composition of the tribunal was not in accordance with the

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44. See, e.g., Broches, supra, note 4, 402.

45. Perhaps it was this positively-phrased restatement of the grounds for refusal of enforcement that caused Delaume to write that "[o]ne of the greatest accomplishments of the New York Convention of 1958 is a simplification of the conditions for the recognition and enforcement of foreign arbitral awards." Delaume, "Transnational Commercial Arbitration" in C. Schmitthoff, International Commercial Arbitration (1982), vol. III, 115. Considering the almost identical list of conditions in the 1927 Geneva Convention and the 1958 New York Convention, no other general simplification is apparent.

agreement or with the law of the country where the arbitration took place or that the procedure was improper; or (e) that the award is not yet binding or has been set aside in the country where rendered. In addition, under art. V(2), recognition and enforcement may be refused if the subject matter was not capable of arbitration under the law of the country where enforcement is sought or if enforcement of the award would be contrary to the public policy of the enforcement jurisdiction. In total, then, there are ten grounds for refusing to enforce contained in the New York Convention.[46] In the Geneva Convention, there were nine, although certain of them were admittedly more open-ended and more liable to justify non-enforcement.[47]

The only sense in which it can be said that the New York Convention reduces the grounds for refusal is that there is no provision comparable to art. 3 of the Geneva Convention which allowed a party challenging enforcement to raise additional, unenumerated, grounds upon the condition that it prove any such ground.[48] The grounds for refusal to enforce listed in art. V

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46. Most of these grounds are invoked rarely and, in any case, they provoke very little theoretical controversy. The most problematic grounds for the refusal of recognition and enforcement will be discussed infra, text accompanying notes 105 to 199.

47. In Government of the State of Kuwait v. Sir Frederick Snow and Partners [1983] 1 Lloyd's L. Rep. 596 (C.A.), Kerr L.J. noted, at 600, that one could argue that the grounds for refusal of enforcement under the New York Convention might actually be wider than those provided for under the Geneva Convention.

48. Van den Berg, supra, note 8, 265.

are exhaustive. It should be emphasised that the grounds do not include any provision justifying non-enforcement based upon an arbitrator's mistake of fact or law. Apart from eliminating the broadly-phrased anti-enforcement provision of art. 3 of the Geneva Convention, the New York Convention represented little real progress in attempting to limit the grounds upon which national courts might base their refusal to enforce a foreign arbitral award.

At this stage of the discussion it is important to refer to two other multilateral conventions which are relevant to the recognition and enforcement of international arbitral awards, even though their importance is circumscribed by their limited application. The 1961 European Convention on International Commercial Arbitration[49] was conceived and drafted in part as a response to the perceived inadequacies of the New York Convention, although the primary aim of its drafters was to facilitate trade between Eastern and Western Europe.[50] The European Convention is open for signature or accession by member states of the Economic Commission for Europe and by countries

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49. (Signed 21 April 1961) 484 UNTS 349 [hereinafter the European Convention].

50. See, e.g., Benteler v. Belgian State (18 November 1983), reprinted in (1984) 1 J. Int'l Arb. 184 [an ad hoc arbitral Tribunal which included Professor K.-H. Böckstiegel]; and Van den Berg, supra, note 8, 92-3. Mr Van den Berg reveals, at 93, that the aims of the Convention's drafters have been largely frustrated in this respect because "the Convention has virtually never been applied in East-West relations."

admitted to the Commission in a "consultative capacity."[51]

The European Convention limits the grounds for refusal of enforcement by national courts set out in the New York Convention, for although the European Convention links itself to the enforcement regime of the New York Convention, it restricts the application of art. V(1)(e) of the 1958 Convention.[52] That provision justifies a refusal to enforce whenever an award is set aside, for whatever reason, in the country where the award was made.[53] In the European Convention, refusal to enforce based upon the quashing of an award by a court in the country where rendered is allowed only when the award has been set aside for reasons enumerated in art. IX(1). The Convention is explicit:

> IX(2) In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

There are six grounds for refusal to enforce set out in art. X(1): (a) incapacity of the parties or a party to the arbitration agreement; (b) invalidity of the arbitration agreement under the chosen law, or failing a choice, under the law of the

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51. European Convention, Article X(1).

52. See, e.g., Carbonneau, supra, note 14, 91.

53. Sanders views this ground for refusal with disapproval. Sanders, Trends in the Field of International Commercial Arbitration (1975) 145 Rec. des cours 205, 282-3.

country where the award was made; (c) improper notice of proceedings to the party requesting the setting aside of the award; (d) impermissible extension of the award beyond the terms of the agreement to submit to arbitration (except where any such aspect of the award may be severed in which case the remainder of the award may stand); (e) improper constitution of the arbitral tribunal; and (f) inadequacy of the arbitral procedure due to non-conformity with the agreement to arbitrate or the terms of the Convention.

Altogether, the approach taken by the drafters of the European Convention on International Commercial Arbitration is more supportive of arbitral awards than is the regime of the New York Convention. There are, however, serious drawbacks in the wording of the Geneva Convention for it is often so vague as to call its practical import into doubt.[54] Van den Berg has put the matter succinctly, describing the wording of the Convention as simply "too complicated."[55] Moreover, the 1961 Convention is of restricted relevance due to its geographic limitations. In particular, the European Convention will have no application to the majority of arbitral awards between states and foreign private parties because the majority of such awards result from agreements between Western corporations and less developed countries that will not be parties to the Convention.

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54. See, e.g., Luzzatto, supra, note 6, 48.

55. Van den Berg, supra, note 8, 93.

A more recent agreement of potentially greater relevance to the immediate discussion is the World Bank-sponsored Convention on the Settlement of Investment Disputes between States and Nationals of Other States[56] which was examined in Chapter One and so can be treated briefly here. State parties to the ICSID Convention have agreed to waive certain prerogatives of national court jurisdiction. Under art. 54(1), "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." In short, under the ICSID Convention the traditional problems of recognition and enforcement, still current under the regime of the New York Convention, simply should not arise:

> [T]he award is valid and enforceable in the jurisdiction of all Contracting States as a final judgment of their own courts. Noncompliance would be in violation of treaty obligations under the Convention which implies direct recourse to international law remedies.[57]

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56. (Signed 18 March 1965; entered into force 14 October 1966) 575 UNTS 160 [hereinafter the ICSID Convention].

57. Vuylsteke, Foreign Investment Protection and ICSID Arbitration (1974) 4 Ga J. Int'l & Comp. L. 343, 360. Presumably the "international law remedies" to which Vuylsteke refers are remedies available to other state parties to the ICSID Convention. It is a difficult question whether the foreign corporation which is party to an arbitration can purport to demand, on its own behalf, international law remedies for breach of state responsibility. The conclusion reached in the previous Chapter is that they cannot do so. On the other hand, it really is the corporation that suffers damage if the state party to an arbitration refuses to comply with an award. Article 27 of the ICSID Convention (cont'd.)

To gain recognition and enforcement of an ICSID award, all that is required is the presentation to the enforcing court of a copy of the award certified as authentic by the ICSID Secretary-General.[58]

To benefit from this "self-contained system",[59] a system which establishes clearly the "binding" nature of an award without reference to legal sources outside the ICSID Convention itself,[60] it is necessary that a contracting state conclude a written agreement with a national of another contracting state submitting a dispute to the International Centre for Settlement of Investment Disputes [ICSID].[61] There are, then, two limiting preconditions for application of the ICSID Convention regime.

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seems to contemplate diplomatic protection and espousal of claims in cases where the state party to an arbitration "shall have failed to abide by and comply with the award rendered" in a dispute. By implication, the private party is not deemed itself to have access to international remedies.

On the recognition and enforcement regime of the ICSID Convention generally, see Broches, supra, note 4, 349; and Schmidt, Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. V. Government of Jamaica (1976) 17 Harv. Int'l L.J. 90, 105.

58. ICSID Convention, supra, note 56, art. 54(2). See also Broches, ibid., 400.

59. Luzzatto, supra, note 6, 98.

60. See Delaume, Foreign Sovereign Immunity: Impact on Arbitration (1983) 38 Arb. J. 34 (No. 2) 36 [hereinafter Foreign Sovereign Immunity].

61. ICSID Convention, supra, note 56, art. 25.

First, the state party to any contractual arrangement must have ratified the Convention; so too the national state of the private party. Secondly, the parties to the contractual arrangement must expressly have chosen to submit to the jurisdiction of ICSID and have manifested that intention in writing; this submission cannot be withdrawn unilaterally.

In fact, as was discussed in Chapter One, the application of the ICSID Convention has been limited severely by the second of these two preconditions. Despite the fact that, as of 1986, eighty-eight states had ratified the ICSID Convention,[62] by 1984 only sixteen cases had been submitted by agreement in writing to the arbitral jurisdiction of ICSID.[63] In its entire history, only four arbitral awards have been rendered under ICSID auspices.[64] Clearly, despite wide ratification of the

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62. See [1986] Rev. de l'arb. 144 (No. 1). Indeed, the ICSID Convention is more widely ratified than any other international convention that deals with transnational arbitration. The same issue of the Revue de l'arbitrage also notes that the New York Convention has been ratified by only sixty-seven states.

63. International Centre for Settlement of Investment Disputes, Annual Report (1984) 6Two other cases were submitted to ICSID Conciliation proceedings.

64. Ibid., 8-9. The writers of the ICSID Annual Report take comfort in the fact that from 1965-81, nine cases were submitted to ICSID, whereas from 1981-84 a further nine were submitted. It was thought that "[t]his marks a significant growth in the number of cases submitted to ICSID in recent years." Ibid., 8. Although some progress is being made in encouraging acceptance of ICSID jurisdiction, one might question that nine cases in four years marks "significant growth".

ICSID Convention, it is the New York Convention which continues to govern the main issues in the recognition and enforcement of most international arbitral awards.

C. "International" Arbitral Awards and Problems Under the New York Convention

i. The Requirement that Awards be Binding

Any proponent of the possibility of procedurally "delocalised" or "internationalised" arbitral awards[65] must at some point confront the express terms of art. V(1)(e) of the New York Convention which states that an award may be refused recognition and enforcement if:

> [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[66]

It seems that the drafters of this provision presumed that arbitral awards would result only from a specific system of

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65. See supra, Chapter II.

66. Paulsson sees art. V(1)(e) of the New York Convention as "[t]he heart of the debate concerning the existence of a transnational award". Paulsson, supra, note 31, 235. It is important to note that the binding nature of an award is a condition for enforcement, and not vice versa. In his separate opinions in Case Nos 6, 51 etc. before the Iran-U.S. Claims Tribunal, (1983) 1 Iran-U.S. C.T.R. 284 (decision of 5 November 1982), Howard Holtzman suggested, at 289, that "[a] binding contract is one which is enforceable". Even when discussing the underlying contract, this approach would appear to be circular. A contract is binding because it is enforceable and a contract is enforceable because it is binding. It is only the latter proposition which is defended here, both in relation to contracts and to arbitral awards. A contract or an award must derive its quality as a "binding" juridical act from a source independent of the mere prospects for enforcement. In the international arbitral context, that source is generally the express will of the parties.

national procedural law. That presumption no longer reflects accurately the contemporary legal reality, as was discussed in the previous Chapter. The question remains whether art. V(1)(e) can accommodate that new reality. The standard reading of art. V(1)(e) seems to be that the first and second clauses are conjunctive, that is, that the "binding" nature of an award is to be determined "by a competent authority of the country in which, or under the law of which, that award was made."[67] By no means is this the only logical reading. Because of the use of the conjunction "or", it is eminently reasonable to suggest that the two clauses are, in fact, disjunctive, that an award can be refused enforcement if it is not "binding" or if it has been set aside in the country where made. One must then ask what is meant by a "binding" award.

As a preliminary point, it may be asserted with vigour and assurance that the use of the word "binding" in the New York Convention does not impose a requirement that the award be confirmed by a court in the country where the award is rendered because that would mean that the award could potentially be subject to the imprimatur of two courts, first in the country where the award was rendered and again in the enforcement jurisdiction. This "double exequatur" is precisely what the New York

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67. See, e.g., Paulsson, ibid.: "Under this provision, foreign awards are enforceable unless the challenging party can show that the award is not 'binding' in the country where rendered."

Convention was designed to preclude.[68] The word "binding" was chosen to replace the word "final" in the 1927 Geneva Convention specifically because "final" had been interpreted by national courts as requiring court recognition in the state where the award was rendered and in the enforcing state.[69]

In attempting to seek a more positive form of definition, one is confronted with the obstacle that the word "binding" is not defined in the Convention except to the extent that context can be used as an interpretive guide. The ordinary meaning, according to the Oxford English Dictionary is "[t]he state or

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68. This interpretation has now become conventional wisdom for almost all courts seeking to interpret the Convention. See, e.g., Fratelli Variola S.p.A. v. Danaos Shipping Co. (28 January 1982 date of filing; Corte di Cassazionne), reprinted in (1984) 9 Y.B. Comm. Arb. 423, 425 (Italy); Official Receiver in the Bankruptcy of Lanificio Walter Banci S.a.S. v. Bobbie Brooks Inc (15 April 1980 date of filing; Corte di Cassazionne), reprinted in (1981) 6 Y.B. Comm. Arb. 233, 235-6 (Italy); Joseph Muller A.G. v. Bergesen (26 February 1982; Federal Supreme Court), reprinted in (1984) 9 Y.B. Comm. Arb. 437, 439-41 (Switzerland); and for a summary of the position adopted by courts in the United Kingdom, Morris, supra, note 17, vol. 2, Rule 200, at 1134.

69. See Van den Berg, supra, note 8, 333 et seq. Some states still require court approval of arbitral awards based upon legal rather than commercial considerations (e.g. the arbitrato rituale of Italy). Such requirements raise the question whether or not court approval transforms or merges the award into a court decision thereby excluding the application of the New York Convention which covers only arbitral awards. Van den Berg argues that no such "merger" should affect the recognition and enforcement of awards under the Convention. Because a primary goal of the Convention was to eliminate the so-called "double exequatur", outmoded provisions of national law should simply be ignored in the international context. Van den Berg, supra, note 8, 347-8. This position is fully supported by the overall tenor of the Convention.

condition of being bound" and to be bound is "to be under an obligation, to have it as a duty, moral or legal, to do something."[70] The verb is passive; the subject is affected by an external action. The source of that action is irrelevant to the state of being bound.

In the context of international arbitration, Harnik asserts that the word binding "is today universally recognized to mean that the award, in the rendering country, is not open to arbitral or ordinary judicial review, irrespective of the admissibility of an action to set aside."[71] In a sense, this definition does not advance the inquiry very far, for Harnik, like the drafters of art. V(1)(e) itself, seems to assume that all arbitral awards will be linked to a national legal system. If one rejects Harnik's assumption that there will always be a "rendering country" and instead accepts the concept of a delocalised award (at least in its procedural aspect), the remainder of his definition is helpful and in conformity with the ordinary dictionary meaning of the word "binding". A "binding award" would then include any award that imposes definitive obligations upon the parties and that is not itself open to further arbitral or judicial appeal. An application to set aside is not such an "appeal", so an award is "binding" for the purposes of the New York Convention even if a disgruntled or

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70. J. Murray, et al., eds, The Oxford English Dictionary, Oxford: The Clarendon Press (1933).

71. Harnik, supra, note 35, 708-9.

dilatory party has instituted new proceedings to set aside the award.[72] This pro-enforcement interpretation, underscoring Von Mehren's principle of "repose", has been adopted by national courts in The Netherlands,[73] France,[74] and the United States.[75] The position was expressed most clearly by the District Court of Amsterdam in S.P.P. (Middle East) Ltd v. Arab Republic of Egypt:

> It results from both the legislative history of the Convention and the text of Arts. V, para. 1 under e, and VI, that the mere initiation of an action for setting aside ... does not have as a conse-

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72. The writers of the Fifth Report of the Private International Law Committee in the United Kingdom went even further while considering the domestic context. They suggested that a municipal arbitral award was "binding" if the parties had no further recourse to another arbitral tribunal. The fact that a regular appeal might exist to a court of law was not thought to undercut the binding nature of an award. Cmnd 1515 (1961), para. 14, discussed in Morris, supra, note 18, vol. 2, 1151.

73. S.P.P. (Middle East) Ltd v. Arab Republic of Egypt (12 July 1984; District Court of Amsterdam), reprinted in (1985) 10 Y.B. Comm. Arb. 487 (The Netherlands).

74. Michel Warde c. Société Feedex International Inc. (13 April 1984; Tribunal de grande instance de Paris), reprinted in [1985] Rev. de l'arb. 155 (No. 1) (France); and Cie de Saint Gobain - Pont à Mousson c. Fertilizer Corp. of India (10 May 1971; Cour d'appel de Paris), reprinted in (1971) 1 Y.B. Comm. Arb. 184 (France) [the relevant considerations actually arose at first instance and are reported at the same place. By the time the case reached the cour d'appel, an Indian Court had upheld the award. Nonetheless, the Cour d'appel nowhere casts doubt upon the determinations of the Tribunal de grande instance which had held that an award is binding even if subject to a proceeding to set aside].

75. Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio, W.D. 1981) 958 (U.S.A.).

> quence that the arbitral award must be considered as not binding. An arbitral award is not binding if it is open to appeal on the merits before a judge or an appeal arbitral tribunal.[76]

The Austrian Supreme Court has held that any challenge concerning the binding nature of an award under Art. V(1)(e) must be raised by the opposing party and will not be addressed by the Court proprio motu.[77]

The condition of being "binding" can certainly be fulfilled by "delocalised" awards, as the decision in the French Gotaverken case demonstrates.[78] Even the numerous LIAMCO enforcement cases illustrate that an award not procedurally connected to the arbitral forum may still be binding. In Sweden, the award was enforced,[79] and the refusals of French, Swiss and United States courts to enforce the award were based upon considerations which did not call into question its binding

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76. Supra, note 73, 489.

77. Oberster Gerichtshof [Supreme Court], 21 February 1978, reprinted in (1985) 10 Y.B. Comm. Arb. 418 (Austria) (parties not indicated).

78. General National Maritime Transport Co. v. Société Gotaverken Arendel A.B. (21 February 1980; Cour d'appel de Paris), reprinted in (1981) 20 I.L.M. 884, 885 (France). In that case, the Paris court refused to arrogate to itself any supervisory jurisdiction over an award that had "no connection whatsoever with the French legal system" even though the arbitration took place in Paris. Because no adjudicative review was possible, the award was final and, perforce, binding. In such a case, the "binding" quality of the award results from the original agreement of the parties.

79. Libyan American Oil Co. v. Socialist People's Arab Republic of Libya (18 June 1980; Svea Court of Appeals), reprinted in (1981) 20 I.L.M. 893 (Sweden).

nature.[80] It would appear, therefore, that a procedurally "delocalised" arbitral award rendered in an arbitration involving a state and a foreign private party can be described as "binding" for the purposes of the New York Convention. The first clause of art. V(1)(e) would not, then, provide a ground for non-enforcement of the award. It must be pointed out, however, that even though an award may be "binding" under art. V(1)(e), enforcement may still be delayed (not refused) under art. VI, pending the final determination of a court in the host state of the arbitration upon any application to set aside the award.[81] This practical provision is designed to prevent precipitous enforcement. If an award is set aside, the second part of art. V(1)(e) may then be applicable.

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80. In France and Switzerland, the courts refused to attach Libyan property, holding that the Libyan state was entitled to claim sovereign immunity. See Procureur de la République v. Société LIAMCO (5 March 1979; Tribunal de grande instance de Paris), reprinted in (1979) 106 J. du dr. int'l 857 (France); and In re Socialist Libyan Arabic Popular Jamahiriya v. Libyan American Oil Co. (19 June 1980; Federal Supreme Court), reprinted in (1981) 20 I.L.M. 151 (Switzerland). In the United States, a Federal District Court held that the Act of State Doctrine precluded any attachment of Libyan assets. See Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.C.D.C. 1980). All these cases will be discussed in greater detail later in this Chapter.

81. Fertilizer Corp. of India v. IDI Management Inc., supra, note 75. Any application to delay confirmation or enforcement proceedings should only be granted if the application is in good faith and is not merely dilatory. See the discussion of a U.S. Circuit Court in Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F. 2d 334 (5th Cir. 1976), especially at 337 (U.S.A.).

The second clause of art. V(1)(e) contains the stipulation that refusal to enforce may be justified if the party resisting enforcement can prove that the award has been set aside by a competent authority in the country where the award was made. This provision creates a link with national law, for it is domestic law which would determine whether an award would be set aside in the country where it was rendered.[82] Although it is a fact that in many cases annulment proceedings are instituted by losing parties solely as a delaying tactic[83] and that most such requests are rejected, art. V(1)(e) nevertheless establishes a nexus between an international arbitration and local law which seems out of place in a Convention which is otherwise supportive of transnational arbitration. Yet the connection cannot be wished away.

Some proponents of "denationalised" arbitration have argued that "floating" awards should be enforceable outside the country where they are made even if the award has been annulled by a competent authority in that country. The argument may be constructed as follows. Because art. V(1)(e) allows a court to refuse enforcement of an award that has been "set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made," and because a

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82. Sanders, supra, note 53, 274. See also Van den Berg, supra, note 8, 355; and Hirsch, The Place of Arbitration and the Lex Arbitri (1979) 34 Arb. J. 43 (No. 3) 44.

83. Sanders, ibid., 283.

delocalised award is "made" under no national procedural law, it is not "made" in any country. If it is governed by an anational law, the local court has no authority to set the award aside and so any such setting aside should have no effect at the time of prospective enforcement.[84] The reasoning is positively Jesuitical.

Given the fact that in arbitrations involving states and foreign private parties the situs of an arbitration will often be entirely fortuitous, chosen simply for the sake of neutrality or for the convenience of the parties or the arbitrators and with no intention that the local law should govern, it would seem that enforcement in other states should in no way depend upon the peculiarities of the local law. Yet under the 1958 Convention it seems to do so, and Professor Park, who is a leading expert in the field, points out that he "knows of no award enforced after explicit annulment where rendered."[85] In fact, since Professor Park wrote those words, at least one highly authoritative court decision has indeed allowed enforcement of an award despite its annulment by a court in its country of origin. In Pabalk Ticaret Ltd v. Norsolar S.A., the French Cour de cassation effectively used art. VII of the New York Conven-

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84. See the descriptive commentary of Park & Paulsson, supra, note 12, 256 where they disapprove of any such claim. See also the almost identical objections in Park, The Lex Loci Arbitri and International Commercial Arbitration: When and Why it Matters (1983) 32 Int'l & Comp. L.Q. 21, 24.

85. Park, ibid., 27.

tion to ride roughshod over art. V(1)(e).[86] Article VII was interpreted to allow a party to avail himself of any arbitral award to the full extent allowed by the country of enforcement. Because the Cour de cassation found that French law provided for enforcement no matter what the status of the award in the country where it was rendered, the applicant was entitled to enforcement. This decision is so singular and, with respect, audacious, that one might still be inclined to follow the more circumspect analysis of the present state of the law which is offered by Professor Park.

In accepting this fact, however, one need not -- as Professor Park does -- call into question the very idea of a delocalised award. It is only the inflated claim of proponents of delocalisation that is defeated by the wording of the Convention. A delocalised award can still exist and, as has been shown, be binding. In most cases where an award has been rendered under a delocalised procedure, there will simply be no cause for a court of the situs to quash the award. Indeed, it can be argued further that because annulment in the country where an award has been made can prevent enforcement elsewhere, national courts should be wary to agree to annulment lest they defeat the openly-expressed intentions of the parties to benefit from a mutually convenient, non-municipal adjudicative process.

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86. Pabalk Ticaret Ltd v. Norsolar S.A., (9 October 1984; Cour de cassation), reprinted in (1985) 24 I.L.M. 363 (France). See also the case note by Gaillard in (1985) 24 I.L.M. 360.

The possibility of annulment exists for all awards -- whether delocalised or rooted in the procedural system of a single state -- and the mere possibility cannot logically be employed as an argument against delocalisation per se. One can only hope that in a future convention, this vestigal manifestation of state interference will be abolished.

Mr Van den Berg has argued forcefully that the present wording of the Convention is adequate and that "[a] losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction."[87] He suggests that a "final" determination of the local court would prevent a multiplicity of spurious enforcement actions around the globe. The goal of finality and certainty is in many legal contexts a valid objective. But it is not a transcendent good. Indeed, in the context of international arbitration, a process quite distinct from the national legal order, certainty should not be pursued entirely at the expense of flexibility or to the exclusion of the express will of the parties who chose arbitration as a means to settle their dispute. In any case, allowing for the setting-aside of an award by a court in the country where the award was made simply does not accomplish the task of providing certainty. The winning party will still seek to enforce the award elsewhere in the hope that a national court will, like the French Cour de cassation in Pabalk Ticaret, hold that it is not bound to refuse

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87. Van den Berg, supra, note 8, 355.

enforcement. A strong argument can be made that the goal of certainty will be enhanced most by making enforcement of a binding award as simple as possible so that enforcement is likely to be obtained in the first jurisdiction where it is sought. If the arbitral tribunal has egregiously breached fundamental standards of fairness, the parties can be protected at the stage of enforcement through the invocation of public policy, as will be discussed below.[88]

ii. The Requirement that Awards be Foreign

The official title of the 1958 Convention is misleading, a point which becomes obvious as soon as one reads art. I. The Convention is not only concerned with "foreign" awards, but with awards considered to be "not domestic" as well.[89] The Conven-

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88. See infra, text accompanying notes 105 to 131. For a recent example of the invocation of public policy to defeat an application for enforcement, see Arab Republic of Egypt v. S.P.P. (12 July 1984; Cour d'appel de Paris), reprinted in (1985) 10 Y.B. Comm. Arb. 113 (France) where the court found that Egypt was not even a party to the arbitration agreement that had resulted in an award rendered against it.

89. Article I(1) of the New York Convention, supra, note 1, reads:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where recognition and enforcement are sought.

In the original ECOSOC draft of the New York Convention, the term "international award" was used, but this was not acceptable to many states. See Van den Berg, supra, note 8, 8.

tion applies both to awards rendered in a country other than that where enforcement is sought and to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." It is well documented that the second branch of the test for applicability was added to the Convention largely at the behest of Civil Law countries of Continental Europe that sought the flexibility to refuse the enforcement of any award that they deemed to be domestic even if it had been rendered in another country.[90] This ability would prevent parties to an essentially domestic dispute from seeking to avoid the application of national law by seeking resolution outside their own country (the notion of fraude à la loi).

Authoritative judicial decisions have recently extended the ambit of the second branch of the Covention's applicability test. On its face, the Convention does not preclude its application to awards that are rendered outside the procedural system of any state.[91] A "delocalised" award will almost

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90. See, e.g., Brown, Enforcement of Foreign Arbitral Awards (1984) 14 Ga J. Int'l & Comp. L. 217, 228; and Van den Berg, supra, note 8, 19.

91. Contra Van den Berg, New York Convention 1958: Commentary Cases (1984) 9 Y.B. Comm. Arb. 329. Van den Berg argues, at 342, that for the purposes of determining the applicability of the Convention, awards "not considered as domestic" cannot possibly include "denationalised" awards "in view of the references to the applicable law in Art. V, para. 1" of the 1958 Convention. This argument improperly conflates two separate ideas. Article V(1) refers to the competence to conclude and the validity of an agreement to arbitrate, which, perhaps regrettably, is submitted to domestic jurisdiction. There is no need to presume that

(cont'd.)

certainly not be considered "domestic" in the state where recognition and enforcement are sought. The Gotaverken and Société AKSA cases[92] emphasise that an award will not necessarily be considered "domestic" even by courts in the same country where the award was rendered.[93] German courts have adopted a similar position[94] as has, more recently, the United States Federal Court of Appeals for the Second Circuit. The case of Bergesen v. Joseph Muller Corp.[95] is the first notable American departure from the territorial principle whereunder only arbitral awards rendered outside the United States could be enforced by U.S. courts under the New York Convention. In the Bergesen case, an arbitration involving two foreign entities took place in New York and the Second Circuit held that the award was enforceable in the U.S. under the 1958 Convention

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national control over the resulting award is also required for the Convention to cover enforcement of the award. The only express reference which provides for national jurisdiction over awards, as opposed to agreements, is the second clause of art. V(1)(e), discussed supra, text accompanying notes 82-85.

92. Gotaverken, supra, note 78; and Société AKSA S.A. v. Société NORSOLOR S.A. (9 December 1980; Cour d'appel de Paris), reprinted in (1981) 20 I.L.M. 887 (France).

93. See generally, Quigley, supra, note 25, 1060-1; Luzzatto, supra, note 6, 71; and Jeantet, note to the Gotaverken case, (1981) 20 I.L.M. 883.

94. See, e.g., Delaume, supra, note 45.

95. Bergesen v. Joseph Muller Corp., 710 F. 2d 928 (2d Cir. 1983) (U.S.A.). See also the case note by Feldman, An Award in New York Can Be a Foreign Arbitral Award (1984) 39 Arb. J. 14, especially 15-6.

because it was "not considered domestic."

Developments in France, Germany and the United States indicate, therefore, that the New York Convention allows for almost complete national discretion in determining what will be classified as a non-domestic award. There are no restrictions as to subject matter, nor are there nationality or residence requirements imposed upon the parties to an arbitration. As Luzzatto points out, even under the first branch of the applicability test -- which requires enforcement of awards rendered in another state -- "[p]urely domestic disputes can ... be referred to foreign arbitration and lead to awards recognizable and enforceable under the convention."[96] State courts might still try to preclude such a result by applying the second branch of the applicability test to consider such an award as being essentially "domestic". In practice, the problem of fraude à la loi simply has not arisen to any meaningful extent. The more important point is that the Convention provides great leeway to allow states to enforce arbitral awards and there is nothing in the wording of art. I which would require non-enforcement of a procedurally delocalised award, whether rendered inside or outside the state where enforcement is sought.

Moreover, there is no necessary condition of reciprocity. A state may bind itself to recognise and enforce arbitral awards

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96. Luzzatto, supra, note 6, 75-6. See also Feldman, ibid., 18.

even when they are rendered in states not party to the Convention. On the other hand, art. I(3) allows a state party to make an express declaration "that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."[97] Many states have in fact entered such a declaration with their ratifications or accessions.[98] Even when state parties require reciprocity, however, this condition does not preclude the enforcement of awards rendered under a delocalised procedure. National court decisions discussed below have held that a reciprocity condition valid under the Convention may only require that an award be "made ... in the territory of another Contracting State." An internationalised award can still be made in the territory of a state party to the 1958 Convention even if it results from a delocalised procedure and will not be subjected to national

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97. Article I(3) also contains another reservation which may be invoked by parties and which states that the Convention will apply only to arbitrations "arising out of legal relationships ... which are considered commercial." Twenty-three states had made such a reservation as of 1984. See (1984) 9 Y.B. Comm. Arb. 327. This reservation recalls the law as it stood under the regime of the 1927 Geneva Convention and the 1923 Protocol which contained a similar reservation. See supra, note 39.
    Today, any contract involving buying and selling is clearly a "classic commercial relationship" and therefore falls within this provision, but "commercial relationship" is often given a much wider interpretation. See Siderius v. Compania de Acero del Pacifico S.A., 453 F. Supp. 22 (SDNY 1978) (U.S.A.).

98. Luzzatto, supra, note 6, 71. As of 1984, forty-two of the sixty-six contracting states have based their adherence to the Convention upon the reciprocity declaration. See (1984) 9 Y.B. Comm. Arb. 327.

court review in that country.

If one accepts that an arbitral award rendered under a delocalised procedure can be "binding", and "made" in another country or "not domestic" for the purposes of the New York Convention, it is difficult to accept Mr Delaume's view that

> the attempt to remove the arbitration proceedings from the lex loci arbitri and to "internationalize" or "delocalize" the proceedings may have its price. It may deprive the parties of the benefit of the liberal provisions of multilateral Conventions regarding the recognition and enforcement of "foreign" as opposed to "international" awards.[99]

Delaume's position is not consonant with the spirit of the recent French and U.S. court decisions discussed above, nor with the express holding of the Dutch Hoge Raad (High Council) in the case of Société Européenne d'Études et d'Entreprises v. Yugoslavia.[100] In that case, the facts of which are well known, the Hoge Raad quashed a decision of the Hague Court of Appeal which had held that because The Netherlands had entered a reservation under art. I(3), the enforcement of an arbitral award under the 1958 Convention required that the award be "made" in the territory of another Contracting state. It further held that this was not simply a geographical requirement

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99. Delaume, State Contracts and Transnational Arbitration (1981) 75 Am. J. Int'l L. 784, 813 [hereinafter Delaume, State Contracts]. See also Delaume, Foreign Sovereign Immunity, supra, note 60, 43-4.

100. S.E.E.E. v. Yugoslavia (26 October 1973; Hoge Raad), reprinted in (1975) 14 I.L.M. 71 (The Netherlands).

but instead imposed a condition that the award should be made according to the municipal procedural law of the country where it was rendered. Because the award in question, although never set aside per se, had previously been declared by a Swiss Court not to be an "award" within the provisions of the lex loci arbitri, that of the Canton de Vaud,[101] the award was held by the Hague Court of Appeal not to have been "made" in Switzerland. This reasoning was rejected in its entirety by the Hoge Raad which held that Art. I(1) of the 1958 Convention could not bear the construction imposed upon it by the lower court. The case was remanded and decided finally upon other grounds which, pace Delaume, have no bearing upon the theoretical possibility of "delocalised" procedure.[102] The decision of the

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101. Société Européenne d'Études et d'Entreprises v. République Populaire Fédérative de Yougoslavie (12 February 1957; Tribunal de Vaud), reprinted in [1958] Rev. crit. de dr. int'l privé 359, aff'd (18 September 1957; Tribunal Fédéral), reprinted in [1958] Rev. crit. de dr. int'l privé 367 (Switzerland).

102. Delaume has argued that in a subsequent appeal, the Hoge Raad reverted to "considerations that, in addition to the place of making of the award would seem to 'renationalize' the award by bringing it within the legal system of the country in which the award is 'made'." Delaume, Foreign Sovereign Immunity, supra, note 60, 44. In fact, the second Hoge Raad decision was based expressly on one of the conditions justifying non-recognition set out in art. V of the 1958 Convention (art. V(1)(a)). The burden of art. V(1)(a) is simply that non-recognition is justified if, "failing any indication" by the parties of the law governing the arbitration, the agreement to arbitrate is found to be invalid under the law of the country where the award was made. In other words, the problem can be avoided by declaring expressly that the arbitration is not to be governed by the local law. Nothing in the Hoge (cont'd.)

Hoge Raad is mirrored in the latest instalment of the French enforcement saga in the case of the Société Européenne d'Études et d'Entreprises c. République de Yougoslavie[103] where even Mr Delaume admits that "the Court takes the position that the New York Convention applies to 'anational' awards 'made' ... in another Contracting State."[104] Neither the requirement that an award be "binding" nor the requirement that it be non-domestic or "made" in another country, would seem to preclude the enforcement under the New York Convention of a procedurally "delocalised" arbitral award.

iii. The Domestic Public Policy Justification for Refusal to Enforce a Non-Domestic Award

Unlike the ICSID Convention which expressly excludes any domestic public policy defence to the enforcement of an arbitral award rendered under its auspices,[105] the New York Convention

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Raad's second decision then, is fatal to the idea of procedural delocalisation. Moreover, the first and more directly applicable decision is supportive of the concept. See also Luzzatto, supra, note 6, 78 who, although professing doubts about procedural delocalisation, emphasises nevertheless that:

> it is noteworthy that the New York Convention does not require that arbitral awards are [sic] connected with the procedural system of the State in whose territory, or under the laws of which, they are made.

103. (13 November 1984; Cour d'appel de Rouen), reprinted in [1985] Rev. de l'arb. 115 (No. 1) (France).

104. Delaume, Note, (1985) 24 I.L.M. 345.

105. See ICSID Convention, supra, note 56, arts. 53-4; and Delaume, ICSID Arbitration and the Courts (1983) 77 Am. J. Int'l L. 784, 801.

allows national courts to deny enforcement if it "would be contrary to the public policy of that country."[106] For arbitrations involving states and foreign private parties that are not conducted under the ICSID regime -- still the vast majority of such arbitrations -- this public policy defence to enforcement could have created severe difficulties. That it has not done so is a testament to the widespread desire to make the New York Convention work as forcefully as possible for the benefit of international commercial arbitration, to enhance the principle of repose. As it stands, the public policy justification for non-enforcement exists solely as the ultimate safeguard against extreme breaches of procedural fairness.[107] Van den Berg reported that as of 1981, "out of some 140 decisions [he reviewed], enforcement of an arbitration agreement and an arbitral award was refused in five decisions only on account of public policy."[108]

On its face, the public policy defence to enforcement of arbitral awards under the New York Convention allows almost completely unfettered discretion to a national court wishing to

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106. New York Convention, supra, note 1, art. V(2)(b).

107. See Carbonneau, supra, note 14, 65 who asserts that
> Court supervision [of arbitration] should be limited to the fundamental concerns of procedural fairness: the need to curb the abusive exercise of excessive arbitral authority and the need to protect the rights of third parties in the private proceeding between the contracting parties.

108. Van den Berg, supra, note 8, 366.

apply local public policy to defeat a binding arbitral award. Indeed, this provision is not really a "defence" at all, for unlike the specific defences to enforcement set out in art. V(1)(a)-(e), the public policy ground for refusal to enforce need not be proven by the challenging party. The court in the country where recognition and enforcement is sought may raise public policy issues proprio motu.

There is, of course, a compelling practical reason why most domestic courts in enforcing jurisdictions -- especially in developed countries where most attempts at enforcement are launched -- would not wish to use domestic public policy to defeat an arbitral award, especially when the award was rendered against a state in a dispute between the state and a foreign private party. To date, most arbitrations of that type have arisen out of factual situations involving the 'nationalisation' of property of the foreign private party, typically a multi-national corporation. If the court in the country where enforcement is sought chose to apply notions of domestic public policy rigorously, it might thereby deprive the foreign private party of its only means of gaining compensation for the expropriation of its property.[109]

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109. It is interesting to note that, in older editions of Dicey and Morris, the editors saw fit to note that there might be occasions on which it would be contrary to public policy for English courts to recognise the decrees of foreign states purporting to "nationalise" property. Even today, courts in certain developed nations might find it (cont'd.)

Public policy can, of course, comprehend both matters of substance and of procedure.[110] But, in discussions concerning the recognition and enforcement of foreign court judgments, it has been argued that fair procedure is the touchstone in evaluating a breach of public policy. The United States Second Restatement of Conflict of Laws was explicit:

> A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and underlying cause of action are concerned.[111]

Clearly, the notion of a "fair trial" relates to specific conceptions of procedural fairness. Even in the context of foreign court judgments, this broadly phrased provision has been criticised strenuously, primarily because it seems to impose upon the party seeking recognition the burden of proving that a particular court proceeding in a foreign country was "fair" by

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necessary to grit their proverbial teeth before recognising a foreign nationalisation decree, but the same upsetment would not be caused in recognising an arbitral award compensating for loss sustained as a result of such a decree. See, e.g., A. Dicey & J. Morris, eds, The Conflict of Laws, 8th ed. (1967) 76.

110. It is unlikely that in the context of international commercial arbitration the substance of a decision will offend domestic public policy. Of course, the result might be questioned in some quarters, but it is entirely unlikely that any award rendered in such a context would so offend the sensibilities of the enforcing court as to prompt it to invoke public policy to defeat the application of the award. An offensive -- here read "non-court-like" -- procedure is a more likely spark for non-enforcement.

111. American Law Institute, Restatement (Second) of Conflict of Laws (1971), s. 98.

American standards,[112] such standards being linked inexorably with liberal-democratic conceptions of adjudication.

In dealing with a non-domestic arbitral award, any approach based upon the position adopted in the Second Restatement would be even less appropriate, for at least two reasons. First, as has been discussed above,[113] it is clear that the drafters of the New York Convention intended that the primary burden of proof regarding enforcement of a non-domestic award should lie squarely on the party seeking to prevent enforcement.[114] Even though the public policy justification for non-enforcement contained in art. V(2)(b) of the Convention certainly allows the court itself to raise public policy issues, it in no way imposes an obligation on the party seeking enforcement to prove the fairness of an arbitral procedure. Secondly, the very notion of "fairness" must be evaluated with great care when dealing with a non-judicial dispute resolution procedure.

Parties may have chosen to resort to arbitration at least in part because they did not wish the procedure to be subjected to the full panoply of procedural minutiae that is thought to guarantee fairness in many Western legal systems. Flexibility may have been an important goal which should not be frustrated

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112. See, e.g., Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Laws (1972) 72 Col. L. Rev. 220, 249.

113. Supra, text accompanying notes 40 to 43.

114. See Art. V(1).

by the imposition of a fully "judicialised" procedure. It is probably for this reason that there is wide agreement among commentators and in the case law that, to quote a recent and important United States decision:

> [T]he [New York] Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.[115]

That holding has been supported and followed in courts across the United States.[116] American courts will almost always refuse to uphold a public policy exception to enforcement. It used to be that certain issues were classified as inherently unarbitrable under U.S. notions of public policy, the best example being cases involving "antitrust" issues. In a major decision, the United States Supreme Court recently reversed this position, holding that an international arbitral award could be enforced

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115. Parsons and Whitmore Overseas Co. v. Société Générale de l'Industrie du Papier (23 December 1974; 2d Cir.), reprinted in (1975) 14 I.L.M. 504, 507-8 (U.S.A.). This approach was justified by the Court, at 507, on the basis of comity and reciprocity principles and in view of the "pro-enforcement bias" of the entire Convention.

116. See, e.g., Marc Rich & Co. A.C. v. Andros Compania Maritima S.A., 579 F. 2d 691 (2d Cir. 1978) (U.S.A.); Waterside Ocean Navigation Co. v. International Navigation Ltd, 737 F. 2d 150 (2d Cir. 1984) (U.S.A.); Sonatrach v. Shaheen Natural Resources Co., 585 F. Supp. 57 (S.D.N.Y. 1983), aff'd 733 F. 2d 260 (2d Cir. 1984) (U.S.A.); Imperial Ethiopian Gov. v. Baruch-Foster Corp., 535 F. 2d 334 (5th Cir. 1976) (U.S.A.); Antco Shipping Co. v. Sidermar, S.A., 417 F. Supp. 207 (S.D.N.Y. 1976) (U.S.A.); and Konkar Indomitable Corp. v. Fritzen Schiffsagentur und Bereederungs GmbH, (S.D.N.Y. 1981), reprinted in (1984) 9 Y.B. Comm. Arb. 468 (U.S.A.).

even if it dealt with questions of U.S. antitrust law.[117] The Supreme Court's decision underscores the contemporary trend which limits the public policy justification for non-enforcement to fundamental issues of procedural fairness. Coing states that public policy now relates only to "the most elementary and basic principles of fair trial."[118] Feldman suggests that United States courts "are loathe to impose preconditions of public policy or natural justice except in the most egregious cases."[119] The reticence is not confined to United States courts alone.[120]

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117. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., Supreme Court, 2 July 1985, reprinted in (1985) 24 I.L.M. 1064 (U.S.A.), rev'g. Soler Chrysler-Plymouth, Inc. v. Mitsubishi Motors Corp., 723 F. 2d 155 (1st Cir. 1983) (U.S.A.).

118. Coing, "The Substantive Law and the Law of Arbitration Procedure" in C. Schmitthoff, International Commercial Arbitration (1974-80) 75, 88 [the author is a past Director of the Max Planck Institute]. See also Luzzatto, supra, note 6, 84; and Feldman, supra, note 95, 20. For a general discussion of the "pro-enforcement bias" of American courts, see Lynch, Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries (1981) 11 Ga J. Int'l & Comp. L. 669, 679.

119. Feldman, ibid., 21.

120. See, e.g., European Grain and Shipping Ltd v. Seth Oil Mills Ltd (29 January 1983; High Court of Bombay), reprinted in (1984) 9 Y.B. Comm. Arb. 411 (India); Arkhbaief v. Entreprise Roumaine d'État (10 March 1981; Cour de cassation), reprinted in [1982] Rev. de l'arb. 429 (France); and Société Bruynzeel Dunrenfabriek N.V. v. Ministre d'État aux Affaires Étrangères de la République Malagache (30 June 1976; Cour de cassation), reprinted in [1977] Rev. de l'arb. 137.

Certain authors have argued that the restrictive application of public policy by national courts has resulted from the acceptance of an entirely new concept, that of "international public policy". International public policy is, Professor Sanders suggests, "confined to violations of really fundamental conceptions of the legal order in the country concerned."[121] It would appear to emphasise procedural rather than substantive norms. Van den Berg also employs this distinction between international and domestic public policy and has explained that the distinction "means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations," and that consequently "the number of matters considered to fall under public policy in international cases is smaller than that in domestic ones."[122] Other commentators have upheld this distinction,[123] which is based primarily upon dicta in a number

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121. Sanders, supra, note 53, 224.

122. Van den Berg, supra, note 91, 388. See also Van den Berg, supra, note 8, 360.

123. See, e.g., Stein & Wotman, International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules (1983) 38 Bus. Law. 1685; Wilner, Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study (1965) 19 Rutgers L. Rev. 646; and Carbonneau, Rendering Arbitral Awards With Reasons: The Elaboration of a Common Law of International Transactions (1985) 23 Col. J. Trans. L. 579.

of French cases.[124] Even accepting the substance of the argument, one might wish that it had been phrased in a more careful manner. There is no doubt that when courts confront proceedings involving a dispute over an international arbitral award they do not usually feel free to apply the full range of domestic public policy considerations to a non-domestic arbitral procedure. There is a widespread policy to uphold agreements to arbitrate by buttressing the resulting award.[125] But to call this reluctance to intervene an "international public policy" is a complete misnomer.[126]

The New York Convention's public policy exception to enforcement relates explicitly to "the public policy of that

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124. See, e.g., Denis Coakley Ltd v. Société Michel Reverdy, (23 July 1981; Cour d'appel de Reims), reprinted in (1984) 9 Y.B. Comm. Arb. 400 (France); and Arab Republic of Egypt v. S.P.P., (12 July 1984; Cour d'appel de Paris), reprinted in (1985) 10 Y.B. Comm. Arb. 113, 114 (France) (where the court found that an arbitral award had been rendered in violation of "international cultural public policy" and therefore refused enforcement).

125. See, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), reprinted in (1974) 13 I.L.M. 974 (U.S.A.); and Rhone Méditerranée Co. v. Lauro, 712 F. 2d 50 (3d Cir. 1983) (U.S.A.). See also the discussion of Mirabito, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years (1975) 5 Ga J. Int'l & Comp. L. 471, 474, and supra, notes 31 and 32.

126. See J. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978) 533; and Matray, "Arbitrage et ordre public international" in J. Schultsz & A. Van den Berg, The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders 12 September 1912-1982 (1982).

country", i.e., where recognition and enforcement is sought. Sanders recognises this fact when referring to "fundamental conceptions of the legal order in the country concerned." Domestic courts may engage in a wise, self-imposed restraint in order to reflect the "pro-enforcement bias" of the 1958 Convention, but this does not amount to any new "international" public policy, for it would be almost impossible to elaborate any content to such a policy. One arbitral award rendered under the auspices of the I.C.C. attempted to set out the sources of a supposed "international public policy". The arbitrators suggested that one should look to (a) usages of international commerce; (b) rules of international arbitration and; (c) the lex mercatoria.[127] The existence of the last source is highly debatable, the "rules of international arbitration" are disparate and, as Julian Lew points out, there is not even any "clearly definable international commercial community" out of which coherent generalised "usages" could be extrapolated.[128] The Austrian Supreme Court was, therefore, wise in rejecting the very notion of an "international" public policy.[129] Such a "policy" is really nothing more than the restraint of domestic

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127. Framatome et al. v. Atomic Energy Organization of Iran, ICC Award of 30 April 1982, [1984] Clunet 58, reprinted in (1983) 8 Y.B. Comm. Arb. 94 (translation).

128. Lew, supra, note 126, 586-7.

129. Oberster Gerichtshof [Supreme Court], 11 May 1983, reprinted in (1985) 10 Y.B. Comm. Arb. 421 (Austria) (parties not indicated).

courts which refuse to apply narrow conceptions of public policy when asked to enforce an arbitral award arising in an international context.

Yet the central point of Professor Sanders and Mr Van den Berg's analysis remains valid and in it they are supported by the preponderant weight of authority: Domestic courts usually will not be willing to use the public policy provision of art. V(2)(b) of the New York Convention to refuse enforcement of an arbitral award which is otherwise immune from attack. Domestic public policy in the enforcing jurisdiction is not likely to interfere with an arbitral award even when rendered under a delocalised procedure. Such restraint on the part of national courts meshes neatly with Professor Falk's conception of the ideal role of domestic courts in the international legal process. Although national courts may be required to function as surrogates for a central authoritative judicial structure in the international community, "[t]he immediate objective is to make judicial outcomes in international law cases as independent as possible of the nationality of the adjudicating tribunal."[130] By avoiding an over-precise application of public policy in the enforcement of non-domestic arbitral awards, national courts will help to create a common standard independent of national idiosyncracies.

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130. Falk, supra, note 15, xii.

Nevertheless, as an instrument of potential control, non-enforcement on grounds of public policy remains available to correct extreme breaches of "basic notions of morality and justice". It is for this reason, as was discussed in Chapter Two, that the public policy of the country where an award is rendered should not be relevant to the validity of an award. If outrageous procedural breaches have occurred, the ultimate sanction is the refusal of enforcement in a potential enforcing jurisdiction. The fact that even in this context, domestic public policy is rarely invoked testifies to the generally high standards maintained by arbitrators. High standards should come as no surprise. Any adjudicative body which relies on the free will of the parties for its initial existence and its continued smooth operation will almost certainly attempt to select or create a system of procedural rules which is seen as being fair by its clientele -- the parties to the dispute. Courts at the *situs* of the arbitration will have no cause to impose narrow conceptions of public policy and courts in the enforcement jurisdiction, following the spirit of the *New York Convention*, will intervene only to sanction glaring breaches of procedural fairness.[131]

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131. See, *e.g.*, the *Parsons and Whitmore* case, *supra*, note 115 where a domestic court in the enforcing jurisdiction refused to apply domestic public policy -- broadly conceived -- to defeat the operation of an arbitral award.

iv. The Sovereign Immunity Defence to Recognition and Enforcement of International Arbitral Awards

No facet of international law has undergone such scrutiny and consequent modification during the last twenty years as has the doctrine known as "sovereign immunity".[132] From a position which acknowledged the absolute immunity of states and state agencies from both suit and execution in foreign states,[133] there has evolved a more flexible principle under which immunity is granted only after the requirements of a purposive test are met. States now are granted immunity, in most Western legal systems at least, only for transactions involving a manifestation of sovereignty and not for transactions of a commercial nature.[134]

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132. For an outstanding review of the contemporary law of state immunity, which includes a highly sophisticated attempt to seek out and illuminate first principles, see Crawford, International Law and Foreign Sovereigns: Distinguishing Immune Transactions (1983) 54 Brit. Y.B. Int'l L. 75. For a creative discussion of the often overlooked linkages between the issues of sovereign immunity and economic development, see Delaume, Economic Development and Sovereign Immunity (1985) 79 Am. J. Int'l L. 319. Finally, Professor Lillich has provided an excellent account of the historical development of the United States approach to sovereign immunity in Lillich, supra, note 15.

133. See, e.g., The Parlement Belge (1880) P.D. 197 (U.K.); Rahimtoola v. Nizam of Hyderabad [1958] A.C. 379 (P.C.) (U.K.); The Congo v. Venne [1971] S.C.R. 998 (Canada); and older editions of Dicey and Morris, e.g., supra, note 109, 126.

134. State Immunity Act 1978, 1978 (U.K.), c. 33; European Convention on State Immunity (done 16 May 1972), reprinted in (1972) 11 I.L.M. 470; United States, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1610(1) (Supp.

(cont'd.)

The distinction between that which is commercial and that which manifests sovereignty is not always easy to draw, and whether one should look at the "purpose" of a transaction or at its "nature" remains a moot point.[135] However, the tenor of recent developments in the field is such that one can argue with conviction that sovereign immunity will not normally be available as a defence to initial jurisdiction or to enforcement of an arbitral award rendered against a state.

As far as immunity from suit is concerned, the position is clear. The submission of a state to arbitration is treated as an implicit waiver of jurisdictional immunity.[136] For that reason, the refusal of a state to participate in an arbitration to which it had formerly agreed is not fatal to the arbitration. The proceedings can commence ex parte the state.[137] The position concerning immunity from execution is somewhat more complicated. The New York Convention does not refer explicitly to the doctrine of sovereign immunity as a bar to enforcement of

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1982); I Congresso del Partido [1981] 3 W.L.R. 328 (H.L.) (U.K.); S.E.E.E. v. Yugoslavia, supra, note 100; and N.V. Cabolent v. National Iranian Oil Co. (28 November 1968; The Hague Court of Appeal), reprinted in (1970) 9 I.L.M. 152 (The Netherlands).

135. See, e.g., G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes, re-issue (1985), Vol. II, Ch. 11, 30-1.

136. Delaume, ibid., Vol. II, Ch. 14, 10.

137. Ibid., 15. See, e.g., Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 1.

a non-domestic arbitral award, but it has been argued that art. V(2)(b), the public policy exception to enforcement, justifies a refusal to recognise and enforce a non-domestic award if sovereign immunity can be pleaded. Of course, in cases before municipal courts the issue of sovereign immunity will be pleaded with reference to the relevant national legislation, but from the perspective of international law, the state's authority to regulate such matters derives from a state's power to pursue its national public policy. That is why the public policy exception to enforcement was fully recognised in the New York Convention. The public policy exception has been dealt with in detail above[138] and, for present purposes, the argument can be phrased as follows. Whatever the theoretical justification for the doctrine of sovereign immunity,[139] it is formulated ultimately as an issue of public policy. Either for reasons of interna-

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138. See, supra, text accompanying notes 105 to 131.

139. It has been suggested that there are at least two distinct theoretical foundations for the doctrine of sovereign immunity. First, there is a justification founded upon principles of international law under which immunity for foreign sovereigns is "seen as a product of comity and respect for the dignity of personal rulers." The second, and more recent, justification for the doctrine is that constitutional principles of executive independence (or crown prerogative) require that the executive have a free hand in directing foreign affairs. Courts refrain from entering into disputes when such action might compromise the policies of the executive. The second justification may relate more directly to the American system of constitutional law where the doctrine of the separation of powers is well entrenched. See Cohen, et al., The Iranian Hostage Agreement Under International and United States Law (1981) 81(1) Col. L. Rev. 822.

tional comity[140] or of internal constitutional structure, it is believed that the courts should not complicate potentially sensitive foreign policy issues by "interfering" to order execution against property vested in a foreign state.

If this basic position is adopted, there are two ancillary complicating factors. First, it becomes necessary to delve into the newly-important distinction between sovereign acts (jure imperii) and commercial acts (jure gestionis). This difficulty was presented to the Tribunal de grand instance de Paris in Procureur de la République v. Société LIAMCO.[141] In attempting to enforce an arbitral award rendered in LIAMCO's favour against the Libyan Arab Republic, the corporation sought to attach Libyan assets located in France. The French court initially imposed an attachment order but this was challenged by the French procureur général on the ground of Libyan sovereign

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140. Comity was the primary justification used by the Tribunal de grande instance de Paris for its refusal to allow execution of an arbitral award where execution was sought against Nigerian property located in France. See Procureur de la République v. S.A. Ipitrade International (12 September 1978), reprinted in (1979) 106 J. de dr. int'l 857, 858 (France). On almost identical facts, an American court held that execution would be appropriate. See infra, note 159 and accompanying text. In any case, the French decision seems out of step with recent developments in other states where important centres of transnational arbitration are located. See infra, text accompanying notes 159-168.

141. (5 March 1979; Tribunal de grande instance de Paris), reprinted in (1979) J. du dr. int'l 857 (France).

immunity which was claimed to be absolute.[142] The Tribunal de grande instance did not endorse the doctrine of absolute sovereign immunity. Rather, it said that without investigation it was impossible to determine whether "sovereign" or "commercial" assets were being attached and it lifted the attachment orders pending the outcome of a court-supervised inquiry into the nature of the Libyan assets in France. The Court held that "la simple invocation d'un bénéfice relevant de l'ordre public interne et international est suffisante pour justifier la levée des mesures de contrainte que la Société LIAMCO a pu dans un premier temps, envisager de prendre dans son intérêt propre."[143] A settlement was concluded before the investigation of Libyan assets had been completed and it is impossible to know under what circumstances the Court would have allowed attachment. It is clear, nevertheless, that the Court perceived the distinction between assets used for sovereign or for commercial purposes to be relevant. How such a distinction can be drawn with any clarity, especially in a world divided by competing socio-economic theories, is a difficult issue, one which was not

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142. The justification for absolute immunity was based, not on domestic constitutional considerations, but on notions of international comity. Ibid., 859.

143. Ibid., 861: "The simple invocation of national or international public policy is sufficient to justify the removal of the attachments that LIAMCO was granted at first instance to protect its own interests." [trans. by author].

addressed by the Court.[144]

And yet the distinction retains great currency. In the United Kingdom State Immunity Act 1978, s. 13(4)(b),[145] the legislator has allowed an exception to the general, and it will be argued outmoded, position that sovereign immunity will preclude enforcement against foreign state-owned property located in the United Kingdom.[146] Section 13(4) provides for the issuance of process directed at property "which is for the time being in use or intended for use for commercial purposes". In an important article, Lady Fox has criticised the test, arguing that it is just as "unworkable" in this context as in the context of immunity from suit.[147] She has suggested that a

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144. Bärmann has suggested that "it will always be a matter of great difficulty to distinguish between what are called jus imperii and ius gestionis." Bärmann, "Limits of Arbitral Jurisdiction" in C. Schmitthoff, International Commercial Arbitration (1974-80) 40, 48. See also Schmitthoff, "Introduction" in C. Schmitthoff, International Commercial Arbitration (1974-80) 1, 18. Professor Simmonds has been more explicit in drawing out the causes of this "great difficulty": "I suspect that many of us, whatever socio-economic system we live under, would agree that to seek to define with clarity a 'commercial' act as opposed to an 'official' or 'sovereign' act, is bound to result, in present world conditions, in an increasingly subjective appraisal of foreign state trading activities". Simmonds, "Extraterritoriality and Arbitration Proceedings" in C. Schmitthoff, International Commercial Arbitration (1974-1980) 136, 140.

145. State Immunity Act 1978, 1978 (U.K.), c. 33.

146. See, e.g. the discussion in Alcom Ltd v. Republic of Colombia [1984] 2 W.L.R. 750 (H.L.) (U.K.).

147. Fox, Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity (1985) 34 Int'l & Comp. L.Q. 115, 125.

better test would be to investigate the origin of the property sought to be subject to execution rather than its "present use or future destination".[148] Any such reformulation is little more than a stop-gap measure which would still permit states to escape legitimately-imposed sanctions determined by an arbitral tribunal to which the state had submitted, presumably in good faith. A better answer is to remove the unfair protection of sovereign immunity from execution in almost all cases where a state has submitted to arbitration, an approach that will be elaborated upon below.

The second distinction which also retains importance if sovereign immunity is treated as an aspect of public policy for the purposes of the New York Convention is the generally irrelevant distinction between immunity from recognition and immunity from enforcement. In a sense, the justifications for this distinction are broadly similar to those that are thought to compel a distinction between immunity from suit and from execution; recognition, like a suit, does not require the use of force to compel performance of an obligation. Recognition is merely declaratory. The argument has been well put by Lady Fox who has emphasised that the distinction between immunity from suit and immunity from jurisdiction is "widely recognized and observed."[149] She went on to assert that

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148. Ibid., 139.

149. Ibid., 123.

> [t]he basis of the distinction is entirely practical. Whereas a court proceeding leading to judgment may be conducted in the absence of the foreign State and produces no immediate hindrance to that State's conduct of its affairs, execution of the judgment involves, in the last resort, the use of force against a foreign State by the seizure of assets.[150]

That argument, although it may be eminently reasonable in the case of a court judgment, is less compelling in the context of arbitration to which a state has submitted voluntarily. The dispute resolution process of arbitration may be rendered illusory if a state can escape obligations it assumed voluntarily. Moreover, because it is not a judgment of a state court that is being enforced, but that of a neutral arbitral tribunal, the issue of comity does not arise. One state is not sitting in judgment upon another. That is perhaps why enforcing courts will almost never grant immunity to assets of state trading agencies. It is clear in such cases that only commercial assets are involved and that comity is not a relevant consideration. Greater problems arise, however, concerning the enforcement of awards rendered against governments of states.

The decision of the French Court in the LIAMCO case is once again of relevance. When the arbitral award was first brought to the Tribunal de grande instance de Paris, the President granted exequatur.[151] In other words, the award

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150. Ibid.

151. Procureur de la République v. Société LIAMCO, supra, note 141, 859.

itself was recognised as valid and binding. And yet, as has been discussed, the award was held subsequently to be unenforceable, at least against Libyan property dedicated to sovereign, as opposed to commercial, ends. In the context of sovereign immunity, the otherwise obsolete distinction between recognition and enforcement may be resurrected with the result that one cannot assume with confidence that a binding award resulting from the free agreement of the parties will be enforceable. Delaume has expressed this concern forcefully:

> The rules regarding sovereign immunity from execution are in even greater disarray than those concerning immunity from suit. Certain legal systems continue to deny execution against the property of foreign states even after rendition of a judgment or award against the state involved. Other systems subject execution to prior approval by the executive branch of government.[152]

Delaume emphasises that disparate rules may lead to "forum shopping"[153] and this sort of "disarray" reinforces his belief that only under the ICSID arbitration procedure can the foreign private party hope to ensure successful enforcement of an award rendered against a state or state instrumentality.

Yet even the ICSID Convention does not settle the problem conclusively, for although it is true that a state party consents irrevocably in advance to treat an ICSID award as

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152. Delaume, Foreign Sovereign Immunity, supra, note 60, 45-6. See also the almost idential observation in Delaume, State Contracts, supra, note 99.

153. Delaume, supra, note 132, 340.

binding[154] and the state is for that reason unlikely to contest enforcement, the doctrine of sovereign immunity is not excluded from application in enforcement proceedings.[155] The Cour d'appel de Paris has added a further wrinkle by holding that even when an ICSID award has been recognised by a French court, the court may nevertheless stipulate that execution against assets of a foreign state may be subject to prior authorization by the court.[156] It is clear that the ICSID Convention was not intended to prevent the invocation of sovereign immunity in the context of enforcement proceedings. In their Report on the Convention, the Executive Directors of the World Bank said plainly:

> The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought.[157]

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154. ICSID Convention, supra, note 56. See also Delaume, Foreign Sovereign Immunity, supra, note 60, 38; and Delaume, ibid., 343.

155. See Vuylsteke, supra, note 57, 360; and Luzzatto, supra, note 6, 99.

156. Benvenuti & Bonfant Co. v. Government of the People's Republic of the Congo (6 June 1981; Cour d'appel de Paris), reprinted in (1981) 20 I.L.M. 878 (France), and see the Introductory Note by Delaume, at 877.

157. International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), reprinted in (1965) 4 I.L.M. 524, 530. Because the doctrine of sovereign immunity is not excluded in relation to enforcement, Delaume has become a strong proponent of restrictive immunity, believing that it "can only contribute to giving

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The answer to the problem of enforcement in the face of sovereign immunity claims is not to be found in the ICSID Convention. Delaume's response to this continuing problem is to suggest that parties to state contracts should "deal directly with issues of sovereign immunity by way of express stipulations in the contract."[158]

There exists, however, a more forceful response directed not to the parties (who would be prudent of course to take up Delaume's suggestion), but to national courts dealing with matters of enforcement. It is a response that has already been articulated by national courts themselves and reiterated by eminent publicists. It is a response that, in the context of arbitrations between states and foreign private parties, makes it unnecessary to distinguish between immunity from recognition and immunity from execution or between absolute and restrictive immunity. The response is simple and cogent: the enforcement of an arbitral award against the contracting state is not precluded by sovereign immunity, because the agreement to arbitrate constitutes a waiver of that immunity.

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a new practical significance to ICSID Awards." Delaume, ICSID Arbitration and the Courts (1983) 77 Am. J. Int'l L. 784, 800.

158. Delaume, State Contracts, supra, note 99, 817.

The leading case is Ipitrade International S.A. v. Federal Republic of Nigeria,[159] where an American court held that a state's "agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity" under the relevant United States legislation.[160] There is nothing in the applicable sections of the Foreign Sovereign Immunities Act[161] which renders this judicial decision a "cas d'espèce". Moreover, the Ipitrade decision by no means stands alone. Its principles have been followed in the United States by courts in Maritime International Nominees Establishment v. Republic of Guinea,[162] in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya[163] and in Birch

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159. 465 F. Supp. 824 (D.D.C. 1978), reprinted in (1978) 17 I.L.M. 1395 [cited to F. Supp.] (U.S.A.). See also the much earlier case of Socobelge v. Greek State (1957) 18 I.L.R. 3 (Belgium).

160. Ipitrade, ibid., 826.

161. 28 U.S.C. §1605(a)(1).

162. 505 F. Supp. 141 (D.D.C. 1981) (U.S.A.).

163. 482 F. Supp. 1175 (D.D.C. 1980) (U.S.A.). This position, that agreement by a state to arbitration should amount to a waiver of sovereign immunity, was supported strenuously by the United States Government in its amicus curiae brief entered in the appeal of this case, an appeal that was withdrawn after settlement. See Brief for the United States as Amicus Curiae in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya (D.C.C.A. 1980, Nos 80-1207 and 80-1252), reprinted in (1981) 20 I.L.M. 161, 162.

Shipping Co. v. Embassy of the United Republic of Tanzania.[164] Strikingly similar conclusions have been reached by courts in The Netherlands,[165] Sweden[166] and, with an important caveat, in Switzerland.[167]

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164. 507 F. Supp. 311 (1980) (U.S.A) [a case concerning garnishment of an Embassy bank account which manifests an approach radically different to that of the House of Lords in Alcom Ltd. v. Republic of Colombia, supra, note 146].

165. See S.E.E.E. v. Yugoslavia, supra, note 100; and N.V. Cabolent v. National Iranian Oil Co., supra, note 134.

166. Libyan American Oil Co. v. Socialist People's Arab Republic of Libya, supra, note 79.

167. See the seminal case République Arabe Unie v. Dame X, (10 February 1960; Tribunal Fédéral), reprinted in (1961) 55 Am. J. Int'l L. 167 (Switzerland). More recently, although the Swiss Federal Court in In re Socialist Arabic Popular Jamahiriya v. Libyan American Oil Co., supra, note 80, 158-9, held that, on principle, where there is no immunity from suit (arbitration) there is no immunity from execution, the Court went on to modify the principle by holding that in order to gain execution in Switzerland it is "necessary that circumstances exist which tie the legal relationship to such an extent to Switzerland that it is justified to bring the foreign state before Swiss authorities." See also Kingdom of Greece v. Julius Bar & Co. (1960) 23 I.L.R. 195 (Switzerland). In LIAMCO, this caveat seemed to be based upon notions of public policy: "The interests of Switzerland do not require such a procedure [of enforcement]; they could, on the contrary, easily cause political and other difficulties." For a discussion of the need for "jurisdictional links" in the context of West German law, see In re National Iranian Oil Co., Federal Constitutional Court, reprinted in (1984) 23 I.L.M. 1281 (F.R. Germany). This type of public policy objection to enforcement in the context of sovereign immunities was rejected expressly in a case parallel to the Swiss LIAMCO case by the Svea Court of Appeals in Sweden. See Libyan American Oil Co. v. Socialist People's Arab Republic of Libya, ibid., 895. The more general grounds for refusal to enforce based upon national public policy have been canvassed supra, text accompanying notes 105 to 131.

The recent French case of Société Européenne d'Études et d'Entreprises c. République de Yougoslavie,[168] is consonant with the pro-enforcement position adopted in Ipitrade and like cases, but the Cour d'appel de Rouen utilised rather idiosyncratic and unfortunate reasoning. The Court did not hold simply that the agreement to arbitrate constituted a waiver of immunity for the purposes of enforcement. Rather, it reasoned that the state's agreement to arbitrate manifested its willingness to be treated like a private party. Because, moreover, the underlying transaction was entirely commercial, no immunity should be granted to the state. In other words, the Court retained the dichotomy between commercial and sovereign natures but instead of applying that test to the property against which enforcement was sought (the usual approach in enforcement cases), it applied the test to the underlying transaction (usually the approach when evaluating immunity from suit). With the greatest respect, the reasoning of the case is so confused as to suggest that it may have been rendered per incuriam. Nevertheless, the central point remains that a French court has found that sovereign immunity does not necessarily preclude enforcement of a non-domestic arbitral against the property of a state.

The authoritative American, Dutch, Swedish and Swiss cases have encouraged distinguished scholars to conclude that a state's initial agreement to arbitrate now constitutes a

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168. (13 November 1984; Cour d'appel de Rouen), reprinted in [1985] Rev. de l'arb. 115 (No. 1) (France).

complete waiver of sovereign immunity, even at the stage of enforcement. In the words of Professor Bowett:

> [I]n most jurisdictions, a Sovereign State's agreement to arbitrate is deemed to be a waiver of immunity for the purposes of arbitration and, in addition, the waiver is generally regarded as extending to enforcement and execution of any award.[169]

Such an implied waiver is necessarily inferred from the consensual nature of arbitrations arising out of state contracts and is an inverse corollary to the basis premise that "consent to arbitration excludes all other remedies."[170] If all other remedies are excluded, principles of justice and plain common sense require that nothing should be allowed to defeat the intention of the parties to resolve their differences through arbitration. For the same reason, the notion of "commercial" assets should be conceived of in an expansive sense, to allow enforcement against a broad range of state-owned property. Only when execution would interfere with an essential sovereign operation of a state should enforcement be refused, for here the principle of comity has its strongest claim to relevance.

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169. Bowett, Contemporary Developments in Legal Techniques in the Settlement of Disputes (1983) 180 Rec. des cours 169, 220. See also Luzzatto, supra, note 6, 93; Perlman & Nelson, New Approaches to the Resolution of International Commercial Disputes (1983) 17 Int'l Law. 215, 230; and Feldman, Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association (1985) 40 Arb. J. 24 (No. 1).

170. Luzzatto, ibid., 93.

If, after agreeing to submit to the exclusive jurisdiction of an arbitral tribunal, a state could effectively prevent enforcement of an award by a claim of sovereign immunity, the manifest intention of the parties at the time of the conclusion of the agreement to arbitrate would be destroyed. It should be noted that this analysis is not based upon the notion of implicit submission to state courts by virtue of the agreement to arbitrate. The relevant fact is simply submission to impartial, third party adjudication. It matters not whether the particular arbitration to which a state agrees is procedurally rooted in the law of a state or is "delocalised". The analysis holds true in each case. By submitting to third-party adjudication, a state must be presumed to have consented to the means of enforcement that are necessary to bring an award into effect. Otherwise, the initial agreement to arbitrate is vitiated. Sovereign immunity should not be allowed and commonly is not allowed to operate under the rubric of public policy to prevent enforcement of a non-domestic arbitral award under the New York Convention.

v. The Act of State Defence to Recognition and Enforcement of International Arbitral Awards

It should be said at the outset that good sense alone should suggest that the Act of State Doctrine has no place in any catalogue of defences to enforcement of non-domestic arbitral awards under the 1958 Convention. The only reason that

it is being discussed here is that in 1980 a United States Federal District Court for the District of Columbia rendered a very odd decision. In Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya,[171] the court ruled out any application of the doctrine of sovereign immunity. It went on to decide, however, that enforcement of a non-domestic award could be prevented under art. V(2)(a) of the New York Convention.[172] The court suggested that the "subject matter of the difference" was "not capable of settlement by arbitration" because the American court could not itself have ordered arbitration at the outset. And why not? "[B]ecause in so doing it would have been compelled to rule on the validity of the Libyan nationalization law"[173] which, of course, constituted an act of state. It is difficult to know where to begin a discussion of such tortured reasoning.

First, it might be helpful to review, in broad outline, the history and theory that lies behind the contemporary Act of State Doctrine. The most authoritative recent review of the development of the doctrine is to be found in Lord Wilberforce's

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171. Supra, note 163.

172. The Convention is cited supra, note 1.
"Art. V(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country ...".

173. Supra, note 163, 1178.

magisterial House of Lords speech in Buttes Gas and Oil Co. v. Hammer.[174] In his Lordship's view, the doctrine originated in the English Courts, specifically in the case of the Duke of Brunswick v. King of Hanover,[175] but was "adopted and generalised in the law of the United States."[176] As re-phrased by the United States Supreme Court in the late nineteenth-century, the doctrine was formulated as follows:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[177]

More recently, the Supreme Court of the United States has modulated the rigid tone of the doctrine as stated by its nineteenth-century forbears by refusing to lay down or to reaffirm "an all-encompassing rule."[178] The more flexible approach has attained wide currency in other United States courts. In National American Corp. v. Federal Republic of

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174. [1981] 1 W.L.R. 787 (H.L.) (U.K.).

175. (1844) 6 Beav. 1, (1848) 2 H.L. Cas. 1 (U.K.).

176. Supra, note 174, 804.

177. Underhill v. Hernandez, 168 U.S. 250 (1897) per Fuller C.J. (U.S.A.).

178. Banco Nacional de Cuba v. Sabbatino, 367 U.S. 398 (1964), 11 L.ed. 2d 804, reprinted in (1968) 7 I.L.M. 22 and 460 [hereinafter Sabbatino; cited to L.ed.] 824 (U.S.A.). Nevertheless, the end result of the Sabbatino case was classically rigorous: the Court held, at 825, that "the act of state doctrine is applicable even if international law has been violated" by the action of the state. Any violation of international law was not directed against an individual but against a state. The individual had no standing to raise the issue.

Nigeria, a Federal District Court pointed out that the Act of State Doctrine should not be viewed as a "talisman" affording "blanket protection" from all consequences flowing from any particular state action.[179]

Traditionally, there have been a number of theoretical justifications advanced to uphold the Act of State Doctrine. The first justification was based upon principles of comity in international law. It was somehow improper, if not dangerous, to call into question the acts of a foreign sovereign. To do so would be to undercut the very idea of national sovereignty, the linchpin of the existing international legal system. This explanation is now largely discredited, at least so far as it implied any binding rule of judicial deference to all acts of foreign states.[180] The second justification related to concepts of private international law whereunder a court would refuse to review transactions which were better evaluated by the local law, even if the transactions contravened the law or public policy of the forum. This justification was rejected by the U.S. Supreme Court in the Sabbatino case.[181] A third explana-

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179. 448 F. Supp. 622 (S.D.N.Y. 1978), reprinted in (1978) 17 I.L.M. 1407 (U.S.A.) [cited to I.L.M.] 1414.

180. Zander, The Act of State Doctrine (1959) 53 Am. J. Int'l L. 826, 837.

181. See the analysis of Longo, Limiting the Act of State Doctrine: A Legislative Initiative (1982) 23 Va J. Int'l L. 103, 108-13. See also Henkin, Act of State Today: Recollections in Tranquility (1967) 6 Col. J. Trans. L. 175, 178 for a lucid review of basic conflicts principles affecting analysis in this area.

tion for the doctrine is grounded in domestic constitutional law, specifically in the relationship between the executive and the judiciary, and owes its existence largely to the U.S. doctrine of the separation of powers.[182] It has been argued that the courts should refuse to review any act of a foreign sovereign state, for such a review could compromise foreign policy objectives which can be pursued legitimately only by the executive.[183]

It is apparent that the justifications advanced in support of the Act of State Doctrine are remarkably similar to those put forward to shore up the old theory of absolute sovereign immunity.[184] The two concepts can, however, be distinguished. Absolute sovereign immunity is a claim that a national court cannot exert *in personam* jurisdiction over a foreign sovereign. Act of State is a denial of jurisdiction *ratione materii* relating to a specific challenged act of a foreign state. Despite this distinction, it would be fair to say that, just as restrictive immunity has replaced absolute immunity, a more restricted formulation of the Act of State Doctrine has now come into vogue.

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182. See, *e.g.*, Fraser, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis* (1983) 51 Fordham L. Rev. 722, 722-3.

183. See, *e.g.*, the doctrinal review undertaken by Fuller C.J. in the *Sabbatino* case, *supra*, note 178, 821. See also the review of older Supreme Court doctrine undertaken by Pavlis, *supra*, note 32, 77-8.

184. See Zander, *supra*, note 180, 850-1.

The contemporary grounding of the Act of State Doctrine is, in a sense, a modified combination of the older international law and constitutional law justifications. The U.S. Supreme Court held expressly that the doctrine was "compelled by neither international law nor the Constitution, its continuing validity depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[185] In Buttes Gas and Oil,[186] the House of Lords carried this flexible approach one step further and, with an uncharacteristic borrowing from recent United States Circuit Court case law, held that the Act of State Doctrine could be justified in the most simple terms: courts should refuse to render judgment on acts of foreign states when there are "no judicial or manageable standards by which to judge" in a domestic court the issues presented.[187] If there are manageable judicial standards to enable a court to evaluate state conduct -- standards which may be derived, presumably, from international custom as well as from express treaty commitments -- a national court is under no obligation to refuse to review a foreign act of state.

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185. Sabbatino, supra, note 178, 823 [emphasis added]. See also Zander, ibid., 834; and Cohen, et al., supra, note 139, 871.

186. Supra, note 174.

187. Ibid., 810.

It should be pointed out that even express treaty provisions will not always be enough to ensure that a court will find justiciable standards. In Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia,[188] the court of first instance held that the provision for "just compensation" after nationalisation found in a U.S.-Ethiopian treaty of amity was so vague that it could not fall within the so-called "treaty" exception to the Act of State Doctrine, whereunder the act of a foreign government can be evaluated by U.S. courts if they are so authorized by an applicable treaty. With respect, this decision exemplified extreme judicial timidity, probably based upon an unfamiliarity with the subject matter.[189] It was wisely reversed by the Sixth Circuit Court of Appeals[190] which held that the relevant treaty provided an adequate standard by which to litigate the issues. The case was remanded to the District Court for further deliberations.[191]

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188. Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 543 F. Supp. 1224 (W.D. Mich. 1982) (U.S.A.).

189. Courts in the Western District of Michigan could not be expected to possess the same expertise in international commercial case as, for example, courts in New York.

190. Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 729 F. 2d 422 (6th Cir. 1984) (U.S.A.).

191. Upon remand, the Government of Ethiopia moved to have the case dismissed on the grounds (a) that the Court lacked subject matter jurisdiction; (b) that the Treaty of Amity and Economic Relations deprived the Court of authority to hear the case; (c) that the Court lacked personal

(cont'd.)

In Buttes Gas and Oil, the House of Lords held that on the facts the Act of State Doctrine did apply. In trying the action for damages before it, a United Kingdom court would have been compelled to rule on a counterclaim alleging conspiracy to defraud involving the procurement through bribery and influence-peddling of various acts of foreign states. Indeed, the major issue concerned a maritime boundary dispute between Sharjah and Umm-al-Qaiwain. According to Lord Wilberforce, such facts "have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass."[192] In the end, Lord Wilberforce's real concern may have been more with judicial propriety than with the absence of clear standards. It would simply be improper for a court to question the conduct of foreign government officials when no clear international standards of conduct had been elaborated. Nevertheless, the central point remains, that in Buttes Gas and Oil, the Act of State Doctrine was defined most narrowly, not as a general rule of international law, but as rule based upon the actual inability of a court to define proper judicial standards of evaluation.

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jurisdiction over Ethiopia; and (d) that the venue was not proper. This preliminary motion was dismissed. Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 616 F. Supp. 660 (D.C. Mich. 1985) (U.S.A.).

192. Supra, note 174, 810.

With this contemporary test for the application of the Act of State Doctrine in mind, it is now possible to assess more fully the decision of the United States court in the LIAMCO case.[193] First, it may be asked if there is any determination involved in an application for enforcement of a non-domestic arbitral award that would require a court to decide issues without any "judicial or manageable standards." Clearly, courts in Sweden, France and The Netherlands, and other U.S. courts, have found no difficulty in discovering such standards.[194] The difficulty perceived by the U.S. Federal District Court was that it felt itself obliged to rule on the underlying issue of the Libyan nationalisation of the American oil company,[195] or, to put it more precisely, the Court believed that it would have had to rule upon that issue if it had been asked at the outset to compel arbitration.

This reasoning is, with respect, faulty. Although nationalisation may very well amount to an act of state, the Court was simply not required (or asked) to rule on that matter. Indeed, it need never have dealt with the issue, for even if it had been asked to enforce an arbitral clause (as opposed to

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193. Supra, note 171.

194. See the cases cited, supra, notes 159, 162, 165 and 166 where courts enforced non-domestic arbitral awards involving states without concerning themselves with the Act of State Doctrine. They felt perfectly able to apply judicial and manageable standards.

195. LIAMCO, supra, note 163, 1178.

enforcement of the subsequent award), the Court need only have examined the validity of the contractual agreement to arbitrate. To do so would not have required any ruling upon the nationalisation which brought the clause into operation. An argument might be advanced that to enforce the arbitral clause, the Court would be forced to determine whether or not the clause was meant to cover the case of nationalisation or only lesser breaches of contract, but such an argument could not really be made in all honesty because it is quite impossible to imagine a modern concession or investment agreement containing an arbitral clause that would not cover the case of nationalisation. Seizure of assets is the most obvious risk faced by a foreign investor. To exclude that risk from the ambit of an arbitration clause would require an express stipulation. In any case, even if a national court felt compelled to determine the ambit of an arbitral clause, the issue would still not be the act of state per se but the interpretation of the clause, and it is generally conceded that arbitrators are fully capable of interpreting their own jurisdiction. Any egregious error in that regard can be sanctioned through the vehicle of public policy at the time of an application for enforcement. The interposition of arguments relating to Act of State is unnecessary and merely confusing.

It was clear in the instant case that Libya and LIAMCO had agreed in the concession contract to resolve major disputes by resorting to arbitration. Once the award was rendered, there was no question of a court in the United States having to

evaluate the legality of the Libyan nationalisation decrees. That issue had been settled by arbitration -- the means of dispute resolution chosen expressly by the parties to the underlying contract. In performing the function of recognition and enforcement, a court "does not adjudicate the validity of the foreign governmental act."[196] Moreover, there was no peculiarity in the Libya-LIAMCO concession agreement that made disputes arising under that contract inherently incapable of settlement by arbitration as the process is conceived in U.S. law. If the parties have agreed to arbitration, that agreement can be acted upon and a resulting award should be enforced. That simple statement reflects the spirit of the New York Convention, a spirit founded upon the governing principle of "repose". The decision of the Federal District Court in the LIAMCO case ignored that spirit by patently misapplying art. V(2)(a) and by refusing to enforce a binding arbitral award. The decision was, quite simply, wrong, and it is for this reason a pity that a settlement was reached before a Federal Circuit Court of Appeal could correct the error of the trial court.[197] It should be pointed out, however, that the decision of the Federal District Court was vacated at the request of the United

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196. Pavlis, supra, note 32, 81.

197. The United States Government was plainly convinced that the District Court judgment had offended the letter and spirit of the New York Convention. See the Brief for the United States as Amicus Curiae, supra, note 163, which was submitted in the abortive appellate proceedings in the LIAMCO case.

States Government, so the decision retains no authoritative value.[198]

Further consolation may be found in the fact that the LIAMCO case stands very much in isolation and, as Professor Bowett has observed,

> [o]ne can see that courts will be reluctant to accept this plea of act of State as a bar to enforcement of an arbitral award. For, if immunity has been waived by the agreement to arbitrate, to allow a State to avoid execution of the arbitral award by relying on the act of State doctrine is, in a sense, to rely on the same 'sovereignty' to escape from the arbitral award.[199]

If a state submits voluntarily to arbitration in a consensual arrangement with a foreign private party, there is no rule of international law or, generally, of domestic legal systems, which would require courts to deny their in personam enforcement jurisdiction under the doctrine of sovereign immunity or their subject-matter jurisdiction under the Act of State Doctrine. No public policy of the forum or inherent incapacity should cause national courts to invoke either doctrine to preclude enforcement of a non-domestic arbitral award under the New York Convention.

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198. Vacated without opinion at 684 F. 2d 1032 (D.C. C.A. 1981) (U.S.A.).

199. Bowett, supra, note 169, 221.

D. Remedies Available to International Arbitral Tribunals

From the foregoing review of the legal regime established by the New York Convention, it emerges that arbitral awards rendered under a "delocalised" procedure are fully capable of enforcement. No specific provision of, nor general policy enunciated expressly in, the Convention signals its non-applicability to delocalised awards. But an enquiry concerning recognition and enforcement of arbitral awards would be peremptory if it were to end with that straightforward conclusion, for parties to arbitrations resulting from state contracts may not wish to rely solely on the enforcement possibilities presented by the 1958 Convention. Parties may seek to design institutional methods by which awards can be enforced without regard to any state legal system. Such methods will be discussed in the next Chapter. Even if enforcement in a national jurisdiction is ultimately required, however, it is important to examine the issue of enforcement from a broader perspective, by investigating the remedies that may be ordered by arbitral tribunals. These remedies are collectively what is sought to be enforced. To discuss the mechanism of enforcement without reference to content would present a clouded picture, especially in light of the fact that the autonomy of arbitral tribunals is recognised increasingly by national courts, meaning that arbitral remedies are often exclusive of any other form of relief.

It is surprising how little attention has been paid by academic commentators to the issue of arbitral remedies. In one

of the very few recent studies of the subject, the author undertook her project by asking the disarming question, "Is There An International Law of Remedies?"[200] Her response was negative. In his leading textbook on international law, Professor Brownlie devotes seven-and-a-half pages to the topic of "reparation" and this is discussed solely within the framework of "state responsibility", with primary emphasis placed upon compensation for "wrongs" committed by states. In his separate discussion of "Injury to Persons and Property of Aliens", Brownlie's treatment of compensation is focussed almost entirely upon the general question whether or not international law provides for a "national" or "international minimum" standard of compensation. No discussion of the appropriateness of particular arbitral remedies is undertaken.[201] Professor O'Connell's textbook[202] contains an entire chapter on contracts and state responsibility, emphasising problems involving contracts between states and foreign private parties, but even here the discussion of remedies is ancillary, serious consideration being given only to the question of international law guarantees concerning specific performance versus damages in the case of contractual breach.[203]

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200. Gray, Is There An International Law of Remedies? (1986) 56 Brit. Y.B. Int'l L. (forthcoming).

201. I. Brownlie, Principles of Public International Law, 3d ed. (1979) 457-64, and 518 et seq.

202. D. O'Connell, International Law (1970) 976.

203. Ibid., 997.

In neither work is attention paid to the measure of damages or to other significant issues in remedies, such as possibilities for granting provisional relief. Whether or not it is appropriate for international arbitral tribunals to apply remedial standards which have evolved in the municipal law context is a question which is not even broached. Indeed, Brownlie states quite categorically that "[i]n the ordinary type of claim the object is similar to that of an action in the municipal sphere."[204] One may well ask if that evaluation is correct in the context of arbitrations arising out of state contracts.

Most of the major state contract arbitrations in recent years have resulted from fact patterns involving "nationalisation" of foreign-owned business enterprises, and although arbitrations resulting from other types of fact patterns can easily be imagined, the "nationalisation" setting provides the most common state-private party arbitral experience to date. Such nationalisations may not be equated with mere breach of contract but are better analysed as a massive repudiation of an entire legal and socio-political relationship. If it becomes necessary for a state to espouse the claim of its national, the violation of state contracts by the respondent government would be treated in international law not as a contractual breach, but as a refusal to accord appropriate protection to foreign nationals, a tortious or delictual act. Liability would then be

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204. Brownlie, supra, note 201, 458.

evaluated on the basis of such an "international wrong" which might require the incorporation of contractual and delictual principles of damage assessment.[205] Clearly, in the international context, it is not possible to establish a rigid dichotomy between a contractual breach and a tortious or delictual act. The first tends to run into the latter, a fact which makes it very difficult to apply municipal law principles to international cases. It may be best to view international remedies as a unified field, without explicit subdivisions. A party whose undertaking has been nationalised, for example, will seek compensation for contractual breach, for the loss of real and personal property, and possibly for damage suffered because of the wrongful acts of the expropriating state. It is probably impossible to establish distinct heads of damages with any coherence.

Moreover, when a breach of a state contract is alleged, the resulting claims may contain a large "political" component. From the perspective of the foreign corporation which has seen its real and personal (immovable and movable) property "patriated" by the host state, and has seen its contractual rights devastated, a claim may have a double purpose. Obviously, there is a desire for economic compensation, but there may also be an attempt to ensure that an award is so favourable as to encourage voluntary compliance or negotiated settlement. A

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205. See M. Whiteman, Damages in International Law (1936), Vol. III, 1579.

strongly-worded award which aligns the equities with the foreign corporation may also be used as a lever by the corporation to encourage its own national government to espouse a claim if compliance is refused. The state which nationalises foreign-owned industrial property is also likely to invest an arbitration with an important political function. Nationalisation is a political as well as an economic act which may be undertaken at least partly in an effort to advance an internal political agenda or even for reasons of national pride and prestige.[206] It may be felt that the very possibility of national survival is at stake:

> An example is Cuba, which has $1.8 billion in claims pending before the settlement commission. This is well beyond any capacity to pay. Its perception was that it needed to transform the country by eliminating foreign ownership. If this had been perceived in terms of paying $1.8 billion there would have been no nationalizations. In their view, it was a choice between nationalization

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206. See, e.g., the collection of Documents and Legislation Concerning Expropriation of La Brea and Parinas Oilfields in Peru (1922-68), reprinted in (1968) 7 I.L.M. 1202. One can sense the enormous political impact of nationalisation and its emotional power in the following words of Dr Allende, then President of Chile:

> It is easy to pronounce the word 'nationalization', and it might be a good banner for political agitation. But to carry out a policy of nationalization of natural resources requires an attitude by the nation of continued determination, a high level of performance and intelligence. Economic independence, as well as political independence, is not gained through mere words, but by work and effort, and excelling at all levels.

Chile. President Allende's Statement on Negotiations for Government Acquisition of Anaconda Co. Properties (26 June 1969), reprinted in (1969) 8 I.L.M. 1073, 1077.

> without compensation, or starvation. They chose to nationalize, which was an entirely rational and necessary act from Cuba's perspective. American investors had been there since 1900 earning great profits which had long since been removed from the island. Foreign investors, now as in 1900, have to take their chances.[207]

The nationalising state will seek an independent benediction for its policy, or it may refuse to participate in an arbitration, believing that its sovereignty is under threat. An arbitral tribunal, in deciding upon remedies, may find itself balancing its concept of justice against harsh external realities.[208] Needless to say, these considerations will not operate in the typical action "in the municipal sphere".

To determine the remedies that are available to any given arbitral tribunal, one must look both to the rules (be they municipal, institutional or ad hoc) under which the tribunal operates and to any specific arrangement of the parties submitting the dispute to the jurisdiction of the arbitral tribu-

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207. Rabinowitz, Remarks, (1983) 77 Proc. Am. Soc. Int'l L. 343.

208. For an example of what may happen when an arbitral tribunal ignores the political realities that confront it, an example drawn admittedly from a state-state arbitration, see the Beagle Channel Arbitration (Argentina v. Chile), reprinted in (1978) 17 I.L.M. 632, 738 and 1198. The award in that arbitration was simply ignored by the dissatisfied party and no successful resolution of the territorial dispute was achieved until early in 1985, after a new effort at negotiations employing the good offices of the Pope.

nal.[209] If the potential remedies are not listed or in any way limited by express agreement, the arbitral tribunal will have to choose the remedies that it feels are available and appropriate.[210]

The major institutional systems of arbitral rules do not circumscribe the remedies available to tribunals set up under their auspices. Indeed, in none of the most important systems of rules is any listing of potential remedies undertaken. Remedies are regulated only obliquely, by reference to the clause prescribing the substantive law to govern disputes. In the Rules of the International Chamber of Commerce, the parties are left free to determine the substantive law "to be applied by the arbitrator to the merits of the dispute", but in the absence of any indication of choice, the arbitrator retains the power to designate the proper law "by the rule of conflict which he deems appropriate."[211] Remedies will thus be determined by the substantive law chosen by the parties or the arbitrator. The

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209. In Ad hoc arrangements, there may be only one source of remedial power -- the agreement of the parties which both creates the tribunal and sets the matters in dispute before it.

210. These remedies may be found in municipal law, international law, or in general principles of law depending upon the approach taken by the tribunal to the issue what substantive law governs the contractual relationship between the parties. See supra, Chapter II.

211. International Chamber of Commerce, Rules of Conciliation and Arbitration, reprinted in (1976) 1 Y.B. Comm. Arb. 157, art. 13(3).

UNCITRAL Rules of Arbitration are to the same effect,[212] as are the rules of the Inter-American Arbitration Commission[213] and of the International Arbitration Centre of the London Court of Arbitration,[214] both of which are modelled upon the UNCITRAL system. The set of arbitral rules promulgated by the Eastern European CMEA countries also contains no express limitation upon the remedies available to arbitral tribunals.[215]

No matter what substantive law is held to apply to a particular arbitration, whether institutional or ad hoc, Greig is certainly correct in stating that "[i]n most cases heard before international tribunals the appropriate remedy is an award of damages."[216] Although, in theory, restitutio in integram is the primary international remedy to compensate for

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212. UNCITRAL, Arbitration Rules, reprinted in (1977) 2 Y.B. Comm. Arb. 161, art. 33.1.

213. Inter-American Commercial Arbitration Commission, Rules of Procedure, reprinted in (1978) 3 Y.B. Comm. Arb. 231, art. 33.1.

214. London Court of Arbitration, International Arbitration Centre, International Arbitration Rules (1982) 7 Y.B. Comm. Arb. 223, art. 13.

215. CMEA, Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce, reprinted in (1976) 1 Y.B. Comm. Arb. 147.

216. D.W. Greig, International Law, 2d ed. (1976) 596. Greig, in referring to "international tribunals", was of course contemplating the traditional tribunal adjudicating state or state-espoused claims, but the basic point applies equally to contemporary arbitrations between states and foreign private parties.

the commission of an illegal act,[217] in the transnational context, such a remedy will often be inappropriate or illusory. Moreover, even traditional international law did not view specific performance as the appropriate means to provide restitution in cases of lawful expropriation.[218]

Because of the important political element in many arbitrations involving states and foreign private parties, it is not at all likely that an arbitral tribunal will seek to order any remedy which might impinge upon the sovereign power of a state to regulate and control its own territory and natural resources.[219] For example, in a dispute involving an oil concession, despite the views of Prof. Dupuy expressed in the TOPCO arbitration,[220] it is highly inappropriate for an arbitral

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217. See, e.g., Case Concerning the Factory at Chorzow (Indemnity Merits) P.C.I.J., Ser. A., No. 13 (1928) 47.

218. Ibid.

219. This sovereign power has been clarified and forcefully re-asserted in recent years. See, e.g., Declaration on Permanent Sovereignty Over Natural Resources, UNGA Res. 1803, 17 UNGAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962); Declaration on the Establishment of a New International Economic Order, UNGA Res. 3201, 6 (Special) UNGAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974); Charter of Economic Rights and Duties of States, UNGA Res. 3281, 29 UNGAOR, Supp. (No. 29) (1974); and Aréchaga, State Responsibility for the Nationalization of Foreign Owned Property (1978) 11 N.Y.U.J. Int'l L. & Pol. 179.

220. Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 19 January 1977, reprinted in 53 I.L.R. 389, 422 (1979) at 511.

tribunal to order specific performance.[221] Money damages are a far less politically sensitive remedy.

In awards rendered against a state it would appear that the preferred method of compensation is monetary damages. This approach accords with the position of the common law which prefers the awarding of money damages to orders for specific performance because "enforced performance may be thought to impose strains on the machinery of law enforcement which are too severe when balanced against the benefit derived by the creditor from enforced performance."[222] A fortiori is this the case in international law where enforcing specific performance against a state would cause enormous strains upon the limited enforcement mechanisms available to the international community. It is, of course, entirely possible for an arbitral tribunal to order specific performance against a foreign private party, for in such a case the political and enforcement difficulties would not be as serious. Specific performance could be a viable remedial

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221. See, e.g., Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 1, 66-7; and B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic (Merits), decision of 10 October 1973 and 1 August 1974, reprinted in 53 I.L.R. 297 (1979) 351-3.

222. Treitel, "Remedies for Breach of Contract" in International Association of Legal Science, International Encyclopedia of Comparative Law (1976) 8.

option.[223]

Two important points must now be made more explicit: Although damages awarded at the end of an arbitration are the most common remedy ordered by tribunals adjudicating state contracts, they should not be viewed narrowly, nor should they be perceived as the sole available remedy. The first point is semantic and reveals again the complicated inter-relationship between contract and delict that exists in the international legal system. The word "damages" need not be limited to the payment of money which is ordered by a tribunal after the breach of a contractual undertaking. Many commentators, including Greig in the passage cited above, would include in the notion of damages the payment of money ordered by a tribunal to remedy a seizure of property or other interferences with proprietary rights. In this context, the word "damages" could be replaced by the more general term "compensation" and it is in this sense that the word is used here.

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223. Once again, the tone of this discussion reveals the essential inequality of state-foreign private party arbitral proceedings. Most of the important political advantages are possessed by only one party -- the state -- and this may cause an imbalance in remedial options available to an arbitral tribunal. This is not to say that the state is always in a stronger position. As was emphasised in the discussion of "delocalised" awards contained in the previous Chapter, a major multinational corporation may be in a much stronger position during contractual negotiations when compared with a small, developing state. The state's advantage may only come into play after a dispute has arisen and an arbitral tribunal is attempting to fashion an award that will encourage enforcement. This advantage may be seen as a simple <u>quid pro quo</u> for the earlier advantage of the foreign corporation.

The second point is emphasised by Van den Berg who notes that although money damages are the most common arbitral remedy, it always remains possible, even under the existing enforcement regime of the New York Convention, to enforce awards containing injunctions or ordering specific performance.[224] Even purely declaratory awards may be recognised.[225] This ability to fashion relief to suit the exigencies of a particular case is a characteristic also of domestic arbitrations.[226] It is this flexibility which is one of the major attractions of arbitration, although it must be reiterated that remedies are limited to those available under the applicable substantive law unless the tribunal has been granted specific remedial powers or broad powers to act as amiable compositeur.[227] If the applicable

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224. Van den Berg, supra, note 91, 342.

225. Ibid. It is here that one may find one of the two relevant distinctions between "recognition" and "enforcement" under the New York Convention. Because a declaratory order in the commercial context merely establishes or confirms rights between the parties and does not order any act or prescribe any action, it cannot be "enforced" in any usual sense of that word. See also the comments supra, note 7. The other distinction may arise in the context of a state's plea of immunity from execution. If such a plea is accepted, an award could be "recognised" without being enforced.

226. See, e.g., Meyerowitz, The Arbitration Alternative (1985) 71 A.B.A. J. 78 (February) 80.

227. The major sets of rules which may be chosen to govern an international arbitration all provide that arbitrators are to be governed strictly by the applicable substantive law unless the parties have agreed expressly that the arbitrators are to act as amiables compositeurs. See, e.g., the UNCITRAL Rules, supra, note 212, art. 33.2; and the ICC (cont'd.)

substantive law is international law, Greig suggests that specific performance is unlikely to be available,[228] primarily because of the enforcement difficulties alluded to above. In any case, it is highly doubtful that international law can be the appropriate governing law for state contracts or resulting arbitrations.[229] Specific performance might well be available under other potentially applicable legal systems although political practicalities may prevent its application. Moreover, if it is accepted that there is now a right to nationalise foreign-owned property, specific performance could never be an appropriate remedy in such cases of lawful nationalisation.

Let it be assumed, then, that money damages are the preferred arbitral remedy. That straightforward evaluation does not carry the discussion very far, for as long ago as 1936 Marjorie Whiteman noted the "extreme dearth of collated material on the subject of the methods and theories of measuring damages in international cases."[230] Few advances have occurred since

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Rules, supra, note 211, art. 13(3). Note, however, that certain sets of arbitral rules also provide that the tribunal may take into consideration "usages of the trade applicable to the transaction" in deciding upon the merits of the case. See art. 33.3 of the UNCITRAL Rules and the same article in the Rules of the Inter-American Commercial Arbitration Commission, supra, note 213. Might such usages affect appropriate remedies? On principle, it would be difficult to argue that they cannot do so.

228. Greig, supra, note 216, 606.

229. See supra, Chapter II, text accompanying notes 201 to 263.

230. Whiteman, supra, note 205, Vol. I, V.

she wrote those words. Indeed, the basic question still remains whether or not the measure of damages can be based upon existing principles of international law. In a recent study, Christine Gray noted that any attempt to articulate coherent principles of damage assessment in international law is hampered by "a remarkable collection of conflicting [judicial] decisions". Even the major arbitration awards in the oil concession cases of recent years have reflected completely contradictory approaches. She concluded that "it may not even be possible for tribunals to evolve a set of general rules" of damage assessment.[231] Gray specifically rejected the possibility of resorting to general principles derived from municipal systems of law because such principles would have to be so general "as to be no guide at all". Despite that warning, there is one great advantage in examining principles derived from the municipal context. Certain municipal systems of law have evolved highly sophisticated theories of damage assessment. Because the international system is so bereft of sophistication, an analysis of municipal theories may be necessary to point the problems and to reveal the important questions. Such a study may not lead to the articulation of "general principles", but fresh insights are needed and an analysis of municipal systems of damages may be one means of reviving a moribund branch of international law. An important caveat must be reiterated. Although municipal systems of law commonly differentiate quite clearly between the

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231. Gray, supra, note 200.

interests protected by damage assessment principles applicable in cases of contract and in tort or delict, it is not possible to categorise so neatly in international cases. In the following discussion, some overlap between normally distinct principles is inevitable.

Damage assessment is an immensely complex topic which is analysed differently in various national legal systems. One can only agree with the English jurist who noted, with significant understatement, that "the assessment of damages is not an exact science".[232] For the purposes of this necessarily limited discussion, primary emphasis will be accorded to the English system of contractual damages, although some reference will be made to Continental systems as well. The English system is, of course, a well articulated system which has been replicated, with modifications, throughout the common law world, but it is chosen primarily as a convenient paradigm to reveal difficulties that may arise if principles of domestic law are adopted wholesale in a transnational context. The difficulties are highlighted when one attempts to apply principles of a Western legal system to disputes involving non-Western states that may neither share, nor even respect, the values inherent in the Western legal tradition.

The cardinal principle governing the awarding of contractual damages in England is that the purpose of such damages is solely to compensate a plaintiff for loss occasioned by the

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232. Quoted in Treitel, supra, note 222, 73.

defendant;[233] the plaintiff should not be enriched by a recovery which accords him more than he has lost.[234] This principle would appear to be largely unobjectionable in the international context as well.[235] To say, however, that compensation is the key concept in damage assessment does not advance the argument very far. As Fuller and Perdue demonstrated in their seminal article,[236] it is necessary to establish the specific purposes that are to be served by an award of compensation. For example, in the English law of torts, the principle has been that the injured party should be put back, as far as possible, in the state that existed before the tortious act occurred. In addition, tortious damages have been used to punish wrongdoers to discourage tortious conduct. The purposes served by contractual damages are conceived to be different. Although it will be stressed that different classes of interests may be protected by contractual damage awards, their dominant purpose is usually described as the protection of the "expectation interest".[237] The "expectation interest" is the benefit that

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233. See, e.g., G. Treitel, An Outline of the Law of Contract, 3d ed. (1984) 305; and A. Ogus, The Law of Damages (1973) 18. See generally, H. McGregor, McGregor on Damages, 14th ed. (1980).

234. See, Treitel, supra, note 222, 25.

235. See, e.g., Greig, supra, note 216, 599, 600.

236. Fuller & Perdue, The Reliance Interest in Contract Damages (1936-7) 46 Yale L.J. 52 and 373.

237. Ibid., 58-9.

the plaintiff may reasonably have expected to gain had the contractual bargain been performed.

Even if one were to accept the expectation interest as the only possible measure of contractual damages, it is apparent that in complex international cases involving, for example, the nationalisation of property, it may be necessary to integrate both tortious and contractual principles of compensation. A case in point is the issue of punitive damages.

In a domestic contractual case, it has not been usual to impose punitive damages for, unlike in tort, damages awarded in contract are not designed to encourage good social conduct in the future, but only to compensate for the loss of benefits from a bargained-for agreement.[238] In contractual claims involving an international element, the principle against punitive damages must be modified somewhat. In an arbitration arising from the breach of a state contract, there would appear to be no reason to award punitive damages. Compensation is the key concept, not punishment. There can be no "punishment" for a nationalisation which is entirely lawful under international law. The nationalised party is simply entitled to fair compensation. However, if an arbitral award runs against the state party and the state refuses to comply, the claim may then be espoused by the national state of the private party. The claim is transformed into an international claim on the plane of full-scale state

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238. Treitel, supra, note 233, 307.

responsibility.[239] It has become, as noted above, an "international wrong" often termed the "denial of justice", and punitive damages may be claimed by the espousing state.[240] Miss Whiteman's assessment remains largely accurate, however, in that "[t]here is an apparent desire on the part of international tribunals to avoid punitive or exemplary damages."[241] The reason for that reticence may be the desire to avoid offending

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239. The process of transformation of a contractual claim from an essentially private claim into a public claim between states is described fully in the Case Concerning the Factory at Chorzow (Indemnity Merits), supra, note 217; and in the important series of Hague Lectures delivered by the ex-President of the International Court of Justice, Jiminez de Aréchaga, International Law in the Past Third of a Century (1978) 159 Rec. des cours 1, especially at 267. The traditional practice of certain major Western states (especially the U.S.A. and the U.K.) had been that the state would not easily be convinced to espouse a claim of its national arising out of a contractual breach by another state. The justifications for this position were well articulated by Professor Borchard: (a) that the citizen entering into a contract does so voluntarily and assumes certain risks; (b) that by going abroad, a citizen subjects himself to local law and to the local judiciary; and (c) that "every civilized state may be sued for breach of contract." E. Borchard, The Diplomatic Protection of Citizens Abroad or The Law of International Claims (1915) 281-5. However, Borchard notes, at 293, that when the private party was faced with a massive repudiation of the contract, his national state was more likely to step in to espouse the claim, especially if local judicial remedies were denied. In almost all cases where an international claims commission was established, they were granted jurisdiction over contractual claims. See Borchard at 296; and Whiteman, supra, note 205, Vol. III, 1558.

240. Greig, supra, note 216, 598. See generally, Mann, State Contracts and International Arbitration (1967) 42 Brit. Y.B. Int'l L. 1, especially at 37.

241. Whiteman, supra, note 205, Vol. III, 1874.

the sensibilities of a state and to prevent any concomitant enforcement difficulties.

In addition to the difficulties that may arise when contractual and tortious standards of damage assessment are combined, one may confront problems caused by the differing interests that may need protection even in a purely contractual context. It has already been established that in the English private law of damages, the so-called "expectation interest" has been the dominant justification for compensation. In England, "[i]n actions for breach of contract, the prima facie object [of damages] is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed."[242] In determining the loss for which he may be compensated, the plaintiff's "overall position in consequence of the breach" must be evaluated[243] and compared to the position that the plaintiff would have occupied if the contract had been performed. The breach must be placed within the surrounding commercial context. The justification for the adoption of this contextual approach is that a court will not wish to award damages which would in fact place the plaintiff in a better position than if the defendant had performed the contract.[244] For example, in a contract for the sale and purchase of a commodity, with the

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242. Ogus, supra, note 233, 18.

243. Treitel, supra, note 233, 307.

244. Ibid.

price to be determined by the market at a set time, if the market is falling when the breach occurs, damages should be assessed on the basis of the falling market.[245] The law seeks to protect the expectations of the parties to a contract,[246] but only the realistic and objectively evaluated expectations. The ideal means of protecting the expectation is, of course, to order specific performance of a contract, for then the expectations will be met without having to engage in any approximations. If specific performance is not possible, the loss of future profits may be compensated as an element of the expectation interest, subject to the rule preventing recovery of damages that are too remote.[247] The troubling issues that arise in the context of awards for lost future profit will be examined shortly.

The "expectation interest" is not the only available measure of damages in contractual actions in England, or, for that matter, in the rest of the common law world. Two other distinct interests have been identified as possible sources of justification for the awarding of contractual damages. If a plaintiff has been induced by the defendant's promise to confer some benefit upon the defendant and he has subsequently failed

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245. Sale of Goods Act 1979, 1979 (U.K.) c. 54, s. 51.

246. Treitel, supra, note 222, 27-8.

247. See Hadley v. Baxendale (1854) 9 Exch. 341 (U.K.); and The Heron II sub nom. Koufos v. C. Czarnikow Ltd [1969] 1 A.C. 350 (H.L.) (U.K.)

to perform his promise, the defendant may be forced to return, as damages, the benefit he received. Such an award is said to protect the "restitutionary interest".[248] Of greater present relevance is the so-called "reliance interest" which would justify an award of contractual damages whenever a plaintiff has been harmed because of his reliance on the unperformed promise of the defendant.[249] This reliance may include actual expenditures or foregone opportunities. Neither of these measures of damage has challenged the place accorded to the protection of the "expectation interest" in English law. In particular, damages based upon the "reliance interest" are commonly said to be inadequate.

An approach to damages under which compensation is based upon contractual expectations (as if the contract had been performed) does not fit neatly with the reality of contemporary state contracts for a number of reasons. First, although the original transaction may indeed be a contract, it is often an agreement which provides for rights which tend to change and develop independently of the founding contract. For example, in the Aminoil arbitration, the arbitrators made much of the fact

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248. See Fuller & Perdue, supra, note 236, 53-4. The restitutionary interest may be particularly relevant in cases involving intangible loss. See e.g., Dawson, General Damages in Contract for Non-Pecuniary Loss (1983) 16 N.Z.U.L. Rev. 232; and Bridge, Contractual Damages for Intangible Loss: A Comparative Analysis (1984) 62 Can. Bar Rev. 323.

249. See Fuller & Perdue, ibid., passim; and Treitel, supra, note 222, 28.

that since the conclusion of the underlying contract, the parties had altered the entire structure of revenue distribution from the concession even though the express terms of the contract had not been amended.[250] What are the legitimate expectations in such a situation?

Another concrete example will be helpful in highlighting the point. In the arbitration between the British Petroleum Company and the State of Libya which resulted from the Libyan nationalisation of B.P.'s oil concession, the British company claimed not only that the Libyan government was guilty of a breach of contract but also that B.P. enjoyed full property rights in the installations it built in Libya and in its share of the crude oil extracted from the concession area.[251] The measure of damages for the latter part of the claim could not be based upon future expectations but upon restoration of the status quo ante, the measure of damages commonly applied in tort or delict. One would then have to establish the value of the tangible assets at the time of indemnification[252] as well as

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250. The Government of the State of Kuwait v. The American Independent Oil Co. [Aminoil], Final Award of 24 March 1982, reprinted in (1982) 21 I.L.M. 976. See especially the Tribunal's discussion of the "Abu Dhabi Formula".

251. B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic (Merits), decision of 10 October 1973 and 1 August 1974, reprinted in (1979) 53 I.L.R. 297, declarations no. 1 and no. 5.

252. Case Concerning the Factory at Chorzow (Indemnity Merits), supra, note 217, 47-8.

property rights.[253] Such a claim mixes contractual damage principles based upon an "expectation interest" with principles of compensation that would seek to measure damage solely at the time of indemnification. Factoring out the applicable measure would be most difficult in a complex economic relationship.

Furthermore, even if one ignores the dual nature of many claims arising from the breach of state contracts, and focusses upon the purely contractual aspect, complications exist which make the atavistic reliance upon municipal law measures of damage unwise, particularly when they are based upon the expectation interest. For example, in England, compensation for loss of the "expectation interest" in a breached contract often involves the award of damages for "loss of profits".[254] The only significant limitation is that no damages will be awarded for loss of profits that are speculative.[255] Given the uncertainty of the international political situation and the volatility of international markets, a reasonable argument can be made that international profits are almost always speculative. Even as concerns municipal law, Fuller and Purdue argued cogently that the expectation interest could not be a basis for recovery

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253. See Greig, supra, note 216, 599.

254. See, e.g., Treitel, supra, note 233, 317.

255. McRae v. Commonwealth Disposal Commission (1950) 84 C.L.R. 337, 411 (High Court) (Australia). See also Treitel, ibid., 311.

when that interest was too "uncertain".[256] Perhaps in the international milieu, where profits are almost inherently uncertain, the reliance interest should be the prima facie starting point for the measure of damages. Another justification for that view may be gleaned from Fuller and Purdue. They demonstrated that damages based upon the expectation interest were typically refused in municipal law when to award them would place too heavy a burden upon the defendant.[257] When a developing state nationalises a large industry, to award the foreign claimant a huge amount of money for the loss of future profits would undoubtedly constitute an oppressive burden for the defendant state.

A yet more fundamental challenge may be made to the appropriateness of the expectation interest as a justification for contractual damages in international cases. When adjudicating contractual agreements involving non-Western state parties, arbitral tribunals may be confronted with deep resentment if they seek to award damages against the state based upon corporate loss of profits. An attorney in the U.S. State Department has emphasised that all "legal issues regarding investment have a political or economic component."[258] Nowhere is that component more apparent than in the issue of compensation for lost profits. Following Fuller and Purdue, Ogus has framed

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256. Fuller & Perdue, supra, note 236, 373.

257. Fuller & Perdue, ibid., 377.

258. Hackney, Remarks, (1983) 77 Proc. Am. Soc. Int'l L. 296.

the problem neatly:

> The question may legitimately be posed why in a contractual action the law is prepared to adopt a measure which seeks to do more than merely to restore the plaintiff to the status quo ante as in tort. The answer lies deeply rooted in the economic foundations of the law of contract in Western capitalist societies. Enforcement of the expectation interest, it has been said, stimulates economic activity, facilitates reliance on business agreements and protects the 'credit system'. Indeed, in societies which do not share the same economic philosophies it is by no means obvious that recovery of lost anticipated profits is always to be tolerated.[259]

Again, political reality may require that an arbitral award seeking to compensate for breach of a state contract should not be couched in terms of compensation for the loss of profits. If it is, resistance to enforcement may be exacerbated. The expectation principle may simply be unworkable in international cases.

Government resistance to the unmodified application of principles allowing for compensation based upon the expectation interest is not limited to regimes in the developing world. A valuable source of analogies may be found in the law of a number of developed states governing issues of breach and compensation in public (administrative) contracts. In most Western legal systems at least, limited distinctions are drawn between purely private contracts and contracts which are public in nature. The rationale behind such distinctions has been well articulated by Turpin:

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259. Ogus, supra, note 233, 285.

> Even in its contractual relations an administrative authority retains its governmental character and its responsibility to safeguard the public interest. Considerations of public policy, which have to be accommodated by special rules, are as much applicable to the contractual as to other activities of governmental bodies.[260]

It is this duty to protect the public interest -- and not the notion of sovereignty or of state prerogative --[261] that differentiates private and administrative contracts. A private contractor who contracts with the government therefor "becomes, indirectly, a participant in the performance of some public service."[262]

Because of the public authority's duty to guard the public interest, most Western legal systems accord to the government party to an administrative contract more or less circumscribed special prerogatives. Even in common law countries, where the prerogatives are most limited "[i]t is impossible to maintain that the government contract is exactly the same as the private contract ... whilst at the same time admitting that the presence of extraneous discretionary powers may override established rules of the common law contract."[263] Discretionary powers

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260. Turpin, "Public Contracts" in International Association of Legal Science, International Encyclopedia of Comparative Law (n.d.) 27. See also Mewett, The Theory of Government Contracts (1959) 5 McGill L.J. 222, 223.

261. Pace Tschanz, Contrats d'État et mesures unilatérales de l'État devant l'arbitre international (1985) 74 rev. crit. dr. int'l privé 47, 80.

262. Mewett, supra, note 260, 224. See also A. de Laubadère, F. Moderne & P. Delvolvé, Traite des Contrats Administratifs (1983), tome 1, 699.

263. Mewett, ibid., 240.

commonly vested in public authorities include (a) the ability to vary contractual terms unilaterally; (b) the power unilaterally to terminate the contract; and (c) the right independently to impose sanctions against the private contractor.[264] The power of unilateral termination is recognised as inherent in French public authorities, and whilst not thought to be inherent in the U.K. or the U.S.A., is included in most standard form government contracts.[265] Though not all government contracts are public or administrative, usually the governmental authority possesses the sole power to determine when a given contract relates to the functioning of the public service and hence is governed by public policy imperatives.[266] In France, the dominant test appears to be whether or not the contract contains clauses that are exorbitantes du droit commun.[267] Thus, in France as in Spain,[268] it is the essential inequality of the parties, revealed in the clauses of the contract itself, that indicates whether or not a contract is truly public.

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264. See, e.g., Turpin, supra, note 260, 37. See also Tschanz, supra, note 261, 78.

265. See Turpin, ibid., 41.

266. See, e.g., Mewett, supra, note 260, 226; and M.-A. Flamme, Traite Théorique et Pratique des Marchés Publics (1969) 36.

267. H. Street, Government Liability: A Comparative Study (1975) 83.

268. See Flamme, supra, note 266, 89; and Turpin, supra, note 260, 28.

A determination that a contract is "public" can have profound implications for the issue of contractual remedies. For example, it is commonly the case that when a government breaches a public contract, the remedy of specific performance will not be available to the aggrieved party.[269] No doubt this derogation from general principles, especially notable in civilian systems of law where exécution en nature is a basic contract remedy, is founded upon the notion of public policy. If a public authority has the right unilaterally to alter or to terminate a contract, then the remedy of specific performance is entirely inappropriate. An interesting parallel may be drawn here with emerging trends in the international law governing expropriations of foreign-owned property. Because it is now widely accepted that states can lawfully nationalise such property,[270] the remedy of exécution en nature can have no application as an order against a breaching state.

Although specific performance is usually not available against a public authority that breaches a contract, some compensation will normally be exigible. The most clearly articulated theoretical underpinning for such compensation,

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269. See, e.g., Street, supra, note 267, 104; and Turpin, ibid., 32.

270. See, e.g., Aréchaga, supra, note 230, 297-9. See also United Nations, Draft Code of Conduct on Transnational Corporations, U.N. Doc. E/1983/17/Rev. 1, Annex II, 12 (Off. Rec. ECOSOC, 1983, Supp. No. 7), reprinted in (1984) 23 I.L.M. 626, art. 54 which assumes the lawful nature of nationalisations.

normally assessed as liquidated damages, has been developed in the law of France. Doctrinal authors in the area of administrative contracts refer to the notion of the "équilibre financier du contrat".[271] Because of the public authority's right to alter or terminate a contract unilaterally, the private party is put at risk. One means of maintaining the essential equilibrium of a contract is to allow for the awarding of damages for breach. Although in the case law it is established that the équilibre financier is to be evaluated at the moment of contracting,[272] so that the main concern will be with the value of the consideration offered by the public authority, there is no reason why the ultimate availability of damages cannot be appreciated from the outset of the contractual relationship as an aspect of the contractual balance.

In France, a further component of the équilibre financier is the ability of private parties to recover both damnum emergens and lucrum cessans in their contractual damage claim against a public authority.[273] The awarding of lost future profits is by no means a universal feature of Western legal systems in their treatment of public contracts. In the United States, for example, lost profits are generally not recoverable

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271. See, e.g., de Laubadère, Traite de Droit Administratif, 8ème éd., (1980) 384; de Laubadère, Moderne & Delvolvé, supra, note 262, 717; and Flamme, supra, note 266, 55-6.

272. de Laubadère, Moderne & Delvolvé, ibid.

273. Ibid., 780. See also Flamme, supra, note 266, 55.

against a public authority which has breached a public contract.[274]

Finally, it must be emphasised that in most representative Western legal systems, the private party in a public contract may in certain circumstances find itself held accountable for excessive profits gained at the expense of the contracting government. English law provides the example of the Review Board for Government Contracts which possesses authority unilaterally to re-fix the profit rates negotiated in a public contract.[275] In French law, the public authority unilaterally can lower the profits available to its co-contractant under an administrative contract.[276]

This brief review of the law governing public contracts in various Western legal systems reveals a number of important points that may cast some light upon the issue of compensation for the breach of state contracts in the international context. First, and most important, is the realisation that even Western legal systems presumably supportive of liberal conceptions of "the market" and "bargain" do differentiate between private and

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274. See, e.g., Colonial Metals Co. v. United States, 494 F. 2d 1355 (Ct. Cl. 1974) (U.S.A.); and Kalver Corp. v. United States, 543 F. 2d 1298 (Ct. Cl. 1976) (U.S.A.), cited in Turpin, supra, note 260, 41.

275. H. Wade, Administrative Law, 5th ed. (1982) 679.

276. de Laubadère, supra, note 271, 381. See also Turpin, supra, note 260, 43-4 who suggests that in Western legal systems it is common to provide for the recovery by a public authority of excess profits gained by a private party in the performance of a public contract.

public contracts, the latter being weighted in favour of public authorities because of their duty to protect the public interest. Secondly, in the context of public contracts, the expectation interest is not always perceived to be the appropriate measure of compensation when directed against a public authority. Specifically, the private party can never assume that a court will order specific performance of its contract. Moreover, there is a significant difference in approach regarding the awarding of lost future profits against a government. In the United States, they are typically not awarded. Lastly, in major Western legal systems a private party may be called to account for excessive profits gained under a public contract. Clearly, when developing states that have breached state contracts object to the awarding of damages based purely upon the "expectation interest", their objections cannot be treated by any sensitive Western observer as "purely political". Western notions of public policy have been employed in the parallel context of public or administrative contracts to undercut many private law notions of fair bargain and appropriate compensation. Public policy, specifically the protection of the public interest, may have to be used to similar effect in the international community.

There are other, even more practical, challenges undercutting the all-too-easy assumption that in the transnational context compensation can be based upon a straightforward application of expectation interest analysis which would allow

for full compensation for the loss of future profits. More precisely, it can be argued that the measure of damages must be far more subtle than the expectation interest alone. When international or transnational lawyers attempt to borrow principles of law from municipal legal systems in order to fill in lacunae in the otherwise applicable international legal system, there is an unfortunate tendency to fasten on to the merely obvious, to cling to simple catch-phrases which tend to obscure the need for deeper analysis. Thus, an investigation of general principles of contract law will commonly lead to the ringing declaration that binding agreements must be performed or that parties must act in good faith. Recognition of first principles is, of course, important, but such principles can only serve as the touchstone for more subtle and specific investigations. Problems involved in a massive repudiation of a contractual concession will not be solved through the incantation of the formula "perform in good faith". So it is with the measure of contractual damages. It is often very difficult, for example, to evaluate the reasonable expectations of the parties, especially in the realm of future profits. In the words of one American economist:

> It is clearly impossible to know in any absolute sense the earning which an asset will yield in the future. Rather, all that can be ascertained is a subjective probability distribution of anticipated future earnings. This distribution, and thus the expected value of earnings, will differ from individual to individual and from firm to firm, and

> so the level of earnings which are [sic] to be discounted will again vary depending on the owner of the asset nationalized.[277]

Although recognising that, on occasion, international tribunals have awarded damages based upon lost future profits,[278] it remains true that such awards are often marked by obfuscatory reasoning[279] that has done little to clarify the underlying damage assessment principles. It is not too harsh to say, with respect, that most international tribunals appear not to have directed themselves to the specific issues, relying instead on bland assertions of "general" rules. Moreover, in most major arbitral decisions that have awarded compensation for loss of future profits, the persuasive value of the awards has been undercut by the fact that they have not been enforced.[280] In

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277. Mintz, "Economic Observations on Lump Sum Agreements" in R. Lillich & B. Weston, International Claims: Their Settlement By Lump-Sum Agreements (1975), Vol. 1, 264, 266-7.

278. See, e.g., The Government of the State of Kuwait v. The American Independent Oil Co. [AMINOIL], Final Award of 24 March 1982, reprinted in (1982) 21 I.L.M. 976; and Libyan American Oil Co. v. The Government of the Libyan Arab Repulbic (Merits), supra, note 221.

279. See, e.g., the LIAMCO decision of Dr Mahmassani, ibid., where the arbitrator relied upon the vague notion of "equitable compensation". And see the comments of Gann, Compensation Standard for Expropriation (1985) 23 Col. J. Trans. L. 615, 632; and Mendelson, What Price Expropriation? Compensation for Expropriation: The Case Law (1985) 79 Am. J. Int'l L. 414, 418.

280. See, e.g., Sapphire International Petroleums Ltd v. National Iranian Oil Co., 15 March 1963, reprinted in (1967) 35 I.L.R. 136; and LIAMCO, ibid. See also the Table in Greenwood, State Contracts in International Law - The Libyan Oil Arbitrations (1982) 53 Brit. Y.B. Int'l L. 27, 79.

addition, in each case the arbitral decision was rendered ex parte the state, so no contrary arguments were advanced. It should also be noted that in certain important awards, the arbitrators have adopted a completely contradictory position, holding that loss of future profits is not a valid head of damages in international law.[281] The justification for that approach has been simply that such damages are too uncertain.[282] Again, a lack of sophisticated analysis is apparent, although one is compelled to agree with the logic that in the international context, the evaluation of future profits is largely speculative. Western domestic markets are islands of stability when compared to the flux of international markets. One need only point to the vagaries of the crude oil market from 1970 to the present day to realise the enormous difficulty in evaluating the prospects for profits. Such uncertainty may be cause enough alone to recognise the need for stringent limits upon any claims for lost future profits on the international plane.

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281. See, e.g., the Alabama Claims Arbitration, reprinted in J. Moore, History and Digest of the International Arbitrations to Which the United States has been a Party (1898) 623, 646 and 658.

282. Ibid. And see Whiteman, supra, note 205, Vol. III, 1863. Even in the LIAMCO arbitration, where loss of future profits was recognised as a valid head of damages, the arbitrator, Dr Mahmassani, held that compensation could only be ordered for damages which were "certain and direct." LIAMCO, supra, note 221, 82. At the end of the day, he awarded a lump sum of $66,000,000 (U.S.), a figure which compensated for all heads of damage and which was vastly inferior to the claim for lost profit alone that had been asserted by LIAMCO.

The clearest example of problems faced in reasonable and fair damage assessment is to be found in arbitrations arising out of investment contracts between states and private parties. Let it be supposed that a foreign multinational corporation has invested large sums of money in a mineral extraction facility in State A and that the government of that state has nationalised, without discrimination, the entire mineral extraction sector of the economy. What, then, are the compensatory options available to the company? Of course, the corporation will invoke immediately any arbitration clause in the mining concession contract, but long before the resulting tribunal has rendered judgment the corporation will have, or should have, done everything possible to mitigate its damages.

There are a number of tools at its disposal. First, depending upon the intricacies of the tax laws of the corporation's national state, the corporation will seek to write-off its plant and equipment losses and probably its operating losses, thus reducing its tax burden and at least partially compensating for the losses caused by nationalisation.[283]

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283. In the United Kingdom, contractual damage assessment must typically take into consideration the tax burden of the plaintiff, reducing an award by the amount that would have been payable if the money had been taxable in his hands. See British Transport Commission v. Gourley [1956] A.C. 185 (H.L.) (U.K.). See generally McGregor, supra, note 233, 321; Ogus, supra, note 233, 107; and Treitel, supra, note 233, 318. This principle presumes, of course, that the damages awarded will not be taxable in the hands of the plaintiff, for otherwise a form of double taxation would result.

(cont'd.)

Secondly, the corporation will seek to divert capital investment that would have been required for its operations in State A to other profitable ventures, thereby profiting from the release of otherwise committed capital and ingenuity.[284] It would be patently unfair to award an investor damages for "loss of profits" if the underlying capital sum has in fact been freed and re-invested for profit elsewhere. Lastly, a corporation may have been able to insure itself against certain contingencies arising in the context of nationalisation. For example, most corporations will have arranged for Protection and Indemnity insurance[285] to cover the seizure and arrest of ocean-growing transport vessels. Even more important and inclusive are government-sponsored insurance schemes which indemnify investors against the risk of foreign expropriation. The United States

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The problem in the international context is that the corporation's tax benefit really means that it is transferring part of its loss to its national government. The interesting point arises whether or not the national state of the private party would be able to make an international claim against the expropriating state to recover the lost taxes.

284. A domestic parallel can be seen in damage principles governing building contracts where the owner prevents the builder from completing his work. The builder's costs, including lost payments for labour, must be reduced "if the defendant can show that the time made available to the plaintiff by the breach has been, or could have been, used by him in executing other profitable contracts with which he would not otherwise have been able to contend." McGregor, ibid., 601-2.

285. Such insurance is normally arranged through mutual societies, called P & I Clubs, on the London Market.

Overseas Private Investment Corporation Scheme is a good example.[286] All of these mitigating factors should be offset against any damages awarded for the loss of future profits, so that even on a purely legal basis divorced from political considerations, it would not be correct to argue that the expectation interest can operate to ensure "full" compensation for loss of profits.

The concept of mitigation is derived primarily from the common law tradition, but there exist analogous concepts in major civilian systems.[287] The mitigation principle has also been recognised and invoked as a general principle of law in international arbitral awards[288] and by expert commentators.[289]

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286. For an interesting discussion of O.P.I.C. practice, see the comments of an officer of the corporation in West, Remarks, (1983) 77 Proc. Am. Soc. Int'l L. 300.

287. See, e.g., Carbonneau, "The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1985) 104, 121-6.

288. See, e.g., Syrian State Trading Organization v. Ghanaian State Enterprise, I.C.C. Award of 17 February 1984, reprinted in (1985) 10 Y.B. Comm. Arb. 52 (Case No. 4237; L.J. Malmberg, arbitrator). See also Goldman, La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives (1979) 106 J. dr. Int'l 475, 495 who argues that the "duty" to mitigate (a perhaps infelicitous phraseology) is a principle of the lex mercatoria, which can be derived from international arbitral awards.

289. See, e.g., Carbonneau, supra, note 287, 120; and Goetz & Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation (1983) 69 Va L. Rev. 967, 967.

In the context of the international sale of goods, the relevant United Nations Convention is explicit:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.[290]

In an excellent entry in the International Encyclopedia of Comparative Law, Professor Treitel has set out the "three related ideas" that constitute the doctrine of mitigation. First, the plaintiff will not be able to recover damages which he ought to have avoided. Secondly, the plaintiff must be made to account for any damages caused by his own contributory negligence. Thirdly, and most importantly for present purposes, "if the plaintiff actually gains some benefit in consequence of the defendant's breach, he may have to bring that benefit into account",[291] even if there was no "duty" to mitigate.[292] One may look at the existence of mitigation in fact when evaluating appropriate compensation. For example, any benefits to the plaintiff derived from the fact that he has been relieved of his own obligations due to the defendant's breach must be taken into account to reduce the plaintiff's compensation.[293] In other

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290. United Nations, Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (10 April 1980), reprinted in (1980) 19 I.L.M. 668, art. 77.

291. Treitel, supra, note 222, 75.

292. See, e.g., British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London [1912] A.C. 673 (H.L.) (U.K.) concerning the "duty" to mitigate.

293. Treitel, supra, note 222, 78.

words, the various means of self-help discussed above -- tax write-offs, re-investment, insurance, etc. -- should be included in any measure of compensation awarded to a private party who has seen his property nationalised. This requirement is founded upon the idea of reasonable behaviour. A reasonable party will not sit idle when confronted by a repudiation of an economic relationship. In principle, and in the absence of any specific rules of the governing law, an arbitral tribunal must take all forms of mitigation, including the simple fact of an improved position, into consideration when setting down an appropriate damages award; only the real damages should be subject to compensation.[294] The "expectation interest" is therefore not fully compensated.

So far, the discussion of remedies has focussed solely upon remedies that may be ordered in the final award of an arbitral tribunal. It may be, however, that provisional or temporary remedies are required before a tribunal can reach its final decision. In the absence of such provisional remedies, the final award may be incapable of any practical effect. Yet, very little attention has been paid to the issue of provisional remedies in international commercial arbitration and, perhaps as a result, there seems to exist a potential conflict between arbitral and national court jurisdiction to order provisional relief.

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294. See Treitel, supra, note 233, 327.

In fact, to state that there is a "potential conflict" is to put the case in too good a light, for there has traditionally existed substantial disagreement amongst the commentators as to whether or not provisional relief can be granted by courts in actions pending before arbitration panels. Recently, a doctrinal trend is perceptible which would recognise the ability of national courts to order provisional relief or interim measures of protection during the course of an arbitration. Trends in the case law, especially in the United States, are less clear-cut. Delaume has argued that

> [t]here is no incompatibility between submission to arbitration, as a means of settling transnational contractual disputes, and recourse to the judicial courts to secure provisional measures intended to provide effective means of enforcing an arbitral award in the event that the award would be in favour of the party requesting the award.[295]

In this conclusion, Delaume is supported by McDonell and by Brower and Tupman, who are among the rare students of the subject,[296] by the express wording of the ICC Arbitration Rules which, in Rule 8(5), allow either party "to apply to any competent judicial authority for interim or conservatory measures,"[297] and by recent French doctrine.[298]

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295. Delaume, supra, note 45, 84-5.

296. McDonell, The Availability of Provisional Relief in International Commercial Arbitration (1984) 22 Col. J. Trans. L. 273, 273; and Brower & Tupman, Court-Ordered Provisional Measures Under the New York Convention (1986) 80 Am. J. Int'l L. 24.

297. Supra, note 211.

298. See, e.g., Couchez, Note, [1985] Rev. de l'arb. 73 (No. 1); and Mendez, Arbitrage international et mesures conservatoires [1985] Rev. de l'arb. 51 (No. 1).

Before examining the topic in detail, it should be pointed out that the most commonly requested and the most valuable form of interim relief is attachment of property. Attachment is a conservatory measure which "freezes" property so that it cannot be dissipated or alienated before adjudication of the dispute has been completed. The attachment ensures that the property will remain available as a means of enforcing the award. Although it is commonly accepted that arbitral tribunals may grant interim awards and make orders granting provisional relief,[299] they are not capable of ordering attachment, for that power remains solely within the competence of national courts.[300] This limitation has probably evolved from the eminently practical conflict of laws rule that jurisdiction over immovable property will commonly be founded in the lex situs. The rule is convenient and realistic in the international context even for movable property, for, absent any reciprocal treaty arrangements, only courts in the jurisdiction where

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299. See, e.g., McDonell, supra, note 296; and the various sets of institutional arbitral rules, including the I.C.C. Rules, supra, note 211, art. 8(5); the UNCITRAL Rules, supra, note 212, art. 26 and the Iran-U.S. Claims Tribunal Final Rules of Procedure, 3 May 1983, reprinted in (1973) 2 Iran-U.S. C.T.R. 405, art. 26(1). See also the London Rules, supra, note 214 which by their silence seem to impose no general restrictions upon the granting of interim relief by arbitral tribunals established under their auspices. However, it does appear that the parties may by agreement exclude from the tribunal's powers the ability to grant provisional relief (Schedule, C(10)).

300. Delaume, Foreign Sovereign Immunity, supra, note 60, 42; and Mendez, supra, note 298, 54; and Brower & Tupman, supra, note 296, 24.

property is located are able to exercise physical control over the assets. It is clear that arbitral tribunals cannot order attachment but must restrict themselves to other interim measures. For example, arbitral tribunals are capable of ordering the deposit of security for costs.[301]

The arguments do not end there, however, for there is a body of United States case law which holds that when a dispute is to go to arbitration, national courts no longer retain their right to grant provisional measures; even attachment is precluded. In McCreary v. CEAT,[302] the Third Circuit Court of Appeals held that pre-arbitration attachment is not available

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301. The Inter-American Rules, supra, note 213 and the UNCITRAL Rules, supra, note 212, upon which the Inter-American Rules are based, both allow for one or more tribunal orders for deposits to secure the payment of costs (art. 41 in each set of rules). The London Rules, supra, note 214, provide in the Schedule of Jurisdiction, para. C(11), that an arbitral tribunal may "make interim orders for security" of costs, but the parties may exclude this power by agreement. The I.C.C. Rules, supra, note 211, in art. 9(1), allow the Court of Arbitration of the ICC to fix the amount of a deposit for security for costs, but it appears that no subsequent orders are permitted to increase the initial deposit. This lacunae has encouraged some parties to seek further orders for security in national courts and it would seem that courts do retain jurisdiction to order security for costs in international arbitrations. The English Court of Appeal has held, however, that this jurisdiction should only be exercised if "there is some more specific connection with this country ... than the mere fact that the parties have agreed that any arbitration is to take place in England." Courts should be reluctant to interfere and should allow arbitral tribunals to determine the necessary security for costs. Bank Mellat v. Helliniki Techniki S.A. [1983] 3 All E.R. 428 (C.A.) (U.K.).

302. 501 F. 2d 1032 (1974) (U.S.A.).

from a U.S. District Court, even when the subsequent award would be enforceable in the United States under the New York Convention. This approach was followed in three cases arising in New York.[303] The rationale was expressed most clearly by the New York Court of Appeals in the Cooper case:

> It is open to dispute whether attachment is even necessary in the arbitration context. Arbitration, as part of the contracting process, is subject to the same implicit assumptions of good faith and honesty that permeate the entire relationship.[304]

In his leading study of provisional relief in international commercial arbitration, McDonnell rejects such reasoning completely, arguing that "[t]he idea that an agreement to arbitrate implies a relationship of trust and confidence, making provisional relief unnecessary and inappropriate, confuses arbitration with conciliation."[305]

McDonnell's position that attachment and general provisional relief should be available to parties in anticipation of arbitration is supported by American case law running completely

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303. Metropolitan Tankers Ltd. v. Pertambangan, 427 F. Supp. 2 (S.D.N.Y. 1975) (U.S.A.); Atlas Chartering Services, Inc. v. World Trade Group, Inc., 453 F. Supp. 861 (S.D.N.Y. 1978) (U.S.A.); and Cooper v. Ateliers de la Motobécane S.A., 442 N.E. 2d 1239 (N.Y.C.A. 1982) (U.S.A.). It should be noted that even courts which adopt a position against attachment before arbitral proceedings acknowledge that attachment is available in cases that would fall within admiralty jurisdiction if they had not been submitted to arbitration. See the Atlas Chartering case which cites Andros Compania Maritima, S.A. v. André & Cie, 430 F. Supp. 88 (S.D.N.Y. 1977) (U.S.A.).

304. Ibid.

305. McDonell, supra, note 296, 273.

counter to that cited above. As early as 1944, the Second Circuit Court of Appeals decided that prejudgment attachment was available even if a court action had been stayed pending arbitration.[306] A tradition has long existed in the U.S. that courts dealing with admiralty matters will grant attachments of ships pending the outcome of arbitral proceedings.[307] In 1977, a U.S. District Court in California granted an attachment, in a non-maritime case, covering certain Californian assets of a French export company during the course of an arbitration proceeding taking place in New York, holding that the 1958 Convention did not preclude prejudgment attachment.[308] Some commentators would not accept this interpretation, suggesting instead that art. II(3) of the New York Convention should be read as a requirement that only arbitrators grant provisional relief.[309] In practice, this would of course mean that no

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306. Murray Oil Products Co. v. Mitsui and Co., 146 F. 2d 381 (2d Cir. 1944) (U.S.A.). See also Cordoba Shipping Co. Ltd v. Maro Shipping Ltd, 494 F. Supp. 183 (Conn. DC 1980) (U.S.A.).

307. Two recent examples are Drys Shipping v. Freights, 558 F. 2d 1050 (2d Cir. 1977) (U.S.A.); and Andros Compania Maritima S.A. v. André & Cie, supra, note 303.

308. Carolina Power & Light Co. v. URANEX (ND CA 1977), reprinted in (1978) 17 I.L.M. 903, 910-1 and 914-5 (U.S.A.).

309. McDonell, supra, note 296, 278 discusses and rejects this argument. It should be noted that the ICSID Convention, supra, note 56, does provide expressly in art. 26 that recourse to ICSID arbitration is exclusive, barring both parties from seeking provisional relief in national courts. See Delaume, Foreign Sovereign Immunity, supra, note 60, 42.

effective attachment could ever be ordered because arbitrators do not possess powers of enforcement.

Judicial decisions in various European jurisdictions also support McDonell's argument that national courts can order pre-arbitration attachments. In England, such attachments have been limited largely to maritime cases,[310] but in France the saisie conservatoire is widely available in the case of pre-arbitration applications for conservation of property.[311] Recent case law from the Federal Republic of Germany is to the same effect. In one notable case, the District Court of Frankfurt-am-Main ordered the attachment of millions of marks located in Iranian Government and National Iranian Oil Company bank accounts in Germany.[312] This order was made despite the relatively safe enforcement procedures available through the Security Account of the Iran-U.S. Claims Tribunal, the tribunal under whose auspices the underlying arbitrations were proceeding. Although the ordering of attachments in that context was certainly inappropriate, the point remains that national courts are increasingly sympathetic to requests for pre-arbitration attachment.

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310. See, e.g., Third Chandris Shipping Corp. v. Unimarine S.A. [1979] 2 All E.R. 972 (C.A.) (U.K.) (where an ex parte Mareva Injunction was applied covering all assets of the defendant); The Rena K [1978] 3 W.L.R. 431 (Q.B.) (U.K.); and The Tuyuti [1984] 2 All E.R. 545 (C.A.) (U.K.).

311. Stein & Wotman, International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules (1983) 38 Bus. Law. 1685, 1690; and Brower & Tupman, supra, note 296, 38.

312. William Brothers Int'l Corp. v. N.I.O.C., Frankfurt-am-Main District Court, No. 3/14 0 11/80, 14 September 1981.

On balance, the approach recommended by McDonell is to be preferred. Pre-arbitration attachment is a valuable tool which cannot be employed by arbitral tribunals in their own right, so some form of national court attachment jurisdiction is useful. This recognition in no way undermines the possibility of a procedurally delocalised award nor does the jurisdiction of national courts to order attachment interfere with the independence of the arbitral tribunal.[313] It means simply that as a practical matter, enforcement of a resulting award will be made easier. Indeed, as has been noted already, the Rules of the International Chamber of Commerce allow parties to apply to national courts for "interim or conservatory measures",[314] and the reading of art. II(3) of the New York Convention most consonant with the Convention's overall spirit is that it authorises arbitral tribunals to make interim protective orders but does not preclude action by national courts of a conservatory nature.[315]

It must be noted that special problems arise when attention is focussed upon applications for attachment in cases involving the assets of foreign states. Just as in the case of the execution of an award, the spectre of sovereign immunity can

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313. Mendez, supra, note 298, 63-4.

314. ICC Rules, supra, note 211, art. 85(5).

315. See Brody, An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention (1985) 18 Cornell Int'l L.J. 99, 110-1.

arise to cloud the issue of pre-arbitration attachment. In England, a plea of state immunity succeeded in preventing the attachment of Egyptian government assets in S.P.P. (Middle East) Ltd v. The Arab Republic of Egypt et al.[316] In principle, a similar result could occur in the United States.[317] In France, however, the Cour de cassation held in the recent case of Société E.U.R.O.D.I.F. c. République islamique d'Iran[318] that an attachment of commercial assets owned by a state could stand, pending the outcome of of an arbitration. Just as it was argued above that sovereign immunity should not preclude execution of an arbitral award, it is here asserted that the decision of the Cour de cassation is right in principle. If a state has agreed to arbitration in a freely negotiated contract, it should not be allowed to escape its obligations by effectively precluding execution through the removal of its assets from the potential enforcing jurisdiction. Attachment is the only method of guarding against such bad faith. The French court was also wise, though, in limiting the possibility of attachment to a state's commercial assets. It would be very unfortunate, for example, if an attachment were ordered covering all Embassy bank accounts. Given the delays often associated with arbitration, a

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316. (Court of Appeal, 19 March 1984), reprinted in (1985) 10 Y.B. Comm. Arb. 504 (U.K.), at 507.

317. See the Foreign Sovereign Immunities Act, 28 U.S.C. §1610(1) (Supp. 1982).

318. (14 March 1984; Cour de cassation), reprinted in [1985] Rev. de l'arb. 69 (No. 1).

state could be prevented from conducting essential diplomatic activity for some years. Such a result would offend not only comity, but common sense.

Having accepted that the attachment jurisdiction of state courts will often be useful, it is still possible to hope that it need not be necessary. As was pointed out at the beginning of this Chapter, one should look at enforcement not simply as an ex post facto concern, but as an influential factor in institutional design. Despite the presumption of good faith compliance, parties are free to set out means of enforcement that are independent of state legal systems. Such designs may involve the posting of performance bonds or the establishment of escrow accounts. Because the enforcement mechanisms of the Iran-U.S. Claims Tribunal are among the most audacious yet designed and as that Tribunal is the subject of the ensuing Chapter, a full discussion of the potential for independent enforcement techniques will be postponed until the experience of that Tribunal has been canvassed.

CHAPTER IV: THE PARADIGMATIC UTILITY OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

At the opening session of the Iran-U.S. Claims Tribunal held on 1 July 1981, the Tribunal's first President, Gunnar Lagergren, expressed great satisfaction with the Iranian-American treaties which had created the Iran-U.S. Claims Tribunal:

> Two important nations have negotiated their way out of serious difficulties by agreeing to arbitration. They have thereby affirmed their belief in what a distinguished lawyer said at the end of the last century, namely, that international controversies may honorably, practically and usefully be dealt with by arbitration.[1]

Nor was President Lagergren alone in recognising the magnitude of the achievement of the negotiators who concluded the Algiers Accords.[2] Coping with an enormously complex and highly charged

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1. President Lagergren, Statement at the Tribunal's Opening Session (1 July 1981), quoted in Von Mehren, The Iran-U.S. Arbitral Tribunal (1983) 31 Am. J. Comp. L. 713, 729.

2. The tripartite Accords, negotiated through the mediation of the Algerian Government, consisted of two Declarations and related Undertakings. The first Declaration included terms designed to end the existing crisis sparked by the forcible detention of United States nationals, including diplomatic personnel, in the Embassy in Tehran, and to lift certain of the economic sanctions imposed by the United States against the Government of Iran. The second, and more immediately relevant, Declaration was the Declaration of the Government of the Democratic and Popular Republic of Algeria, Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (19 January 1981), reprinted in (1982) 7 Y.B. Comm. Arb. 257 and (1982) 1 Iran-U.S. C.T.R. 4 [hereinafter Claims Settlement Declaration]. The Claims Settlement Declaration created the Iran-U.S. Claims Tribunal (Art. II(1)), established the scope of its jurisdiction (Arts. II and VI(4), read with Art. VII) and, in general terms, prescribed the applicable procedure (Art. III(2)) and substantive law (Art. V). It should be noted, however, that one crucial

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political and ideological confrontation,[3] the negotiators nevertheless managed to create an institution which has already called forth some remarkably favourable rhetoric. A Legal Adviser to the U.S. State Department has written that "the Iran-United States Claims Tribunal represents one of the most ambitious and complex international claims adjudication programs ever undertaken."[4] A distinguished American professor expert in

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element of the Tribunal process is governed by the first Declaration, for it is there that one finds provision for the creation of a "Security Account" by Iran out of which successful American Claimants are to be paid. See Declaration of the Democratic and Popular Republic of Algeria (19 January 1981), reprinted in (1981) 1 Iran-U.S. C.T.R. 3 and (1981) 20 I.L.M. 223.

3. See the description of the circumstances under which the Accords were negotiated in Belland, The Iran-United States Claims Tribunal: Some Reflections on Trying a Claim (1984) 1 J. Int'l Arb. 237, 237. The Tribunal arbitrators are also aware of the heavy political constraints that hampered the negotiating process. In the words of one of the Iranian arbitrators:

> [A] crisis of extreme complexity was created by the abrupt and radical rupture of all political and economic relations between Iran and the United States, two Governments which had been closely linked, particularly during the twenty years preceding the Iranian Revolution.

Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality (Cases 157 and 211) (1983) 2 Iran-U.S. C.T.R. 178, 178. The close nature of the economic links between the U.S.A. and pre-revolutionary Iran is revealed by a comparison of trade statistics from 1970 and 1978. In 1970, Iran-U.S. trade was valued at $400 million (U.S.). By 1978, the figure had climbed to $6.5 billion (U.S.). Tonelson, Hostage Aftermath (1986) 257 The Atlantic 22, 22.

4. Robinson, Recent Developments at the Iran-United States Claims Tribunal (1983) 17 Int'l Law 661, 661. The Tribunal falls within the tradition of international claims commissions that were typically set up to adjudicate post-

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international claims has been even more fulsome in his pronouncements: "The current effort in The Hague [the home of the Tribunal] is the most significant international arbitration in history. ... If not in number of claims, then certainly in amount of money and complexity of issues involved ...".[5]

One might question whether significance can be measured in advance without the benefit of historical perspective, but it is true that the Iran-U.S. Claims Tribunal would appear to be of potentially great importance, both as a vehicle for the elaboration of substantive legal doctrines and as a paradigm which could contribute to a more sophisticated understanding of the process of international arbitration. An important caveat must be entered at this point, for it may be that the circumstances that prompted the creation of the Tribunal and that continue to condition its operation are so singular as to undercut the general application of lessons or insights derived from its practice. If the functioning of the Tribunal and the substantive rules it evolves are dictated by its unique purpose and status, one would be forced to call into question its relevance as a paradigm. Such issues can only be addressed adequately

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war reparations claims, for example the U.S.-Italian Tribunal set up after World War II which produced the famous Mergé award, infra, note 141. However, it will be seen that the role and nature of the Iran-U.S. Claims Tribunal is more complex than the models on which it may have been based.

5. Lillich, Remarks, (1982) 76 Proc. Am. Soc. Int'l L. 5, 5-6.

after a thorough investigation of the Tribunal's operations and decisions.

Oddly enough, to explore the Tribunal successfully, one must grapple with a threshold question the answer to which should be self-evident, or at least readily apparent. Yet in reviewing the academic comment that has already appeared concerning the Tribunal and in reading Tribunal decisions and dissenting opinions, it soon becomes evident that there is a debate regarding the very nature of the institution. What was envisioned in the Algiers Accords? Is the Tribunal an 'international' tribunal adjudicating issues of state responsibility under international law? Is it really accurate to describe it as an arbitral tribunal at all? These questions must be confronted head-on if we are to construct any coherent picture of the Tribunal's potential impact, for on the answers will depend other crucial evaluations concerning the proper role of Tribunal arbitrators, the substantive law to be applied by the Tribunal and the persuasive value of Tribunal practice.

A. The Nature of the Tribunal

i. The Algiers Accords: Their Status and Effect

"In January 1981, owing to the mediation of the Democratic and Popular Government of Algeria, the U.S. and the Iranian Governments agreed to settle their disputes amicably and signed the Algiers Declarations. The release and free transfer of

Iranian assets was an essential objective of the Declarations."[6] That description, offered by one of the Tribunal's Iranian arbitrators, is in full accord with the emphasis given to the transfer of assets in the Algiers Accords. The resolution of disputes was also a crucial objective; the creation of the Tribunal was described by Professor Von Mehren as "an indispensable element of the peaceful solution of the hostage problem." He noted that there were "vast claims at stake" and concluded that "it was highly unlikely that a negotiated settlement between the United States and Iran could have been reached" without an independent mechanism for claims adjudication.[7] From the American perspective, apart from the immediate goal of attaining release of the hostages,[8] it was important to provide some means of redress for United States nationals with outstanding claims against Iran. On the Iranian side, at a time of intense economic disruption, and with the prospect of an expensive and protracted war with Iraq, it became crucial to regain control of the billions of dollars of Iranian government assets frozen under an American Executive Order.[9]

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6. Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality, supra, note 3, 212.

7. Von Mehren, supra, note 1, 729.

8. See Lillich, "Preface", in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) vii, vii.

9. Executive Order 12170 of 14 November 1979, 44 Fed. Reg., No. 222 (1979) 65729, reprinted in (1979) 18 I.L.M. 1549 and subsequent regulations reprinted in (1979) 18 I.L.M. 1552-6. (cont'd.)

In the first of the two Algiers Declarations, which dealt with the underlying political disputes,[10] the United States Government agreed to release the Iranian assets held by the U.S. Federal Reserve Bank, U.S. private banks and by other United States individuals and institutions. In return, Iran promised to release the fifty-two United States nationals held in Tehran and to co-operate in setting up the Security and Escrow Accounts that were designed to lend efficacy to the separate Claims Settlement Declaration which was concluded on the same day.[11] In independent "Undertakings",[12] the United States promised to release a specified amount of gold, dollars and securities to the Algerian Central Bank as Escrow Agent and Iran pledged to release the hostages and to transfer dollars to the U.S. Federal Reserve Bank to cover the principal and interest owing on all loans and credits made by bank syndicates in which U.S. banks

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Estimates of the value of the frozen Iranian Government assets range from eight billion to twelve billion dollars. See Belland, supra, note 3, 237; and Tonelson, supra, note 3, 22.

10. Declaration of the Government of the Democratic and Popular Republic of Algeria, supra, note 2.

11. Claims Settlement Declaration, supra, note 2.

12. Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (19 January 1981), reprinted in (1981) 1 Iran-U.S. C.T.R. 13 and (1981) 20 I.L.M. 229.

had participated.[13]

The second Declaration, the Claims Settlement Declaration, was the means whereby the two governments sought to provide a forum for the resolution of legal disputes caused by the severance of economic relations after the Iranian Revolution and the hostage-taking.[14] Unfortunately, the Declaration was not phrased so as to indicate clearly the nature of the Tribunal it created. The nature of the Tribunal, and particularly its "international" status, is relevant to such issues as the substantive law to be applied by the Tribunal and the remedies available to successful claimants. Arguments concerning the

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13. The Undertakings, ibid., create a special regime for the settlement of most "bank claims" and so they will not be the focus of the following discussion. Bank Claims are assigned to the Tribunal under para. 2(B) of the Undertakings, not under the Claims Settlement Declaration, and satisfaction of Awards will be through the separate Dollar Account No. 2. From the very beginning of Tribunal Operations, separate settlement negotiations were taking place in London to try to resolve such claims.

14. See Stewart & Sherman, "Developments at the Iran-United States Claims Tribunal: 1981-1983" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) 1, 3-4, reprinted from (1983) 24 Va. J. Int'l L. 1 [hereinafter cited to Lillich]. As to the causality questions involved in the economic countermeasures pursued by the United States, see the Dissent of H.M. Holtzmann in Queens Office Tower Associates v. Iran National Airlines Corp. (1983) 2 Iran-U.S. C.T.R. 247, 254. It is clearly the view of the Iranian Government that the complete disruption of economic relations was proximately "caused" by the sanctions of the United States. The American Claimants argue that the sanctions were in turn "caused" by the actions of the Iranian Government in condoning -- at the very least -- the hostage-taking in Tehran. The issue is of crucial importance in cases involving assertions of contractual frustration. See also Haji-Bagherpour v. United States of America (1983) 2 Iran-U.S. C.T.R. 38.

status of parties in Tribunal cases, especially the status of corporations, will also be affected by the evaluation of the status of the Tribunal itself. A preliminary, and ultimately inconclusive, point is that the Declaration is prima facie an agreement between two states through an intermediary, itself a state. As such, the written agreement is a treaty, fulfilling all customary requirements and the rules of the Vienna Convention on the Law of Treaties.[15] The Tribunal so held in Case A-1.[16] But concluding that the Algiers Accords are treaties does not necessarily lead to the further conclusion that the Tribunal created is an international tribunal. It would be entirely possible for two states to agree to create and fund a tribunal designed solely to adjudicate cases involving private parties and which would apply a municipal system of law. The enabling instrument would be a treaty, but the resulting institution would not be "international" in any meaningful sense, even though the states which created such a tribunal would be under an international obligation to respect the tribunal's decisions, as was stated by Chamber One in the RCA Global Communications case.[17] One must look more closely at the Claims

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15. Vienna Convention on the Law of Treaties (1969), reprinted in (1969) 8 I.L.M. 679 and (1969) 63 Am. J. Int'l L. 875, arts. 1 and 2(1)(a).

16. Case A-1 (1982) 1 Iran-U.S. C.T.R. 144 (First Phase).

17. RCA Global Communications Disc, Inc. et al. v. The Islamic Republic of Iran, et al. (1983) 4 Iran-U.S. C.T.R. 5 (Interim Award) 8.

Settlement Declaration itself to find further guidance.

In Art. II(1), the drafters of the Declaration seem to offer a straightforward answer to the question of characterisation. The article announces simply:

> An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States ....[18]

It would seem quite clear that the Tribunal is "international". The remainder of the quoted sentence, however, should immediately suggest serious difficulties with that straightforward evaluation. The purpose of the Tribunal is in part to adjust claims by the nationals of one state party against the government of the other. That fact would indicate that, under widely-accepted legal definitions, the Tribunal is really "transnational"[19] and concerned essentially with private law rights. Supporting that conclusion is the fact that some private parties, under certain conditions, have direct access to the Tribunal,[20] avoiding in the first instance the general rules

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18. Claims Settlement Declaration, supra, note 2.

19. The notion of "transnational law" was first elaborated by the outstanding American jurist Philip Jessup, sometime Judge on the International Court of Justice, but the idea has since been adopted widely, especially in its application to the law governing relations between states and foreign private parties and the law relating to multinational corporations. See P. Jessup, Transnational Law: Storrs Lectures on Jurisprudence (1956); and W. Friedmann, L. Henkin & O. Lissitzyn, Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup (1972).

20. Claims Settlement Declaration, supra, note 2, Art. III(3).

concerning state espousal of claims under international law. And yet, the Nationality of Claims rules of international law have been retained,[21] even if some traditional rules have been modified.[22] Moreover, the Tribunal has also been granted jurisdiction to decide "official claims of the United States and Iran against each other arising out of contractual arrangements between them" and interpretational disputes involving the Algiers Declarations.[23] It is apparent, as is so often the case, that a straightforward textual analysis provides no clear answer to the question posed. To explore fully the nature of the Iran-U.S. Claims Tribunal, it will be necessary to review the interpretations offered by the Tribunal as well as informed doctrinal commentary.

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21. Ibid., Art. VII.

22. The Tribunal rejected the traditional approach to jurisdictional issues involving claims brought before an international or transnational tribunal by dual nationals in Case A-18, infra, note 32. See also the discussion, infra, text accompanying notes 132 to 169.

23. Claims Settlement Declaration, supra, note 2, Art. II(2) and (3), and Art. VI(4). "Official claims" which arise "out of contractual arrangements between" the state parties cannot comprehend non-contractual claims that do arise out of contractual relationships. In claims involving a private party (non-official claims), the Tribunal has held that it does have jurisdiction over non-contractual claims, but it would appear that such jurisdiction is limited to claims that cannot be viewed as attempts to present a contract claim in a covering guise. See the cases cited infra, notes 122 and 123.

ii. An International Tribunal?

There appears to be some measure of agreement amongst the American and third-country arbitrators on the Tribunal as to whether or not the Tribunal is "international", although there is less agreement regarding the nature of arbitration per se. In a series of interviews conducted in September 1984, the writer asked five of the nine arbitrators then serving[24] to discuss their conceptions of the nature of the Tribunal. The second President of the Tribunal was interviewed in October, 1985. All of the arbitrators who were willing to go on record[25] shared similar notions concerning the international status of the Tribunal. Mr George Aldrich was the most detailed in his response:

> The Tribunal does, of course, have a number of interstate claims, or, more likely, interstate disputes about the Algiers Declarations. It does, in fact, have some really commercial claims between the Governments, but those are just like any other commercial claims which happen to have Governments as parties. The great bulk of our work is claims

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24. President Gunnar Lagergren, Judge Nils Mangard, Mr Howard Holtzmann, Mr Charles Brower and Mr George Aldrich. At the time of the interviews, Professor Riphagen was indisposed and it was suggested that it would be inappropriate to seek access to the Iranian arbitrators for reasons which will become apparent below.

25. Although agreeing to be interviewed and willing to speak frankly, Mr Holtzmann expressed concern that in the highly-charged environment of the Tribunal he did not wish to be quoted directly without his prior approval. Therefore, in the following discussion, none of the general attributions of opinion should necessarily be held to represent the views of Mr Holtzmann unless he is referred to specifically in which case his comments will have been extracted from a public record.

> of individuals and companies against entities, some of which were Government agencies, others of which were not at the time the deal was made, but have since become controlled by the Government, so that the Government under the Algiers Declaration is responsible for the debt, and Article V of the Claims Settlement Declaration gives us a remarkable degree of flexibility in our choice of law. ... I must say, there is a question that we have to face that we really haven't faced up to squarely, I think ... [It] is the question of when we decide a case involving the taking of property, are we deciding it, a typical international law case of State responsibility for expropriation, or are we simply deciding a taking of property under general principles of law as a result of the Claims Settlement Declaration, saying we have jurisdiction over actions affecting property rights. Certainly, we have used, in the few cases we have had, we have used international legal materials and argued from them, and I think we'll probably continue to do so, but, in fact, there is, of course, quite an argument available that one doesn't need to do that. Certainly, the requirements for international law with respect to the espousal of claims and the exhaustion of local remedies and those things don't apply, and it is certainly possible to argue that the mere taking of property, whether or not under international law illegal, is a claim we can deal with.[26]

It is apparent that Mr Aldrich conceives of the Tribunal as having a "mixed" nature, being a creature of public international law with jurisdiction to hear interstate cases, but with the primary duty to adjudicate private commercial disputes. He would appear to be willing to emphasise one or the other aspect of the Tribunal's nature depending upon the parties and facts before him.

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26. Mr G. Aldrich, transcript of interview (13 September 1984). On file with author.

This approach was accepted expressly by the Tribunal's second President, K.-H. Böckstiegel[27] and by Arbitrators Brower and Mangard as well.[28] In discussion, no Tribunal member openly rejected it. That being said, it is also clear that the ramifications of that characterisation have not been elaborated in any detail. For example, Mr Aldrich pointed out that the issue of the substantive law applicable to expropriation claims has not yet been addressed comprehensively. Moreover, there is significant disagreement amongst the arbitrators concerning the precedential or persuasive value of Tribunal judgments[29] and

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27. President K.-H. Böckstiegel, transcript of interview (31 October 1985). On file with author.

28. Mr C. Brower, transcript of interview (13 September 1984); and Judge Nils Mangard, transcript of interview (14 September 1984). On file with author.

29. That disagreement comes to light most clearly in the controversy concerning the appropriate level of secrecy afforded to parties who seek to have their settlement agreements transformed into Awards on Agreed Terms. Under Art. 35(5) of the Final Tribunal Rules of Procedure (3 May 1983), reprinted in (1983) 2 Iran-U.S. C.T.R. 405, all awards are to be made public

> except that upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted.

It has become common Tribunal practice to grant requests from arbitrating parties to maintain secrecy over entire settlement agreements which are used as the basis for Awards on Agreed Terms. That practice has been criticised roundly by the arbitrator H.M. Holtzmann. See Cases 15, 19 and 387: Separate Opinions of H.M. Holtzmann (1983) 3 Iran-U.S. C.T.R. 78 and the discussion infra, text accompanying notes 377 to 383. On additional "problems" perceived by

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concerning the role of an arbitrator.[30] Some of this disagreement is prompted no doubt by dissimilar appreciations of the

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Claimants to result from Tribunal secrecy, see Clagett, "The Iran- United States Claims Tribunal: A Practitioners Perspective" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) 129, 131-3. Implicit in Mr Holtzmann's criticism is the assumption that Tribunal Awards do have an important persuasive value. It is, in fact, a neat question whether, in an arbitral context, parties who seek to have their private disputes resolved are under any legal or moral obligation to allow the decision in their case to be made public. A case may be made that in international tribunals, decisions and pleadings should be made public so as to increase the certainty of the law, thereby providing guidance to other prospective parties and increasing the likelihood of resort to the peaceful settlement of disputes. Discouraging the use of force by promoting peaceful methods of dispute resolution may be imposed as a duty upon states as an extension of the basic principles of the United Nations Charter. It is more difficult to see the application of such a duty in a commercial context, however. Moreover, private parties are not directly susceptible to the obligatory force of international law.

The belief of some Tribunal arbitrators -- one may say the fear -- that Tribunal decisions will be accorded precedential weight by the international legal community is highlighted by the habit of some Tribunal members, most commonly the Americans, but sometimes the Iranians, to issue separate, concurring, opinions. There is clearly an assumption that Tribunal decisions will be followed as precedents and some members evince a strong desire to avoid association with certain holdings of the majority even though it may be necessary to concur in the result so as to provide a majority for an Award. See, e.g., ITT Industries, Inc. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 348, 349 (Concurring Opinion of George Aldrich); Chas T. Main Int'l, Inc. v. MAHAB Consulting Engineers, Inc. (1983) 3 Iran-U.S. C.T.R. 270, 277 (Concurring Opinion of Richard M. Mosk); Craig v. Ministry of Energy of Iran (1983) 3 Iran-U.S. C.T.R. 280, 293 (Concurring Opinion of Richard M. Mosk); and Continental Grain Export Corp. v. Government Trading Corp. (1983) 3 Iran-U.S. C.T.R. 319, 323 (Concurring Opinion of Mahmoud Kashani).

30. The role of the arbitrator in the Iran-U.S. Claims Tribunal will be explored fully infra, text accompanying notes 300 to 340.

political constraints which affect the Tribunal, but an additional and substantial impediment to consensus on important issues is clearly the differing emphases placed upon the public and private law aspects of the Tribunal by each arbitrator.

In a thorough and balanced article prepared in 1983, David Lloyd Jones of Cambridge lamented the "flaw in the jurisprudence of the Tribunal, that it has, to date, offered little guidance as to its nature and function and has failed to identify the exact role it is performing."[31] Subsequently, the Tribunal has issued a major decision in Case A-18,[32] the so-called Dual Nationality decision, where the nature of the Tribunal was a significant issue joined in the pleadings. In many ways, however, Jones's lament still rings true.

In Case A-18 the Tribunal was faced with the difficult issue whether it could assert jurisdiction over claims brought by persons who possessed both Iranian and United States nationality. For present purposes the importance of the Tribunal decision lies in its tentative exploration of its own nature. The Iranian Government had argued that the Iran-U.S. Claims Tribunal was a creation of public international law and was to

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31. Jones, "The Iran-United States Claims Tribunal: Private Rights and State Responsibility" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) 51, 67, reprinted from (1984) 24 Va J. Int'l L. 259 [hereinafter cited to Lillich].

32. Case A-18, 6 April 1984, reprinted in (1984) 23 I.L.M. 489 (Iran-U.S. C.T.); and (1984) 5 Iran-U.S. C.T.R. 251 [hereinafter cited to I.L.M.].

be governed by and to apply primarily the rules of public international law.[33] As will be discussed more fully below, the result of the Iranian approach would have been the application of the traditional rules governing the nationality of claims which would have precluded, Iran asserted, all claims of dual nationals.[34] In their dissenting opinion, the three Iranian arbitrators underscored that position, arguing that the Algiers Declarations should be seen in the context of a long line of interstate agreements to establish mixed arbitral tribunals, as an exercise of diplomatic protection between states, to adjudicate "claims of their nationals against each other."[35] Because the Algiers Declarations were interstate agreements designed to bring about "a peaceful solution to an international crisis between the Iranian and United States Governments",[36] any

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33. See, e.g., "Letter from Mr Eshragh [the Iranian Agent before the Tribunal] to Legal Adviser's Office, Ministry of Foreign Affairs, the Netherlands Regarding the Applicability of Netherlands Arbitration Law to the Awards of the Tribunal", undated, reprinted in (1984) 5 Iran-U.S. C.T.R. 405; and Mangard, supra, note 28.

34. See infra, text accompanying notes 161 to 168.

35. Case A-18: Dissenting Opinion of the Iranian Arbitrators, filed 10 September 1984, 79 (Tribunal mimeograph copy on file with author); and (1984) 5 Iran-U.S. C.T.R. 275 [hereinafter cited to the original].

36. Ibid., 28. It is fascinating to note that in the oral hearings in the case E-Systems, Inc. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 51, the United States Agent had argued that the Tribunal had been created by international law and was thus an "international tribunal" with its decisions being "part of international law". This position appears to have been abandoned in Case A-18, supra, note 32. See Jones, supra, note 31, 64.

claims brought to the Tribunal under those Declarations should be treated as "true inter-State claims brought before an international tribunal by means of the classic method of diplomatic protection".[37]

To the anticipated objection that the Tribunal could not be viewed as a fully "international" adjudicatory body because certain claims could be brought directly by individuals and private entities, the Iranian arbitrators responded:

> [W]hether or not [a state] authorizes its nationals personally to present their claims in no way affects the nature of the diplomatic protection the government is extending. It is merely a matter of a simple procedural technique justified by the convenience it affords in view of the great number of claims.[38]

The position of the Iranian arbitrators, then, was that the Iran-United States Claims Tribunal is an "international" tribunal which must emphasise the role of international law in adjudicating disputes. As a first principle of international law, the sovereign equality of states would perforce be an overriding consideration in the decision-making process; the rights of private parties would be correspondingly de-emphasised.[39] It

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37. E-Systems, Inc., ibid., 31.

38. Ibid. Accord Jones, supra, note 31, 66 (the ability of individuals to file claims is only a "procedural device that cannot determine the substantive role of the Tribunal.")

39. See, e.g., Iran. Statement of the Prime Minister of Iran, Mr Musavi, Regarding the Tribunal's Decision in Case A/18," 24 April 1984, reprinted in (1984) 5 Iran-U.S. C.T.R. 428: "It is certain that Iran's joining the Algerian accord was based on the equality of the sovereignty of governments." (cont'd.)

would seem that, for the Iranian arbitrators, an important goal is to foster an essential equilibrium between the rights and

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Another argument in favour of the position adopted by the Iranian arbitrators can be extrapolated from certain jurisdictional decisions of the Tribunal. In E-Systems, Inc., ibid., 57, the full Tribunal held that it had an "inherent power" to issue conservatory orders to protect the rights of either party. Therefore, it was possible for the Tribunal to "request" that any court proceedings in Iran relating to a counterclaim be suspended until after the Tribunal had made its own evaluation of the merits of the instant case (including the counterclaim). See also the decisions of Chamber One in QuesTech Inc. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 96, following E-Systems, Inc., but in fact employing stronger language; and Rockwell Int'l Systems Inc v. Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 369. And see the decision of Chamber Two in Watkins-Johnson Co. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 362. All these decisions are discussed infra, text accompanying notes 172 to 183, but for present purposes the point is simply that the Tribunal clearly sees itself as being vested with primary jurisdiction to evaluate claims and counterclaims before it.

One reading of this series of cases is that as an international tribunal operating under a valid treaty, the Tribunal has precedence over Iranian and United States courts. Probably the better reading, however, is simply that the U.S. and Iran have imposed upon private parties a choice of forum agreement which must be given effect. The inherent nature of the Tribunal is of no relevance in this context; in enforcing its jurisdiction the Tribunal is simply enforcing the will of the parties to the Algiers Accords which it is bound to do. In a sense, the exhaustion of local remedies rule, that would apply under international law, has been turned on its head. Individual claimants (including counterclaimants) must exhaust the Tribunal remedies before seeking remedies in any other forum. This requirement was created by their own national governments in the exercise of their right to espouse claims and does not reflect any international legal status inherent in the Tribunal. This reading is supported by the fact that under U.S. law, specifically the Executive Order of President Reagan, a U.S. Claimant who is ultimately dismissed by the Tribunal on grounds of its own lack of jurisdiction still retains a right to resume the action in a U.S. court. Executive Order 12294 of 24 February 1981, s. 3, reprinted in (1982) 7 Y.B. Comm. Arb. 260.

duties of the two states party to the Algiers Accords. This goal would affect decisions in all claims, even those involving a private party and to which municipal law would apply. In the later discussion of the role of the arbitrators in the Tribunal it will become apparent that the third-country arbitrators manifest some political, if not strictly legal, appreciation of the Iranian position, but that the American arbitrators reject the Iranian analysis entirely.[40]

A majority of the plenary Tribunal in Case A-18 reached a conclusion contrary to that of the Iranian arbitrators. Although recognising the fact that the Tribunal was established by treaty and was, in a sense, an international body, the majority went on to point out that "most disputes ... involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law."[41] It followed that the doctrine of espousal of claims did not apply: "[I]t is the [private] rights of the claimant, not of his nation, that are to be determined by the Tribunal."[42] The decision of the full Tribunal was in accord with the prior

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40. See infra, text accompanying notes 300 to 340.

41. Case A-18, supra, note 32, 498.

42. Ibid. See also the Concurring Opinion of W. Riphagen, at 509.

holdings of Chamber Two.[43] It would seem that the majority of the plenary Tribunal was comfortable with the view that the nature of the Tribunal is "mixed".

Although the Tribunal majority sought to distance itself from the specific arguments of the United States, it is obvious that the majority's reasoning concerning the nature of the Tribunal is in accord with the broad outline of the American position. The structure of the argument may conveniently be extrapolated[44] from an article written jointly by Ms Selby, then Deputy Agent of the United States, and Mr Stewart, the Administrator for Iranian Claims of the U.S. State Department.[45]

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43. See, e.g., Esphahanian v. Bank Tejarat (1983) 2 Iran-U.S. C.T.R. 157; and Golpira v. Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 171. It was stated expressly in Case A-18, ibid., that the prior decision of Chamber Two would stand no matter what the decision of the Full Tribunal on the issue of dual nationality. The implications of that holding will be discussed infra, text accompanying notes 134 to 138.

44. Under the Iran-United States Claims Tribunal Rules, only the Orders and Awards of the Tribunal and its Chambers may be made public. The oral pleadings remain confidential unless there is specific agreement to the contrary. See the Final Tribunal Rules of Procedure, supra, note 29, Art. 24(4).

45. Selby & Stewart, Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal (1984) 18 Int'l Law. 211. Although this article contains a typical disclaimer that the views do not necessarily represent the position of the State Department, one may assume that two civil servants who remained directly involved in the claims litigation were unlikely to adopt positions that they knew to be contrary to the "official" line of their government. Moreover, the article does not purport to be an independent academic commentary, its avowed purpose being to assist American lawyers in prosecuting their clients' claims. As

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On the nature of the Tribunal, Selby and Stewart had this to say:

> Also as a result of the governing treaty instruments, the Tribunal has both private and public law dimensions. On one level, it is an intergovernmental institution and a creature of public international law. ... On the other hand, the Tribunal in many respects resembles typical international commercial arbitration, handling ordinary commercial debt and contract claims.[46]

The public and private aspects of the Tribunal were envisaged to "coexist and interact in a way which is unprecedented and, at times, unpredictable."[47] In other words, the nature of the Tribunal is "mixed".

Having noted that the Tribunal majority seems largely to have accepted the U.S. view of the Tribunal's nature, it must be added that such a result was almost inevitable. Faced with constitutional documents (the Algiers Accords) that provided no adequate guidance on the question, and taking into consideration that the Tribunal was called upon to evaluate both interstate claims (and interpretational controversies) and private law claims between states and foreign private parties, the majority's holding that the Tribunal possesses a mixed nature was

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such, the article may be assumed to bear a strong similarity to the arguments put forward by the United States in Case A-18. That conclusion is underscored by the obvious connections between the approach elaborated by Selby and Stewart and the positions adopted in the majority judgment of the Tribunal.

46. Ibid., 217.

47. Ibid., 218.

probably the only fully coherent result. The validity of the approach is underscored by the fact that the traditional international law rules governing exhaustion of local remedies and espousal of claims do not apply in all their rigour to claims before the Tribunal,[48] but that the nationality of claims rules do operate in full, albeit with at least one major modification imposed by the Tribunal's case law.[49] Moreover, although the

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48. Under Art. III(4) of the Claims Settlement Declaration, supra, note 2, no claim could "be filed with the Tribunal more than one year after the entry into force of this agreement." Implicit in this rule is that there is no need to exhaust local remedies. See also the Award of Chamber Three in Rexnord, Inc. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 6, 10, where the Chamber stated explicitly that "[t]he mere availability of a local remedy, whether judicial or otherwise, cannot preclude the Tribunal from jurisdiction." There are two justifications for the exclusion of the exhaustion of local remedies rule. The first is the simple temporal reality that to have insisted upon exhaustion of local remedies would have delayed the Tribunal's proceedings immeasurably. The second reason is politically more sensitive. At the time of the conclusion of the Algiers Accords, anti-Americanism was running so high in Iran that access to Iranian courts for American claimants was precluded as a practical matter.
Claims of over $250,000 (U.S.) are presented by the Claimants themselves under Art. III(3) of the Claims Settlement Declaration, thereby excluding the espousal of claims doctrine of international law. The doctrine does apply, however, vis-à-vis small claims.

49. See, e.g., the Claims Settlement Declaration, ibid. Art. VII and the extensive discussions regarding corporate nationality in Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran (1982) 1 Iran-U.S. C.T.R. 455; and Alcan Aluminum Ltd. v. Ircable Corp. (1983) 2 Iran-U.S. C.T.R. 294 (discussed infra, text accompanying notes 184 to 186.) See also VSI Corp. v. The Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 31 (Order) following the decision in Flexi-Van, but adding one further requirement of proof. A good example of the proof required
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vast majority of Awards involve primarily issues of pure fact and private law (aside from often perfunctorily raised issues of jurisdiction under the Claims Settlement Declaration),[50] certain claims have called into play various issues of state responsibility under international law and the Tribunal has assumed its competence to adjudge such claims.[51] The preponderant weight of doctrinal authority also supports the characterisation of the Tribunal as "mixed", encompassing elements of private and public

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to establish corporate nationality may be found in Rexnord, Inc. v. The Islamic Republic of Iran, ibid., 9. The "modification" referred to in the text relates to the Tribunal's rejection of the dual nationality rules of the traditional doctrine of nationality of claims. See infra, text accompanying notes 132 to 153.

50. See, e.g., Gruen Associates, Inc. v. Iran Housing Co. (1983) 3 Iran-U.S. C.T.R. 97; Woodward-Clyde Consultants v. The Government of the Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 239; Craig v. Ministry of Energy of Iran, supra, note 29; RayGo Wagner Equipment Co. v. Iran Express Terminal Corp. (1983) 2 Iran-U.S. C.T.R. 141; Queens Office Tower Associates v. Iran National Airlines Corp., supra, note 14; Pomeroy Corp. v. The Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 391; and Morgan Equipment Co. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 272.

51. See, e.g., Grimm v. The Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 78 (a claim for compensation from Iran for failure to take adequate measures to prevent the death by assassination of the plaintiff's husband); Harza Engineering Co. v. The Islamic Republic of Iran (1982) 1 Iran-U.S. C.T.R. 499 (a claim based upon expropriation of property by Iran); and Starrett Housing Corp., et al. v. The Government of the Islamic Republic of Iran, et al. (1983) 4 Iran-U.S. C.T.R. 122 (Interim Award) (expropriation of real property and contractual rights).

law.[52]

Altogether, it would seem that to describe the Iran-United States Claims Tribunal as a "mixed" tribunal is a convenient and honest way to characterise what is admittedly a complex institution. Yet the characterisation is ultimately unsatisfying for in reality it is no more than an evasion. In Case A-18, the Tribunal recognised explicitly that it performs two functions and that it may have to apply different legal regimes in differing circumstances, yet the Tribunal failed to elaborate any guiding principles to shape its exercise of that dual function. As will be discussed below in the section on choice of law,[53] different Chambers have already employed contradictory approaches in seeking legal authority. When dealing with similar questions, one Chamber has felt bound to apply only the rules of the proper law of the contract in question. Another Chamber has felt at liberty to modify strict contractual interpretation by rejecting the expressly chosen law, employing instead rules of international law. Clearly, the mere pronouncement that the Tribunal serves a dual purpose and is of a

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52. See, e.g., Sohn, "The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) 92, 92. Professor Sohn sees the Tribunal as a somewhat inconvenient "marriage of an interstate tribunal with a commercial arbitral tribunal" facing "difficulties caused by trying to apply in tandem both the principles of commercial law and of international law." See also Jones, supra, note 31, 64-7.

53. See infra, text accompanying notes 394 to 427.

mixed nature does not help to resolve inconsistencies in approach. If the Tribunal wishes to elaborate a coherent body of law, it must not only recognise its dual nature, it must grapple with it. Jones argues that the Tribunal must try to ensure that its two functions remain distinct[54] if the Tribunal's decisions are to have any persuasive value outside the Tribunal's premises. It will be argued here that the Tribunal is probably incapable of such a clear division of function, that its nature is so mixed as to preclude legal clarity. Indeed, to strive for rigorous differentiation of function at the expense of flexibility might very well lead to the demise of the institution. The full implications of that assertion will be examined in the final section of this chapter.[55]

There is one practical reason why the Tribunal has not been pushed to define its nature clearly nor to separate its various functions rigorously. That reason is the existence of the Security Account. Provision for the Account was one of the most remarkable aspects of the Algiers Accords and its existence must always be borne in mind when evaluating Tribunal procedures and Awards. The Security Account will be discussed in some detail in the section on enforcement of Tribunal awards,[56] but its operation must be outlined briefly in order to assess its

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54. Jones, supra, note 31, 67.

55. See infra, text accompanying notes 359 to 429.

56. See infra, text accompanying notes 359 to 373.

role in allowing the continued conflation of the Tribunal's functions.

Under the traditional doctrine of diplomatic protection (the espousal of claims) in international law, an injury done to an individual or corporate entity by a state is not directly actionable by the individual or corporate body, but must be pursued as a claim by the national state against the injuring state. Because international law traditionally has been viewed primarily -- though not exclusively -- as law between states, the doctrine evolved that an injury to a national was to be treated as an injury to his state, and only the state could prosecute the claim.[57] As has been noted, the Claims Settlement Declaration which set up the Iran-U.S. Claims Tribunal, to a certain extent dispensed with the diplomatic protection rule, allowing parties with claims above $250,000 (U.S.) to act on their own behalf before the Tribunal.[58]

It would not be accurate, however, to say that the diplomatic protection rule has been excluded completely. First, claims of less than $250,000 (U.S.) must be pursued under the aegis of the State Agents to the Tribunal. More importantly, if one investigates provisions for the enforcement of Tribunal

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57. See, e.g., Oppenheim's International Law, 8th ed. (1955) (Sir H. Lauterpacht, ed.) 347, esp. fn. 2; and I. Brownlie, Principles of Public International Law, 3rd ed. (1979) 480-1. See also Cohen, Krueger et al., The Iranian Hostage Agreement Under International and United States Law (1981) 81 Col. L. Rev. 822.

58. See supra, note 48.

awards, it becomes apparent that there are circumstances in which the espousal of claims rule could still operate, even in the context of large claims. Under Art. IV(3) of the Claims Settlement Declaration, any award rendered by the Tribunal against either government "shall be enforceable against such government in the courts of any nation in accordance with its laws." Under the law of certain nations it remains possible that particular court interpretations of the doctrines of sovereign immunity and Act of State will preclude enforcement of an award rendered by the Tribunal against one of the state parties to the Algiers Accords. Moreover, some courts might hold that Tribunal Awards are "delocalised" and, in consequence, not enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[59] Although it has been argued[60] that such an interpretation of the New York Convention is not correct, the possibility remains that a national court will mistakenly adopt that view. If foreign courts were to refuse enforcement on whatever grounds, a "successful" Tribunal litigant would be forced back to the traditional rules of international law and would need to rely upon his national state to espouse his claim. He would have no personal standing in

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59. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958; entered into force 7 June 1959), 330 UNTS 38, reprinted in (1968) 7 ILM 1046. See Jones, supra, note 31, 75.

60. See supra, Chapter II.

international law to pursue the debtor state any further. Because the most appropriate form of dispute resolution -- arbitration -- will have failed to produce an enforceable award, it would seem that diplomatic negotiations (or failing that, political or economic sanctions) would be the only remaining avenue to settlement. Of course, in the present climate of Iranian-American relations, diplomatic negotiations would have little chance of success. The point is simply that the private American claimants are not able to assert "international" remedies directly.

In its decisions so far, because of the easy enforcement procedures linked to the Security Account, the Tribunal has not had to confront this enforcement difficulty. As a consequence, it has been possible to hold to the comfortable, if ill-defined, notion that the Tribunal is a mixed creature of public and private law. If the Tribunal were forced to reflect upon the problems of sovereign immunity and the Act of State doctrine, with an attendant recognition that the enforcement of its awards could depend upon the exercise of pure diplomatic protection as traditionally conceived, it is possible that the Tribunal would more easily perceive its primary mandate as the resolution of the broad range of disputes between Iran and the United States, rather than as the settlement of individual, "private" claims. If so, the "international" aspect of the Tribunal's nature would be underscored.

But despite the fact that, ultimately, every claimant could be forced to rely upon the good offices of his national

state, the direct application of the diplomatic protection rule has been avoided owing to the existence of the Security Account. That Account was created under para. 7 of the First Declaration of 19 January 1981[61] (not, oddly enough, under the Claims Settlement Declaration which otherwise governs the operations of the Tribunal). Iran was required to place one billion U.S. dollars in an interest-bearing "Security Account", the funds from which were to be used "for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement."[62] A further obligation was accepted by Iran whereunder it agreed to replenish the Security Account (held in the Algerian Central Bank) "promptly" after awards are paid out so as to maintain a minimum balance of $500 million (U.S.).[63] Given Iran's seeming dissatisfaction with the operation of the Tribunal,[64] some U.S. claimants doubt that Iran will be inclined to fulfill the "topping-up" obligation. The consequences of a failure to do so would be enormous and the fragile equilibrium that has so far been maintained might very well collapse.

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61. See supra, note 2.

62. Ibid., para. 7.

63. For a discussion of the enforcement provisions of the Algiers Accords and their relevance to the general law of recognition and enforcement of arbitral awards, see infra, text accompanying notes 359 to 373.

64. See infra, text accompanying notes 161 to 169.

Professor Lowenfeld has suggested that the existence of the Security Account has promoted "respect for the [Tribunal] process ... at least for a time."[65] Indeed, the practical importance of the Account cannot be overstated. Not only does it provide remarkable ease of enforcement, its existence undoubtedly encouraged many claimants to come to the Tribunal in the first place. In this regard, it is important to recall that, although there were only a few hundred suits filed in U.S. courts against Iran when the Claims Settlement was being negotiated,[66] by the time the deadline for Tribunal claims passed, no less than 3,836 cases had been lodged, only ninety of which were state-to-state claims or interpretational cases.[67]

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65. Lowenfeld, "The Iran-United States Claims Tribunal: An Interim Appraisal" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1985) 77, 91, reprinted from (1983) 38 Arb. J. 14 (No. 4).

66. See, e.g., Hertz, "The Hostage Crisis and Domestic Litigation: An Overview" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1985) 136, 137-40, and 147.

67. Iran-United States Claims Tribunal, Annual Report: Period Ending 30 June 1983 (1983) (xerographic copy on file with author) [hereinafter Annual Report 1]. One American arbitrator went so far as to suggest that, due to the enforcement possibilities presented by the Security Account, some Claimants thought that the Tribunal would be a "free lunch", therefore bringing cases that "would never be brought ... to a normal court". Aldrich, supra, note 26. See also Iran-United States Claims Tribunal, Annual Report: Period Ending 30 June 1984 (1984) (xerographic copy on file with author) [hereinafter Annual Report 2] 17. The Iranians certainly believe that the vast influx of unexpected cases indicates that many claims are spurious. See NIC Leasing, Inc. v. The Government of the Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. (Dissent of Mahmoud Kashani).

From a theoretical point of view, the importance of the Security Account is manifest, having rendered it so far unnecessary for the Tribunal to grapple with fine distinctions between its public and private natures; such elaborations may never be required unless state sanctioned enforcement of Tribunal awards becomes an active issue involving the international law problems of Act of State and sovereign immunity. The nature of the Tribunal is also of great importance when considering questions of substantive law, but again, so long as practical compromises can be worked out to allow Awards to be rendered, providing access to the ready money of the Security Account, the Tribunal may avoid any definitive pronouncements.

Speaking in terms of "compromise" would no doubt raise the hackles of many Tribunal Claimants and even of certain independent academic observers, for it is clear that the arbitrators have not been authorised generally to act as conciliators or even as amiables compositeurs (though they may be so authorised by the parties in a specific case). Article V of the Claims Settlement Declaration[68] appears to speak to the issue without equivocation: "The Tribunal shall decide all cases on the basis of respect for law ...." In fact, the uncertainties involved in the application of law by the Tribunal are myriad, undercutting the seeming clarity of this statement. But leaving aside, for the moment, questions of the substantive law to be applied by

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68. Supra, note 2.

the Tribunal,[69] the issue of "compromise" must still be addressed in any discussion of the nature of the Tribunal. For if the nature of the Tribunal in any sense determines its proper role, one must decide not only whether the Tribunal is an "international" forum but whether or not it is in any meaningful sense, an arbitral forum, and if so, of what type.

This examination may seem excessively theoretical, for it could be interjected that as a practical matter the Tribunal will operate and decide cases no matter what characterisation is accorded to it by academic observers. But it must be reiterated that the present investigation is in part an effort to explore the persuasive value of Tribunal practice. To do so will require that its field of application and its status be defined as clearly as possible. And so the following discussion, though continuing to focus upon the "nature" of the Tribunal, has intensely practical ramifications which will be elaborated in the final sections of this chapter.[70]

iii. An Arbitral Tribunal?

When asked to comment upon the nature of the Iran-United States Claims Tribunal, one of the third-country arbitrators was

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69. For a discussion of issues involved in the choice of substantive law to be applied by the Tribunal, see infra, text accompanying notes 394 to 425.

70. See infra, text accompanying notes 359 to 429.

adamant that the Parties to the Claims Settlement Declaration[71] had clearly agreed to create a traditional arbitral tribunal. In his estimation, "that's not really a court -- it's still called arbitration ... it's intended to be arbitration, and you may know that in arbitration, you try to get those parties to agree, and to get a settlement ...".[72] Consider, then, the following statement of one of the American arbitrators: "... I think probably it was a misnomer to call this arbitration, in a sense. Arbitration, I'm sure you would agree, runs a gamut, a spectrum of possibilities, but this one is a very judicial type of arbitration because we have so many cases ... and our relations to the parties in any particular case are about the same as in a court when it deals with a case that comes before it."[73] It may seem incongruous that two distinguished jurists, engaged in a common pursuit, should entertain such patently antipathetic conceptions of the nature of their enterprise. Yet their division of opinion reflects what is, increasingly, the central enigma of international arbitration.

With the ever-increasing tendency to formalise the arbitral process, the main symptom of which is the growing list of arbitral institutions promoting sets of "Rules", it becomes more and more difficult to distinguish between arbitration and

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71. Supra, note 2.

72. Mangard, supra, note 28.

73. Aldrich, supra, note 26.

full-scale court adjudication. Although it will be argued that this increasing institutionalisation, with its attendant formality, is an unfortunate trend, for the present it is probably a mere distraction to ask whether either of the gentlemen quoted immediately above has articulated the "correct" view. A more fruitful line of inquiry is to accept that the Iran-U.S. Claims Tribunal is a sui generis amalgam of court-like adjudication and arbitration and to explore the implications of that fact for the role of the Tribunal as a source of systemic legal authority. First, the two aspects must be distinguished further.

The sheer scale of operations of the Iran-U.S. Claims Tribunal encourages comparisons with court structures. As noted previously, some 3,836 cases were initially submitted to the Tribunal.[74] To process all of these claims, it has been found necessary to employ a Registry staff of eleven people,[75] a translation staff of sixteen,[76] and a legal support staff consisting of three senior legal officers employed to analyze the "small claims" of under $250,000 (budgeted for in 1983, but not appointed until 1984),[77] three Chamber clerks, eleven

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74. Annual Report 1, supra, note 67, 16.

75. See Annual Report 2, supra, note 67, 24.

76. Ibid., 31.

77. Ibid., 8.

secretaries,[78] and ten legal assistants who act as clerks and researchers to the nine Tribunal members.[79] The Administration is presided over by a Secretary-General who has one Assistant and a Secretary.[80] Perhaps the best indication of the scope of the Tribunal is the tantalising fact, buried in the Second Annual Report, that in an average month, the Tribunal generates roughly 125,000 photocopies![81]

But to define the nature of an adjudicatory institution with reference primarily to the size of the operations is too blunt an analytical device, for one must remember that no matter how much the Tribunal looks like a large domestic court, it was nevertheless established as an arbitral Tribunal dependent for its existence upon the co-ordinated will of the contracting states. Similarly, to define the Tribunal's nature simply by relying upon the fact that its mandate is to decide cases "on the basis of respect for law"[82] is also too simplistic. An arbitral tribunal is just as much a legal institution as is a court, but that does not necessarily imply that an arbitral tribunal should be equated, for all purposes, with courts.

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78. See Annual Report 1, supra, note 67, Annex XI.

79. Ibid., 10. Each arbitrator has one legal assistant and the President has one additional assistant.

80. Ibid., Annex XI.

81. Annual Report 2, supra, note 67, 40.

82. See the Claims Settlement Declaration, supra, note 2, Art. V.

The United States Agent at the Tribunal has complained about what he sees as a "systemic problem [at the Tribunal]... the tendency to compromise," going on to explain:

> It is a long tradition in international arbitral practice that contentious questions be split down the middle, which means ignoring the legal arguments in favor of reaching a political compromise satisfactory to both parties. This tendency is exacerbated in a tribunal such as the present one where the judges must deal with the parties on a day-to-day basis.[83]

This concern is shared by other United States Government participants in the process.[84] Moreover, the American Arbitrators have attempted to downplay any conception that the Tribunal should be a source of compromise solutions; they insist upon the importance of rigorously "legal" decisions,[85] and for them legality seems to be divorced from compromise. Although the Tribunal has manifested some concern that its decisions not be based upon purely "political" considerations,[86] there has been a

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83. Rovine, Remarks (1982) 76 Proc. Am. Soc. Int'l L. 1, 5.

84. The Administrator for Iranian Claims in the U.S. State Department has written in his private capacity that the requirement that Awards be made "on the basis of respect for law" is crucial and must be obeyed (in a very literal and formal fashion it would appear) if the Awards are to be accorded "their proper precedential weight". It should be reiterated that the "proper precedential weight" is an issue which has yet to be explored and no answer can legitimately be presupposed. Stewart & Sherman, supra, note 14, 17. For a full discussion of the issue see infra, text accompanying notes 359 to 429.

85. See, e.g., Brower, supra, note 28; and Aldrich, supra, note 26.

86. See, e.g., Hoffland Honey Co. v. National Iranian Oil Co. (1983) 2 Iran-U.S. C.T.R. 41, 42 (Chamber Two).

greater feeling of the necessity for some compromise than the American participants would desire.

In any case, the objection to any degree of compromise is unrealistic and is not in conformity with underlying principles of international arbitration and of law in general. First, in the excerpt quoted above, the U.S. Agent himself pointed out that "compromise" is a tendency exacerbated "in a tribunal... where the judges must deal with the parties on a day-to-day basis." In this statement, he recognises a powerful imperative. It will almost always be true that where there is any kind of continuing relationship, whether amongst the members of the tribunal itself or between the disputants, there will be a pressure to reach decisions that can accommodate all concerned parties. This pressure could alternatively be defined as a tacit form of customary law-making within a circumscribed community.

The "continuing relationship" is recognised as an important factor in decisions concerning the pursuit of municipal law contract claims where compromise, even involving a short term loss, may be preferred to the controversy of litigation. It is perhaps even more relevant in the transnational milieu where alternative markets may be limited and where cross-cultural relationships are difficult to forge. One American lawyer who has represented a number of claimants before the Tribunal has stated that "[t]he claimants who have settled well before a hearing appear primarily to be those whose continuing relation-

ship is important to Iran [sic]."[87] One could well add that the American claimants most eager to achieve amicable, compromise settlements are likely to be those who desire to continue commercial relations with Iran and who are economically powerful enough to assume the risk involved.[88] Just as settlements are more common between parties wishing to encourage further commercial contact, some form of "compromise" in decision-making is likely to evolve in a Tribunal where it is essential to maintain at least formal civility between the arbitrators and between the state representatives (the Agents and their staffs).

Even more important in the pursuit of compromise is what the U.S. Agent recognised as "a long tradition in international arbitral practice": the desire to reach solutions that are politically acceptable to both sides. This component in decision-making is to a certain extent masked in the Iran-U.S. Claims Tribunal because many of the most important claims are presented against a state by a private party from the other state. The direct state-to-state political interests are not openly at issue. Yet it would be unrealistic to suggest that those political interests are not constantly in the mind of Tribunal arbitrators. To quote a perspicacious American lawyer who has participated in Tribunal proceedings:

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87. Belland, supra, note 3, 246, fn. 3.

88. See, e.g., the settlement confirmed in the Award on Agreed Terms in ITT Industries, Inc. v. The Islamic Republic of Iran, supra, note 29.

> Bear in mind that your case will be presented before a Tribunal on which the political pressures are enormous. No one, least of all the arbitrators who will hear your case, wishes to see the Tribunal collapse, and the withdrawal of Iran from further participation would virtually assure this.[89]

"No one ... wishes to see the Tribunal collapse." That is the overriding consideration for all the members and for Tribunal staff. To ensure that no collapse occurs, some element of consensualism -- of compromise -- is inevitable. The reality is that the Tribunal depends for its continued existence, as it did for its creation, upon the will of the parties to the Algiers Accords. There is nothing to be gained in bemoaning that reality.

Nor indeed is acceptance of the reality of compromise merely an unduly sanguine attempt to make a virtue out of necessity. The inability of the Tribunal to render decisions based upon "pure law", even accepting the entirely dubious proposition that such a creature exists, is an inevitable and not entirely undesirable manifestation of the complex nature of the Tribunal. It has already been stressed that the Tribunal has both public and private functions. Now it will be argued that its tasks are legitimately and expressly both legal, and broadly speaking, political. The relevant matter is not to

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89. Belland, supra, note 3, 247. See also W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 111; and Audit, Le Tribunal des Différends Irano-Américains (1985) 112 J. dr. int'l 791, 847.

castigate the dual legal and political function, but as was the case concerning the public and private law dichotomy, to evaluate its implications.

In a provocative article in the American Journal of International law, Stein has argued that traditional arbitration between states is a "tool of diplomacy".[90] In a sense the Iran-United States Tribunal fits that description, for its existence is due to a diplomatic compromise resolving a complex political and ideological dispute. Yet private parties who prosecute claims before the Tribunal no doubt hope that their own claims will not be treated as diplomatic tools but will be resolved fairly, according to a coherent body of legal rules. As the later discussion of substantive law applied by the Tribunal will demonstrate,[91] that hope has sometimes been frustrated. Although the complex nature of the Tribunal almost guarantees some lack of clarity, parties do have a right to expect internal logical consistency in the Tribunal's resolution of disputes. Whether that consistency need be based on "purely legal" principles with broad precedential value is another matter. It may be that the great value of the Tribunal is not in the externally applicable "rules" it may formulate, but in the internal coherence of the process itself. The parties will see their

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90. Stein, Jurisprudence and Jurist's Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal (1984) 78 Am. J. Int'l L. 1, 49.

91. See infra, text accompanying notes 394 to 425.

disputes being resolved fairly upon some rational basis. In itself, such a process enhances the Rule of Law, no matter what specific rules are being applied.

Stein suggests that a sophisticated appreciation of the role of international arbitration will lead in any case to the rejection of a legalistic approach to conflict resolution. This is especially true when, as is the case with the Iran-U.S. Tribunal, there is strong reason to believe that the parties' intentions in setting up a Tribunal were "not fully congruent". Then, according to Stein, "there may exist a special freedom for the tribunal to consider the parties' reactions to its judgments."[92] Due to the existence of the Security Account, the Iran-U.S. Claims Tribunal has so far been spared worry concerning whether or not its Awards will be respected. But there is a far deeper concern whether, given the enormous political pressures, the Tribunal itself can be held together. Although no one could argue seriously that an arbitral tribunal should always capitulate to a recalcitrant party simply to ensure its own survival, for the value of survival under such conditions would be subject to serious question, a sensitive tribunal will seek to lessen, not exacerbate, potential sources of conflict. To do so, some degree of compromise is essential, even when

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92. Stein, supra, note 90, 49. On the incongruence of the intentions of Iran and the United States, and their subsequent inability to build a consensus, see Mangard, supra, note 28.

"legal" issues are at stake.[93]

A past chairman of the American Bar Association Section on International Law has suggested that "[t]he success of any third-party mechanism depends largely upon its ability to convince the disputants to compromise on as many issues as possible".[94] Even if the parties fail to compromise, a distinguished expert in international arbitration, Professor Pieter Sanders, has pointed out that in the formal disposition of a case the arbitrators are sometimes "forced to continue their deliberations until a majority, and probably a compromise solution, has been reached."[95] On occasion, various arbitrators at the Iran-U.S. Claims Tribunal have stated openly that a

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93. An American Agent before the Tribunal has recognised this necessity as motivating many of the Tribunal's decisions, although he by no means applauds that fact:

> There is a tendency to try to find cases that the Iranians can win. The view appears to be that we don't want to displease them too much. We know how hard it is for them to be defendants in all these cases. We don't want them to leave or to boycott the Tribunal, and so we will do what we can for them.

Rovine, Remarks, (1983) 77 Proc. Am. Soc. Int'l L. 26, 30.

94. Aksen, "The Iran-U.S. Claims Tribunal and the UNCITRAL Arbitration Rules -- an early comment" in J. Schultsz & A. Van den Berg, eds, The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders 12 September 1912-1982 (1982) 1, 5. See also M. Shapiro, Courts: A Comparative and Political Analysis (1981), passim.

95. Pieter Sanders, quoted in Ultrasystems, Inc. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 100, 114 (Concurring Opinion of R.M. Mosk).

majority decision is the product of compromise.[96] If one remembers that arbitral decisions are rarely open to appeal on the merits, such compromise solutions will not seem at all improper. Views of arbitrators may validly differ and it is certainly the case, even in national legal systems, that appeal courts, especially courts of final appellate jurisdiction, will render judgments based upon some form of compromise.[97]

In the international milieu, the case law of the International Court of Justice is replete with examples of solutions clearly based upon compromise. The clearest instances of compromise can be found in the sea boundary decisions which are based upon the concept of "equitable delimitation".[98] These decisions demonstrate that even when a tribunal discovers the "applicable rules", the rules may be so lacking in precision that no "right" answers are apparent. The tendency to

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96. See, e.g., Starrett Housing Corp., et al. v. The Government of the Islamic Republic of Iran, et al., supra, note 51 (Concurring Opinion of H.M. Holtzmann) 159; Ultrasystems, Inc. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 77 (Final Award), (Dissenting Opinion of R.M. Mosk) 80 at 82; and American International Group, Inc. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 96 (Award), (Concurring Opinion of R.M. Mosk) 111.

97. See, e.g., B. Woodward & S. Armstrong, The Brethren: Inside the Supreme Court (1979) passim; A. Paterson, The Law Lords (1982), especially at 98-121; and Stein, supra, note 90, 33.

98. See, e.g., The North Sea Continental Shelf Cases [1969] ICJ 4; Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ 18; and the decision of the I.C.J. Chamber in Case Concerning Delimitation of the Maritime Boundary In The Gulf of Maine (Canada/United States of America) [1984] ICJ 246.

compromise is accentuated. The "compromise" exists, therefore, on two levels: first, during the pleadings as the parties negotiate their positions and secondly, during the drafting of the judgment when the judges give and take on various issues to form a majority. If judicial decisions of national courts and of the World Court are sometimes effected through a process of compromise, such a process has an even greater value in the context of an international arbitration where the congruence of basic cultural values may not be presumed. Compromise will, of course, be more difficult in such a context. As Stein points out, the very existence of the Iran-U.S. Claims Tribunal is "derived from a crisis in which Iranian authorities had demonstrated their disregard for what are probably the most inclusively supported principles of international law."[99] Profoundly contradictory views cannot simply be ignored by the arbitrators. They must, during the decisional process, be assimilated to the greatest extent possible, albeit without sacrificing basic principles, if both parties are to retain confidence in the proceedings.

Stein's conclusion is that, in evaluating the performance of international tribunals, one should not look simply at the

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99. Stein, supra, note 90, 37. Stein goes on to suggest, at 37-8, that "[c]entral to the defining ethos of the Iranian Revolution is the rejection of Western liberalism, an ideology in which secular rights-based legalism plays a central role." See also Selby & Stewart, supra, note 45, 219 who recognise that the "daily operation" of the Tribunal "is affected by competing political and ideological goals."

normative content of decisions, one "should expect international tribunals to draw upon consent, mediate solutions, law and office as partial substitutes for one another in an overall effort to elicit compliance with their decisions."[100] In the case of the Iran-U.S. Claims Tribunal, all these aspects of decision-making are required, not so much to promote enforcement, as to ensure survival. In a major dissenting opinion, the Iranian arbitrators openly called into question their commitment to the entire enterprise of international arbitration, asserting that Western "political and materialistic motives have permeated the institution."[101] A Prime Minister of Iran has accused "the great Satan, America" of exerting "its arrogant influence", thereby "corrupting" the Tribunal.[102] In the face of such assertions, one is compelled to disagree with Stein's bland assumption that the Tribunal will play a "therapeutic and pedagogic" role in co-opting Iran into a Western-style legal process.[103] Without deep sensitivity and flexibility, Western-dominated Tribunal majorities are more likely to drive Iran even further into isolation. In such circumstances, clinging to notions of rule-bound legality in the decisional process would

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100. Stein, ibid., 35.

101. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 84.

102. "Statement of the Prime Minister of Iran", supra, note 39, 428-9.

103. Stein, supra, note 90, 51.

be institutionally suicidal.

There are important, but implicit, normative structures that condition the operation of the Tribunal. For the United States Agent to treat the "tendency to compromise" as a "systemic problem"[104] is to reveal an impoverished conception of legal institutions and to ignore the reality of the political situation confronting the Tribunal, thereby threatening the very basis of its continued authority. The tensions besetting the Tribunal, hence the political contingency of many of its decisions, are extreme. That being said, the troubling question remains whether, in the circumstances described and in view of its complex nature, the decisions of the Tribunal can be accorded much authoritative value outside the Tribunal itself. Responses to that question must be delayed pending a more complete investigation of the Tribunal process. In the next section, certain relevant issues concerning the jurisdiction of the Tribunal will be explored.

B. Jurisdiction of the Tribunal

Early in its deliberative history, the Iran-United States Claims Tribunal rendered a series of decisions in the so-called Iranian forum clause cases. In brief, the issue involved in the cases was whether or not certain forum selection clauses contained in contracts implicated in various claims precluded Tribunal jurisdiction. The clauses in question were diverse,

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104. Rovine, supra, note 83.

some providing for the application of Iranian law, or for alternative venues for adjudication one of which was an Iranian court, or for various combinations of these options. Were such clauses, contained in binding contracts, to be treated as clauses "specifically providing that any disputes" relating to the contract "shall be within the sole jurisdiction of the competent Iranian courts", and thereby excluded from Tribunal jurisdiction under Art. II(1) of the Claims Settlement Declaration?[105] The Tribunal decided that the issue was of fundamental importance -- it would undoubtedly affect many claims -- and that therefore it should be dealt with by the full Tribunal. To facilitate uniformity of approach and to save precious Tribunal time, a system was established whereunder the various claims were scrutinized by the Chamber clerks[106] and a group of nine "test cases" was selected.[107] The cases were thought to be

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105. Supra, note 2.

106. See Lowenfeld, supra, note 65, 81.

107. The following cases were selected and decisions were handed down in each case on the same day, 5 November 1982: Dresser Industries, Inc. v. The Government of the Islamic Republic of Iran (1982) 1 Iran-U.S. C.T.R. 280; Zokor International, Inc. v. The Government of the Islamic Republic of Iran, et al. (1982) 1 Iran-U.S. C.T.R. 271; Stone and Webster Overseas Group, Inc. v. National Petrochemical Co. (1982) 1 Iran-U.S. C.T.R. 274; Howard, Needles, Tammen & Bergendoff v. The Government of the Islamic Republic of Iran (1982) 1 Iran-U.S. C.T.R. 248; Gibbs and Hill, Inc. v. Iran Power Generation and Transmission Co., et al. (1982) 1 Iran-U.S. C.T.R. 236; Halliburton Co. v. Doreen/IMCO (1982) 1 Iran-U.S. C.T.R. 242; Drucker v. Foreign Transaction Co. (1982) 1 Iran-U.S.

(cont'd.)

representative of the range of jurisdictional clauses that the Tribunal would be called upon to evaluate. The decisions of the Tribunal in the Iranian forum clause cases have now been commented upon widely, most authoritatively by Stein in his comprehensive article in the American Journal of International Law,[108] and no purpose would be served by delving into the minutiae yet again. In attempting to assess the nature of the Tribunal and its potential impact, all that is here required is that the broad outlines of the Tribunal's approach to jurisdiction be traced.

The effect of the Iranian forum clause decisions was that only a small proportion of American claims was held to be outside the Tribunal's jurisdiction. Only those clauses where the "plain wording... fulfils the requirements"[109] of Art. II(1) of the Claims Settlement Declaration were interpreted as excluding the Tribunal's jurisdiction. And it is clear that such wording had to be very plain indeed. The choice of forum clause would have to provide "specifically" for the "sole" jurisdiction of competent Iranian courts. Any ambiguity was interpreted so as to allow the Tribunal to retain jurisdic-

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C.T.R. 252; TCBS, Inc. v. Iran (1982) 1 Iran-U.S. C.T.R. 261; and Ford Aerospace and Communications Corp., et al. v. The Air Force of the Islamic Republic of Iran, et al. (1982) 1 Iran-U.S. C.T.R. 268.

108. Stein, supra, note 90. See also Stewart & Sherman, supra, note 14, 18-20; Lowenfeld, supra, note 65, 79-86; and Sohn, supra, note 52, 95-100.

109. Halliburton Co. v. Doreen/IMCO, supra, note 107, 245.

tion.[110] Needless to say, the Iranian arbitrators were not in agreement with this restrictive interpretation of the jurisdictional exclusion contained in Art. II(1). The Iranians were not entirely alone in challenging the majority's approach. In one of the nine test cases, then-President Lagergren joined the three Iranian arbitrators in dissent and would have excluded the Tribunal's jurisdiction over contracts which provided that disputes be adjudicated "through the competent courts according to Iranian law".[111] The dissentients argued, inter alia, that because the contract in question contained a separate choice-of-law clause, the forum selection clause had to be read so as to confer sole jurisdiction on Iranian courts or the clause would be redundant. The majority preferred a more restrictive interpretation of the exclusion and held that "competent courts" did not necessarily imply the sole jurisdiction of Iranian courts.

In the forum clause cases the American claimants did not succeed on all points. The Tribunal refused to adopt one argument which, from the perspective of the United States, was decisive in each and every case. It had been argued by counsel

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110. Gibbs and Hill, Inc. v. Iran Power Generation and Transmission Co., et al., supra, note 107, 238.

111. Howard, Needles, Tammen & Bergendoff v. The Government of the Islamic Republic of Iran, supra, note 107, 251. President Lagergren also joined the Iranians in dissent in a case in which a majority of the full Tribunal decided that a non-profit, non-stock U.S. corporation could pursue a claim before the Tribunal. International School Services, Inc. v. National Iranian Copper Industries Co. (1984) 5 Iran-U.S. C.T.R. 338.

for American claimants, and supported by the U.S. Agent, that particular emphasis should be given to the word "binding" in Claims Settlement Declaration Art. II(1), which excluded 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". The argument ran that none of the contracts could be considered "binding" at the time of the Claims Settlement Declaration because all had been nullified by a fundamental change in circumstances, the Iranian revolution, which effectively frustrated their purpose and rendered resort to hostile Iranian courts an illusory option. The Tribunal would therefore have jurisdiction over every U.S.-Iranian contract. In support of this contention, American claimants filed an affidavit from Warren Christopher, one-time Deputy Secretary of State, who had been the chief U.S. negotiator during the hostage crisis.[112] He swore that the word "binding" had been inserted in the Declaration, at American insistence, specifically to authorise the Tribunal to reach a decision on the effect of the fundamental change of circumstance that purportedly had occurred.

The Tribunal majority rejected the American contention, holding that Mr Christopher's affidavit was "ambiguous concerning the clarity with which this intent was made known to the Algerian intermediary, there being no direct contact between

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112. See Lowenfeld, supra, note 65, 83.

the American and Iranian negotiators".[113] It followed that there was "not sufficient evidence that the two Governments came to an agreement as to the meaning of the word 'binding'," and the Tribunal refused to give the word any effect.[114] Oddly enough, this decision seems to emphasise mightily the will of the parties as the sole source of the Tribunal's jurisdiction, while at the same time ignoring an express jurisdictional requirement of the constitutional document created by the parties.

Two of the three American arbitrators expressed their strong dissent from this aspect of the Tribunal's holding.[115] Both Messrs Holtzmann and Mosk seized upon one, perhaps unfortunately phrased, paragraph contained in some of the nine majority opinions in the forum clause cases to ground their dissent. To quote from the Interlocutory Award in the Halliburton Co. case:

> It is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts. If the parties wished the Tribunal to determine the

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113. Halliburton Co. v. Doreen/IMCO, supra, note 107, 246.

114. Ibid. See also Stone and Webster Overseas Group, Inc. v. National Petrochemical Co., supra, note 107, 276; and Drucker v. Foreign Transaction Co., supra, note 107, 255.

115. See Cases Nos 6, 51 etc.: Concurring and Dissenting Opinions of H.M. Holtzmann (1982) 1 Iran-U.S. C.T.R. 284; and Cases Nos 6, 51 etc.: Concurring and Dissenting Opinions of R.M. Mosk (1982) 1 Iran-U.S. C.T.R. 305. These dissents have received some academic support. See, e.g., Stein, supra, note 90, 26. Note that Arbitrator George Aldrich formed part of the majority.

> enforceability of contract clauses specifically providing for the sole jurisdiction of Iranian courts, it would be expected that they would be so [sic] clearly and unambiguously. Thus, the Tribunal would be reluctant to assume such a task in the absence of a clear mandate to do so in the Algiers accords.[116]

The Tribunal appears to be saying that it has prima facie jurisdiction to interpret forum selection clauses but no prima facie jurisdiction to determine if they are binding. Phrased in such a manner, the Tribunal's holding flies in the face of the vast preponderence of contemporary authority which recognises that arbitral tribunals have full authority to determine their own jurisdiction,[117] which would of necessity include the right to determine the status of a relevant forum selection clause.

Arbitrators Holtzmann and Mosk exploited this point to castigate the majority. In the words of Mr Holtzmann:

> I am simply unable to understand the statement of the majority that [the Tribunal should not determine the enforceability of forum selection clauses]. ... In the context of these Cases, a determination of whether the forum-selection clauses are enforceable, i.e., binding, is necessary in order to determine the Tribunal's jurisdiction.[118]

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116. Halliburton Co. v. Doreen/IMCO, supra, note 107, 245.

117. See, e.g., Saudi Arabia v. Arabian American Oil Co. (ARAMCO), decision of 23 August 1958, reprinted in (1963) 27 I.L.R. 117, 146; and Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Preliminary Award), decision of 27 November 1975, reprinted in (1979) 53 I.L.R. 389, 393 at 404. See also Stein, supra, note 87, 16.

118. Holtzmann, Dissenting and Concurring Opinions, supra, note 115, 295, fn. 26.

Mr Mosk was even harsher, asserting that the majority's conclusions were "devoid of factual and legal support."[119] Both arbitrators would have permitted the Tribunal to determine whether or not the clauses in question were binding. They would have interpreted "binding" to refer to the forum-selection clauses themselves, for such clauses, they asserted, could be severed from the contracts as a whole.[120] Moreover, they would have accorded substantial evidentiary weight to the Christopher affidavit,[121] thereby holding that the Tribunal had been required by the parties to determine if there had been a fundamental change in circumstances in Iran which would render the choice-of-forum clauses providing for the sole jurisdiction of Iranian courts non-binding. Finally, they imply that such circumstances did exist.

In concurring with the opinion of Messrs Mosk and Holtzmann that arbitral tribunals are masters of their own jurisdiction, one need not accept the remainder of their analysis. On the whole the Tribunal majority reached the best possible result; it should simply have been more careful in choosing its methods of justification. Rather than calling into question the Tribunal's right to evaluate its own jurisdiction,

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119. Mosk, Dissenting and Concurring Opinions, supra, note 115, 307 and 312.

120. Ibid., 308. See also Holtzmann, Dissenting and Concurring Opinions, supra, note 115, 292.

121. Mosk, Dissenting and Concurring Opinions, ibid., 307.

the majority could have held that the reference to "a binding contract" in Art. II(1) of the Claims Settlement Declaration was not directed to the forum clause alone, but as the words literally say, and as the Tribunal itself suggested en passant, to the "contract" as a whole. The issue whether or not changed circumstances had so altered Iranian court structures as to render a forum-selection clause non-binding would simply not arise. The word "binding" in Art. II(1) would be given a meaning, which the Tribunal failed to do, and it would be a perfectly sensible meaning: Tribunal jurisdiction would only be excluded when a sufficiently express contractual forum selection clause had granted sole jurisdiction to Iranian courts and when the contract was binding upon the parties. If the contract was not binding, the Tribunal could still retain jurisdiction over non-contractual claims relating to, for example, unjust enrichment (as long as the claim was not merely a masked contract claim)[122] or the taking of property.[123] For some reason,

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122. In Dames and Moore v. The Islamic Republic of Iran, et al. (1983) 4 Iran-U.S. C.T.R. 212 (Award) 220-1, Chamber Three refused to entertain a claim based upon unjust enrichment (quantum meruit) because the claim was really "for the value of services rendered under the contract." The Chamber underscored, however, that in principle the Tribunal could seize jurisdiction over non-contractual claims. See also TCSB, Inc. v. The Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 160.

123. The Tribunal itself has recognised its potential jurisdiction over claims not grounded in contract. See e.g., Halliburton v. Doreen/IMCO, supra, note 107, 247: "The extent to which the claims asserted in this case ... are not based in contract, and [are] thus within the

(cont'd.)

although recognising this possible approach, the Tribunal saw fit not to follow what is a careful and restricted analysis, but instead to adopt wide-ranging language improperly calling into question the power of the Tribunal to evaluate its own jurisdiction. Admittedly, even if the interpretation suggested here had been adopted, the issue of rebus sic stantibus would still arise (most probably in its municipal law analogue of frustration or as an issue of "force majeure"),[124] but then the change of circumstance to be evaluated would go to the possibility of performance of the contract and not to issues involving the fairness or otherwise of Iranian courts.

Tribunal's jurisdiction, remain[s] to be determined by Chamber Two, the Chamber to which this claim is assigned." In Isaiah v. Bank Mellat (1983) 2 Iran-U.S. C.T.R. 232, the Tribunal used this power and determined that it did have jurisdiction over a claim founded in unjust enrichment. It should be noted that the situation is different for "Official Claims" of one state against the other. Under art. II(2) of the Claims Settlement Declaration, the Tribunal may only adjudicate "Official Claims" relating to contracts for the sale and purchase of goods and services. Non-contractual claims could not be heard. See Case B-24 (1984) 5 Iran-U.S. C.T.R. 97, 100; and Iranian Customs Administration v. The United States of America (1984) 5 Iran-U.S. C.T.R. 94, 96.

124. On the potential application of the doctrine of "force majeur", see Carbonneau, infra, note 390, 106-20. The doctrine of rebus sic stantibus has now been applied by the Tribunal in a manner advantageous to Iran. See QuesTech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran, Award of 20 September 1985, reported in (1986) 80 Am. J. Int'l L. 362 (although the Tribunal took pains to point out that the Iranian termination of the relevant contract could be justified on the ground of changed circumstances only because the contract involved services relating to national security).

Here lies the central consideration that conditioned the majority's approach, the consideration that prompts the present writer to reject the analysis put forward by Arbitrators Holtzmann and Mosk. Given its status as, at least in part, an international arbitral tribunal, it was impossible for the Tribunal to hold expressly that the Iranian Revolution had so altered the legal system of Iran that it would be impossible for American claimants to find justice. That would have been the clear message contained in any decision which followed the Mosk-Holtzmann line of argument and it is a message that would have been completely unacceptable to Iran -- so unacceptable that, as Professor Lowenfeld points out, the atmosphere at the Tribunal would almost certainly have been irremediably poisoned.[125] Professor Lowenfeld is joined in his overall support for the majority's position by Professor Von Mehren of Harvard. He suggests that "in matters of jurisdiction the Tribunal has been especially careful, cognizant that it draws its jurisdiction solely from the fragile agreement of the two unfriendly states."[126] Two important ideas can be extrapolated from Von Mehren's insight. The first is that, as an arbitral tribunal, the Iran-U.S. Claims Tribunal derives its authority solely from the agreement of the two state parties as expressed in the

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125. See Lowenfeld, supra, note 65, 81.

126. Von Mehren, supra, note 1, 720.

Algiers Accords.[127] There can be no residual jurisdiction, another factor that distinguishes the Tribunal from domestic superior courts. Secondly, because arbitral tribunals derive their authority from the will of the parties to the constituting instrument, some care will normally be taken to avoid offending the sensibilities of the parties. Of course, in some contexts, an arbitration (usually ad hoc) will proceed even where one party has expressed the ultimate in contempt, by refusing to participate.[128] But the Iran-United States Claims Tribunal is unique; as an enduring institution it retains a continuing sensitivity to the legitimate concerns -- and even the simple pride -- of the parties.

The decision of the majority in the forum clause cases reveals much about the nature of the Tribunal. Stein has complained that "the Tribunal's essential response to the legal

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127. The Tribunal has spoken clearly and unequivocally on the source of its jurisdiction:

> [I]t is an undisputed fact that the extent of the Tribunal's jurisdiction has been determined by Iran and the United States in the Algiers Declarations, which contained detailed provisions on the jurisdiction of the Tribunal and that, consequently, the Tribunal has no jurisdiction over any matter not conferred on it by these Declarations.

Case A-1, supra, note 16, 152.

128. See, e.g., B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic (Merits), decision of 10 October 1973 and 1 August 1974, reprinted in 53 I.L.R. 297; and Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 19 January 1977, reprinted in 53 I.L.R. 389, 422.

issues was to refuse to confront them",[129] but that evaluation is not quite fair, or at least not sensitive enough to the real constraints under which the Tribunal operates. The only issue effectively avoided by the Tribunal was the question of the meaning of the word "binding" in Art. II(1) of the Claims Settlement Declaration. As suggested above, that difficult issue could have been handled with equal political sensitivity without sacrificing rigorous analysis, as the majority was disposed to do. However, in the end, the decisions reached by the Tribunal are fair. Professor Lowenfeld has even advanced a gloss on the majority's opinion regarding the requirement that contracts be "binding" that leads to the conclusion that the Tribunal's decision "was the right outcome, not only in terms of the institutional character of the Tribunal, but in terms of law."[130] He argues that because the Tribunal derives its authority from the Accords between the two states and not from the agreement of the parties to any impugned underlying contract, the "binding" quality should be evaluated from the time of the signing of the Accords (January 1981) and that since then no fundamental change of circumstances has occurred, the Revolution obviously pre-dating the Accords.

Even if one is not prepared to go quite as far as Professor Lowenfeld -- for his gloss still fails to explain the

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129. Stein, supra, note 90, 2.

130. Lowenfeld, supra, note 65, 83.

majority statements that would restrict the Tribunal's ability to determine its own jurisdiction, statements which are simply not consonant with contemporary law -- it is still true that the overall result was right. Even a highly critical American observer was forced to admit that, despite the perceived inadequacies of the majority's approach, very few Americans claimants would be forced to seek a remedy in presumptively hostile Iranian courts.[131] At the end of the day, 15 November 1982, the Iranian arbitrators were still sitting, the Iranian government was still participating in proceedings, no nation's pride had been offended, and the vast majority of American claimants still had a forum in which to pursue their claims (and access to a guaranteed enforcement mechanism). Surely this was not a bad day's work for a fledgling Tribunal beset by intense political acrimony. There was one problem, of course, for in order to preserve itself, the Tribunal had been seen to call into question a basic premise of international adjudication: the right of a tribunal to evaluate its own jurisdiction. Such idiosyncracies, prompted by the Tribunal's unique nature and its political environment, may be inevitable.

The second great test of Tribunal jurisdiction arose in claims brought by individuals who, under the relevant municipal law, possessed both American and Iranian nationality. Under Art. II(1) of the Claims Settlement Declaration, the Tribunal was granted jurisdiction to adjudicate "claims of nationals of

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131. Stein, supra, note 90, 44.

the United States against Iran and claims of nationals of Iran against the United States". The noun "national" was defined in Art. VII(1) as "(a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States ... ." Regarding corporate nationality, certain other conditions of proof were imposed which have been elaborated in case law,[132] but no further guidance was provided concerning the nationality of natural persons. It would not appear that the negotiators had contemplated the problem of dual nationality; if they had, no agreement was manifest. Perhaps the issue was not thought to be of great importance. Yet when the claims were finally processed, it transpired that approximately 150 involved dual nationals.[133]

The question whether a dual national was allowed to bring a claim in the Tribunal against one of his national states arose first in Chamber Two. It should be pointed out that in practice all such claims are directed against Iran and not the United States, and that the claimants were, without exception, supporters of the deposed Shah. That fact undoubtedly complicated the decision-making process, for the result would certainly be perceived in strongly partisan terms. This was the sort of case one state would "win" and the other would "lose".

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132. See the cases cited, supra, note 49.

133. Belland, supra, note 3, 242, fn. 22.

Because of the highly charged political atmosphere, it is difficult to see why the Chamber Chairman, Judge Bellet, did not seek immediately to turn the case over to the plenary Tribunal for adjudication.[134] Instead, the Chamber rendered three decisions relating to claims of dual nationals[135] before the issue was addressed by the full Tribunal in Case A-18.[136]

This odd decision to hear the cases in a chamber placed the full Tribunal in a very uncomfortable position. It became necessary to state expressly in the majority opinion in Case A-18 that the previous decisions of Chamber Two would not be affected by the full Tribunal holding.[137] In the result, no

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134. In Presidential Order No. 1 of 19 October 1981, Art. 6(a), reprinted in (1981) 1 Iran-U.S. C.T.R. 95, President Lagergren, who was exercising his power under Art. III of the Claims Settlement Declaration, ordered that "[w]here a case pending before a Chamber raises an important issue the Chamber may, at any time prior to the final award relinquish jurisdiction in favour of the plenary Tribunal".

135. Esphahanian v. Bank Tejarat, supra, note 43, and Golpira v. Government of the Islamic Republic of Iran, supra, note 43, were the two controversial cases in which dual nationals were authorised to claim against Iran. In Haroonian v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 226, 227, the Chamber decided unanimously (though Dr Shafeiei refused to sign the Farsi version of the Award, having previously signed the English version) that a person who became a U.S. citizen after the date of the Algiers Accords was not entitled to claim against Iran because "[d]uring the critical time ... that is, from the date the claim arose ... until the date the Algiers Declaration entered into force (19 January 1981), the Claimant was an Iranian national and an Iranian national only."

136. Case A-18, supra, note 32.

137. Ibid., 490.

real inconsistency was involved because the full Tribunal in large measure adopted the reasoning of the majority opinions in Chamber Two. One has cause to ask, however, if the Chamber decisions in any way prejudiced the full Tribunal evaluation, predisposing it to reject the Iranian position. Alternatively, one could speculate that the full Tribunal majority was enabled to say that the Chamber Two decisions would stand because it was clear that the approaches taken would be, in fact, compatible. A believer in rigorously "legal" decision-making might be tempted to accept the second alternative except that there does not appear to be any authority vested in the Tribunal to overturn awards once rendered,[138] so that even if the full Tribunal had disagreed with the Chamber Two majority, it would not have been possible to reverse the previous Awards. The pressure, then, would have operated in the other direction, encouraging the plenary Tribunal to reach a decision compatible

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138. There are only two provisions in the Final Tribunal Rules of Procedure, supra, note 29, which allow for any re-examination of Tribunal Awards. Article 35 allows the Tribunal to "interpret" an award and Art. 36 provides for the correction of "any errors in computation" or for the rectification of clerical and typographical errors "or any errors of similar nature". Neither of these provisions authorises the full scale reversal of an award once rendered. In an Order in one of the cases involving the Charles T. Main Group, Judge Riphagen noted that "the Tribunal Rules, while providing in Articles 35 and 36 a thirty day period for the interpretation of awards and the correction of errors, do not provide for the substantive reconsideration or revision of awards. Chas. T. Main International, Inc. v. Khuzestan Water and Power Authority et al. (1983) 4 Iran-U.S. C.T.R. 60 (Order) 60. See also Dallal v. The Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 74.

with the Awards in Chamber Two so as to prevent blatantly contradictory results.

These circumstances point once again to the extremely complex nature of the Tribunal. Because in many ways it looks so much like a court, there is a temptation to assume that the Tribunal possesses the same powers as a court. Normally, courts of final jurisdiction possess a right to reverse their own prior holdings.[139] Yet, despite what appears to be a two-tier system, the plenary Iran-U.S. Claims Tribunal has no power to reverse the decision of a Chamber.[140] The full Tribunal was completely at liberty to render an inconsistent decision but it had no procedural mechanism which would enable it to strive for consistency. Any consistency that is achieved must result solely from the restraint and politesse of the arbitrators.

Consistency was achieved in the dual nationality cases, but at a cost -- a cost that has yet to be measured. In the original Chamber Two decision, the majority (Judge Bellet and Mr Aldrich) held that, in determining whether or not a dual national could present a claim, the Tribunal should follow the perceived contemporary trend which would allow such claims if the individual was relying upon his "dominant and effective

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139. See, e.g., the "Practice Statement" of the United Kingdom House of Lords in [1966] 1 W.L.R. 1234.

140. Under Art. IV(1) of the Claims Settlement Declaration, supra, note 2, each decision of the Tribunal is "final and binding."

nationality".[141] It should be reiterated that the point of the exercise was that, despite the "mixed" public and private (international and transnational) nature of the Tribunal, the nationality of claims rules did apply and it was necessary to show that individual claimants had a right to the protection of one of the state parties, a protection operating through the granting of access to the Tribunal.

It had been the traditional position of international law, a position argued forcefully by the Iranian Government, that under the doctrine of "non-responsibility", a dual national could not request the state of one of his nationalities to pursue a claim against his other national state.[142] In his copious and comprehensive dissenting opinion, which treated both the Esphahanian and Golpira cases, Dr Shafeiei argued that this traditional rule was still binding,[143] but the majority held in Esphahanian that "since the beginning of the century, there has been a very strong tendency to limit the principle of non-

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141. See especially the leading case, Esphahanian, supra, note 43, 160-1. In so deciding, the Chamber put great emphasis, at 163, upon the Judgment of the International Court of Justice in the Nottebohm Case (Liechtenstein v. Guatemala) [1955] I.C.J. 4, 22 where the Court elaborated the "real and effective nationality" doctrine. See also the Mergé Case (U.S. v. Italy) (1955) 14 R.I.A.A. 236.

142. See, e.g., E. Borchard, The Diplomatic Protection of Citizens Abroad or The Law of International Claims (1915) 588. See also the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930, art. 4.

143. Dissenting Opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality, supra, note 3, 225.

responsibility ... by the principle of effective nationality."[144] The majority went on to examine the factual links that bound Esphahanian to the United States and to Iran and concluded that "Esphahanian's dominant and effective nationality at all relevant times has been that of the United States" and that therefore, the Tribunal "has jurisdiction to decide his claim against Bank Tejarat."[145] The only caveat was that if fraudulent exploitation had been proved, the majority might have denied Tribunal jurisdiction "on equitable grounds."[146] The Esphahanian Award was followed expressly by the majority in Golpira.[147]

The dual nationality issue was brought to the full Tribunal by Iran as an interpretive dispute between the two state parties to the Algiers Accords, an "A" case according to the Registry's numbering system, indicating a dispute referred

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144. Esphahanian v. Bank Tejarat, supra, note 43, 162.

145. Ibid., 168. In evaluating the factual connections, the Tribunal took into consideration such factors as Esphahanian's long residence in the United States (he first arrived at the age of seventeen), his service in the American armed forces, his marriage to an American and the fact that there were two U.S.-based children of the marriage, and his complete severance of ties with Iran after 1978. The major countervailing factor was that Esphahanian, from 1970-8, was the Middle Eastern manager for a Houston-based corporation and spent nine months of every year stationed in Iran. The factors which linked him to America were thought to be more significant. Ibid., 158-9.

146. Ibid., 168.

147. Golpira v. The Government of the Islamic Republic of Iran, supra, note 43, 173.

to in Art. IV(4) or II(3) of the Claims Settlement Declaration.[148] The decision of the plenary Tribunal is therefore not an "award" for it does not relate to any specific claim; it is really a declaratory judgment. As such, it will be relied upon as a guide to facilitate decisions in subsequent claims involving issues of dual nationality.

As noted above, the majority of the full Tribunal in effect adopted the same position as the Chamber Two majority in Esphahanian. In the words of the plenary Tribunal:

> There is a considerable body of law and legal literature... which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality.[149]

Like Chamber Two, and without pursuing any extended analysis, the Tribunal majority relied primarily upon "the two most important decisions on the subject in the years following the Second World War [which] have had a decisive effect"[150] -- the Nottebohm and Mergé[151] cases. In fact, the relevance of both cases is open to some question.[152] Nevertheless, the Tribunal

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148. See Annual Report 1, supra, note 67, 14-5.

149. Case A-18, supra, note 32, 497.

150. Ibid., 499.

151. Supra, note 141.

152. Points that should perhaps have been treated with reference to the Nottebohm Case include: (a) the fact that the Nottebohm decision did not involve a problem of dual nationality; and (b) the potentially decisive effect of the Guatemalan arguments which treated Nottebohm's acquisition of Lichtenstein nationality as fraudulent, (cont'd.)

majority simply went on to suggest factors that would be applicable in determining "dominant and effective" nationality. Those factors included "habitual residence, center of interests, family ties, [and] participation in public life."[153] The list was not intended to be exhaustive and the Chambers retain a right to consider any additional factors which they deem to be relevant.

Case A-18 caused the greatest convulsions yet experienced by the Tribunal.[154] The mere fact that, apart from the majority opinion, there were three separate concurring opinions and one dissent (joined by all three Iranian arbitrators)[155] is

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arguments to which the International Court did not wish to lead its imprimatur. Similarly difficult issues arise vis-à-vis the Mergé Case, issues such as: (a) the factual importance of Italy's status as a defeated Axis power; (b) the nature of the Tribunal which may be seen as a manifestation of traditional post-war "victor's justice"; and (c) the modest reputations of the members of the Tribunal in no way mitigated by reasoning that is, to put it charitably, wooly (the Tribunal's attempt to suggest that it was upholding both the traditional rule of non-protection and the Nottebohm rule of effective nationality remains unconvincing).

153. Case A-18, supra, note 32, 501.

154. Accord Belland, supra, note 3, 242, fn. 22.

155. See the Concurring Opinions of H.M. Holtzmann and George Aldrich in Case A-18, supra, note 32, 503, of R.M. Mosk at 505 and of W. Riphagen at 509. When the majority opinion was released, the Iranian arbitrators attached a "Declaration" expressing their outrage, accusing the Tribunal of "bad faith", bias and political motivations. Case A-18, supra, note 32, 502. The three Iranians later filed a full scale dissent which retains a sense of outrage but attempts to ground their anger in a rational legal argument. See Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35.

sufficient evidence of controversy. When one reads the separate opinions, the intensity of that controversy is manifest. Arbitrators Holtzmann and Aldrich indicate that although they concur in the result, they would, in preference, have adopted an entirely different course of reasoning, holding that, because the Claims Settlement Declaration defines "nationals" as "citizens", a term of municipal law, it was "clear that all nationals, including dual nationals, are entitled to bring claims to this Tribunal."[156] In other words, the jurisdiction of the Tribunal would depend upon the domestic law definitions of "citizen" in the United States and Iran. If a person were a "citizen", for example, of the United States under U.S. law, he would be automatically a "national" for the purposes of the Claims Settlement Declaration and would be entitled to claim. Any other nationality would be irrelevant.

Richard Mosk, in his concurring opinion, objected to the Tribunal's resort to customary international law and its test of dominant and effective nationality, because in his view the "plain language" of the Claims Settlement Declaration was clear in according to the Tribunal jurisdiction over claims brought by dual nationals. He too would rely upon the equation of nationality with citizenship in the Declaration definition to hold that all those who could claim U.S. citizenship would have standing to be heard before the Tribunal, and the Tribunal would

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156. Concurring Opinions of H.M. Holtzmann and George Aldrich, ibid., 503.

have jurisdiction to hear them.[157]

Judge Riphagen, who had replaced Judge Bellet as Chairman of Chamber Two,[158] also concurred in the result but would have modified the applicable test of dual nationality, holding that the relevant issue was not "the choice of the 'better' (ie. the 'dominant' or 'effective') nationality" but rather "the search for the most relevant nationality within a specific context".[159] That search would also explore the 'cause' of dual nationality: the Tribunal should look at the "social conduct" of the claimant and the "presence or absence of deliberate acts aimed at the relinquishment from [sic] the 'other' nationality".[160]

But these divisions of opinion, though important, appear mere quibbles in the face of the Dissent signed by all three Iranian arbitrators. In a lengthy opinion which can only be summarized here, they made a solid attempt to marshal all possible legal objections to the position adopted by the majority. The Iranian arbitrators began by stressing that the totality of the Tribunal's jurisdiction was derived from the Claims Settlement Declaration. For the purposes of interpretation, one had to look for the subjective will of both states in the Declaration; only results which were "mutually acceptable"

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157. Concurring Opinion of R.M. Mosk, ibid., 505-9.

158. Annual Report 1, supra, note 67, 3, fn. 1.

159. Concurring Opinion of W. Riphagen in Case A-18, supra, note 32, 509 [emphasis in original].

160. Ibid., 510.

in the light of those subjective wills could be appropriate interpretations. Using this approach, and positing a duty to interpret jurisdictional clauses restrictively, it was clear that "[n]othing in the context, preamble, or preparatory work indicates a converging will of the two governments to extend the tribunal's jurisdiction to dual nationals."[161]

The Iranians rejected the argument that the term "national" in the Declaration must automatically include dual nationals because in their reading of customary international law, a dual national was generally excluded from claiming against either of his national governments under the principle of non-responsibility. Following Dr Shafeiei's lead in his dissent from the previous Chamber Two decisions in the dual nationality cases, the Iranian arbitrators in Case A-18 relied primarily upon the Hague Convention of 1930,[162] persuasive and authoritative doctrine supporting the approach of that Convention and state practice (largely excluding that of the United States) to support their position. But they also included one rather neat argument based upon United States practice, drawn, one presumes, from the Iranian Government Memorial in the case. In 1976, the U.S. Government concluded a Claims Settlement Agreement with Egypt in which the parties believed it necessary to state expressly that the term "nationals" included dual

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161. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 11.

162. Supra, note 142.

nationals and that the relevant test to determine standing to claim was "dominant and effective" nationality. The Iranians pointed out that if the new customary rule governing the presentation of claims by dual nationals was the principle of dominant and effective nationality, as asserted by the United States, then the wording of the U.S.-Egyptian agreement was redundant. It was only because dominant and effective nationality was not the customary rule governing the status of claims by dual nationals that the United States and Egypt were required expressly to include that rule in their agreement.[163]

Whether or not one accepts this argument -- and it is clear that it could almost equally run in the other direction, the U.S.-Egypt agreement being viewed as further evidence of the emergence of the "new" dual nationality rule -- it is clear that the Iranian arbitrators were concerned to construct a forceful legal argument based upon traditional principles of international customary law, buttressed by recent practice involving claims of dual nationals. It would be incorrect, then, to suggest that the Iranian arbitrators are concerned only with "politics". Even if their decisions are commonly motivated by intensely-felt political beliefs, they often strive to provide

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163. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 12-3.

formally legal justifications for their holdings.[164] Finally, the Iranian arbitrators rejected with scorn the American contention, a contention ultimately supported only by the U.S. arbitrators, that the municipal law definition of "citizen" was the appropriate and exclusive means of defining "national" for Tribunal purposes. That argument, the Iranians asserted, would deny the international nature of the Tribunal.[165] Ultimately, the Iranians found themselves alone in dissent and their isolation, mixed perhaps with anger at the failure of their attempt at "legal" argument, caused them to adopt a vitriolic tone. They asserted:

> In assuming jurisdiction over these claims [of dual nationals], the majority has exceeded its power and acted in ultra vires. As such, its decision is null and void ab initio.[166]

They went on to savage the Tribunal's holding, and the work of the Tribunal in its entirety on frankly political grounds, noting its "predominantly Western composition" and criticising the "exclusive club" of Western arbitrators who "are concerned [only]... to satisfy their political and materialistic inclina-

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164. See Economy Forms Corp. v. The Government of the Islamic Republic of Iran (1983) 5 Iran-U.S. C.T.R. 1 (Dissenting Opinion of Mahmoud M. Kashani). See also the comments of an American observer who notes that "American officials and attorneys freely acknowledge that opinions and dissents, even by Iranian judges they happen to revile, are copiously documented and closely reasoned". Tonelson, supra, note 3, 23.

165. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 16-7.

166. Ibid., 82.

tions".[167] The entire arbitral process was "designed to safeguard the interests of the capitalist world."[168]

The anger displayed by the Iranians in Case A-18 again highlights the enormous difficulties facing the Tribunal and it justifies a careful approach to evaluations of its own jurisdiction. In the forum-clause cases, the Tribunal majority was cautious and avoided wounding national sensibilities. It refused to hold that the Iranian legal system was incapable of providing a fair trial for American claimants. Although few claimants were actually excluded from the Tribunal under the decisions, Iran was not thrust fully into the position of "loser" for certain important American arguments were expressly rejected. In the dual nationality case, although the majority did reject the American equation of nationality and citizenship, the result of the case was entirely in accord with American wishes. It is probably no coincidence that in the period immediately following the release of the decision in Case A-18, the Tribunal was confronted with the most serious crisis it has yet had to face.[169] The impact of that crisis may be felt in subsequent cases, where Tribunal majorities may feel constrained to reach decisions which will avoid any repetition of the anger

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167. Ibid., 84-5.

168. Ibid., 85.

169. For a discussion of the crisis, sparked by a physical attack upon one of the third-country arbitrators, see infra, text accompanying notes 347 to 353.

prompted by Case A-18.

In the end, the major Tribunal decisions involving jurisdictional questions seem to have been conditioned by one overriding concern: the desire to provide a forum. Because the Tribunal is fully aware that it constitutes the last, best hope for many claimants who have suffered due to the collapse of U.S.-Iranian economic relations, there is a strong desire on the part of the American and third-country arbitrators to ensure that access is granted. Only when it is patently impossible to fit a claim within the wording of the Claims Settlement Declaration will the majority exclude the claim.[170] In the forum clause cases a few claims were clearly outside the Tribunal's jurisdiction and Iran could be partly accommodated. In the dual nationality case, the Declaration could fairly be interpreted to allow for the inclusion of all the disputed claims and Iran was

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170. A similar approach can be identified in the so-called "Refusal Cases" where the Registry had refused to file certain claims because they had arrived late. The Tribunal majority held that such claims were properly refused even if they had arrived only one day late and due to bad weather which had prevented flights into the Netherlands. When the wording of the Declaration is clear, the majority will exclude a claim, but any ambiguity will be interpreted in favour of a claimant. See, e.g., In Re Refusal to Accept the Claim of Cascade Overview Development Enterprises, Inc. (1982) 1 Iran-U.S. C.T.R. 127. For a harsh critique of this position, see Refusal Cases Nos 1, 2 & 3: Dissent of H.M. Holtzmann to the Tribunal's Decision Refusing to Accept as Filed Three Claims Received by the Registrar on January 20, 1982 (1982) 1 Iran-U.S. C.T.R. 129. See also Lianosoff v. The Government of the Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 90 where the claim of a stateless person based upon a 1923 arbitral award was held, properly, to beyond the scope of the Tribunal's jurisdiction.

to be the loser. The Government of Iran may also have made a tactical error in arguing the Dual National case. It is reported that the United States arbitrators repeatedly asked Iranian counsel during oral hearings in Case A-18 if, in Iran's view, dual nationals were excluded from the Tribunal, they would still retain a right to sue Iran in U.S. courts. In a perhaps ill-considered response, Iranian counsel denied that possibility, thereby making it clear that the Tribunal was the only likely forum for such claimants.

Another case in which Iran's position was rejected in its entirety by a majority of the plenary Tribunal was Case A-2, where the Tribunal held that the Claims Settlement Declaration did not grant it jurisdiction to hear direct claims by the Government of Iran against United States nationals.[171] The Declaration was simply incapable of bearing an interpretation inclusive of any such independent claims. However, as will be discussed immediately below, the rigours of this decision were mitigated in practice by the Tribunal's findings concerning its jurisdiction over Iranian Government counterclaims, thereby underscoring the Tribunal's eagerness to provide a forum wherever possible.

In the series of cases treating the issue of counterclaims, the tendency to favour the inclusion of claims has

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171. Case A-2 (1982) 1 Iran-U.S. C.T.R. 101. See also, Case A-16 (1983) 5 Iran-U.S. C.T.R. 57, where a majority of the full Tribunal followed Case A-2 and applied it to claims of Iranian banks against U.S. nationals.

clearly been, formally at least, to the benefit of Iran. In many cases, Iranian defendants have sought to offset their own claims for breach of contract or for the payment of outstanding tax or social security assessments against the claims of American corporations and individuals. The American claimants asserted that such counterclaims were not within the Tribunal's jurisdiction because they were not mentioned expressly in the Claims Settlement Declaration. However, in Case A-1 the Tribunal held that although Iran could not bring direct claims against U.S. nationals, counterclaims against "nationals" were admissible as long as they arose "out of the same contract, transaction or occurrence that constitutes the subject-matter of [the] national's claim."[172] In Gould Marketing, Inc. v. Ministry of National Defense of Iran,[173] Chamber Two made it clear that such counterclaims were within Tribunal jurisdiction even if the value of the counterclaim exceeded vastly the value of the initial claim.

Having held that Iranian counterclaims were within its jurisdiction, the Tribunal then faced a thornier issue, for it soon became apparent that although Iran sought to offset its counterclaims in Tribunal proceedings, it was also pursuing separate remedies in Iranian courts. The question then arose

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172. Case A-1, supra, note 16. See also Owens-Corning Fiberglass Corp. v. The Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 322.

173. (1983) 3 Iran-U.S. C.T.R. 147, 152.

whether or not the Tribunal had exclusive jurisdiction over any counterclaim arising out of the same contract, transaction or occurrence constituting the subject matter of a claim before the Tribunal. American claimants sought orders from the Tribunal to compel the dismissal of proceedings instituted in Iranian courts.[174] In the leading case, E-Systems, Inc v. The Islamic Republic of Iran, the full Tribunal held that "the wording of the Algiers Declarations does not support the argument that the Tribunal's jurisdiction over Iran's counterclaims is exclusive."[175] In the abstract, counterclaims could be presented separately to a national court. However, the Tribunal went on to hold that once a counterclaim had been presented to the Tribunal, under Art. VII(2) of the Claims Settlement Declaration, the claim would "be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."[176] It followed that

> [t]his Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective. Not only should it be said that the award to be rendered in this case by the Tribunal, which was established by intergovernmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United

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174. See, e.g., E-Systems, Inc v. The Islamic Republic of Iran, supra, note 36, 51.

175. Ibid., 56. See also QuesTech, Inc. v. The Islamic Republic of Iran, supra, note 39, 99. And see generally Stewart & Sherman, supra, note 14, 31-3.

176. Supra, note 2.

> States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions be stayed until proceedings in this Tribunal have been completed.[177]

The Tribunal therefore "requested" that Iran stay proceedings in the Tehran courts. Such "requests" to stay proceedings have been issued in many subsequent cases.[178] In an order in the Behring International case, Judge Mangard clarified the meaning of the word "request" in a somewhat different context, but one which is parallel to the situation discussed here. He stated that "[t]he word request ... is tantamount to and constitutes an order".[179] In fact, the Iranian court cases have proceeded,

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177. E-Systems, Inc. v. The Islamic Republic of Iran, supra, note 36, 57.

178. See, e.g., Rockwell International Systems, Inc. v. Government of the Islamic Republic of Iran, supra, note 39; Watkins-Johnson Co. v. The Islamic Republic of Iran, supra, note 39; Ford Aerospace & Communications Corp. v. The Government of Iran (1983) 2 Iran-U.S. C.T.R. 281 (Interim Award); Touche Ross & Co. v. The Government of the Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 59 and 200 (Interim Awards); CBA International Development Corp. v. The Government of Iran (1983) 4 Iran-U.S. C.T.R. 53 (Interim Award); and RCA Global Communications Disc, et al. v. The Islamic Republic of Iran, et al., supra, note 17 (Interim Award).

179. Behring International, Inc. v. Islamic Republic Iranian Air Force, et al. (1983) 3 Iran-U.S. C.T.R. 173, 175. The conclusion that a request was an Order had not been made clear in the E-Systems case where a strong division of opinion was evident. Supra, note 36. Such "requests" have been issued in diverse contexts. For example, Chamber Two has "requested" that the Government of the United States prevent the sale by public auction of certain of Iran's diplomatic and consular properties in America "which possess important historical, cultural or other unique features" pending the Tribunal's adjudication of the underlying disputes. Cases A-4 and A-15 (Iran v. United States) (1984) 5 Iran-U.S. C.T.R. 131, 133.

Iran arguing that its municipal rules of civil procedure prevent it from complying with the Tribunal's requests.[180] Why such an argument should avail before an international or transnational tribunal has not been elaborated upon. Internal constitutional arrangements may not be invoked to defeat an international obligation. Still less should the easily-altered positive law of a state justify non-compliance with international norms. It would appear that Iran simply wants to retain control over the disposition of cases. It should be noted that Iran is not entirely alone in seeking external remedies. A losing claimant, Mr Dallal, has attempted, unsuccessfully, to relitigate his case in an English court, basing his application solely upon the Tribunal's supposed mistake of law. Mr Justice Hobhouse wisely struck out Dallal's claim.[181] In 1981, one American claimant did succeed, however, in gaining a court attachment order covering property of the National Iranian Oil Company located in the Federal Republic of Germany.[182] Iran has petitioned the Tribunal to order U.S. claimants to abandon such attachments. In at least one case, an Iranian court rendered judgment on

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180. See, e.g., Stewart & Sherman, supra, note 14, 31-2. The Iranian arbitrators have adopted that position as well. See e.g., the concurring opinion of Arbitrators Kashani, Shafeiei and Sani in E-Systems, Inc. v. The Islamic Republic of Iran, supra, note 36, 65 at 67.

181. Dallal v. Bank Mellat [1986] 1 All E.R. 239 (Q.B.D.) (U.K.).

182. William Brothers Int'l Corp. v. N.I.O.C., Frankfurt-am-Main District Court no. 3/14 0 11/80, 14 September 1981.

matters intimately related to a Tribunal claim and counterclaim, and when the American claimant asked the Tribunal to order the Iranian Government to take steps to vacate the judgment of the Tehran Court, Chamber One refused, suggesting that "the alleged interrelationship between the two cases is not quite clear."[183] One might well ask why the Chamber had ordered a staying of the Iranian proceedings in the first place. There would appear to be some reticence on the part of the Tribunal to confront an open attack upon its jurisdiction.

Again, one can see in the Tribunal's approach to counterclaims the desire to facilitate access as long as it can be justified by a close reading of the Claims Settlement Declaration and as long as harsh controversy can be avoided. Iranian counterclaims were allowed because nowhere in the Declaration were they expressly excluded. Yet, once the counterclaims were allowed, the Tribunal held that its exclusive jurisdiction should be made to bear upon the case and, under Art. VII(2) of the Declaration, recourse to all other tribunals should be suspended. Confronted with an open Iranian challenge to that decision, however, the Tribunal has chosen not to push the point, hoping, it may be presumed, to avoid any destabilizing confrontation.

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183. RCA Global Communications Disc, Inc. et al. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 9 (Interim Award-2-) at 12.

The same intent to grant access to the Tribunal as long as it can be justified safely under the express wording of the Claims Settlement Declaration is evident in the corporate nationality cases. The issue in each case concerned problems of evidence. How could a corporation prove that it was a "national" within Art. VII(1) of the Declaration, which requires that "natural persons who are citizens of [Iran or the U.S. as the case may be] hold directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock." In Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran,[184] the majority facilitated corporate claims by rejecting Iranian contentions that the corporation should prove conclusively the nationality of each of its shareholders. Such a holding would effectively have precluded access to the Tribunal for any publicly-owned corporation. Having established a more lenient system of proof of corporate nationality, the Tribunal then applied it rigorously. In Alcan Aluminum Ltd. v. Ircable Corp.,[185] the management of a Canadian-based corporation had sought to bring a claim on behalf of its U.S. shareholders on the grounds that U.S. nationals owned more than fifty percent of the Corporation. In the end, however, after being asked specifically to adduce stronger proof, all that the Corporation was able to show was that just over fifty

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184. Supra, note 49. See also VSI Corp. v. The Government of the Islamic Republic of Iran, supra, note 49.

185. Supra, note 49.

percent of its shareholders had registered American addresses. Because many non-Americans live in the United States and because it was probable that a significant proportion of non-Americans living in the U.S. (e.g. Canadians) would own shares in a non-American corporation, Chamber Three held that the proof of nationality was not adequate and that the Alcan claim fell outside the Tribunal's jurisdiction. The American arbitrator concurred in this holding and stressed that Alcan had been given every encouragement and opportunity to improve upon its proof.[186]

There have been only two major cases in the Tribunal's history, apart from Case A-1 concerning Iranian Government claims against U.S. nationals,[187] where the Claims Settlement Declaration has been interpreted so as to exclude entire classes of claims. In Haji Bagherpour v. The Government of the United States of America[188] Chamber Two held that it had no jurisdiction to adjudicate the claim of an Iranian oil tanker owner who suffered the loss of a tanker during the abortive rescue attempt undertaken by American military forces to free the U.S. hostages. Article II(1) of the Claims Settlement Declaration read with para. 11 of the first Algiers Declaration[189] precluded Tribunal jurisdiction over claims against the United States

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186. Ibid., Concurring Opinion of R.M. Mosk.

187. See supra, note 16.

188. Supra, note 14.

189. Supra, note 2.

based directly upon its response to the seizure of the hostages. The question was how "direct" those connections had to be and the Tribunal held that in Haji-Bagherpour, the causality was direct enough to preclude the claim. There would have been no claim unless there had been an American rescue attempt and there would have been no rescue attempt unless the hostages had been taken in the first place. Any claim arising out of the abortive rescue would be inadmissible.[190]

In Grimm v. The Government of the Islamic Republic of Iran,[191] Chamber One read the Claims Settlement Declaration to preclude the claim of the widow of an American oil company executive who had been assassinated in Iran in 1978. The widow had argued that her husband's death was a "measure affecting [her] property rights" and hence could be the subject of a valid claim under Art. II(1) of the Claims Settlement Declaration. She argued further that the assassination had engaged Iran's international responsibility and that compensation for breach of that responsibility (the failure to protect her husband) was due under international law. The Chamber did not deal with the second contention because it found that in the context of the entire Claims Settlement Declaration, the reference to "measures affecting property rights" should be interpreted as relating solely to the expropriation of property. Assassination did not

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190. Haji-Bagherpour v. The Government of the United States of America, supra, note 14, 38-40.

191. Supra, note 51.

fit within that rubric. The Tribunal justified this holding by noting that

> it is generally recognized that a provision which establishes the scope of jurisdiction of an arbitral tribunal should be given a restrictive interpretation.[192]

That justification may appear somewhat odd in that, as this Chapter has attempted to show, the Tribunal has tended to treat questions of jurisdiction expansively so as to provide a forum for as many claimants as could possibly fit within the linguistic limits of the Algiers Accords. But if one sets the Grimm case in context, the result is hardly surprising.

In both Grimm and Haji-Bagherpour, the Tribunal was faced with claims involving highly sensitive political questions. If it had agreed to adjudge the latter claim, the Tribunal would have been called upon to deal with the legality of the American hostage-rescue attempt under principles of self-defence and self-help in international law. To do so would not only have been acrimonious and destabilising, it would have been contrary to the tenor of the Claims Settlement Declaration which clearly was designed to preclude any claims relating to the hostage crisis per se (including claims of the hostages themselves). The Grimm claim would have forced the Tribunal to evaluate the internal security arrangements in Iran and the extent to which the failure to protect Mr Grimm amounted to a breach of international state responsibility. The potential for rancour was

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192. Ibid., 80.

enormous in both cases and it may be that, given the small number of people affected by the Tribunal's refusal to assume jurisdiction in the cases, these were issues in which discretion really was the better part of valour. Neither of the claims was at all representative of the majority of Tribunal cases, yet to decide them might have caused irreparable harm to the institution. Just as the Tribunal refused to comment in the forum clause cases upon the fairness of the Iranian legal system, it refused in these two cases to delve into issues almost calculated to dredge up antipathies and anger.

C. The Day-to-Day Operations of the Tribunal: A Study in Wilful Delay?

In the Claims Settlement Declaration,[193] Iran and the United States agreed that "[m]embers of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade law (UNICITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out." Although designed initially for ad hoc arbitrations,[194] the UNCITRAL Rules have been adopted for the first time to provide a structure for the deliberations

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193. Supra, note 2, Art. III(3).

194. See, e.g., Aksen, supra, note 94; and Branson & Tupman, Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration (1984) 24 Va. J. Int'l L. 917, 920.

of a continuing institution.[195] In practice, the "modifications" allowed for in the Claims Settlement Declaration were undertaken by the Tribunal itself and not by the parties. The Tribunal issued a set of Provisionally Adopted Tribunal Rules in March 1983[196] and the Final Tribunal Rules of Procedures only two months later.[197] The Final Rules contained modifications -- some amounting to complete transformations -- involving eighteen of the forty-one UNCITRAL Rules.

The consensus of Tribunal staff and members is that the Rules as modified have been entirely adequate. The co-Registrars of the Tribunal agreed that "from our perspective in the Registry, the Rules cover just about every contingency that can or has come up."[198] The American and third-country arbitrators are also in broad agreement that the Rules work well for them. Mr Brower believes that the UNCITRAL Rules used as a basis for the Tribunal Rules "are [as] good as any set of rules

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195. Robinson, supra, note 4, 662.

196. Provisionally Adopted Tribunal Rules, 9 March 1983, reprinted in (1983) 8 Y.B. Comm. Arb. 234.

197. Final Tribunal Rules of Procedure, supra, note 29.

198. D.J. Gulliford, transcript of interview (11 September 1984). On file with author. The Co-Registrar, A. Foroughi, expressly agreed with that assessment, though he felt that the "rules about resignation and about the substitution or replacement of members" were "not clear". A. Foroughi, transcript of interview (11 September 1984). On file with author. The issue of resignation and replacement of arbitrators has been a difficult one for the Tribunal and it will be discussed in some detail, infra, text accompanying notes 303 to 308.

you find."[199] Judge Mangard feels that the Tribunal Rules provide the arbitrators, particularly the third-country heads of Chambers, with all the procedural tools they need to get their job done.[200] Mr Aldrich is also satisfied with the Rules, suggesting that they work "pretty well".[201]

In regulating the day-to-day operations of the Tribunal, the Rules have to provide for two distinct sets of operations, those that go on in the deliberative processes of the Tribunal and those that are purely administrative. Initially, of course, the administrative task was paramount. It was necessary to receive, collate and process the 3,836 cases lodged with the Tribunal. Under the Claims Settlement Declaration, to fall within Tribunal jurisdiction a claim had to be filed no "more than one year after the entry into force" of the Accords,[202] that is, one year after 19 January 1981. The Tribunal Rules were somewhat sketchy regarding the process of filing because the UNCITRAL Rules were really designed for one-off arbitrations. In any case, the Tribunal Rules were only promulgated

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199. Brower, supra, note 28.

200. Mangard, supra, note 28.

201. Aldrich, supra, note 26.

202. Claims Settlement Declaration, supra, note 2, Art. III(4). The Declaration also provided for an alternative termination date for presenting claims -- six months after the date of the President's appointment if that date would establish a later filing deadline -- but that provision turned out to be inapplicable as the President was appointed on 9 June 1981 which would have created a filing date of 9 December 1981, earlier than the alternative.

after the filing deadline; they do however incorporate many of the administrative decisions taken earlier to guide the initial filing process. The Rules provided that filing was "deemed to have been made when [the relevant document was] physically received by the Registrar."[203] The Registrar was authorised to refuse to accept "any document which [was] not received within the required time period". A party objecting to such a refusal could, within thirty days, request that the Tribunal review the refusal.[204] In fact, a number of claims were refused because of late filing, and upon review, the refusal in the majority of cases was upheld by the Tribunal[205] over the strong protests of one of the American arbitrators.[206]

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203. Final Tribunal Rules of Procedure, supra, note 29, Art. 2(1).

204. Ibid., Art. 2(5).

205. In Re Refusal to Accept the Claim of Cascade Overview Development Enterprises, Inc., supra, note 170; In Re Refusal to Accept the Claim of Mr. Mohammed Sadegk Jahanger (1982) 1 Iran-U.S. C.T.R. 128; and In Re Refusal to File Claim Concerning Sara Helali (1982) 1 Iran-U.S. C.T.R. 134. See also Annual Report 2, supra, note 67, 21.

206. Refusal Cases Nos 1, 2 and 3: Dissent of H.M. Holtzmann to the Tribunal Decision Refusing to Accept as Filed Three Claims Received by the Registrar on January 10, 1982, supra, note 170. It should be noted that the two other American arbitrators concurred with the majority in upholding the Refusals of the Registry, although Mr Mosk wrote a Separate Opinion suggesting that "the Tribunal should urge the two Governments to agree to allow these claims to be filed in order to avoid inequitable results. Refusal Cases Nos 1 and 2: Separate Opinion of R.M. Mosk (1982) 1 Iran-U.S. C.T.R. 132.

Because the UNCITRAL Rules had little to say about the processing of claims, the Tribunal agreed upon certain more specific Administrative Directives[207] to guide the Registry in the acceptance of claims, and in all further filings of documents. These Directives imposed upon Claimants significant requirements of form, including the necessity of filing claims and most evidence in both official languages of the Tribunal (English and Farsi), the presentation of at least twenty copies of each claim and of much subsequent written material,[208] very precise limitations upon paper size, and provisions requiring signatures on a set number of documents. If the Registry staff discovered that any of these formal requirements had not been observed, and the deficiency was one that could timeously be remedied, the documents were marked as "lodged" until the defects were corrected and filing was possible.[209]

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207. Now incorporated as Notes to the Final Tribunal Rules of Procedure as reprinted, supra, note 29. See especially the Notes to Art. 2, incorporating Administrative Directive No. 1 of 4 July 1981. The specific functions of Registry Staff were further clarified by the "Provisional Instructions to Staff Concerning Receipt of Documents" of 19 October 1981 (Unpublished, but referred to in Annual Report 1, supra, note 67, 12).

208. In Note 3 to Art. 2 of the Final Tribunal Rules of Procedure, ibid., it is provided that in relation to subsequent evidence, the Tribunal may determine in each case "based on the nature and volume of the particular exhibit or written evidence" the number of copies that is required.

209. See Annual Report 1, supra, note 67, 14. In all, some forty-eight claims were "lodged" pending compliance with formal requirements.

Once a claim had been accepted by the Registry, staff prepared documentary receipts for the parties and for the relevant state Agent. The claim was then served on the opposing Agent after having first been assigned a Claim number, entered into the Register, and accorded to a Chamber by lot.[210] The statement of claim was then distributed to the members of the Tribunal. The Registry, of course, also has a continuing responsibility for the processing and care of all documentary evidence filed with the Tribunal. Apart from the Rules and existing Guidelines, the Registry receives direction from the Tribunal which continues to meet regularly in administrative session. By the time of completion of the 1983 Annual Report, the Tribunal had held eighty-one administrative meetings.

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210. As required by the Tribunal itself. See ibid., 7. Under Presidential Order No. 8, 24 March 1982, reprinted in (1982) 1 Iran-U.S. C.T.R. 97, all disputes regarding interpretation of the Algiers Accords were required to be submitted to the full Tribunal. Despite the fact that Claims were assigned to Chambers randomly, it would appear that there are informal mechanisms used to prevent inconsistent judgments. For example, it has been revealed that the Chairmen of the Chambers meet to discuss some proposed awards before issuance. Professor Lowenfeld has called this informal system a "rough-and-ready substitute for the practice of stare decisis." Lowenfeld, supra, note 65, 78. The practice also highlights the crucial role of the Chairmen in a Tribunal which is so polarised. In many cases, given the predictable split between the Iranian and American arbitrators, it will be the Chamber Chairman who shapes the final award. This is particularly true given the tendency of the American arbitrators to concur with a result simply to allow the issuance of an Award even if they disagree with the third-country arbitrator's reasoning. For a full discussion of the role of the arbitrators, see infra, text accompanying notes 300 to 358.

Although the conclusions reached "are recorded in serially numbered minutes,"[211] the content, like all written Tribunal material apart from Awards[212] and Orders, is not open to the public.

Such secrecy, though typical of international arbitration, has been identified as a "major problem" by the one-time United States Agent, Arthur Rovine. He has suggested that because the Tribunal is a continuing institution, and is not ad hoc, the confidentiality rule may not be beneficial. It inhibits the "coordination of claims" because, he asserts, Iran is in possession of greater knowledge about the nature of the claims and pleadings. The U.S. claimants are prevented from benefiting from each other's experience.[213] In practice, this aspect of the confidentiality rule may not be a real problem for most American claimants. First, it is highly unlikely that the Iranian Government has been able to co-ordinate its approach to claims in the manner implied by Mr Rovine. Unlike most American claimants who are dealing with one, or at most a few, claims, Iran has been confronted with thousands of cases within a very short space of time. Its capacity to organise and analyse the

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211. Annual Report 1, supra, note 67, 6.

212. The generic term "Awards" is sometimes used to encompass not only Final Awards, but also Interim Awards, Awards on Agreed Terms, Interlocutory Awards, and Refusal Cases. The term "Decisions" is sometimes used in the same sense.

213. Rovine, supra, note 83, 1. See also Clagett, supra, note 29, 131-2.

claims in a sophisticated manner has almost certainly been over-taxed. Knowledge is only power if it can be assimilated.

Indeed, one American lawyer, who has worked for Iran on cases before the Tribunal, has asserted that Iran is at a disadvantage precisely because it cannot adequately co-ordinate its claims and defences. Not only is the Iranian Government unfamiliar with "Western precepts of co-ordination", but there is a substantial problem of manpower, with only "16 or 17 lawyers in all of Iran available at any one time for the kind of service required by representation before the Tribunal."[214] Secondly, many American claimants have banded together in a spirit of self-help to share information through an umbrella group, the United States-Iran Claimants' Committee. Although participation is voluntary, most major claimants have been willing to participate in the sharing of information and in the staffing of committees set up to explore widely applicable issues of substantive law.[215] These two factors -- the overwhelming legal burden on Iran and the self-help of American claimants -- probably operate to ensure that the confidentiality rule does not benefit Iran as much as Mr Rovine suggests. It should also be reiterated that secrecy is a strong tradition in arbitration, a tradition based upon wise sensitivity to the

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214. Shack, Remarks, (1983) 77 Proc. Am. Soc. Int'l L. 23, 24-5.

215. See, e.g., the description of the work of USICC in Clagett, supra, note 29.

concerns of state parties. It may even be a defining feature of the entire process, allowing for behind-the-scenes compromises which lead to mutually acceptable results. The confidentiality rule should not lightly be discarded.[216]

The Registry having processed the Statement of Claim and accompanying documentation, the Chamber or plenary Tribunal is then in a position to deal with the case. Initially, progress was very slow. By the middle to April 1984, the Tribunal had resolved approximately 118 of the some 3,700 cases pending.[217] It should be noted, however, that a very high proportion of those 3,700 cases consists of the so-called "small claims" of less than $250,000 (U.S.). They account for 2,782 of the claims initially filed.[218] Immediately following the conclusion of the Algiers Accords, there appeared to be agreement in principle that the small claims could be settled by a lump-sum payment by Iran which would then be apportioned to claimants by the United States Foreign Claims Settlement Commission.[219] Despite the increasingly important place occupied by the lump-sum settlement method in twentieth-century state practice,[220] and despite

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216. See the discussion, supra, note 29.

217. Belland, supra, note 3, 237.

218. Annual Report 2, supra, note 67, 17.

219. See Stewart & Sherman, supra, note 14, 13-4.

220. In their creative and authoritative monograph, Professors Lillich and Weston point out that lump sum settlements "often in combination with national claims commission adjudication" has accounted for "at least 95 percent of (cont'd.)

Iran's initially favourable reaction to the idea, there is no indication that Iran is now willing to agree to that method of dealing with the small claims.

The United States Government has suggested subsequently that the Tribunal employ special procedures and a test case regime to expedite the claims.[221] Although the Tribunal Rules make no specific provision for small claims,[222] the Tribunal has agreed to employ special legal advisers to evaluate such claims.[223] It would seem, however, that the Iranian Government is now disinclined to treat the small claims differently from major claims, arguing somewhat ingenuously that every claimant deserves a full hearing.[224] The Americans assert that the Iranians are simply trying to delay settlement. A stalemate has

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international claims practice since the close of World War II." R. Lillich & B. Weston, eds., International Claims: Their Settlement by Lump Sum Agreements (1975), vol. I, 11. The study had begun in a more limited form with the publication of R. Lillich, International Claims: Postwar British Practice (1967); and B. Weston, International Claims: Postwar French Practice (1971). See generally Borchard, supra, note 142, 381 et seq.

221. See Stewart & Sherman, supra, note 14, 13; and Annual Report 1, supra, note 67, 7.

222. A fact bemoaned by R.M. Mosk in Alcan Aluminum Ltd. v. Ircable Corp., supra, note 49, (Concurring Opinion of R.M. Mosk) 298, 301 where he complained that "[t]he Tribunal Rules lack some of the modern or innovative case-resolution techniques" that would speed the resolution of small claims. There are, for example, no specific Rules governing joinder or consolidation of cases, interventions, or class claims.

223. See Annual Report 2, supra, note 67, 8.

224. Mangard, supra, note 28.

resulted. As of June 1984, the Tribunal had distributed by lot some 145 small claims cases to the Chambers and had ordered the production of fully particularised Statements of Claim accompanied by full documentary evidence "including evidence of nationality, written statements of witnesses and [a] legal brief."[225] All of the Awards that had been rendered by the Tribunal in small claims cases, as of June 1984, had been in the form of Awards on Agreed Terms,[226] settlements negotiated by the parties and merely approved by the Tribunal, thereby providing access to the Security Account for purposes of enforcement.[227]

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225. Annual Report 2, supra, note 67, 8-9.

226. See a recent example, The Government of the U.S.A. on behalf of Shipside Packing Co. v. The Islamic Republic of Iran (1984) 5 Iran U.S. C.T.R. 80.

227. Annual Report 2, supra, note 67, 9. Overall, the rate of resolution of all types of cases was not much higher in the early days of the Tribunal. By the end of October 1983, the Tribunal had rendered seventy-five Awards, thirty-nine of which were Awards on Agreed Terms. Annual Report 1, supra, note 67, 17, fn. In 1984, writing after two-and-a-half years of Tribunal operation, Selby and Stewart noted that some 300 claims had been dealt with but that "[o]nly one-fifth of those claims ... were resolved by Tribunal adjudication, the remainder having been settled or voluntarily withdrawn." Selby & Stewart, supra, note 45, 215. Surprisingly, commentators have based their evaluations of Tribunal efficiency on quite varied statistics. For example, Stewart & Sherman, supra, note 14, 8, suggested that over 5,000 claims had been filed with the Tribunal Registry. Belland, supra, note 3, 238, quoted a figure of some 3,750 claims, while Lowenfeld, The U.S.-Iranian Dispute Settlement Accords: An Arbitrator Looks At the Prospects for Arbitration (1981) 36 Arb. J. 3 (No. 3) 4, seems to have posited a figure around 1,900 cases, although he appears to have been referring only to American claims against Iran. Even then, the figure is

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As of October, 1985, the Tribunal had approved 101 Awards on Agreed Terms representing some $235 million (U.S.) for American Claimants, but had still issued only forty-six Awards, with a much lower total monetary value.[228]

The overall position is that after some initial congestion in the Registry caused by the unexpected flood of claims,[229]

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too low. The variety in figures is due largely to the fact that some commentators were attempting tentative evaluations early in the Tribunal's existence and before the Registry had completed its evaluation of the claims. There is also sometimes a distinction drawn between "claims" and "cases" which may incorporate more than one claim. Wherever possible, the present writer has relied exclusively upon case statistics compiled by the Tribunal Registry, though the words claim and case are used interchangeably for in the present context, nothing hangs on the distinction.

228. Tonelson, supra, note 3 (Statistics from the U.S. State Department). The figures might today look even more skewed for it has recently been reported that the Chevron Corporation has concluded a settlement agreement with the Iranian Government under which $115 million (U.S.) will be paid as compensation to the U.S. corporation for the loss of its Iranian assets. The settlement has apparently been accepted by the Tribunal. Reported in the New York Times (30 January 1986) D-4, col. 6.

229. It took almost a year for the filing of all documents presented on or before 19 January 1982 to be completed. Annual Report 1, supra, note 67, 15. Early in the deliberative process, the three American arbitrators pointed out that filing delays could have a significant effect. In their dissenting opinion in In Re Refusal to Accept the Claim of Raymond International (U.K.) Ltd. (1982) 1 Iran-U.S. C.T.R. 394, 396, a case involving the refusal of a claim filed improperly on behalf of a United Kingdom national, the Americans took the position that the difficulty was purely formal, that the corporation was controlled completely by a U.S. corporation and that the Claim need merely be amended:

(cont'd.)

the physical processing of claims has been efficient, facilitated primarily by the Administrative Guidelines set down by the Tribunal in the absence of detailed provisions in the Tribunal Rules. Having reached the Tribunal and Chambers, however, the adjudication of claims has been slow. Indeed, American claimants, government officials and some of the United States arbitrators have seized upon the issue of delay as the basis for some extremely damning evaluations of the Tribunal

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> [I]n this case the claim was received in the last days before the deadline. The Registry was overwhelmed with a very large number of claims filed at that time and could not immediately examine each one and contact the Claimant when it found an error. Had the Registry been staffed to do so, this Statement of Claim could have been corrected with the stroke of a pen before the January 19 deadline. However, the Registry was unable to examine the claim until five months later, by which time correction within the deadline was, of course, impossible. Thus, in some measure, the Tribunal's own Registry procedures and limited staffing contributed to the problem which has arisen in this case.

The Co-Registrars of the Tribunal refused to countenance the argument of the American arbitrators in the Raymond International (U.K.) case. Mr Foroughi stated that the notion of dealy in the Registry was only "an excuse" used to support a dissent really motivated by other factors. He felt that the five month delay in processing the claim "didn't have any effect on the acceptance [or dismissal] of that Raymond Claim." Equally, Mr Gulliford stated simply that "other than the fact that within a very short time period vast amounts" of claims appeared, he simply did not "understand that notion of delay in processing the claims." A. Foroughi and D. Gulliford, transcripts of interviews, supra, note 198. It was emphasised by both Co-Registrars that after the initial rush "there's been no trouble at all" in processing documentary material.

process.[230] Interestingly, none of these critics has attached any serious blame to the Tribunal Rules as a cause of delay. Criticism has instead revolved around the Tribunal's perceived lack of resolution in promoting the goals of speed and efficiency.

The harshest critiques have emanated from the Tribunal itself, in the form of dissents to Awards and Orders. The most vocal critics of Tribunal delays have been the American arbitrators Holtzmann and Mosk, though Mr Brower seems to have adopted a similar position after his appointment to replace Mr Mosk. From the outset of the deliberative process, the American arbitrators have made it clear[231] that they believe Iranian defendants to be purposely delaying the processing of claims, arguing further that the Chambers have been co-opted in a game of delay.

Before that charge can be evaluated, the governing Rules must be examined. Under Art. 19(1) of the Final Tribunal Rules

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230. The harshness of these reactions supports the observation in a recent editorial by Werner that "the length of proceedings is clearly of paramount importance to the parties' perception of the arbitral process." Werner, Optimizing the length of arbitration proceedings (1985) 2 J. Int'l Arb. 5. In the Iran-U.S. Claims Tribunal, because the American arbitrators identify primarily with the interests of the Claimants (see infra, text accompanying notes 322 to 331), the American arbitrators also see the length of proceedings as of "paramount importance".

231. George Aldrich does not entirely fit the mold shaped by his American confrères and his attitude to delay will be dealt with infra, text accompanying notes 263 to 267.

of Procedure, the Tribunal is accorded wide discretion in the fixing of delays for the filing of Statements of Defence, the first step in pleadings after the filing of the Claim:

> Within a period of time to be determined by the arbitral tribunal with respect to each case, which should not exceed 135 days, the respondent shall file its Statement of Defence. However, the arbitral tribunal may extend the time-limits if it concludes that such an extension is justified.[232]

The Tribunal decided in administrative session that, in determining whether or not to grant any extensions to filing deadlines, the Chamber or plenary Tribunal should take into consideration such factors as (a) the complexity of the case; and (b) special circumstances "including demonstrated hardship to a claimant or respondent." Moreover, the Tribunal or Chamber could also consider "such other circumstances as it considers appropriate." These circumstances could include an "unfair burden" imposed on a party by the "large number of Statements of Defence" it might be required to file "in any particular period."[233] This gloss on the Rule reflects the overriding principle contained in Art. 15(1), that the Tribunal is required to conduct the arbitration in a manner it considers "appropriate" but that it must be ever mindful of the need to treat the parties "with equality."

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232. Supra, note 29. In their comparative survey of arbitral rules, Branson & Tupman, supra, note 194, 925, suggest that the UNCITRAL Rules "impose the most comprehensive time limits" of all the Rules studied. It should already be apparent, however, that those "limits" are in no way immutable. Indeed, if the parties are treated with equality (Art. 15(1)), the limits can almost be ignored.

233. Ibid., Notes to Art. 19, 1(i)-(iii).

The Chamber Chairmen and the Iranian arbitrators have interpreted the Rules to allow for very liberal extensions to the filing dates that have been set in scheduling orders. In Texaco Iran Ltd., et al. v. The Government of the Islamic Republic of Iran,[234] Chamber Three issued an order providing for a fifth extension of the date for filing Iran's Statement of Defence. American arbitrator R.M. Mosk dissented vigorously:

> In this case the Tribunal has granted extensions to the Respondents many times with the statement that no further extensions will be granted without a showing of compelling reasons, for such an extension. The Tribunal has then granted extensions without any showing. In opposition to this latest extension request, the Claimants stated, "A deadline so clearly stated - and restated - must be enforced if the Tribunal is to retain the respect of those who appear before it." The deadline was not enforced.[235]

A similar concern was expressed by Mr Holtzmann in his dissents to Chamber One orders allowing for a fourth extension of the filing dates for Iranian Statements of Defence in two cases. Mr Holtzmann feared that "these further extensions send a message to respondents in these and other cases that this Chamber lacks the resolve to enforce its scheduling orders."[236] In certain cases, American arbitrators have dissented from orders granting extensions when they believed that the Iranian defendant had not proven, or even suggested, any ground upon

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234. (1983) 3 Iran-U.S. C.T.R. 372 (Order).

235. Ibid., R.M. Mosk Dissent to Order, 379.

236. Cases Nos. 452 and 926: Dissent of H.M. Holtzmann from Orders (1983) 3 Iran-U.S. C.T.R. 84, 85.

which an extension could be "justified", a requirement of Art. 19(1) of the Tribunal Rules.[237] In other cases, or as alternative considerations, the American dissents to extensions of filing dates have been based on notions of equity -- the potential for unfair treatment of the claimant --[238] and upon a fear that the lack of firm deadlines would ultimately cause administrative confusion, precluding the development of a rational case management system.[239] In still other cases, the American arbitrators have engaged in a broad attack, consolidating all of their grounds for desiring to refuse extensions.[240]

As the adjudicative process has progressed, the frustration of the American arbitrators has intensified as each new stage has presented new possibilities for delay. In this connection, Art. 20 of the Final Tribunal Rules of Procedure[241]

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237. See, e.g., R.J. Reynolds Tobacco Co. v. The Government of Iran (1982) 1 Iran-U.S. C.T.R. 119 (Order), (Dissent of R.M. Mosk) 119; Control Data Corp., et al. v. The Islamic Republic of Iran (1983) 1 Iran-U.S. C.T.R. 230 (Order), (Dissent of R.M. Mosk) 230-1; and Pepsico, Inc. v. Zamzam Bottling Co. Azarbaijan, et al. (1982) 1 Iran-U.S. C.T.R. 773 (Order), (Dissent of H.M. Holtzmann) 175.

238. See, e.g., Cases Nos. 203, 262, 330, 333 etc.: Dissent of H.M. Holtzmann (1982) 1 Iran-U.S. C.T.R. 178, 180; and National Airmotive Corp. v. The Islamic Republic of Iran (Dissent of R.M. Mosk) (1982) 1 Iran-U.S. C.T.R. 158, 158.

239. See, e.g., the Control Data Corp. case, supra, note 237, 231.

240. See, e.g., Cases Nos. 6, 51 etc.: Dissent of H.M. Holtzmann, G.H. Aldrich and R.M. Mosk re Procedural Decisions (1982) 1 Iran-U.S. C.T.R. 320.

241. Supra, note 29.

is relevant, for it permits the parties at any time to "amend or supplement" a claim or defence "unless the tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances." The Tribunal has tended to interpret the basic provision allowing amendment liberally and has rarely invoked the power to prevent amendment. Mr Holtzmann has been outspoken in his criticism of this approach:

> The Tribunal has faced efforts to delay at every stage of its proceedings. First, there were delays in setting times for submissions of Statements of Defence; then delays caused by extensions of those deadlines -- as many as four extensions in some cases. As cases move to more advanced stages, extensions of time for respondent to file replies have become routine; often Orders to submit evidence are complied with late or not at all.
>
> Now a new opportunity for delay emerges: there are frequent requests by respondents to submit further written statements after the Hearing has been closed. I write to dissent from Orders of this Chamber granting such requests.[242]

Delays in later stages have not resulted solely from actions by Iranian defendants. In one case, a Chamber Chairman took the initiative and required further written submissions, allowed under Art. 22 of the Tribunal Rules, four months after the oral hearing had taken place.[243] Such difficulties prompted the

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242. Cases Nos. 33, 87 and 174: Dissent of H.M. Holtzmann From Orders (1983) 3 Iran-U.S. C.T.R. 87, 87. See also Sylvania Technical Systems, Inc. v. Government of the Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 141 (Dissent of Howard M. Holtzmann to Order).

243. R.J. Reynolds Tobacco Co. v. The Government of Iran (1983) 3 Iran-U.S. C.T.R. 39 (Order), (Dissent [No. 2] of R.M. Mosk) 40.

American arbitrator in the same Chamber to complain that "[t]he mechanism of hearing and deciding cases is becoming so long delayed that the Tribunal adjudicatory process may begin to be perceived as nothing more than an illusion".[244]

More recently, Chamber Three expressed the same concern, prompting it to reject "unauthorised" post-hearing filings made by both parties. That rejection was justified by considerations of "[f]airness, orderliness and possible prejudice to the other party".[245] The latest "delaying tactics" perceived by the American arbitrators are the Iranian insistence upon pre-hearing conferences, designed initially to promote settlement and to define clearly the areas of disagreement, and disruptions to proceedings caused by the resignation of Iranian arbitrators. The American arbitrators now believe that the value of pre-hearing conferences is questionable:

> Some pre-hearing conferences have promoted settlements, some pre-hearing conferences have made it easier to organize the procedures, a lot of them have not been very useful. So increasingly, we have tried to limit their use to complex or very large cases. The Iranians have learned to like them because they delay proceedings, so they ask for them all the time ....[246]

American members of the Tribunal have also insisted that the Tribunal's proceedings should not be allowed to grind to a halt

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244. Ibid., Dissent [No. 3] of R.M. Mosk, 41.

245. Dames and Moore v. The Islamic Republic of Iran, et al., supra, note 122, 214.

246. Aldrich, supra, note 26.

during the inevitable delay before the replacement of retiring Iranian arbitrators. Nor, they argue, should any hearings be repeated for the benefit of new members.[247]

Most American participants in the Tribunal process, both government and private counsel, support the negative evaluations offered by certain American arbitrators. The Legal Adviser to the U.S. State Department has criticised "Iran's delaying tactics" and the Tribunal's "tendency to grant extensions and to allow delays at Iran's urging."[248] The U.S. Administrator for Iranian Claims has characterised the Tribunal's pace of adjudication as "slow and frustrating."[249] He has also written, together with the Deputy United States Agent, that the perceived Iranian strategy of delay "may not respect, or even acknowledge, the imperatives of fair and consistent legal procedures."[250] A lawyer who has represented American claimants has speculated that delay "evidently is the very cornerstone of the Iranian strategy in defending claims before the Tribunal."[251]

The predominant American appreciation of the situation, that delay is almost entirely due to wilful Iranian procrastina-

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247. See, e.g., R.J. Reynolds Tobacco Co. v. The Government of Iran (1983) 4 Iran-U.S. C.T.R. 2 (Order), (Dissenting Opinion of R.M. Mosk) 2-3.

248. Robinson, supra, note 4, 665.

249. Stewart & Sherman, supra, note 14, 8.

250. Selby & Stewart, supra, note 45, 243.

251. Belland, supra, note 3, 244.

tion coupled with Tribunal indulgence, is by no means shared universally. Not surprisingly, the Iranian arbitrators view the situation in an entirely different light:

> [T]he American arbitrators have been constantly striving to give the Tribunal the impression that Iran and the Iranian arbitrators are preventing the Tribunal from examining cases, thwarting its work, and slowing down its operations. It must be accepted that the American arbitrators have been successful in this attempt. Within a short space of time, the Tribunal has sent Iran notice to file defences in hundreds of cases, scheduled preliminary hearing conferences and hearings, and inequitably placed a country which is in a state of war, revolution, and internal disarray under great pressure.[252]

It would be unwise to discount the burdens that have been placed upon Iran. Effectively, it is the sole defendant in many hundreds -- indeed thousands -- of claims; the organisational and analytical tasks involved must be enormous. Given the paucity of experienced legal talent in post-Revolutionary Iran, the problems involved in defending claims are real.

Iran's difficulties have been noted even by some American observers, including the Chairman of the American Bar Association Section on International Law.[253] Professor Von Mehren, a distinguished American arbitration expert, has been

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252. Cases Nos. 83, 188, 200 and 449: Dr. Shafeiei's Reasons for Not Signing the Awards (1983) 3 Iran-U.S. C.T.R. 124, 129-30. See also Phillips Petroleum Co., Iran v. The Islamic Republic of Iran and Amoco Iran Oil Co. v. The Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 283 (Order), (Dissent of Dr. Shafeiei) 284.

253. Aksen, supra, note 94, 13. See also Belland, supra, note 3, 252; and Shack, supra, note 214.

blunt, questioning whether delay really is a serious problem for claimants before the Tribunal: "It is very difficult, it seems to me, to demonstrate that proceedings before the Tribunal are more costly or less expeditious than proceedings in American courts would be."[254] A similar conclusion was drawn by one of the Tribunal Co-Registrars, who had previously been employed in the Registry of the California State Court of Appeals:

> When I left -- the situation had been getting progressively worse -- but when I left, from the beginning of a case in that Court to final disposition of the normal civil case of the kind we have here, it was six years and climbing fast. How can I say that this [the Tribunal] is moving too slowly?[255]

Yet, as has been demonstrated, Americans who participate directly in the proceedings by and large do say that the Tribunal is moving too slowly. Their main complaint now seems to be that the Tribunal is not strict enough in applying its own Rules. It must be stressed, however, that the wording of the Rules does not necessarily compel quick action. The Rules allow for the enforcement of time limits, but they also grant the Tribunal and its Chambers wide discretion to permit extensions. Without intending to criticise the Rules per se, one American commentator has suggested that the Rules "are general procedural guidelines at best", their sanctions for delay being "rudimen-

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254. Von Mehren, supra, note 1, 730.

255. Gulliford, supra, note 198. See also the comments of Rovine, supra, note 92, 30-1 who underscores that a major commercial case may take between five and six years to move its way through the Federal court system in the United States.

tary".[256] Precisely because the Rules are so flexible, the role of Chamber Chairmen is crucial to the progress of claims: "The Chairman's task is understandably difficult, but their ability and willingness to apply the Rules in a firm and consistent manner is essential if the Tribunal is to maintain procedural as well as substantive fairness".[257]

It would appear that some of the American arbitrators are dissatisfied with the manner in which the Chamber Chairmen have conducted themselves. As noted above, there have been a large number of dissents penned by American members criticising extensions to time limits for filings. When interviewed privately, certain arbitrators were quite willing to express their frustration, although the language employed was necessarily elliptical:

> ... I think it's a general feeling among the American arbitrators, it certainly is my feeling, that the Tribunal to this point has not had the kind of firm direction and leadership, in an organisation and administrative sense, that it required ...[258]

The third-country arbitrators are well aware of the disaffection. Judge Mangard was perfectly open about the criticism that had been directed at him: "I know that some of my American colleagues have criticised my Chamber for being too lenient, too quick to grant extensions. That's a question of temperament,

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256. Belland, supra, note 3, 238 and 244.

257. Selby & Stewart, supra, note 45, 244.

258. Brower, supra, note 28.

and a question of fairness."[259]

The Chamber Chairmen have found themselves to be truly between a rock and a hard place when trying to gauge the appropriateness of extensions to filing time limits. Generally, such extensions are requested by Iranian defendants and are supported by the Iranian arbitrator. In at least two of the three Chambers, the American arbitrator will routinely oppose extensions. The Tribunal Rules provide little guidance. In the end, the decision whether or not to grant an extension will often be based upon the Chairman's conception of the nature of the arbitral process. That is what Judge Mangard means when he speaks of extensions in the context of "fairness". The Chamber Chairman are well aware of the desire of American claimants to grasp at the remedies held out to them; the promise of the Security Account is great. But at the same time, the Chairmen are conscious of the problems facing Iran in defending against claims:

> We must not forget that while on the American side you have, maybe ... a thousand or so individual law firms, having only a few cases each, and having time to work on them ... on the other hand, on the other side, you have, in principle, only one respondent, and that's the Iranian Government. And they have had to build out [sic] their legal departments, to try to find suitable lawyers, which was not easy.[260]

The Chairmen do not accept that the Iranians are always delaying for the sake of delay. In the words of Judge Mangard: "Maybe

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259. Mangard, supra, note 28.

260. Ibid.

sometimes, yes, because there are politically sensitive cases ... but in the main, and we have seen during the last year, they have really tried to keep dates." Extensions must be granted, the argument runs, to allow Iran the opportunity fully to defend itself, to provide for a fair hearing. In this context, it is interesting to note the recent comments of one arbitral expert who has suggested that any rigid time limits imposed upon arbitral tribunals by their governing rules "usually turn out to be incompatible with the due process rights of the parties."[261] Judge Mangard is clearly concerned about the institutional ramifications of valuing efficiency more highly than the complete presentation of a case. He refused to see extensions merely in terms of "delay", emphasising that "[i]t's necessary to try to get the cases fully briefed on both sides ... Because in arbitration, you don't want really to give an award in default."[262] The third-country arbitrators at the Tribunal are very conscious of the consensual origins of arbitration and they urge and practise flexibility in the disposition of cases so as not to lose the support of the parties.

One American arbitrator seems also to share a sincere appreciation of the predicament of Iran. Despite joining the dissent of his two American colleagues in the 1982 decisions in

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261. Werner, supra, note 230, 5.

262. Mangard, supra, note 28.

Cases Nos 6, 51, etc.[263] wherein there were strong protests against delays, Mr Aldrich has taken care not to side fully with the position elaborated by the United States Agent and his staff. In commenting upon the Final Tribunal Rules of Procedure,[264] Mr Aldrich noted that when the Tribunal met to modify the UNCITRAL Rules "[w]e were, of course, preoccupied with certain parts of the problem ... particularly we were concerned about potentials for delay". But he went on to assert that "[t]oday, that's a lesser problem, it seems to me, than we saw at the beginning."[265] Delay, then, is not for Mr Aldrich as great a worry as it is for some of his American confrères. Nor do the actions of Iran seem to him always to be wilfully dilatory. Although agreeing that the Iranians do "stall" certain cases, Mr Aldrich has noted that there is simply no "bottleneck" at the Tribunal. It has "more cases ready for hearing than we can hear."[266] Moreover, he recognises "that some of the Iranian parties do have an awful lot of cases to respond to."[267]

On balance, it would seem that the Tribunal Rules are adequate for the purposes of moving cases forward, given the

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263. Supra, note 240.

264. Supra., note 29.

265. Aldrich, supra, note 26.

266. Ibid.

267. Ibid.

will to do so. Because of somewhat different appreciations of the role of the Tribunal, the third-country arbitrators and the Americans collectively have manifested different levels of determination concerning the goal of efficiency. Mr Mosk and Mr Holtzmann (and to some extent Mr Brower) seem to have taken the position that once the Tribunal has seized jurisdiction it must act forcefully to assert its jurisdictional imperatives to control the progress of claims. The Chamber Chairmen seem to view the Tribunal as a continuing process of consensual readjustment. Only if both state parties to the Algiers Accords believe that they are being given a full opportunity to be heard will the Tribunal be able to continue operating and settling any claims. In the end, much of the controversy concerning delay may result, as Judge Mangard suggests, from a clash of legal cultures (or, more fully, a clash of legal, political, religious, economic, and artistic cultures). The cultures, the American and the Iranian, have "quite different routines, quite different possibilities".[268]

Despite the fact that, superficially, the Tribunal operates in a manner fully compatible with American attitudes towards third-party adjudication -- one American lawyer has written that he feels quite at home there --[269] it must accommodate in some manner the instincts of a radically different

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268. Mangard, supra, note 28. See also Audit, supra, note 89, 795-6.

269. Belland, supra, note 3, 252.

culture. For example, another American lawyer, one who has worked for Iran, issued the following warning to his American colleagues:

> Cultural sensitivity is very important, and whether you are litigating with the Iranians, arbitrating with them, or negotiating with them, the heavy-handed litigation techniques of the American litigator are likely to offend them.[270]

He also noted that although the Iranian participants at the Tribunal have been exposed to Western cultural values, and hence have some insight into the thought process of their adversaries, very few Westerners have been exposed to Iranian, or even Middle-eastern, culture: "And thus they have a significant advantage over you. That is something very difficult for a Westerner to perceive."[271] The Tribunal must accommodate both contrary cultural impulses and profound ignorance. Professor Lowenfeld points out that in his experience of international arbitration "it has been necessary to fashion particular procedures, tailored partly to the arbitrators and counsel, partly to the elements of the controversy",[272] and if one might suggest an addition, partly to the needs and perceptions of the "clients" of the arbitration, the parties.

In the Iran-U.S. Claims Tribunal, the procedural rules have been fashioned to provide enormous flexibility in the process of pleadings. This flexibility has been employed by the

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270. Shack, supra, note 214, 26.

271. Ibid., 24.

272. Lowenfeld, supra, note 227, 6.

Chamber Chairmen mainly to allow extra time to Iranian parties at each stage of the adjudicative process. No doubt this approach has been frustrating to American claimants, counsel and to the American arbitrators. But a strong argument can be made that such flexibility is a central component of the arbitral process. Moreover, it has probably been crucial in holding the Iran-U.S. Claims Tribunal together. At least one American arbitrator, Mr Aldrich, recognises the great value of the leeway provided by the Tribunal Rules, admitting that he "would rather have the flexibility they give us than be locked into something more precise."[273]

If there is nothing to be gained in tightening up the Tribunal Rules to encourage greater efficiency, the question remains whether there are any other techniques that might speed up the decision-making process. The most obvious answer, one often bruited about by commentators and Tribunal participants, is that the size of the Tribunal could be increased. Article III of the Claims Settlement Declaration[274] states that "[t]he Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously." Apparently, the state parties initially agreed in principle that the Tribunal would be much larger than it is at present. The American Government had

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273. Aldrich, supra, note 26.

274. Supra, note 2.

suggested the creation of a thirty-member Tribunal, with ten chambers.[275] However, it seems that by the time the Iranian Government agreed to that number, the Americans had changed their position. According to Judge Mangard:

> I have been told that the Iranians were willing and already had nominated ten Iranian arbitrators prepared to sit in ten Chambers. At that time, ... the Americans said, "Well, let's go step-by-step. Let's start with three chambers and see what would happen." Nobody knew at the time -- it was May 1981 -- how many cases we could get.[276]

The American Government presumably anticipated that the Tribunal would face a similar case load to that of the American courts which had been seized with only a few hundred Iranian claims. In fact, over 3,800 cases were presented to the Tribunal and, as Judge Mangard noted with some understatement, "the American Government had found out that it had made a mistake."[277] But when the Americans proposed anew that the Tribunal be increased in size, they encountered stiff Iranian opposition. The American arbitrator, George Aldrich, suggested one reason for that opposition: "Iran doesn't want to increase [the size] because increasing it would speed the resolution of cases, and would hasten the day when they may have to replenish the Security Account."[278] Judge Mangard offered another explana-

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275. See Rovine, supra, note 83, 5; and Aldrich, supra, note 26.

276. Mangard, supra, note 28.

277. Ibid.

278. Aldrich, supra, note 26.

tion, that the Iranians have no desire to spend more money on a larger Tribunal bureaucracy.[279] To do so, in a time of deep war-induced austerity, is simply against Iranian interests.

The Claims Settlement Declaration provides in Art. VI(1) that "[t]he expenses of the Tribunal shall be borne equally by the two governments." In practice, both governments make quarterly payments in advance based upon Tribunal estimates and extraordinary payments when requested by the Tribunal to do so. In 1982-83, the estimates for the financial year amounted to $4,165,939 (U.S.). In 1983-84, the figure rose to $4,736,873 (U.S.).[280] The Tribunal has, in fact, managed to operate under budget. The actual expenditure for 1983-4 amounted to $3,999,426.70 (U.S.), and the reserve was reimbursed in equal portions to the United States and Iranian Governments.[281] Nevertheless, the cost of operating a Tribunal of this size is great. One can imagine that the cost of expanding the Tribunal would be significant, especially because the current premises would not be large enough to cope with any major increase in size. The United States Government has tried to recoup some of its expenses by charging successful American Claimants a "user fee" amounting to two percent of the monetary value of their

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279. Mangard, supra, note 28.

280. Annual Report 1, supra, note 67, 38-9.

281. Annual Report 2, supra, note 67, 43-4.

award,[282] a decision that caused considerable anger amongst U.S. claimants and that has led to constitutional challenges not yet decided authoritatively by U.S. courts. Iran has no such opportunity to recover its expenses.

Some American participants in the Tribunal process have sought to place the responsibility for the lack of agreement to expand the Tribunal squarely on the shoulders of Iran. The U.S. Agent has written that "Iran has resisted expanding the Tribunal even by one chamber," implying that an expansion could occur as soon as Iran was willing to "change its position".[283] However, in a remarkably frank interview, American arbitrator Charles Brower, commenting upon the possibility of expansion, suggested that "the United States Government, to the best of my knowledge, has, for some time, not been willing to agree either." That reluctance was "largely motivated", he speculated, "by the consideration that if you have, say, ten Chambers instead of three Chambers ... inevitably one or more of those Chambers is going to be presided over by someone from the Third World who may, or may not, be as appropriate to that position from the perspective of American Claimants."[284] In other words, for motives of varying degrees of legitimacy, neither Iran nor the United States is currently willing to enlarge the Tribunal.

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282. See Selby & Stewart, supra, note 45, 232, fn. 51.

283. Rovine, supra, note 83, 5.

284. Brower, supra, note 28.

In concluding this discussion of delay, it should be noted that, even if the Tribunal were to be expanded at some future time when a common will to do so might exist, there is no guarantee that the resolution of cases would quicken dramatically. There are many reasons for delay apart from mere size limitations. For example, Stewart and Sherman point out that "[b]y and large, the arbitrators have held claimants to high standards of proof."[285] Although rigorous standards are to be applauded, evaluating proof is both difficult and time-consuming. One American arbitrator has, in fact, expressed surprise that he is "not spending most of [his] time on the questions of what is the law, but rather on how to sort out the facts." He noted that the Tribunal is "a trier of facts as well as law, and the facts are very confused in many of these cases."[286] In the Ultrasystems case, R. Mosk elaborated upon some typical problems of evidence confronting the arbitrators:

> The parties and the Tribunal operated under difficult circumstances. Of two key witnesses, one is deceased and the other is incarcerated in Iran. Other witnesses were unavailable. Claimant did not have access to certain documents and witnesses. There were various discrepancies among those documents produced. Restrictions on travel between Iran and the United States, the lack of relations between the two countries, the age of the claim and language differences exacerbated proof problems.[287]

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285. Stewart & Sherman, supra, note 14, 44.

286. Aldrich, supra, note 26.

287. Ultrasystems, Inc. v. The Islamic Republic of Iran, supra, note 95, Concurring Opinion of R.M. Mosk, 114, 115.

On other occasions, Mr Mosk has suggested that the standard of proof required of American Claimants was too high while the requirements imposed upon the Iranian parties were too low.[288] He emphasised again the difficulties of adducing proof which may be available only in Iran.

Although an expansion in the size of the Tribunal would give more time to the Chambers to evaluate different claims, the time devoted to each case would probably grow. Currently restricted stages of the Tribunal process, such as oral hearings, might then run at a more leisurely pace.[289] Individual claimants could not necessarily expect much faster adjudication. Moreover, because of the myriad problems of proof, claimants themselves often cause delay by their inadequate presentation of

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288. Case B-1 (1983) 4 Iran-U.S. C.T.R. 57 (Order), (Dissenting Opinion of R.M. Mosk) 58; and Schering Corp. v. The Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 361 (Dissenting Opinion of R.M. Mosk) 374, 375.

289. It should be pointed out that despite complaints about the lassitude of the Tribunal process, oral hearings are one element that is circumscribed rigorously. Indeed, the oral hearings are, if anything, too brief. One American lawyer has written that in the claim he tried, two-and-a-half days of oral argument were permitted. He estimated that in a comparable case in an American Federal Court, between three and four weeks of oral pleading would have been allowed. Belland, supra, note 3, 250, fn. 38. See also Selby & Stewart, supra, note 45, 228-9, who emphasise, however, that Tribunal hearings are not designed for the presentation of proof but for "explanation". Nevertheless, little time appears to be wasted at the stage of hearings; indeed, there must be some cases in which more time for explanation would be of value.

facts,[290] a problem that would not be ameliorated by increasing the size of the Tribunal. The difficulties facing the Tribunal in evaluating proof and developing coherent evidentiary standards are exacerbated by the Tribunal's lack of any computerised data retrieval system. Consequently, the research done by members and their legal assistants is often duplicated and is difficult to transfer from case to case.[291]

Perhaps the greatest obstacle to increased speed in the disposition of cases, which would persist even if the size of the Tribunal were to be increased, is the problem of translation. This problem exists in more than one context. The claimants and respondents may have great difficulty in finding translators to prepare English or Farsi versions of the written pleadings.[292] Once the materials have been filed with the Tribunal, even greater problems may occur, first when attempting to schedule oral hearings:

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290. See, e.g., Woodward-Clyde Consultants v. The Government of the Islamic Republic of Iran, supra, note 50, 251 where the Chamber complained "that the Parties submitted voluminous documents without sufficient explanation, thus requiring the Tribunal to expend a considerable amount of time reconciling figures. This is not a desirable way of proceeding from the standpoint of either the Parties or the Tribunal."

291. Frances Meadows, notes of interview, (14 September 1984). On file with author. (Ms Meadows was, at the time, a legal assistant to President Lagergren).

292. See Belland, supra, note 3, 243. After the creation of the Tribunal, lawyers in Washington and New York found that the market for English-Farsi translators was very tight. Translators may command fees as high as $400. (U.S.) per typed page. See Tonelson, supra, note 3, 23.

> As a service vital to the efficiency of the Tribunal's work, every effort is made to ensure that simultaneous interpretation facilities are available whenever required. However, a dearth of personnel capable of providing services of an acceptable degree of speed and accuracy, has imposed limitations.[293]

The Tribunal has found it difficult to find adequate simultaneous translation staff. It has been forced to contract out work to freelance interpreters, which is both expensive and administratively inflexible.

Freelancers were initially paid on a "take-or-pay" basis, so they billed for unrendered services on the cancellation of meetings or hearings (an unfortunately common phenomenon in the first years of the Tribunal).[294] In 1984, a new method of payment was negotiated whereunder freelance interpreters were offered dates "on an 'optional' basis, whereby they need not be compensated for dates cancelled at least 15 days in advance."[295] This improved method of payment has increased administrative flexibility to a certain extent. Freelance interpreters, though generally very skilful, also operate under rigid time constraints. When their contract time is finished, they will simply leave, whether or not a hearing has been completed.[296] For these reasons, the Tribunal sought actively to expand its

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293. Annual Report 1, supra, note 67, 22.

294. Ibid., 23.

295. Annual Report 2, supra, note 67, 27.

296. Belland, supra, note 3, 252.

full-time simultaneous translation staff. The potential applicant pool for such positions is small, but the Tribunal has managed to hire four staff interpreters.[297]

Another bottleneck can occur when the Tribunal or a Chamber seeks to have written drafts of orders, awards, minutes, etc. translated. In just over one year of Tribunal operations for which figures are available, the translation service was required to translate some 8,735 pages of documents. When one considers that on average only six pages are translated per Tribunal translator per working day, the enormity of the task becomes apparent.[298] In short, even if the Tribunal could be expanded, "the lack of resources or infrastructure" and especially the problems presented by English-Farsi, Farsi-English translation could still "cause tremendous delay."[299]

D. The Role of the Arbitrators

There exists a striking, and potentially destabilising, disparity in role perception amongst the Members of the Iran-United States Claims Tribunal. This disparity has already been

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297. Annual Report 2, supra, note 67, 27.

298. Ibid., 28-9. It seems that the "level of performance" of translators at the Tribunal "compares very favourably with that of similar units in other intergovernmental organizations." Annual Report 1, supra, note 67, 23-4.

299. Marks, Remarks, (1982) 76 Proc. Am. Soc. Int'l L. 9 (a former Deputy Legal Adviser in the U.S. State Department).

adverted to in the preceding section where it was pointed out that there seems to be a disagreement concerning the very nature of arbitration, some arbitrators emphasising jurisdictional autonomy,[300] others suggesting that arbitration should be viewed to some extent as a continuing process of consensual readjustment. Clearly, such a difference in opinion about the process will lead inevitably to disagreement concerning the arbitrator's role within the institution.

The central issue concerning the role of Tribunal members is their independence. Prima facie, one would imagine that the issue would arise only in conjunction with the party-appointed arbitrators. That is probably why the third-country arbitrators are often referred to by Tribunal staff as the "neutral" members, a practice to which the American arbitrators take great umbrage.[301] In fact, the question of independence has arisen rather pointedly even in the context of the third-country arbitrators, whom the Iranian members have taken to calling the

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300. That is, once the parties have formally agreed to create an arbitral Tribunal, the Tribunal must assert its jurisdiction rigorously even in the face of party intransigence. In a sense, the Tribunal, although given birth by the parties, takes on an independent life, guided by self-defined imperatives.

301. See especially the comments of Brower, supra, note 28: "[F]irst I'd like to disabuse you of the notion that there are members of the Tribunal who are supposed not to be neutral in the sense of impartial and independent. Under the Rules all nine arbitrators are to be, and that's a particular point with the American arbitrators because they feel that they live by those rules."

"so-called neutrals".[302] Indeed, it is primarily the Iranian arbitrators who have called into question the impartiality of their third-country colleagues. The issue first arose early in the Tribunal's history when the Iranian arbitrators sought to force Judge Mangard's resignation, asserting that he was biased in favour of the United States.[303] Judge Mangard refused to resign and the case was brought before the plenary Tribunal which held, with two of the Iranians dissenting, that "the only method by which an arbitrator, once appointed, may be removed from office is through a challenge by a High Contracting Party and decision by the appointing Authority pursuant to Articles 10-12 of the UNCITRAL Rules".[304]

In response to this decision, Iran did prosecute an official "challenge" to Judge Mangard under Articles 10-12 of the Final Tribunal Rules of Procedure.[305] Article 10 provides that "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's

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302. See Mangard, supra, note 28, who refers with some amusement to the Iranian usage.

303. Judge Mangard had been overheard making certain private remarks which were interpreted as being anti-Iranian.

304. Re Judge Mangard (1982) 1 Iran-U.S. C.T.R. 111, 115. The two Iranian dissentients call their judgment a "separate opinion" (at 115), but they do not, in fact, concur in the result, suggesting instead that President Lagergren should use his "good offices" to ask the "two High Contracting Parties to agree on a substitute for Mr. Mangard" (p. 118).

305. Supra, note 29.

impartiality or independence." Under Art. 11, a procedure is established for notification of the challenge and for agreement between the parties. If no agreement can be reached, and there was none in this case, the challenge goes ahead and must be evaluated by the independent "appointing authority" as provided for in Art. 12, read with Art. 6, of the Rules. The appointing authority, designated by the Secretary-General of the Permanent Court of Arbitration at The Hague,[306] was Dr Ch. M.J.A. Moons, the President of the Supreme Court of the Netherlands. In his decision of 5 March 1982, Dr Moons held that "Iran is not admissible in the objections it has raised regarding Mr Mangard", primarily because the documents presented by Iran as proof of its charge "contain neither a sufficiently clear description of the circumstances giving rise to the accusation levelled against Mr. Mangard of a 'lack of neutrality', nor any indication of the dates on which the actual event on which the disqualification is based took place".[307] Because the decision was based on "formal" grounds, no evaluation of the authenticity of the Iranian assertions was undertaken. Judge Mangard remained on the Tribunal but, as will be discussed below, he

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306. As required in the absence of party agreement under Art. 6(2) of the Final Tribunal Rules, ibid.

307. Re Judge Mangard, decision of Dr Ch. M.J.A. Moons, sitting as Appointing Authority Under the Iran-United States Claims Settlement Declaration, 5 March 1982, reprinted as Appendix I, (1982) 1 Iran-U.S. C.T.R. 509.

was later made to suffer for his presence.[308]

The second major assertion by Iranian arbitrators of bias on the part of the third-country arbitrators arose in the highly-charged dual nationality case, A-18.[309] In their dissenting opinion, the Iranian arbitrators castigated their colleagues:

> Regrettably, the [decisional] task has now fallen into the hands of a group of 'professional' arbitrators who, forming an exclusive club in the international arena, are automatically brought into almost any major dispute by the operation of pre-determined methods. These 'professional' arbitrators are concerned, not with the quality of their decisions, or with the rights and wrongs of the parties, but with the quantity of their decisions, made to satisfy their political and materialistic inclinations. The present award is only a manifestation of the work of a degenerated system.[310]

The "political ... inclinations" referred to were identified as solidly pro-Western, and pro-capitalist.

Although the position adopted by the Iranian arbitrators on this score is undoubtedly overstated, to the point of offensiveness, it contains a kernal of truth, as uncomfortable as that may seem to Western observers. It is unquestionably true that over the last twenty years or so, there has emerged a highly talented corps of international arbitrators, mostly European, whose expertise makes them valuable members of any Tribunal. The first and second Presidents of the Iran-U.S.

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308. See infra, text accompanying notes 347 to 351.

309. Supra, note 32.

310. Supra, note 35, 84.

Claims Tribunal are good examples. Without casting any aspersions on the professionalism or integrity of such persons, it is fair to comment that, because a central feature of most arbitrations is the appointment of arbitrators by the parties, any arbitrator who hopes to continue working in that highly specialised field must hope to be acceptable to at least one of the two potential arbitrating parties. Candidate arbitrators who are from Western states are more likely to be chosen as party-appointed arbitrators by such states or by Western corporations. If they then adopt positions radically opposed to the arguments put forward by Western parties, the chances are that they would not be chosen by another Western party in any subsequent arbitration. Although this pressure may not prompt actual "bias", for there are subtle moderating factors linked to an arbitrator's role appreciation and even to a Western party's desire that justice be seen to be done (part of the Rule of Law mystique), it is still likely that a Western arbitrator will not wish to go on record as being strongly opposed to Western economic interests.[311] It should be said that an arbitrator from a developing state is likely to find himself or herself in exactly the same position vis-à-vis his or her potential

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311. Although in a different context, the point is supported by the vitriolic reaction of some British commentators to Sir Humphrey Waldock's vote against certain United Kingdom arguments in the Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (30 June 1977 and 14 March 1978), reprinted in (1979) 18 I.L.M. 397.

appointers. As one observer has pointed out, in arbitration, unlike in judicial settlement, "[t]he issue is essentially one of striking a balance between the requirement that the tribunal be impartial and recognition of the right of the parties to select persons in whom they have confidence."[312]

On the whole, the third-country arbitrators at the Iran-U.S. Claims Tribunal seem to have found an acceptable balance. They are conscious of the need at times to placate both state parties and always to maintain the essential "equality" of treatment commanded by Art. 15(1) of the Tribunal Rules. But one can understand that, from the Iranian point of view, the third-country (European) arbitrators may not be seen as fully "neutral". Before examining in greater detail the substantive aspect of the role played by the third-country members as Chamber Chairmen, it is best to review briefly the job of the party-appointed arbitrators, for the Chairmen often seem to define their functions in opposition to the approaches taken by their party-appointed colleagues.

There can be no doubt that the independence of party-appointed arbitrators on the Tribunal is more suspect than that of the third-country arbitrators. One distinguished American lawyer has pointed out that:

> [t]here are certainly some skeptical American attorneys who have expressed concern as to the independence of the Iranian members of the

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312. de Vries, Practical Aspects of International Litigation and Arbitration (1970) 64 Proc. Am. Soc. Int'l L. 251.

> Tribunal. They point to the recent reported purge of the judiciary in Iran as casting doubt on whether any Iranians are free to decide impartially and in accordance with generally understood principles of international law. Similarly, Iranian skeptics may question the role of any American arbitrator who was employed by the U.S. government.[313]

Another American counsel who has appeared before the Tribunal reports that "[t]he records of Tribunal decisions make it quite apparent that the Iranian arbitrator is not likely to support [an American Claimant's] claim or be won over by anything you say no matter how compelling".[314] The U.S. Agent was even more blunt, perhaps unintentionally, in discounting the possibility of impartiality on the part of the Iranian arbitrators. In discussing a major plenary Tribunal decision, the Agent noted that "[t]he final vote of the Tribunal on the issue was 6 to 3 against Iran, which in a sense makes the vote unanimous."[315] Implicit in that statement is the assumption that the votes of the Iranian members are predetermined and the only votes that really "count" are those of the American and third-country arbitrators. Despite the rather unattractive smugness displayed -- the assumption is that the American arbitrators are patently impartial for otherwise why should their votes count any more

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313. Aksen, supra, note 94, 4.

314. Belland, supra, note 3, 241.

315. Rovine, supra, note 83, 3. See also Rovine, supra, note 92, 26: "From the Iranian point of view, the Iranian arbitrators, the Iranian parties, and the Iranian Agent are all one large family."

than those of the Iranians? -- the U.S. Agent was not being entirely unfair. The Iranian arbitrators have stated openly that they do not believe themselves to be subject to any obligation of impartiality. Because they view Iran as the weaker party, they believe that their duty is to protect Iran.[316] Indeed, on no major decision have any of the Iranian arbitrators voted against the Iranian Government position.[317] On the other hand, one observer has cautioned against viewing the Iranian arbitrators as "robed Islamic zealots." He noted that they are typically quite sophisticated lawyers trained in the European civil law tradition.[318]

The strong connection between the Iranian members and their government was made plain, however, in the circumstances surrounding the resignation of Dr Sani, the second Iranian arbitrator assigned to Chamber Three.[319] When Dr Sani first contemplated resigning (in the end, a rather protracted process), he contacted the Head of the International Legal

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316. See, e.g., the comments of Judge Mangard, supra, note 28: "[T]he Iranians in Chamber Three openly admit it [a pro-Iranian bias], saying that 'that is our role, we would act otherwise if we were sitting in an Iranian court as judges, but here we are defending the underdog. The Iranians are always weaker; we have to defend them.'" See also the impressions of Mr Brower, supra, note 28, who notes that "[m]y Iranian colleague has announced that he does not live by" any rules of neutrality.

317. See Rovine, supra, note 92, 27.

318. Tonelson, supra, note 3, 23.

319. The original member was Mr Enayat who also resigned. See Annual Report 1, supra, note 67, 7.

Services Bureau of of the Islamic Republic of Iran who replied by telex as follows: "[P]lease advise Dr. Mostafa Jahanguir-Sani that his resignation will be raised at the next meeting of the High Council of Supervision, whose decision will be duly conveyed to him."[320] Agreement was finally forthcoming and Dr Sani submitted his resignation to the Government of Iran, and not to the Tribunal. Mr Mosk, the American member of Chamber Three, characterised this course of action as "inconsistent with the principle that the members of the Tribunal are independent and not employed by their governments."[321] The Tribunal as a whole decided that resignations should be submitted to the Tribunal itself and not to the appointing government.

The position of the American arbitrators is more complicated, reflecting a remarkable disparity between their self-perception and the impressions they convey to their third-country colleagues. The American arbitrators have made it a point of pride that they are perceived to be impartial and motivated only by a desire to discover the truth. Mr Brower has stated that "[u]nder the Rules all nine arbitrators are to be [impartial and independent], and that's a particular point with the American arbitrators because they feel that they live by

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320. Reported in RayGo Wagner Equipment Co. v Star Line Iran Co. (1982) 1 Iran-U.S. C.T.R. 411, (Reply of Dr. Sani to Mr. Mosk's Comments of 3 March 1983 Concerning Case No. 17) 428 at 440.

321. Cases Nos. 42, 48, 60, 167 and 439: Dissent of R.M. Mosk to Orders (1983) 3 Iran-U.S. C.T.R. 209.

those rules".[322] For Mr Aldrich, "[t]he job is to decide on the basis of the law appointed by Article V what is the legal result, and, on the whole, I would say that certainly is what I have tried to do. I have not hesitated to come down against American parties when it seemed to me that it was the right thing to do."[323] On one important occasion, Mr Aldrich did indeed part company with his American colleagues in deciding not to join their dissent in the forum clause cases.[324] This development was seized upon by Professor Lowenfeld as evidence of the essential impartiality of the American arbitrators:

> I think ... that it was important for the cause of international arbitration that one of the American arbitrators, George Aldrich, shared the view of the majority. In contrast to the Iranian arbitrators, who have voted as a bloc on every significant issue, the American arbitrators appear to be calling the cases as they see them, sometimes for and sometimes against the contentions of the American claimants.[325]

One might be forgiven for suggesting that Professor Lowenfeld has extracted rather too much from a very small data sample. Evaluations of this kind are admittedly impressionistic at best, but if one reads through the reported decisions of the Tribunal, it is difficult to point to many instances in which an American arbitrator has rejected outright the claim of an American corpo-

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322. Brower, supra, note 28.

323. Aldrich, supra, note 26.

324. See the discussion supra, text accompanying notes 115 to 131.

325. Lowenfeld, supra, note 65, 84-5.

ration or the contentions of the U.S. Government. The American members may be "calling the cases as they see them" but they see them in very large measure in a manner most compatible with the perceptions of American parties. It may be, of course, that the claimants do have very strong legal arguments, but it does seem significant that unanimous decisions are extremely rare at the Tribunal and that on the few occasions when American claimants do lose, the American arbitrator is typically to be found dissenting.[326]

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326. See, e.g., In Re Refusal to Accept the Claim of Raymond International (U.K.) Ltd., supra, note 229, (Dissent of H.M. Holtzmann in which G.H. Aldrich and R.M. Mosk Join) 396; Grimm v. The Government of the Islamic Republic of Iran, supra, note 51, (Dissenting Opinion of H.M. Holtzmann) 81; RayGo Wagner v. Iran Express Terminal Corp., supra, note 50, (Concurring and Dissenting Opinion of R.M. Mosk) 146 (concurring in holding that the Tribunal had jurisdiction to hear the claim and dissenting from the Award on the Merits which rejected the American Company's Claim); Queens Office Tower Associates v. Iran National Airlines Corp., supra, note 50, (Dissenting Opinion of H.M. Holtzmann) 254; Dallal v. The Islamic Republic of Iran, et al. (1983) 3 Iran-U.S. C.T.R. 10, (Dissent of H.M. Holtzmann) 17; J.I. Case Co. v. The Islamic Republic of Iran, et al. (1983) 3 Iran-U.S. C.T.R. 62, (Dissent of H.M. Holtzmann) 66; RCA Global Communications Disc, Inc. et al. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 9 (Interim Award), (Dissent of H.M. Holtzmann) 12; Ultrasystems Inc. v. The Islamic Republic of Iran, supra, note 96, (Dissenting Opinion of R.M. Mosk) 80; Behring International Inc. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 89 (Decision), (Dissent of R.M. Mosk) 93; Dames and Moore v. The Islamic Republic of Iran, supra, note 122, (Dissenting Opinion of R.M. Mosk) 229; CBA International Development Corp. v. The Government of Iran (1984) 5 Iran-U.S. C.T.R. 177, (Dissent of R.M. Mosk) 181; and American Housing International, Inc. v. Housing Cooperative Society of Officers of State General Gendarmerie (1984) 5 Iran-U.S. C.T.R. 235 (Dissenting Opinion of R.M. Mosk) 242.

The third-country arbitrators certainly believe that both their Iranian and American colleagues tend to favour their own side. Judge Mangard was most frank in discussing this aspect of Tribunal deliberations. He believed that the Iranian and U.S. arbitrators "have worked very much alone", that the third-country arbitrators have been caught in a no-man's land between essentially intractable positions:

> So, the three neutral arbitrators, ... I believe, always in my Chamber and also in the others, have acted between two persons, two colleagues who, even if they don't admit it, really act as the leading counsel for the party in question, for the private party, or the Government party to the particular case. They both do that, no doubt about it, and the Iranians in Chamber Three openly admit it, saying "that is our role" .... The Americans could not, would not admit it, but they act in the same way ...[327]

Clearly, Judge Mangard's impressions mesh with the self-perceptions of the Iranian arbitrators, but are completely at variance with the publicly-expressed perceptions of the Americans. Privately, however, at least one American arbitrator was willing to admit that because, in his view, the Iranians

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327. Mangard, supra, note 28. It is interesting to note that under the Arbitral Rules of the American Arbitration Association, a party-appointed arbitrator may, if the parties agree, actually operate as an advocate for his appointing party (Rule 12). Such a rule emphasises the important theoretical dissimilarities between arbitration and the judicial settlement of disputes. The moral objections to bias are clearly not as strong in arbitral tribunals as in courts, at least when considering the role of party-appointed arbitrators. See Stein & Wotman, International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules (1983) 38 Bus. Law. 1685, 1701.

were so partisan, he sometimes felt it necessary to support actively the position of American claimants.

There can be no doubt that there are valid distinctions to be drawn between the role of a party-appointed and a third-country arbitrator. Although he argues that a party-appointed arbitrator should be "truly impartial", de Vries suggests that such an arbitrator has a duty to ensure that "full understanding is attained by the entire tribunal of the presentation of facts and law advanced by his nominator."[328] The Iranian arbitrators carry this argument very far and seek actively to represent the interests of the "underdog", Iran. They also perceive a special duty to ferret out inconsistencies in the English and Farsi versions of proof.[329] Needless to say, none of the other arbitrators is likely to be capable of such a task.

The American arbitrators seem to share de Vries's perception of their role. Mr Aldrich acknowledged in discussion that, despite his emphasis upon complete impartiality, "the party-appointed arbitrator has a special responsibility to bring to light matters peculiar to his own legal system and to explain things that may not otherwise be explicable in terms of the facts of the case".[330] Mr Brower also sees a "special responsibility" to "ensure that the Tribunal or the Chamber, in most

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328. De Vries, supra, note 312, 253.

329. Reported by Judge Mangard, supra, note 28.

330. Aldrich, supra, note 26.

cases, has understood, has appreciated in a cognitive sense, the arguments presented by the claimants, and that those arguments have been considered so that a full exposition of the issues has taken place."[331] Clearly, there is a very fine line between ensuring that the Tribunal has "understood" the Claimant's case and acting as "leading counsel" for the party, to adopt Judge Mangard's words. The perception of the third-country arbitrators is that the line is regularly transgressed by both the American and Iranian arbitrators.

Indeed, it may be fair to say that the Chamber Chairmen have come to expect that the party-appointed arbitrators will show a "special interest"[332] in the arguments presented on behalf of the party which shares their nationality. The Chairmen have consequently developed a distinctive conception of their own role. They are painfully conscious of the fact that, as is commonly the case with tripartite arbitral tribunals, it is their vote that will in effect decide most cases.[333] The Chairmen have gone to some remarkable lengths to ensure that they can pull together a majority, including such expedients as dividing cases into sections according to subject matter and rendering "Interim Awards" which will attract the support of one or the other party-appointed arbitrator, even though neither

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331. Brower, supra, note 28.

332. de Vries, supra, note 312, 253.

333. Ibid.

could go along with the result if conceived as a whole.[334] There is at least one significant institutional pressure that prompts the Chamber Chairman to adopt this singular approach: the ability of the party-appointed arbitrators to write separate and dissenting opinions. That ability tends to make compromise more difficult, forcing the Chamber Chairman to adopt expedient solutions to create some common ground for an award. There is also a strong desire on the part of Chamber Chairmen to be seen to have provided a full hearing to both parties. It is this fact that has led to the routine granting of extensions to filing deadlines. It may also be relevant in this context that all three of the third-country arbitrators originally appointed to the Tribunal had significant judicial experience whereas the party-appointed members were drawn from the ranks of leading advocates, government officials or professors. The third-country arbitrators may initially have possessed a more highly-developed perception of impartiality. Recently, there has been a change of emphasis in the appointment of third-country arbitrators (in the absence of agreement, by the appointing authority). Messrs Bocksteigel, Virally and Riphagen were all

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334. See, e.g., Ultrasystems Inc. v. The Islamic Republic of Iran, supra, note 96, (Dissenting Opinion of R.M. Mosk) 80, 82: "I am ... disturbed by the potential consequences of unnecessarily separating a case into segments and then deciding it piecemeal at different times and with different majorities. The procedure gives the Chairman the ability to divide a case into a number of issues and thereby to dictate the final result without their being any majority for the award."

professors.

Owing partly to the perceived imbalance in the quality of advocacy before the Tribunal,[335] the Chamber Chairmen seem also to emphasise an independent "truth-seeking" approach, particularly in hearings. That is, the Chairmen will involve themselves actively in the presentation of cases, adopting an inquisitorial tone and requesting the presentation of additional written proof.[336] There is also a common feeling amongst the third-country arbitrators that they must act as buffers between the two party-appointed arbitrators in each Chamber, and between the parties in any given case. Although recognising that they

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335. Mr Aldrich was quite frank in pointing out that "[t]he Iranians often come with totally inarticulate counsel of very modest abilities. They have, I think, the Iranians have made a great mistake in this regard." Aldrich, supra, note 26. He did note, however, that the National Iranian Oil Company had engaged independent and eminent counsel such as the Whewell Professor of International Law at the University of Cambridge.

336. Judge Mangard emphasises the importance of his Swedish background to his role perception: "I would say, as I am used to Swedish arbitration and Swedish litigation, the presiding judge really has the functional roles of trying to find the truth and not being just passively listening to the attorneys of the parties but also by putting questions and asking maybe for possible documentary evidence, and so on." Mangard, supra, note 28. It may be relevant in this regard that so far all of the third-country arbitrators have been Europeans familiar with civilian systems of law where an inquisitorial judiciary is the norm. On the advantages of this system, see Langbein, The German Advantage in Civil Procedure (1985) 52 U. Chi. L. Rev. 823. In their article advising counsel for American claimants, Selby and Stewart note that "[t]he arbitrators are prone to ask difficult questions regarding legal theories and factual details." Selby & Stewart, supra, note 45, 230.

are bound to decide cases "on the basis of respect for law",[337] they emphasise the need at times to foster an informal, "conciliatory" atmosphere. In the words of Judge Mangard:

> [W]e know that according to the UNCITRAL Rules, we are not allowed to act as an amiable compositeur unless we are expressly asked to do so, but I would say that there is maybe a greater amount of ... maybe not calling [sic] conciliation, but equity coming into our minds than maybe would be otherwise. And in a way, we conciliate too, because to try [sic] to avoid this very harsh conflict within the Chambers ... in the full Tribunal, it has been impossible.[338]

It would not be accurate to say that the third country arbitrators see themselves as being conciliators above all. The Tribunal's second President, Professor Böckstiegel, stressed that he is in a formal sense, a judge,[339] but other third country members have demonstrated that being a "judge" does not require rigid observance of rule-bound legality. They may be required to mediate between intractable positions. The party-appointed arbitrators acknowledge this "conciliatory" aspect in the work of the Chamber Chairmen, although it is not necessarily

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337. Article V of the Claims Settlement Declaration, supra, note 2.

338. Mangard, supra, note 28.

339. Böckstiegel, supra, note 27.

applauded.[340]

Given the obvious conflicts in role perception amongst the arbitrators, and in light of the enormous political strains to which the Tribunal is subjected, it comes as no surprise that the atmosphere at the Tribunal has been tense. Professor Lowenfeld has written that "the key to tripartite arbitration with party-appointed arbitrators is that all members of the Tribunal approach the task as professionals. They must want to earn each other's respect, and to be prepared to give it."[341] It must be accepted that such mutual respect simply does not exist at the Iran-U.S. Claims Tribunal, particularly between the Iranian and American members. From the very beginning of the deliberative process the arbitrators have failed to develop a sense of collegiality.[342] There has been constant and violent disagreement, some of which has erupted publicly and is revealed on the pages of Tribunal Reports. In a remarkable series of "Statements" and "Replies" in one of the RayGo Wagner Equipment Co. cases, Arbitrators Sani and Mosk traded angry accusations.

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340. See, e.g., Brower, supra, note 28:
> I can tell you as a practical matter, the Third Country judges, the Chairmen, apparently all feel that they have some additional role to play ... and feel that they should be taking some steps to encourage the two sides to come together in the case."

Mr Brower believes that they should instead behave fully as judges and simply apply the law. See also Selby & Stewart, supra, note 45, 229.

341. Lowenfeld, supra, note 227, 7.

342. See Lowenfeld, supra, note 65, 90.

In the concluding volley, Mr Mosk suggested that Dr Sani's previous statement had been "inaccurate and misleading" and reflected "bickering among members of the Tribunal which does little more than detract from the decorum of the Tribunal."[343] Similar problems are revealed in cases such as Granite State Machine Co. v. The Islamic Republic of Iran, et al.[344] and Gruen Associates, Inc. v. Iran Housing Co.,[345] and in the published "Reasons of Dr. Shafeiei for not signing the Awards in Cases 83, 188, 220 and 449."[346]

The most serious public display of anger and frustration to date is to be found in the reports of Case A-18, the dual nationality decision of the plenary Tribunal. In their separate "Declaration", the Iranian arbitrators called the decision a "clear manifestation of a bad faith interpretation."[347] Two of the American arbitrators complained bitterly about this

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343. RayGo Wagner Equipment Co.v. Star Line Iran Co., supra, note 320, (Further Comments of R.M. Mosk) 441. The exchange of views had by then reached almost comic proportions, having already encompased the following missives: a) "Mr Jahangir Sani's Reasons for Not Signing the Decision Made by Mr Mangard and Mr Mosk in Case No. 17", at 415; b) "Comments of R.M. Mosk With Respect to Mr Jahangir Sani's Reasons for Not Signing the Decision Made by Mr Mangard and Mr Mosk in Case No. 17", at 424; c) "Mr Jahangir Sani's Reply to Mr Mosk's 'Comments' of 3 March 1983 Concerning Case No. 17", at 428. Mr Mosk's "Further Comments" were the final volley.

344. (1982) 1 Iran-U.S. C.T.R. 442, (Concurring Opinion of R.M. Mosk) 449.

345. Supra, note 50.

346. Supra, note 252.

347. Case A-18, supra, note 32, 502.

"Declaration": "We deeply regret the tone and content of the 'Declaration' which the three Iranian Arbitrators have inserted above their signatures on the Decision. Such libelous and baseless invective has no place in an international arbitral tribunal and merits no reply."[348] In their Dissent, published subsequently, the members from Iran went further, as was noted above, to assert that the Tribunal, and all international arbitration, was designed solely "to safeguard the interests of the capitalist world."[349] The Prime Minister of Iran declared that the decision in Case A-18 was "unlawful and wrong" and that Iran would boycott proceedings in claims presented by dual nationals.[350] As the decision and dissent were released, reports suggest that tension at the Tribunal rose to new heights. Indeed, in September 1984, shortly before the filing of the Iranian members' dissent in Case A-18, two of the Iranian arbitrators physically assaulted Judge Mangard and attempted to eject him from the Tribunal premises on the ground that he was pro-American.[351] That action precipitated a major crisis at the

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348. Ibid., (Concurring Opinion of H.M. Holtzmann and George Aldrich) 503 at 504.

349. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 85.

350. "Statement of the Prime Minister of Iran", supra, note 39, 430.

351. Reported in The Times [of London] (5 September 1984) 6, col. 8. Judge Mangard, in his sixties and an ex-Member of the Swedish Court of Appeals, was not seriously injured. See also Aldrich, supra, note 26.

Tribunal which prompted intense negotiations leading to the resignation and replacement of the Iranians involved. Tribunal business ground to a halt for some months.

Interviewed shortly after the attack, Judge Mangard was remarkably sanguine and would say only that there was no strong rapport amongst members of the Tribunal. Ironically, he felt that overall he had "rather better relations to [sic] my Iranian colleague [in Chamber Three] than maybe to my American colleagues who have written rather aggressive dissents."[352] In his earlier letter of Resignation from the Tribunal, Judge Bellet had been far less circumspect:

> My efforts are becoming pointless, and, at the end of my moral and physical tether, I consider that I cannot continue, at the risk of endangering my health and my family life.[353]

Judge Bellet's letter highlights the intense pressure imposed upon the third-country members. Perhaps that pressure goes some way towards explaining the high turnover in third-country membership on the Tribunal.

Mr Aldrich has also been quite open about his frustrations, admitting that the Tribunal had been "often an unpleasant place to work" largely because "the Iranians are under terrible pressure and sometimes they behave terribly." He believed that it would be difficult to attract competent replacement arbitra-

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352. Mangard, supra, note 28.

353. Quoted in Cases Nos. 83, 188, 220 and 449: Dr. Shafeiei's Reasons for Not Signing the Awards, supra, note 252, 144.

tors to fill openings caused by resignations.[354] Mr Brower felt saddened by the lack of "collegiality", and he suggested that the difficulty was basic and perhaps, therefore, insoluble:

> Arbitration ordinarily presumes [sic] two parties that are present in the arbitration within the institution, not simply technically by agreement, but because of being motivated by underlying will to really use that means for resolving certain outstanding problems, and I think many people have concluded that that type or degree of will is not present on the Iranian side.[355]

Keeping in mind Judge Mangard's point that there exists in the Tribunal a fundamental clash of cultures, Mr Brower's evaluation may be somewhat too simple. The tensions and frustrations probably are not caused solely by a lack of commitment by Iran to the Tribunal process, but also by deep differences in perception involving the very nature of the process and the role of the arbitrator within the institution.[356] Although it is true that the Tribunal is buffeted by external political constraints

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354. Aldrich, supra, note 26.

355. Brower, supra, note 28.

356. In the words of a former American Agent:

> The process is fragile. It is not solidly based. The cultural differences are enormous. The two sides' perceptions of what an international arbitration is are very different. The roles of their key players, the arbitrators, the agents, and the parties are very different.

Rovine, supra, note 92, 30-1.

The antipathy created by the decision in Case A-18, supra, note 32, was exacerbated by the fact that all of the dual nationals who were seeking to assert claims were supporters of the former Shah, who was viewed by the new Iranian regime as an arch-villain and a Westerniser. The dual nationals represented an ousted regime that was thought to have posed a deep threat to Islamic culture.

and continuing ideological antipathies,[357] it must also respond to sincerely-held, but contradictory, cultural impulses amongst its membership. One may question whether or not the institution is strong enough to withstand such pressures, but the more far-reaching issues are whether the compromises necessary to hold it together will render its process and decisions entirely idiosyncratic and whether the enormous tensions will threaten to undermine the entire institution of international arbitration by calling into question the possibilities for trust and consensus upon which it is based.[358] These issues will be explored in the concluding section.

E. Contributions of the Iran-U.S. Claims Tribunal to the Theory and Practice of International Arbitration

Oddly enough, the greatest contribution yet made by the Tribunal to international arbitral practice was actually imposed upon it by the parties. That was the creation of an independent enforcement mechanism -- the Security Account -- under the Algiers Accords.[359] The Account was designed to ensure Iranian performance of monetary awards issued by the Tribunal; it will

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357. See, e.g., Selby & Stewart, supra, note 45, 216.

358. On the second issue, see Lowenfeld, supra, note 65, 91. Mr Rovine, the former U.S. Agent, doubts the integrity of the process: "[W]e have a process here where the cultural differences run so deep as, in many cases, to betray the essential purpose of international arbitration." Rovine, supra, note 92, 27.

359. See the discussion, supra, note 2.

have no bearing upon non-monetary Orders nor upon Awards rendered against the United States or American parties. The creation of the Account is analogous to a lump sum settlement agreement, for the money to settle claims against Iran has been paid in advance and the adjudication of specific claims takes place subsequently. Of course, the analogy cannot be drawn too far because the distribution of lump sum settlements is commonly managed by a national Claims Commission[360] and here the adjudication is undertaken by an international or transnational tribunal. Moreover, the money in the Security Accounts vests in Iran until the Tribunal orders a transfer to satisfy a specific award. Nevertheless, the basic structure of the two systems is comparable.

None of the previously existing sets of institutional arbitral rules elaborate any specific enforcement mechanism. Although arbitral awards rendered under the auspices of ICSID may benefit from the state parties' commitment to recognise and enforce awards, no independent enforcement procedure was established by the World Bank Convention.[361] Local rules governing

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360. See, e.g., Lillich & Weston, supra, note 220.

361. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (done 18 March 1965; entered into force 14 October 1966) 575 UNTS 160. Under Art. 54(1), "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that State." However, subsection (3) emphasises that the "[e]xecution of the award (cont'd.)

specific aspects of enforcement -- most notably claims of sovereign immunity -- are still allowed to operate. The situation with awards of the Iran-U.S. Claims Tribunal is exactly the reverse. One may start with the presumption that, as long as funds remain in the Security Account, enforcement of awards against Iran (the vast majority of all Tribunal awards) will take place without any involvement of municipal law, and it is only in strictly limited situations that local rules may have application.

One of the central provisions of the Algiers Accords was the termination of all existing or future legal proceedings in United States courts involving claims arising out of the Iranian Revolution and subsequent events and the lifting of related attachments.[362] An essential element of the quid pro quo of the Accords was that, in response to the lifting of United States attachments, Iran agreed to the creation of the Security Account out of which Tribunal monetary awards against Iran would be

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shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought." Moreover, any local interpretations of the rules of state immunity from execution are still permitted to apply (Art. 55).

362. See Adler, The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment (1982) 68 Va. L. Rev. 1537, 1539. See also Executive Orders 12277-12281 (19 January 1981) 46 Fed. Reg. No. 15 (1981), reprinted in (1981) 20 I.L.M. 287-91. For full discussions of the legal status and effects of the Algiers Accords and the Executive Orders in United States Law, see Cohen, Krueger, et al., supra, note 55; and Eskridge, The Iran Nationalization Cases: Toward a General Theory of Jurisdiction Over Foreign States (1981) 22 Harv. Int'l L.J. 525.

paid. The Tribunal has itself recognised this quid pro quo:

> A critical aspect of this substitution of fora [the Tribunal for domestic courts] was the parallel replacement of the various United States attachments with the Security Account in the N.V. Settlement Bank. Although funded initially with U.S. $1 billion, the Account's continued replenishment at the U.S. $500 million level has been guaranteed both by the Government of Iran and Bank Markazi Iran. In order to assure further the effectiveness of this unique claims settlement mechanism, the United States in essence forced its nationals to file their claims here by dissolving their attachments and suspending litigation in the United States.[363]

The Security Account was established under the first Declaration of the Government of the Democratic and Popular Republic of Algeria.[364] As Iranian funds were released from the American freeze orders and attachments, one-half of each instalment paid to Iran was placed "in a special interest-bearing security account in the [Algerian] Central Bank, until the balance in the security account [had] reached the level of $1 billion." All funds in the Security Account were "to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement." Iran also accepted a continuing obligation that whenever it was notified by the Central Bank that the "balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account."

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363. Esphahanian v. Bank Tejarat, supra, note 43, 165.

364. Supra, note 2, para. 7.

Under a subsequent "Technical Agreement"[365] involving various banking institutions charged with the transfer and deposit of Iranian Government assets, the N.V. Settlement Bank of the Netherlands, a public corporation with registered office in The Hague (a subsidiary of the Dutch Central Bank), agreed to act as "Depositary for the Iranian funds in the United States within the meaning of the Algiers Agreements".[366] The Security Account was thereby established in that Bank. Under the Agreement, Bank Markazi Iran undertook an independent and binding obligation to replenish the Security Account once it had fallen below U.S. $500 million. Two of the parties to the Technical Agreement, the Bank Markazi Iran and the New York Federal Reserve Bank as Agent for the United States, were unable to agree upon the treatment of interest from the Security Account. The Iranian bank argued that such interest should accrue to it directly, while the U.S. bank asserted that the interest should remain in the Security Account, in partial fulfilment of the obligation to replenish.[367] Because the Algiers Accords gave no adequate guidance on the question, it was almost inevitable that the Tribunal would reach a compromise result. The debate was resolved by the plenary Tribunal in the second phase of Case

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365. Technical Agreement with the N.V. Settlement Bank of the Netherlands (17 August 1981), reprinted in (1981) 1 Iran-U.S. C.T.R. 38 [hereinafter Technical Agreement].

366. Ibid., para. 1(d)(ii).

367. Ibid., Appendix I, para. 1.

A-1, the majority deciding "that the interest must ... be credited as it accrues to a separate interest-bearing account in the N.V. Settlement Bank". The funds in the separate account "would be finally remitted to Iran at the same time as any balance in the Security Account". Iran would retain access to the separate account "in order to help satisfy its replenishment obligation, if the need arises." The Tribunal majority believed that this solution maintained the existing "equilibrium" between the parties by "freezing the situation".[368]

When a monetary award in favour of a U.S. claimant has been rendered by the Tribunal, payment is made in the following manner. The President of the Tribunal must notify the Escrow Agent (the Central Bank of Algeria)[369] that the Tribunal has rendered an award, identifying the number of the claim, the name and address of the claimant, the amount awarded including interest, and the number of the award. The Escrow Agent will then issue payment instructions to the Depositary Bank (N.V. Settlement Bank), including all the information provided by the President of the Tribunal, and the Depositary Bank will "promptly comply" with those instructions.[370] Each Award must be dealt with individually. The Depositary Bank is expressly exonerated

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368. Case A-1 (1982) 1 Iran-U.S. C.T.R. 189 (Second Phase) 191-2.

369. Escrow Agreement (20 January 1981), reprinted in (1981) 1 Iran-U.S. C.T.R. 16.

370. Technical Agreement, supra, note 365, paras 1(e)(i) and (ii).

from any liability regarding funds transferred "in satisfaction of ... an award" even if the award is subsequently challenged, revoked, set aside or modified.[371] For its services, which also include the co-ordination of investments from the Security Account,[372] the Depositary Bank receives a monthly fee of $150,000 (U.S.).[373]

A problem has arisen in connection with the payment from the Security Account of Awards rendered to confirm party-negotiated settlements, the so-called Awards on Agreed Terms. In Case A-1 (First Phase), the Tribunal established a set of standards "to be applied in recording a settlement as an award on agreed terms."[374] It decided, unanimously, that because the Tribunal derived its jurisdiction solely from the Claims Settlement Declaration, when it was required to make an Award on Agreed Terms, the Tribunal would have to undertake "such examination concerning its jurisdiction [over the settled claim] as it deems necessary". But it refused to set down "in abstracto" any general rule "concerning the extent of the examination as to jurisdiction that may be needed."[375] In fact, the Tribunal has adopted a flexible approach and usually records

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371. Ibid., para. 1(e)(iii).

372. Ibid., para. 2(a)(iii).

373. Ibid., para. 3(d)(i).

374. Case A-1 (First Phase), supra, note 16.

375. Ibid., 152.

simply that it is satisfied that it has jurisdiction when it approves an Award on Agreed Terms. In some cases, the issue is not even mentioned.[376]

One American arbitrator, H.M. Holtzmann, has complained about the ease with which Awards on Agreed Terms have been approved. He believes that the Security Account may in some circumstances have been abused. Two difficulties have arisen. First, Holtzmann has suggested that certain parties have reached agreement on a settlement in order to extract funds from the Security Account which will be used to finance transactions involving goods ordered after 19 January 1981, the date of the Accords. In other words, the money from the Security Account will be available to complete a transaction over which the Tribunal would not have jurisdiction.[377] Mr Holtzmann would not

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376. See, e.g., ABS Worldwide Technical Services, Inc. v. The Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 176; Advanced Computer Techniques Corp. v. The Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 326; Combustion Engineering, Inc., et al. v. The Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 366; William H. Rorer, Inc. v. Toobi Co. (1983) 3 Iran-U.S. C.T.R. 390; American Motors Corp., et al. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 29; and Smith International, Inc. v. The Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 33. The American arbitrator, Mr Mosk, has criticised the Tribunal for its tendency in all types of cases to decide substantive issues "without deciding jurisdictional issues". Schering Corp. v. The Islamic Republic of Iran, supra, note 288, 377.

377. The General Tire and Rubber Co. v. Iran Tire Manufacturing Co. (1983) 3 Iran-U.S. C.T.R. 351, (Dissent of H.M. Holtzmann) 358. See also Pan American World Airways, Inc., et al. v. The Government of the Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 205 (Dissenting Opinion of H.M. Holtzmann) 206 at 207.

give Tribunal blessing to such Agreements.

It should be pointed out that, if the Tribunal refused jurisdiction and the Settlement Agreement collapsed, the Claimant would not formally be left without a remedy, for under President Reagan's Executive Order Suspending Iranian Litigation, a claimant may re-institute an action in United States courts if the Tribunal has dismissed the claim for lack of jurisdiction.[378] Execution could, of course, prove very difficult for idiosyncratic municipal law interpretations of the doctrines of sovereign immunity and Act of State might preclude enforcement of any court judgment.

The second problem with the Awards on Agreed Terms in Mr Holtzmann's view is that the Tribunal has abused its limited discretion to order that the exact terms of an Award be kept secret. According to the Tribunal Rules:

> [U]pon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade and military secrets have been deleted.[379]

Mr Holtzmann has argued that this discretion is being exercised much too broadly, to excise entire Awards from the public record. He has asserted that the Tribunal should restrict itself

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378. See Lowenfeld, supra, note 65, 80-1, commenting upon Executive Order 12,294 of 24 February 1981, 46 Fed. Reg., No. 3.

379. Article 32(5) of the Final Tribunal Rules of Procedure, supra, note 29.

to the deletion of only the identity of the parties and other "identifying facts and trade and military secrets". Even then, the Tribunal should act only when it is satisfied that such action is necessary.[380] Instead, the Tribunal has tended to bow to the will of the parties in specific cases and to suppress entirely the substantive content of certain Awards on Agreed Terms.[381]

Mr Holtzmann's overriding concern is that fairness be seen to be done to all parties before the Tribunal. Because all awards are paid out of the Security Account, parties in all cases have an interest in seeing that only those awards based upon claims where the Tribunal would have jurisdiction are extracted from the Account. Secrecy prevents open examination:

> A primary purpose of the Settlement Agreements is to provide for payment of Settlements from the Security Account established by the Algiers Declarations. Any withdrawals from the Security Account affect the interest of parties in all cases. It is therefore highly inappropriate that a Settlement Agreement annexed to an Award which triggers such a withdrawal of funds should be cloaked in secrecy.[382]

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380. Cases 15, 19 and 387: Separate Opinions of H.M. Holtzmann, supra, note 29, 79-80; and The Government of the U.S.A. on behalf of Shipside Packing Co. v. The Islamic Republic of Iran, supra, note 226, (Opinion of H.M. Holtzmann, Concurring in Part and Dissenting in Part from Award on Agreed Terms) 82.

381. See, e.g., Chevron Research Co. v. National Iranian Oil Co. (1983) 2 Iran-U.S. C.T.R. 364 (Award on Agreed Terms).

382. Cases 15, 19 and 387: Separate Opinions of H.M. Holtzmann, supra, note 29, 80.

Of course, Mr Holtzmann's position is predicated upon a particular view of the Tribunal process. The proper scope of secrecy will depend in part upon whether or not the Tribunal's Awards are believed to have any precedential value. Formally, of course, no decisions of international tribunals have binding precedential value. However, even a cursory examination of contemporary textbooks in public and private international law will reveal the extent to which case law is now relied upon as a source of legal justification. It is still best to refer rather to the persuasive value of tribunal awards. It will be suggested below that in the case of the Iran-U.S. Claims Tribunal such value is, in fact, very low except in relation to future adjudication in the same Tribunal. Mr Holtzmann would probably disagree.

Parties no doubt have a right to expect that the Security Account will not be drained by the payment of improper awards, but it remains for the Tribunal to evaluate its own jurisdiction. If it is satisfied that it does have jurisdiction, it is entirely proper to satisfy the parties' request for secrecy. In practical terms, the limited persuasive value of Tribunal Awards, elaborated upon below, means that secrecy will have no damaging consequences. Mr Holtzmann's first concern is valid and important: the Tribunal must be careful in evaluating its jurisdiction when approving Awards on Agreed Terms, for it will

not commonly be subject to review,[383] and enforcement will occur almost immediately through the Security Account. The second concern, which leads to the conclusion that there is almost a duty to publish details of awards, even when the parties are opposed, is probably misdirected.

The existence of the Security Account must be viewed as almost the defining feature of the Iran-U.S. Claims Tribunal. Its creation was a singular achievement and its operation is of enormous benefit to Claimants. One American lawyer has pointed out that if the American Claimants had been forced to litigate in United States courts, even if their cases were held to qualify for judicial consideration under the doctrine of restrictive sovereign immunity, execution and even prejudgment attachments could very well have been held to be contrary to the relevant American legislation.[384] The importance of an independent enforcement mechanism, agreed upon in advance by the parties and

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383. The Dutch Parliament has considered a bill which would effectively preclude judicial review in the Netherlands of any Tribunal Award on substantive grounds or even for lack of jurisdiction. See the Law concerning the "Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States", reprinted in Iranian Assets Litigation Rep. 6, 899 (15 July 1983). The bill appears to have died on the order paper. See also The Netherlands. Ministers of Justice and Foreign Affairs, Applicability of Dutch Law to the Awards of the Tribunal Sitting at The Hague to Hear Claims Between Iran and the United States: Explanatory Notes, reprinted in (1983) 4 Iran-U.S. C.T.R. 308.

384. Clagett, supra, note 29. On problems of enforcement and issues of sovereign immunity, see supra, Chapter III.

free of idiosyncratic municipal law constraints, cannot be over-stressed. Indeed, if there is any outstanding lesson to be gleaned from the experience of the Iran-U.S. Claims Tribunal, it is that private parties wishing to negotiate an arbitration clause in a contract with a state, or an ex post facto dispute resolution agreement, would be well advised to attend to the possibility of creating some type of institutional enforcement mechanism.

The design of any such security mechanism would, of course, depend upon the amount claimed, the number of cases to be dealt with, the nature of the parties, and the level of trust that exists between them. Possibilities include the deposit of performance bonds, the negotiation of separate suretyship contracts with third-party guarantors, the simple deposit of funds with the Tribunal, or the creation of a formal Security Account with pre-established rules of access and disbursement. If either of the last two mechanisms is chosen, experience at the Iran-U.S. Claims Tribunal suggests that the negotiating parties should make every attempt to reach agreement on the treatment of interest, thereby avoiding later legal disputes which would have to be settled by the arbitral tribunal, causing delay and increasing costs.

Ironically, although the Security Account is one of the great innovations of the Tribunal structure, its existence may be viewed as a major inhibiting factor in the general application of Tribunal practice and case law in other contexts. This

difficulty has been alluded to throughout this Chapter but must now be dealt with more fully. It bears reiteration that the Tribunal is operating in a highly charged, deeply politicised atmosphere. Typically, the American and Iranian arbitrator will not agree on the legal reasoning applicable in any given case. The burden then falls upon the Chairman to conduct Chamber business and to author awards, orders, etc. in such a manner that some equilibrium and some rational communication can be maintained. To do so, it will often be necessary to compromise, to play down differences of opinion and to render decisions that are intentionally vague and obfuscatory. The Security Account makes such an approach more attractive because its existence precludes the need for separate enforcement proceedings. In other words, given the lack of any review procedure or challenge mechanism, the Iran-U.S. Claims Tribunal can afford to be imprecise, and in order to ensure its own survival it is almost bound to be imprecise. Justice will still to a great extent be done because Claimants will benefit from almost immediate, essentially guaranteed enforcement of their awards, a benefit they could hardly have anticipated in the dark days when their contracts were being repudiated and their assets seized. For the parties, the precision of the Tribunal's reasoning, or lack thereof, is largely irrelevant. Consistency is a valid objective of all parties, for they have a legitimate expectation of being treated with equality, but precision is largely irrelevant. It is for the wider legal community, seeking guidance and precedent, that precision is an issue.

Professor Sohn has been quite supportive of the Tribunal's elaborations of substantive law, arguing that the Tribunal has not been "timid and conservative", that it has been willing to apply "novel" rules.[385] In support of this view, he cited the decision establishing the de facto successorship of liabilities whereunder a government-controlled entity which effectively took over a private company was held liable for its debts even though no legal succession had taken place.[386] He also pointed to the decisions in the dual nationality cases[387] and to one case in which the Tribunal asserted jurisdiction over a claim grounded in unjust enrichment.[388] It is interesting to note, however, that the Tribunal's lack of timidity has been apparent almost entirely in cases involving the interpretation of its own jurisdiction under the Claims Settlement Declaration. As was discussed above,[389] the Tribunal is loth to deprive Claimants of access. But jurisdiction is essentially an internal question, and when other substantive questions have been addressed, the

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385. Sohn, supra, note 52, 100-2.

386. Oil Fields of Texas, Inc. v. The Government of the Islamic Republic of Iran (1982) 1 Iran-U.S. C.T.R. 347, 356-62.

387. Professor Sohn was relying upon the decisions of Chamber Two in Esphahanian v. Bank Tejarat, supra, note 43 and Golpira v. The Government of the Islamic Republic of Iran, supra, note 43, but a similar approach was adopted by the full Tribunal in Case A-18, supra, note 32.

388. Isaiah v. Bank Mellat, supra, note 123.

389. Supra, text accompanying notes 105 to 192.

Tribunal's approach has been far less bold and far less predictable. On some issues the Tribunal has even manifested patent inconsistency. In any case, one may question whether "timidity" or "boldness" are very useful measures of a legal process. A tribunal may be quite bold and fail to ground its decisions in any rigorous analysis. On the other hand, timidity may promote vagueness of thinking or it may prompt intense legalism in an attempt at self-justification. The central question raised by the experience of the Iran-U.S. Claims Tribunal is not so much whether it is "bold" but whether or not its practice has persuasive value for the larger legal community.

In most cases, the Tribunal has focussed very heavily upon the facts in rendering Awards.[390] It is quite common for the major part of an Award to be devoted to a recitation of the facts and contentions of the parties, probably drafted by a legal assistant to the Chamber Chairman, only then followed by a short and typically vague set of reasons for the Award.[391] Even Professor Sohn notes that opinions are generally succinct and that the majority "does not find it necessary to rely expressly

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390. See Carbonneau, "The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal" in R. Lillich, ed., The Iran-United States Claims Tribunal 1981-1983 (1984) 104, 126.

391. See, e.g., J.I. Case Co. v. The Islamic Republic of Iran, supra, note 326; and Ran International Industries, Inc., et al. v. The Air Force of the Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 203.

on precedents."[392] The concurring and dissenting opinions are generally much more elaborate in their citation of sources, but their utility remains entirely dependent upon the power of the argument advanced. No doubt, the style of majority opinions is influenced heavily by the factual complexity of the cases brought before the Tribunal and by difficulties in proof.[393] But there are also institutional imperatives promoting such a technique.

One American academic observer, Professor Carbonneau, has been particularly harsh in his evaluation of Tribunal decisions, asserting that "the awards rendered by the Tribunal have been essentially devoid of substantive legal content and, as a result, [are] incapable of having much precedential value."[394] A similar argument has been advanced by one of the Iranian arbitrators who has written that if "legal principles are sacrificed, the resulting decisions ... will necessarily be so flawed and insupportable as to damage the reputation and standing of a tribunal enjoying a certain international status."[395] So far, most of the Tribunal's major decisions have been jurisdictional -- the forum-selection clause cases, the dual nationality cases,

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392. See Sohn, supra, note 52, 96.

393. See supra, text accompanying notes 285 to 288.

394. Carbonneau, supra, note 390, 128.

395. R.N. Pomeroy, et al. v. The Government of the Islamic Republic of Iran: Dissenting Opinion of M.J. Sani (1983) 4 Iran-U.S. C.T.R. 237.

the corporate nationality cases, all of which have been discussed above. Jurisdictional questions do not lend themselves to the elaboration of broad norms, especially in arbitration where particularities of the governing instrument will condition the Tribunal's evaluation of its jurisdiction. To evaluate Professor Carbonneau's criticism, then, it is best to examine other types of Tribunal decisions. One area in which there has been, necessarily, a great deal of discussion is the issue of applicable law. That issue will now be investigated as an example of the Tribunal's typical approach to dispute resolution.

First, one potential objection must be met. It could be suggested that, in arbitration, the evaluation of applicable law is similar to the evaluation of jurisdiction in that decisions in both cases are strongly guided, if not controlled, by specific clauses in the agreement to arbitrate (whether a separate document or part of an underlying contract). As such, the issue of choice of law may be just as particular to a specific tribunal as are questions of jurisdiction. However, in the case of the Iran-U.S. Claims Tribunal, that potential objection loses much force because of the nature of the choice of law provision in question. The relevant provision is Art. V of the Claims Settlement Declaration which states:

> 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.[396]

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396. Supra, note 2.

Clearly, the choice of law is phrased in such a broad manner that conclusions reached by the Tribunal might be thought potentially to have relevance in other contexts. A fortiori is that the case at a time of great indecision amongst the proponents of international arbitration concerning the law applicable to contracts between states and foreign private parties.[397] Any decisions involving that issue could be of widespread interest due to the absence of clear international authority.

The central element of Art. V is the requirement that Tribunal decisions be rendered on "the basis of respect for law". Although some American participants have tried to argue that this choice-of-law provision is "sharply and narrowly drawn",[398] one must conclude that such an assertion has more to do with bargaining positions and desired outcomes than with independent analysis. There are many ways in which a decision may be based upon "respect for law". Moreover, the crucial point is that "law" is a very wide term, with many sub-categories and related concepts. Article V seems to contemplate the application of many different legal sources, mentioning as it does "commercial" law, "international" law, "contract" provisions, "changed circumstances", and "relevant usages of the trade". Guiding the application of these sources is the overriding principle that the Tribunal may apply "such choice of law

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397. See the discussion, supra, Chapter II.

398. Stewart & Sherman, supra, note 14, 7.

rules ... as [it] determines to be applicable."

Even in its early days, as it wrestled with the modification of the UNCITRAL Rules, the Tribunal signalled that it would take a flexible approach regarding choice of law, for it chose not to alter Art. 33(2), which enabled the Tribunal to decide cases ex aequo et bono if so authorised in writing by the parties to a specific case. The United States Government had argued that any such decision would not be "on the basis of respect for law",[399] but the Tribunal demonstrated that "respect" is a nebulous concept which may extend "law" into an independent form of "equity". It would seem, however, that unless there is specific authorisation to decide ex aequo et bono, the Tribunal does feel bound to apply some form of law. The sources of that law remain in doubt. One might have expected at least one clear rule to emerge, that the various alternative sources of law mentioned in Art. V would not override a clear contractual choice of law, but as will be discussed below, even this seemingly obvious interpretive point has been obfuscated.

The choice-of-law provision of the Claims Settlement Declaration underscores the "mixed" nature of the Tribunal. In the case of international claims commissions adjudicating under principles of state responsibility in international law, the

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399. Ibid., 15-6. The Tribunal has yet to publish a case in which the parties had authorised it to act ex aequo et bono. See also Jones, supra, note 31, 52.

characteristic agreement provides for the application of "international law, justice and equity."[400] Professor Stuyt's survey of international arbitral tribunals also revealed that when choice-of-law clauses are drafted to govern such proceedings, they tend to require the application of amorphous principles of "justice and equity" and "impartiality", or they refer the Tribunal to rules of international law.[401] David Lloyd Jones notes that the Iran-U.S. Tribunal is called upon to apply a more complex amalgam of legal rules. Like a tribunal resolving state-state controversies, it is authorised to apply international law, but the Tribunal is also directed to apply principles of commercial law, contract law and trade usages, signalling that it is also a "transnational" commercial arbitral tribunal.[402] The application of any particular category of sources would depend upon the nature of the underlying dispute.[403] It would seem unlikely that all sources should apply in any given case.

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400. Jones, ibid., 51-2.

401. Out of 441 arbitrations catalogued by Professor Stuyt, 281 were not governed by any express choice-of-law clause (or, if they were, the clause is not known), 101 were governed by principles of "justice and equity", etc., and forty-seven were to apply international law. See A. Stuyt, Survey of International Arbitrations 1794-1970 (1972), passim.

402. Jones, supra, note 31, 51-2.

403. Audit, supra, note 89, 844.

In Case A-18,[404] the dual nationality decision of the plenary Tribunal, the debate in part revolved around the nature of the Tribunal, as was discussed above.[405] In attempting to decide upon that nature, inevitably the issue of choice of law arose. In the case, Iran argued forcefully that the Tribunal was fully "international". One would have expected, then, that its primary source of law would be international law. Initially, that seemed to be the position adopted by the three Iranian arbitrators in their dissenting opinion: "[T]he Tribunal shall base its decisions on law, not equity, and that law can be no other than international law."[406] But a mere glance at Art. V of the Claims Settlement Declaration belies the validity of that approach and the Iranian arbitrators recognised that fact, for they went on to say:

> Equal reference in Article V to choice of law rules and commercial law, as well as other provisions and elements, appears fully justifiable due to the nature and diversity of the claims before the Tribunal.[407]

In the end, the Iranians were forced to accept the inevitable, even though their broader argument was much weakened by the admission. The Tribunal does retain enormous flexibility to pick and choose amongst various sources of law. Some commen-

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404. Supra, note 32.

405. Supra, text accompanying notes 32 to 52.

406. Case A-18: Dissenting Opinion of the Iranian Arbitrators, supra, note 35, 25.

407. Ibid., 25-6.

tators have speculated that the flexibility allowed the Tribunal under Art. V of the Declaration would encourage it to adopt comparative law techniques and to find guidance in the principles of private international law.[408] It was thought that the Tribunal might engage in creative methodological explorations. In fact, "the awards generally are devoid of any comparative law methodology or transnational substantive dimension."[409]

The striking feature of many awards is that they nowhere state expressly what sources of law are being applied. In Craig v. Ministry of Energy of Iran, et al.,[410] an American engineer claimed unpaid fees and expenses, and damages for breach of contract, from three separate Iranian defendants and their supervising Ministry. In evaluating the status of the relevant contract, Chamber Three rejected a defence argument that non-compliance with internal company procedures invalidated the contract. The Chamber stated that "even if internal MAHAB provisions required the signatures of more than one MAHAB representative, such a provision, even under Iranian law, would not affect the validity of the contract".[411] The statement seems consciously ambiguous, leaving entirely unclear if Iranian law in fact governed the formation of the contract and the result in

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408. See, e.g., Lillich, supra, note 5, 6-7; and Carbonneau, supra, note 390, 105.

409. Carbonneau, ibid., 126.

410. (1983) 3 Iran-U.S. C.T.R. 280.

411. Ibid., 287.

the case or if the reference to Iranian law was merely en passant. The governing law is never established any more clearly.

Later in the case, the Tribunal refused to decide if the claim was barred by the one-year limitation period contained in the Iranian Civil Code because "[m]unicipal statutes of limitation have not been considered as binding on claims before an international tribunal."[412] In the context of limitation periods Iranian law clearly did not apply. The remainder of the Tribunal's Award focusses almost entirely upon factual issues and the contract is interpreted in the light of the facts without express reference to any governing legal principles or sources. For example:

> That Craig departed from Iran, thereby making himself unavailable for further services there, should rather be taken as an election on Craig's part to regard the contract as having been terminated by reason of MAHAB's longstanding failure to pay him the contract fees. The Tribunal holds that MAHAB's non-payment constitutes a breach of contract justifying an election.[413]

It would seem that the Tribunal's decision is grounded upon the words of the contract itself, perhaps supported by general principles of contract law (with a heavy emphasis upon common law contract doctrine) but those principles remain veiled and unelaborated.

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412. Ibid. 289.

413. Ibid.

In cases where the arbitrators have been more specific about the applicable law, they have sometimes revealed starkly contradictory approaches, especially when one compares results in different Chambers. The clearest example to date concerns the law governing the awarding of interest by the Tribunal. In White Westinghouse International Co. v. Bank Sepah-Iran,[414] Chamber Three held that the amount of interest due on the principal sum of a dishonoured cheque was governed by the law of New York, where a "consent judgment" had been rendered: "Because the debt was payable in New York and the consent judgment was entered in New York, the law of that State is applicable in this case." More recently, Chamber Two adopted a completely antithetical position regarding the source of law governing damage awards, including interest. In CMI International, Inc. v. Iranian Ministry of Roads and Transportation, et al.,[415] the Chamber confronted a situation in which the application of the governing law of the contract (that of the U.S. State of Idaho) would have led, it believed, to an inequitable result. Consequently, the Chamber held that it was not "rigidly tied to the law of the contract" and that it should analyse all issues of damages "in accordance with general principles of law", rather than by reference to the U.S. Uniform Commercial Code as incorporated in the statutes of Idaho. The Chamber went so far

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414. (1982) 1 Iran-U.S. C.T.R. 169, 170-1.

415. (1983) 4 Iran-U.S. C.T.R. 263 (Award).

as to suggest that its task was to search for "justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals."[416] In conversation, the arbitrator George Aldrich, expressed great pride in the CMI decision:

> [I]t was a very interesting case in which we rejected the damages as applied by the law of Idaho because we thought it led to an unfair result. It led to a result that made sense in a United States legislative context of trying to promote the sale of goods, the Uniform Commercial Code, but didn't necessarily do justice, in our view, here ... even though the Contract said the law of Idaho applies, we were free to resort to general principles in respect of damages.[417]

He acknowledged, however, that "there is probably not uniformity about this among the Chambers" and it was his impression that Chamber One in particular was "much more interested in adhering to the stated law of the contract."[418]

Resort to international law on questions of damages and interest has also received some indirect support in Chamber Three, despite the holding in White Westinghouse International Co.[419] Mr Mosk, the American arbitrator, implicitly sanctioned the alternative -- international law-based -- approach in his

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416. Ibid., 268.

417. Aldrich, supra, note 26.

418. Ibid.

419. Supra, note 414.

concurring opinion in the Granite State Machine Co. case.[420] There he employed international law sources to determine a "reasonable" rate of interest on a damage award, relying especially upon O'Connell who suggested that interest under international law in cases of expropriation or seizure of funds could reasonably be determined by answering the question "what could the claimant reasonably have expected had he had use of the property?"[421]

Perhaps in an effort to avoid the obvious incompatibility of these approaches, in many recent decisions of the Tribunal, interest has been awarded without any citation of legal sources.[422] The most common approach now seems simply to award interest at a "fair" or a "reasonable" rate, usually set at ten percent.[423] Lump sum interest damages have also been awarded in

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420. Granite State Machine Co. v. The Islamic Republic of Iran et al. (1982) 1 Iran-U.S. C.T.R. 442 (Concurring Opinion of R.M. Mosk) 449 at 450.

421. D. O'Connell, International Law, 2d ed., (1970) 1123.

422. See, e.g., Economy Forms Corp. v. The Government of the Islamic Republic of Iran (1983) 3 Iran-U.S. C.T.R. 42, 53; Ultrasystems, Inc. v. The Islamic Republic of Iran, supra, note 95, 111; and the cases cited, infra, note 423.

423. See, e.g., Intrend International, Inc. v. The Imperial Iranian Air Force, et al. (1983) 3 Iran-U.S. C.T.R. 110, 116; Blount Brothers Corp. v Ministry of Housing and Urban Development, et al. (1983) 3 Iran-U.S. C.T.R. 225, 235; John Carl Warnecke and Associates v. Bank Mellat (1983) 3 Iran-U.S. C.T.R. 256, 267; Chas. T. Main International, Inc. v. MAHAB Consulting Engineers, Inc., et al., supra, note 29, 275; General Dynamics Corp. v. The Islamic Republic of Iran (1984) 5 Iran-U.S. C.T.R. 386; and Craig v. Ministry of Energy of Iran, supra, note 29, 290 (all (cont'd.)

a few cases.[424] On the whole, the Tribunal has failed to provide any consistent legal justifications for the awarding of interest in particular types or categories of cases.[425] An attempt by President Böckstiegel to elaborate a consistent set of principles in the awarding of interest has not been followed. He had suggested in the Sylvania Technical Services case that an appropriate rate of interest could be established by looking to six month certificates of deposit for which the rate of interest could be gleaned authoritatively from government sources. Such certificates are available to all types of investors. Recently the interest on six month deposit certificates has hovered around twelve per cent. Subsequent awards have reverted,

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establishing a "fair" rate of interest). And see Woodward-Clyde Consultants v. Iran, supra, note 50, 251 (setting a "reasonable rate" of ten percent per annum). American Arbitrator, Howard Holtzmann, has criticised this "arbitrary" approach to the awarding of interest. See Case B-53 (Iran v. United States) (1984) 5 Iran-U.S. C.T.R. 105 (Concurring Opinion of Howard M. Holtzmann) 111.

424. See, e.g., Gruen Associates, Inc. v. Iran Housing Co., supra, note 50; Pomeroy et al. v. The Government of the Islamic Republic of Iran (1983) 2 Iran-U.S. C.T.R. 372; and Pomeroy Corp. v. The Government of the Islamic Republic of Iran, supra, note 50.

425. Given the intentionally vague approach concerning the law governing damage awards (including interest), one aspect of Chamber Three's Award in Woodward-Clyde Consultants v. Iran, supra, note 50, is surprising. The Chamber held, at 251, that although the damages suffered by the Claimant were higher than those actually requested, "[t]he Tribunal is, however, constrained by the relief requested by Claimant." No indication is given of the source of that "constraint", and one might well ask why such a rigid approach was adopted.

however, to the "fair" rate of ten per cent.[426]

The Administrator for Iranian claims in the U.S. State Department has warned that the decisions of the Iran-United States Claims Tribunal "will not be accorded their proper precedential weight if they are not well reasoned and firmly grounded in law". Moreover, he has emphasised the difficulty of establishing the Tribunal's "place in the international arbitration process generally"[427] if its decisions are not consistent and justified in law. Given the nature of the Tribunal, such cricitisms, although probably accurate, are simply misdirected. The various parties appearing before the Tribunal have a right to expect logical consistency in decisions, consistency transcending Chambers and, of course, cases. Without such consistency, and it has not always been apparent, the Tribunal becomes little more than a lottery which can hardly be viewed as a legal process. However, the world beyond the Tribunal can and should expect to gain little from its deliberations, either in the elaboration of substantive law or in the development of a model structure for international arbitration. The Tribunal is a very complex creature: part public and part private; part international and part transnational; part legal and part political. This complexity alone should cause one to be wary in

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426. Sylvania Technical Systems, Inc. v. Islamic Republic of Iran, Award of 27 June 1985, reported in (1986) 80 Am. J. Int'l L. 365, 366.

427. Stewart & Sherman, supra, note 14, 17.

searching for general principles. Its very size and formal structure have caused some arbitrators and observers to doubt whether it should be categorised as arbitration at all. Certainly it is a form of arbitration which bears little relation to the typical ad hoc and relatively informal method of dispute resolution commonly called by that name.

The presence of the Security Account has affected the persuasive value of Tribunal awards, insulating the decisional process and allowing the arbitrators enormous licence to render awards in the full knowledge that they will be enforced without comment or subsequent evaluation. That factor, when linked to the harsh political realities confronting the Tribunal, has tended to promote the drafting of vague, almost unreasoned, awards. There is a strong institutional resistance to tight drafting or to the elaboration of general rules.[428] When that tendency is linked to the fact that the majority of awards are actually authored by only one person, the third-country arbitrator, the persuasive force of Tribunal awards must be doubted. Moreover, even when the Tribunal is more precise in its holdings, most commonly in jurisdictional cases, its decisions must be treated warily for they are likely to be heavily contingent upon the arbitrators' reactions to the political difficulties

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428. Professor Reisman remarks that most international adjudication is based upon some form of compromise which encourages the drafting of judgments with a "weak legal formulation". See supra, note 89, 111.

they face. Compromise solutions are advanced which may be valuable and entirely proper within the Tribunal context but which may have limited applicability outside that institution. In certain cases, the Tribunal has felt the political pressure so keenly that it has even forgone its characteristically expansive interpretation of jurisdiction and has refused to adjudicate on the merits of a claim.[429]

Throughout its short history, the Tribunal -- and here one must emphasise the major role of the third-country arbitrators -- has manifested a remarkable instinct for self-preservation. There have been many occasions upon which observers might have predicted collapse. In the end, the Tribunal's continued existence must be viewed as its greatest achievement. It is a symbol of the importance of process-values in legal systems. It is the process itself that enhances the Rule of Law rather than the substantive content of the Tribunal's Awards. Claimants still have an opportunity to gain compensation and, on a higher plane, Iran and the United States, despite intense ideological and cultural dissimilarities, are still engaged in a common pursuit. That is probably all that one could fairly be entitled to expect given the circumstances of the Tribunal's creation and the fine balancing required every day of its operation. In resolving disputes on the basis of "respect for law", the Tribunal is forced to display enormous flexibility; it must be

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429. See, e.g., Grimm v. The Government of the Islamic Republic of Iran, supra, note 51.

willing to compromise. This has led to an essentially idiosyncratic approach to choice of law and even to the application of substantive legal principles. In addition, the heavy case load and the need for some degree of efficiency has required the establishment of highly formal and elaborate institutional structures which are peculiar to this Tribunal. For all these reasons, it would be unwise and misleading to treat the substantive output of the Iran- U.S. Claims Tribunal as highly persuasive authority in other third-party adjudications of conflicts involving states and foreign private parties. The independent enforcement mechanism is worthy of emulation but on the whole, the Tribunal's idiosyncracy makes it a flawed paradigm.

CONCLUSION

The eminent American legal theorist, Lon L. Fuller, believed that all "adjudication should be viewed as a form of social ordering", as a means -- but not the only or necessarily the dominant means -- by which "the relations of men to one another are governed and regulated."[1] Given his understanding of the nature of law, that it is a purposive and constantly developing enterprise,[2] Fuller's description of adjudication as a form of social ordering implies that serious attention must be paid to the design of an adjudicatory mechanism and that, to do so adequately, one must articulate the purposes it is to serve.

To identify the purposes of arbitration between a state and a foreign private party -- "mixed arbitration" -- is not an easy task because the "purposes" will surely differ depending upon the perspective from which the mechanism is viewed. The foreign private party may desire arbitration primarily because of its potential for "delocalising" the decisional process,

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1. Fuller, The Forms and Limits of Adjudication (1978) 92 Harv. L. Rev. 353, 357.

2. L. Fuller, The Morality of Law, rev. ed. (1969) 145:
   I have insisted that law be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals.
   The same theory underlies the fascinating work of the Harvard anthropologist, Sally Falk Moore, who describes the creation of legal systems and rules as a "human industry" notable for its dynamism. See S.F. Moore, Law as Process: An Anthropological Approach (1983) 1 et seq.

providing neutrality by removing the dispute from the jurisdiction of the courts of the state party. An additional interest of the private party may be in the potential application of "international" (or transnational) legal standards that are perceived to provide stability and protection for investors. The state party to an arbitration may be seeking a means to settle a dispute quietly and confidentially so that a decision that runs contrary to the state's interests will not involve any loss of prestige or cause domestic political controversy.

But from the perspective of the academic observer, particularly if he is an international lawyer, the purpose of an adjudicatory institution cannot be defined solely by mediating the expectations of the clients, although those expectations should be accommodated as far as possible. A further consideration must be factored into the equation. The international lawyer must evaluate arbitration with reference to its systemic purposes by asking how arbitration contributes to the infrastructure of the international legal system. It is this aspect of institutional or "process" purposes that most interested Fuller.

This study has revealed a complex and, at times, uneasy relationship between mixed arbitration and the broad structure of international law. Arbitrations involving states and foreign private parties pose a number of difficult problems for international legal theorists and for practitioners. The central problem is how to cope with the unequal status of the parties. The approach suggested here has been that the inequality of the

parties must be preserved, or rather, that our recognition of that inequality should not be obfuscated.

There is no doubt that a state and a foreign private party do not possess the same international status. This fact is demonstrated amply by the examination of arbitral enforcement rules contained in this study. Even in the case of institutions such as ICSID and the Iran-United States Claims Tribunal, which were designed specifically for the purpose of adjudicating disputes between states and foreign private parties, it has proven impossible to eliminate completely the traditional rules concerning diplomatic protection. If the institutional enforcement mechanisms fail, as they can in the case of either institution, the private party seeking to enforce a valid award may be required ultimately to ask for the diplomatic intervention of its national state, for the private party will have no standing to pursue international law remedies. This possibility is even greater in the case of awards resulting from ad hoc arbitration.

Despite the patently unequal status of the parties, lawyers for private interests and some Western commentators have argued that arbitrations involving states and foreign private parties fall within the purview of international law. According to some proponents of this view, the state bequeaths a limited international status upon a private party simply by consenting to resolve a conflict through arbitration. Because this reasoning leads to the dangerous conclusion that standing in the international community can be granted (and, by implication, withdrawn) through the unilateral act of a single state, it must

be rejected. Such a conclusion would undermine the rules of recognition of states and would challenge the fundamental theory of customary law formation.

Most participants and commentators who accord international status to arbitrations between states and foreign private interests do not even attempt a theoretical justification. Some suggest simply that when a state and a foreign private party to a dispute instruct arbitrators to apply international law, alone or in conjunction with another system of substantive rules, their choice automatically gives the arbitration an international status. Others opine that it is the nature of the underlying contract that may grant status under international law; if a contract is an "international development agreement", it must be governed by international law and a consequent arbitration must be international. In yet another setting, it is asserted that when an arbitral institution has been created by treaty, ICSID for example, the international status of resulting arbitrations must be presumed.

It has been demonstrated that there are serious problems with all of these arguments. Creating a tribunal by treaty does not necessarily imply that the tribunal is itself international nor that the parties granted access to the tribunal are transmuted into international persons. The choice of international law simply reveals the principle of party autonomy that underlies all arbitration; the parties can typically choose to apply any system of law, but the choice indicates nothing about the

status under international law of the parties or the arbitration. The same is true with regard to assertions of "internationalisation" based upon the existence of an "international development agreement". Furthermore, under the theory that "internationalisation" results from the mere existence of international development agreements, investments in developing states are said to be governed by international law and foreign corporations are presumed to be entitled to invoke that law directly for their own benefit. The international responsibility of the state is said to be engaged directly vis à vis the private investor. Interestingly, foreign investments in developed states are never said to be subject to the same process of "internationalisation". But there exists no legally relevant distinction between investments in developed and developing states and it must be assumed that the reason for the difference in treatment is based upon political and economic considerations, specifically the desire to protect Western commercial interests. To reject the argument that all arbitrations growing out of international development agreements are "internationalised" should not be viewed, therefore, as a conservative position buttressing the power of the state in the face of challenges from other participants in the international community. It is the rejection of an inequality of treatment as between developed and developing states.

There is an even stronger challenge to arguments claiming full status under international law for arbitrations involving states and foreign private parties, a challenge based upon the

fundamental incoherence of such assertions. If an arbitration between a state and a foreign private party were truly "international", the obligations imposed upon the parties by the decision of the tribunal would have to be international legal obligations. Yet, if one examines the facts, a very different pattern of obligation emerges. When an award is rendered against a private party, that party is contractually bound, by virtue of the agreement to arbitrate, to perform the terms of the award. But in no sense is it bound by international law to abide by the award. The foreign private party will not be subject to doctrines of state responsibility, and the opposing state will have no international recourse directly against the private party. Any enforcement proceedings under the New York Convention would depend solely upon the fulfilment of the obligations of other states party to the Convention. If enforcement was not possible, for whatever reason, the state would not even be able to press a claim against the national state of the private party because the latter state would bear no responsibility for the private acts or omissions of the corporation.

To say, therefore, that the obligations arising out of an arbitration between a state and a foreign private party are international could at best be only a half truth. The state party could potentially be bound under international law, but the private party could never be so bound. This fundamental inequality of obligation is the strongest indication that these arbitrations are not creatures of international law.

The persistence of arguments favouring "internationalisation" is due to three factors. The first is the tendency to view arbitrations between states and foreign private parties purely as a sub-category of international commercial arbitration and partaking of the values of that process. The second is the undue emphasis placed upon the objectives of the foreign party by many of the commentators in the field. The third factor may be deemed "psychological": the desire for systematisation that leads some observers to seek to fit all phenomenon within existing structures, in this case, within the international legal system.

It has been reiterated throughout this study that arbitrations between states and foreign private parties, even those conducted under the auspices of an institution created by an international convention, are of a "mixed" nature. Although substantive principles of international law will apply in some cases, and although the procedure of the arbitral tribunal can be completely delocalised, the process of mixed arbitration itself is not a manifestation of international law. The issues that must be addressed concern both private law rights and public law actions. It is crucial that in such arbitrations attention be paid to the legitimate goals and expectations of <u>both</u> parties and to broader institutional imperatives and values. The special "mixed" nature also underscores the need to conceive of the institutional characteristics in an inclusive manner. These characteristics are not limited to the elements that animate and affect systems of commercial arbitration that

involve only private parties.

From the institutional characteristics outlined in this study, it is possible to identify five values that animate the process of mixed arbitration. These values must be acknowledged and strengthened if arbitration between states and foreign private parties is to function efficiently and to play a beneficial role in the international community.

The overriding value is party consent to jurisdiction, which must be recognised as the foundation of the mixed arbitral process. In practice, this recognition will require arbitral tribunals to take special care not to offend the sensibilities of state parties unless absolutely necessary to reach a principled result. That approach, manifested most clearly in the case law of the Iran-U.S. Claims Tribunal, is justifiable both practically and theoretically.

The practical justification for a solicitous attitude towards state participants in the arbitral process is the evident fact that despite the limitations placed by international law upon the sovereignty of states, particularly in the field of human rights,[3] the state remains the principal actor in

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3. See, e.g., C. Jenks, The Prospects of International Adjudication (1964) 497; H. Lauterpacht, Private Law Sources and Analogies of International Law (1927) 73, fn. 1 and 306; H. Lauterpacht, The Function of Law in the International Community (1933) 431 [hereinafter The Function of Law]; W. Friedmann, The Changing Structure of International Law (1964), passim but especially 35 et seq.; Fuller, ibid., 110; and J. Finnis, Natural Law and Natural Rights (1980) 149-50.

the international arena and the principal repository of power.[4] Arbitration is a means of dispute resolution rooted in party autonomy and it is therefore dependent for its smooth operation upon the continuing consent of the parties.[5] Because of its dominant position in the international milieu, the state is in a stronger position to withhold or to withdraw consent. This should not, however, lead to a cynical conclusion that states always get what they want. Examples of awards can be drawn from

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4. See, e.g., McDougal & Reisman, "International Law in Policy-Oriented Perspective" in R. Macdonald & D. Johnston, eds, The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (1983) 108; Friedmann, A Theory of Justice: A Lawyer's Critique (1972) 11 Col. J. Trans. L. 369, 378; and Friedmann, The Reality of International Law -- A Reappraisal (1971) 10 Col. J. Trans. L. 46, 56. Professor Friedmann also made the acute observation that even the most forceful and authoritative advocates of an expanded role for individuals in the international legal system, people such as Lauterpacht and Jessup, were careful to limit the claim: "They have ... drawn a distinction between the individual as the subject of enforceable claims on an international level and the individual as the beneficiary of a system of international law, in which the states are subjects and actors, but in which they are directed to take action and assert claims on behalf of individuals." Friedmann, ibid., 234.

5. Shapiro has argued that all third party dispute settlement is dependent upon consent because the "logic of the triad" is that both parties agree to abide by the result of the adjudication. The adjudicator, in turn, must attempt to fashion a result that does not alienate one party completely. In discussing full-scale court adjudication, Shapiro noted that "[a] substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one." M. Shapiro, Courts: A Comparative and Political Analysis (1981) 2. Because arbitration is rooted solely in the consent of the parties and does not typically include independent enforcement mechanisms, the need to foster continuing consent is obvious.

the practice of both institutional and ad hoc tribunals where a state has been an unqualified loser.[6] The point is rather that a tribunal which is sensitive to the realities of the international community will strive not to exacerbate potential sources of tension on the part of state participants.

Such solicitude also has a sound theoretical justification. It has already been stressed that the parties to the type of arbitration discussed here do not have equal standing in the international legal process. Although that unequal status is often analysed in terms that emphasise the greater rights of states, it can equally be viewed as a recognition of their more onerous duties. Sir Hersch Lauterpacht framed the point neatly:

> No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.[7]

States exist to serve their citizens, and in their capacity as guardians of the public interest, states are deemed to possess

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6. See, e.g., Libyan American Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 12 April 1977, reprinted in (1981) 20 I.L.M. 1 (ad hoc); Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Merits), decision of 19 January 1977, reprinted in (1979) 53 I.L.R. 389, 422 (ad hoc); Amco Asia Corp. v. Republic of Indonesia (Merits), ICSID award of 21 November 1984, reprinted in (1985) 24 I.L.M. 1022; Case A-18, Iran-U.S. Claims Tribunal award of 6 April 1984, reprinted in (1984) 23 I.L.M. 489 and (1984) 5 Iran-U.S. C.T.R. 251; and SPP (Middle East) Ltd v. Egypt, I.C.C. award of 11 March 1983, reprinted in (1983) 22 I.L.M. 752.

7. Lauterpacht, The Function of Law, supra, note 3, 430-1.

special prerogatives within the international legal system.

It is this "public" aspect of the role of the state that demands a sensitive application of commercial norms. Although a lex mercatoria which exalts the principles of stability and certainty may apply most appropriately to a contractual dispute between two Western corporations, it is less appropriate when seeking principles to regulate a dispute involving, for example, the expropriation of a foreign-owned mineral extraction operation that happens to account for a significant percentage of a state's gross national product. Arbitral tribunals that are set up under the auspices of an institution that is concerned almost exclusively with private law rights are not likely to be sufficiently sensitive to the public interest obligations of states, and states will be loth to submit any but the most purely commercial disputes to such tribunals.

Flowing directly from the principle of consent is a second value that must be emphasised in arbitral proceedings involving states and foreign private parties, the value of compromise. In arbitral systems designed specifically to deal with mixed public and private law disputes, the process can be viewed as a continuing essay in consensual readjustment. One commentator emphasises that in arbitration,

> [m]ediate solutions acceptable to both parties are the goal, and, as a practical matter, few arbitrators would find much employment if they did not develop a record of providing such solutions.[8]

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8. Shapiro, supra, note 5, 4.

The notion of a "mediate solution" in arbitration should not be confused with mediation per se. In arbitration, the mediate solution will typically be based upon legal norms and the result will be binding. Nevertheless, throughout the process, arbitrators will attempt to employ the rules so as to encourage the continuing participation of the parties and voluntary compliance with the resulting award. Such an approach has particular value when the parties wish to continue commercial relations.

The important role of compromise highlights a third value crucial to mixed arbitrations, that is, the independence of the arbitrator. Here a distinction must be drawn between two types of arbitration. The issue is quite clear when only one arbitrator is sitting. He must display impartiality throughout the process for it has already been stressed that access to a neutral forum is one of the primary goals of many parties, particularly of private parties, in choosing arbitration.

The case of three-member tribunals, the more common modality when dealing with disputes involving a state, is more problematic. The experience of the Iran-U.S. Claims Tribunal suggests that to expect impartiality from the party-appointed arbitrators is unrealistic. Indeed, full impartiality may not even be desirable. As Lon Fuller noted:

> [T]he device as I have stated it [with three arbitrators] amounts to a mixture of adjudication and negotiation. All mixed forms have their dangers, and tripartite arbitration is no exception. The danger lies in the difficult role to be played by the flanking arbitrators. They can be neither wholly advocates nor wholly judges. They cannot perform their role adequately if they are

> completely impartial; it is their task during the deliberations to represent an interest, a point of view. ... If, on the other hand, each of the flanking arbitrators must represent the party who appointed him, he must at the same time observe some of the restraints that go with a judicial position.[9]

A delicate balancing is required, for although a party-appointed arbitrator may represent a special interest, he must always remain conscious of the "role morality"[10] that attaches to the arbitral function.

Increasingly, the concern of legal theorists from diverse traditions is to underscore the personal responsibility of adjudicators, and to recognise the policy implications of all legal decisions.[11] The idea of role morality is linked to this emphasis upon personal responsibility because the role of an adjudicator always requires a willingness to distance oneself from one's personal interests and from the pressures exerted by one's sponsors. The party-appointed arbitrator must ensure that his appointer's case is understood by the tribunal, but at the

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9. Fuller, supra, note 1.

10. Fuller, supra, note 2, 193.

11. See, e.g., the "policy-oriented" perspective of W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 261; the classic liberal position of Fiss, The Bureaucratization of the Judiciary (1983) 92 Yale L.J. 1442, 1452-3; and the secular natural law approach of Fuller, supra, note 2, 165-7. The most radical formulation of the concern is to be found in the writings of the Critical Legal Studies Movement. See, e.g., R.M. Unger, Law in Modern Society: Toward a Criticism of Social Theory (1976); and Hutchinson, From Cultural Construction to Historical Deconstruction (1984) 94 Yale L.J. 209.

time of decision he must assume a personal responsibility to render a fair judgment.

The fourth value central to the process of arbitration between a state and a foreign private party is flexibility in the application of rules. This value may be distinguished from "compromise" in that flexibility may be required even when the parties' positions are so far apart or are based upon such incompatible premises that no real "compromise" is possible. Flexibility in the application of rules has a potentially wider ambit than does the value of compromise. To lay emphasis upon the goal of flexibility is necessarily to devalue to some extent the goals of certainty and predictability. In private commercial arbitration, the parties typically share common cultural assumptions and a common goal, to foster increased commercial activity. It is widely assumed that stability is the key to that enhanced activity, and that stability is promoted by rules that are certain and adjudicatory processes that are, to the greatest extent possible, predictable.[12] Therefore, proponents of commercial arbitration have created institutions and systems of rules that foster certainty and predictability. At least in part, this development is due to a heavy reliance upon unsophis-

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12. See, e.g., Cohn, The Rules of Arbitration of the International Chamber of Commerce (1965) 14 Int'l & Comp. L.Q. 132, 158: "Only the application of rules of law can give that amount of predictability and certainty which commercial relations require."

ticated and idealised notions of municipal court adjudication,[13] but the Scottish legal philosopher Neil MacCormick has suggested that there may be a general

> tendency of legal order to define itself in terms of more or less precise rules (the move, as Max Weber put it, towards "logically formal rationality" in law) [which] tends to reduce judicial and official discretions.[14]

The tendency towards a rigid procedural or substantive rule-orientation is dangerous in the context of mixed arbitrations primarily because of the lack of consensus between the parties as to the goals to be pursued. Due to its public interest orientation, a state party may not accord as high a value to commercial security as will the private party. Moreover, the parties' cultural context may be so different as to preclude any agreement upon a specific body of immutable rules of substance or procedure. For example, the expectations and attitudes of an Islamic Revolutionary state or an African Socialist state simply do not mesh with the perceived needs of a United Kingdom corporation. An arbitral tribunal created by such parties must retain a certain flexibility in its process and in its application of substantive rules if the arbitration is to succeed in settling the underlying dispute. In such an arbitration, "the problem of adjusting the functioning of the

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13. See Brownlie, "The United Nations as a Form of Government" in R. Higgins & J. Fawcett, eds, International Organization: Law in Movement (1974) 26; and Bilder, Some Limitations of Adjudication as an International Dispute Settlement Technique (1982) 23 Va J. Int'l L. 1, 1.

14. N. MacCormick, H.L.A. Hart (1981) 132.

law to the perpetual antinomy of change and stability"[15] is acute, but ultimately it is flexibility and an openness to change that is essential. Applying "the rules" without sensitivity could lead to intense antipathy and ultimately to the disintegration of the arbitral tribunal. In the international context, there may be no alternative forum to pursue a legitimate claim.

The fifth underlying value identified in this study of mixed arbitration is the depoliticisation of disputes. In a sense, this value is fostered by the previous four. It is enhanced especially by the impartiality of arbitrators, by flexibility in the arbitral process, and by proper attention to consensual readjustment. But depoliticisation as a value must still be underscored separately because of its important implications for the issue of "internationalisation".

One of the great advantages of arbitration as a means of settling disputes between states and foreign private parties is that disputes which are at core commercial or economic can be adjudicated without setting at issue the entire political relationship between the state party and the national state of the foreign private party. Arguments promoting the full international status of such arbitrations encourage, perhaps unintentionally, the intrusion of extraneous political issues into the arbitral process. The debate may cease to focus upon the commercial relationship of the parties and may instead turn

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15. Lauterpacht, The Function of Law, supra, note 3, 248.

towards the exposition of a whole range of irritants in the relationship of the states implicated in the arbitration. A good example of the consequences that may flow from such an approach is to be found in the heated controversies that have arisen in the Iran-U.S. Claims Tribunal because of the insistence of certain private parties that they may invoke for their own benefit the 1955 Treaty of Amity between the U.S.A. and Iran. The difficult and often bitter relationship between the governments of those two states has had to be debated in order to resolve disputes rooted in private contractual relations. Although disputes between states and private entities will always be subject to special, often political, considerations (justifying the view of mixed arbitration as a unique process of consensual readjustment), the full internationalisation of mixed arbitration would actually encourage politicisation, making the resolution of commercial disputes more difficult. The value of depoliticisation is enhanced by a rejection of the notion of full internationalisation.

The preceding identification of the values that are fundamental to the process of arbitration between states and foreign private parties would no doubt cause concern in some students of the process, particularly those of a positivist bent. There is a danger that arbitration as here described may seem to be too much the creature of the parties' will. The adjudication may appear unprincipled, the results entirely contingent upon the respective power of the parties. In short,

it would be argued by some that this type of arbitration, if it is truly based upon the values that have been articulated in this study, is simply not a legal process at all. It would follow that the worth of such arbitrations should be discounted, for they would have nothing to contribute to the development of the international rule of law.

To the extent that such an argument addresses the question whether or not awards rendered by tribunals adjudicating disputes between states and foreign private parties should be accorded significant precedential value, it has some merit. Because of the need for flexibility in the application of substantive rules, because of the need to ensure continuing consent and to encourage compromise, any award rendered by a tribunal in a mixed arbitration is likely to manifest certain idiosyncracies in the application of procedural and substantive law. The clearest examples are found in the case law of the Iran-U.S. Claims Tribunal, but idiosyncratic awards can equally be expected from ICSID or ad hoc arbitrations. Such awards are not necessarily valueless as precedent, but they should be analysed carefully, with their context always in mind.

The possible lack of persuasive value of arbitral awards should not be particularly troubling, however. At a purely formal level, it is important to remember that no doctrine of stare decisis exists in the international legal system, not even for the case law of the International Court of Justice. More substantive reassurance can also be offered by contrasting the

role of arbitration with that of courts. Whereas courts are designed not only to settle individual disputes but also to provide guidance for the larger society that created them, arbitration has always been conceived primarily as a means to resolve specific disputes. The process of arbitration is, as Fuller reminds us, a means of social ordering, but the impact of particular awards has typically been case specific. That distinction is the reason why court judgments are almost always public documents and arbitral awards are very often confidential. Of course, the content of a confidential award is immaterial at a systemic level, for it can have little external impact. But even if an arbitral award from a mixed tribunal is made public, it should not be seen to play the same role as a court judgment. Whether or not the substantive content is contingent or idiosyncratic, therefore, should not be of great concern to those outside the scope of the particular arbitration.

A yet more fundamental argument can be adduced to combat the suspicion that mixed arbitration is incapable of furthering the international rule of law. All that is required is an understanding of the rule of law that is sufficiently sensitive to process values. The pedigree of the argument can be traced to the seminal work of Lon Fuller who, in the words of Robert Summers, "rejected a narrowly instrumentalist view that legal processes are to be judged by the quality of their outcomes; the workings of the processes themselves involve important

values."[16]

One of Fuller's greatest contributions to contemporary legal theory was his focussing of attention upon the values inherent in legal processes, what he called the "internal morality of the law".[17] His concern with legal process may be seen as one aspect of a broader attempt to challenge the radical dissociation of ends and means, fostered, Fuller believed, by utilitarian and positivist philosophy. Fuller rejected the idea that means "are a mere matter of expediency", emphasising instead "that means and ends stand in a relation of pervasive interaction."[18]

Fuller's recognition of the central importance of legal process caused him to reinterpret the ideal of the rule of law. He suggested that the rule of law could be defined as "the process by which the party affected by a decision is granted a formally defined participation in that decision."[19] The particular vocation of adjudication, Fuller believed, was that

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16. R.S. Summers, Lon L. Fuller (1984) 76. Professor Falk of Princeton adopted an analogous position when he warned that "[t]he extension of law in international relations should not be identified ... with the maximum application of universal substantive standards." R. Falk, The Role of Domestic Courts in the International Legal Order (1964) 5.

17. See Fuller, supra, note 2, 39 where he sets out the eight elements of the inner or internal morality of the law. See also Summers, ibid., 28 and 37.

18. Fuller, ibid., 197.

19. Fuller, Adjudication and the Rule of Law (1960) 54 Proc. Am. Soc. Int'l L. 1, 2.

it could provide the "affected party [with] a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[20]

Armed with this process-centred understanding of the rule of law, it is easier to recognise the significant legal contribution that can be made by mixed arbitration. The simple fact that a state and a foreign private party are willing to structure their disputes in a reasoned manner and to settle them through an appeal to the rational decision of a third party, rather than resorting to mere fiat, enhances the rule of law. The symbolic value of third party adjudication in the international community is significant.[21] Moreover, there is a practical reason to encourage third party adjudication. Much international commerce could be discouraged if the private party believed itself to be subject to the whim of state fiat. Of course, the rule of law will not be created simply through participation in legal processes. Fuller stressed that an evolving "community of purpose" is also essential.[22] But participation in the process may actually encourage the development of stronger bonds of communication and shared experience.

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20. Fuller, supra, note 1, 364.

21. See Bilder, supra, note 13, 9.

22. Fuller, supra, note 1, 378. One of the most extensive discussions of the role of community is found in the work of Finnis who described community as "a sharing of life or of action or of interests, an associating or coming-together. Finnis, supra, note 3, 135.

Fuller believed that the development of all types of relationships across borders would contribute to the growth of the international rule of law[23] but he also thought that participation in rational legal procedures was a particularly helpful means to build what he called "moral insight", fostering community identifications and, hence, the rule of law.[24]

As described in this study, the process of arbitration between states and foreign private parties does not mesh comfortably with municipal law conceptions of adjudication nor with the system of international commercial arbitration as a whole. Largely because of the unequal status of the parties and the consensual source of jurisdiction, the values that animate and sustain the process are and must be singular. Because of this singularity, one should not expect the process simply to mirror court structures or other forms of arbitration. Although the broad outlines of an arbitration between a state and a foreign private party will resemble those of private international commercial arbitration, there are certain possibilities of institutional design that can increase the efficacy of the process by reflecting in practice its special animating values.

A preliminary point is that states and foreign private parties would be well advised to submit disputes to private arbitral institutions only in the very rare cases when the

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23. Fuller, supra, note 19, 8.

24. Fuller, Irrigation and Tyranny (1965) 17 Stanford L. Rev. 1021, 1033-4.

disputes concern straightforward and completely non-political commercial dealings. Private arbitral institutions are designed to exalt the value of commercial stability above all else, and tribunals set up under their auspices cannot be expected to display the requisite degree of sensitivity to the special public interest considerations that affect the commercial dealings of states. Whenever questions of sovereign rights or public policy are likely to arise, resort to specialised institutions such as ICSID or to ad hoc tribunals is preferable.

The parties should make every effort to choose or design a set of arbitral rules to guide the arbitrators in their tasks. Whether chosen from among the institutional systems or specially designed, the arbitral rules should allow great flexibility in the submission of evidence and in the structure of hearings. Although clear time limits should be established, they should not be particularly rigorous. The arbitrators should be instructed that the full articulation of the issues is to take precedence over pure time considerations. Of course, rigorous time limits are needed when dealing with the appointment or replacement of arbitrators or the process can grind to a halt. Within the arbitral rules, some provision should be made for pre-hearing conferences. Such conferences are often intended primarily to identify the issues at stake and to develop a procedure to deal with them, but pre-hearing meetings may also serve to encourage compromise on as many issues as possible.

The parties should also try to agree in advance upon the possible sources of substantive rules of law to be applied by

the tribunal. They should avoid vague invocations of "general principles" and be explicit if they wish to incorporate international law. It is in the interest of the state to make it clear that resort to international law does not imply any direct application of the principles of state responsibility.

If a three-member tribunal is established, the arbitrators should be instructed expressly about the nature of their job, which would require that the parties openly state their expectations concerning the role of the party-appointed arbitrators. Ideally, their independence should be stressed. The procedural rules of the arbitration should establish clearly that any protective measures involving the seizure of property should be referred to municipal courts with powers of enforcement, or the parties should agree in advance upon the deposit of performance bonds or the creation of a security account to guarantee performance. The final award may be published or kept confidential as the parties see fit, but advance agreement on the question is needed. A number of recent awards have been made public by one party alone for motives that probably have little to do with a desire to aid legal scholarship or to promote the rule of law.

Apart from the incorporation of these elements of institutional design, the values underlying the process are served best by arbitrators who are sensitive to the special and highly complicated nature of arbitrations involving states and foreign private parties. It is widely acknowledged that an arbitration is only as good as the arbitrators. Perhaps, therefore, the

most important component of good institutional design is a reliable system for choosing and replacing arbitrators.

The arbitral system as it applies to states and foreign private parties does not fit very neatly within existing international legal structures. There remains considerable room for debate concerning its role and its status. Indeed, the concluding prescription must be for the debate to continue and to expand. Mixed arbitration, like all legal institutions, is a dynamic phenomenon; it changes and is refined in response to the needs of the constituency it serves. If international law is, as Fuller put it, a highly imperfect system, still "in the process of being born",[25] the system of law that clings to the fringes of international law and structures the relationships between states and foreign private groups and persons must still be _in utero_. For that reason, being full of possibilities for growth and change, mixed arbitration should continue to prove a fascinating and challenging subject for the student of legal process.

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25. Fuller, _supra_, note 19, 1. See also Allott, _Language, Method and the Nature of International Law_ (1971) 45 Brit. Y.B. Int'l L. 79, 130-1; and Friedmann, _supra_, note 3, 118.

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