

## "If It Quacks Like a Duck:" Comparing the ICJ Chambers to International Arbitration for a Mechanism of Enforcement

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**“IF IT QUACKS LIKE A DUCK:”  
COMPARING THE ICJ CHAMBERS TO  
INTERNATIONAL ARBITRATION FOR A  
MECHANISM OF ENFORCEMENT**

JOHN C. GUILDS, III\*

I. INTRODUCTION

In 1972 and 1978 the International Court of Justice (“ICJ”) amended its Rules to stimulate the use of “Chamber” proceedings in an attempt to breathe new life into the moribund forum. With these changes, the ICJ Chambers began to closely resemble the workings of international arbitration. Unfortunately, however, the enforcement of Chamber awards depends almost exclusively on the willingness of dutiful states to comply with the international good deeds and intentions embodied in the United Nations Convention. The purpose of this article is to argue the suitability of adopting a mechanism for enforcing Chamber awards very similar, if not identical, to those mechanisms used to enforce awards rendered by the Iran - United States Claims Tribunal (“Iran - U.S. Tribunal”) and the International Centre for the Settlement of Investment Disputes (“ICSID”).

The Iran - U.S. Tribunal and the ICSID will be compared with the ICJ Chambers because their treaty-based mandates for resolving disputes involving State actors and addressing questions encompassing both “public” and “private” concepts of international law mirror the potential role of the ICJ Chambers. Specifically, three basic concepts often attributed to international arbitration — the parties’ ability to choose the panel to hear the case, the parties’ ability to determine the applicable law to settle the dispute, and the parties’ ability to select the internal rules to govern the proceeding — will be compared in relation to the ICJ Chambers, the Iran - U.S. Tribunal and the ICSID.

In the discussion that follows, the history of the ICJ Chambers will be highlighted for purposes of evaluating its current and potential functionings in the proper historical perspective. Following this brief history, the three forums will be compared, leading to the conclusion that the ICJ Chambers possess many, if not all, of the characteristics common to international arbitration. Stemming from that conclusion, an overview of the mechanisms used to enforce the Iran - U.S. Tribu-

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nal and the ICSID will be presented so as to point the way to a feasible mechanism for enforcing the ICJ Chambers' awards. After addressing the problem of sovereign immunity and three preliminary matters concerning enforcement of Chamber awards — the appropriate disputes for Chambers, the necessary limitation of only enforcing monetary awards, and the benefits of using Chambers — the final conclusion will be reached that the New York Convention is applicable to enforcing Chamber awards, but that a new convention should be created to ensure the mandatory enforcement of Chamber awards under international law.

## II. BACKGROUND

### A. *The History of Chambers*

The idea of using a limited number of ICJ judges in a Chamber proceeding, instead of the full membership of the International Court of Justice, dates back to the Statute of the Permanent Court of International Justice ("PCIJ"), the predecessor to the ICJ.<sup>1</sup> The PCIJ Statute allowed labor, transit and communication disputes to be argued before a permanent Chamber composed of five judges selected in conformity with the requirement of Article 9 of the Statute that "the body as a whole" be representative "of the main forms of civilization and of the principal legal systems of the world."<sup>2</sup> This Chamber procedure, however, was never utilized.<sup>3</sup>

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1. Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831, 831 (1987) (citing Statute of the Permanent Court of International Justice, Arts. 26-28, 1926 P.C.I.J. (ser. D) No. 1 [hereinafter P.C.I.J. Statute]). Much has been written on the origins of the ICJ Chambers, but only the highlights are of concern to this paper. For a more thorough examination see Shigeru Oda, *Further Thoughts on the Chamber Procedure of the International Court of Justice*, 82 AM. J. INT'L L. 556 (1988); Rudolf Ostrihansky, *Chambers of the International Court of Justice*, 37 INT'L & COMP. L. Q. 30 (1988); Hermann Mosler, *The Ad Hoc Chambers of the International Court of Justice — Evaluation After Five Years of Experience*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY — ESSAYS IN HONOR OF SH. ROSENNE (1989); Andreas Zimmermann, *Ad Hoc Chambers of the International Court of Justice*, 8 DICK. J. INT'L L. 1 (1989); Note, *A Proposal for the Second Use of the International Court of Justice Mechanism*, 1 EMORY J. INT'L DISP. RESOL. 239 (1987).

2. Schwebel, *supra* note 1, at 831, 832; P.C.I.J. Statute, *supra* note 1, Art. 9. The provision remains in the current Statute of the ICJ. Statute of the International Court of Justice, Art. 9, 59 STAT. 1055, T.S. No. 993, 3 BEVANS 1179 [hereinafter I.C.J. Statute]. Article 9 of the current statute, however, no longer applies to the creation of an *ad hoc* Chamber. See *infra* notes 7-9 and accompanying text; *infra* note 28.

3. Schwebel, *supra* note 1, at 832. A separate provision of the PCIJ allowed the

In 1945 the Washington Committee of Jurists, while meeting to reexamine the Statute of the Court, addressed the idea of creating *ad hoc* chambers.<sup>4</sup> The United States introduced the following proposal,<sup>5</sup> now embodied in Article 26(2) of the ICJ Statute: "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the court with the approval of the parties."<sup>6</sup>

Thus, with this proposal, which was adopted during the San Francisco Conference creating the United Nations and its judicial branch, the ICJ, the concept of allowing the parties a voice in forming a Chamber to hear their case was born. Another interesting development arising from the Washington Committee of Jurists and the San Francisco Conference was the rejection of Article 9's requirement that the "main forms of civilization" and "principal legal systems of the world" be represented in a Chamber formed pursuant to Article 26(2).<sup>7</sup> Thus, a Chamber could now be assembled at the request of the parties without being confined by Article 9.<sup>8</sup> This development freed-up the possible composition of any given Chamber by increasing the number of "civil" and "legal" combinations available,<sup>9</sup> and thus expanded the list of judges able to serve.

Nothing occurred in the ICJ in general and the Chambers in particular until 1971, when a group of concerned nations sought to have the somnolent condition of the ICJ addressed by the United Nations

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creation of a three-member Chamber for Summary Procedure which was utilized in 1924 and 1925 for the *Interpretation of the Treaty of Neuilly*. *Id.* (citing Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation), 1924 P.C.I.J. (ser. A) No. 3 (Judgment of Sept. 12), and Interpretation of Judgment No. 3, 1925 P.C.I.J. (ser. A) No. 4 (Judgment of Mar. 26)); James Hyde, *A Special Chamber of the International Court of Justice — An Alternative to Ad Hoc Arbitration*, 62 AM. J. INT'L L. 439, 440 (1968).

4. Oda, *supra* note 1, at 560.

5. *Id.*; Schwebel, *supra* note 1, at 832.

6. Oda, *supra* note 1, at 560; Schwebel, *supra* note 1, at 832; I.C.J. Statute, *supra* note 2, Art. 26 (2).

7. Schwebel, *supra* note 1, at 835; Oda, *supra* note 1, at 557.

8. Schwebel, *supra* note 1, at 835; Oda, *supra* note 1, at 557.

9. For example, a Chamber could now be composed solely of Europeans, or solely of Latin Americans, or it could be composed of two Asians and three Africans, or of any number of combinations instead of having to be composed of judges representing the "five main regions according to United Nations practice." See Oda, *supra* note 1, at 557-58; Zimmermann, *supra* note 1, at 15 (citing Evensen, *The International Court of Justice Main Characteristics and its Contribution to the Development of the Modern Law of Nations*, 57 NORDIC J. INT'L L. 3, 10 (1988)).

General Assembly.<sup>10</sup> In response, the General Assembly directed the Secretary-General to solicit the views and suggestions of the States on the proper role of the ICJ.<sup>11</sup> Of the thirty responses received by the Secretary-General, several specifically mentioned the formation of Chambers.<sup>12</sup> The views of the United States called for:

[T]he establishment and wide use of *ad hoc* chambers of the Court for legal problems requiring expertise in technical areas, and for peculiarly regional problems, for whose solution all parties prefer to address a regionally oriented bench. . . .

To encourage use of such chambers, States might write into future treaties provisions referring disputes to a special chamber rather than to the full Court, if appropriate . . . .<sup>13</sup>

In a more detailed statement, the Government of Sweden argued the following:

No State has ever made use of the possibility of having a dispute adjudicated . . . by a special chamber as provided for in Article 26 of the Statute. . . . In determining the number of judges constituting the chamber, the Court shall have the approval of the parties. On the other hand, the parties are without any influence when it comes to the election of the individual judges of such a chamber. The President of the special chamber as well as its members shall, according to . . . the Rules of the Court, be elected by . . . an absolute majority of votes . . . .

The Swedish Government believes that the procedure envisaged in paragraph 2 of Article 26 . . . would prove more attractive if the Rules of the Court were modified to the effect that also the election of the individual members of a chamber [was] based on a consensus between the Court and the parties. . . . In this way, . . . a special chamber could be constituted either as a regional

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10. See Schwebel, *supra* note 1, at 836; Zimmermann, *supra* note 1, at 5 (citing Rosenne, *The 1972 Revision of the Rules of the International Court of Justice*, 8 *ISR. L. REV.* 197, 213 (1973)).

11. Schwebel, *supra* note 1, at 836.

12. *Id.*

13. *Id.* at 836-837 (citing *Review of the Role of the International Court of Justice, Report of the Secretary-General*, U.N. Doc. A/8382, at 46-47 (1971)).

chamber or as a chamber composed of judges possessing expert knowledge of the particular subject to be dealt with.<sup>14</sup>

Showing that these recommendations did not fall on deaf ears, the ICJ undertook significant rule changes in both 1972 and 1978.<sup>15</sup> Article 17 of the current Rules of the ICJ outlines the creation of a Chamber and embodies the changes made by the Court:

1. A request for the formation of a Chamber . . . may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.
2. When the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly. . . .
3. When the Court has determined, with the approval of the parties, the number of its Members . . . to constitute the Chamber, it shall proceed to their election [by secret ballot] . . . .<sup>16</sup>

Thus, Article 17(2) explicitly states that the President of the Court is to ascertain the views of the parties "regarding the composition of the Chamber." In addition, the rule envisions the President of the Court asking one or possibly two Members of the Court elected to the Chamber to "give place" to the *ad hoc* judges chosen by the parties.<sup>17</sup> Because of the fear that selecting some ICJ Judges over others would alienate the Members of the Court, the constitutionality of Article 17(2) was quickly challenged.<sup>18</sup> ICJ Judge Stephen Schwebel summarized the argument against Article 17(2) of the Rules as follows:

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14. *Id.* at 837.

15. Zimmermann, *supra* note 1, at 5.

16. Schwebel, *supra* note 1, at 838-39 *citing* 1978 I.C.J. Acts & Docs. No. 4, at 151-52.

17. SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 43 (1983); *see* Zimmermann, *supra* note 1, at 16 n.110, 19-20. As will be more fully developed below, the parties to I.C.J. Chamber proceedings can elect, in addition to which Members of the Court will sit on the Chamber, up to two *ad hoc* judges in accordance with either Article 31(2) or Article 31(3) of the I.C.J. Statute. *See infra* notes 33-36 and accompanying text.

18. Schwebel, *supra* note 1, at 840; *see* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.), Constitution of Chamber, 1982 I.C.J. 3, 11-13 (Order of Jan. 20) (dissenting opinions of Judges Morozov and El-Khani) [hereinafter Gulf of Maine Order].

Article 26 of the Statute provides that the Court may at any time form a Chamber for dealing with a particular case, and that the *number* of judges constituting such a Chamber shall be determined by the Court with the approval of the parties. Since the Statute provides for approval by the parties of the number of the Chamber's judges, it is argued that, inferentially, it excludes requiring approval by the parties of its composition. Thus, the provision of the revised Rules requiring the President of the Court to ascertain the views of the parties regarding the composition of the Chamber, it is claimed, is inconsistent with the Statute, which, of course, governs the Rules.<sup>19</sup>

Thus, the crux of the resistance to transforming the ICJ into a more viable forum by facilitating the needs and desires of the parties in forming a Chamber was that granting such considerations threatened to usurp the domain of the Court. Although this idea was seemingly guilty of denying the scant scope of the Court's docket for a fatuous allegiance to its jurisdiction, the idea was vigorously believed.<sup>20</sup> But in 1974 the U.N. General Assembly gave a strong vote of confidence for the changes in the ICJ Rules by declaring:

*The General Assembly, . . .*

*Considering* that the International Court of Justice has recently amended the Rules of Court with a view to facilitating recourse to it for the judicial settlement of disputes, . . . and allowing for greater influence of parties on the composition of ad hoc chambers, . . .

*Draws the attention* of States to the possibility of making use of chambers as provided in Articles 26 and 29 . . . including those which would deal with particular categories of cases.<sup>21</sup>

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19. Schwebel, *supra* note 1, at 839-40; *see Oda, supra* note 1, at 556; *see also* Zimmermann, *supra* note 1, at 17 (*citing* G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL TRIBUNALS: INTERNATIONAL JUDICIAL LAW 393 (1986) (Arguing that if Article 17(2) of the Rules does not conform with the Statute, then Article 17(2) and any actions under it are *ultra vires* and therefore null and void.)); *see generally* ROSENNE, *supra* note 17, at 43-45 (Discussing various issues concerning the role of the parties in composing a Chamber and the possible conflict with the Statute).

20. *See Oda, supra* note 1, at 558-59; Schwebel, *supra* note 1, at 842; ROSENNE, *supra* note 17, at 44-45.

21. G.A. Res. 3232, 29 U.N. GAOR, Supp. No. 31 at 141-42, U.N. Doc. A/9631 (1974) *cited in* Schwebel, *supra* note 1, at 842-843 and Zimmermann, *supra* note 1, at 18.

This declaration supporting the use of *ad hoc* Chambers, plus the actual forming of four *ad hoc* Chambers since 1982, confirms the emergence of a new way of doing business in the ICJ.<sup>22</sup> A former Member and President of the ICJ succinctly outlined this “new way of doing business” under the Rules, while explaining the reality of the situation, when he wrote in 1973:

After the President reports on [the consultations with the parties concerning the composition of the Chamber], the Court must always proceed to an election of the members of the Chamber by secret ballot, thus retaining ultimate control over the composition of any Chamber. However, . . . it is difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected . . . since it would simply result in compelling the parties to resort to an outside arbitral tribunal . . . .<sup>23</sup>

The validity of this view is attested to by the formation of the *ad hoc* Chamber created to settle the maritime boundary dispute between the

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22. See Zimmermann, *supra* note 1, at 18. The four Chamber decisions are: Gulf of Maine Order, *supra* note 18, at 3; Frontier Dispute (Burk. Faso v. Mali), Constitution of Chamber, 1985 I.C.J. 6 (Order of Apr. 3) [hereinafter Frontier Dispute Order]; Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Constitution of Chamber, 1987 I.C.J. 3 (Order of Mar. 2) [hereinafter ELSI Order]; Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Constitution of Chamber, 1987 I.C.J. 10 (Order of May 8) [hereinafter Land, Island and Maritime Order].

23. Eduardo Jimenez de Arechaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1, 2-3 (1973); see also Schwebel, *supra* note 1, at 853 (“Thus, responsibility for the activation — and hence, at bottom, the composition as well as the size — of an *ad hoc* Chamber is shared between the Court and the parties.”); Land, Island and Maritime Order, *supra* note 22, at 13 (declaration of Judge Oda) (“In practical terms . . . it is inevitable, if a Chamber is to be viable, that its composition must result from a consensus between the parties and the Court.”).

The Jimenez de Arechaga article proved to be instrumental in the United States' decision to use the ICJ Chambers in the Gulf of Maine case. “The United States was first attracted to the Chamber procedure for the reasons set out by Eduardo Jimenez de Arechaga in a 1973 article in the *American Journal of International Law* on the 1972 amendments to the Rules of Court.” Davis R. Robinson, David A. Colson & Bruce C. Rashkow, *Some Perspectives on Adjudicating Before The World Court: The Gulf of Maine Case*, 79 AM. J. INT'L L. 578, 581 (1985) [hereinafter Robinson, Colson]. “Davis R. Robinson . . . served as the United States Agent in the *Gulf of Maine* case. David A. Colson . . . served as the United States Deputy Agent in the case. Bruce C. Rashkow . . . served as Director of the Office of Canadian Maritime Boundary Adjudication, Office of the Legal Advisor, during the case.” *Id.* at 578.



United States and Canada over the Gulf of Maine.

### B. *Forming The First Chamber*

The Gulf of Maine case, the first ever to utilize a specialized Chamber,<sup>24</sup> was initially brought before the ICJ pursuant to Article 40 of the ICJ Statute<sup>25</sup> by the United States and Canada jointly submitting a special agreement requesting a five-member Chamber to be established under Article 26(2).<sup>26</sup> After consulting with the United States and Canada on the make-up of the Chamber pursuant to Rule 17(2), the Court elected by a vote of 11 to 2 the five judges that the parties had requested.<sup>27</sup>

The five Members of the Court elected to the Chamber were Judges Gros (France), Ruda (Argentina), Mosler (Federal Republic of Germany), Ago (Italy), and Schwebel (United States).<sup>28</sup> In addition, because the Court had an American but not a Canadian Member on the bench, Canada was eligible pursuant to Article 31(2) of the Statute to choose an *ad hoc* judge to sit on the Chamber.<sup>29</sup> Thus, acting upon the request of the President under Article 31(4) of the Statute, Judge

24. Stephen M. Schwebel, *New Life For World Court*, 23 VA. J. INT'L L. 375, 377 (1983).

25. Article 40, paragraph 1 of the ICJ Statute states that: "Cases are brought before the Court, as the case may be, either by the notification of the *special agreement* or by a *written application* addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated." I.C.J. Statute, *supra* note 2, Art. 40 (1) (emphasis added).

26. Robinson, Colson, *supra* note 23, at 580.

27. Gulf of Maine Order, *supra* note 18, at 8-9; see Schwebel, *supra* note 1, at 845; see generally Robinson, Colson, *supra* note 23, at 582-583 (Recounting how the Gulf of Maine Chamber was created.); Robert H. Brauer, Note, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute*, 23 VA. J. INT'L L. 463 (1983) [hereinafter Brauer].

28. Gulf of Maine Order, *supra* note 18, at 9; Robinson, Colson, *supra* note 23, at 582. It should be noted that the composition of the Chamber was clearly Western, and thus in no way complied with the once required mandate of Article 9 of the Statute that the "main forms of civilization" and "principal legal systems" be represented. That only one Member of the Court, Judge El-Khani, dissented in the Constitution of Chamber Order on these grounds demonstrates that a majority of the Court realizes that Article 9 no longer applies to the formation of a Chamber. Gulf of Maine Order, *supra* note 18, at 12; see Schwebel, *supra* note 1, at 851.

29. Gulf of Maine Order, *supra* note 18, at 4. Article 31(2) allows a party to "choose a person to sit as judge" when "the court includes upon the Bench a judge of the nationality of [the other party]." Article 31(3) allows each party "to choose a judge" when "the court includes upon the Bench no judge of the nationality of [either party]." See *infra* notes 33-36 and accompanying text.

Ruda willingly "gave place," i.e., gave up his seat on the Chamber, to Maxwell Cohen of Canada to serve as the *ad hoc* judge.<sup>30</sup>

Hence, in forming and, more importantly, in composing the Gulf of Maine Chamber, the ICJ strictly abided by the requests of the United States and Canada, thus indicating that by using a properly worded special agreement,<sup>31</sup> nations are well assured of obtaining a Chamber composed of the Members of the Court and *ad hoc* judges they desire.

Having outlined the history and procedure of creating a Chamber, the ICJ Chambers can now be compared to the Iran - U.S. Tribunal and the ICSID for the purpose of developing a mechanism for enforcing its awards.

### III. COMPARING THE FORUMS

#### A. *The Ability To Choose The Panel*

##### 1. ICJ Chamber

The first of the basic concepts to be compared — the parties' ability to choose the panel to hear the case — finds that parties wishing to form an ICJ Chamber, because of the cognizant reality that they can abandon an unsuitable Chamber altogether for another forum, can freely choose from the existing Members of the Court.<sup>32</sup> Their freedom to choose *ad hoc* judges, i.e., persons from outside the Members of the Court, is limited, however, by Articles 31(2), 31(3), and to a lesser

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30. Gulf of Maine Order, *supra* note 18, at 10; see Robinson, Colson, *supra* note 23, at 582. However, in two of the subsequent Chamber proceedings, the Frontier Dispute Case and the Land, Island and Maritime Boundary Case, the Court directly elected only three Members of the Court to serve on the Chambers, leaving vacant two *ad hoc* positions to be filled by the parties and avoiding the step of having to ask two Members of the Court to "give place." Zimmermann, *supra* note 1, at 19-20; Frontier Dispute Order, *supra* note 22, at 7; Land, Island and Maritime Order, *supra* note 22, at 12.

31. For example, the treaty and special agreement between the United States and Canada provided an "escape clause" allowing for the dispute to be "submit[ted] to a Court of Arbitration" "[i]f, for any reason, the Chamber . . . [was not] constituted in accordance with the provisions of [the] Treaty and the Special Agreement." Treaty Between the Government of the United States of America and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, Art. II, 20 I.L.M. 1377 (1981) [hereinafter Gulf of Maine Treaty]. The special agreement between El Salvador and Honduras in the Land, Island and Maritime Frontier Dispute contained a similar clause. Zimmermann, *supra* note 1, at 17 n.113.

32. See *supra* note 23 and accompanying text.

degree, Article 31(6). Article 31(2) provides that "[i]f the Court includes . . . a judge of the nationality of one of the parties, any other party may choose a person [from outside the Court] to sit as judge."<sup>33</sup> Therefore, in the Gulf of Maine case, Canada was able to select an *ad hoc* Member to the Chamber because the full Court of the ICJ included a national of the United States but not of Canada.<sup>34</sup> Conversely, the United States was not able to select an *ad hoc* judge to the Chamber because it already had a national on the Court.<sup>35</sup>

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33. I.C.J. Statute, *supra* note 2, Art. 31(2).

34. Gulf of Maine Order, *supra* note 18, at 9.

35. Article 31(2) raises two questions. The first question is if both parties to a dispute have a national on the Court, may both parties choose an *ad hoc* judge? In the ELSI case both parties (the United States and Italy) had a national on the Court, but neither party was able to choose an *ad hoc* judge. ELSI Order, *supra* note 22, at 4. Thus, the logical reading of Article 31(2) is that where the Court includes a judge of the nationality of one of the parties but not the other, then the other party may choose an *ad hoc* judge. Article 31 is therefore meant to assure that no one party is given an unfair advantage over the other by having a national on the Court that is not balanced by a national of the other party also being on the Court. But should both parties be equally represented by a national on the Court, the matter is settled and the composition of the Chamber is limited to choosing from among the permanent Members of the ICJ.

The second question raised by Article 31(2) is what if a party, the United States, for example, had a national on the Court but did not want him or her to serve on the Chamber — would the United States then be able to choose an *ad hoc* judge? The answer apparently is no. Following the reasoning above, the ability to choose an *ad hoc* judge is limited to parties that do not have a national serving on the Court.

Strong evidence supporting this proposition is found in an amendment made to the Gulf of Maine Special Agreement between the United States and Canada. The Letter of Submittal from the Department of State to the President of the United States summarized Article I of the Special Agreement as prescribing a Chamber "composed of three judges elected by and from the members of the Court and two judges *ad hoc*, who shall not be nationals of the United States or Canada." Letter of Submittal, 20 I.L.M. 1374, 1374 (1981). But as stated above, only Canada was able to appoint an *ad hoc* judge to the Chamber.

That this would occur, however, was foreseen by the United States Senate amending Article I of the Special Agreement to read: "The parties shall submit the question posed . . . to a Chamber . . . , composed of five persons, to be constituted after consultation with the Parties, pursuant to Article 26(2) and Article 31 of the Statute . . . ." Text of Resolution of Ratification, 20 I.L.M. 1389, 1389 (1981). The amendment was explained as being needed "to take into consideration changed circumstances of the I.C.J." S. REP. NO. 5, 97th Cong., 1st Sess. (1981) *reprinted in* 20 I.L.M. 1383, 1385 (1981). These events appear to emphasize that while the ICJ is willing to abide by the wishes of the parties as to which of its Members shall serve on a Chamber, it will strongly enforce the requirement that only parties without nationals serving on the Court can appoint *ad hoc* judges.

Thus, in the event that the United States did not want Judge Schwebel to serve on

Article 31(3) applies when neither party forming the Chamber has a national on the Court. In this situation, the parties enjoy the most leeway. Not only are they able to select, as occurred in the Frontier Dispute case and the Land, Island and Maritime case, three Members of the Court to serve on the Chamber, but they are also able to select one *ad hoc* judge each.<sup>36</sup> As will be more fully developed below, the ability to form a Chamber in conjunction with Article 31(3) is a leading benefit of using an ICJ Chamber to settle an inter-State dispute.<sup>37</sup>

The ability to appoint *ad hoc* judges is limited by a final consideration — Article 31(6).<sup>38</sup> Article 31(6)'s most basic requirement is that those selected to serve as *ad hoc* judges be persons "of high moral character, who possess[] the qualifications required in [their] respective countr[ies] for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."<sup>39</sup> But, considering the abundance of highly qualified persons willing and able to serve as *ad hoc* judges, the requirement of Article 31(6) is a minimal restriction that rightfully serves to assure the integrity of the Chamber. Thus, as established in Article 26(2) and Article 31 of the ICJ Statute, nations agreeing to appear before an ICJ Chamber command substantial latitude in choosing the judges to hear their case.

## 2. Iran - U.S. Tribunal

Parties before an ICJ Chamber enjoy much more freedom in choosing the panel to hear their case than do parties appearing before the Iran - U.S. Tribunal.<sup>40</sup> In fact, parties before the Iran - U.S. Tribu-

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a specialized Chamber, the Chamber could conceivably be formed pursuant to Rule 17(2) without Judge Schwebel being elected to serve on it, but the United States would remain unable to select an *ad hoc* judge. Nothing in Article 31(1), which states that "Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court," would dictate an opposite result. For Article 31(1) to do more than allow Judges to hear cases in which their home nations are parties by granting them an affirmative right to hear such cases would be grossly inconsistent with the intent and purpose of Rule 17(2).

36. Frontier Dispute Order, *supra* note 22, at 7; Land, Island and Maritime Order, *supra* note 22, at 12.

37. *See infra* notes 113-15 and accompanying text.

38. Article 31(6) reads in full: "Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues." I.C.J. Statute, *supra* note 2, Art. 36(6).

39. I.C.J. Statute, *supra* note 2, Art. 2.

40. The Iran - United States Claims Tribunal is an outgrowth of the political and military crisis the United States and Iran underwent in 1979 and 1980. The Iran -

nal are powerless in choosing the panel to hear their case. Article III of the Claims Settlement Declaration governs the formation of the Iran - U.S. Tribunal and its subsequent panels. It reads in relevant part:

1. The Tribunal shall consist of nine members . . . . [E]ach government shall appoint one-third of the members. . . . [T]he members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. *Each such panel shall be com-*

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United States Claims Tribunal was created pursuant to what is collectively known as the Algiers Accords. The Algiers Accords consists of: The Declaration of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) [hereinafter General Declaration]; the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) [hereinafter Claims Settlement Declaration]; the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) [hereinafter Undertakings]; and the Escrow Agreement with related technical agreements set up to fund awards of the Iran - United States Claims Tribunal against Iran, *reprinted in Iranian Assets Litigation Reporter* [hereinafter I.A.L.R.] 2,361-74 (Feb. 6, 1981).

Article II of the Claims Settlement Declaration establishes three areas of jurisdiction for the Iran - United States Claims Tribunal:

1. An International Arbitral Tribunal (the Iran - United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . . .
2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.
3. The Tribunal shall have jurisdiction . . . over any dispute as to the interpretation or performance of any provision of [the General Declaration].

I.A.L.R. 2,364 (Feb. 6, 1981).

A multitude of articles have been written on numerous issues concerning the Iran - U.S. Tribunal, many beyond the narrow scope of this article. They include: E. Lauterpacht, *The Iran - United States Claims Tribunal — An Assessment*, 1982 PRIVATE INVESTORS ABROAD 213; James H. Carter, *The Iran - United States Claims Tribunal: Observations on the First Year*, 29 UCLA L. REV. 1076 (1982); Lake & Dana, *Judicial Review of Awards of the Iran - United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 LAW & POL'Y INT'L BUS. 755 (1984); David Caron, *The Nature of the Iran - United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990); Robert P. Lewis, *What Goes Around Comes Around; Can Iran Enforce Awards of the Iran - U.S. Claims Tribunal in the United States?*, 26 COLUM. J. TRANSNAT'L L. 515 (1988).

*posed by the President . . . .*

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal . . . .<sup>41</sup>

Thus, Article III(1) provides for the full Tribunal consisting of nine members — six having been appointed by the two governments — which can be divided by the President into three panels consisting of three members each. As foreseen by Article III(2), which provides the rules of the Tribunal, the UNCITRAL Rules needed slight modification to be efficiently used by the Iran - U.S. Tribunal.<sup>42</sup> These modifications, however, did not change the UNCITRAL rules governing the appointment of arbitrators. But an important note of clarification was added to the text of the rules finally adopted: “As used in Articles 6, 7 and 8 of the UNCITRAL Rules, the terms “party” and “parties” refer to the one or both of the two Governments, as the case may be.”<sup>43</sup>

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41. I.A.L.R. 2,364 (Feb. 6, 1981).

42. Stewart Abercrombie Baker & Mark David Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 INT'L LAW. 81, 83 (1989).

43. I.A.L.R. 6,313 (Apr. 1, 1983). The final rules can be found at I.A.L.R. 6,306 (Apr. 1, 1983). The UNCITRAL, and hence, the Iran - U.S. Tribunal rules governing the appointment of members of an arbitral tribunal are Articles 6 through 8. Article 6, which concerns the appointment of a sole arbitrator to a panel of one, is not relevant to the Iran - U.S. Tribunal because of Article III(1)'s instruction that the panels will consist of three members each. I.A.L.R. 6,312-13 (Apr. 1, 1983). Article 7 of the UNCITRAL Rules, however, concerns the appointment of arbitrators to a panel of three and is therefore relevant to the Iran - U.S. Tribunal. Article 7 provides that:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days . . . of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the authorities to appoint the second arbitrator; or

(b) If no such authority has been . . . designated . . . or if the appointing authority . . . refuses . . . or fails to appoint the arbitrator within thirty days . . . , the first party may request . . . the Permanent Court of Arbitration . . . to designate the appointing authority.

The first party may then request the appointing authority to appoint the second arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on . . . the presiding arbitrator, the presiding arbi-

Thus, the Rules of the Iran - U.S. Tribunal, along with Article III(1) of the Claims Settlement Declaration, clearly demonstrate that only the Governments of the United States and Iran, and not the individual parties, are allowed any input in determining the composition of a panel.

Nor do the individual parties have any input as to which of the three panels forming the Iran - U.S. Tribunal is to hear their case. In adopting the new rules of the Iran - U.S. Tribunal, the UNCITRAL Rule, Article 5, addressing the number of members on a panel, was replaced by the following:

The composition of the Chambers, the assignment of cases to various Chambers, the transfer of cases among Chambers and the relinquishment by Chambers of certain cases to the Full Tribunal will be provided for in orders issued by the President pursuant to his powers under Article III, paragraph 1 of the Claims Settlement Declaration.<sup>44</sup>

Thus, concerning the parties' ability to choose the panel to hear the case, parties before the Iran - U.S. Tribunal are powerless in determining the composition of the panel and must present their case to whichever panel they are assigned by the President. This, however, is not the case for parties before an ICSID<sup>45</sup> arbitration — who enjoy

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trator shall be appointed by an appointing authority . . . .  
I.A.L.R. 6,313 (Apr. 1, 1983). Article 8 concerns the documents and biographical information that would have to be furnished when requesting to appoint an arbitrator.  
I.A.L.R. 6,313 (Apr. 1, 1983).

44. I.A.L.R. 6,312 (Apr. 1, 1983).

45. The International Centre for the Settlement of Investment Disputes ("ICSID") was established by Article 1(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter I.C.S.I.D. Convention], *done at* Washington, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), *reprinted in* 4 I.L.M. 532 (1965) and in I.C.S.I.D. Basic Documents 11 (1985). ICSID has its headquarters at the World Bank Offices in Washington, D.C. and is sponsored by the Bank. Article 1(2) of the ICSID Convention states that: "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention."

As with the ICJ Chambers and the Iran - U.S. Tribunal, there exists a plethora of books and articles written on an abundance of ICSID topics. These materials include: George R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 *ARB. INT'L* 21 (1989); George R. Delaume, *ICSID Arbitration and the Courts*, 77 *AM. J. INT'L L.* 784 (1983); George R. Delaume, *ICSID Arbitration in*

almost unlimited freedom in choosing the panel to hear their case.

### 3. ICSID

In an ICSID arbitration, the parties' ability to choose *ad hoc* arbitrators is found in Articles 37 through 40 of the ICSID Convention, which provide for the "Constitution of the Tribunal."<sup>46</sup> Article 37(2)(a) states one of the few procedural rules that are mandatory for ICSID arbitration:<sup>47</sup> "The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree." Thus, a requirement for an ICSID arbitration is that the panel (or Tribunal, as used in the ICSID Convention) consist of an uneven number of arbitrators. Other than that, the panel is chosen "as the parties shall agree."

One of the main functions of ICSID is to maintain a list of possible arbitrators from which the parties may choose when composing a panel to hear their dispute.<sup>48</sup> But just as parties choosing *ad hoc* judges for an ICJ Chamber are not confined to the Members of the Court, parties forming an ICSID panel are not confined to the list in selecting their arbitrators. Article 40(1) of the ICSID Convention allows the parties to appoint arbitrators from outside the list, subject only to the requirements of Article 40(2)<sup>49</sup> — that the arbitrators be of high moral character, recognized competence in the field of law, and able to be relied upon to exercise independent judgement.<sup>50</sup> Other than this restriction of competence and fair dealing, the parties to an ICSID arbitration have an absolute ability to choose the panel for resolving their dispute.

Hence, a comparison of the three forums illustrates that the par-

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*Practice*, 2 INT'L TAX & BUS. L. 58 (1984); Comment, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention* 17 HARV. INT'L L. J. 401 (1976); Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW. 521 (1985).

46. I.C.S.I.D. Convention, *supra* note 45, Chapter IV, Section 2 (containing Articles 37-40).

47. Richard T. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?*, 4 AM. U. J. INT'L L. & POL'Y 319, 363 (1989).

48. "Panel of Arbitrators" is the nomenclature used by the Convention. I.C.S.I.D. Convention, *supra* note 45, Chapter I, Section 4 (consisting of Articles 12-16).

49. Article 40 provides in full:

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

50. I.C.S.I.D. Convention, *supra* note 45, Art. 14 (1).



ties' ability to choose the panel to hear the case covers the full spectrum — from parties before the ICSID having almost total discretion in selecting their arbitrators, to parties before the Iran - U.S. Tribunal having no choice at all. Falling near the ICSID on the spectrum are parties before an ICJ Chamber, having the ability to choose both existing Members of the Court and *ad hoc* judges to make-up the panel to hear their dispute.

### B. *The Ability To Determine The Law*

#### 1. ICJ Chambers

Turning to the second area for comparison, parties before an ICJ Chamber entertain great authority in determining the law for settling their dispute. Article 38(1) of the ICJ Statute mandates the application of international law by a Chamber when adjudicating a case. The Article, however, leaves open an important window for the use of party determined law. Article 38(1) provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, *establishing rules expressly recognized by the contesting states*;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>51</sup>

Thus, Article 38(1)(a) directs ICJ Chambers to apply “rules expressly recognized by the contesting states” in settling a dispute.<sup>52</sup> And

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51. I.C.J. Statute, *supra* note 2, Art. 38(1)(emphasis added). Scholars generally agree that Article 38(1) “is the most authoritative statement of the sources of international law.” Grant H. Hanessian, “*General Principles of Law*” in the *Iran - U.S. Claims Tribunal*, COLUM. J. TRANSNAT’L L. 309, 324 n.71, *citing* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 36 (2d ed. 1987).

52. A leading authority on the ICJ, Shabtai Rosenne, has said that Articles

although the Article only mentions international conventions as establishing the recognized rules, the ELSI case between the United States and Italy demonstrates that treaties can also establish "rules expressly recognized" by the parties to be applied in deciding disputes submitted to an ICJ Chamber.<sup>53</sup>

In the ELSI case<sup>54</sup> the United States, pursuant to Article 40 of the ICJ Statute, filed a written application with the ICJ requesting the formation of a Chamber for proceedings against the Government of Italy.<sup>55</sup> The gravamen of the United States complaint was that the requisition by Italian authorities of an United States company's Italian subsidiary (ELSI) prevented the subsidiary's orderly liquidation and forced it into bankruptcy, all of which allegedly violated the Treaty of Friendship, Commerce and Navigation ("FCN") between the two nations.<sup>56</sup> The Italians responded by denying that they had violated the FCN Treaty, but that, even if they had, no payment of damages was justified because ELSI was already bankrupt when seized by the Italian officials.<sup>57</sup>

The importance of the case is not that the Chamber held for Italy, but that it strictly applied the facts of the dispute solely to the rules recognized by the two governments in the FCN Treaty. As stated in Judge Schwebel's dissenting opinion, the United States lost the case not because the Chamber "found against the United States on the law of the treaty," which was "largely interpreted to give [it] effect rather

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38(1)(a) and 38(1)(b) "merely refer to the generally accepted elements of the conventional and customary general international law, and call for no special comment." SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 607 (2d ed. 1985). He noted, however, that the requirement of the rules being "recognized" by the states was normally satisfied by both states being signatories to the convention. *Id.* at 607 n.4.

53. The Restatement of the Foreign Relations Law of the United States (Revised) determines that the terms "treaty" and "convention" have the same meaning. Restatement Section 301 states: "The terminology used for international agreements is varied. Among the terms used are treaty, convention . . . . Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise." B. CARTER & P. TRIMBLE, *INTERNATIONAL LAW* 80 (1991).

54. ELSI Order, *supra* note 22, at 3; Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Decision on the Merits, 1989 I.C.J. 15 (Order of July 20) [hereinafter ELSI Decision]. For a good analysis of the decision, see Gill, *International Court of Justice — Diplomatic Protection — U.S. Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249 (1990).

55. Gill, *supra* note 54, at 249.

56. *Id.* at 249-250.

57. *Id.*

than to deprive [it] of effect," but because the Chamber found against "the practical and legal significance to be attached to the facts of the case."<sup>58</sup> Thus, the ELSI case serves to demonstrate that, pursuant to Article 38(1)(a) of the ICJ Statute, parties appearing before an ICJ Chamber possess the ability to determine the applicable law used to settle their dispute. This ability comes in the form of carefully drafted treaties, conventions, and even special agreements to bring cases before ICJ Chambers.<sup>59</sup>

## 2. Iran - U.S. Tribunal

In contrast to parties appearing before an ICJ Chamber, parties appearing before the Iran - U.S. Tribunal do not have the ability to determine the applicable law to be employed in settling their dispute. Article V of the Claims Settlement Declaration defines the applicable law to be employed by the Iran - U.S. Tribunal:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law *as the Tribunal determines* to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.<sup>60</sup>

Here, the key point is that the Tribunal, not the parties, determines the law applicable to the particular case to be heard. As stated

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58. *Id.* at 256 citing 1989 I.C.J. at 95 (Schwebel, J., dissenting).

59. The Special Agreement between the United States and Canada in the Gulf of Maine case illustrates this proposition. Article II(1) of the Special Agreement stated: "The Chamber is requested to decide [the dispute], in accordance with the principles and rules of international law applicable in the matter as between the Parties." Gulf of Maine Special Agreement, 20 I.L.M. 1378 (1981). Of more interest, however, is the Letter of Submittal from the Department of State to the President of the United States, which summarized Article IV of the Special Agreement as follows:

Article IV of the Special Agreement requests the Chamber to utilize, and obligates the Parties to utilize, certain technical provisions. These provisions enumerated in Article IV are for the purpose of ensuring to the fullest extent possible that there will be no misunderstanding or technical misapplication of the maritime boundary established by the Chamber.

Letter of Submittal, 20 I.L.M. 1374, 1375 (1981). Thus, the Gulf of Maine Special Agreement functioned not only to create the Chamber to hear the dispute, but also to provide highly technical "rules expressly recognized" by the parties and concluded by the Chamber to decide the dispute.

60. Claims Settlement Declaration, *supra* note 40, Art. V (emphasis added); *see generally* Hanessian, *supra* note 51 (Discussing the use of "general principles of law" under Article V of the Iran - U.S. Claims Tribunal.).

above, Article III(2) of the Claims Settlement Declaration foresaw the possible need to modify the UNCITRAL Rules for use in the Iran - U.S. Tribunal.<sup>61</sup> That the UNCITRAL Rule titled "Applicable Law" was completely replaced by Article V of the Claims Settlement Declaration is particularly revealing of the powerlessness of parties appearing before the Iran - U.S. Tribunal in determining the applicable law to settle their dispute.<sup>62</sup>

It must be noted, however, that Article II of the Claims Settlement Declaration grants the Iran - U.S. Tribunal jurisdiction over three areas: claims of nationals of the United States or Iran against the other government; claims between the two governments over contractual arrangements for the purchase and sale of goods and services; and disputes between the two governments over the interpretation or performance of the General Declaration.<sup>63</sup> The first of these areas, the claims of nationals, involves parties who are powerless in determining the applicable law to settle their dispute.<sup>64</sup> But the situation in the sec-

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61. See *supra* notes 41 and 42 and accompanying text.

62. The modified rule reads in full:

1. The arbitral 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 arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

2. The arbitral tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so.

I.A.L.R. 6,325 (Apr. 1, 1983).

Some commentators believe the ability of the tribunal to hear cases *ex aequo et bono* is contrary to Article V. See David P. Stewart & Laura B. Sherman, *Developments at the Iran-U.S. Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1, 16 (1983).

By way of comparison, in the original UNCITRAL Rule, Article 33 stated:

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

I.A.L.R. 6,324-25 (Apr. 1, 1983).

63. See *supra* note 40.

64. One commentator has written:

The Tribunal is obviously different from the typical commercial arbitration proceeding in that the parties before the Tribunal did not choose to have their disputes settled according to the choice of law rules set forth in Article V of

ond and third areas of jurisdiction is somewhat different.

Areas two and three involve disputes, because they are between states, very similar, if not identical, to the disputes brought before ICJ Chambers. A characteristic shared in common by the United States and Iran in negotiating the Algiers Accords to be enforced by the Iran - U.S. Tribunal and of other nations in negotiating an international agreement to be enforced by an ICJ Chamber is that once a dispute arises and is brought before either forum, interpretation of the document is solely dependent on the collective wisdom of the members of the body. Thus, although the United States and Iran, like any other nations creating a binding international agreement, had the opportunity to state within the Algiers Accords the applicable law for settling subsequent disputes, that opportunity no longer exists and now belongs uniquely to the Tribunal through the mandate of Article V of the Claims Settlement Declaration. On the other hand, nations bringing a case before an ICJ Chamber under Article 40 of the Statute may carefully negotiate and articulate in their special agreement the "recognized rules" to be applied to the dispute pursuant to Article 38(1)(a). Therefore, an advantage enjoyed by nations before an ICJ Chamber is the opportunity of negotiating and drafting the appropriate "recognized rules" for settling the dispute after it has arisen, and thus being able to pinpoint the manner in which the issue will be resolved.

### 3. ICSID

Parties appearing in ICSID arbitrations enjoy almost total liberty in determining the applicable law for settling their dispute. Article 42(1) of the ICSID Convention states:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>65</sup>

Thus, the presumption of an ICSID arbitration is that the dispute shall

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the Claims Settlement Agreement. . . . [T]he Tribunal has applied "general principles of law" even where the parties have chosen a national law to govern their contract.

Hanessian, *supra* note 51, at 347-48.

65. I.C.S.I.D. Convention, *supra* note 45, Art. 42.

be decided by the rules of law determined by the parties. Only if the parties are unable to agree on what law governs the dispute is the ICSID panel of arbitrators then able to intervene. In addition, any intervention on the part of the arbitrators to determine the applicable law for deciding the dispute must follow the tight instructions of Article 42(1), thus providing the parties with further assurances as to what law will be applied.

In the absence of the parties agreeing on the applicable law, Article 42(1) instructs the ICSID arbitrators first to apply the law of the Contracting State involved in the dispute, and subsequently "such rules of international law as may be applicable." This systematic, two-stage procedure creates a balanced application of law equally favorable to both parties. First, the law of the Contracting State is applied to the dispute, thus protecting the State's pride and national sovereignty and soothing any sensitivity to undue influence from outside sources. But the result reached under national law is then checked for inconsistencies with the rule of international law, thus protecting the investor from unfair treatment by the host State. The idea was well summarized by a former General Counsel to the World Bank and architect of the ICSID Convention:

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 to the law of the host State and that law will in the first instance be 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).<sup>66</sup>

Thus, in the absence of an agreement between the parties on the applicable law, an ICSID panel of arbitrators, like an ICJ Chamber or the Iran - U.S. Tribunal, will, in the final analysis, apply rules of international law in deciding the dispute. However, the major difference between the three forums is that parties before an ICJ Chamber or an ICSID panel are able to influence the law applicable to deciding their

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66. Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 R.C.A.D.I. 331, 392 (1972-II) quoted in Graving, *supra* note 47, at 362-63.

dispute, whereas parties before the Iran - U.S. Tribunal are confined to the mandate of Article V of the Claims Settlement Declaration.

### C. *The Ability To Select the Rules*

#### 1. ICJ Chambers

The final comparison to be made among the three forums is the parties' ability to select the internal rules to govern the proceeding. Article 101 of the ICJ Rules recognizes the parties' ability to modify the normal Rules of Court. It provides:

The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.<sup>67</sup>

Thus, the parties appearing before the ICJ, either the full Court or a Chamber, have the explicit, if not inherent, ability to modify the ICJ Rules to their liking. The inherent nature of this ability has been explained as such:

The litigants are sovereign states (Statute, Article 34), and the Court is *their* organ. The ability of the Court to *impose* its will upon the parties is thus much more limited than in any domestic litigation. Forceful expression of this appears in Article 101 of the Rules.

Procedure in the Court is regulated by a curious, and not entirely logical, combination of provisions appearing sometimes in the Statute and sometimes in the Rules of Court . . . . Rules appearing in the Statute are thus mandatory, while the others possess an inherent flexibility, preserved by Article 101 of the Rules. Among the statutory provisions of particular relevance . . . is the categorical requirement in Article 43, paragraph 1, of the Statute that the procedure shall consist of two parts: writ-

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67. International Court of Justice Rules of Court, Art. 101 [hereinafter I.C.J. Rules] *reprinted in* ROSENNE, *supra* note 17, at 208. Articles 93-97 concern the issuance of judgments by the Court or a Chamber. *Id.* at 192-200.

ten and oral . . . .<sup>68</sup>

Therefore, proceedings before an ICJ Chamber are restricted by the statutory requirements of Article 43(1), which is largely a codification of the rules of inter-State arbitration developed prior to World War I and subsequently formulated to govern the Permanent Court of International Justice.<sup>69</sup> One of the basic principles carried over from these origins and now reflected in the procedure of the Court is the principle of the equality of the parties.<sup>70</sup> This principle, as it relates to written and oral proceedings, is quantitatively manifested in the provision that each party have an equal number of pleadings and an equal amount of time for preparation.<sup>71</sup>

However, except for the requirement of equality of treatment, parties appearing before a Chamber are able to adopt modified rules governing the written and oral proceedings. In addition to the general language of Article 101, this ability is recognized in Article 31 of the Rules, which specifically provides that: “[i]n every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure.”<sup>72</sup> Thus, parties before a Chamber

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68. ROSENNE, *supra* note 17, at 73; *see* ROSENNE, *supra* note 52, at 544. Article 43 of the ICJ Statute provides:

1. The procedure shall consist of two parts: written and oral.
2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

I.C.J. Statute, *supra* note 2, Art. 43.

69. ROSENNE, *supra* note 17, at 73.

70. ROSENNE, *supra* note 52, at 546.

71. *Id.* at 547.

72. I.C.J. Rules, *supra* note 67, Art. 31. Article 31's relationship to modifying written proceedings is found in Article 44 of the Rules. Article 44 states:

1. In the light of the information obtained . . . under Article 31 of these Rules, the Court shall make the necessary orders to determine, *inter alia*, the number and the order of filing of the pleadings and the time-limits within which they must be filed.
2. In making an order under paragraph 1 of this Article, any agreement between the parties which does not cause unjustified delay shall be taken into account.
3. The Court may, at the request of the party concerned, extend any time-



enjoy a well recognized ability under Articles 101 and 31 of the ICJ Rules to formulate the internal rules to govern the proceeding.

## 2. Iran - U.S. Tribunal

As has been the pattern in the two previous comparisons, parties appearing before the Iran - U.S. Tribunal do not have the ability to select, or even to modify, the internal rules to govern the proceeding. In this regard, Article III(2) of the Claims Settlement Declaration provides a pertinent clause: "the Tribunal shall conduct its business in accordance with the . . . [UNCITRAL Rules] except to the extent modified by the parties or by the Tribunal . . . ."<sup>73</sup> Based on the clear language of the Claims Settlement Declaration, it would appear that the parties have the ability to modify the rules. However, due to changes made to the UNCITRAL Rules for use in the Iran - U.S. Tribunal, this ability does not exist.

Article 1(1) of the UNCITRAL Rules provides for modification of the rules by the parties.<sup>74</sup> But Article 1(1) was amended for application

limit, or decide that any step taken after the expiration of the time-limit fixed therefore shall be considered as valid, if it is satisfied that there is adequate justification for the request. In either case the other party shall be given an opportunity to state its views.

4. . . . If the consultation referred to in Article 31 reveals persistent disagreement between the parties as to the application . . . of these Rules, the Court shall be convened to decide the matter.

I.C.J. Rules, *supra* note 67, Art. 44.

Similarly, Article 31's relationship to modifying oral proceedings is found in Article 58(2) of the Rules:

2. The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of the each party, shall be settled by the Court after the views of the parties have been ascertained in accordance with Article 31 of these Rules.

I.C.J. Rules, *supra* note 67, Art. 58.

73. *See supra* note 41 and accompanying text.

74. I.A.L.R. 6,308 (Apr. 1, 1983); Baker and Davis, *supra* note 42, at 85.

UNCITRAL Rules Article 1 states in full:

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

I.A.L.R. 6,308 (Apr. 1, 1983).

by the Iran - U.S. Tribunal to only allow modifications to the arbitral rules by the Full Tribunal or the two governments of Iran and the United States.<sup>75</sup> Consequently, parties appearing before the Iran - U.S. Tribunal do not have the ability to select or modify the internal rules governing the settlement of their dispute.

### 3. ICSID

As also has been the pattern, parties before an ICSID arbitration have an almost totally unrestricted ability to select the internal rules to govern their dispute. Article 44 of the ICSID Convention simply states that: "Any arbitration proceeding shall be conducted . . . , except as the parties otherwise agree, in accordance with the Arbitration Rules . . . ."<sup>76</sup> Thus, the parties are given the unequivocal opportunity to formulate the procedural rules to govern the dispute through their own agreement. The ICSID Arbitration Rules, however, are at the parties' disposal should they so choose.<sup>77</sup>

Even within the Arbitration Rules, the parties' ability to select their own procedural rules is reinforced. Rule 20 states:

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. . . . He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its settings;

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75. Baker & Davis, *supra* note 42, at 85. The modified Article 1(1) states: Within the framework of the Algiers Declarations, the initiation and conduct of proceedings before the arbitral tribunal shall be subject to the following Tribunal Rules which may be modified by the Full Tribunal or the two Governments.

I.A.L.R. 6,308-9 (Apr. 1, 1983).

76. I.C.S.I.D. Convention, *supra* note 45, Art. 44.

77. The procedural flexibility of ICSID arbitration was summarized by an ICSID brochure as follows:

Details of the procedure to be followed by the Arbitral Tribunal are determined by rules of procedure supplementing the basic provisions of the Convention. The Arbitration Rules will apply except to the extent that the parties otherwise agree. Such agreement may be included in the instrument recording the parties' consent to ICSID arbitration, or may be concluded subsequently, either before or after the institution of proceedings. Any question of procedure not covered by whatever rules are applicable will be decided by the Tribunal.

Doc. I.C.S.I.D./12 at 11.

- (b) the language or languages to be used in the proceeding;
- (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
- (d) the number of copies desired by each party of instruments filed by the other;
- (e) dispensing with the written or the oral procedure;
- (f) the manner in which the cost of the proceedings is to be apportioned; and
- (g) the manner in which the record of the hearings shall be kept.<sup>78</sup>

Thus, both the ICSID Convention and the Arbitration Rules themselves clearly establish that the parties before an ICSID-sponsored arbitration are fully able to select or modify the procedural rules that will be used to govern their dispute.

The above comparisons may only be found to conclude that in terms of the parties' ability to choose the panel to hear the case, to determine the applicable law to settle the dispute, and to select the internal rules to govern the proceeding, the three forums span the full spectrum from almost absolute liberty to complete subrogation of the will of the parties. The most open forum, in which the parties are free to agree upon all aspects of the arbitration, is the ICSID. At the opposite extreme is the Iran - U.S. Tribunal, where the parties are voiceless in all substantive matters concerning the settlement of their dispute. Falling between the two but certainly leaning towards the ICSID, is the least used of the three forums, the ICJ Chambers.

Parties before ICJ Chambers have the ability to choose their own Chamber made up of existing ICJ judges pursuant to Article 26(2) and to appoint *ad hoc* judges under the direction of Article 31(2) or 31(3). The parties are also able to decide what law will govern their dispute by agreeing upon "recognized rules" articulated in their special agreement or, in the case of a written application, previous treaty or convention, which is then applied by the Chamber pursuant to Article 38(1)(a) of the Statute. And finally, parties appearing before ICJ Chambers are able to select, through agreement with the Court, the rules to govern their written and oral proceedings under Articles 101 and 31 of the ICJ Rules. In summary, a succinct description of the three forums is this: the Iran - U.S. Tribunal is based on agreement of

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78. I.C.S.I.D. Arbitration Rules, Rule 20 (1) *reprinted in* I.C.S.I.D. Basic Documents I.C.S.I.D./15 61, 73-74 (Jan. 1985) [hereinafter I.C.S.I.D. Rules].

the Tribunal, an ICJ Chamber is based on agreement of the parties and the Chamber, and the ICSID is based on agreement of the parties.

Thus, if "arbitration is the product of agreement"<sup>79</sup> is an appropriate working definition of arbitration, then the ICJ Chambers, like the ICSID, and even more so than the Iran - U.S. Tribunal, represent arbitration for purposes of enforcing and executing its awards. A contrary result would be nothing short of the "triumph of form over substance." Hence an overview of the enforcement mechanisms used by the Iran - U.S. Tribunal and the ICSID is a prerequisite to developing a specific mechanism for enforcing ICJ Chamber awards.

#### IV. ENFORCEMENT & EXECUTION

##### A. *The Iran - U.S. Tribunal And The New York Convention*

Awards of the Iran - U.S. Tribunal are enforced and executed in two ways. The first way involves the escrow account established in the Algiers Accords to provide funding for awards issued against Iran.<sup>80</sup> The second way, however, is not an internal mechanism of the Algiers Accords, but involves the use of domestic courts in enforcing and executing awards against the United States and United States nationals. Although Article IV(3) of the Claims Settlement Declaration directs that "[a]ny award which the Tribunal may render against either government shall be enforced against such government in the courts of any nation in accordance with its laws,"<sup>81</sup> the actual external mechanism used is the New York Convention.<sup>82</sup>

Article III of the New York Convention directs the Contracting States to "recognize arbitral awards as binding and enforce them in accordance with [their own] rules of procedure."<sup>83</sup> As a prerequisite to enforcement, however, Article II(1) requires "an agreement in writing under which the parties undertake to submit to arbitration."<sup>84</sup>

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79. Baker & Davis, *supra* note 42, at 90.

80. *See supra* note 40.

81. Claims Settlement Declaration, *supra* note 40, Art. IV.

82. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention]; *see generally* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049 (1961) (Providing a general background of the development of the New York Convention, its mechanics, and accession by the United States.).

83. New York Convention, *supra* note 82, Art. III, *cited in* Ministry of Defense v. Gould, Inc., 887 F.2d 1357, 1362 (9th Cir. 1989).

84. New York Convention, *supra* note 82, Art. II (1).

The applicability of the New York Convention to the Iran - U.S. Tribunal was validated in *Ministry of Defense v. Gould, Inc.*<sup>85</sup> In *Gould*, the issue presented to the Ninth Circuit was "whether an award against an American corporation entered by the Iran - United States Claims Tribunal [could] be enforced in federal court" with subject matter jurisdiction vesting under the New York Convention.<sup>86</sup> In upholding the District Court's affirmative ruling, the Court of Appeals made two holdings highly relevant to enforcing ICJ Chamber awards under the New York Convention. First, the court held that the Convention's requirement of an "agreement in writing" was satisfied by the Algiers Accords between the two governments,<sup>87</sup> with the individual, Gould, Inc., ratifying its authority by filing a claim and arbitrating before the Tribunal.<sup>88</sup> Thus, if an international agreement between two nations that prohibits a third party, their nationals, from using any other forum for settling disputes satisfies the "agreement in writing" requirement of Article II(1) of the New York Convention as to that third party, then certainly a special agreement between two nations to bring a case before an ICJ Chamber would also be satisfactory.<sup>89</sup>

The second holding by the court was that "an award need not be made 'under a national law' for a court to entertain jurisdiction over its enforcement pursuant to the Convention."<sup>90</sup> In other words, for an award to be enforceable under the New York Convention, it does not have to be subject to review by a domestic court. This is of particular importance to the prospect of enforcing ICJ Chamber awards under the New York Convention because of Articles 27 and 60 of the ICJ Statute.

Article 27 states that "[a] judgment given by any of the chambers . . . shall be considered as rendered by the Court."<sup>91</sup> Any decisions of an ICJ Chamber must therefore meet the requirements of a judgment of the full Court. Specifically, Article 60 directs that: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of

85. 887 F.2d 1357 (9th Cir. 1989).

86. *Id.* at 1358. The New York Convention is codified at 9 U.S.C.A. §§201-208 (West Supp. 1991).

87. *Gould*, 887 F.2d at 1363.

88. *Id.* at 1364 citing Lewis, *supra* note 40, at 546.

89. See Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891, 919 (1990). A written application pursuant to Article 40 of the ICJ Statute would also seem to qualify. See *infra* pages 75-76.

90. *Gould*, 887 F.2d at 1365.

91. I.C.J. Statute, *supra* note 2, Art. 27.

any party.”<sup>92</sup> Thus, because an ICJ judgment is “final and without appeal,” it is intrinsic that the judgment is “non-national” — i.e., without appeal to a domestic court.<sup>93</sup> The *Gould* holding that “an award need not be made ‘under a national law’ ” to be enforced under the New York Convention is therefore of immense importance to enforcing an ICJ Chamber award under the Convention.<sup>94</sup> Hence, because an ICJ Chamber is more characteristic of international arbitration — through the parties’ ability to determine the panel, the applicable law, and the rules of procedure — than is the Iran - U.S. Tribunal, and because it satisfies the requisites of the New York Convention as outlined in the *Gould* case, there appears to be no sound reason for prohibiting ICJ Chamber awards from being enforced under the New York Convention.

### B. Enforcing ICSID

In contrast to practice under the Iran - U.S. Tribunal, awards issued by ICSID arbitrations are not enforced under the New York Convention, but through the ICSID Convention itself as implemented by domestic legislation in the Contracting States. Article 54(1) of the ICSID Convention requires that:

Each 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.<sup>95</sup>

The legislation implementing Article 54(1) in the United States is codified at 22 U.S.C. § 1650(a) (1988). When presented to the Senate

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92. I.C.J. Statute, *supra* note 2, Art. 60.

93. A great deal has been written on “non-national” or “a-national” awards. For a more detailed discussion *see* Lewis, *supra* note 40, at 550; Caron, *supra* note 40, at 116-126; Hanessian, *supra* note 51, at 344; Lake & Dana, *supra* note 40, at 755, 796-800; Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1989); Van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 I.C.S.I.D. Rev. 439, 442 (1987).

94. Also of importance to enforcing an ICJ Chamber award in the United States, which reserved in its acceptance to the New York Convention the reciprocal right of only enforcing awards rendered in states party to the Convention, is the *Gould* court’s recognition that the Iran - U.S. Tribunal “sits at the Hague . . . in the Netherlands, which is a contracting State.” *Gould*, 887 F.2d at 1362. Because the ICJ also sits at the Hague, the court’s statement is of obvious importance to enforcing ICJ Chamber awards under the New York Convention in United States courts.

95. I.C.S.I.D. Convention, *supra* note 45, Art. 54.

Foreign Relations Committee, the purpose of the implementing legislation was explained as follows:

[T]he convention provides that arbitral awards rendered pursuant to the convention shall be enforceable in contracting states. Actually, it is only the pecuniary obligations imposed by an arbitral award; that is, any monetary damages assessed against one of the parties, which the courts of a contracting state is obligated to enforce. . . .

The main purpose of [the bill] is to implement article 54(1) of the convention . . . [by stating that] an arbitral award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. . . . Essentially, this means that the district courts would be precluded from inquiring into the merits of the underlying controversy.<sup>96</sup>

Thus, by precluding the courts "from inquiring into the merits of the underlying controversy," ICSID arbitrations, like the ICJ Chambers, are also "non-national."<sup>97</sup> But because the ICSID Convention is specifically tailored to enforcing ICSID awards, it could not be used to enforce Chamber awards. The ICSID Convention, as well as the New York Convention, could, however, serve as a model for a similar convention for enforcing Chamber awards.

### C. *The Problem Of Sovereign Immunity*

A problem often facing a party holding an ICSID award, possibly an Iran - U.S. Tribunal award, and definitely an ICJ Chamber award,

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96. S. REP. NO. 1374, 89th Cong., 2d Sess., reprinted in 1966 U.S.C.C.A.N. 2617, 2618-19 (statement of Fred B. Smith, General Counsel, Department of the Treasury).

97. That ICSID arbitrations are "non-national" is stated in Article 53(1):  
The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

I.C.S.I.D. Convention, *supra* note 45, Article 53.

For an exhaustive look at the ICSID internal control mechanism run amuck see W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739.

is sovereign immunity. This problem is actually two-pronged: enforcing the award and executing the award.

The doctrine of sovereign immunity is invoked by a foreign state to exempt itself from the jurisdiction of another state's domestic courts.<sup>98</sup> In the United States, this doctrine is subject to the restrictions of the Foreign Sovereign Immunities Act ("FSIA").<sup>99</sup> The FSIA provides uniform standards to be employed by courts when determining whether a foreign state is immune from suit.<sup>100</sup> Section 1605(a)(1)(6) of the FSIA provides that immunity from jurisdiction is not available to a foreign state in any case:

in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . . .<sup>101</sup>

Thus, because both the New York and ICSID Conventions are treaties "in force for the United States calling for the recognition and enforcement of arbitral awards," states are precluded from seeking sovereign immunity from the jurisdiction of United States courts in cases brought under these conventions to enforce awards against them.

As for executing an arbitral award, the relevant law in the United States is 28 U.S.C. § 1610(a), the commercial activity exception to the FSIA.<sup>102</sup> Section 1610(a)(6) declares that "property in the United States of a foreign state . . . used for a commercial activity" is not immune from attachment or execution if:

the judgment is based on an order confirming an arbitral award

98. Note, *ICSID Arbitral Awards in the United States*, 18 GA. J. INT'L & COMP. L. 101, 107 (1988) [hereinafter Note, *ICSID Arbitral Awards*].

99. 28 U.S.C. §§ 1602-1611 (1988).

100. Note, *ICSID Arbitral Awards*, *supra* note 98, at 108.

101. 28 U.S.C. § 1605(a)(1) (1988); Note, *ICSID Arbitration Awards*, *supra* note 98, at 109; Note, *International Commercial Arbitration as a Model for Resolving Treaty Disputes*, 21 INT'L L. & POL. 379; 394 (1989) [hereinafter Note, *International Commercial Arbitration*].

102. "Commercial activity" is defined in the FSIA as:

either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d) (1988).



rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.<sup>103</sup>

Thus, section 1610(a) explicitly disallows sovereign immunity from execution of an arbitral award upon property used for a commercial activity. It must be noted, however, that finding property fitting within the "commercial activity" definition may remain problematic.<sup>104</sup>

The FSIA greatly alleviates the problems caused by the doctrine of sovereign immunity in enforcing and executing an award against a state in a United States court. Worldwide, however, the likelihood of enforcing and executing an award issued against a state still requires cognizance of the scope and application of the doctrine of sovereign immunity in the domestic courts. As in the United States, some domestic courts will only execute an award upon those assets of a state that fit within the commercial activity exception.<sup>105</sup> Award holders are, however, theoretically able to "forum shop" for the domestic court system with the least restrictive view of sovereign immunity among the nations where assets of the debtor defendant are located.<sup>106</sup>

In addition, an explicit waiver of sovereign immunity is also a possibility. Often banks lending to states will require the adoption of a clause expressly waiving immunity from execution.<sup>107</sup> A concise version provides that: "The Borrower waives any immunity from which it could claim as a sovereign in the courts in which execution of the . . . award would be brought."<sup>108</sup> Thus, with planning and the proper drafting of an international agreement, it is possible to minimize the problems presented by the doctrine of sovereign immunity.

#### D. Three Preliminary Matters

Having reviewed the enforcement mechanisms of the Iran - U.S.

103. 28 U.S.C. § 1610(a)(6) (1988).

104. For an example of property remaining outside the definition of "commercial activity" see *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 650 F. Supp. 73, 77-78 (S.D.N.Y. 1986).

105. The United Kingdom, Belgium, and the Netherlands are among other nations that join the United States in adhering "to the restrictive view of sovereign immunity." Soley, *supra* note 45, at 542.

106. Georges R. Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38 *ARB. J.* 34, 46-48 (June 1983); Soley, *supra* note 45, at 528, 542.

107. Soley, *supra* note 45, at 542 (quoting Delaume, *The ICSID and the Banker*, *INT'L FIN. L. REV.* 9, 12 (Oct. 1983)).

108. *Id.*

Tribunal and the ICSID, conclusions may be drawn as to the appropriateness and applicability of a mechanism for enforcing awards rendered by ICJ Chambers. But first, three preliminary matters must be addressed. The first involves distinguishing the types of inter-State disputes suitable for resolution by a Chamber. The key to this distinction is recognizing the sometimes inevitable triumph of politics over adjudication.

### 1. Appropriate Disputes

In the realm of international relations, in order for a dispute to be capable of being settled by a binding decision of a third party like an ICJ Chamber, the disputants must generally have and desire to maintain a relationship of sufficient mutual benefit that anticipates continuing commercial and political intercourse between the two nations. In short, both parties must be able to justify the need for an amicable settlement of the dispute even though it may not fully reflect what they perceive as the just outcome. These disputes are exemplified by decisions to bring the cases before an ICJ Chamber through either a special agreement or a written application pursuant to Article 40 of the ICJ Statute. Of the two, a special agreement reflects the higher level of diplomatic interface by manifesting the parties' ability to agree on the issue to be decided, who is to decide it, and the law and rules by which it will be decided. A written application, however, reflects a somewhat lower level of diplomatic interface by manifesting a conciliation by the parties that the issue be permanently resolved. After such a conciliation, however, the parties are able to agree on submitting themselves to the jurisdiction of an ICJ Chamber for settling the dispute. The normal situation involves one party beginning the process by sending a written application to bring the case before a Chamber, and the other party then recognizing the benefits of resolving the matter and thus agreeing to the application.

Hence, the proper disputes to be brought before ICJ Chambers are those in which the parties are able to agree on the appropriateness of a formalized and binding settlement retained through the decision of a third party.<sup>109</sup> In contrast, those issues of such perceived national interest as to evoke visceral reactions — i.e., those flash points of world politics that defy any ability or will for third party settlement — are not within the proper domain of ICJ Chambers. These are disputes which reflect the triumph of politics, or its extension through force,

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109. This idea preempts the bringing of cases under compulsory jurisdiction in ICJ Chambers.

over adjudication. By their very nature, disputes involving armed conflict fit well within this category. Others may include issues concerning natural resources — oil issues in Mexico, for example. In reality, whether or not a dispute is appropriate for settlement by an ICJ Chamber will be determined by the reaction evoked in the parties by each particular case.

## 2. Monetary Awards Only

A second consideration of enforcing ICJ Chamber awards in domestic courts is that they be limited to pecuniary obligations. For example, Article 54(1) of the ICSID Convention requires the Contracting States to “enforce the pecuniary obligations imposed by [the] award . . . .”<sup>110</sup> Such a limitation reflects a recognition of the realistic capabilities of a mechanism to enforce and execute Chamber awards. Beyond attaching assets of the debtor State, there is little else that can be expected of a domestic court. In a hypothetical situation, if State One refuses to comply with a decision of an ICJ Chamber that it recognize its boundary with State Two to be behind a contested mountain range, a domestic court would be virtually powerless in enforcing the order. This type of situation is more appropriately within the jurisdiction of the United Nations Security Council than within the jurisdiction of a domestic court. A court would, however, be able to enforce and execute upon the same Chamber decision, subject to the limitations imposed by the doctrine of sovereign immunity, if the decision required State One to move its boundary to a point behind the contested mountain range or pay State Two Five-Hundred Million Dollars. Here, State Two could seek enforcement of its award through the normal channels provided in

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110. I.C.S.I.D. Convention, *supra* note 45, Article 54. Related to the idea of limiting enforcement of Chamber awards to pecuniary obligations is the United States and France, among others, restricting the applicability of the New York Convention to awards arising only from “commercial cases.” O’Connell, *supra* note 89, at 919. Although this reservation is likely to exclude some possible Chamber decisions from enforcement, there would certainly be others that would qualify. An example would be a dispute arising under a FCN Treaty as in the ELSI case. *Id.* See also Werner F. Ebeke & Mary E. Parker, *Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT’L LAW. 21, 48-49 (1990) (“Generally, the FCN treaty provisions are consistent with the New York Convention.”).

The United Kingdom, Belgium, Switzerland, and the Netherlands are among nations that do not have a “commercial case” reservation. O’Connell, *supra* note 89, at 919. But the possibility of some ICJ Chamber decisions being excluded from enforcement in those states with a “commercial case” reservation may point to the need of establishing a new convention for enforcing Chamber awards.

the appropriate domestic court.

### 3. Advantages Of Using Chambers

Beyond the advantages enjoyed by the parties to an ICJ Chamber stemming from their ability to determine the composition, law and rules of the Chamber, there are other advantages to be considered. One is the possibility of a Chamber being convened outside The Hague for the convenience of the parties.<sup>111</sup> Article 28 of the ICJ Statute allows that “[t]he chambers . . . may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.”<sup>112</sup> Thus, should the parties consider it useful, the Chambers could be convened in a location closer to the dispute, or in any location generally more convenient.

The implication of this possibility is not fully appreciated unless considered in conjunction with Article 31(3) of the ICJ Statute. Article 31(3) provides that if the full Court does not include a national of either party, then both parties may appoint an *ad hoc* judge to the Chamber.<sup>113</sup> This ability could be of particular benefit to the developing world. Considering the vast number of developing countries, and that the composition of the ICJ is limited to fifteen judges representing “the main forms of civilization and . . . principal legal systems of the world,”<sup>114</sup> the probability is high that neither of the two developing countries seeking to bring a case before a Chamber would be represented by a national on the Court. Thus, both nations would have the opportunity to select an *ad hoc* judge to sit on the Chamber.<sup>115</sup>

A final advantage of using an ICJ Chamber is its subsidized cost. Because the ICJ is the judicial arm of the United Nations, “the ex-

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111. Hyde, *supra* note 3, at 441. ICJ Judge Stephen Schwebel describes the Hyde article as: “What may have been the first small sound of life [for *ad hoc* Chambers] is to be found in 1968 in an innovative Note published by James Nevin Hyde.” Schwebel, *supra* note 1, at 835.

112. I.C.J. Statute, *supra* note 2, Art. 28. An interesting question that must be mentioned is whether an ICJ Chamber award rendered outside The Hague and in a state not a party to the New York Convention would be enforceable in the United States, which reserved the right of only enforcing awards rendered in a Contracting State. See *supra* note 9. The apparent and probable answer is no, that it would not be enforceable in a United States domestic court.

113. I.C.J. Statute, *supra* note 2, Art. 31.

114. I.C.J. Statute, *supra* note 2, Arts. 3 and 9.

115. It must be remembered that even if only one party is not represented by a national on the Court, that party is still able to select an *ad hoc* judge under Article 31(2). I.C.J. Statute, *supra* note 2, Art. 31.

penses of the Court [are] borne by the United Nations."<sup>116</sup> And although cost cutting is important to all nations, the subsidized cost of an ICJ Chamber is again an advantage of particular interest to developing countries. Thus, the ability to change the Chamber's location for a particular case, the propensity of many disputants being able to appoint *ad hoc* judges, and the subsidized costs of the forum present three additional advantages for utilizing ICJ Chambers to settle inter-State disputes.

### E. Enforcing Chamber Awards

With these preliminary matters addressed, we now turn to the central question of what type of mechanism would be of greatest benefit and utility for enforcing Chamber awards. Having shown that an ICJ Chamber possesses a much closer resemblance to international arbitration than does the Iran - U.S. Tribunal, there is little reason for denying that Chamber awards, like those of the Iran - U.S. Tribunal, are eligible for enforcement under the New York Convention.<sup>117</sup> The alter-

116. I.C.J. Statute, *supra* note 2, Art. 33. Article 33 states in full that: "The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly." See also Hyde, *supra* note 3, at 441; Brauer, *supra* note 27, at 475 ("In particular, the salaries of judges and secretaries, as well as clerical costs, are paid out of the U.N. budget.").

117. An obstacle to enforcing Chamber awards under the New York Convention is the formalistic point that the ICJ, and therefore its Chambers, is generally viewed as a court, not an arbitral panel. Indeed, the very name, International *Court* of Justice, seems to dictate that a Chamber award would not be enforceable under a convention specifically entitled "The Convention on the Recognition and Enforcement of Foreign *Arbitral* Awards." Interview with Barry E. Carter, Professor of Law, Georgetown University Law Center (April 22, 1991). This article, however, attempts to demonstrate that such a consistency to form is inappropriate in light of the substantive workings of the Chambers, especially in comparison to the Iran - U.S. Tribunal. Beyond this reasoning, however, only two comments remain.

First, the New York Convention does not define arbitration. The Random House College Dictionary (Revised Edition, 1984), however, defines arbitration as "the hearing and determining of a dispute between parties by a person or persons chosen or agreed to by them." By this definition, an ICJ Chamber, because of the parties' ability to choose through Articles 26 and 31 the judges to hear their dispute, is a better example of arbitration than the Iran - U.S. Tribunal. Second, although Article II(1) of the Claims Settlement Declaration mandates establishing "an International Arbitral Tribunal," the official title is the Iran - United States Claims Tribunal. I.A.L.R. 2,364 (Feb. 6, 1981). Turning again to the Random House College Dictionary, tribunal is defined as "a court of justice." Thus, with these definitions in mind, the fact that an ICJ Chamber more greatly resembles arbitration in substance than in form may not present an insurmountable problem for enforcing Chamber awards under the New York Convention. It does, however, present extra evidence for establishing a new con-

native would be to create a new convention to mandate the enforcement of Chamber awards.<sup>118</sup>

The biggest advantage of using the New York Convention is its immediate availability. An ICJ Chamber could issue a monetary award arising from a commercial dispute,<sup>119</sup> and as soon as it became evident that Nation A refused to abide by the award, Nation B could bring an action in the domestic court of any Contracting State to the New York Convention. Assuming the existence of assets of Nation A in the Contracting State and that claims of sovereign immunity would not apply for executing the award, the judgment could be satisfied.

As discussed above, the *Gould* decision concluded that awards entered by the Iran - U.S. Tribunal were enforceable under the New York Convention by holding that the Algiers Accords satisfied the "agreement in writing" requirement of Article II,<sup>120</sup> and that the Convention did not prohibit enforcing "non-national" awards.<sup>121</sup> By comparing the Iran - U.S. Tribunal with the ICJ Chambers in conjunction with *Gould*, it is apparent that enforcing Chamber awards under the New York Convention is the next logical step — especially in light of the abundance of characteristics shared by the ICJ Chambers and traditional notions of international arbitration. For these reasons, using the New York Convention for enforcing Chamber awards could become widely recognized.

In fact, enforcement of ICJ Chamber awards may be becoming an

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vention for enforcing Chamber awards.

118. Either the New York Convention or the ICSID Convention could serve as useful models for creating a new convention for enforcing Chamber awards. The idea of using the ICSID Convention as a model for enforcing the ICJ has been gathering dust since at least 1971 when it was proposed by W. Michael Reisman. See W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 672-73 (1971). Reisman proposed that:

Article 54 of the Convention on the Settlement of Investment Disputes is an appropriate model for rendering judgments of the International Court enforceable *eo ipso* in municipal courts. . . . The measure could be further facilitated by appropriate internal implementing legislation by each contracting state.

*Id.*; see *supra* note 95 and accompanying text for Article 54. Perhaps now is an appropriate time to dust off Reisman's idea and put it to use.

119. A "commercial dispute" is provided as the example in order to avoid problems connected with the "commercial case" reservation found in some states. See *supra* note 110. A hypothetical commercial dispute before an ICJ Chamber could involve Nation A arbitrarily denying Nation B's national airline landing rights and thus violating a treaty between them.

120. See *supra* note 87 and accompanying text.

121. See *supra* note 90 and accompanying text.

international norm. In a 1988 Court of Appeals case holding that private parties do not have a cause of action to enforce ICJ decisions in U.S. courts,<sup>122</sup> Judge Mikva stated in dicta that:

[i]n special agreement cases — in which both parties to a dispute simultaneously submit to the ICJ's jurisdiction — adherence to the Court's judgment may well be the norm . . . accepted and recognized by the international community of States . . . from which no derogation is permitted.<sup>123</sup>

Thus, if adherence to special agreement cases has become an international norm, then enforcement of Chamber cases brought by special agreement may also have become an international norm and thus readily, if not obligatorily, enforceable under the New York Convention.<sup>124</sup>

But, in spite of Judge Mikva's comment, the problem remains that courts in some of the Contracting States may resist making the leap to enforcing Chamber awards under the New York Convention.<sup>125</sup> For this reason, a better mechanism for enforcing Chamber awards may be found in drafting and ratifying a new convention. A Convention on the Enforcement and Execution of Chamber Awards could be created under U.N. auspices requiring the Signatory Nations to enforce and execute the pecuniary obligations of ICJ Chamber awards. The convention could be limited to cases involving special agreements or written applications, thus assuring that no cases be brought before a Chamber not based on mutual consent, and removing any danger of the convention being used to perpetuate harassing, politically motivated suits or disguised expropriations. Similarly, if the proposed new convention were to adopt a uniform sovereign immunity law, the problems facing an award-holder trying to execute on the assets of a nation would be

122. Committee of U.S. Citizens in *Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The court reasoned that ICJ decisions "operate between and among governments and are not enforceable by individuals having no relation to the claim that the I.C.J. has adjudicated . . ." *Id.* at 934.

123. *Id.* at 941, citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 8 I.L.M. 679.

124. Three of the four Chamber cases were brought by special agreement. They include: Gulf of Main Order, *supra* note 18, at 3; Frontier Dispute Order, *supra* note 22, at 6; and Land, Island and Maritime Order, *supra* note 22, at 10.

125. Indeed, the courts of some Contracting States may be uneasy with applying the New York Convention to the Iran - U.S. Tribunal. One can only wonder as to what would have been the outcome of *Gould* had the U.S. Government not filed a "Statement of Interest" urging Iranian access to the courts for enforcing its award. *Gould*, 887 F.2d at 1361 n.7.

greatly eased.<sup>126</sup> However, if such a uniform law remains elusive, it should not preclude the drafting of a new convention. Based on the numerous benefits enjoyed by parties using the ICJ Chambers — that is, the ability to choose the judges, law and rules determining the dispute, along with the location of the Chamber and its subsidized costs — signing and ratifying a new convention could quickly become popular within the international community.

What then is the optimum mechanism for enforcing ICJ Chamber awards — the New York Convention or a new convention? The answer almost appears to be both. Based on the major characteristics of classical international arbitration found in ICJ Chambers, especially in light of the *Gould* case and the lack of characteristics of classical international arbitration found in the Iran - U.S. Tribunal, there is every reason for utilizing the New York Convention to enforce and execute monetary awards rendered by ICJ Chambers. Indeed, given the comment of Judge Mikva, such a course may even be mandatory. However, there remains the possibility that some domestic courts will not recognize the wisdom of applying the New York Convention to awards of the ICJ Chambers. Thus, a new convention is needed to remove all doubt as to the role of domestic courts in enforcing and executing pecuniary obligations of Chamber awards. States should continue to bring cases before ICJ Chambers, reassured by the strong possibility that should it be necessary to enforce the award, the New York Convention can apply. At the same time, however, the United Nations should focus on creating a new convention specifically mandating the enforcement of Chamber awards as a dictate of international law.

## V. CONCLUSION

A comparison of the ICJ Chambers, the Iran - U.S. Tribunal and the ICSID leads to the conclusion that the ICJ Chambers possesses many more characteristics of traditional international arbitration than does the Iran - U.S. Tribunal. Parties settling their dispute through the ICSID enjoy the greatest liberty in choosing the panel to hear their case, and in determining the applicable law and internal rules for resolving the matter. After the ICSID, parties before an ICJ Chamber are allowed to agree among themselves and the Court, whose approval

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126. See generally L. Weatherly Lowe, Note, *The International Law Commission's Draft Articles of the Jurisdictional Immunities of States and Their Property: The Commercial Contract Exception*, 27 COLUM. J. TRANSNAT'L L. 657 (1989) (discussing the U.N. International Law Commission's articles as attempting to conclude an international convention on sovereign immunity laws and codify the spectrum of views.)



has been readily forthcoming, on the appropriate judges, law and rules. Parties before the Iran - U.S. Tribunal are provided the least opportunity to influence their forum, being tightly confined by the Claims Settlement Declaration.

Through application of the *Gould* reasoning for enforcing the Iran - U.S. Tribunal under the New York Convention, it is apparent that the New York Convention is an equally appropriate mechanism for enforcing monetary awards of the ICJ Chambers. Indeed, if the dicta in Judge Mikva's opinion is true, i.e., that enforcing ICJ awards arising from special agreements has become an international norm, then enforcement of Chamber awards may be mandatory under international law.

Nonetheless, though the logic of enforcing Chamber awards through the New York Convention seems compelling, application of the New York Convention might be thwarted by unconvinced domestic courts. Thus, a new convention for enforcing and executing Chamber monetary awards is necessary. Such a new convention would be helpful in specifically outlining the role and responsibilities of the domestic courts. The scope of the sovereign immunity doctrine could also be addressed.

Thus, states should not hesitate to utilize the advantages of the ICJ Chambers because of the strong possibility that if judicial enforcement is necessary, the New York Convention can be found to apply. But the United Nations General Assembly should also begin drafting a new convention for enforcing Chamber awards. Such a step would further the aims of the 1972 and 1978 changes to the ICJ Rules by encouraging and facilitating the use of this potentially significant international forum.