The Settlement of Claims through Arbitration

Follow this and additional works at: http://repository.law.miami.edu/umialr

Recommended Citation
Available at: http://repository.law.miami.edu/umialr/vol13/iss1/8

This Transcript is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
Robert Mundheim: In any event, if the freeze was not recognized, the banks were still prepared to argue their setoffs in the British courts, the French courts, and the German courts.

Cynthia Lichenstein: I think I can help clarify. When speaking about attachments of deposits you are dealing with property of the attachment debtor, which is Iran, in the hands of a third party, the bank, and the question is, what is the situs of the property? Thus, the banks can argue for purposes of not recognizing an attachment which was issued by a New York court that the situs of the debt owed (i.e., the deposit account) by Citibank’s French office or its London branch is in France or in England and that the property right was in England or in France for that purpose. Simultaneously, they can argue that the U.S. Government freeze order should be given effect by the foreign court insofar as their obligation to repay Iran is concerned because the parties to the deposit agreement have determined that New York law should be applicable or because ultimately the transfer will have to take place on the books in New York. These are two totally separate arguments. So they can happily reply “No Funds;” there are no funds booked here in the United States.

Robert Mundheim: I’m reassured.

The Settlement of Claims Through Arbitration

Alan Swan: I think what we shall do now is go back to Mark Feldman for some comments regarding the development of the arbitral tribunal as one way of resolving the claims problem.

Mark Feldman: Just for purposes of structuring some of the presentation, I will try to talk about the arbitration process itself. Much of this has yet to unfold and I can really use such advice as you may want to give to me. We are just feeling our way. Later on we can talk about the domestic litigation implications of these agreements.

One thing I would like to say by way of background is that from the outset of the negotiations, when the Iranians called for the return of their assets, the U.S. Government took the position that because of the judicial attachments we could not return those assets without Iran’s agreement to an effective claims settlement process.

The Iranians first floated the idea of arbitration. I cannot say exactly how it came up in the negotiations with the Algerians because I was not involved intimately in the early stages of it. But there had

---

14. This tribunal is established by the Claims Settlement Agreement supra note 1, at art. II.
been public references to arbitration by Nabavi among others. From the very early period, the Iranians said two things, (1) that they would pay their debts, and (2) that they would be prepared to have the claims settled by a process in which the United States appointed one person, Iran appointed one person, and those two appointed a third. It was that kind of three-man proposal that was the background against which we prepared the Claims Settlement Agreement. The only other major option was a lump-sum settlement agreement; a collective settlement of all of the claims for cash or for cash over a period of years—probably in this case for cash on the barrelhead—with claims later to be adjudicated by the Foreign Claims Settlement Commission. We had a lot of discussion and vacillation in our own ranks as to which was the better procedure. The advantage of a lump-sum settlement is that it gets the money up front. You know how much you have; there is certainty, speed, and so forth. The disadvantage is that the settlement is likely to come in at substantially less than one hundred cents on the dollar. At least that is the experience with such settlements. We could not be sanguine about being able to get an amount of money from Iran that would satisfy all of the claimants through that kind of process.

The advantage of the arbitration process to the United States is Iran's acceptance of liability for one hundred cents on the dollar for all the claims determined to be valid by an impartial decision maker. Moreover, we were able to get a fund of $1 billion to secure that liability. Even though that fund is probably not, in itself, adequate to pay one hundred cents on the dollar for all claims, it is a substantial amount of money.

15. Behzad Nabavi, member of the Iranian cabinet with the rank of Minister of State for Executive Affairs, chairman and principal negotiator of the Iranian Commission that negotiated the hostage settlement.

16. This commission was established in 1950 pursuant to the International Claims Settlement Act of 1949, ch. 54, 64, Stat. 12 [current version at 22 U.S.C. §§ 1621-1644 (1977)].

17. Algerian Declaration, supra note 1, at par. 7 provides:

As funds received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall
From the beginning, it was clear that Iran would not accept judgments made by U.S. courts. They stated that position very clearly. I am not quite sure exactly how the subject was first broached in the negotiations with the Algerians. But sometime, at least by December, the United States provided Iran with four or five points that were necessary if the United States were to make any kind of settlement with them. The claims issue was one of these. It was part of our fundamental negotiating position from the beginning. We had several objectives: getting our people out, ending the crisis which had complicated our strategic interests in that area of the world, and establishing an effective claims settlement process. We achieved all three of those objectives.

Now, we did not get beyond the four or five general points, which included arbitration, until the holiday season—in late December, almost New Year's Day—when the United States first tabled a draft agreement. We had prepared a twenty-three page draft arbitration agreement which covered all the things that we could think of in elaborate detail the way a lawyer would like to have it done. But, when we came down to the crisis negotiations, it became apparent that that was much more than the traffic would bear, particularly in this kind of indirect negotiation with people who do not understand anything about legal process, so we went back to work and prepared an eight-page document that was handed to the Algerians. They came back and said, "The text was too complicated. Couldn't we do it in one page?" They said that if they took it to Tehran it would take six months for the Iranians to study and get agreement on it. We responded that we had to have a legally effective agreement and it just could not be compressed very much. We stood firm, although we did compress it some. For example, we had used the typical definitions of a claim found in U.S. claims agreements. We were persuaded that the definitions could be simplified so they could be digested in Tehran without losing any significant legal protection. In a few other places it was simplified and digested to five or six pages and sent off to Tehran.

thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.
The issue that caused the Algerians the greatest difficulty, and caused us the greatest discussion in the Washington round of negotiations, related to the definition of national claims. It was their view that Iran had agreed to negotiate the claims of U.S. nationals,\(^1\) that foreign corporations did not qualify as U.S. nationals, and that there should be no coverage of the claims of U.S. shareholders in foreign corporations. We had originally proposed that an indirect interest or indirect claim of a minority share-holder of U.S. nationality could be brought if collectively the U.S. share-holders held twenty-five percent of the stock of the foreign corporation. We could not sell that, so we agreed on a draft that substituted the concept of control.\(^9\) We understand that it will be up to the tribunal to decide what that means. But it is distinctly not a percentage of ownership; we got away from that test. I think it is up to the claimants who find themselves in that position to argue that control is a matter to be decided by the tribunal based not only upon their shareholdings in relation to the dispersion of the rest of the stock, but also upon management contracts and other relevant contractual relationships. This has become a matter of concern, and those concerns have found voice in the Senate Foreign Relations Committee where I was asked to address the question on March 4. This is the kind of answer that I gave to that question.

*Michael Silverman:* Was there any discussion of the issue of minority U.S. interests in Iranian ventures?

---

18. A "national" is defined in the Claims Settlement Agreement as follows:

1. A "national of Iran or of the United States, as the case may be," means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock.

Claims Settlement Agreement, *supra* note 1, at art. VII.

19. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

*Id.*
Mark Feldman: Well, the Algerians were thinking primarily of European companies in which Americans might have casual shares. That was the example they gave of situations that should not be covered. We pointed out that probably the most important situation affected by this provision was that of an Iranian corporation having significant minority U.S. shareholders. With that in mind they seemed willing, nonetheless, to accept the concept of control.

Michael Silverman: Am I correct when I read the language as permitting American nationals who own a claim continuously in Iran to bring that claim before the tribunal even if they have a minority interest in an Iranian venture, so long as they have control?

Mark Feldman: There are two aspects to this. If the shares are taken, then you have a direct claim.

Michael Silverman: Regardless of minority or majority?

Mark Feldman: Right. And there may be other circumstances in which you can argue a direct claim. But if you are really talking about an indirect claim because of the taking of a foreign corporation, Iranian or otherwise, then to qualify for the tribunal there has to be “control,” but collective control. In other words, the individual claimant does not have to show that he has control, only that U.S. nationals collectively have control. Now, we knew that some companies are fifty-fifty. We just do not know how that is going to work out; it will have to be decided on a case-by-case basis. We had in mind the fact that under SEC\(^{20}\) and other practice in the United States, ten percent or fifteen percent can sometimes control or, I suppose, in an enormous corporation one or two percent can control if the shares are sufficiently dispersed. And, of course, depending upon who makes up the tribunal, there may be a problem of educating the tribunal of these kinds of questions.

Michael Silverman: In the case of a taking, was the required “control” intended to be control at the time of taking?

Mark Feldman: Yes, the Agreements so specify.\(^{21}\)

Robert Mundheim: If you have a corporation with sixty percent non-U.S. ownership including one forty percent Iranian owner, and forty percent U.S. ownership, under SEC concepts both of the latter might be considered to be in control, particularly if they have run the corporation together. How would that come out in your view under this agreement?

\(^{20}\) Securities and Exchange Commission.

\(^{21}\) Claims Settlement Agreement, supra note 1, at art. VIII, para. 2.
Mark Feldman: I would hope that we would have the broadest jurisdiction.

Robert Mundheim: But you haven't given them a lesson in SEC concepts of control?

Mark Feldman: I do not think I was qualified to do that.

Stefan Riesenfeld: We might ask how “control” is determined as a matter of the conflict of laws.

Mark Feldman: Let's raise that question, I would like to learn the answer. My first reaction is to ask why the issue even arises.

Michael Reisman: The UNCITRAL rules.\textsuperscript{22}

Mark Feldman: Well, the UNCITRAL rules do not provide for substantive law.

Michael Reisman: That is a choice of law problem.

Mark Feldman: There is a difference between the law which applies to the contract dispute—that is for the tribunal—and the law governing the claims settlement agreement itself. That is international law, isn't it? And that is what we are talking about.

Stefan Riesenfeld: Yes, but international law might say that insofar as American companies are concerned “control” is to be determined by American law, while “control” of Iranian companies is to be determined by Iranian law. You do not know whether international law has its own standard or whether it refers to local law. You will have to investigate that issue with care. It may well be that international law has a built-in concept of “control” or it may provide that insofar as interests in national companies are concerned “control” is to be determined by local law. The applicable rule of international law may have the character of a conflicts rule or it may contain a concept of its own distilled from comparative analysis.

Mark Feldman: I would have thought that the only thing at issue here is the intent of the parties, which are two sovereign states, to the agreement.

Stefan Riesenfeld: Yes, but the intention may be that these rules should control. I am thinking about the reference to the SEC. I

\textsuperscript{22} UNCITRAL—United Nations Commission on International Trade Law. UNCITRAL Arbitration Rules, U.N.P. Sales No. E.77.V.6, \textit{reprinted in} 1 C. Schmitthoff, \textit{International Commercial Arbitration} 181 (1980) \textit{[for the text of the rules, see infra Appendix at 212]. The Claims Settlement Agreement, supra note 1, at art. III, para. 2, provides that the arbitral tribunal “shall conduct its business in accordance with” these rules.}
am just uneasy. Frankly, I am puzzled that people talk about the SEC in connection with Iranian companies. It just goes somewhat against my legal instincts.

Robert Mundheim: Don’t take the question too literally. I just wanted to raise the principle.

Michael Reisman: A point of information: if this aspect of the problem is governed by international law, you must look to the International Court of Justice’s judgment in Barcelona Traction. It deviates very sharply in this regard from U.S. practice.

Mark Feldman: But the parties didn’t adopt the rule in Barcelona Traction. The agreement is expressly to the contrary.

Michael Reisman: But you said international law governs the issue of who is entitled to protection under the agreement. International law on this point is expressed in Barcelona Traction.

Mark Feldman: What is international law? The intent of the parties to the agreement and nothing more. It is an exercise in common sense. It requires the right kind of tribunal trying to do justice in a very complicated situation by taking into account the business expectations of the parties, the nature of the injury, and the purposes of the agreement.

Hans Smit: Of course, article 24 does address this question in circular fashion. When I read this, I smiled and asked whether that was drafted by someone who had ever sat on an arbitral tribunal. Having had that privilege and having had the privilege of operating under applicable law clauses, I think it is fair to say that, in all the cases in which I have sat, we said, “Well, who cares about the applicable law clause? We are making up the law we think is appropriate for the case at hand.” I remember writing an opinion in which I said we had to consider whether international law is applicable or international commercial law or the law of Belgium or the law of Delaware or the law of Wisconsin, all of which had some connection with the subject at hand. Since we wanted to make the award judgment-proof, I said that under all of these laws the consequence was the same. The


24. Claims Settlement Agreement, supra note 1, at art. V 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.
fact, of course, was that we asked, "What are the reasonable rules to be applied to this situation?" In fact, this is the first time that I have ever seen an agreement that tells the tribunal to determine the rules that it thinks should be applicable. You often find clauses which refer to such things as international law in the light of reason and justice and equity, but this is the first time I have seen the arbitrators told to go and do right. Now, of course, you may have also opened a Pandora's box. In a normal arbitral tribunal the arbitrators might get together and come to some sensible solution. In this particular tribunal, with the Iranians naming one-third, a lot of problems are going to have to be resolved before you come to some kind of consensus as to what the law might be.

Michael Reisman: I wanted to pursue something Mark Feldman said. It is self-delusion to assume that because the judges are reasonable or, at least, that two of the three judges are reasonable, they will apply the agreement the way we understand it. The majority of the judges in the Barcelona Traction case were reasonable, a majority of them were European, but they said, as a general matter, that it is only the state of registration of a corporation that can bring a claim on its behalf. It seems to me that the situation we face here is even more problematic. If you are saying that the agreement simply invokes reason, you had better be sure that the calculus of reason that the judges use does not follow Barcelona Traction.

Mark Feldman: First of all, I was not saying that article V was relevant to the issue. Someone else said that. Article V, as I understand it, deals with the question of the law to be applied by the tribunal in deciding specific cases.

Hans Smit: That is no way to say it.

Mark Feldman: "[The Tribunal] shall decide all cases . . .", that is, article V refers to the law applicable in the decision of the particular cases. It does not apply to the law of the agreement itself. There is no law of any nation that is applicable to this agreement. This is an agreement between two sovereign states, so questions concerning the tribunal's jurisdiction, and so forth, will not be decided according to national law.

Stefan Riesenfeld: Why do you have the words "choice of law" written there [in the Agreement], when you say that they were not meant to be in there?

25. Claims Settlement Agreement, supra note 1, at art. V.
26. Id.
Mark Feldman: I did not say they were not meant to be in there.

Stefan Riesenfeld: Then let me rephrase the issue a little bit. We are discussing the interrelationship of article VII(2) and article V of the Claims Settlement Agreement. We are discussing the question whether the “control” of an Iranian company was to be determined by Iranian law and of an American company by American law or whether in all cases this question was to be determined according to general principles. That is the question; what do those words mean? Is article VII(2) to be interpreted in light of article V or not? Of course, the arbitrators will do what is good but then we must ask what is good? Somebody has to make the argument based on the agreement. To me—I do not think that Mark Feldman disagrees with me—there is some question as to how articles VII(2) and V interrelate insofar as a determination of “control” is concerned. That is all I mean to say. The record should show that I am not focusing on anything else. I still think it is a reasonable question and probably a reasonable arbitrator in a reasonable forum will follow my reasonable suggestion.

Robert Mundheim: And being eminently reasonable he probably would not look at the SEC rules.

Soia Mentschikoff: The language is very unique here. Hans Smit is absolutely right. Look what it says: “The Tribunal shall decide all cases on the basis of respect for law, applying such . . . 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 is not a normal conflicts provision; it is not a normal arbitration provision.

Stefan Riesenfeld: You conveniently dropped part of the sentence [referring to “choice of law” rules].

Mark Feldman: If you let me, I will tell you what it is. I myself think this is one of the most interesting provisions of the agreement. To give you background, the provision is there for a couple of different reasons. First of all, the choice of law provisions in the UNCTRAL rules do not mention international law. We were very much concerned about the expropriation cases. Secondly, many of the contracts—I do not know the exact percentage but it is large—are, according to their terms, governed by Iranian law. Many of them provide for arbitration under Iranian law, some ten or fifteen percent

27. Id.
provide for the resolution of disputes exclusively in the courts of Iran. The purpose of this clause was to try to present something that was sufficiently neutral and familiar, redolent of general principles of law and equity, to permit the tribunal to do exactly what Hans Smit was suggesting; that is, to override all the choice of law provisions in the contracts and to do something that made sense. We introduced not only international law but also general principles of commercial law. I do not know whether there is a commercial law in Iran today, so we allow the tribunal to make it up as it goes along.

The most controversial provision here relates to "changed circumstances." The U.S. introduced that. All the U.S. drafts contained it. It was not changed by Iran but was revised several times in meetings with the Algerians, who wanted to get it shorter and simpler. It lost a little precision in the process. The basic concept is all ours; it constituted our major attempt to draw upon the revolutionary circumstances in Iran in order to write contract commitments to the Iranian courts out of the arbitration. This last, of course, is a whole other issue to which we will want to come in a moment. The Iranian courts provision in article II(1) of the Claims Settlement Agreement has a long history. But, on this reference to "changed circumstances," I think it gives the tribunal ample latitude to do justice in the circumstances and that was our objective.

Robert Mundheim: Mark, just to be clear, it is very important to establish that article V does govern the question of jurisdiction because that is the reason you wrote the "changed circumstances" provision in there. In other words, with respect to some of the con-

28. Claims Settlement Agreement, supra note 1, at art. V.
29. This article provides:

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date this agreement, whether or not filed with any court, and arises out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of Jan. 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

Supra note 1.
tracts under which disputes are to be tried exclusively in the courts of Iran, this provision would give the tribunal the option of saying that, in light of changed circumstances, those cases were properly before it. Was that the purpose?

Mark Feldman: Yes. The "changed circumstance" language came first. Then came the Majlis action putting in the language of article II(1) of the Claims Settlement Agreement which withdraws contracts referring disputes to the Iran courts from the jurisdiction of the tribunal. Maybe I should just go into this because it all seems to be part of one discussion.

The Algerians were very concerned about this from an early date. The issue had arisen on two or three occasions before I was ever in the negotiations. In the Iranians' mind they had contracts with Iranian court provisions, they were going to stick with those contracts, and that was that. The Algerians thought they had some sort of understanding with us because we were willing to say that the jurisdiction of the arbitrators over such contracts was an issue for the tribunal to decide. Nevertheless, we wanted to make it clear in the text of the agreement that the tribunal was going to decide that issue on the basis of certain agreed principles. We wanted the agreement to override the contracts as much as possible. Then we got into a head-to-head disagreement. They said they wanted the agreement to specifically exclude those contracts from the tribunal's jurisdiction. We said we wanted the agreement to provide specifically for submission of the question of the tribunal's jurisdiction over these contracts to the tribunal. So we agreed to drop the provision altogether. The agreement contained nothing with regard to Iranian court provisions in the contracts. At the same time, we still had this language on "changed circumstances" in article V to fall back on, and could make the argument that Bob Mundheim suggested. 30 When the agreement was, we thought, completely agreed upon, they took it to the Majlis. When the Majlis saw the provision regarding arbitration, one of the opponents of the agreement added the provision which would require that all disputes committed to the Iranian courts by contract be withheld from the tribunal. They actually came to us with a proposal that was even broader than that. It reflected the general proposition that cases which, under the law of either country, were not subject to arbitration would be excluded from the jurisdiction of the tribunal. We would not accept that because we had no idea what it meant. This was the most difficult issue in connection with the Claims Settle-

30. See Robert Mundheim's statement supra, at 27.
ment Agreement during the final days. It was the last issue in that agreement to be resolved, and was done on the basis of the text that you see. We added some words. A dispute was to be withheld from the tribunal only in the case of a "binding contract" which specifically provides for the "sole" jurisdiction of the Iranian courts.31 The Iranians did not want to accept that language. It was obvious that we were trying to put qualifications on the Majlis resolution. They were very unhappy about it. Warren Christopher had to make a special trip to the Foreign Ministry in Algiers where he talked about this with the Foreign Minister. We just had to have this word "binding." We kept that word in so that we could make the argument suggested by Bob Mundheim. I also think that we can use article V to some extent as support for our interpretation of the Iranian courts provision.

Robert Mundheim: In other words, whether an Iranian courts provision is "binding" depends upon whether or not changed circumstances deprive the clause of its binding quality.

Mark Feldman: The argument that I make is that there is no judicial remedy available to Americans in Iran today, because, in the present circumstances, it is not safe and because there is a pervasive prejudice against everything associated with the "Great Satan." There are other circumstances concerning the state of their institutions which might be argued, but that gets a little bit more difficult.

Harold Maier: I just want a clarification. Exactly where do you stand with regard to Hans Smit's position to the effect that article V merely tells the tribunal to go forth and do good. That is basically what he was suggesting. Correct me, Hans, if I am wrong.

Hans Smit: To do what I would do.

Harold Maier: Is that the position of the State Department? Or are these terms—"choice of law rule" and "principles of commercial or international law"—intended as terms of art rather than having the more general meaning that Hans suggests?

Mark Feldman: We would argue that international law has a content, for example, "full, prompt and effective compensation"32 in the case of an expropriation. But it depends on your judge.

Harold Maier: You can argue that about all law.

32. See Restatement (Second) of Foreign Relations Law of the United States §§ 187-190 (1965) [hereinafter Restatement].
Mark Feldman: Well, particularly in this agreement it is the mind of the judges, it is what they think. Arbitrators make it up as they go along and so do we in the State Department.

Michael Silverman: One more point on the interpretation of "binding," which I know was reflected in the Government's recent Statement of Interest filed in all the pending court cases.\(^{33}\) I am somewhat wary of claimants arguing that these contracts are not binding insofar as choice of forum clauses are concerned. Such an argument opens up the possibility that the Iranians will say that if the contracts are not binding that includes other contract terms, such as the terms of payment and performance. I wonder what Pandora's box we are opening by promoting that kind of argument. Also, insofar as I know, there is no provision in Iranian law which requires going to the Majlis or any other government body to approve an arbitration. Under the Iranian civil code there is a provision against nominating non-Iranian arbitrators in advance of a dispute. I never heard of any other provision requiring the approval of another body.

Mark Feldman: It is in the Constitution of Iran.\(^{34}\)

John Westburg: In the current Constitution?

Mark Feldman: Yes.

John Westburg: It was not in the old Constitution. There is a lot of background to this problem of arbitration in Iran. There is a distinction made in Iranian law between an arbitration involving nongovernmental entities and arbitration on a government contract. With regard to nongovernmental entities, arbitration is clearly provided for in the arbitration law of the Civil Practice Act. Many disputes in Iran have been settled that way. But on government contracts there has been a series of laws and decrees dating back to 1945. These attempted to limit the authority of government officials to agree to arbitration. No one has ever been able, so far as I know, to exhaustively research that question in Iran. No one really knows for sure which government authorities can agree to arbitration and when they can do so. When I was there, if there was an important contract

\(^{33}\) Statement of Interest of the United States, filed in New England Merchants Nat'l Bank v. Iran Power Co., Nos. 80-3083, 80-6254, 80-7912, slip op. (2d Cir. Apr. 9, 1981) [hereinafter Statement of Interest] [for text, see infra Appendix at 109]. An identical statement of interest was filed by the Government in a number of cases involving Iranian assets.

\(^{34}\) CONST., Chap. VI, art. 77, para. 1 (Iran), reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, IRAN (A. Blanstein & G. Flantz, eds. 1980).
with an arbitration clause in it, the common practice was to make sure that the contracting agency went to the Council of Ministers and obtained a Council decree. That is what the oil companies did and that became the practice if you had any doubts. But there never has been a judicial decision or a legal opinion from the Minister of Justice or anything else upon which we in the West could safely rely. It was just practice.

Keith Rosenn: I want to follow up on Michael Silverman’s first point. I question whether the “changed circumstances” language in article V can be confined solely to the choice of forum problem. Might it also not be argued by Iran that, by inserting the words “and principles” after “choice of law,” article V really gives “changed circumstances” a substantive law content rather than simply a conflict of laws content? If so, one can turn around and say that all of the civil law frustration doctrines, catalogued so neatly by Professor Smit in a fine article in the Columbia Law Review, which allow obligors to escape from contracts because of changed circumstances, should be part of the law which the tribunal should be applying. The “changed circumstance” language might well backfire on the American claimants. It is clear from the context of the negotiations that “changed circumstances” was intended to have only a choice of forum reference?

Mark Feldman: It is clear from the negotiating context who wants the contracts to be performed.

Michael Silverman: I also want to go back to the word “binding” and the language at the end of that clause that says, “in response to the Majlis position.” Maybe Mark Feldman would comment on how that came to be included. It raises the possibility, or probability, that the Iranians will argue that this incorporates by reference the Majlis decree which contains a very different and broader exclusion provision than what has been suggested here. Was there some discussion of this during the negotiations?

Mark Feldman: Just as you might expect, it was the very last thing that was done. The Algerians finally said: “All right, you have to have this ‘binding’ language; would you people agree if we put these words at the end?” We accepted it as cosmetic, and Iran accepted the clause.

35. Supra, at 30.
Michael Reisman: Two points. First of all, I continue to be very much concerned about articles V and VII and the points Steve Riesenfeld raised. It is not profitable to discuss them any more but I continue to think that there is much more of an international consensus, and that it may not always work to our benefit.

I do have another question and it goes back to article II(1) of the Claims Settlement Agreement. The New York Times reported, probably incorrectly, that you [Mark Feldman] had said at a meeting in New York shortly after the agreement, that you understood the last section of article II(1) to mean that a claimant who was excluded from the arbitral tribunal because of a choice of forum clause in the contract, can continue to sue in the United States. But, if I now understand what you are saying, “changed circumstances” in article V, as you construe it, means that you still contemplate that such a claimant will be able to go before the tribunal. Which is your position?

Mark Feldman: The litigation is governed by the first declaration, where we committed ourselves to terminate litigation through the process of arbitration. On that basis we take the position that if a case were excluded from the arbitral tribunal, including Iranian cases (i.e., where the claimant is an Iranian national), for whatever reason, the claimant can continue to litigate in the U.S. courts. However, every American claimant has a powerful argument that he has no forum in Iran, and that he has a forum in the arbitral tribunal.

There is going to be a dynamic process which, we hope, will develop in the course of the litigation. We hope Iran’s attorneys in the United States will have a mandate to take a position in those cases. If they say that the claimant cannot go before the arbitral tribunal and if the claimant prefers to stay in the U.S. courts, we are just going to say

38. Supra, at 39, 43.
39. Algerian Declaration, supra note 1. General Principles, para. B. This paragraph provides:

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.
SETTLEMENT WITH IRAN

...go ahead in the U.S. courts. If, on the other hand, the claimant wants to go before the arbitral tribunal, we will suspend the claim until the tribunal has had a chance to decide the question. That is the way we hope it will work.

Michael Reisman: Again, if I may add a point as to arbitral procedure, I know of no case in which the argument that there was no other available forum swayed an international tribunal to depart from its general principles and allow a claimant that could not otherwise prove his right to be there to appear before it. So, unless this tribunal really does depart from the procedures and practices of other tribunals, I think it quite unlikely that a claimant will get that approval.

Mark Feldman: It is a question of whether the contract clause is impossible of performance. Isn’t that a generally accepted notion with regard to the performance of contracts? I do not know whether there has ever been a comparable issue before. Do you know of a case in which an international tribunal ever addressed anything like this?

Michael Reisman: It is common for claimants to say, “If we can’t prove our claim in this arbitral tribunal, we don’t have any forum available to us at all.” But that never sways the tribunal, since it views itself as a creature of limited powers and examines these questions in terms of its own competence.

Mark Feldman: I am interested in this because it is something that could occur in these cases. But here the tribunal has jurisdiction and then it is taken away if there is a “binding” contract specifically providing “solely” for reference to the Iranian courts. Therefore, the contract has to be analyzed by the arbitrators.

Alan Swan: The trigger is the “binding.”

Soia Mentschikoff: No, I think you are wrong on that. The trigger isn’t the “binding.” You have got two things, it has to be a “binding” contract and it also has to provide that the sole remedy is in the Iranian courts. The trigger is the “sole remedy” in the Iranian courts. It is like “sole remedy” for any breach of contract. If the contract provides a “sole remedy” and that remedy fails—becomes impossible—then all other remedies open up. That is the argument. That is the commercial principle of general application. It has nothing to do with international law.

Mark Feldman: That’s very helpful, Soia. That was our intention—our subjective intention. But it is good to have it stated. We had another purpose. Many of these contracts provide for arbitration with just general references to Iranian law, or refer to procedures involving
arbitration with some use of the Iranian courts later on. The word "sole" was intended to exclude those cases.

*Soia Mentschikoff:* Well that excludes it in and of itself. It is just like any other remedy provision. It may provide for "repair and replacement" but not limit it. In that case I have all the other remedies. Or, I may say "only repair and replacement." That is like "only the courts of Iran." What you have decided is that when it says "only" you will go with it. But then you reserve the right to say, "But it fails of its essential purpose which is to get a remedy, and, therefore, you can't go with it." That is a fairly solid commercial argument.

*Hans Smit:* Yes, but we must come back to the language of article II[1]. I did not want to let it pass because, as Soia says, you can attack the Iranian choice of courts provision on two fronts. You may say it is a failing contract term, so that once that contract term has failed you can supply whatever other contract terms are appropriate. The other approach is to say that it is not a "binding" contract term. I thought that was the approach that Mark Feldman was advocating. In fact, I think that if you went into an American court and the defendant said there is an exclusive forum selection clause selecting Iran, the American courts would say, "Under our conflict of laws rules we will not hold you bound to that clause in view of the circumstances that prevail." To that extent, the clause would not be binding on you. If that is the intention, the formulation was not felicitous.

*Mark Feldman:* I agree with that.

*Hans Smit:* It should have been a contract between the parties "bindingly providing...?" Depending where you put the word "binding" you can get into Mike Silverman's problem. If he says, "Oh, the contract is not binding," then the Iranians will say, "All right, it is not binding."

*Mark Feldman:* Everybody on the U.S. team was well aware of that. It was the subject of a twenty-minute conversation at 3:00 o'clock in the morning.

*Charles Brower:* I wonder if I could take a slightly different direction. There seems to be a lot of feeling that the law applied is going to be what the mythical "I" would do in his wisdom and goodness. If so, it becomes increasingly important to know what sort of person the "I" is going to be. That, I think, would be educational for at least some of us to know. We might be able to help out a little bit on the actual process if we could discuss who is contemplated. Are the Iranians going to appoint a bunch of Iranian revolutionaries or are they going to dip into that shallow pool of Swedes and Swiss to whom
we all turn at such times? What are we going to do? Nobody is limited to nominating their own nationals. Who do we think the third category of people—the neutrals—ought to be? What stature are they going to have? What are they going to be paid? How much time will they have to spend on it? I was struck by a conversation I had recently with someone else that most of the people in my position are looking only through one end of the telescope, namely, what is going to happen in court next week? Should we fight this or not? How do we fight it? And how do we position ourselves each step of the way? There are others, and that is where the Government should be at the present time, looking through the other end of the telescope. How is this arbitral process going to look? That seems to be probably the most uncertain and, yet, perhaps the most important aspect of the agreement.

Mark Feldman: This is the issue on which we are spending the most time right now. There are two processes. The first is to get the claimants officially on notice, to give them the opportunity to submit their claims and so forth. The other is to move ahead on the arbitration. We are developing lists of people. We are looking at options in terms of compensation, which is a big problem for something which is going to come out of appropriated funds. The consensus of the claimants is that we ought to be using people of distinction; people who have experience in international business and law; people that will be, in effect, credible to the claimant community. We agree with all of that. In view of the number of cases and our uncertainty regarding the number of arbitral panels we will be able to have, my tentative thinking is to have a core of people who are practically full-term. There are lots of volunteers. I am just amazed at how many volunteers there are; people who are distinguished attorneys, maybe semi-retired, and lots of professors who have experience and interest in it. We have one request from the Clerk of the Administrative Office of the U.S. Courts, some from sitting judges. There are people who have had experience as arbitrators, particularly in commercial matters. We have asked Iran to increase the number of arbitrators from nine to thirty so that we can have ten panels instead of three. It may be that we will have a smaller group of permanent panels and then have a roster with some ad hoc arrangement for other people to come in on just one or two cases. We are completely flexible on this. We are working very closely with the ABA committee on Foreign Claims. I know that Mike Silverman and others are working on the issue and they are preparing a paper. At the meeting on March 11th I hope to make some further progress on this. The issue of compensation is a
much more difficult problem. It is a tradition in the United States not to provide munificent compensation to civil servants.

_Ved Nanda_: We did not try to internationalize this conflict as much as we should or could have done, although we adopted a textbook kind of approach in managing the conflict. As an international lawyer, I was pleased that we went to the United Nations and to the International Court of Justice. However, we did not pursue all of the available remedies. We did not seek in every available international forum for Iran's ouster or suspension from the U.N., or make an even stronger case involving the international community versus Iran. Iranian expulsion or suspension from the United Nations and other international organizations would have had a great psychological impact upon Iran, no matter how incohesive and unfocused the Iranian leadership was.

Although only historians can judge what the most desirable action on the part of the United States would have been, it is clear that this country lost real opportunities when it failed to transform the conflict into one between the international community and Iran. By allowing the focus to remain on the conflict between America and Iran, rather than on the tension between an outlaw nation and an outraged international community, the United States did not optimize the skills of international diplomacy. Imaginative diplomacy is still an art that the United States can learn from its European partners.

This, however, is not the principal point of our present discussion. With regard to article VII(2) and V, I can see Soia's argument. But if we consider article V in its relation to the choice of law issues and international law, especially international commercial law, I do not think it will work unless we can show that there is absolutely no remedy in Iran. It will be a very difficult case and should be a cause of concern. We do not, in fact, know the answer.

_Covey Oliver_: I have two questions. One is very practical. Do you foresee that a number of these cases can be settled in a summary way, maybe even by prearbitral litigation or prearbitral negotiations? That is one of my questions.

_Mark Feldman_: The agreement provides a six-month period for settlement by the parties. This can be extended for three months by

either party. That language came in from Iran. Iran has always said that it hopes to settle these cases. The American attorneys for Iran are in Tehran this week. They went Wednesday afternoon [March 4]. I hope they will return with some concrete authority or instructions with respect to establishing some of the procedures. As I mentioned earlier, we are trying to do two things, one is to increase the number of panels and the other is to make settlements. We have over 2,500 claims. Approximately 1,700 are small claims that would be the responsibility of the Department of State to present to the arbitral tribunal. We have proposed to the Iranians, through Algeria, that they settle those for a lump sum in order to alleviate the tremendous workload of the tribunal. The amount is peanuts compared to the billions they are otherwise talking about. Maybe they will go for that; I don't know.

Soia Mentschikoff: The notion of having permanent arbitrators is wholly inconsistent with the notion that you are going to have thirty panels. I do not believe you can. Moreover, you get much better arbitrators in the commercial area if the panels are ad hoc.

Mark Feldman: I talked about the possibility of ten. I did not dare suggest thirty. But the prospect of a roster for ad hoc arbitration has a lot of promise to it. The limitation both for the ad hoc and for the permanent panels is Iran's shortage of human resources.

Covey Oliver: My other question is a broader one and you may not want to address it now. Have you, or has anyone, thought about the old weakness of arbitration when the award is contended to be ultra vires the compromis? Are we really finally willing to accept "finality" as to jurisdiction? After all, we do have in our diplomatic history an unfortunate precedent: an arbitration that was supposed to be final—as most of them are supposed to be—but which we refused to accept because we said that the arbitral body went beyond the jurisdiction established in the compromis. That is the question that I am raising. Is the Claims Settlement Agreement an arbitral compromis?

41. Claims Settlement Agreement, supra note 1, at art. I, provides:

Iran and the United States will promote the settlement of claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of the agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

mis? It seems to me that it is. Also it is cast very broadly and that, I think, would make it very difficult for us in international political, not legal, terms to disavow a “final award” of the tribunal.

Mark Feldman: I can only speak for myself. I have been motivated from the beginning by one overriding preoccupation—that the Iranians may not cooperate. There are so many cases, and I have wanted to insure that the process goes forward with as little participation by them as necessary. So we have gone for automatism, maximum power in the tribunal, and finality, and we are continuing to pursue that policy. We are at a stage which raises a very complicated question concerning the law applicable to the proceeding. I’m willing to hear different views. The question is how the arbitral arrangement relates to the New York Convention on the Recognition and Enforcement of Arbitral Awards.43 It is a subtle and difficult thing. We are struggling with it right now. In this connection, we have gone out of our way to give the tribunal the authority necessary to make its awards final. One of the things we will have to try and decide is how to keep the courts of the Netherlands or of England out of these cases. That is our desire.

Covey Oliver: Final as to its own competence; that is what we are talking about.

Mark Feldman: We do not want any review at all.

Soia Mentschikoff: You can’t keep the English courts out; really, I’m serious.

Mark Feldman: They have a new statute,44 Soia.

Soia Mentschikoff: Nobody can keep them out unless they themselves agree to be kept out.

Mark Feldman: I want to hear more about that because various attorneys who are pushing London—there is a lot of pressure to go London—say that an exclusion clause is all you need even though the statute appears to authorize appeals “with the leave of the tribunal.” I’m very interested in that.

Soia Mentschikoff: If you look at what the English courts have consistently done, you should have something more than just an exclusion clause in the arbitral agreement.

44. Arbitration Act, 1979, c. 42.
Mark Feldman: Well the point is worth discussing. I am told that you cannot get away from natural justice—from certain fundamental concerns—for example, if an arbitrator has a conflict of interest.

Soia Mentschikoff: That is international arbitration. There is always the concept that courts will inquire into whether there has been bias or fraud in the proceedings. You are not going to get rid of that. That, in turn, can open a Pandora's box if properly argued. There is no way, Covey, of getting finality by action of the arbitrators.

Covey Oliver: I didn't think so. That is why I asked the question.

Mark Feldman: But there are different gradations of finality. In England they used to have the "stated case" rule and now that is out.

Soia Mentschikoff: That's out, I know. But that does not eliminate the problem. What you really need is an agreement with all the countries that may become involved as to what will happen to the awards.

Tone Grant: I have a question for Mark. A number of practical problems and issues regarding implementation of the agreements have surfaced, questions regarding settlement of claims and establishment of the arbitral tribunal. I am curious to have your assessment of not only the willingness, but the responsiveness and capacity, of the Iranians to recognize the issues and to work toward resolving those problems.

Mark Feldman: It remains to be demonstrated. We will know much more about that next week.

Gillis Wetter: I have two questions. First, do any of the underlying contracts between the claimants and the government of Iran provide for international arbitration? If so, what is the effect of the Claims Settlement Agreement in relation to that alternative route? My other question goes to the question of finality. Has an effort been made to secure finality contractually in regard to the escrow fund? I have not been able to find what provisions operate in regard to the escrow.

Mark Feldman: We certainly have every intention of getting finality. I hope we will do it this month. If we do not, we will still be looking for a bank to hold what we call the security account. There is going to have to be a new agreement worked out in that connection. The Federal Reserve Bank and the Treasury and State Departments are involved in working up a draft of that agreement. Basically, the concept is that the bank will pay out on the certification of the president of the tribunal.
Gillis Wetter: No matter what?
Mark Feldman: No matter what.
Hans Smit: All of these negotiations are still indirect?
Mark Feldman: Up to now that negotiation is primarily between the Federal Reserve Bank and the Central Bank of Algeria.
Hans Smit: No one from Bank Markazi?
Mark Feldman: Bob, do you know if Bank Markazi is involved at all?
Robert Mundheim: Their lawyers are.
Hans Smit: I asked the question because one of the purposes of the Agreements is to put the past behind us and turn a new leaf. Yet even now we are still negotiating in large measure indirectly through the Algerians.
Mark Feldman: Exclusively through the Algerians and through Iran's attorneys. It is the beginning of a very informal negotiation. I have just accepted an invitation for a meeting in April; an Iranian official has also allegedly accepted the invitation.
Cynthia Lichtenstein: Two questions. One, you just said you were looking for a bank to hold the escrow account, and that that bank will be able to pay out upon the certification of the president of the tribunal, no matter what. Can you do that unless you proceed to put it in some kind of offshore banking center, such as the Bahamas, that is willing to promise that their courts will not issue attachments against the escrow agent? Won't you need to have the agreement of the government of the jurisdiction in which the bank that is acting as escrow agent is located, to the effect that it will not allow its courts to issue any kind of order blocking payment out of the escrow?
Mark Feldman: It's a good question. Maybe we ought to do that.
Robert Mundheim: Could you get a government to give that agreement?
Mark Feldman: Let me just say that the location with which we are now negotiating permits practically no attachments of foreign government property. But the other question is: "Whose asset is this?"
Robert Mundheim: That seems to be the interesting question. If the assets in the escrow account are more than necessary to meet Iran's obligations, the residual belongs to Iran. How do you know now how much that is? Is any payment order to a claimant immediately freed of attachment?
John Westburg: I missed the answer to Gillis Wetter's first question concerning the effect of arbitration clauses in the underlying
contracts. Do they continue to exist? Are they superseded by the Claims Settlement Agreement? I think you answered it a minute ago, but I didn't hear the answer.

_Mark Feldman:_ We haven't discussed that issue. We have, however, discouraged claimants from believing that they could continue to pursue other remedies than the remedy agreed to. But I do not think we really have come down on the issue.

_Charles Brower:_ The Statement of Interest[^45] filed by the Government on February 26 has, I believe, a paragraph addressed to that. In referring to the exclusion clause relating to the granting of a judicial remedy, it says that where you have a clause providing for arbitration of some other type, or in general, you may go before the tribunal.

_Mark Feldman:_ But that is not the question. You may go before the tribunal. The question is whether you can go elsewhere.

_John Westburg:_ What if you preferred to go to an _ad hoc_ international arbitration rather than to the arbitral tribunal established under this agreement? You might ask, "Why would anyone want to do that since they've got such a marvelous remedy here?" But there are some people who are not quite convinced.

_Mark Feldman:_ May I make one observation since we may go on from arbitration to something else this afternoon? We were so concerned about Iranian cooperation, or rather lack of cooperation, in this agreement that we provided for the arbitral tribunal to actually alter the rules of procedure if necessary to produce a result.[^46] The purpose was to insure that this agreement would be carried out. What we really would have wanted to say is that the tribunal can alter the agreement if necessary. We were actually thinking about the possibility of going for a default judgment _en masse_. We were looking for some way of expediting the process if Iran absolutely refused to cooperate.

_Stefan Riesenfeld:_ I only want to make one remark concerning John Westburg's question. If you could go to another tribunal, isn't there also a question of what that might do to the impossibility of abiding by a choice of forum clause?

[^45]: Statement of Interest, _supra_ note 33.
[^46]: Claims Settlement Agreement, _supra_ note 1, art. VI, para. 4 provides: "Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon request of either Iran or the United States."
Michael Reisman: This goes to an issue that Covey raised a little earlier about the possibility of the nullification of claims because of an *exces de pouvoir* on the part of the tribunal. It is a pervasive problem—much more common in our history than the single case of the Chamizal Arbitration. However, I do not think that it is a real problem in this case because the debtor state has already anted up. It is a problem only in those circumstances in which we have an arbitral award but the debtor does not want to pay. You pursue him and he claims that there's been an *exces de pouvoir*.

Alan Swan: But what happens if the American claimant loses before the arbitral tribunal, commences his lawsuit in the United States, and the arbitrator's decision is then pleaded as a defense?

Frank Mayer: Or what happens if the Iranians do not replenish the billion-dollar security account?

Hans Smit: Or what happens if the Iranians seek an injunction against the escrow agent?

Covey Oliver: Suppose the Iranians do not appoint anybody? That is an old ploy we have faced before.

Michael Silverman: One last last point on this matter of another forum. I take it that the position in the regulations is that American claimants who are capable of securing jurisdiction over Iran in foreign courts are not free to do so; that American claimants cannot now bring suit in foreign courts. That certainly seems to be the effect of the regulations.

Mark Feldman: In the regulations we have not done anything to touch suits in foreign courts. That is entirely between the parties and the foreign court.

Cynthia Lichtenstein: I would like to ask if there was any history as to the meaning of the word “debts” in article II. This goes back to the point that if you say the contracts are not binding—that the contracts themselves are considered to be rescinded or possibly are unenforceable because of frustration or whatever—can the claimant say, “My restitutionary right is a debt,” and still claim? Under article II does the word “debt” imply the right to restitution for benefits conferred?

47. *Supra* at 63.
Mark Feldman: We're all lawyers. You can make that argument. Certainly the arbitral tribunal can, as I understand it, remedy unjust enrichment even if it does not award expectation damages in the particular circumstances. I am not aware, however, of any circumstance in Iran that would justify a tribunal in withholding expectation damages. Just because there is a change of government and it does not like certain people, that is not a reason for breaching a contract. That is not the same thing as saying the claimant cannot go and litigate in Iran because he is afraid for his life or liberty.

Covey Oliver: Is it all right to ask a few more textual questions? If so, is there anything in the negotiating history regarding the next phrase in article II of the Claims Settlement Agreement which reads: "arising out of debts, contracts . . . , expropriations or other measures affecting property rights, excluding claims described in paragraph 11 of the Declaration?" Cynthia Lichtenstein's question prompted my inquiry.

Mark Feldman: In shorthand the reference to paragraph 11 refers to the hostage claims.

Michael Silverman: And claims arising out of "popular revolutionary movements."

Mark Feldman: I saw a complaint in a hostage case just yesterday of which I had not been aware. I think it shows what the Iranians had in mind in terms of "popular revolutionary movements." This was a complaint with respect to an incident that took place in Febru-

50. Id.
51. The term is found in the Algerian Declaration, supra note 1, at para. 11, which provides:

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution of Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.
There was a brief embassy takeover in February, property was damaged, the people were hassled, and so forth, and they have just filed suit for those damages.

**Michael Silverman:** Regarding this reference to "popular revolutionary movements," to your knowledge, Mark, was there any discussion with the Iranians of things like workers' committee takeovers of factories and offices, arrests of management by workers, and that type of thing, which arguably could be a partial "taking"—namely, the loss of control by management? Did the Iranians express the view that such action would be considered part of a "popular revolutionary movement" not sanctioned by the Government? I know that the new regulations try to address that and give some comfort to claimants, but was that also part of the negotiations?

**Mark Feldman:** There was no discussion of that.

**Covey Oliver:** The point this discussion makes for me is that if the exclusion in article II, which I read out, is a one minus one equals zero situation—put in by article II of the Claims Settlement Agreement and then taken out by paragraph 11 of the Algerian Declaration—that is one thing. If, however, it is something *in addition* to what is covered by the exclusion in paragraph 11, then there will be a problem of interpretation by somebody as between the Algerian Declaration and the Claim Settlement Agreement. I suppose that will fall to the tribunal too.

**Mark Feldman:** We tried to avoid rephrasing or recharacterizing those claims and just referred to the paragraphs in the Declaration.

**Covey Oliver:** This is only a reference to what is excluded? There is no surplusage? The statement is not one minus something equals a residue? It is one minus one equals zero?

**Mark Feldman:** If we succeeded that's what we intended.

**Frank Mayer:** Were any of these declarations and undertakings on the governmental level executed or issued in more than one language?

**Mark Feldman:** Unlike other negotiations, these were agreed upon in separate rooms, in separate languages and were never compared.

**Frank Mayer:** So one of the issues before the tribunal is certainly going to be the interpretation of linguistic disputes.

**Mark Feldman:** Conceivably, even likely.
Robert Mundheim: The French/English provision in paragraph 9 of the Escrow Agreement brings back an amusing memory to me. In the negotiations, the Algerians tabled a French version; we tabled an English version. The problem was that the American delegation was not really expert in French. The Algerians, however, spoke English a little better than we spoke French, so ultimately we started to work off the English language version. They said all along that there must be a French and an English version and that they were to be of equal weight. Well, it got around to the end and we said, "Who's going to do the French version?" They said, "You are." We said, "We don't have any facility for doing it." So, what we concocted was the clause which says that sometime in the future the French language version will be done and then it will have equal status with the English version. As far as I know, Mark, there is no French language version yet.

Mark Feldman: I don't know of any.

Alan Swan: What structure are you thinking about for the arbitral tribunal? These interpretive problems are all large questions which cut across lots of cases. Yet, on some of the same basic questions, individual cases will present unique circumstances. Are you thinking of some mechanism within the tribunal—a review procedure or a group—that will control so that there is some uniformity in the resolution of these issues?

Mark Feldman: We hope that the president of the tribunal will do that. In our more elaborate draft we provided for all kinds of review procedures, very elaborate structures and so forth. We have here a situation where the president can appoint panels. It is really within his discretion. We need a very strong president for this tribunal. If any of you have any ideas on that subject, I'd be very glad to

52. Escrow Agreement, supra note 1, para. 9, states: "A French language version of this Agreement will be prepared as soon as practicable. The English and French versions will be equally authentic and of equal value."

53. Claims Settlement Agreement, supra, note 1, art. III, para. I, provides: The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within 90 days after the entry into force of this agreement, each Government shall appoint one-third of the members. Within 30 days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.
have them. It is going to have to be somebody who has sufficient credibility with the Third World to be acceptable. But it should be somebody who is fundamentally schooled in the Western system of law and rooted in the concepts of property rights and human rights.

Charles Brower: I gather that consideration is being given to London as an alternative seat for the arbitration. Why is it being considered, are there any others, and why?

Mark Feldman: There are a great many anglophiles among the claimants' bar in Washington who feel that they want the amenities of London. Some of them even told me that we could not run something like this out of The Hague. I said I didn't believe that.

Charles Brower: They've probably been to The Hague.

Mark Feldman: There is enough work to spread all around Europe as far as I can see.

Validity of the Settlement Under International Law

Alan Swan: I think we should begin this afternoon to work a little bit on the question of the validity of the agreements under international law. Later, we will pick up questions regarding the statutory authorities that underlie the executive actions in this case. So, to get us started on the issue of the international legal validity of the agreement—the effect of that question on the jurisdiction of the arbitrators and on court actions—I'm going to ask Hans Smit if he would open up with some remarks.

Hans Smit: When I saw the terms of the settlement with Iran for the first time, I followed what I have already told you is my natural inclination, and that is to test its validity under the Hans Smit conception of justice. I came to the conclusion that an agreement of that nature had to be void or voidable under international law. Having reached that conclusion, I went to the authorities to see whether I could find someone to back up the accuracy of that statement. I looked at the Vienna Convention on the Law of Treaties and found some articles that bore upon it. One of them, article 52, said that a

55. Id. This article states:

Coercion of a state by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.