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International Courts and Tribunals

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The most significant developments in 1998 regarding international courts and tribunals are reviewed herein, particularly events relating to the International Court of Justice, the International Tribunal for the Law of the Sea, the United Nations Compensation Commission (a quasi-tribunal), the Iran-U.S. Claims Tribunal, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Other significant developments relating to the establishment of the permanent International Criminal Court and to the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the World Trade Organization are detailed in other reports in this issue.

I. International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It is charged with the task of delivering judgments in contentious cases submitted to it by sovereign states and issuing nonbinding advisory opinions at the request of certain U.N. organs and agencies. It began 1998 (the 52nd since its first inaugural sitting on April 18, 1946) with nine contentious cases. The ICJ rendered four judgments relating to its jurisdiction and held hearings in four cases. Seventeen orders were issued. One case was discontinued and six new cases (five contentious and one advisory) were introduced in 1998. No cases were pending before any chamber of the court. This section reports briefly on the main judicial activity and decisions rendered in 1998.

A. CONTENTIOUS CASES DURING 1998

1. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom* and *Libya v. United States)*[1]

On February 27, 1998, the court delivered its judgments on the preliminary objections raised by the United Kingdom and the United States, respectively, concerning the court's jurisdiction

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1. *See* Peter H.F. Bekker, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 92 AM. J. INT'L L. 503 (1998).

and the admissibility of Libya's Application filed in both cases on March 3, 1992. The dispute, which arose out of the crash of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, involves the obligations of states parties to the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the only treaty applicable between the parties. Libya has asked the court to declare that the United Kingdom and the United States have breached the Montreal Convention through their sponsorship of certain Security Council resolutions imposing economic sanctions against Libya and through the threat of force designed to compel Libya to extradite two Libyan nationals accused by the respondent states of having placed the bomb aboard the aircraft.

The court ruled, by clear majorities, that it has jurisdiction and that Libya's application is admissible, thus allowing the case to proceed to the merits.

The court agreed with Libya that a general dispute exists between the parties as to whether the destruction of the aircraft is governed by the Montreal Convention. The court also found that specific disputes exist concerning certain provisions of the Montreal Convention relating to the place of prosecution and assistance with criminal proceedings. According to article 7 of the Montreal Convention, a state in whose territory an alleged offender is found must either prosecute that person before its domestic courts or extradite him. Libya claims that it has complied with article 7, whereas the respondent states believe that Libyan jurisdiction is contrary to binding Security Council resolutions. The court will decide this controversy in its decision on the merits.

The court also held that Libya's application is admissible. It pointed out that the critical date for such determination was the date of the filing of the application, so that binding U.N. resolutions adopted after that date relied on by the respondents had no effect on the admissibility of the application filed in each case.

Finally, the court disagreed with the respondent states that intervening Security Council resolutions had left the Libyan claims without object. The court ruled that objections are not "exclusively" preliminary, and therefore must be dealt with at the merits stage, if they contain both preliminary aspects and other aspects relating to the merits. It found that Libya's rights would constitute, in many respects, the very subject matter of a judgment on the merits, so that the related objection was inextricably interwoven, or at least closely interconnected, with the merits. The court concluded that the respondents' objection of mootness did not, in the circumstances of the case, have an exclusively preliminary character and could be considered at the merits stage.

Oil Platforms (Iran v. United States)[2]

The court's order of March 10, 1998, upheld (15-1) the admissibility as such of the counterclaim filed by the United States as part of its Counter-Memorial of June 23, 1997. The U.S. counterclaim was held to form part of the proceedings in the case brought by 'ran on November 2, 1992, concerning the destruction of certain Iranian oil platforms by the U.S. Navy in 1987-1988. The counterclaim requested a declaration by the court that in attacking ships and laying mines in the Persian Gulf and by engaging in military actions that were dangerous and detrimental to maritime commerce, Iran breached its obligations under article X of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the U.S. and Iran. The court was satisfied that the U.S. counterclaim was directly connected with the subject matter

2. *See* COMMENTARIES ON WORLD COURT DECISIONS (1987-1996) 263 (Peter Bekker ed., 1998).

of Iran's claims under the treaty's provision on freedom of commerce found to be the sole basis of the court's jurisdiction in the judgment of December 12, 1996. Moreover, the court was satisfied that the claims of both parties constitute separate claims seeking relief beyond the dismissal of the applicant's claims. Hence, the court concluded that the U.S. counterclaim is admissible as such and that it forms part of the main proceedings instituted by Iran.

Unanimously, the court directed Iran to submit a reply by September 10, 1998, and ordered the United States to file a rejoinder by November 23, 1999. At Iran's request, the court's order of December 8 extended these time limits to March 10, 1999, and November 23, 2000, respectively.

The March 10 order constitutes only the second time in the court's history that it has upheld the admissibility of counterclaims at a preliminary stage, closely following the court's decision of December 17, 1997, on Yugoslavia's counterclaims in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*.

3. *Vienna Convention on Consular Relations (Paraguay v. United States)*

On April 3, 1998, Paraguay filed an application instituting proceedings against the United States in the case of Angel Francisco Breard, a Paraguayan citizen whose execution was ordered by the Circuit Court of Arlington County. Paraguay complained that the U.S. had violated its obligations under the 1963 Vienna Convention on Consular Relations. The United States admitted that the enforcement authorities of the Commonwealth of Virginia—the state in which Breard was arrested and sentenced to death in 1993—failed to advise him of his right, under article 36(1)(b) of the Vienna Convention, to communication with, and request assistance from, the consular officers of Paraguay after his arrest. Consequently, Paraguay argued that the conviction and death penalty imposed on Breard should be revoked and that Breard should have the benefit of the protection provided by the Vienna Convention in any renewed proceedings against him. However, the United States argued that the failure to notify Breard of his rights under the Vienna Convention was not deliberate and that the assistance of Paraguayan consular officers would not have altered the outcome of the criminal proceedings. According to the United States, the remedy for any failure of notification under the Vienna Convention was diplomatic apologies presented by the responsible government, which it claimed it did in July 1997. The United States also argued that it was not able to stay Breard's execution, as this was in the hands of the U.S. Supreme Court and the Governor of Virginia.

On April 9, 1998, the court, acting under its power to indicate provisional measures of protection, issued an order ruling, unanimously, that, pending final judgment in the case, the United States should take all measures at its disposal to prevent Breard's execution on April 14, 1998. The court pointed out that the existence of the relief sought by Paraguay under the Vienna Convention could be determined only at the merits stage, so that Breard's execution would render it impossible for it to order, in a subsequent stage, the relief sought by Paraguay. This in turn would cause irreparable harm to the rights Paraguay claimed. However, the court made clear that the case does not concern the right of U.S. federal states to resort to the death penalty. In the court's view, its function is to resolve international legal disputes between sovereign states and not to act as a universal supreme court of criminal appeal. The U.S. Supreme Court declined to bar Breard's execution, which was carried out on April 14, 1998.

An order of April 9, 1998, fixed June 9, 1998, as the time limit for the filing of the Memorial by Paraguay, and September 9, 1998, for the filing of the Counter-Memorial by the United States. An order of June 9, 1998, extended these time limits to October 9, 1998, and April 9, 1999, respectively.

After Paraguay indicated to the court its desire to discontinue the proceedings in the case on November 2, 1998, the court's order of November 10, 1998, directed the removal of the case from the General List seven months and one week after its filing.

4. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*[3]

On June 11, 1998, the court rejected Nigeria's preliminary objections concerning the court's jurisdiction and the admissibility of Cameroon's application filed on March 29, 1994, and supplemented on June 6, 1994. The case was brought on the basis of declarations made by the two parties without reservations under article 36, paragraph 2 of the ICJ Statute. Cameroon has asked the court to determine the question of sovereignty over the Bakassi Peninsula and a disputed parcel of land in the area of Lake Chad. It has also asked the court to specify the land and maritime boundary between Cameroon and Nigeria and to order Nigeria to withdraw its troops from alleged Cameroonian territory in the disputed areas.

The court agreed with Cameroon that it had not acted prematurely and in disregard of certain procedural rules governing the introduction of cases based on Optional Clause declarations. The court disagreed with Nigeria that Cameroon had accepted an exclusive regional mechanism for dispute settlement, denying the exclusive competence of the "Lake Chad Basin Commission." Moreover, it found that the interests of the Republic of Chad, a third riparian state, did not constitute the very subject matter of the matter to be decided in the merits phase, so that Chad's absence did not block the proceedings.

On the basis of Nigeria's reserved position as to whether a dispute existed over the whole length of the land boundary, the court concluded that a dispute existed at least as regards the legal bases of the boundary. The court also disagreed with Nigeria that no maritime delimitation could be undertaken by the court without prior negotiations between Cameroon and Nigeria having taken place, pointing out that it was not seized pursuant to the U.N. Convention on the Law of the Sea but on the basis of condition-free declarations made under the statute's Optional Clause. Finally, the court found that Nigeria's objection, which complained that the question of maritime delimitation necessarily involved the rights and interests of third states, was not exclusively preliminary and related to the merits, given that it required a determination where exactly a prolonged maritime boundary would run and where and to what degree it would meet possible claims of other states.

5. *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*[4]

On September 3, 1998, Slovakia filed a request for an additional judgment in the case in which the court rendered its decision on September 25, 1997. According to Slovakia, Hungary has been unwilling to implement the court's decision in the case that was brought by both parties on July 2, 1993. In its decision, the court found that both Hungary and Slovakia had breached their obligations under a bilateral treaty concluded in 1977 concerning the construction of the Gabcíkovo-Nagymaros System of Locks (Treaty): Slovakia for putting into operation an alternative solution from October 1992 and Hungary for its prior unilateral suspension and abandonment of the project envisaged by the treaty.

3. *See* Peter H.F. Bekker, *Land and Maritime Boundary Between Cameroon and Nigeria*, 92 AM. J. INT'L L. 751 (1998).

4. *See* Peter Bekker, 92 AM. J. INT'L L. 273 (1998).

Under the special agreement, Hungary and Slovakia had six months to agree on the modalities for implementing the court's judgment. The parties did enter into negotiations on such modalities, which resulted in a draft framework agreement that both initialed. According to Slovakia, Hungary has disavowed the draft framework agreement. After the six-month period for reaching agreement on the execution of the court's judgment expired, Slovakia requested the court to proceed to determine the modalities for executing its judgment. Slovakia also asked the court to declare that the parties must conclude a binding framework agreement by January 1, 1999, and that they must reach a final agreement on the necessary measures to ensure the achievement of the objectives of the 1977 treaty in a separate treaty that is to enter into force by June 30, 2000. Hungary duly filed its written statement on Slovakia's request within the time limit of December 7, 1998, fixed by an order issued by senior Judge Oda on October 29, 1998.

6. *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*

On October 28, 1998, Nigeria filed a request for interpretation of the court's judgment of June 11, 1998, rejecting Nigeria's preliminary objections to the court's jurisdiction and the admissibility of Cameroon's application. This is the first time that the court has been asked to interpret a judgment on preliminary objections while the proceedings on the merits are still pending. In Nigeria's view, the judgment of June 11, 1998, does not specify which of a series of alleged border incidents to which Cameroon referred at various stages of the proceedings are to be considered as belonging to the merits of the issue of Nigeria's international responsibility. Nigeria asked the court to declare that Cameroon can only invoke alleged border incidents, and can only introduce additional facts relating to such incidents, mentioned in Cameroon's application of March 29, 1994, as supplemented on June 6, 1994.

In accordance with the procedure set out in article 98 of the Rules of Court, an order dated October 29, 1998, fixed December 3, 1998 as the time limit for Cameroon's written observations on Nigeria's request for interpretation. Cameroon duly filed such observations on November 12, 1998.

The court's jurisprudence on article 60 of the ICJ Statute indicates that two conditions must be satisfied before a request for interpretation can be held admissible: (1) there must exist a dispute as to the meaning or scope of the judgment in question; and (2) the object of the request must be to obtain clarification of the meaning and scope of what the court has decided with binding force, i.e., the request cannot aim to obtain an answer to questions not so decided.[5]

7. *Sovereignty over Pulau Ligitan and Pulau Sipadan Islands (Indonesia/Malaysia)*

On November 2, 1998, the court received a special agreement signed by Indonesia and Malaysia on May 31, 1997, and which entered into force on May 14, 1998, asking the court to determine, on the basis of treaties, agreements and other evidence furnished by the two parties, whether sovereignty over the Pulau Ligitan and Pulau Sipadan Islands in the Celebes

5. *See* Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colom./Peru), 1950 I.C.J. 395, 402; *see also* Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunis./Libyan Arab Jamahiriya) (Tunis. v. Libyan Arab Jamahiriya), 1985 I.C.J. 192.

Sea belongs to the Republic of Indonesia or to Malaysia. This is the first joint filing of a case since May 29, 1996, when Botswana and Namibia notified the court of a special agreement concerning their dispute over Kasikili/Sedudu Island.

An order of November 10, 1998, fixed November 2, 1999, and March 2, 2000, as the time limits for the filing of a memorial and a counter-memorial, respectively, by both parties.

8. *Fisheries Jurisdiction (Spain v. Canada)*

On December 4, 1998, the court ruled, by twelve votes to five, that it is without jurisdiction to adjudicate the dispute brought by Spain against Canada in 1995. Spain had requested the court to declare that the Canadian Coastal Fisheries Protection Act, as amended in 1994, and implementing regulations, are not opposable to Spain, insofar as that legislation claims to exercise jurisdiction over ships flying a foreign flag on the high seas outside Canada's 200-mile exclusive economic zone. In addition, Spain asked the court to declare that the arrest by the Canadian Navy on the high seas, on March 9, 1995, of the Spanish flag fishing vessel *ESTAI* involving the use of force violated international law and required Canada to make reparation.

Spain sought to base the court's jurisdiction on the declarations made by Spain and Canada under the Optional Clause of article 36(2) of the ICJ Statute. Canada claimed that the court lacked jurisdiction on the basis of a reservation contained in its 1994 declaration. The reservation excludes from the court's jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."

The court pointed out that the words of an Optional Clause declaration, including a reservation embodied therein, must be interpreted in a natural and reasonable way, having regard for the intention of the state making the reservation at the time when it accepted the court's compulsory jurisdiction. The declarant state's intention, in turn, may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, the circumstances of its preparation, and the purposes intended to be served. Reservations operate to define the parameters of a state's acceptance of the court's compulsory jurisdiction. The court stated that there was no basis under its jurisprudence for Spain's argument that a reservation should be interpreted in accordance with the legality under international law of the matters sought to be excluded from the court's jurisdiction. The question of legality relates to the compatibility of particular acts with international law, which can only be addressed when the court deals with the merits after having established its jurisdiction.

Emphasizing the intention of the declarant state, the court considered that the purpose of the Canadian reservation was to prevent the court from exercising jurisdiction over matters that might arise with regard to the international legality of the Canadian legislation. In the court's view, "measure" covers a law and its implementing regulations and, in order for a measure to be characterized as a "conservation and management measure," it suffices under general international law and state practice that the measure's purpose is to conserve and manage living resources (in this case, Greenland halibut) and satisfies certain technical requirements. The court noted that the Canadian reservation referred to "vessels fishing," without exception, so that Spain's argument that the reservation applied only to stateless vessels or those flying a flag of convenience ran contrary to a clear text expressing Canada's intention. Finally, the court was satisfied that the provisions of the Canadian legislation authorizing a vessel's boarding, inspection, arrest, and minimum use of force fall within the general category familiar in connec-

tion with "enforcement" of fisheries conservation measures. The court concluded that the dispute introduced by Spain constituted one "arising out of" and "concerning" "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" and "the enforcement of such measures," bringing the dispute within the terms of the reservation contained in Canada's declaration.

This is the first time since 1978, when the court dismissed Greece's application in *Aegean Sea Continental Shelf (Greece v. Turkey)*,[6] that it has found, at a preliminary stage, that it lacks jurisdiction.

9. *Kasikili/Sedudu Island (Botswana/Namibia)*

In this inter-African case brought by Special Agreement on May 29, 1996, the court, on October 1, 1998, fixed February 15, 1999, as the date for the opening of hearings on the merits of the case concerning the boundary around Kasikili/Sedudu Island and the legal status of the Island.

10. *Ahmadou Diallo (Republic of Guinea v. Democratic Republic of the Congo)*

On December 28, 1998, the Republic of Guinea filed an application exercising diplomatic protection on behalf of a Guinean businessman, Mr. Diallo Ahmadou Sadio, against the Democratic Republic of the Congo (the state formerly known as Zaire). Guinea and the Congo accepted the court's compulsory jurisdiction without reservations on February 8, 1989, and November 11, 1998, respectively. Guinea claims that Mr. Diallo, while residing in the Congo, was unjustly imprisoned by the Congolese authorities, despoiled of his sizable investments, businesses, moveable and immovable property, and bank accounts in the Congo, and then expelled from the country. At the time of his expulsion, Mr. Diallo was engaged in proceedings to recover substantial debts allegedly owed to his businesses by the Congolese State and by state-owned oil companies. Guinea has asked the court to order the Congo to pay compensation for material damages and to make an official public apology.

11. *General List*

As of the end of December 1998, the General List of ICJ cases was composed as follows: *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)* and *(Libya v. United States), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Kasikili/Sedudu Island (Botswana/Namibia), Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Nigeria v. Cameroon), Request by Slovakia for an Additional Judgment in the Case concerning Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Sovereignty over Pulau Ligitan and Pulau Sipadan Islands (Indonesia/Malaysia)* and *Ahmadou Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

6. 1978 I.C.J. 3 (Dec. 19).

B. Advisory Jurisdiction

1. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*

One advisory proceeding was instituted in 1998. On August 10, 1998, the Economic and Social Council of the United Nations filed a request for an advisory opinion on "the legal question of the applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers . . . and on the legal obligations of Malaysia in this case."

According to section 30 of the 1946 convention, known as the "General Convention," a request for an advisory opinion shall be made in case of a difference between the United Nations and a member state concerning the application or interpretation of a provision of the General Convention. The difference arose out of the denial of the Special Rapporteur's immunity from legal process, despite the Secretary-General's certification, by the Malaysian courts in civil lawsuits brought against him by Malaysian plaintiffs. These plaintiffs allege that they have been defamed by the Special Rapporteur's comments on cases in which they were victorious as part of an interview entitled "Malaysian Justice on Trial" in the November 1995 issue of *International Commercial Litigation*, a magazine published in the United Kingdom and distributed in Malaysia. Section 22 of the General Convention provides that experts on mission for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions, including, in respect of words spoken in the course of their mission, "immunity from legal process of every kind." Under section 34, Malaysia, which became a party to the General Convention in 1957, is required to "be in a position under its own law to give effect to the terms of this Convention."

In accordance with an Order of August 10, 1998, the United Nations Secretary-General, Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States filed written statements on or before the time limit of October 7, 1998. On November 6, 1998, the court had received written comments on those written statements from the Secretary-General, Costa Rica, Malaysia and the United States, together with a written communication from Luxembourg. Hearings in the case were held on December 7-8, and December 10, 1998. The court is expected to issue its opinion in the Spring of 1999.

II. The International Tribunal for the Law of the Sea

A. Institutional Aspects

The International Tribunal for the Law of the Sea was established under part XV of the United Nations Convention on the Law of the Sea. The convention, which was adopted in 1982, entered into force in 1994. As of December 31, 1998, some 130 states are parties to the convention. The tribunal is authorized to deal with a variety of international disputes, including fisheries, navigation, ocean pollution, and the delimitation of maritime zones.

The organizational work of the tribunal, which operates as an independent international judicial institution being independently funded, is divided among several internal committees, including a Committee on Budget and Finance, a Committee on Staff and Administration, and a Committee on Library and Publications.

The tribunal reconstituted its Chamber of Summary Procedure, which now consists of President Thomas Mensah (Ghana), Vice-President Ruediger Wolfrum (Germany), and Judges

Soji Yamamoto (Japan), Budislav Vukas (Croatia), and Edward Arthur Laing (Belize). Judges Joseph Akl (Lebanon) and David Anderson (United Kingdom) serve as alternate members.

On September 8, 1998, the U.N. General Assembly adopted, without a vote, Resolution 52/251 whereby the "Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea," approved by the Tribunal on March 12, 1998, entered into force. The agreement formalizes the cooperation and interaction between the United Nations and the tribunal, which was granted observer status by the General Assembly on December 17, 1996. The agreement provides for cooperation on several matters, including exchange of information, reciprocity of representation in each other's meetings, and use by the tribunal of the United Nations laissez-passer travel documents. The tribunal, which has followed the regulatory framework of the United Nations, has been part of the United Nations common system of salaries, allowances, and benefits since January 1997.

The Sixth Session of the "Meeting of States Parties to the United Nations Convention on the Law of the Sea" was held in Hamburg in September 1998. The Meeting of States Parties, to which the U.N. Secretary-General provides secretariat services, is the intergovernmental body with responsibility for the tribunal. At the Sixth Session, the tribunal made further advances in its internal organization by adopting regulations relating to its internal operations. In 1998, the tribunal established financial and staff regulations and made progress on its work on the draft Instructions for the Registry.

The financial regulations established by the tribunal will be considered by the Meeting of States Parties at the Seventh Session scheduled for February-March 1999. At the Eighth Meeting of States Parties, held at United Nations Headquarters in New York on May 18-22, 1998, the 1999 Budget of US $6,983,817, the tribunal's third regular budget, was approved. The European Communities deposited its instrument of formal confirmation of the United Nations Convention on the Law of the Sea on April 1, 1998. This means that for the first time an international organization will be contributing to the budget of the tribunal.

The privileges and immunities that the tribunal enjoys globally are governed by the Agreement on the Privileges and Immunities of the Tribunal adopted by the States Parties on May 23, 1997. This agreement was opened for signature on July 1, 1997, and will remain open until June 30, 1999. As of October 30, 1998, eight states had signed the agreement and one state had ratified it. Host state Germany and the tribunal are negotiating a headquarters agreement that is to specify the privileges and immunities that the tribunal will enjoy in the host country. In the interim, the tribunal's immunities continue to be governed by a German ordinance adopted on October 10, 1996.

The tribunal's first yearbook, covering the period from its inception in October 1996, until the end of 1997, is due to be issued in the first half of 1999.

B. Pending Cases

In the M/V SAIGA (No. 2) Case, the only case presently before the tribunal, hearings on the merits are expected to commence in early March 1999. The first round of written pleadings was completed in 1998. Saint Vincent and the Grenadines filed its Memorial on June 19, 1998, in compliance with the time limit fixed in the tribunal's order of February 23, 1998. After the president's order of September 16, 1998, extended the time limit for the filing of the counter-memorial, Guinea duly filed that document on October 16, 1998. A further order of October 6, 1998, fixed November 20, 1998, as the time limit for the reply of Saint Vincent and the Grenadines and December 28, 1998, for the filing of the rejoinder of Guinea, completing the second round of written pleadings and making the

case ready for hearing. The merits of this first case include various law of the sea related issues, including the freedom of navigation, the enforcement of customs laws, the bunkering of vessels, and the right of hot pursuit.

III. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC), created by the U.N. Security Council pursuant to Resolution 687 in 1991, is the principal international institution responsible for the processing, determination, and payment of claims against Iraq arising from the Gulf War. A number of significant developments occurred in 1998, including the payment of hundreds of millions of dollars to claimants, the first major award to the Government of Kuwait, and further progress on several precedent-setting corporate, government, and large individual claims.

A. Payment of UNCC Awards

Significant progress was made in 1998 in paying claimants. According to Norbert Wühler, Chief of Legal Services Branch at the UNCC, 2.5 million of the 2.6 million claims filed with the commission have been resolved. All of the 930,000 category "A" claims (departure claims), most of the 6,225 category "B" claims (serious personal injury or death claims), and more than 342,000 of the 420,000 category "C" claims (individual claims up to $100,000) have been resolved. The UNCC also made significant progress on the more complicated category "D" claims (individual claims in excess of $100,000), "E" claims (corporate claims), and "F" claims (government claims). Of these claims, 462 category "D" claims, totaling $89 million, fifteen category "E" claims, totaling $980 million, and twenty-seven category "F" claims, totaling $120 million, have been awarded compensation. Thus, as Wühler has noted, this year marked a turning point in the UNCC's work, with over 90 percent of the awards resolved in terms of number, but over 90 percent yet to be resolved in terms of amounts claimed. The coming years will now focus on the larger, more complex category D, E, and F claims.

B. Governing Council Decisions

1. *First Installment of E2 Claims*

In July 1998, the Governing Council of the UNCC approved the recommendations of the Panel of Commissioners appointed to review the First Installment of "E2" Claims and awarded approximately $187.5 million to four category E corporate claimants.[7] The UNCC chose to decide these four "test" cases because they presented certain threshold jurisdictional issues that are relevant to the remaining claims—notably, the issue of what constitutes a debt or obligation of Iraq arising prior to August 2, 1990, within the meaning of U.N. Security Council Resolution 687. The panel concluded that in order to determine whether a debt or obligation has arisen prior to August 2, 1990, one must devise an administrable rule to distinguish "old debt" from "new debt." To do this, the panel adopted an unusual approach that focused not on the contractual language in the contracts at issue or the parties' expected date of payment, but rather on when Iraq should have paid its obligations after discounting for the effects of the

7. *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of "E2" Claims*, U.N. Compensation Council Commission, U.N. Doc. S/AC.26/1998/7 (1998) <http://www.internationalADR.com/uncc.htm>.

Iran-Iraq War on Iraq's debt servicing capabilities.[8] On this basis, the panel concluded that the appropriate jurisdictional standard was one that focused on current performance: "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." The conclusions derived from this decision are particularly significant in that they are to be used to analyze and resolve the remaining $82 billion in claims brought by approximately 7,000 other corporate claimants from fifty countries. Another noteworthy aspect of the panel's decision addressed the question of whether compensation for contractual losses should be denied where performance of the contract violated the United Nations trade embargo established by U.N. Security Council Resolution 661. The panel concluded that it should, but that Resolution 661 only prohibited the import or export of goods or capital into or from Iraq after August 6, 1990, and not the provision of services within Iraq after the trade embargo went into effect.

IV. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal was established in 1981 to resolve disputes between the governments of Iran and the United States, and their respective nationals, arising out of the Iranian Revolution of 1979. The vast majority of claims have been resolved, but several important interpretative claims (A claims), intergovernmental claims (B claims), and claims by private parties remain outstanding. The total amount awarded to U.S. parties exceeds $2.1 billion, excluding interest, while the total amount awarded to Iran exceeds $1 billion.

A. Interpretative Claims

1. *Case A27*

On June 5, 1998, the full tribunal rendered an interpretative decision in *Case A27* addressing the question of the United States' obligation under the Algiers Accords to recognize and enforce tribunal decisions.[9] At issue was the refusal by the Second Circuit to recognize and enforce the tribunal's decision in *Avco Corp. v. Iran Aircraft Industries* on the grounds that the tribunal denied Avco the opportunity to present its claim within the meaning of article V(1)(b) of the New York Convention.[10] The tribunal noted that article IV(1) of the Claims Settlement Declaration provides that "all decisions and awards of the Tribunal shall be final and binding" and that the tribunal had previously held that the "parties to the Algiers Declarations are obligated to implement them in such a way that the awards of the Tribunal will be treated as valid and enforceable in their respective national jurisdiction."[11] On this basis the tribunal

8. Such an approach is in tension with prior UNCC jurisprudence. *See Final Report and Recommendation of the Panel of Commissioners of the United Nations Compensation Commission Concerning the Egyptian Workers' Claims (Jurisdictional Phase) (Egyptian Workers' Claims)*, U.N. Doc. S/AC.26/1997/3 (1997), and the decisions of other international tribunals. *See, e.g.*, J.I. Case Co. v. Islamic Republic of Iran, 3 Iran-U.S. Cl. Trib. Rep. 62, 65 (1983); Schering Corp. v. Islamic Republic of Iran, 5 Iran-U.S. Cl. Trib. Rep. 361, 373 (1984); Hood Corp. v. Islamic Republic of Iran, 7 Iran-U.S. Cl. Trib. Rep. 36, 42-43 (1984); Housing and Urban Services Int'l, Inc. v. Islamic Republic of Iran, Tehran Redevelopment Corp., 9 Iran-U.S. Cl. Trib. Rep. 313, 333-34 (1985).

9. *See* Avco Corp. v. Iran Aircraft Indus., 19 Iran-U.S. Cl. Trib. Rep. 200 (1998).

10. *See* Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (refusing to recognize and enforce *Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200 (1998)).

11. Iran v. United States, 14 Iran-U.S. Cl. Trib. Rep. 324 (1987).

concluded that the Second Circuit's refusal to enforce the tribunal's *Avco* award violated its obligation under the Algiers Declarations "to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States." The tribunal further held that the U.S. judiciary's refusal to recognize and enforce the tribunal's *Avco* decision was an international wrongful act that was attributable to the United States. Accordingly, the tribunal awarded $5,042,481.65 in compensation to Iran, plus interest. The United States has not yet paid this award to Iran, as it is subject to a separate writ of attachment by U.S. nationals who secured a federal court judgment in 1998 against Iran for the terrorist bus bombing in Israel in 1996.

V. Claims Resolution Tribunal for Dormant Accounts in Switzerland

The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) was established in 1998 to resolve claims relating to holocaust-era dormant Swiss bank accounts. The CRT has been described by its Chairman, Dr. Hans Michael Riemer, as an "exceptional, even unique" process in international arbitration in that it is a mass arbitration tribunal that resolves claims in a judicial case-by-case manner rather than through an administrative procedure using predetermined criteria (as is the approach of certain types of claims before the UNCC). The CRT's jurisdiction, with limited exception, is over accounts opened by non-Swiss nationals or residents that have been dormant since May 9, 1945 and that were made public by the Swiss Bankers Association on or after 1997. As of December 1998, over 9,000 claims have been made to 2,380 published dormant accounts.

The bulk of 1998 has been spent on the so-called "initial screening" procedure, a process designed to protect the banks' obligation of confidentiality to account holders. This process establishes whether a claimant has submitted any information on his or her entitlement to the dormant account or it is otherwise apparent that he or she is not entitled to the account. If the claimant does not meet this minimum threshold, the CRT will decline to disclose details about the account and, subject to a request for reconsideration, the claim will not go forward to arbitration. In 1998, approximately 90 percent of all claims considered did not go forward to arbitration because they did not pass this initial screening.

If a claim survives initial screening, it will proceed either under a "fast-track procedure" or "ordinary procedure." The former is a process in which the bank offers to settle the claim subject to confirmation by the CRT that the claimant is entitled to the account as a legitimate heir of the account holder. The ordinary procedure, by contrast, involves a full review of the claims and all available evidence in an expedited procedure. As of December 31, 1998, of the 9,000 claims submitted, approximately 1,047 claims have been classified as fast-track, while only 301 claims have been classified as ordinary procedure. It is anticipated that 1999 will complete the vast majority of the initial screenings, with the focus turning to resolving claims through fast-track and ordinary procedures.

The CRT is composed of sixteen arbitrators: Prof. Dr. H.M. Riemer (Switzerland) (Chairman), Judge Hadassa Ben-Itto (Israel), Dr. Robert Briner (Switzerland), Prof. Thomas Buergenthal (United States), L. Yves Fortier, C.C., Q.C. (Canada), Mr. David Friedmann (Israel), The Rt. Hon. The Lord Higgins (United Kingdom), Judge Howard Holtzmann (United States), Amb. Andrew J. Jacovides (Cyprus), Prof. Franz Kellerhals (Switzerland), Dr. Hans K. Nater (Switzerland), Roberts B. Owen (United States), Prof. William W. Park (United States), Mr. Doron Shorrer (Israel), The Hon. Tsevi E. Tal (Israel), and Prof. Luc Thévenoz (Switzerland).