

1984

Practical and Legal Aspects of Arbitrating Claims before the Iran-United States Claims Tribunal

Jamison M. Selby

David P. Stewart

Recommended Citation

Jamison M. Selby & David P. Stewart, *Practical and Legal Aspects of Arbitrating Claims before the Iran-United States Claims Tribunal*, 18 INT'L L. 211 (1984)

<https://scholar.smu.edu/til/vol18/iss2/3>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*

JAMISON M. SELBY AND DAVID P. STEWART†

I. Introduction

The Iran-United States Claims Tribunal in The Hague represents one of the largest and most complex international arbitration endeavors in recent times. Some of the Tribunal's accomplishments since its establishment in mid-1981, and the substance of its more important decisions to date, have been noted elsewhere.¹ Less has been said, however, about the mechanics of pursuing a claim at the Tribunal. The experiences gained over the first two and one-half years of the Tribunal's existence should provide international practitioners a measure of insight into the application of the UNCITRAL Arbitration Rules, the problems arising in multiclaim arbitrations, and the

*The authors gratefully acknowledge the assistance of Laura B. Sherman and others in the preparation of this article. The observations and opinions expressed herein, however, are the authors' and do not necessarily represent those of the Department of State or the United States Government. Moreover, the descriptions and commentary herein are intended solely as general background information based on experience to date. Because procedures may vary from case to case and because general procedural approaches may change over time, they should not be relied on as authoritative guidance for future situations.

†Ms. Selby, a member of the District of Columbia Bar, currently serves as Deputy Agent of the United States to the Iran-United States Claims Tribunal. Mr. Stewart, a member of the New York and District of Columbia Bars, is Assistant Legal Adviser and Administrator for Iranian Claims in the Department of State.

¹See Stewart and Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L LAW 1 (1983); Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal*, 38 ARB. J. 14 (1983); Leigh, *Judicial Decisions*, 77 AM. J. INT'L L. 642 (1983) and 77 AM. J. INT'L L. 891 (1983); 7 YEARBOOK COMM'L ARB. 255 (1982) and 8 Y.B. COMM'L ARB. 231 (1983); and Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984).

difficulties parties may encounter in arbitrating claims against unwilling adversaries.

This article discusses the background and organization of the Tribunal and describes the practical and procedural aspects of pursuing a claim through the various stages of arbitration. While intended in large part to inform claimants about the mechanical dimension of this particular international arbitration, the article is also aimed at providing other interested observers with a review of the Tribunal's procedures.

II. Background

A. ORGANIZATION AND CASELOAD

The Iran-United States Claims Tribunal was established by the Algiers Accords of January 19, 1981,² which brought an end to the unlawful detention of the 52 American hostages in Tehran. The Tribunal has jurisdiction to decide through binding arbitration claims of United States nationals against Iran,³ and of Iranian nationals against the United States, which arise out of debt, contract, expropriation and other measures affecting property rights.⁴ Certain "official claims" between the two governments relating to the purchase and sale of goods and services, disputes between the governments concerning the interpretation or performance of the Accords, and claims between United States and Iranian banking institutions are also within its purview; they will not, however, be discussed in detail here.

The Tribunal consists of nine arbitrators—three appointed by Iran and the United States respectively, and three others selected by the six party-appointed arbitrators.⁵ The arbitrators sit both as a Full Tribunal and in

²Four basic documents comprise the Accords, of which one, the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (the "Claims Settlement Agreement"), is the principal governing instrument with respect to the Tribunal. The other documents are: (i) the Declaration of the Government of the Democratic and Popular Republic of Algeria (the "General Declaration"); (ii) the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (the "Undertakings"); and (iii) the Escrow Agreement and related Technical Arrangement. 81 DEP'T ST. BULL. 1 (1981), reprinted in 20 I.L.M. 223 (1981).

³Many of the claims against Iran had been the subject of litigation in United States courts and had resulted in extensive attachments of Iranian assets within the United States. As a result of the Algiers Accords, these attachments were nullified, and the litigation suspended insofar as it involved claims within the Tribunal's jurisdiction. See Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

⁴Claims Settlement Agreement, article II(1).

⁵Claims Settlement Agreement, article III(1). The selection of arbitrators is governed also by Articles 6-8 of the Tribunal Rules of Procedure. In case the six party-appointed arbitrators cannot agree on one or more third-country arbitrators, either government may apply to an outside Appointing Authority to make the selection. One third-country arbitrator has been selected through this method.

Chambers (each consisting of an Iranian, United States and third-country arbitrator).⁶ A modified version of the UNCITRAL Arbitration Rules governs oral and written proceedings, which take place in English and Farsi.⁷ Iran and the United States are represented before the Tribunal by their respective Agents, through whom Tribunal documentation is served on arbitrating parties.⁸ Expenses of the Tribunal are shared equally by the two governments.

Awards of the Tribunal against Iran for private claims, other than certain bank claims, are paid from a Security Account, initially funded with \$1 billion from the Iranian assets which had been frozen in the United States. The depositary for the Security Account is a subsidiary of the Central Bank of the Netherlands, with the Algerian Central Bank acting as Escrow Agent. Both the Government of Iran and its Central Bank, Bank Markazi Iran, have an obligation promptly to replenish the Account whenever the payment of awards causes the balance to fall below \$500 million. (Two other escrow accounts were established for payment of bank claims.) Moreover, the Claims Settlement Agreement provides that "all decisions and awards of the Tribunal are final and binding" and that "any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws."⁹

The Accords themselves specified only the essential structural framework of the Tribunal, for example, the number of arbitrators, the method by which they were to be appointed, and the governing procedural rules. The task of creating a functioning organization from this basic plan proved to be substantial. The first step—selection of the party-appointed arbitrators by their respective governments—was accomplished promptly, and agreement on the three third-country arbitrators was achieved among the six within a matter of three weeks after their first meeting in mid-May.¹⁰ At the outset,

⁶See Claims Settlement Agreement, article III(1), which permits the expansion of the Tribunal to "such larger multiple of three as Iran and the United States agree are necessary to conduct its business expeditiously."

⁷Copies of the Tribunal's Rules of Procedure (hereafter "Tribunal Rules") may be obtained from the Tribunal's Registry or from the Office of Iranian Claims in the Department of State. For the text of the original United Nations Commission on International Trade Law (UNCITRAL) Rules, see 15 I.L.M. 701 (1976).

⁸Until August 1983, the United States Agent was Arthur W. Rovine, who was succeeded by John R. Crook. The Iranian Agent initially was and at present is Mohammad K. Eshragh; Asghar Kashan also served for a time as the Iranian Agent.

⁹Claims Settlement Agreement, articles IV(1) and (4).

¹⁰The Tribunal first met on July 1, 1981. The original composition was: Chamber One: Gunnar K. A. Lagergren, Chairman and Tribunal President, Howard M. Holtzmann and Mahmoud M. Kashani; Chamber Two: Pierre Bellet, Chairman, George H. Aldrich and Shatie Shafeiei; Chamber Three: Nils Mangård, Chairman, Richard M. Mosk and Seyyed Hossein Enayat. See Exec. Order No. 1, 46 Fed. Reg. 55,468 (1981). Judge Enayat resigned in January 1982 and was replaced by Judge Mostafa Jahangir Sani, who in turn resigned effective September 1983 and was replaced by Judge Parviz Ansari Moin. Judge Bellet resigned effective August

the arbitrators and Agents met in borrowed rooms at the Peace Palace, home of the International Court of Justice and the Permanent Court of Arbitration.¹¹ Because no claims could be filed before mid-October, 1981, the Tribunal was able to use these first months for such essential "house-keeping" tasks as hiring the necessary staff; making preparations to receive, file and serve the claims; resolving basic administrative, budgetary and organizational questions; and beginning to modify the UNCITRAL rules to the particular circumstances of the Tribunal.¹² A search for suitable quarters was also begun and in April, 1982 the Tribunal moved into its own building where, in addition to offices, it has two hearing rooms, as well as several conference rooms which may be reserved for settlement discussions.

Today, the Tribunal staff numbers over sixty persons. In addition to the nine legal assistants to the arbitrators, they are divided among: (i) legal clerks to each of the Chambers; (ii) the Registry, which is responsible for receiving, serving and distributing all Tribunal documentation as well as for maintaining the Tribunal's case files; (iii) Language Services, which provides the necessary English and Farsi translation and simultaneous interpretation support; (iv) secretaries; and (v) other essential building and administrative personnel. This staff is directly managed by the Secretary-General, Mr. Christopher Pinto, under the general supervision of President Lagergren and the Full Tribunal.

Under the Accords, claims could be filed with the Tribunal no earlier than October 20, 1981 and no later than January 19, 1982.¹³ Since the rules of procedure were still being revised, guidance for the preparation and submission of statements of claim was provided by Tribunal Directives.¹⁴ While the

1, 1983 and was replaced by Judge William Riphagen. Judge Mosk resigned effective January 15, 1984 and has been replaced by Judge Charles N. Brower.

¹¹The members and staff of the International Court of Justice, the Permanent Court of Arbitration and the Carnegie Foundation were instrumental in providing support in the early days. In particular, a vital role was played by Mr. Jacob Varekamp, Secretary-General of the Permanent Court of Arbitration, who not only assisted in the creation of the Tribunal but, upon request under article 7(2)(b) of the Tribunal Rules, appointed Chief Justice Moons of the Netherlands Supreme Court as the Appointing Authority.

¹²Article III(2) of the Claims Settlement Agreement states that the Tribunal shall conduct its business in accordance with the UNCITRAL Arbitration Rules "except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out." 20 I.L.M. 225 (1981).

¹³The January 19, 1982 deadline was specified by article III(4) of the Claims Settlement Agreement. To promote settlements, article I provided a six-month moratorium on the filing of claims, which at Iran's request was extended by three additional months, to October 20, 1981.

¹⁴Administrative Directive No. 1 of July 4, 1981, 46 Fed. Reg. 37,418 (1981) and Ad. Dir. No. 2, 46 Fed. Reg. 49,695 (1981). Further guidance was provided in Ad. Dirs. No. 3 of 46 Fed. Reg. 55,468 (1981) and No. 4, 46 Fed. Reg. 58,631 (1981). Claims have, in general, been adjudicated in a sequence determined by the status of the pleadings and the complexity of the issues involved, with the result that those in which Statements of Defense were received early and which do not pose major evidentiary or legal issues have often been dealt with sooner than others.

Directives were in part aimed at preventing a sudden influx of claims at the beginning or at the end of the three-month filing period, most claims were nonetheless submitted in the last few days before the deadline. In the end, some 3,835 claims were filed, the great majority of them claims by U.S. nationals against Iran.¹⁵

Over the past two and one-half years, some 300 claims (including more than twenty-five percent of the large claims of United States nationals) have been disposed of. Only one-fifth of those claims, however, were resolved by Tribunal adjudication, the remainder having been settled or voluntarily withdrawn. As of May 1, 1984, there had been 124 final or partial awards, 91 of which resulted in payment to American claimants totalling \$197 million.¹⁶ Of these 91 awards, 63 were based on settlements, totalling \$163 million and 28 represented adjudicated awards, totalling \$34 million.¹⁷ Some 37 interim or interlocutory awards had also been issued. The remaining caseload stood at 3,536, including: (i) 14 interpretive disputes, (ii) 54 official claims, (iii) 389 "large" claims and 2,719 "small" claims of United States nationals, (iv) 343 bank claims, and (v) 17 claims of Iranian nationals against the United States Government.

B. DISTINGUISHING FEATURES

While the Tribunal belongs generically to a long line of international claims commissions or mixed arbitral tribunals, its unusual origins and governing agreements give it a distinctive character. Since the historical and

¹⁵Some 520 claims for \$250,000 or more (large claims) and 2,782 claims for less than \$250,000 (small claims) were filed by or on behalf of U.S. nationals. Iranian nationals submitted 24 claims against the United States. Approximately 420 banking disputes were also filed, primarily by Iran. The Government of Iran also filed some 70 interpretive disputes and official claims against the United States; the United States has filed 20 such cases against Iran. In addition, the Government of Iran submitted some 1,400 claims against U.S. nationals (not included in the aggregate figure given in the text) which it withdrew in 1982, presumably as a result of the Tribunal's decision that it lacked jurisdiction over "direct" claims by one government against nationals of the other. See Case No. A/2 (Decision of Dec. 19, 1981), reprinted in 21 I.L.M. 78 (1982).

¹⁶While the Tribunal's proceedings and deliberations are held in private, as is normally the case in international commercial arbitration, its awards and other decisions are publicly available pursuant to art. 32(5) of the Tribunal Rules. Copies may be obtained by request to the Registry (for a fee of \$5 per document). While the Tribunal itself does not publish its awards, they normally appear in the *IRANIAN ASSETS LITIGATION REPORTER*, a biweekly publication of Andrews Publications, Inc., P.O. Box 200, Edgemont, PA 19028. In addition, Grotius Publications Ltd., a private firm, has published the texts in a series entitled the *IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS*, Volume I of which covers the period 1981-1982. Inquiries concerning the *REPORTS* may be sent to Grotius Publications Ltd., Llandysul, Dyfed SA44 4BQ, United Kingdom. A new biweekly reporter, *MEALEY'S LITIGATION REPORTS: IRANIAN CLAIMS*, put out by Mealey Publications, Inc., P.O. Box 446, Wayne, PA 19087, made its appearance in February, 1984.

¹⁷The remaining awards consisted of 15 U.S. and 5 Iranian claims dismissed on jurisdictional grounds, 11 U.S. claims dismissed on the merits, 2 voluntary withdrawals and 1 award on the merits against the United States Government.

political dimension within which it operates and its structural features determine in fundamental respects the nature of proceedings, a brief description of those aspects is important to an understanding of how individual claims may be handled.

1. *Political Dimensions*

Historically, international claims tribunals have been created at the end of a period of conflict—either after a war or some other crisis—with the goal of resolving outstanding disputes between the participating governments, in the context of resumed diplomatic and commercial relations.¹⁸ In contrast, this Tribunal was established in the midst of intense political confrontation, by governments which had (and continue to have) neither diplomatic relations nor the immediate objective of reestablishing such relations. Iran's participation in the Tribunal in no way represents any lessening of its anti-American views. Thus, the Tribunal operates against an unusual background of continued intergovernmental tension.

A second significant feature, common to claims tribunals but uncommon in private litigation or commercial arbitration, is that essentially all the private claims are related to a specific historical event, the Islamic Revolution in Iran. A major element of that revolution was its rejection of the former Shah of Iran's extensive modernization and industrialization programs, in which American and Western European companies had been significant contractual partners. As a result, hundreds of development projects were terminated, contracts abruptly breached, and investments expropriated. Thus, the Tribunal faces the task of resolving disputes representing a cross-section of U.S.-Iranian commercial and economic relations, severed at roughly the same point in time, with many factual and legal similarities and interrelationships among discrete claims.

Finally, the fact that the other party to the Tribunal and to virtually all individual claims is the Government of Iran (or one of its component agencies or controlled entities) is of particular significance. Arbitration of commercial and investment disputes between private entities on the one hand and foreign governments or governmental agencies on the other is hardly unusual. All government respondents do not, however, behave alike. The particular origins, ideology, composition and organizational structure of the current government in Iran directly affect the arbitral process. In a particular case it can also matter which Iranian agency or entity is a respondent, and how its staff has been affected by the changes which occurred as a result of the Islamic Revolution.

¹⁸See generally, *The Mixed Arbitral Tribunals Created by the Peace Treaties*, 12 BRIT. Y.B. INT'L L. 135 (1931); A. FELLER, *THE MEXICAN CLAIMS COMMISSIONS* (1935); K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946).

2. The Nature of the Tribunal

It should not be forgotten that the Tribunal is an *arbitral* body. While its proceedings cannot be strictly compared with international *ad hoc* arbitration, they nonetheless represent a process distinct from litigation in municipal courts. As described in greater detail below, the proceedings are relatively informal, without a transcript or possibility of appeal, and the rules permit considerable scope for arbitrator discretion as well as party negotiation and agreement.

The Tribunal is distinguished from the usual commercial arbitration particularly by its quasi-public nature and by the large number of cases before it. The necessity of adjudicating this caseload in an organized and expeditious manner, along with the mandatory requirements of the Algiers Accords, impose some standardization and limitation on the generally loose arbitral procedure. Thus, for example, hearings are relatively short, some matters (like jurisdiction) cannot be determined by agreement of the arbitrating parties, and the Tribunal has developed some more or less standard practices and routines.

Also as a result of the governing treaty instruments, the Tribunal has both private and public law dimensions. On one level, it is an intergovernmental institution and a creature of public international law. It was established pursuant to treaty between Iran and the United States, which as High Contracting Parties maintain an active role in the functioning of the Tribunal. Some of the claims are based on contractual arrangements between the two governments, and others involve intergovernmental disputes presenting questions of treaty interpretation normally associated with international tribunals.

On the other hand, the Tribunal in many respects resembles typical international commercial arbitration, handling ordinary commercial debt and contract claims between a private entity and a foreign governmental agency. In comparison with past intergovernmental claims commissions, this aspect is unusually pronounced: not only does the Tribunal's jurisdiction extend to debt and contract, but the claimants with the largest claims present their claims directly.¹⁹ The Tribunal's Rules are adapted from the

¹⁹In accordance with article III(3) of the Claims Settlement Agreement, claims for \$250,000 or more are presented by the claimants while those for less than \$250,000 each are presented by the respective governments. The United States filed 2,782 such claims on behalf of United States nationals. It had been the idea that these "small claims," as they have come to be known, could be resolved through a lump-sum settlement agreement of the kind the United States has frequently negotiated with other governments in the post-World War II era. In the event of such a settlement, the claims would be withdrawn from the Tribunal and adjudicated by the United States Foreign Claims Settlement Commission. However, Iran has to date been unwilling to negotiate such an agreement. At its December 1983 session, the Full Tribunal adopted a procedure anticipating the adjudication of the small claims based on test cases

UNCITRAL Arbitration Rules, which were themselves designed for private, *ad hoc* arbitration of international commercial disputes.

These two aspects—the public and the private—coexist and interact in a way which is unprecedented and, at times, unpredictable. The “public” aspect of the Tribunal has certain benefits for claimants. For example, the Claims Settlement Agreement settled some important issues claimants might normally encounter in international commercial arbitration.²⁰ Claimants have been relieved of such problems as enforcement of the agreement to arbitrate,²¹ choice of location and rules of procedure, or (in view of the Security Account and Iran’s replenishment obligation) enforcement of an award in their favor. Nor do they face the defenses of sovereign immunity or Act of State frequently raised by foreign states or government agencies. The “public” side, however, also imposes certain constraints on parties to a particular claim at the Tribunal: specific questions related to jurisdiction and procedure are substantially determined either by reference to the Accords or by the Tribunal as a whole.

The tripartite composition of the Tribunal, and its division into three separate Chambers, adds a further dimension to the process of adjudication. All private and official claims are assigned by lot to, and decided by, the Chambers, except when a case or issue is relinquished to the Full Tribunal because of its particular importance, the absence of a Chamber majority, or the possibility of inconsistent decisions among Chambers.²² From a

reflecting various categories of claims by type of legal issue and loss. Eighteen test cases have been selected, six of which are assigned to each Chamber. The Tribunal has also decided to employ three senior legal officers to work exclusively on the small claims. The additional staff and test case approach are the first steps towards the expeditious adjudication of the small claims without causing undue disruption in the work of the Chambers.

²⁰See generally, McClelland, *International Arbitration: A Practical Guide to the System of Litigation of Transnational Commercial Disputes*, 17 VA. J. INT’L LAW 729 (1977); Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL’Y INT’L BUS. 1191 (1977); Higgins, Brown and Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980); and Perlman and Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT’L LAW. 215 (1983).

²¹In some cases, Iran has filed suit in Iranian municipal court against United States nationals who have claims at the Tribunal. See Stewart and Sherman, *supra* note 1, at 31.

²²Article III(1) of the Claims Settlement Agreement empowers the president to decide whether claims are to be handled by the Full Tribunal or by the Chambers. The present system of distribution and relinquishment was established by Exec. Orders Nos. 1 and 8, of October 19, 1981 and March 24, 1982 respectively. Relinquishment has thus far occurred with respect to interpretation of the choice of forum exclusion of article II(1), determination of whether nonprofit corporations can bring claims as United States nationals, and determination of whether the Tribunal has exclusive jurisdiction over counterclaims or at least may order stay of related proceedings in Iranian courts. Cases may also be transferred among Chambers by the president “[i]f the preliminary or main issues . . . are similar,” or “if a member withdraws with respect to that case, or if a challenge of a member with respect to that case is sustained,” or “in order to maintain balance in the workload in the Tribunal as a whole.” Exec. Order No. 1, 46 Fed. Reg. 55,468, 55,469. In a number of cases, respondents have sought transfer and consolidation of cases involving different parties but related transactions. To date, a few transfers

claimant's point of view, therefore, it is the situation in a given Chamber, rather than the Tribunal as a whole, which may have the predominant effect on proceedings. Moreover, the decisive view on all questions is that of the third-country arbitrators. This factor, coupled with the lack of formal precedential effect of decisions among Chambers and of an appeal procedure, results in Chambers which distinctly reflect the particular styles, views and legal backgrounds of their respective Chairmen.

In sum, the Tribunal is an arbitral body with a deceptively simple structure. Its daily operation, however, is affected by competing political and ideological goals, by the need to accommodate the rules and practices of *ad hoc* arbitration to the caseload and design of this Tribunal, by the tension between its public and private nature, and by the composition and relation of the Chambers and Full Tribunal. In reading the following sections, which describe the mechanics of presenting a claim before the Tribunal, it may help to keep these features in mind.

III. The Sequence of Proceedings

The fundamental principle governing proceedings is, as expressed in Article 15(1) of the Tribunal Rules, that

[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality.

The Rules thus provide a relatively loose set of guidelines. Few are mandatory; all can be waived by the arbitrating parties.²³ The only strict guidelines are those provided by the Accords. Even these, however, confer on the Tribunal considerable discretion.²⁴ Within this framework, the Tribunal has

have occurred in order to bring related cases into a single Chamber, but requests for consolidation or coordination of scheduling of cases with unrelated claimants have been denied.

²³*Cf.*, article 30, Tribunal Rules. It is not possible, however, to waive mandatory requirements set forth in the Algiers Accords.

²⁴For example, the arbitrators have considerable freedom to choose the governing law. Article V of the Claims Settlement Agreement provides:

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

This provision, incorporated in article 33(1) of the Tribunal Rules, has been interpreted by one Chamber to empower the Tribunal to decide legal issues on the basis of "general principles" of law, including equitable principles, even in disregard of a contractual choice of law clause. The United States has taken the position that article V does not permit the Tribunal to render a decision on nonlegal grounds, that is, on the grounds of pure compromise or in the absence of sufficient proof. Nonetheless, the Tribunal has adopted a rule that it may decide a case "*ex aequo et bono*" if the arbitrating parties "have expressly and in writing authorized it to do so." Article 33(2), Tribunal Rules. There has been no instance to date in which arbitrating parties have given such authorization.

developed methods of operation which it finds efficient and convenient in this particular context. The arbitrators are frequently willing, however, to modify these methods to suit the desires of parties or the idiosyncracies of a given case.

Under the Tribunal's rules and practice, there are generally four stages of proceedings: (i) submission of initial pleadings, (ii) a preliminary (or pre-hearing) conference, (iii) further submission of evidence and briefs, and (iv) a hearing on the merits. These stages are not, however, invariable: the Tribunal decides whether to hold a prehearing conference and, where both parties agree, may also dispense with the hearing.²⁵ There may be a further step of post-hearing submissions; more rarely, there may be a separate briefing or hearing on jurisdictional issues, or other additional procedures. Following the hearing and submission of any additional materials called for by the Chamber, deliberation upon the award begins. Most cases result in the issuance of a single final award. Occasionally, however, the Tribunal may issue a partial or interlocutory award, followed by further deliberations or proceedings.²⁶ Parties may request interpretation or correction of an award within thirty days, but the Rules do not provide for reconsideration or appeal.²⁷

A. PRELIMINARY SUBMISSIONS

The first pleading to be submitted was a Statement of Claim, which served both as a demand for arbitration and the description of the matters at issue and relief sought. Since the Tribunal Rules were not adopted at the time claims had to be filed, these requirements were originally set forth in Administrative Directives Nos. 1 and 2,²⁸ and are now contained in Tribunal Rule 18.

Upon receipt of the Statements of Claim, the Chambers began setting deadlines for the filing of Statements of Defense by each named respondent. There was considerable dispute between the Governments regarding the amount of time which should be allowed for submission of Statements of Defense and the speed with which Statements of Defense should be sched-

²⁵As interpreted by the Tribunal, under article 15(2) of the Tribunal Rules a hearing on the merits will be held if either party requests it. Any additional hearings, for example on questions of jurisdiction, lie within the discretion of the arbitrators.

²⁶Article 32(1) of the Tribunal Rules permits interim, interlocutory, partial and final awards. Interim awards are issued regarding requests for interim relief, although a temporary interim measure, analogous to a temporary restraining order, may be embodied in a procedural order. Interlocutory awards have been used for partial determination of legal issues on the merits, leading to further proceedings. Where a partial determination is dispositive of a claim, in whole or in part, this has been reflected in a partial award.

²⁷Articles 35 and 36, Tribunal Rules.

²⁸July 4, 1981 and October 2, 1981, respectively, *supra* note 14.

uled in the claims as a whole. As finally adopted, Article 19(1) of the Tribunal Rules provided that deadlines should not exceed 135 days, with extensions only as specifically justified. However, in practice this rule has had little effect.

The Chambers have now established initial deadlines for filing Statements of Defense in all cases, but the Iranian respondents have routinely sought and been granted multiple extensions despite numerous dissents by American arbitrators. In some cases, respondents provide particular justification for their extension requests. Extensions are commonly granted, however, in response to boilerplate requests citing, for example, insufficient time, lack of competent translators, high technicality and complexity of views. In an effort to impose some restraint, orders granting third and fourth extensions may include cautionary language, to the effect that no further extensions will be granted without specific and compelling reasons. Nonetheless, at least in Chambers One and Three, further extensions may still be granted, with the respondents reminded "once again" that no further extensions will be granted without specific and compelling reasons. Most respondents in the active claims have eventually filed Statements of Defense. However, as of May 1, 1984, Iranian respondents had yet to file Statements of Defense in more than a hundred "large" claims.

Experience to date suggests that there are a few effective sanctions for delay. The rules do not provide for summary judgment in case of default, except against a nonprosecuting claimant, but rather for moving ahead with the proceedings without the respondent's participation.²⁹ The difficulty, from the claimant's point of view, has been the hesitancy of the Chairmen of the Chambers to adopt such a course. Some claimants who feel they face undue hardship as a result of delay have informed the Tribunal of their opposition to an extension as soon as they become aware of the request.³⁰ While such objections may be difficult to support in the case of a first extension, this practice has had some effect on the amount of time allowed for subsequent extensions, especially where specific arguments were made against granting the extension. Some claimants have also submitted requests under Rule 28 to continue with proceedings and to schedule a prehearing conference. It is also possible to request that deadlines be maintained at least for filing counterclaims, even if further extensions are granted for the Statement of Defense.³¹

²⁹*Cf.* article 28, Tribunal Rules.

³⁰In urgent cases submissions may be accepted in one language provided that a curative filing is made subsequently. *See infra*, notes 59 and 60.

³¹This procedure, which was developed by Chamber Two, has been applied in a very few cases, largely at the initiative of the Chamber.

Once a Statement of Defense has been filed, a Reply and frequently a Rejoinder are normally called for. Under the Tribunal Rules, the claimant has a right to file a Reply if the Statement of Defense contains a counter-claim. These additional pleadings are also commonly ordered in other cases, particularly in Chambers One and Two, to permit further comment by both parties and to clarify any specific matters which the Chamber has noted.

B. PREHEARING CONFERENCES

Following the submission of the initial pleadings, a prehearing conference is frequently scheduled. This procedural step was not expressly contemplated by the UNCITRAL Rules, but was proposed by the American arbitrators as a device to simplify and expedite proceedings in cases which appeared on the pleadings to pose complex issues. In practice, however, prehearing conferences have become the norm even in relatively simple cases. Their utility is in many cases debatable and it has been the Iranians who usually seek a prehearing conference in every case.³²

Prehearing conferences are conducted in one-half or one-day sessions in one of two hearing rooms at the Tribunal.³³ Normally, both the United States and Iranian Agents (or their Deputies or legal assistants) will be in attendance as well.³⁴ The conference is primarily for clarification and exchange of views. It is not a vehicle for decision of preliminary or jurisdictional questions.³⁵ As set forth in the standard order, the following items will normally be discussed:

- (a) clarification of the issues presented and the relief sought;
- (b) identification and clarification of any issues to be considered as preliminary questions and particularly the issue of jurisdiction;
- (c) status of any settlement discussions;
- (d) whether any further documents or written statements, including any

³²As of May 1, 1984, prehearing conferences had been held on approximately 145 claims.

³³The hearing rooms are set up for informal proceedings at U-shaped conference tables, with the arbitrators at the end and the parties flanking them on either side. Hearings or prehearing conferences in major government cases or in cases in which a large number of persons will attend may be held at the Peace Palace.

³⁴United States claimants are encouraged, prior to their first meeting with the Tribunal, to contact the Office of the United States Agent in The Hague and the Office of Iranian Claims in the Department of State in Washington, for up-to-date information on practices and procedures.

³⁵In general, jurisdictional and preliminary questions have not been decided in advance of the merits. Separate determination of such questions would result in substantial additional proceedings, largely on minor points such as corporate nationality. On rare occasions, where the issues significantly affect the course of further proceedings or where a jurisdictional question can be decided on the documents expeditiously, without the need for a hearing, preliminary or jurisdictional issues may be severed from the merits for prior decision.

reply or rejoinder, are requested by the arbitrating parties or required by the arbitral tribunal;

(e) fixing a schedule for submission by each arbitrating party of a summary of the documents or lists of witnesses or other documents it intends to present at the hearing;

(f) fixing a schedule for submission of any documents, exhibits or other evidence which the arbitral tribunal may require;

(g) desirability of appointing an expert by the arbitral tribunal and, if so, the expert's qualifications and terms of reference; whether the arbitrating parties intend to present experts and, if so, the qualification of and the areas of expertise to be covered by any such expert;

(h) determining what documentary evidence will require translation;

(i) fixing a schedule of hearings;

(j) other appropriate matters.

The largest part of the prehearing conference is normally spent on items (a) and (b)—review and clarification of the contentions of the parties, with particular attention to jurisdiction. A smaller portion is spent on further scheduling, items (c)–(i). The prehearing conference is also an appropriate place to discuss any requests for production of documents by respondents.

The prehearing conference may begin—particularly in Chambers One and Two—with the Chairman summarizing the case and relief sought, as well as issues of particular concern. The respective parties then present and explain their positions, beginning with the claimant.³⁶ There is usually a second, shorter round of comment. The presentations are informal and the arbitrators may interject questions, particularly in Chambers One and Three. Unless the Chairman indicates a more specific focus, the usual order of presentation has been as follows: (i) a description of the parties, including any associated jurisdictional questions, such as nationality; (ii) any further jurisdictional questions, (iii) the merits of the claim, and (iv) substantive defenses and counterclaims.

The most detailed discussion concerns jurisdictional questions and clarification of precisely who is claiming what against whom. The Tribunal can accept alternative theories of recovery, but is intolerant of fence-straddling, vagueness, and imprecision. Jurisdictional questions should be treated with seriousness. Claimants' representatives should be thoroughly prepared and well-versed with the relevant facts, documents, and details.³⁷

³⁶According to Tribunal protocol, the Chairman is generally addressed as "Mr. Chairman," or, in the case of President Lagergren, "Mr. President." The other arbitrators are customarily addressed as "Judge"; the term "Your Honor" is also appropriate.

³⁷In general, it is not necessary to file evidence at this stage of the proceedings except as the Chamber specifically indicates. However, it can facilitate proceedings to file at least the central documents, including contracts and proof of jurisdiction, in advance of the prehearing conference. Chamber One routinely orders the submission of evidence of United States nationality in advance of a prehearing conference.

Where the claim names multiple respondents, the claimant has been required to explain why each is named. While there are no express guidelines for who is a "proper" respondent, and the Tribunal's practice has not been altogether consistent, a few generalizations can be made. An entity has been considered a proper respondent where there is a direct theory of liability against that entity. It is therefore regarded as proper to name "the Government of Iran" for an expropriation claim and to name the specific contracting or debtor entity, even if part of the government, for a debt or contract claim. Alternative theories running against different entities have been accepted where they were clearly explained.

A particular area of confusion concerns governmental or quasi-governmental agencies. In some cases, identifying "Iran" as the respondent, without further specification of the entities or agencies involved, has raised questions. The phrase, "The Islamic Republic of Iran," has normally been taken as referring to the government only. The Tribunal generally has required that a private company controlled by Iran be named and treated as an entity separate and apart from the government. It is less clear when a government-affiliated agency should be separately named.

The Tribunal may press for elimination of "unnecessary" respondents. Such simplification may have practical benefits as each named respondent seems to feel obliged to submit its own separate filings and send representatives to hearings and prehearing conferences. In general, where respondents have been pared down, the claimant has frequently preferred to keep "the government" and drop any clearly constituent parties. This broader designation may, however, widen the scope of permissible counterclaims.

"Clarification" of the parties has in some cases revealed the desirability of correcting or amending the listed parties. Consistent with the principles of Article 20 of the Tribunal Rules, such changes are permitted "unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstance."³⁸ There is thus a risk that the Tribunal will not accept a requested amendment. Amendment at early stages in proceedings has thus far generally been permitted. Requests for significant amendments, however, are not guaranteed acceptance and should be resorted to with some caution.³⁹

³⁸See *American International Group v. The Islamic Republic of Iran*, AWD No. 93-2-3 (Dec. 19, 1983).

³⁹Amendments which have in some cases been accepted include the addition of a corporate subsidiary or parent as an additional claimant, addition of an unjust enrichment theory as an alternative theory of claim, and recalculation of invoices and payments. The Tribunal has been less accepting of outright substitutions than of additions or corrections, particularly where the amendment is not based on facts already presented in the statement of claim. Chamber One has also refused to accept an additional basis of claim presented first in a prehearing brief.

Discussion of the merits at a prehearing conference has generally been limited to clarification and general background, rather than argument. Each party is given a chance to explain its views and theories in a preliminary fashion, without having to adduce evidence of legal authority in support of every point. The arbitrators may seek, through questions, to probe for legal and factual weaknesses. Parties should be prepared to respond in a preliminary way to such probing, bearing in mind that mandatory submission of legal argument and evidence comes later.

The remaining portion of the prehearing conference has typically been devoted to further scheduling. This may include discussion of procedural steps leading to the hearing, whether a hearing is required, whether and how many witnesses might be produced, what type of evidence will be produced in what quantity and what languages, and whether experts are required. In this context, claimants may raise for discussion any document requests, since further scheduling orders may specifically identify certain documents which one or the other party is to produce.

Since the discussion of these items may be rather brief, claimants have been well-advised to make any specific requests in writing and in advance.⁴⁰ Such requests have typically concerned document production and suggestions regarding the subsequent schedule of proceedings, as questions regarding the number of copies and languages required for different items of evidence can often be handled subsequently.

A request for document production should clearly and specifically identify the documents requested and which respondent (or government office) has control of them; it should also explain why they are relevant and why the claimant does not have access to them, and describe all reasonable steps which have been taken to obtain the documents by other means. The Tribunal has on occasion inquired whether the respondent is willing to volunteer the documents, or asked the claimant to make such inquiry, before deciding whether to order production. Orders for production of limited specific documentation are not uncommon and can be useful. However, since the Tribunal has not been aggressive in making or pursuing document requests and Iranian respondents have frequently not produced the documents requested, claimants should not expect to obtain the same kind of response as they would to a discovery request in U.S. litigation.

Party views and requests for specific further procedural steps are also entertained at this stage. As described subsequently, in Chamber Two the

⁴⁰Requests and other documents submitted in anticipation of a prehearing conference should be filed no less than two weeks in advance. Sometimes a more general "Prehearing Conference Memorandum" is submitted by the claimants on their own initiative. These can be useful if they specifically address those items listed in the prehearing conference order, but, insofar as they consist of summary, restatement and reargument, they are often superfluous.

sequence of further proceedings has been somewhat standardized along lines that seem generally efficient and workable. Chambers One and Three seem more inclined to solicit the parties' views and may even suggest that they meet and try to reach agreement. Partial party agreement is not uncommon, although respondents may not subsequently adhere to their agreement.

A request for the appointment of experts may be made under Article 27 of the Tribunal Rules. Thus far, the Tribunal has appointed experts only in four complex cases; experience indicates that the process is likely to be lengthy, elaborate, and expensive.⁴¹ In the vast majority of cases, therefore, it has been preferable for the parties to supply whatever expert opinion they deem desirable. In cases involving considerable technical dispute, such as construction claims, claimants may wish to be prepared to argue why an expert should not be appointed, in case the subject is raised.

No decisions are taken during the prehearing conference itself, except insofar as the parties are in agreement on some point. An order will generally be issued within several weeks, setting the schedule for further proceedings, and possibly ordering production or inspection of documents.

C. FURTHER DOCUMENTARY SUBMISSIONS

The steps involved in submission of further evidence and legal argument following the prehearing conference have varied from Chamber to Chamber and from case to case. There may be two or more rounds of further submissions; the filings in each round may be sequential or simultaneous. The parties may be given more or less instruction as to what particular documents to file and which particular legal issues to focus on. In a few cases, a Chamber has asked for submissions only on specific jurisdictional or other fundamental issues, which it can then decide prior to scheduling further proceedings.

Chamber Two has the most standardized approach, typically a three-step schedule: (i) claimant files a summary of all evidence on which it will seek to rely, together with all documentary evidence (including affidavits) and any written briefs; (ii) respondent files the same; and (iii) both parties file any rebuttal evidence and briefs. Chambers One and Three have normally issued more varied, tailor-made orders, frequently with detailed descriptions of specific documents and types of evidence to be submitted and often setting a hearing date. Chamber One, in keeping with its general attention

⁴¹Under articles 38(1)(a) and 41(2) of the Tribunal Rules, the Tribunal may request the parties to deposit costs for experts. In those few cases where experts have been appointed, parties have been asked to make equal deposits.

to technical and jurisdictional points, is most likely to decide minor preliminary questions in its orders or to indicate its intention to decide a given jurisdictional issue (especially corporate nationality) on documents at some future time.

Experience thus far suggests the following points. First, a schedule which has too many steps invites delay, as each deadline provides a separate occasion for extension requests. Second, simultaneous filing requirements frequently cause more trouble than they are worth, as respondents resist simultaneous filing on principle and request extensions at the last possible moment, thus effectively disrupting the schedule. Third, the sophisticated planning behind a complicated schedule may be wasted, since respondents frequently seem to have difficulty making submissions in any particular order or even in advance of the hearing.

At this stage of proceedings, the problem of untimely submissions becomes increasingly critical. In most cases, claimants have (or should have) two major procedural concerns: to obtain and keep a hearing date,⁴² and to avoid or anticipate last-minute evidentiary submissions, which present the unwelcome choice between a further round of responsive filings or dispensing with rebuttal. Claimants have guarded against these more serious dangers by making timely submission of all documents well in advance of hearings, avoiding requests for extensions which disrupt the hearing schedule, generously complying with guidelines for translation of documents, and generally avoiding giving respondents any excuse for requesting extensions or further submissions.

On occasion, the schedule of further submissions and hearing have been suspended to facilitate settlement talks.⁴³ This is an area, however, which calls for particular caution. In general, the existence of a filing and hearing schedule facilitates settlement while suspension merely encourages more extended negotiations and delay. Hearings, once postponed, may be re-scheduled only much farther in the future. As a matter of procedure, it is not necessary to postpone a hearing where settlement is contemplated. Negotiations can be conducted up to and after hearings; there have even been settlement discussions conducted during coffee breaks at hearings. In a few exceptional cases, claimants have deemed it advantageous to agree to a specifically limited suspension pending settlement. In such cases, the sus-

⁴²Hearings, like prehearings, are scheduled far into the future. As of May 1, 1984, some 77 hearings had been held.

⁴³Respondents have sometimes moved unilaterally for a suspension of further proceedings on the grounds that settlement negotiations are underway or are contemplated. While this can be objected to, and has not been a major problem, some claimants have made negotiations expressly subject to maintenance of the scheduled proceedings.

pension deadline has evidently provided some motivation to arrive at a final agreement.

D. HEARINGS

Tribunal hearings are normally very brief and relatively informal, especially in comparison with trials in U.S. courts. Most cases have been scheduled for no more than one or two days, although a few major cases have taken longer. A hearing day is usually six hours—from 9:30 to 1:00 and from 3:00 or 3:30 until 6:30 or so, with two coffee breaks. Managing this limited time effectively can be difficult, since Iranian respondents insist upon equal time and can easily consume any time available with apparently uncoordinated, repetitive presentations by numerous representatives. In addition, questions from the Tribunal and examination of witnesses can be lengthy.

It is, however, usually impossible for a hearing to carry on beyond its scheduled time, as interpreters must be arranged well in advance and Chamber schedules may be full. A second hearing, if necessary, may be scheduled far in the future. For obvious reasons, Iranian respondents are frequently interested in a second hearing, as well as further evidentiary filings and post-hearing submissions. The claimant must therefore make the most of the scheduled time, and avoid using more than half of it.

1. *Format and Purpose*

The hearing begins with an introduction of representatives in attendance. At this point, questions regarding the status of a witness, time allocations, and other minor procedural points may be discussed. The hearing itself is generally divided into two phases: the main presentations of claimant and respondent, and their respective rebuttals.⁴⁴ The main presentation is the lengthier. In a six-hour hearing, the main presentation of both parties might take four or five hours. This time includes witness presentations and questions to witnesses and attorneys.⁴⁵ Questions from the arbitrators to the attorneys and other representatives may be saved for the end of their presentations, or may interrupt presentations, as the Chamber sees fit. Thus, for each day of hearing, each party normally has less than two and a

⁴⁴The presentation of witnesses may be handled as a separate, intermediary phase. This is customary in Chamber One, and may be proposed in the other Chambers.

⁴⁵Article 25, Note 6, of the Tribunal Rules allows lawyers to question independent and party witnesses "subject to the control of the presiding member." In Chambers One and Three, direct questioning has been permitted, subject to interruption by the Chairman in extreme cases of argumentative, repetitive, or irrelevant questioning. In Chamber Two, questions have more frequently been directed through the Chairman ("Mr. Chairman, would you ask the witness . . ."), but this is a time-consuming formality and may be dispensed with.

half hours of presentation time, including witnesses and questions, and one-half hour of rebuttal.

If the time allowed seems unduly abbreviated, it is well to remember that the function of the hearing is primarily explanatory. The hearing is not designed to serve as a vehicle for the presentation of evidence; the case should be made on the previously filed documents, including affidavits. The hearing is essentially an opportunity to describe the written materials and to explain their significance, to pull the claim together into a clear picture, and to provide additional personality and credibility to the claim by presenting the people who were involved or who have provided expert opinion or affidavits.

Given the short hearing time and the frequently lengthy questioning of witnesses, it is generally neither possible nor particularly useful to present more than one or two witnesses.⁴⁶ The Tribunal provides no transcripts of hearings; while the arbitrators and staff may take notes, they do not have a complete or authoritative record of the oral proceedings.⁴⁷ Deliberations may take place long after the hearing, when only a general impression remains.

The second goal of a hearing, beyond creating a clear understanding of the claim and its merits, is to uncover and offer solutions to any particular factual or legal problems which may still be outstanding. Claimants should anticipate eventual discovery of any weaknesses in their case. The Chamber in its deliberations is likely to find new arguments, questions and problems with the claim. For a variety of reasons, frequently including the lack of strong legal or evidentiary defense on the part of respondents, the Chairmen see their role as "truth-seeking." Thus, it is generally unwise simply to ignore a fundamental question about the claim, merely hoping that it will not be uncovered, since there is a good chance it will be raised in deliberations, when it is too late to answer.

2. Presentations

As a general matter, the presentation of a claim is in the discretion of the attorney or representative, apart from time limits and questions. The style most applauded is dignified, low-key, somewhat informal. The atmosphere is generally civilized and friendly; animosity and unnecessary conflicts are not appreciated. Nonetheless, firm and forceful advocacy is often required.

⁴⁶Article 25(2) of the Tribunal Rules requires that the Tribunal be notified of all witnesses at least thirty days in advance of the hearing. This requirement must be complied with.

⁴⁷Note 2 to article 25 of the Tribunal Rules permits an arbitrating party in a case to make a transcript at its own expense, in which case the Tribunal is to be provided with a copy. Under article 25(3), the Tribunal itself may decide to record a hearing, but probably would do so only in an exceptional case. The Chambers do, however, take minutes of prehearing conferences and hearings. In Chamber One, these are made part of the Registry files. A party or officially-designated representative may inspect the Registry files by advance arrangement.

Concise, clear presentations delivered slowly and without the use of slang or technical terms possibly unfamiliar to non-Americans are generally most successful. Speaking from an outline rather than a prepared text can be useful, especially as points can then be condensed, handled out of sequence in response to questions, and otherwise adapted to the setting.

It is not necessary to repeat everything in the written submissions since the Chamber will be familiar with them. It is, however, important to refer specifically to those submissions which discuss or support the important points. Critical portions of documents, within reason, should be read. In order to assist the arbitrators in following the documents referred to during a presentation, it has proven useful to use some method—tabbing or sequential numbering—to permit identification of the document being discussed. The arbitrators are prone to ask difficult questions regarding legal theories and factual details; attorneys are accordingly advised to know the facts, documents and legal citations well.

Charts and other visual aids, in very limited quantities, have sometimes proven helpful. These should be illustrative only, and not contain new information. Where feasible, they should be in Farsi as well as English, or Farsi versions supplied. Pictures may easily be handed around; the Chamber should be notified in advance if use of films, slides, or videotape is contemplated. As it is difficult to see details of many charts, it is helpful to make reduced photocopies to hand out to the arbitrators and other parties. The most effective charts have been those giving a clear financial break-down of the elements of the claim; providing linear comparisons, for example, of planned versus actual completion; and diagramming complex transactions, such as letters of credit pursuant to contract. Charts presenting a financial break-down of the claim have a further use in focusing deliberations.

Procedural objections play a very limited role in this Tribunal. There is no record for appeal; the Chairmen usually make only limited rulings on their own authority, while deliberations entail disruption of the hearing. Procedure tends to be controlled by very rough concepts of “balance.” For example, if an American claimant submits one document during the hearing, even if it is minor, it will be difficult to rule out a “corresponding” Iranian submission, even a rather significant one. On the other hand, if the Iranian respondents have just made a last-minute submission, the claimant will justifiably have something to complain about.

There seems little doubt that strength of feeling counts for something in this Tribunal. Any objection of major importance should be made with conviction, for substantive reasons rather than on technical grounds. One should keep in mind, however, the tendency for trade-offs and be selective. Usually, it is most critical to avoid second hearings, posthearing submissions, and submission of documents during hearings which would require a posthearing response. Matters of minor dispute include status, questioning of witnesses and distribution of time.

3. *Witnesses*

The Tribunal has developed special concepts of witness testimony which are not apparent from the rules. As used in the rules, the term "witness" does not differentiate between persons with a direct interest or involvement in the claim and those who are independent. In practice, however, they have been treated differently. The former (party witnesses or party representatives), who may include individual claimants and senior officials of corporate claimants, are not put under oath and are permitted to sit through proceedings. They may be questioned at one time during the main presentation or at several appropriate points. "Independent witnesses," on the other hand, are kept outside of the hearing room except when testifying.⁴⁸ This distinction, while unfamiliar to many American lawyers, reflects civil law concepts. Despite its differing treatment of these two types of witnesses, the Tribunal accepts both types of testimony as evidence.

In questioning any person giving information, whether or not denominated a witness, experience suggests that it is useful to avoid the U.S. courtroom style of close questioning by the attorney. It is best if the individual can be introduced and left to make his own narrative statement, with interruptions limited to those absolutely necessary to prevent rambling. Any sign of coaching or prompting by the attorney has been very poorly received; saying too much about what a witness is going to say, conferring with a witness before a question is answered, and giving helpful hints, notes, or documents can be harmful. It has sometimes been appropriate, however, to suggest that someone else might better answer some questions—for example, a legal or factual question outside the witnesses' competence or knowledge. Other objections, such as to argumentative, repetitive, or oppressive questioning, should be resorted to most sparingly, particularly when the questioning comes from an arbitrator.

E. *Posthearing Submissions*

Posthearing submissions are not a "normal" procedural step but, unfortunately, are not uncommon. They have become a standard device to permit a response to documentary submissions accepted during a hearing. In addition, they have been ordered in some cases apparently to placate respondents, for example where there have been massive claimant submissions "too close" to a hearing or where respondents have made particularly insistent demands for a second hearing. The United States Agent and some arbitrators have objected to this type of posthearing submission, as the practice has created problems. Posthearing submissions not only give rise to further extension requests and delay, but may contain new evidence. As a

⁴⁸See letter of May 15, 1984 from the U.S. Agent concerning the Tribunal's evidentiary practices regarding witnesses (available from the Department of State).

practical matter, posthearing submissions have best been avoided by filing all documents early and in Farsi, and by keeping careful accounting of other possible trade-offs. If a posthearing submission cannot be avoided, it should be focused as narrowly and submitted as promptly as possible.

F. Deliberations and Awards

Following the hearing and receipt of any posthearing submissions, the Chamber will begin its deliberations. Decisions are taken in camera by majority vote.⁴⁹ Depending on the outcome, one or both of the party-appointed arbitrators may indicate his concurrence or dissent, either below his signature at the end of the award or in a separate opinion. Iranian arbitrators have also refused in some cases to sign the awards, a practice which does not render an award defective under the Tribunal Rules.⁵⁰

It is impossible to generalize with respect to the time within which an award will be rendered. At present, Chambers One and Three have substantial backlogs of undecided cases. The Tribunal recently focused on this problem, and at the end of 1983 adopted internal guidelines specifying that, in principle, deliberations should begin within a week of the hearing (or completion of any posthearing submissions) and be completed within ninety days. Inevitably, however, some cases will be "easier" to decide, especially those which suffer from clear jurisdictional defects, and some, including decisions setting major precedents, will be "harder." In general, an award can be expected in anywhere from two months to a year following completion of a hearing.

Following the issuance of an award in favor of a successful American claimant, payment is initiated by a written notification from the President of the Tribunal to the Central Bank of Algeria. The issuance and receipt of this notification may take anywhere from one to several weeks. Thereafter, the Central Bank of Algeria issues telex instructions to the N.V. Settlement Bank of the Netherlands, as depositary of the Security Account, to transfer the necessary funds to the Federal Reserve Bank of New York. The Federal Reserve Bank then contacts the claimant (or its legal representative) to make specific arrangements for payment of the award.⁵¹

The possibilities for post-award proceedings are extremely limited. Under the Tribunal Rules, its powers in this respect are limited to "inter-

⁴⁹See article 31(1) and note (2), Tribunal Rules.

⁵⁰Article 32(4) of the Tribunal Rules states that "an award shall be signed by the arbitrators. . . . Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature."

⁵¹Successful claimants are advised to contact the Federal Reserve Bank of New York to make the necessary arrangements. Pursuant to a directive license from the Treasury Department, the N.Y. Fed will deduct 2% of any award to reimburse the government for a portion of its expenses in maintaining the Tribunal and the Security Account. See 47 Fed. Reg. 25,243 (1982).

pretation" and "correction."⁵² Whether the Tribunal has inherent power to review and revise an award under exceptional circumstances, such as when an award was based on forged documents or perjury, is a question which it has not yet answered and it has to date rejected all attempts at reconsideration.⁵³

A somewhat different situation is presented, however, where the object is reconsideration of a precedent rather than reconsideration of a particular case. For example, following the Chamber Two decisions that individuals holding both United States and Iranian nationality could be claimants, Iran succeeded in raising this question to the Full Tribunal as an interpretive dispute. Such reconsideration of an issue does not affect cases already decided.

IV. Specific Points of Attention

In addition to the procedural matters discussed above, the following aspects of Tribunal practice merit particular attention.

A. JURISDICTION AND NATIONALITY

The Tribunal is a creature of limited jurisdiction. The limitations imposed on it by the Accords cannot be waived or amended by the parties to a particular case. As a consequence, jurisdictional questions cannot be approached casually, and claimants have almost invariably been required to prove jurisdiction even where respondents do not object. Jurisdiction should be clearly set forth and proved with the best evidence available. While it is not possible to discuss all jurisdictional aspects which may arise in a given claim, the following is a guide to some of the major issues.

As provided in the Algiers Accords, claims may be presented to the Tribunal only by a "national" of the United States or Iran. For these purposes, a natural person is a United States "national" if a citizen of the United States, and each individual claimant is accordingly expected to prove that citizenship by submitting copies of a birth certificate, passport, or naturalization papers.⁵⁴ Corporations and other legal entities are U.S.

⁵²See articles 35 and 36, Tribunal Rules.

⁵³See *Morris v. Iran*, Claim No. 200 (Decision of September 16, 1983). Iran has also sought to challenge a number of Tribunal awards in Dutch court, primarily where the Iranian arbitrator boycotted deliberations and/or signing. It remains to be determined whether or on what basis Dutch courts have jurisdiction to entertain such actions.

⁵⁴Naturalization papers may not be copied under United States law. However, the details may be submitted and the original document brought to a prehearing conference or hearing. The full Tribunal has held that it has jurisdiction over dual nationals as United States claimants if their dominant and effective nationality with respect to the claim was United States. See Case No. A/18 (Decision of April 1, 1984).

“nationals” if they meet two criteria: (i) they are organized under the laws of the United States or any state or territory, including the District of Columbia or the Commonwealth of Puerto Rico, and (ii) natural persons who are citizens of the United States collectively hold, directly or indirectly, an interest in the corporation or entity equivalent to fifty percent or more of its capital stock. Proof of corporate nationality is, accordingly, more intricate.

In order to satisfy the first criterion, corporate claimants have been required to submit a certificate of good standing from the relevant state or other appropriate government official showing the date of incorporation and whether the corporation was in existence on the date of the certificate. Partnerships or other legal entities have submitted other appropriate documentation establishing organization under United States law from the time the claim arose until at least January 19, 1981. The second criterion has not posed difficulties for closely held corporations and partnerships, as it is relatively easy to show that specific individuals hold particular ownership interests and to document that individuals holding more than a fifty percent interest are United States citizens.

Proof of majority United States ownership, however, has presented particular problems for widely held corporations. After long study and debate, Chamber One developed guidelines for proof of corporate nationality in such cases, based on presumptions drawn from other data; these guidelines have been accepted by the other Chambers as well. These guidelines, set forth in the *Flexi-Van* and *General Motors* cases, call for submission of the following:

1. A certificate of good standing (as described above);
2. An affidavit of an appropriate corporate officer, sworn to before a notary public, stating the percentage of voting stock which is held by stockholders of record with addresses in the United States as shown on the stockholders list used in connection with the corporation's Annual Meeting closest to January 19, 1981;
3. A copy of the page, or pages, of the proxy statement previously issued by the company in connection with its Annual Meeting closest to the earliest date on which a claim in this case arose, which shows (a) the date of the Annual Meeting, (b) the number of shares of each class of capital stock entitled to vote at the meeting, and (iii) information with respect to any beneficial owners of 5 percent or more of the corporation's voting stock. These pages should be attached to a certificate by an officer of the company, sworn to before a notary public, that they are true and complete copies of pages included in the proxy statement in the form filed with the Securities and Exchange Commission and mailed to stockholders. In the event the proxy statement contains no reference to any beneficial owners of 5 percent or more of the corporation's voting stock, such certificate shall include a statement as to whether that is because there are no such owners; and

4. The same material as described in paragraph 3, but related to the proxy statement in connection with the Annual Meeting . . . closest to 19 January 1981.⁵⁵

Where the above material reveals significant foreign ownership or raises other questions, additional evidence should be submitted to dispel any doubt concerning United States nationality.

All claims must have continuous United States (or Iranian) nationality from the time they arose until January 19, 1981. If there has been only one owner of the claim during this period, the proof of claimant nationality, as described above, has usually been sufficient to cover this requirement as well. If there has been more than one owner of the claim, or if there have been any other changes with respect to the claimant, including even a change of name, these aspects should be explained and documented.

A claim for direct liability to a foreign corporation or other legal entity which cannot itself qualify as a United States national may be made as an "indirect claim" by United States nationals who own "capital stock or other proprietary interests" in that entity, provided that the ownership interests of United States nationals, "collectively, were sufficient at the time the claim arose to control the corporation or other entity. . . ."⁵⁶ There have on occasion been complications where the claim was not put forward by the first United States entity which qualifies as a United States national.⁵⁷

A special problem has been encountered with respect to divisions and branches operating in their own name. If the division or branch is presented as a claimant, it should be established that it can sue in its own name. If the

⁵⁵See Orders of January 18, 1983 in Case No. 94 (General Motors) and of August 17, 1983 in Case No. 36 (Flexi-Van Leasing), *discussed* at 77 AM. J. INT'L L. 642 (1983). The original Chamber One decision is set forth in its Order of December 20, 1982 in Case No. 36 (Flexi-Van). Chamber One stated that it would examine sufficient evidence to determine whether or not the claimant corporation is similar to the vast majority of other United States corporations in which foreign investment is very small. If the total number of shares of voting stock of the claimant corporation owned by all holders of five percent or more of such stock, as shown in the proxy statement, is less than forty percent of the shares entitled to vote at an Annual Meeting, the Chamber will draw the reasonable inference that more than fifty percent of such stockholders are citizens of the United States. Publicly-held corporations whose ownership is concentrated cannot follow these guidelines. See Flexi-Van Order of December 20, 1982 at 13.

⁵⁶Claims Settlement Agreement, article VII(2).

⁵⁷According to the General Motors guidelines, control of a foreign corporate subsidiary for an indirect claim should be proved by "[a] certificate by the firm of certified public accountants which audited and gave its opinion concerning the financial statements of [the parent company] for the fiscal year ended immediately prior to its Annual Meeting closest to the earliest date on which a claim in this case arose, stating: (i) the number of voting shares of the stock of the [subsidiary] which were issued and outstanding at the end of such fiscal year and (ii) the number of and percentage of such shares owned by [the parent] on that date" and "[t]he same material . . . related to the fiscal year immediately prior to the Annual Meeting of [the parent] closest to 19 January 1981." See also, *American Int'l Group, Inc. v. Islamic Republic of Iran*, AWD No. 93-2-3 (Dec. 19, 1983).

claim and underlying documents use at times the corporate and at times the division name, the claimant's representative must be sure there are no discontinuities. While these may appear to be very technical points, lack of precision has caused some claimants difficulties.

B. FILING OF DOCUMENTS

All documents submitted to the Tribunal must be sent care of the Registry, not to the United States Agent or directly to the Chamber or Chairmen, so that they are not overlooked or lost.⁵⁸ The Registry accepts documents either as "filed" or as "received." The distinction is important because under the Tribunal Rules a document may be "filed" only when it is received by the Registry in the correct languages and number of copies.⁵⁹ Once filed, it will be distributed to the Chamber and the Agents. In contrast, the "received" designation has no operative effect. It is a purgatory for incomplete filings, pending receipt of missing translations or additional copies, and a final semi-official status for certain complex or massive exhibits which may be provided in limited copies "for inspection." The Registry may hold documents which are merely "received" without notifying the Chambers, so that any documents which do not meet the filing requirements should be accompanied by an explanation and an appropriate request for action. The request itself, if addressed to the Chamber, should be provided and in twenty copies in each language for filing.

Claimants have in the past been well advised not to file original evidentiary documents—checks, contracts, bills of sale—but rather copies, with the originals brought to the hearing. If for some reason it is necessary to file

⁵⁸All official documents should be addressed c/o The Registry of the Iran-United States Claims Tribunal, Parkweg 13, 2585 JH The Hague, The Netherlands. Tel: (31)(70)(52.00.64). Correspondence to the United States Agent should not be sent to the Tribunal, but rather to the American Embassy, Lange Voorhout 102, 2514EJ The Hague. Tel: (31)(70)(62.49.11). Correspondence from the United States to the United States Agent may be sent by domestic mail, addressed to AmEmbassy The Hague, APO N.Y. 09159.

⁵⁹Note 2 to article 2 of the Tribunal Rules provides that generally 20 copies are to be filed, with one extra copy for each additional respondent. The Tribunal may be requested to permit filing of a lesser number of copies, for example, in the case of bulky exhibits. Pursuant to notes 3 and 4 to article 17, pleadings and requests should be filed in English and Farsi, while the Tribunal may decide what other documents and evidence need to be translated. Generally, contracts, laws, regulations, and any other important documents on which the claim is based should be translated. Material which is offered to prove its existence rather than its content, such as technical reports or other contract products, generally need not be translated. Underlying documentation of financial data, such as checks, invoices, and computer print-outs, can be submitted in the original language. However, where the wording of a document is important, or where the arbitrators would be otherwise expected to read it, it should be translated. Further advice should be formally requested from the Chamber.

an original, the Registry should be advised clearly what it is and what is to be done with it.

The Registry insists that all documents be securely joined together, preferably stapled or bound. Documents which are merely clipped together may get separated and lost, and will not be accepted. The Registry further requests that filings be made in comprehensible fashion, with any necessary explanations. Thus, if several boxes of documents constitute a filing, the boxes should be appropriately marked (1 of 3, 2 of 3, etc.) and should each include an explanatory note.

It has proven best to file any procedural requests or objections requiring an interim decision as separate documents, clearly headed "Request for. . . ." If such requests or objections are buried in another document, they may not be noticed until the documents are reviewed in preparation for a prehearing conference or hearing. If necessary, urgent requests and objections may be sent by telex, provided that a proper bilingual filing is made subsequently.⁶⁰

Timeliness of filing is a major issue. To date, the Registry has not refused to file documents which are slightly late, but it is permitted to do so. Substantial lateness in filing counterclaims and posthearing submissions may result in rejection by the Chamber, and late filings just prior to or during a hearing are strenuously objected to. Even if accepted, late filings frequently generate costly Iranian objections, and may result in unwelcome trade-offs. If an extension is required, it should be requested well in advance. Extensions are almost inevitably granted (although not always in the full amount requested) except where the extension would interfere with a scheduled prehearing conference or hearing.

Typically, Iranian filings are late. Simultaneous submissions seem to be resisted as a matter of principle, and extensions are frequently requested late in the day on which a filing is due. Respondents not infrequently attempt to submit filings just prior to, during, and even after a hearing; all too frequently, these are accepted as well. A claimant's best response to such tactics has normally been to make its own filings in a timely and correct fashion. A respondent's lapses may also be used "in trade" for some other desirable deviation, but generally the overriding goal is to strengthen the claimant's position against their objections, to avoid unwanted filings during a hearing, and to eliminate any excuse for a posthearing submission.

⁶⁰The Tribunal has decided that, where appropriate, incoming correspondence (documents, letters and telexes) in only one language may be brought to the attention of the Tribunal or the Chamber concerned. In such cases, claimants should request the Registry to bring the document to the attention of the Chairman or appropriate person, explain briefly why this is appropriate or necessary under the circumstances, and affirm that a proper curative filing will be made as soon as possible.

C. EVIDENCE

Under the Tribunal Rules, as confirmed by practice, there are relatively few constraints on admissibility of evidence. Article 25(6) provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." Consistent with arbitral practice generally, this discretion is applied liberally in favor of admissibility, with objections going to credibility and weight.⁶¹

There should be little hesitation in introducing whatever evidence is available in support of a claim. Nonetheless, properly sworn or certified submissions and proper foundation for documents should be provided to the extent possible.⁶² No special formalities for authentication or introduction of documents are required, but such formalities and evidentiary rules as bear on credibility and weight should be observed where possible. In general, common sense and United States practice may serve as a guide; for example, all affidavits should be sworn and notarized and copies of official records should be certified.

The Tribunal considers affidavits to be documentary evidence, to be filed in advance along with other documentary submissions. This is a critical point which should not be overlooked. Affidavits should be submitted to accompany any proposed testimony and should be buttressed by documents confirming their credibility, even if that confirmation is circumstantial or indirect. This is particularly true of affidavits from involved parties. Documents referred to in an affidavit should also be submitted.

How much documentation to provide has sometimes been a question. All aspects of the claim should be documented, but presented in such a way that the arbitrators may easily locate relevant items. Primary documentation, such as invoices, checks and other primary financial documents or blue prints, reports, or other "contract product," may present a problem. The Tribunal does not appreciate the submission of voluminous underlying documentation, but it may be necessary in order to support the claim; claimants must therefore judge carefully how much to submit. In some cases, the submission of documents which obviate the need for recourse to the primary evidence has been helpful. For example, the Tribunal has accepted summary billings, contemporaneous correspondence or memoranda and reports prepared by independent auditors or experts who have

⁶¹In one case claimant submitted an affidavit by an attorney describing a telephone conversation; this was accepted subject to a determination as to weight.

⁶²In general, affidavits should not be substituted for available documents and should be used only to provide a foundation for and supplement documents or where no documentary proof is reasonably available. This is particularly emphasized in relation to affidavits of corporate officers. The basic formative documents for joint ventures, partnerships, or other private contractual arrangements material to the status of the claimant or the claim should be submitted, preferably prior to the prehearing conference.

reviewed the primary documents and provided a summary and confirmation. It is advisable, however, to provide the respondents and the Tribunal with at least the opportunity to inspect underlying documentation well in advance of the hearing.

D. WITHDRAWAL OF CLAIMS

Withdrawal of claims is not automatic. When a request for withdrawal is made, the Chambers have usually granted the respondent some time to comment. In practice, there have rarely been objections, but it is difficult to say at present what the rules are, as there is little precedent. In one case, a request for costs on withdrawal was granted although in that case the claimant had also failed to attend a prehearing conference. In a few letter of credit disputes, the Tribunal refused to permit withdrawal against the account party only, where both the account party and the issuing bank were named, over the account party's objection. Requests for costs and possible survival of counterclaims which have already been filed are potential dangers in connection with withdrawals. These have been guarded against in many cases by conditional requests to withdraw.

V. Settlements

Both Iran and the United States undertook, in Article I of the Claims Settlement Agreement, to promote the settlement of claims by the parties directly concerned. For its part, the Tribunal also welcomes and seeks to encourage the private settlement of claims between the parties. Pursuant to Article 32(2) of the Tribunal Rules, parties reaching such a settlement may make a joint request to the Tribunal to enter it as an Award on Agreed Terms, for payment out of the Security Account. Within the limits of its other requirements, the Tribunal also provides facilities and resources for settlement discussions, including rooms, typing and translation, and document reproduction.⁶³

A. NEGOTIATIONS

Successful settlement activity has been increasing rather steadily. At any given time, there may be several negotiations going on at the Tribunal. Typical Iranian respondents are interested in settlement only where there is some other advantage to be gained. Thus, settlements occur where the respondents want proper documentation of ownership of expropriated

⁶³Claimants contemplating settlement negotiations are advised to contact the Co-Registrars at the Tribunal to make advance arrangements to use Tribunal facilities.

shares or equipment, where the claimant has property, technical assistance or training which the respondents would like to acquire, or where it is desirable to resume business relations among the parties. In a few cases, apparently as a result of impermissible *ex parte* communications between Iranian respondents and Iranian arbitrators or staff, there have been settlement initiatives aimed at avoiding an adverse legal precedent in a pending award.

Political factors necessarily play a complicating role in settlements. On the Iranian side, policy imperatives and governmental priorities no doubt influence the determination of which agencies will be permitted to attempt to settle which claims, on what terms, and at what time. Typically, it seems to be the respondent agency which wishes settlement, while other agencies may impede with delay, neglect or even specific opposition. The local Iranian Government Office in The Hague responsible for Tribunal matters (the Bureau for International Legal Services or BILS) has some reputation for tending to complicate settlements as well.

The United States Agent does not attend settlement discussions, but can give background procedural advice. Attorneys contemplating settlement discussions can also benefit from discussion with others who have actually settled.⁶⁴

B. AWARDS ON AGREED TERMS

Pursuant to Article 32(2) of the Tribunal Rules, a settlement which will result in payment from the Security Account must be filed with the Tribunal so that it can be rendered as an Award on Agreed Terms.⁶⁵ The Tribunal does not automatically accept settlements, however, and will review the terms of the settlement agreement in order to assure that the substance of the settlement is within its jurisdiction and that the interests of all parties to the claim have been adequately taken into account. The Tribunal cannot for example accept a settlement where the claimant is not a United States national or the respondent is not within the definition of "Iran" according to Article VII, or where the subject-matter of the claim is outside the scope of Article II(1), of the Claims Settlement Agreement. The Tribunal has not, in this context, insisted on comprehensive proof of jurisdiction, such as would

⁶⁴In this context, it should be noted that claimant attorneys are free to, and frequently do, telex or call the Iranian respondents either directly or via the BILS office in connection with settlements. Contact does not have to be, and is probably more efficiently not, routed through the United States or Iranian Agents.

⁶⁵Not all settlements result in a request for an Award on Agreed Terms, to be paid from the Security Account. Settlements of banking claims, paid out of Dollar Account No. 2, result in the withdrawal of claims filed with the Tribunal. Settlements out of fresh funds are also possible, though very rare, and would also result simply in withdrawal.

be required in a disputed case. Some proof of claimant nationality should, however, be provided in all cases, and any other jurisdictional issues arguably presented in a given case should be considered.

Settlements may, as an incidental matter, cover claims or counterclaims not within the Tribunal's jurisdiction, provided such claims or counterclaims are not the subject of payments from the Security Account. Thus, settlements have included a general waiver of all claims and counterclaims between the parties, resolved specific counterclaims, including tax counterclaims, or included provision for payments from "fresh" (non-Security Account) funds, letters of credit, or other ancillary financial arrangements, as reasonably related to the settlement of claims and counterclaims over which the Tribunal does have jurisdiction. The Tribunal will not, however, accept settlements providing for payment from the Security Account for items not included in the claim as filed (or properly amended) nor for items outside the scope of the Tribunal's jurisdiction. Where, for example, a settlement involves delivery of goods to Iran, the agreement should make clear that those goods were included in that claim, rather than constituting new purchases which should be paid for from fresh funds. Care must also be taken to avoid structuring the settlement agreement in such a manner that funds from the Security Account are paid to Iran. For example, payments from the Security Account in settlement of the claim should be net of any allowance for tax on social security or other counterclaims.⁶⁶

In the usual case, the settlement agreement is submitted with a joint request for its approval by all parties to the settlement agreement. This request should clearly inform the Tribunal exactly what it is being asked to do, either in the Request itself or by specific reference to provisions of the settlement agreement. The joint request and the settlement agreement should of course be consistent, and should specify any relevant deadlines of which the Tribunal should be aware.

The joint request and/or settlement agreement should ideally be signed by or on behalf of all entities or agencies which are named as respondents in the case. If not, the Tribunal may question whether the entire claim is in fact settled. Where a respondent has not participated in the settlement, it is possible simply to withdraw the claim as against that respondent. Withdrawal, however, has potential complications, and, in at least one case, a respondent requested costs in connection with a settlement withdrawal.⁶⁷

The Tribunal may also question the authority of the particular individual signing on behalf of a respondent. Settlement agreements should be signed by individuals who are on record as proper representatives, that is, who have

⁶⁶See Dept. of State Public Notice 870, June 24, 1983, 48 Fed. Reg. 30,617 (1983).

⁶⁷Although costs have not yet been awarded in connection with settlements, they have not been rejected in principle.

been formally notified, have signed official filings, or have attended hearings as representatives. The Iranian Agent has recently advised the United States Agent and Tribunal Registry that he should sign all joint requests, whether the Government of Iran is a party or not; this signature may serve to verify the others. It is less clear whether the signature of the Iranian Agent, by itself, will be taken as sufficient; this issue is complicated by unsettled views as to the role of the Agent and the separate identity and authority of different governmental agencies. Chamber One, for example, has in several cases requested confirmation that the Iranian Agent was authorized to represent Bank Markazi and the National Iranian Oil Company.

To date, no settlement has been rejected as a result of questions relating to inclusion or representation of respondents, but such problems have delayed acceptance in some cases pending confirmation that the documents have been signed by authorized representatives or that nonparticipating respondents have no objections. It is, moreover, possible that Tribunal practice in this area will become more strict.

C. CONTINGENT SETTLEMENTS

Conditional and staged settlements have been accepted, where carefully structured. Some settlements have required a series of staged partial payments, and several have provided an external escrow agent to ensure simultaneous performance. In such cases, it is important to provide clearly for all contingencies. The settlement agreement should specifically address what happens to the claim, provide for reversion of any Security Account funds to the Security Account, and resolve any other loose ends which might arise if a condition is not met, or is not met in timely fashion, or if the plan is otherwise frustrated or aborted. The settlement agreement and joint request should also ask the Tribunal expressly to reserve jurisdiction over the claim in case the settlement agreement is frustrated.

The Tribunal is aware that the practical imperatives of negotiations and the preferences of respondents may produce agreements which do not provide for all contingencies. The attraction to claimants of entering into such an arrangement is undeniable, as a filed settlement agreement and joint request are hard to renegotiate pending resolution of minor problems. It is nonetheless a risky course, as respondents may not provide the anticipated cooperation in resolving loose ends and the Chamber does not always accept settlements. Where a proposed settlement has unusual features, it may be wise to seek formal Chamber review in advance of filing. Where, however, it is deemed preferable to file a settlement "as is," it may be possible to arrange for prompt review by the Chamber after filing while the parties are still together, if the Chamber's schedule permits. In general, of course, approaches to the Chamber should not be made *ex parte*.

In some contingent settlements, the parties have sought to keep the terms of the settlement confidential under Article 31(5) of the Tribunal Rules, at least pending the completion of the transactions provided for in the settlement documents. Such requests have occasioned debate, because of the potential for screening objectionable arrangements from public scrutiny. General, unsupported requests for confidentiality may delay the acceptance of a settlement and may be denied.

VI. Conclusion

The practices and procedures developed by the Tribunal over the past two and one-half years reflect more than the structural constraints imposed by the governing treaty instruments and the procedural rules. In large measure, they result from the particular backgrounds, interests and expectations of the participants. The third-country arbitrators, for example, bring to the Tribunal experiences gained in various international fora as well as European civil law systems. While their perspectives on procedural issues may sometimes be unfamiliar to a United States attorney, they are nonetheless relevant to the handling of individual claims and have made significant contributions to the development of workable Tribunal procedures.

As an institution, the Tribunal represents a considerable achievement, operating in many respects at a substantial level of organization and competence. On the other hand, there remain potentially serious threats to the just and expeditious resolution of the many claims which are still pending. The pace of adjudication continues to be a matter of particular concern.

In general, the process is colored by the objectives of the Iranian respondents, who typically seek both on general issues and in particular cases to deflect the arbitration in directions favorable to their interests, either by use of the rules or in derogation from them. This is not to say merely that Iran strenuously defends its interests; that much could only be expected and is entirely proper. Beyond that, however, Iranian strategy and behavior, as motivated by domestic political concerns, may not respect, or even acknowledge, the imperatives of fair and consistent legal procedures.

Many American claimants have been surprised and somewhat unsettled to encounter such unorthodox tactics. They expect the Tribunal to function as a United States domestic court might, and the respondents to behave as United States defendants would. They are frustrated by the relative unavailability of sanctions, the comparative lack of discovery, the repeated requests for extensions, and the time it takes to get their claims beyond the pleading stage. In some instances, claimants have reacted in too litigious a manner, relying on technical and procedural arguments, and forgetting that the Tribunal is, above all, an international arbitral institution.

The behavior of the parties, however, is neither the only nor the deter-

mining factor. The Chairmen themselves hold the decision-making power. How that power is or is not exercised is what gives the Tribunal and each of its Chambers their predominant procedural characteristics. The Chairmen's task is understandably difficult, but their ability and willingness to apply the Rules in a firm and consistent manner is essential if the Tribunal is to maintain procedural as well as substantive fairness and succeed in efficiently adjudicating claims.