

THE IRAN-U.S. CLAIMS TRIBUNAL: SUCCESS UNDER DURESS OR HOW HAVING YOUR ENEMY IN THE TENT IS BEST

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One measure of success solely examines level of achievement, but this method is incomplete. In order to truly measure success, one must consider not only level of achievement, but also obstacles surmounted.¹

Regardless of the method used in assessing the success of the Iran-U.S. Claims Tribunal (“Tribunal”), it is clearly a resounding success.

Applying the former albeit incomplete method, the Tribunal’s level of achievement is remarkable for its sheer volume of settled claims. In its nearly three decades of existence, the Tribunal settled claims of roughly U.S. \$3.1 billion – \$2.5 billion of it to U.S. parties.² It resolved nearly 4,700 private claims, issued 133 published decisions, and made approximately 600 awards.³

¹ Booker T. Washington, *UP FROM SLAVERY* 26 (Doubleday 1901) (“Success is to be measured not so much by the position that one has reached in life as by the obstacles which he has overcome.”)

² Quarterly Communique, Iran-U.S. Claims Tribunal (“IUSCT”) 2, No. 10/1, Jan. 29, 2010, <http://www.iusct.org/communique-english.pdf> (marked “Not an official record / For immediate release”). See Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 788 (Winter 2006). Mr. Kaplan states the total of claims settled effective Winter 2006 was U.S. \$2.5 billion. Note all references are in United States dollars. See Richard B. Bilder and John R. Crook, *Jacomijn J. Van Hoff’s Commentary on the UNCITRAL Arbitration Rules, The Application by the Iran-U.S. Claims Tribunal*, 88 AM. J. INT’L J. 193 (1994). The reviewers comment on the “lively debate” as to whether the Tribunal’s success is more modest as “lex specialis” thus not applicable to other situations, while stating it served as a “laboratory for the testing of UNCITRAL Arbitration rules” particularly as to procedural matters. But see *The Iran-United States Claims Tribunal 1981-1983* vii-iii (Richard B. Lillich, ed., Univ. of Virginia 1984). Mr. Lillich contends the Tribunal is the most momentous “arbital body in history”.

³ Iran-U.S. Claims Tribunal, Office of the Legal Adviser, Int’l Claims and Investment Disputes, U.S. Dept. of State, <http://www.state.gov/s/l/3199.htm>. Kevin T. Jacobs and Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and “Americanization” in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT’L L.J. 359, 379 (Summer 2008). Quarterly Communique, *supra* note 2, effective Dec. 31, 2009, the Tribunal announced it finalized 3,936 cases, 20 “A”, 72 “B”, 96 large, and 2,884

But it is only when you employ the latter method and also consider obstacles surmounted that a true picture of the Tribunal's success is apparent. During the entire existence of the Tribunal, the relationship between the U.S. and Iran was openly hostile and contentious. In fact, it was the hostile relationship coupled with urgent circumstances arising in 1979 that prompted the Tribunal's formation. Yet, even with this inauspicious backdrop, the Tribunal achieved a stellar resolution rate of nearly 95 percent.⁴

The Tribunal's success was not at all guaranteed. History is littered with failed negotiations between fractious sovereignties. Just ten years before the Tribunal's formation, Libya refused to arbitrate when it found itself in a situation similar to that of Iran.⁵ Further, failures arise even when sovereignties agree to negotiate, illustrated by the loss of U.S. assets following nationalization by Cuba and separately China.⁶

Another factor that could have led to failure was the Tribunal's use of as-yet unproven rules. The Tribunal adopted UNCITRAL Rules which at that time were largely

involving claims less than U.S. \$250K. See Warren Christopher and Richard M. Mosk, *The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J. 165, 171 (2007). Kaplan, *supra* note 2, at 788. Mr. Kaplan explains that "small claims" – those under U.S. \$250K – are brought by the government while nationals may bring their own claims if over this threshold. See Jacobs, *supra* note 3, at 366-68, 400. Some criticize the Tribunal for pushing international arbitration towards "Americanization." The trend towards Americanization tends to increase costs and proceeding duration. At the same time, critics concede that since international deliberations are "confidential," criticism specific to the Tribunal is not based upon empirical evidence.

⁴ Charles N. Brower and Jason D. Brueschke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 657 (Martinus Nijhoff 1998).

⁵ Jacobs, *supra* note 3, at 379. See Brower, *supra* note 4. The authors dubbed the Tribunal a "Surprising Success" in the face of countless crises such as the 1987 sinking of the Iranian ship, the Ajar, the downing in 1988 by the USS Vincennes of the Iranian Airbus, destruction of Iranian oil platforms, festering doubts over Iran's role in the hostage taking in Lebanon, and the Iran-Contra Affair – all at a time absent diplomatic relations and during the Tribunal's first decade.

⁶ Kaplan, *supra* note 2, at 791.

untested in an international forum.⁷ Just five years old when adopted by the Tribunal, the Rules were in effect in their infancy.⁸

Finally, another factor that could easily have led to failure was the circumstance leading to the Tribunal's formation. Rather than a concept arising from repose and contemplation, the Tribunal was conceived as a means to resolve a crisis, one that could easily have escalated into armed conflict.⁹ Such conditions are not typically conducive to thoughtful implementation. Yet, as illustrated by the preceding factual results, the gamble paid off despite the foregoing substantial risks.

So what does the Tribunal mean to us now? On the most basic level, the Tribunal can be parlayed in other international dispute fora¹⁰ as a “watershed in international arbitration.”¹¹ More importantly, the Tribunal's form is the best way to resolve international disputes in which the parties' have antithetical legal systems. It should be used as the model to resolve disputes arising from the growing divide, currently the topic of some scholarly and diplomatic debate, between countries with Islamic law and those with secular law systems.¹² Finally, rather than U.S.-domestic

⁷ Darius Adam Marzec, *The New Iraq: Resolving Public and Private Obligations Incurred Under Saddam Hussein's Rule in the Context of International Arbitration*, 7 CARDOZO J. CONFLICT RESOL. 163, 186 (Fall 2005).

⁸ U.N. UNCITRAL Arbitration Rules (1976), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. See Ronald A. Brand, *UNCITRAL Arbitration Rules*, INT'L ECON. L. DOC., Intro. & Bibliog. VIII-E-1 (1991). Mr. Brand notes that while the rules were established in 1966, they were actually adopted both by the UNCITRAL Commission at its 9th Session and unanimous approval of the UN General Assembly in 1976.

⁹ Lillich, *supra* note 2. Sept. of 1980 marked the onset of the Iran-Iraq War. Christopher, *supra* note 3, at 174.

¹⁰ Kaplan, *supra* note 2, at 769-70. Mr. Kaplan argues that the best practices garnered from the Tribunal can be put to good use in improving international dispute resolution between Chinese and U.S. parties.

¹¹ *Id.* at 788.

¹² Bernard Rudden, *Legal Systems*, Legal Info. Inst., Cornell U. L. Sch., http://topics.law.cornell.edu/wex/legal_systems. See Marzec, *supra* note 7, at 195. Mr. Marzec comments that in “the context of Muslim law and jurisprudence, the general principles of law are shared by all cultures and their source is not exclusive to any legal system...and it is consequently wrong for an international arbitrator who has to apply these general principles in a multicultural dispute to refer only to their Western source” (citing PCA

courts, the Tribunal should be the sole resolution forum for all claims brought by U.S. nationals against Iran, including allegations premised on Iran's support of terrorism.

Historical Overview of International Dispute Resolution Milestones:

To gain a sense of the distinctiveness of the Tribunal, it is useful to contrast it with various models that have emerged throughout history beginning with the traditional medieval model. In the traditional model, only sovereigns had authority to bring international claims.¹³ Use of the traditional model was gradually phased-out with the introduction of human rights in the modern era. In the modern era, exclusive sovereign authority was replaced with expanded authority to private parties, with an expectation that sovereignties would protect its nationals' rights: the "Modern Mass Claims Process."¹⁴

Heralding the advent of this modern international dispute resolution model was the Jay Treaty of 1794, implemented to resolve post-Revolutionary War disputes between British and U.S. parties. The Treaty authorized private parties to bring claims against U.S. federal and state parties, applied international law, and authorized impartial panels.¹⁵

International Law Seminar, Anthony Connerty, *Strengthening Relations with the Arab World through Dispute Resolution*, 99, 100 (The International Bureau of the Permanent Court of Arbitration, ed., Oct. 12, 2001).

¹³ John O'Brien, *INTERNATIONAL LAW* 642 (Cavendish 2001).

¹⁴ Jessica Bodack, *International Law for the Masses*, 15 *DUKE J. COMP. & INT'L L.* 363, 365 (2005). Ms. Bodack refers to the new model as the Modern Mass Claims Model. *Id.* at 384.

¹⁵ Barton Legum, *Federalism, NAFTA Chapter 11, and the Jay Treaty of 1794*, World Bank, Vol. 18 News from ICSID 1, 11-12 (2001),

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DC13>. Mr. Legum reminds us that John Jay was one of the authors of the Federalist Papers and also the first Chief Justice of the U.S. But see Lillich, *supra* note 2. Mr. Lillich argues the Tribunal outshines both the Jay Treaty and the Alabama Arbitration.

The Alabama Arbitration of 1872, a component of the post-Civil War Treaty of Washington, marks another evolutionary milestone in international dispute resolution. The Treaty of Washington was to resolve disputes arising from Great Britain's violation of its obligation to remain neutral by supplying the Confederacy. Viewed as a resounding success, the Alabama Arbitration was emulated in later dispute resolutions. It was also reflected in the establishment of The Hague Conference of 1899 and Permanent Court of Arbitration.¹⁶

Founding of the Tribunal:

Events surrounding the Islamic Revolution in 1979 led to openly-hostile relations between the U.S. and Iran. But the contentious relationship between the two countries was a marked departure from longstanding relations. Prior to 1979, the U.S.-Iran relationship was one of rapprochement in which business transactions, finance and commerce flourished. Contrasting commercial volume pre- and post-Revolution illustrates the dramatic change in this relationship. Just one year before the Revolution, commercial transactions totaled U.S. \$5.7 billion. Compare this to the level post-Revolution of U.S. \$501 million to see the extent to which the relationship had soured.¹⁷

The souring of the relationship and the need for the Tribunal was precipitated by disastrous events following the Islamic Revolution.¹⁸ These events began with the

¹⁶ O'Brien, *supra* note 13.

¹⁷ Lillich, *supra* note 2, at 2 (David P. Stewart and Laura B. Sherman's Chap. I: Developments at the Iran-United States Claims Tribunal: 1981-1983 2 (citing Bureau of Census, Dep't of Commerce, Highlights of U.S. Imports and Exports 37, 87 (1981))).

¹⁸ Christopher, *supra* note 3, at 165. Mr. Christopher includes in the "Chronology of Events Affecting the Iranian Hostage Crisis" meddling with Iranian leadership (e.g., the ouster of Prime Minister Mohammad Mosadegh and replacement with Mohammed Reza Pahlavi and consequent execution of the Treaty of Amity in 1953). See Kaplan, *supra* note 2, at FN134. Mr. Kaplan raises a critical point: one of the benefits of the Tribunal was that it

taking of the U.S. Embassy in Tehran and ensuing crisis in which 52 Americans were held hostage for more than a year. This prompted a series of portentous actions. First, the U.S. announced it would halt Iranian oil imports.¹⁹ Subsequently, the U.S. froze U.S. \$12 billion in Iranian assets, effectively removing them from Iran's reach.²⁰ Iran nationalized U.S. assets and repudiated foreign contracts. These actions brought economic disaster to the many parties affected.²¹

Critically, these actions did nothing to resolve the hostage crisis (although the frozen assets provided effective leverage in subsequent negotiations).²² In recognition of the critical importance of resolving the hostage crisis, intermediary Algeria stepped up to the plate with a diplomatic team that ultimately spear-headed their release. Release of the hostages was effectuated through binding arbitration which culminated in the 1981 Algiers Accords ("Accords"), the primary objective of which was to release the hostages.²³ Two Declarations constitute the Accords, the first of which arranged the release. The second, the Claims Settlement Agreement, instituted the Tribunal in The Hague in the Netherlands.²⁴

The Tribunal at Work: Best Practices Plus "Grand Design" Innovations:

precluded armed conflict or meddling. See Jacobs, *supra* note 3, at 375. Mr. Jacobs notes that Iran was the first Middle Eastern country to nationalize assets of its exclusive foreign investor, British Petroleum, in 1951 after failed profit-sharing negotiations. See also PETER HOPKIRK, *THE GREAT GAME: ON SECRET SERVICE IN HIGH ASIA 2-3* (Oxford Univ. Press 2001). Mr. Hopkirk details the competition among western nations – notably Great Britain, Russia, and the U.S. -- for Middle East resources.

¹⁹ Kaplan, *supra* note 2, at 789.

²⁰ Marzec, *supra* note 7, at 183.

²¹ Bodack, *supra* note 14, at 368.

²² Marzec, *supra* note 7, at 184.

²³ *Id.* at 183-84. See Bodack, *supra* note 14, at 368-69. Negotiations resulted in a four-item Resolution dated November 2, 1980, of the Islamic Consultative Assembly of Iran 1, <http://www.iusct.org/general-declaration.pdf>.

²⁴ Marzec, *supra* note 7, at 183-84. See Thomas E. Oehmke, *Commercial Arbitration*, 2 COM. ARB. 41:49 (2009).

Although the Tribunal reflects improvements garnered through centuries of international dispute resolution experience, it also boasts key innovations including approach (the “grand design”) to human psychology and nature, pragmatism, and common sense. The grand design incorporates “carrots and sticks” (e.g., leverage and incentive), mechanisms to curtail “slippery eel” tactics (such as delay), and other improvements.²⁵ The grand design is evident even in the Tribunal’s founding in the role of neutral third-party Algeria as broker and *compromis*.²⁶ Had the work been left to the intransigent parties, the result could easily have been doomed to failure. Conversely, having a neutral party lead the resolution effort engendered the antagonists’ belief in Tribunal impartiality.

Two of the Tribunal’s most pragmatic characteristics, its mechanisms for funding²⁷ and enforcement,²⁸ also exemplify the grand design. The escrow account is considered by many to be the most salubrious – and practical – innovation.²⁹ These funds ensured that settlement awards would actually be paid rather than result in failed, judgment-proof awards. Creation of the escrow account also furthered the Tribunal’s credibility by incentivizing the parties to participate fully to protect their “skin” in the game. Each sovereignty would understandably be reluctant to forfeit its funds, thereby assuring whole-hearted participation.

²⁵ The Tribunal’s public decisions also further its salience in contemporary international dispute resolution. These decisions have become tremendously valuable to the international community, and serve as authority in other arbitral bodies. Jacobs, *supra* note 3, at 379.

²⁶ Lillich, *supra* note 2, at 7 (David B. Stewart and Laura B. Sherman, DEVELOPMENTS AT THE IRAN-UNITED STATES CLAIMS TRIBUNAL: 1981-1983, Chap. 1).

²⁷ Marzec, *supra* note 7, at 185-86.

²⁸ *Id.* (citing Matti Pellonpää & Davgid Caron, The UNCITRAL Arbitration Rules as Interpreted and Applied 3 (1994)).

²⁹ *Id.*

The escrow account, which was established pursuant to Points II and III of the Declaration, worked in tandem with the Central Bank. Paragraph 2 of the Declaration required both countries to agree on a Central Bank to serve as depository institution for all escrow funds, with the Central Bank to be instructed by the Central Bank of Algeria.³⁰

The U.S. escrow account was funded by a transfer of gold bullion and other assets owned by Iran but held in the Federal Reserve Bank of New York.³¹ The U.S. was also required to top off the bullion by transferring other Iranian deposits, plus interest dating from year-end 1980, as escrow.³²

Rather than distributing Iranian funds outright to Iran, the Central Bank disbursed only one-half keeping the remainder in an “interest-bearing Security Account” until such time that the balance reached U.S. \$1 billion. Funds exceeding that amount would immediately be disbursed to Iran.³³

The second key pragmatic feature of the grand design, enforcement, came into play in the event Iranian funds fell below the minimum-threshold of U.S. \$500 million. In the event the balance fell below the threshold, the Central Bank would notify Iran in expectation the fund would be replenished. Note that upon closure of all Tribunal proceedings and upon the notification by the Tribunal President, the funds would be disbursed to Iran.³⁴

³⁰ Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), Jan. 19, 1981 (“Declaration”), ¶ 2, p. 2, <http://www.iusct.org/general-declaration.pdf>.

³¹ *Id.* at ¶ 4, p. 3. Provision for the Central Bank is detailed in the Declaration, ¶ 2, p. 2.

³² *Id.* at ¶ 5, p. 3, <http://www.iusct.org/general-declaration.pdf>.

³³ *Id.* at ¶ 7, p. 4, <http://www.iusct.org/general-declaration.pdf>.

³⁴ *Id.*

Several other Tribunal factors exemplify the grand design by furthering either the perception of impartiality or efficiency. The first of these factors was location: The Hague in the Netherlands. International arbitration in a neutral forum makes sense, as a hearing in a third-party location absent a home-court advantage is intuitively more apt to be perceived as fair and impartial.³⁵ Critically, credibility of the arbitration rests on the perception of impartiality.³⁶ But, the Tribunal was not located in just any third-party country. It was instead situated in the Netherlands, with its longstanding reputation for neutrality itself furthering the Tribunal's impartiality. The choice of third-party neutral Netherlands, no doubt deliberate, went a long way toward solidifying the effort's legitimacy and credibility right out of the starting gate.³⁷

Another characteristic of the Tribunal's grand design was that of limiting "slippery eel" delay tactics. For example, rather than delay until the permanent facility in The Hague was complete in 1982, initial proceedings were heard in temporary quarters in the Peace Palace.³⁸

However, the overall effectiveness of these efforts to limit delay is unclear, particularly during the early period. The Tribunal's record suggests that early-on there were delays. For example, the monthly average resolved reported in the first nine months was two while by 1986 it had risen to six.³⁹ Nonetheless, this increase would occur quite naturally as Tribunals operation would be expected to be more efficient with

³⁵ Marzec, *supra* note 7, at 187.

³⁶ Kaplan, *supra* note 2, at 792.

³⁷ *Id.* at 791-792.

³⁸ Jacobs, *supra* note 3, at 379. The official address is: Iran-United States Claims Tribunal, Parkweg 13, 2585 JH The Hague, The Netherlands, www.iusct.org/contact-eng.html.

³⁹ *Awards with Opinions, Corrections and Amendments by Award Number*, undated, IUCST, <http://www.iusct.org/lists/list-01.html>.

the passage of time. There is, however, evidence of foot-dragging by Iran during the early years such as its repeated use of forced arbitrator resignations to delay proceedings.⁴⁰ Another source of delay was the “small town syndrome” endemic to close-knit arbitrator communities, which led neutrals to repeatedly grant requests for time extensions predominately to Persian parties.⁴¹

Some attribute these delay tactics to Iran’s position which stood in diametric opposition to that of the U.S.: To seek compensation for nationalized assets.⁴² However, Iran too stood to gain from submitting to arbitration, to effectuate return of Iranian funds including those of the Shah. Further, Iran no doubt sought return of its Security Account funds, which would only be fully disbursed upon completion of all proceedings. Thus, the “skin” or self-interest of each sovereignty ultimately ensured full and hearty participation.

Selection of the UNCITRAL Arbitration Rules (“U-Rules”) , albeit in somewhat modified form, also reflected the grand design.⁴³ As noted earlier, the U-Rules were largely untested. Nevertheless, selection of the U-Rules made sense. The U-Rules had originally been promulgated to cultivate “harmonious international economic relations” between parties from countries with disparate “legal, social and economic systems.”⁴⁴ As to legal systems, the U.S. and Iran are ideal candidates for the U-Rules as their legal systems are indeed disparate. Iran’s is a mixed system of law based upon

⁴⁰ Bodack, *supra* note 14, at 373.

⁴¹ *Id.*

⁴² Kaplan, *supra* note 2, at 804.

⁴³ Christopher, *supra* note 3, at 172.

⁴⁴ G.A. Res. 31/98 ¶ 2, U.N. Doc. A/RES/31/98, 99th plen. sess. at 182 (Dec. 15, 1976), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/302/81/IMG/NR030281.pdf?OpenElement>.

Islamic and civil law which differs from the U.S. with its common-law system that prides itself on separation of church and state.⁴⁵

Ultimately, the Claims Settlement Declaration authorized the Tribunal's use of U-Rules, modified as stipulated by the parties.⁴⁶ The U-Rules – and the modified Tribunal Rules -- are organized into four sections: (I) Introductory rules Articles 1-4, including scope, notice, and representation; (II) Tribunal composition Articles 5-14, including number, appointment, challenge, and replacement of arbitrators, as well as procedure following replacement; (III) Proceedings Articles 15-30, including general matters, location, language, statements of claim and defense, jurisdiction, time, evidentiary rules, closure, and rules waivers; and (IV) Award Articles 31-36, including decisions, effect, settlement, interpretation, correction, additional award, costs and escrow.⁴⁷

As for modifications, Article 1 of the Tribunal Rules details general modifications.⁴⁸ A number of provisions were untouched, but where modified, specific changes are recorded within each Article along with interpretive comments. Thus, the Tribunal Rules record the delta or change between the U-Rules and the Tribunal Rules.

⁴⁵ Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems, World Leg. Sys., Univ. of Ottawa, <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php>. Iran is reported as a mixed legal system, based upon Muslim and civil law. Conversely, the U.S. law is reported as a common law legal system, with the exception of the state of Louisiana, which is premised on civil and common law. See Rudden, *supra* note 12.

⁴⁶ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America (Claims Settlement Declaration), Jan. 19, 1981, Art. III, ¶ 2, p. 2. <http://www.iusct.org/claims-settlement.pdf>. Tribunal Rules of Procedure ("Tribunal Rules") 3, May 3, 1983, <http://www.iusct.org/tribunal-rules.pdf>.

⁴⁷ UNCITRAL, *supra* note 8, rules 1-2.

⁴⁸ *Id.* at Art. 1, p. 5

This delta also evidences the grand design through its consistent effectuation of pragmatic gains. These gains include improved operating efficiency, transparency of decisions, and fiscal governance and management.

For example, as to improved operating efficiency, several modifications replace ambiguous time periods with set times.⁴⁹ These modifications attempt to limit “slippery eel” delay tactics by requiring action within a set time. To illustrate, U-Rule Article 19 left the time to Answer to the discretion of the presiding arbitrator (see paragraph 1). But the Tribunal Rule requires a response within 135 days albeit while granting discretion to extend this time as warranted. This discretion is limited, as described in the Notes section, and is to be grounded in concrete factors such as whether respondents are overburdened by a “large number” of claims).⁵⁰

Another key provision addresses panel structure, set forth in Articles 5 through 8 of the Tribunal Rules.⁵¹ Of these, only U-Rule Article 5 was modified. Article 5 of the Tribunal Rules sets the default panel at 9, called a Full Tribunal.⁵² Panels of 3, called a Chamber, were also authorized.⁵³ Additions in multiples of three could also be made.⁵⁴ Generally, the Full Tribunal heard the more momentous disputes, including those between the two governments.⁵⁵ The Full Tribunal “was the default “ but a claim could be assigned “by lot” to a Chamber for resolution.⁵⁶ A Chamber was comprised of one arbitrator from Iran, one from the U.S., and a third-party country neutral drawn from

⁴⁹ Nevertheless, the Tribunal is criticized for needless ambiguities. See Lillich, *supra* note 2, at preface.

⁵⁰ Tribunal Rules, *supra* note 46, at Art. 19, pp. 23-24.

⁵¹ *Id.* at Sec. II, pp 10-13, Composition of the Arbitral Tribunal.

⁵² *Id.* at 3(f), p. 3.

⁵³ *Id.* at 3(d), p. 3.

⁵⁴ Claims Settlement Declaration, *supra* note 46, at Art. I, ¶ 1, p. 2.

⁵⁵ Bodack, *supra* note 14, at 371.

⁵⁶ Tribunal Rules, *supra* note 46, at Note to Art. 2, ¶ 6, p. 8.

countries such as Argentina, Finland, France, Germany, Italy, Poland, Sweden, and Switzerland.⁵⁷

Each of the two governments picked one-third of the impartial arbitrators, and the final neutral third was picked by the party-selected impartial two-thirds.⁵⁸ The presiding neutral had the final say, at least when deciding a procedural issue; otherwise, the decision of the majority prevailed.⁵⁹ Commentators largely agree the role of the neutrals was essential to the Tribunal's success.⁶⁰

Conversely, the impartiality of the party-selected arbitrators has its critics. One criticism is that impartialists were partisan, and lack of standards is cited as an institutional failing. Ironically, at the same time, there is grudging admiration for the successful end-result. One rationale for this success is that since the credibility of the neutrals was high, the party-appointed "impartial" – who, by hearing, empathizing, and advocating for one side – caused that party to feel as if it were fully represented and heard in the Tribunal.⁶¹

Overall, Tribunal Rules effectively address a range of removal and replacement scenarios, always stressing effective operations and expediency. Illustrating, Tribunal Rules Articles 9 through 12 detail procedures for addressing impartial arbitrators. Of these, only Article 9 was modified to require self-disclosure to the President, and if with the President's suggestion, self-disqualification.⁶² As for removal and replacement, the

⁵⁷ Bodack, *supra* note 14, at 371.

⁵⁸ Marzec, *supra* note 7, at 185.

⁵⁹ Tribunal Rules, *supra* note 46, at Art. 31, p. 33.

⁶⁰ Kaplan, *supra* note 2, at 792.

⁶¹ *Id.*

⁶² Tribunal Rules, *supra* note 46, at Art. 9-12, pp. 13-15.

Tribunal Rules Article 13 details the process for arbitrator replacement, including the removal of the President. The provision amplifies and corrects the UNCITRAL provision to address temporary illnesses and absences for impartial, neutrals, and the President.⁶³

Expeditionness is also a key feature of Tribunal Rules, such as the requirement that parties complete their initial arbitrator appointments within three months. The selected arbitrators then had 30 days in which to appoint the final and remaining one-third – and appoint one to be Tribunal President.⁶⁴ The President had authority to determine whether the presiding panel would be a Chamber or Full Tribunal.⁶⁵

Tribunal Rules likewise effectuate finality, which is essential to institutional credibility. Once filed in the Tribunal, the claim was precluded from being heard elsewhere – in the U.S., Iran, or anywhere else. Further, filing a claim marked the ensuing Tribunal proceeding as “binding.”⁶⁶

The impact of this factor is augmented by the expansive jurisdiction of the Tribunal. The Tribunal was authorized to hear three types of claims. It had jurisdiction, first, over claims brought by nationals of one party against the opposing government. Second, it had jurisdiction to hear claims brought by a government against the opposing government. Finally, it had jurisdiction over construction of both Declarations.⁶⁷ This

⁶³ *Id.* at Art. 13, p. 16.

⁶⁴ Communiqué Regarding the Death of the President of the Tribunal, Professor Dr. Krzysztof Skubiszewski, IUSCT official website, Feb. 9, 2010, www.iusct.org/communique-2010-02-09.pdf. An early President was Judge Jose Maria Ruda. Appointed Feb. 16, 1994, the subsequent and longest-serving President Justice was Professor Skubiszewski from Poland, deceased Feb. 8, 2010.

⁶⁵ Claims Settlement Declaration, *supra* note 46, at Art. III, ¶ 1, p. 2.

⁶⁶ Background, IUSCT (undated), www.iusct.org/background-english.html.

⁶⁷ Bodack, *supra* note 14, at 369-70.

type of jurisdiction which authorizes private and governmental claims is “mixed arbitration” (which aligns with the modern view of arbitration introduced earlier in the international arbitration historical summary).⁶⁸ In effect, the Tribunal was empowered to hear all cases and make a decision which would be final.⁶⁹

Yet to be heard, a case *generally* must have been filed with the Tribunal by January 19, 1982. The case population is thus temporally set. However, there is an exception to this *prescription* generality, as disputes between the two governments involving Accords-interpretation may be brought at any time.⁷⁰ Inter-governmental claims were still being resolved as of last report.⁷¹

As to cultural issues, several differences challenged the Tribunal, and it dealt with or adapted to them in various ways. First of all, the basic rights of parity and to have one’s claim heard were authorized in Article 15 of the Tribunal Rules.⁷² Nevertheless, despite the establishment of these rights, issues surrounding these rights and the consequent need to adapt did arise. These adaptations further illustrate the grand design.

One such adaptation relates to choice of law, addressed initially in a modified U-Rule. As noted earlier, Iran and the U.S. have different legal systems, so choice of law could have been a major stumbling block. Of course, each party would advocate for

⁶⁸ *Id.*

⁶⁹ *Id.* at 372.

⁷⁰ Claims Settlement Declaration, *supra* note 46, at Art. III, ¶ 1, p. 2. Paragraphs 16 and 17 are exempt from the temporal filing deadline; paragraph 17 in the Settlement of Disputes section, pertains to interpretation of the Declaration. See <http://www.iusct.org/general-declaration.pdf>.

⁷¹ Christopher, *supra* note 3, at 171-72. See Iran-U.S. Claims Tribunal, Office of the Legal Adviser, International Claims and Investment Disputes (“ICID”), U.S. Dept. of State, <http://www.state.gov/s/l/3199.htm>. The ICID notes that cases between the governments are still being resolved.

⁷² Marzec, *supra* note 7, at 186.

use of its own law. Iran would advocate for use of its mixed system, while the U.S. would for its common law.

Choice of law is addressed in Article 33 of the Tribunal Rules, which marks a substantial departure from the UNCITRAL provision. The U-Rule authorizes the Tribunal to: (1) first seek agreement from the parties; and (2) then the tribunal decides based on conflict of laws rules. If authorized by the parties, the tribunal shall decide as *amiable compositeur* or *ex aequo et bono* – but only if the governing law allows. Further, the U-Rule requires arbitrators to abide by both contract provisions and trade usage.⁷³

Conversely, representing a major departure from the U-Rules, the Tribunal is authorized to decide based upon “respect for law, applying such choice of law ... taking into account relevant usages of the trade, contract provisions and changed circumstances.”⁷⁴ The authorization of greater discretion in determining choice of law has led to formation of a body of law called “Lex mercatoria” or international-contract law that transcends national law.⁷⁵ This important, new body of law serves the key function of establishing international contract standards.⁷⁶ Lex mercatoria is essential, first by showing parties where they agree, and second by establishing the rules that apply in those areas where they disagree. Critically, this body furthers rather than chills

⁷³ Tribunal Rules, *supra* note 46, at Art. 33, pp. 34-35. Professor William Tetley of McGill Law School defines “amiable compositeur” as discretion given to an arbitrator as to the legal principles he sees fit to apply rather than abiding by the law of any particular nation, http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/#letter_a. See Andrew K. Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims FN11 45 Va. J. Int’l L. 809 (Summer 2005). Ms. Bjorklund defines “ex aequo et bono” as “in accordance with what is just and good” as opposed to strictly following the law.

⁷⁴ Tribunal Rules, *supra* note 46, at Art. 33, p. 35.

⁷⁵ Jacobs, *supra* note 3, at 386-87.

⁷⁶ *Id.*

international commercial transactions, in all likelihood because its use cultivates outcome predictability.⁷⁷

Another example of adaptation, albeit of questionable import, was prompted by the relative autonomy of U.S.-appointed arbitrators. Iranian impartialists tended to be viewed by neutrals and U.S.-impartialists as being under governmental control. This perception appears to have caused neutrals to align more with U.S. impartialists who were seen as comparatively free of bias. Although this tendency could have undermined credibility, commentators point to the Tribunal's success, some suggesting the means justified the ends.⁷⁸

Much more successful are adaptations surrounding language differences. Experts acknowledge the importance of these requirements, which either further credibility of an international tribunal or undermine it when biased. In this light, the requirement that proceedings be conducted in both English and Farsi furthers credibility and ensures proceeding efficiency.⁷⁹

Several language-related requirements are set forth in Tribunal Rules Article 17; e.g., the tribunal's decision-making authority for selection of language, as well as mandate that all documents be provided in both languages. The Notes section enumerates document requirements, but remains unchanged from the UNCITRAL

⁷⁷ *Id.*

⁷⁸ Kaplan, *supra* note 2, at 790. There are undoubtedly other cultural gaps that remained unaddressed. For example, there is no concession to the Persian calendar such as listing date conversions. The Iranian or Jalali (variously spelled "Jalaali") calendar is solar-based. M. Heydari-Malayeri, A concise review of the Iranian calendar, copyright 2004, last updated Dec. 11, 2006, Paris Observatory, <http://aramis.obspm.fr/~heydari/divers/ir-cal-eng.pdf>.

⁷⁹ Kaplan, *supra* note 2, at 802-03. Kaplan contrasts IUCST with CIETAC arbitrations between Chinese and U.S. parties, in which Chinese is the only official language, as promoting appearance of bias and tending toward operational confusion.

version.⁸⁰ Other sections of the Tribunal Rules reinforce the dual-language requirement; e.g., the Notice Rules require the mandated documents be in both English and Farsi.⁸¹

In the area of transparency, although the Tribunal predates Sarbanes-Oxley Act (“SOX”) by decades, its fiscal management and governance provisions would have been the envy of SOX-drafters. Once again, these provisions reflect the grand design through their acknowledgement of the foibles of human nature. First, Tribunal Rules Article IV §3 provide that all Tribunal costs would be shared equally by the two parties.⁸² Non-neutral panelists had the authority to arrange for their offices, internal staff, interpreters and translators, and budget.⁸³ The importance of these provisions relates to undue influence. That is, lack of funding impinges on credibility and functionality by leaving arbitrators open to influence (human nature dictates a natural alignment with the hand that feeds). Thus, by detailing spending provisions, this practical measure was key to ensuring operations were above board.⁸⁴

As for costs of individual proceedings, Article 40 of the Tribunal Rules establishes that the unsuccessful party generally pays the costs of arbitration.⁸⁵ As a sort of insurance-policy against judgment-proof nationals, parties could request that

⁸⁰ Tribunal Rules, *supra* note 46, at Art. 17, pp. 19-20.

⁸¹ *Id.* at Art. 2, ¶ 7, p. 8.

⁸² Claims Settlement Declaration, *supra* note 46, at Art. IV, ¶ 3, p. 3.

⁸³ Marzec, *supra* note 7, at 185.

⁸⁴ Kaplan, *supra* note 2, at 803.

⁸⁵ Tribunal Rules, *supra* note 46, at Art. 40, pp. 39-40.

each party provide an equal security deposit.⁸⁶ Note that the Tribunal employs a broad definition of “national” which includes both commercial and human entities.⁸⁷

In the area of fiscal reporting and transparency, the Tribunal Rules really shine and mark a substantial departure from the UNCITRAL provisions. Article 41 of the Tribunal Rules requires provision of monthly, quarterly, and annual financial reports to the Full Tribunal and Agents (each government was required to appoint an Agent both to receive notice on behalf of the government and its instrumentalities as well as nationals).⁸⁸ Independent audits of the Tribunal books and records were also required at least annually.⁸⁹

A key transparency-related characteristic fundamental to the Tribunal’s legal legacy is that its decisions were made public. Although Arbitration **Deliberations** were strictly private, detailed in the Tribunal Rules Notes to Article 31,⁹⁰ **decisions** were required to be made public pursuant to Article 32. Paragraph 5 of the U-Rules Article 32 was modified to reflect this mandate while providing for protections of trade or military secrets.⁹¹

Final Thoughts and Recommendation:

Reportedly the world community is on a collision course with conflict arising from disparate Islamic and secular legal systems. This conflict may manifest itself in a

⁸⁶ *Id.* at Art. 41, p. 41.

⁸⁷ Claims Settlement Declaration, *supra* note 46, at Arts. VI & VII, p. 3. For the broad definition of “national” see Article VII, ¶ 1.

⁸⁸ Tribunal Rules, *supra* note 46, at Art. 41, p. 41. See Claims Settlement Declaration, *supra* note 46, at Art. VI, p. 3.

⁸⁹ *Id.* at Art. 41, p. 41-42.

⁹⁰ *Id.* at Art. 31, Notes p. 33.

⁹¹ *Id.* at Art. 32, Modifications 2 (of paragraph 5), pp. 33-34.

dispute between two different sovereignties, one with an Islamic legal system, the other with a system premised on secular law. Alternately, it may arise within the same sovereignty between two factions – one espousing one legal system, the other faction espousing the polar opposite.⁹²

The Tribunal provides the best means to redress disputes stemming from conflicts of this sort. The Tribunal is eminently credible, beginning with its inception and Algeria's role as neutral broker. Its credibility is furthered in its grand-plan approach to the vagaries of human psychology evidenced by pragmatism and adaptations to cultural differences. As such, it is the preferred forum for resolution of these disputes.

One such dispute is Rubin v. Islamic Republic of Iran ("Rubin"), a suit between U.S. nationals and Iran.⁹³ Rubin is a complex consolidated case that has for nearly a decade been litigated in multiple U.S. and international courts. The case involves tragic personal injuries suffered by several Americans from a 1997 suicide bombing in Israel. The plaintiffs won based on the uncontroverted claim that Iran supported the Hamas terrorists, and then sought to execute the judgment – but found the coffers empty. Rather than accept defeat, the plaintiffs sought U.S. museum- and university-held Persian cultural artifacts.⁹⁴

Rubin may have the unexpected consequence of putting at risk priceless Persian cultural heritage held in U.S. institutions. If successful, the art works could be sold to

⁹² Rule of Law Resource Center Staff, Malaysia: Can Shari'a and Secular Law Co-Exist? LexisNexis.com, Feb. 18, 2010, <http://law.lexisnexis.com/webcenters/RuleofLawResourceCenter/Issues-Spotlight/Malaysia-Can-Shari'a-And-Secular-Law-Co-Exist/>. Malaysia is a country with two parallel legal systems, one Islamic for Muslim citizens and the other secular.

⁹³ Rubin v. The Islamic Republic of Iran, 349 F.Supp. 2d 1108 (N.D. Ill. 2004). Campuzano v. Islamic Republic of Iran was the companion case (Campuzano v. Islamic Republic of Iran, 281 F.Supp.2d 258 (D.D.C. 2003)).

⁹⁴ Rubin, *supra* note 93, at 1110.

those who have neither the expertise nor the wherewithal to care for these irreplaceable objects.⁹⁵

Another compelling aspect of the case is the disparate positions the multiple U.S. institutions and Iran take on ownership of the artifacts. Some say they are on loan, expropriated, or in trust for the real owner Iran, while others say the holders are the owner or in the alternative, that Iran abandoned its property.⁹⁶ The terms of the agreements between Iran and the various institutions holding these artifacts vary significantly. However, the substantial passage of time since the agreements were put into place no doubt compounds obstacles, and even finding relevant documents could prove daunting. In turn, the legal issues vary depending upon the owner, resulting ownership interest and consequent ability of the claimant to sue (while as noted earlier, attributing ownership may itself be a major undertaking).

Illustrating is the position of the University of Chicago (“UChic”), which claims Iran loaned the artifacts which date from earlier than 500 B.C., during the period from 1930 through 1960. The artifacts are divided into two sets: The Choga Mish collection (“Choga”) and Persepolis Fortification Texts which includes many cylindrical seals. Once the research effort is concluded, the artifacts are to be returned. It is interesting to

⁹⁵ See Sebastian Heath and Glenn M. Schwartz, *Forum Note: Legal Threats to Cultural Exchange of Archeological Materials*, 113 Am. J. Archeology 459-62 (2009).

⁹⁶ Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in Restitution of Cultural Objects*, 16 Conn. J. Int’l L. 197, 197-198 (1992) (for discussion of categories of ownership), at 211-212 (the law normally requires stolen artifacts be returned to the owner, even when the acquirer is a bona fide purchaser, although statute of limitations can sometimes be a bar. Not surprisingly stolen arts-traffickers try to exploit jurisdictions with favorable statutes-of-limitations). See Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 Chi. J. Int’l L. 623, 625 (2007).

note that a Choga-claim was pending resolution in the Tribunal as late as 2004 (one could theorize the terms of the “loan” might not have been as clear-cut as described).⁹⁷

As to UChic-held artifacts, the plaintiffs sought execution based on the “commercial use” exception to the Foreign Sovereign Immunities Act (“FSIA”) U.S.C. 28 Chap. 97 (Jurisdictional Immunities of Foreign States).⁹⁸ FSIA normally protects a sovereignty from claims brought by a national of another state, but there are exceptions, several pursuant to Sec. 1605(a)(1)-(4). The commercial use exception states that a sovereignty effectively waives FSIA protection when it puts its artifacts to a commercial use, pursuant to 28 U.S.C. Sec. 1610(a). The plaintiffs argued that inclusion of artifact photos in UChic artbooks was evidence of commercial use.⁹⁹ However, the legal test looks to the nature of the use to decide commercial use, pursuant to 28 U.S.C. Sec. 1603(d). Applying this test to the facts, the District Court found Iran had not put the artifacts to commercial use.¹⁰⁰

The court modified its holding in a subsequent hearing in May of 2008, when it held Iran must comply with the Plaintiff’s discovery requests relating to its assets anywhere in the U.S.¹⁰¹ Soon after in June, the court affirmed its authorization for broadened discovery from named-only institutions to any U.S. museum holding Iranian

⁹⁷ Rubin, *supra* note 93, at 1110. See David Wengrow, Prehistories of Commodity Branding, *Current Anthropology* 7, Vol. 49, No. 1 (Feb. 2008), <http://www.journals.uchicago.edu/doi/pdf/10.1086/523676>. Mr. Wengrow details the significance of cylinder seals.

⁹⁸ LII, Cornell University Law School, FSIA, http://www.law.cornell.edu/uscode/28/usc_sup_01_28_10_IV_20_97.html. Another exception is when a foreign state supports terrorism which causes an injury to a U.S. national. See http://www.law.cornell.edu/uscode/28/usc_sec_28_00001605---A000-.html.

⁹⁹ Rubin, *supra* note 93, at 1111.

¹⁰⁰ *Id.* at 1113.

¹⁰¹ Rubin v. Islamic Republic of Iran, WL 2501996 (N.D. Ill. 2008) (unpublished opinion, decision modified on reconsideration by 2008 WL 2502039 (N.D. Ill. 2008)).

artifacts.¹⁰² These holdings paved the way for plaintiffs to attach Persian artifacts in several museums, including the Museum of Fine Arts in Boston and the Harvard University museums.¹⁰³

Relying on the UChic case to represent the scope and complexity of this far-reaching case, the details of other proceedings are omitted. The fact remains that the litigation is messy. The plaintiff has failed to receive an award, the parties have failed to get a speedy trial, and all parties are burdened with heavy costs and worries. The courts have been mired with frequent motions and hearings, surely adding to an already-heavy docket-load. Institutions, the scholarly community, and museum-goers stand to lose access to priceless cultural artifacts. And Iran and its people stand to lose their priceless and irreplaceable cultural heritage, if the artifacts are seized and sold to the highest bidder.¹⁰⁴

Just as the recent Choga dispute was resolved in the Tribunal, so too should Rubin. As the diplomatic impasse between Iran and the U.S. drags on, thirty years and counting, several General Declaration provisions show potential for allowing cases such as Rubin to be brought to the Tribunal without being time-barred. Paragraph 15 refers to Declaration paragraphs 12-15, 12-14 which require that U.S.-held assets belonging to the former Shah or his estate be reported to the U.S. Treasury and safeguarded.

¹⁰² Rubin v. Islamic Republic of Iran, WL 2502039 (N.D. Ill. 2008).

¹⁰³ Rubin v. Islamic Republic of Iran, 541 F.Supp.2d 416, 417 (D.Mass. 2008).

¹⁰⁴ It is important to note that the court moved to certify three questions on interlocutory appeal – typically a precursor to appeal. The first question related to section 201 of TRIA (Pub.L. No. 107-297, 116 Stat. 2322), having to do with the effect failure to have a “bona fide opinion, in writing” described in the statute has on an assessment of whether an object is a blocked asset. The second question is whether immunity under FSIA (28 U.S.C. Sec. 1609) has to be brought by the foreign state itself. Finally, the third question is whether commercial use exception for FSIA (28 U.S.C. Sec. 1610(a)(7)) must be by the foreign state in the U.S. in order to invoke the waiver of FSIA protection. Rubin, *supra* note 103 (D. Mass.), at 421.

Paragraph 16 requires that the U.S. enforce any court judgment that provides for the return to Iran of assets and/or property, to the extent that the U.S. has assets on hand. Paragraph 7 provides that the U.S. will return to Iran all Iranian-owned property held in the U.S. not covered by other provisions.¹⁰⁵ Finally, Article 21 of the Tribunal Rules authorizes the Tribunal to rule on its jurisdiction.¹⁰⁶ One or more of the provisions above could be invoked, depending upon the circumstances of the matter. Alternately, the Tribunal could be reauthorized or reformulated.

In closing, the legacy of the Tribunal is substantial. At a minimum, it provides lessons learned, best practices, and volumes of legal precedent particularly as to *Lex Mercatoria*. It could also be time to reevaluate whether the Tribunal is needed to resolve emerging disputes between sovereignties with disparate legal systems, particularly those marked by conflicts stemming from the Islamic-secular legal system divide. Mandating hostile sovereigns to come together to resolve their disputes in a constructive forum is far better than any self-help efforts that could arise; thus, the Tribunal epitomizes the saying that it is better to have your enemies in your tent than without.¹⁰⁷

¹⁰⁵ General Declaration, *supra* note 30, pp. 4-5.

¹⁰⁶ Tribunal Rules, *supra* note 46, at 25.

¹⁰⁷ Curt Gentry, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 558 (W.W. Norton & Co. 1991). The author attributes this quote to then President Lyndon B. Johnson, referring to J. Edgar Hoover.