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CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

361

ORIGINAL DOCUMENTS IN SAFE

Case No.

439

Date of filing:

26-Sep-86

** AWARD

- Type of Award _____

- Date of Award _____

_____ pages in English

_____ pages in Farsi

** DECISION

- Date of Decision _____

_____ pages in English

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English

_____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English

_____ pages in Farsi

** DISSENTING OPINION of

Judge Brower

- Date

26-Sep-86

34 pages in English

_____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____

_____ pages in English

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CASE NO. 439

CHAMBER TWO

AWARD NO. 256-439-2

INTERNATIONAL SYSTEMS & CONTROLS
CORPORATION,

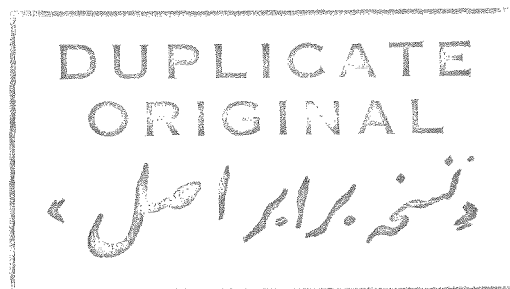
Claimant,

and

INDUSTRIAL DEVELOPMENT AND RENOVATION
ORGANIZATION, IRAN WOOD AND PAPER
INDUSTRIES, MAZANDARAN WOOD AND PAPER
INDUSTRIES, and THE ISLAMIC REPUBLIC
OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL		دادگاه دآوری دعاوی ایران - ایالات متحدہ	
ثبت شد - FILED			
Date	26 SEP 1986	تاریخ	
	۱۳۶۵/۷/۴		
No.	439	شماره	



DISSENTING OPINION OF JUDGE BROWER

1. Palpable reluctance to grasp the nettle of alleged Imperial corruption in Iran has led the Tribunal to choose a graceless jurisdictional exit. The potential discomfort thus avoided, however, was principally created by the Tribunal's own casualness in allowing Respondents tardily, unilaterally and hence prejudicially to engorge the record on the eve of trial. The miscarriage of justice which now results is magnified by the disastrous consequences which inevitably must befall the Parties.

I.

2. Under the best of circumstances this Case would pose a formidable challenge to an international tribunal such as

this one. Over \$116,000,000 has been sought by Claimant, which entered into contracts to design and construct two enormous paper producing projects in Iran through its Canadian subsidiary Stadler Hurter Limited ("SHL"). Respondents' counterclaims bring the total of sums in dispute to well over \$1,000,000,000. At one of the longest Hearings held at the Tribunal¹ much expert technical evidence was presented. Overall the accumulated record occupies 3.6 meters of shelf space and is the largest yet compiled at the Tribunal. Quite unnecessarily the Tribunal on the very eve of the Hearing radically compounded the difficulties facing it.

3. From the very beginning of their defense to this case² Respondents alleged that the contracts which form the subject matter of the indirect claims were procured by bribery, particularly of a brother of the Shah, in violation of both Iranian and United States law. As the Hearing of this Case approached, however, Respondents had failed during the four years' pendency of the claims to submit to the Tribunal one single piece of evidence in support of such allegation. The few non-evidentiary items submitted largely demonstrated that the United States Securities and Exchange Commission ("SEC") on 9 July 1979 had sought civil injunctive relief against Claimant based on allegations that it had corrupted foreign government officials in various

¹The three days allotted for hearing this Case so far have been exceeded only by the five days consumed by the Hearing in Starrett Housing Corporation and Islamic Republic of Iran. See Order of 20 Sept. 1982, Case No. 24, Chamber One.

²Respondents' Statement of Defense filed 13 August 1982 alleged that Claimant's "Gilan" contract was "concluded through influence peddling and bribing the government officials" and that the "Mazandaran" contract resulted from "a series of briberies, collusions and influence peddling."

countries (including Iran)³ and that Claimant subsequently had consented to entry of a decree.⁴ The omission to submit any evidence for so long is of some significance given both the seriousness of the charge and the fact that consistently a far greater volume of submissions (including evidence) had been filed in this Case than in any other at the Tribunal, Respondents having been ably assisted by North American counsel (who apparently have long represented them in related Canadian litigation).

³A painstaking review of the file in this Case reveals that other than legal argument the only materials submitted by Respondents on the issue of bribery prior to the end of 1985 were (1) four news articles reporting allegations of such activity on the part of Claimant by the SEC; (2) the SEC's "Brief of Points and Authorities" filed 9 July 1979 in the United States District Court for the District of Columbia, i.e., the SEC's written legal arguments (unaccompanied by any of the evidence, testimonial or documentary, referred to therein); (3) a September 1979 telex from the United States Department of State to the American Embassy in Tehran forwarding certain questions posed by the SEC; (4) two letters of Respondents to SHL (or a related company) advising of a new Iranian legal requirement that all foreign contractors submit an affidavit disclosing any payments to government officials and inviting compliance; (5) a letter to one of Respondents from a discharged expatriate employee seeking reinstatement with that Respondent, which is dated contemporaneously with the aforementioned SEC activity and apparently was prompted by it, and alleging that "kickback bribes . . . and other criminal wrongdoings by SHL hindered all my . . . efforts and eventually I was fired"; and (6) two letters through which a complaint was conveyed to the Prime Minister by the executive officer of one of the projects addressed in this Case to the effect that a named agent of SHL had threatened to have him dismissed from his position.

Claimant responded to these submissions by introducing evidence of extensive efforts to assure compliance with both Iranian and United States law. Such efforts included employment of special counsel who conducted an internal investigation and rendered an independent opinion which confirmed such compliance.

⁴It is important to note that this decree, dated 17 December 1979, recited expressly that it was entered
(Footnote Continued)

4. On 5 November 1985, however, roughly four years after this Case was commenced⁵ and less than ten weeks before it was heard,⁶ the Iranian Agent filed with the Tribunal a three-sentence request as follows:

Respondents in the captioned case have announced that they have recently gained access to new documentary evidence which will have a considerable impact in shedding light on the dark aspects of this case, particularly in terms of bribery, deception, the adjustment agreement and Claimant's direct claim.

Accordingly, the Arbitral Tribunal is respectfully requested to schedule a date for the filing of the said evidence and to notify it in due course.

Your concurrence to grant the above request will be highly appreciated.

This brief request offered no explanation as to why such evidence was being offered only at the eleventh hour notwithstanding Respondents' longstanding representations that the "documents supporting the illegal payment of bribery by Claimant are voluminous" and promises of "valid and specified documents" including "clear confessions" of Claimant.

(Footnote Continued)

"without [Claimant] admitting or denying any of the allegations" made by the SEC.

⁵The Statement of Claim was filed 18 January 1982.

⁶The Hearing was held 20-22 January 1986, for which dates it had been scheduled since 25 June 1985. Prior to that it had been scheduled for a complete and final Hearing on five separate occasions, the first such planned Hearing date having been 16-17 December 1983. In addition, a Hearing on jurisdictional and preliminary issues, including the allegations of bribery, had been scheduled for five different dates between March and December 1983, but was never held. (See, e.g., Order of 18 Nov. 1982.)

5. On 8 November 1985, just two days after Respondents' request was served on Claimant, but months after the Tribunal expressly had closed the record,⁷ the Tribunal summarily granted the request without affording Claimant a reasonable opportunity to comment:

The Tribunal notes Respondents' letter filed on 5 November 1985, requesting a date to be scheduled for the submission of new documentary evidence.

In view thereof, Respondents shall file such evidence by 10 December 1985. Should Claimant wish to file any evidence in rebuttal it shall do so not later than 6 January 1986.

The Order thus confirmed that the requested submission must be of "new documentary evidence."⁸

⁷By Order of 7 May 1984 the Tribunal had required Respondents to "file their summary of all evidence, together with all documentary evidence" and "any evidence or briefs in rebuttal" by "not later than 27 August 1984." (Emphasis added.) The Tribunal subsequently denied a request for extension of this deadline (Order of 19 July 1984) and Respondents filed their evidence on 28 August 1984. At that time the Hearing was scheduled to be held 28-29 September 1984; it was postponed subsequently due to the illness of the then Chairman of the Chamber (Order of 12 September 1984). Thereafter the then Chairman resigned and was replaced by the present Chairman. (1985 Annual Report at para. 6-7.)

⁸Article 31(2) of the Tribunal Rules provides:

In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

As I did not concur in this Order or in authorizing the Chairman of Chamber Two to "decide on his own" the Chairman necessarily signed this Order either with the concurrence of Judge Bahrami or after determining that "no majority" existed either supporting or opposing it.

6. On 10 December 1985 Respondents in fact filed eighteen volumes containing thousands of pages of materials demonstrably not "new." Collectively, these volumes constitute over 40 percent of Respondents' total filings in this Case. Of greatest significance for present purposes, this submission included a 139-page comprehensive Memorial supplemented by nineteen affidavits⁹ and ten exhibits. The principal such exhibit was, in essence, the "guts" of the SEC's proceeding against Claimant publicly filed 9 July 1979 in the United States District Court for the District of Columbia. That SEC filing included an extensive affidavit of the relevant SEC investigative official and its 131 separate documentary exhibits embracing three volumes. It is this last-minute presentation of voluminous evidence on the issue of bribery, all of which was publicly available to Respondents and their counsel (Iranian as well as North American) since 9 July 1979,¹⁰ that created a dilemma for the Tribunal.¹¹

⁹Eight of these were executed after the Order of 8 November 1985. The remainder had been prepared months before (executed on various dates between 22 March and 19 May 1985), or were never executed and hence bear no date.

¹⁰The previous submission by Respondents on 30 August 1984 of the SEC's "Brief of Points and Authorities" filed in the same proceedings, on the same date, and in the same place confirms that Respondents had full knowledge and enjoyed full access to the records of those proceedings no later than that time.

¹¹The other eleven volumes of the 10 December 1985 submission of purportedly "new documentary evidence" consisted of (1) Detailed Project Reports on one of the projects here in issue dated 15 July 1973; (2) audit reports dated 29 Aban 1359 (20 November 1980); and (3) a Memorial with exhibits in support of certain counterclaims. As to the first two categories, the Iranian Agent, by letter of 10 December 1985 to the Chairman of this Chamber, admitted that they either had "been previously invoked frequently in the submissions by Claimant and Respondents" or "were previously brought to the Tribunal's attention in Respondents' briefs." Examination of the third category in detail reveals that the

(Footnote Continued)

7. The proper way to deal with this submission would have been to exclude it initially, as was done by this Chamber in Middle East Management and Construction Corporation and Islamic Republic of Iran, Award No. 202-292-2 (25 Nov. 1985). In that case both parties made late filings, just prior to or at the Hearing, including "various documents dated between 1968 and 1979 which clearly always had been in [the producing party's] possession and which in no way were required as rebuttal" Id. para. 6. The Tribunal stated:

All of these last-minute submissions are far too late. . . . [I]t is inexcusable for the Parties to delay in this fashion the full articulation of their arguments and presentation of their evidence. The Tribunal could not accept such late submissions without prejudice to the opposing Party or Parties in the Case and damage to the fair and orderly conduct of the proceedings. Therefore, all of these submissions are rejected as untimely.

Id. para. 8. Accord Ford Aerospace & Communications Corporation and Air Force of the Islamic Republic of Iran, Award No. 236-159-3, para. 12 (17 June 1986) (requirement of fairness to, and equality between, the Parties obligates Tribunal to reject unscheduled filings submitted immediately prior to Hearing, to which the opposing party objects); Logos Development Corp. and Information Systems of the Islamic Republic of Iran, Award No. 228-487-3, para. 3 (30 April 1986); McCollough & Company, Inc. and Ministry of Post, Telegraph, and Telephone, Award No. 225-89-3, para. 6 (22 April 1986).

8. First by letter filed 18 November 1985, and subsequently by telex of 17 December 1985, Claimant argued that

(Footnote Continued)
evidentiary materials date almost exclusively from the 1970's.

Respondents' proffered submissions were unexcusedly tardy, were an abuse of the Tribunal's process, and should be stricken so that the Hearing could be conducted without prejudice to Claimant. Instead of following the Tribunal's consistent practice when such objections are made, the Tribunal equivocated:

The Tribunal notes Claimant's telex received on 17 December 1985 requesting the Tribunal to strike from the record Respondents' submission of 10 December 1985.

The Parties are hereby informed that the Tribunal will take a decision regarding the admissibility of Respondents' submission of 10 December 1985 at the Hearing in this Case, scheduled for 20, 21 and 22 January 1986.

The Tribunal re-confirms its Order of 8 November 1985 and reiterates that if Claimant so wishes, it may file any evidence in Rebuttal to Respondents' above-mentioned submission not later than 6 January 1986.

Order of 19 December 1985.¹²

9. As a result the Tribunal finds itself confronted by what it apparently regards as a distasteful choice: On the one hand, the Tribunal could substantially remove the issue of bribery from this Case only by rejecting, and then ignoring, evidence offered to prove, inter alia, that the contracts at issue were procured through corruption of the Shah's brother, including materials gathered by an agency of the United States Government and presented to an American

¹²This Order likewise was issued without my concurrence. See supra note 8.

On the face of it, Claimant could not possibly have been in a position adequately to rebut within twenty-seven days (i.e., by 6 January 1986) the eighteen volumes of evidence which, judging from the dates of certain affidavits, see supra note 9, Respondents had been preparing for months.

court resulting in entry of a consent decree; on the other hand, the definitive admission of Respondents' belated and voluminous evidence would make unavoidable the ticklish task of evaluating it, after which the Tribunal would be required to find either that corruption was established or that it was not, and, should the alleged corruption be proven, to proceed to break wholly new ground regarding its legal effect in these proceedings.¹³

¹³Such international legal precedent as exists regarding bribery has focused on a situation quite different from that alleged here, i.e., the enforceability of an agreement for payment of a bribe, the consistent result being that such an agreement is unenforceable as contrary to public policy. See, e.g., I.C.C. Award No. 3916 (1983), 111 J. Droit Int. 930 (1984); P. Lalive, Transnational (or Truly International) Public Policy and International Arbitration paras. 111-27 (1986) (presented at the Eighth Quadrennial Congress of the International Council on Commercial Arbitration); El Kosheri & Leboulanger, L'Arbitrage Face à la Corruption et aux Trafics d'Influence, 1984 Revue d'Arbitrage 3, 9-18.

The present Case, however, does not involve such a claim for the payment of a bribe, but rather includes an allegation that otherwise legal and valid contracts are tainted because they allegedly were obtained by bribery. This issue apparently has not, until now, confronted an international tribunal, and thus, had it proceeded that far, the Tribunal would have had to decide the issue unaided by authoritative international precedent.

While municipal law may be informative, it likewise fails to provide any consistent bellwether. Under Swiss law, for example, a contract procured by bribery is not considered morally tainted by the underlying corruption, and thus may be enforceable. Recueil Officiel 47 II 86, Spälti c. Motor AG (1921); A. Héritier, Les Pots-de-Vin 145-52 (1981). Anglo-American legal systems instead consider such a contract to be voidable, but impose a quasi-contractual duty to pay in quantum meruit the objective value of goods or services actually rendered in order to avoid unjust enrichment. Crocker v. United States, 240 U.S. 74 (1916); 15 Williston, A Treatise on the Law of Contracts sec. 1749 (3d. ed. 1972); Mahesan v. Malaysian Government Officers' Co-op., 2 W.L.R. 444 (1978); 1 Chitty on Contracts sec. 2049. French law appears similar, S. v. Delvaux, Paris 1st ch. J.P.C. II 7435 (1953); A. Von Mehren & J. Gordley, The
(Footnote Continued)

10. While I am sensitive to the delicacy of the choice thus facing the Tribunal, we are duty bound to make it. On balance, I would have rejected the late evidence. I am inclined to the view that if Respondents had been truly serious about the corruption issue, and genuinely believed in their position, they would not have delayed putting it before us until well over six years after the evidence on which they principally rely became public, more than four years after the commencement of this Case, and a good two years after the full and final Hearing originally was scheduled to take place. Balanced against Respondents' negligence is the severe prejudice to Claimant in being required to deal with thousands of pages of new submissions on the eve of the Hearing. More than four years ago, when filing this claim, Claimant urged expedition on the basis of financial distress, the acuteness of which doubtless has increased rather than diminished. At this point admission of Respondents' belated evidence would force Claimant to choose between offering no defense to it, which is unthinkable, and engaging in many more months, if not years, of costly proceedings here.¹⁴ I regret that the Tribunal has

(Footnote Continued)

Civil Law System 1029 (1971), while German law may consider a contract procured by bribery to be itself void as contra bonos mores and thus outside the scope of any unjust enrichment remedy. German Civil Code Art. 138, 817; Judgment of 27 March 1936, Case No. VII 336/35, 151 Reichsgericht Entscheidungen 70.

¹⁴The only release from the horns of this dilemma, other than the one the Tribunal unfortunately has chosen, would be to determine as a matter of law that the alleged bribery, even if proven, cannot have any influence on the outcome of the case. The legal consequences in international arbitration of corruption, if proven, as an inducement to a contract itself having a valid purpose are not obvious, but no one would be prepared to rule as a preliminary matter that it could have none. See supra note 13.

A difficult but possible alternative would have been
(Footnote Continued)

not been able to face up to the necessity for choice, especially since it is a choice produced entirely by the Tribunal's own ill-advised acts.

11. The Tribunal's order of 19 December 1985 indicated that the decision on admissibility would be taken at the Hearing in January 1986. Oral argument was presented by both sides but no decision was taken. Instead, the Tribunal's Award today holds that the issue is "moot." It is against this background that the Tribunal's treatment of the jurisdictional issue must be viewed.

II.

12. In addressing the jurisdictional issue it is important briefly to recall the underlying basic facts. In addition to its own direct claim, Claimant ("ISC") asserts indirectly the claims of its wholly owned Canadian subsidiary SHL. SHL, the direct party to the contracts at issue with Respondents, suffered extreme financial impairment following Respondents' alleged breaches. In October 1979 SHL submitted a contractual "proposal" in bankruptcy to its creditors in conformity with Canadian federal law. Under the terms of the proposal (as amended in January 1980 and thereafter accepted by SHL's creditors), all SHL's assets were placed with a Canadian trustee to "secure and

(Footnote Continued)

for the Tribunal to admit the belated evidence but accord it only the weight given evidence which the opposing party has not had an opportunity to confront and rebut and then proceed to an award on the merits.

The dilemma faced by the Tribunal is of crucial significance because Respondents' allegations of bribery constitute the principal and overarching issue in this Case.

guarantee" execution of the proposal.¹⁵ The trustee was empowered to liquidate and distribute SHL's assets to the creditors in order to satisfy SHL's debts, see Amended Proposal, 9 Jan. 1980, para. 4; any excess remaining after satisfaction of creditors and payment of the trustee's expenses would automatically revert to SHL, see infra paragraph 30. The trustee thereafter commenced suit in a Canadian court against the present Respondents, seeking damages for breach of the contracts on which Claimant bases its claims here. See Bertrand v. Industrial Development and Renovation Organization of Iran, No. SCM-05-017071-794, Quebec Superior Ct., filed in November 1979.

13. The jurisdictional issue most seriously disputed in this Case is whether following the proposal SHL's American owners no longer "owned" the claim as necessary under the

¹⁵The full text of that portion of the proposal transferring SHL's assets to the trustee reads as follows:

9. THAT to secure and guarantee the execution of the foregoing Proposal, the Company does hereby pledge, cede, transfer, assign and convey to the Trustee in trust for and on behalf of the creditors all its property wherever situated and all such property that may be acquired by it or devolve upon it during the term of this Proposal together with such powers in or over or in respect of property as might have been exercised by it for its own benefit, the whole in the manner and to the extent as if the undersigned was a bankrupt and the Trustee herein were vested with its assets as same as defined under Section 47 of the Bankruptcy Act.

Under Canadian law such a "proposal," upon acceptance by the proponent's creditors, becomes a contract. Ordinarily it implies an intention on the part of all concerned to enable the proponent to continue in business and recoup its fortunes. This in turn suggests an expectation either that the security given will never be foreclosed upon or that any foreclosure would leave a surplus returning to the proponent.

Claims Settlement Declaration to permit this Tribunal to entertain the claim. See Arts. II(1) and VII(2). To resolve this issue necessitates a determination as to what is required for a claim to be "owned" within the meaning of the Claims Settlement Declaration. Here the Tribunal was confronted by a difference between the Parties as to whether the law applicable to this issue is international law, as Claimant asserts,¹⁶ or Canadian law, as urged by Respondents. Although the Award does not confront this fundamental issue expressly, it appears implicitly to accord with my conclusion that neither view is wholly correct and that we must resort to both sources of law, for distinctly different purposes.

14. As an international arbitral tribunal established by the two States Parties, this Tribunal's jurisdiction is determined by reference to the terms of its organic documents, in particular the Claims Settlement Declaration. In staking out the precise boundaries of the Tribunal's jurisdiction, should guidance be required, resort must be made to applicable principles of international law to ascertain what factors must be present for jurisdiction to attach. Thereafter, once the Tribunal has determined what is required for a claim to be "owned" within the meaning of

¹⁶At the Hearing Claimant referred to two prior Tribunal cases in support of the view that the Canadian law governing SHL's insolvency is irrelevant to the Tribunal's jurisdiction. See Behring International Inc. and Islamic Republic Iranian Air Force, Award No. ITM 52-382-3 (21 June 1985); Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3 (10 Jan. 1983), reprinted in 2 Iran-U.S. C.T.R. 6. While those cases reflect the principle that the Tribunal is generally independent of any national laws, I find them not to be otherwise determinative. In those cases the municipal bankruptcy law that was purported to affect jurisdiction was that of the United States (in Behring) or of Iran (in Rexnord), i.e., the States Parties to the Accords. They are thus distinguishable from the present Case, where the municipal law in question is that of a State with no obligations under the Accords.

the Declaration, the Tribunal must determine whether the factors necessary for jurisdiction exist in the particular case. It is this latter inquiry that may involve an examination of the municipal law governing relevant ownership rights, i.e., Canadian federal law, which doubtless applies as between SHL and the trustee.

15. In undertaking interpretation of the Declaration's requirement that a claim be "owned" by a national of a State Party one must apply the principles, often invoked by the Tribunal,¹⁷ of Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), opened for signature 23 May 1969, U.N. Doc. A/Conf. 39/27, entered into force 27 January 1980), reprinted in 8 Int'l Legal Mat'ls 679 (1969):

. . . [O]rdinary meaning [should] be given to the terms of the treaty in their context and in the light of its object and purpose.

16. In determining the ordinary meaning of "owned" in the Claims Settlement Declaration where a trust is involved one may usefully refer to the Hague Convention on the Law Applicable to Trusts and on Their Recognition, Hague Conference on Private International Law, 2 Proceedings of the Fifteenth Session 361 (1985) ("Hague Convention"). Article 2 defines "trust" as referring "to the legal relationships created . . . by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose." (Emphasis added.) It adds that "reservation by the settlor of certain rights . . . [is] not necessarily inconsistent with the existence of a trust." While the Hague Convention does not deal explicitly with the term "ownership" as such it makes

¹⁷See authorities collected in Concurring Opinion of Charles N. Brower, In Which Howard M. Holtzmann Joins, in Case No. A17, Decision No. DEC 37-A17-FT, pp. 2-5 (18 June 1985).

clear in Article 11 that trust assets are immune from recourse by the "personal creditors of the trustee;" that they do not form any "part of the trustee's estate upon his insolvency or bankruptcy" or "of the matrimonial property of the trustee or his spouse" or his "estate upon death;" and that they "may be recovered" upon a specified "breach of trust." It is thus at least implicit in the Hague Convention scheme that a "settlor" retaining reversionary rights to the trust assets (here SHL) continues to have ownership rights in them. Precisely this is the conclusion of Dr. David M. Walker, Regius Professor of Law in the University of Glasgow, in the Oxford Companion to Law 910 (1980), in defining "Ownership":

Ownership is always . . . ownership of a group of rights in and to some object of these rights. The owner may, accordingly, transfer to others some or many of the rights but he remains owner so long as he retains the radical or reversionary right of getting the thing back when the other party's right has terminated; he ceases to be owner if he alienates the reversionary right and can no longer recover the thing. (Emphasis added.)

17. Looking next at the "object and purpose" of the Claims Settlement Declaration, the conclusion that ownership is a concept intended to embrace Claimant's rights in the indirect claims asserted here is well founded. Principle B of the General Declaration refers to "claims" as follows:

It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations . . . , 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. . . . [T]he United States agrees to terminate all legal proceedings in United States courts regarding claims of United States persons and institutions against Iran . . . , to nullify all attachments . . . obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration. (Emphasis added.)

18. Clearly an important purpose of the Tribunal is to adjudicate claims against Iran brought by American parties in U.S. courts prior to the conclusion of the Accords on 19 January 1981. When determining what is a "claim" which is "owned" by U.S. nationals sufficiently to satisfy our jurisdictional requirements it is appropriate to bear this in mind. The Tribunal must take judicial notice of the fact that the same indirect claims asserted here were the subject of litigation commenced by Claimant against Iran in November of 1980, over a year after the trustee acquired rights under the proposal in regard to the indirect claims here, and a year after the trustee had instituted suit in Canada against the same Iranian parties (in November 1979), and that such litigation was pending in a United States District Court at the time the Accords were concluded.¹⁸ These are facts of which Iran as well as the United States must be deemed to have had knowledge when reaching the Accords on 19 January 1981. Exercise of jurisdiction here by us thus would be consonant with the "object and purpose" of the Accords.

19. Turning then to the "context" of the Claims Settlement Declaration, one finds that it follows historical international claims practice (see infra paras. 21-22), which emphasizes "beneficial" ownership to the virtual exclusion of "legal" ownership as the basis of standing to assert a claim. The Declaration does so particularly (1) by excluding jurisdiction over a claim the legal title to which is held by a corporation organized in one of the States Parties unless "natural persons who are citizens of" that State Party ultimately, i.e., beneficially, own that corporate claimant to the extent of at least fifty percent (Article

¹⁸See International Systems & Controls Corp. v. Islamic Republic of Iran, C.A. No. H802575 (S.D. Tex. filed 14 Nov. 1980).

VII(1)); and (2) by permitting claimants to assert claims in which they have only beneficial ownership and no legal title, i.e., claims held by foreign corporate subsidiaries (Article VII(2)).

20. Put another way, under Articles II(1) and VII(2) it is necessary that the benefit of a claim, whether it be a "direct" or an "indirect" one, reside ultimately in one or more American nationals. It is not enough for our jurisdiction that a claimant be, for example, a Delaware corporation. Something else is required, namely that the ultimate owners of that company are to the extent of at least fifty percent of its "capital stock" individual United States citizens. In other words, our jurisdiction depends on there being ultimate, i.e., beneficial, American ownership (or Iranian ownership, as the case may be). Conversely, a Claimant may assert a claim in which it has no legal title whatsoever. Under Article VII(2) nationals of a State Party may assert "claims that are owned indirectly [i.e., beneficially] by such nationals through ownership of . . . juridical persons [incorporated outside that State Party]" In such a case, of course, the foreign "juridical person," and not the claimant, is the legal owner of the claim asserted.¹⁹ This requirement of beneficial rather than legal ownership is underscored in the distinction expressed in Article VII(2) itself between "ownership" and "control."

21. As noted just above, the Claims Settlement Declaration's concentration on beneficial ownership conforms to the

¹⁹It appears also that for such an indirect claim to be within our jurisdiction the claimant's ownership interest in the foreign corporation may itself be beneficial rather than legal. In International Technical Products Corporation and
(Footnote Continued)

traditional practice of claims settlement commissions. Where ownership interest is relevant to a claimant's right to recovery, it is actual beneficial ownership rather than legal title that has been considered determinative. An important example is that of the Mexican Claims Commissions:

A number of claims on behalf of corporations in liquidation or receivership were presented to the Commissions. In only one case was any question raised with respect to a receiver's authority. . . . It was urged that the claim should be dismissed because the nationality of the receiver had not been shown The Commission held that the nationality of the receiver was immaterial since he was only a representative of the insolvent corporation

A. Feller, The Mexican Claims Commissions 116-117 (1935), citing U.S.A. (W. C. Greenstreet, Receiver) v. United Mexican States, Opinions of Commissioners, p. 199 (1929).

22. As Whiteman has stated, "the national character of a claim must be tested by the nationality of the individual 'holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim'." 8 M. Whiteman, Digest of International Law 1262, citing Re Claim of American Security & Trust Co., Trustee, Dec. No. HUNG-51 (U.S. Dept. of State, 1957). See also E. Borchard, The Diplomatic Protection of Citizens Abroad 643-44 (1915); R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements 105-06 (1975). Indeed, the

(Footnote Continued)

Islamic Republic of Iran, Award No. 196-302-3, pp. 35-39 (28 Oct. 1985), allegedly expropriated property was owned by a private Iranian corporation of which the claimant was the beneficial owner throughout the relevant period. For a substantial part of the relevant time 89 or 90 percent of the legal ownership was held by a third person "in trust" for the claimant. The Tribunal held that this beneficial ownership interest was sufficient to support continuous United States ownership of the claim for expropriation.

opinion of Respondents' international law expert, D. Bowett, Q.C., submitted in this Case states that Claimant must demonstrate that it retains a "beneficial interest."

23. The present Award does not dispute the primacy of beneficial ownership;²⁰ instead, it denies that Claimant has any, stating virtually without discussion that after the execution of the proposal "SHL no longer retained any . . . beneficial interest." (Para. 80. Emphasis added.)

24. It seems obvious, however, that notwithstanding the proposal SHL remains a beneficiary of its Iranian claims. The proposal recognizes and secures the rights of SHL's creditors to payment out of its assets, but it does not thereby deprive SHL of ownership of those assets. There has not yet been any liquidation or distribution to the creditors of the claims here presented, and thus SHL continues to own these claims, subject to the terms of the proposal. It is true that, under the proposal, SHL's assets ultimately may be used to discharge its legal debts, but that very possibility recognizes that until that occurs SHL retains one of the most fundamental beneficial rights to property, i.e., the ability to use its property to pay its just debts. If the assets ultimately are liquidated to pay creditors, that act undeniably would benefit SHL quite as much as it would its creditors, since SHL would thereby be

²⁰ Indeed, in citing (para. 85) International Technical Products Corporation, see supra note 19, it at least implicitly confirms that beneficial ownership is determinative.

relieved of its debts.²¹ No doubt many if not all claimants before us have just debts outstanding to which substantial portions of the amounts awarded here will be applied. That fact obviously cannot be said to deprive such claimants of the benefit of their claim. SHL's situation differs only in the particular manner by which SHL's creditors are secured.

25. Even if this practical approach is rejected (and, indeed, the Award fails even to consider SHL's continued beneficial interest evident in its ability to use assets to pay debts), it is clear that SHL retains a beneficial interest in the excess of its assets not ultimately applied to pay its debts. On this subject, however, the Award concludes simply (paras. 80-81):

The fact that at some time in the future SHL would be entitled to the remaining assets, if any, is irrelevant. . . . Only if there is a surplus after all creditors had been paid, would any residue accrue to the company. A potential future interest is not an existing interest
(Emphasis added.)

Aside from the dubious and unsupported characterization of SHL's rights as a "potential future interest,"²² this conclusion is utterly inconsistent with the scheme of the Claims Settlement Declaration, Article VII(2) of which permits an indirect claim notwithstanding the fact that the

²¹Thus SHL's creditors are themselves beneficiaries of SHL's property only in the sense that any secured creditor is a beneficiary of an asset: they have a right to foreclose on an asset should a debt remain unpaid. Until the actual exchange of asset for debt, however, the debtor owns his property, encumbered though it may be.

²²Even an interest that may subsequently vest consists of present legal rights. Characterizing such an interest as contingent, "potential," or "future" merely describes the current incidents of ownership and possession of the rights; it does not make the rights nonexistent.

claiming national may never see one penny of it, i.e., its only entitlement is to dividends declared, if any, by the foreign subsidiary shareholder out of surplus, if any, or, upon liquidation of such subsidiary, to its shareholder's equity, if any.

26. In addition, the analysis employed totally contradicts that recently articulated by this same Chamber in Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986) (Briner, Bahrami, Aldrich, arbs.). In that case the claimant asserted, inter alia, an expropriation claim for which it had received compensation from its insurer, Overseas Private Investment Corporation ("OPIC"), in consequence of which it had transferred "to OPIC . . . a beneficial interest in ninety percent of its shareholdings" in the expropriated company. (Emphasis added.) Id. para. 15. The Tribunal, in rejecting the Respondent's argument that Claimant thereby "somehow lost its right to pursue" its claim, after citing Claimant's retention of a ten percent beneficial interest as well as the legal title in its claim, concluded as follows:

Moreover, it appears from clause 2 of the insurance contract that Phelps Dodge may well be able to retain any amount it recovers from the present arbitration that exceeds the total of the amount of insurance payment it received from OPIC . . . with respect to the claims.²³

²³The Award errs (para. 83) in its paraphrase of this portion of Phelps Dodge insofar as it states that "because Phelps Dodge had retained the beneficial ownership of ten percent of its investment with respect to which it bore the risk of loss under the insurance contract with OPIC it would have been entitled to receive any excess" (Emphasis added.) The right to any excess, as the Tribunal itself noted, was based independently on clause 2 of the original insurance contract and was in no way "caused" by, or necessarily related to, the retention of a beneficial interest in ten percent of the expropriated shares.

Thus this very Chamber of the Tribunal expressly has confirmed the relevancy of precisely that which it now rejects as "irrelevant."²⁴ While this finding in Phelps Dodge was, as the Award points out (para. 83), obiter dicta insofar as the issue of continuous ownership was concerned, since the transfer to OPIC was made after 19 January 1981, its mere utterance in that context necessarily refutes the charge of irrelevancy.

27. The justice of regarding rights such as those enjoyed by SHL as an adequate beneficial interest on which to rest jurisdiction is evident when one views the "proposal" by analogy. SHL's claim, among other assets, was transferred to the trustee as security for payment of SHL's debts as provided by the proposal, much as a mortgage, pledge or other security interest might be given. Such a security interest always implies the possibility that under certain circumstances the ownership rights of the mortgagor or pledgor might be extinguished. Until that extinguishing event takes place, however, the owner retains an ownership interest in the assets. As noted earlier, it is evident that SHL's interest in its claims against Respondents, although subject to the rights of the trustee since 1979, were not conveyed or otherwise extinguished before 19 January 1981, nor have they been subsequently.²⁵

²⁴In Phelps Dodge, as here, it was entirely speculative as to whether there would ever actually be an excess available, as the Tribunal expressly denied Respondent's request that Claimant be required to divulge the amount of the insurance settlement. In fact, the absence of any such excess may be presumed from the fact that Claimant was awarded only the actual cash amount initially invested and not a higher "going concern" value it had sought. Id. paras. 30-31.

²⁵While the sale, settlement, prosecution to final judgment, or other liquidation of SHL's claims apparently would be within the trustee's authority under the proposal,
(Footnote Continued)

28. The plain fact is that, notwithstanding the analysis made up to this point, the Tribunal's wide concept of its jurisdiction has led it to award sums even where a claimant arguably had no continuous beneficial interest whatsoever. In Foremost Tehran, Inc. and Islamic Republic of Iran, Award No. 220-37/231-1 (11 April 1986), Claimant sought compensation for expropriation of, inter alia, a 1979 cash dividend from an Iranian company, to the extent (64 percent) it had been insured with OPIC.²⁶ Prior to the 19 January 1981 entry into force of the Claims Settlement Declaration, i.e., on 29 July 1980, Claimant was paid by OPIC and assigned to OPIC the "'entire beneficial interest' in the insured dividend" for 1979, retaining only legal title.²⁷ Id. p. 15. (Emphasis added.) Notwithstanding this complete divestiture of any beneficial interest in the insured dividend, Chamber One of the Tribunal, with former President Lagergren as its Chairman, utterly rejected Respondent's argument that Claimant lacked locus standi:

Legal title to the entire claim was vested continuously in Foremost from the date the claim arose to 19 January 1981 and remained so thereafter, notwithstanding the intervening settlements with OPIC. This being so, the recovery by Foremost of a measure of compensation from its insurer cannot affect its title to claim against the present Respondents.²⁸

(Footnote Continued)

it is not alleged that any such action took place before 19 January 1981. SHL's ultimate beneficial ownership thus remained unimpaired during the jurisdictional period.

²⁶A separate claim, also decided in Award No. 220-37/231-1, was made for the uninsured portion of this loss.

²⁷It must be presumed that as to this dividend there was no chance of a recovery exceeding the insurance payment, as the amount of the dividend was fully liquidated.

²⁸Foremost, supra, p. 15. In its two cases Foremost also sought to recover both the insured and the uninsured portions of its losses from expropriation of a 1980 cash

(Footnote Continued)

It would appear that despite the basic need for continuous beneficial ownership, its complete absence in regard to a specific claim may be excused where the fundamentally American character of the claim is nonetheless evident. Cf. International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. ITL-37-111-FT, pp. 10-12 (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 338, 343-44 ("This interest [of natural persons in a corporation or other entity] need not amount to beneficial ownership.").²⁹

(Footnote Continued)

dividend and of a 31 percent equity interest in the issuing Iranian company, likewise all insured by OPIC to the extent of 64 percent. On 31 August 1981 Claimant and OPIC had settled as to these items as well. The settlement agreement also contained "an assignment to OPIC of 'a beneficial interest'" Id.

²⁹A recent decision of this Chamber itself appears at least implicitly to confirm that even a modest degree of ownership may suffice. In Seaco, Inc. and Islamic Republic of Iran, Award No. ITL 61-260-2 (20 June 1986), the American claimant sought to assert indirectly a claim held by an Australian corporation, AustIran. It asserted as the basis of its "ownership" (1) the fact that its separate, wholly owned Australian subsidiary "acquired voting proxies for" 50 percent of AustIran on 7 November 1978; and (2) the fact that Claimant "also enjoys a beneficial interest in 27.5 percent of the common stock of AustIran, pursuant to a deed" executed in favor of Claimant's separate, wholly owned Australian subsidiary by the same 50 percent shareholders. The Tribunal found that various approvals requisite to the contemplated transfer of shares "were never obtained and [Claimant's wholly owned Australian subsidiary] was therefore not, at the relevant times, a record owner of any shares of AustIran." In other words, beneficial ownership, apparently dependent upon an executory accord, expired with the definitive failure of its execution, which likewise precluded vesting of legal title. Therefore, since Claimant's wholly owned Australian subsidiary "did not actually own a single share of AustIran stock during the time between the date the claims arose and the date of the Claims Settlement Declaration," the Tribunal concluded it had no jurisdiction over claims held by AustIran.

29. The instant Award itself confirms this Chamber's understanding that the "ownership" interest required for our jurisdiction is not necessarily a material one. In attempting to distinguish Foremost the Award confirms that the salient point in that case was that there was "no interruption of the continuous ownership of the claim since the legal interest remained vested in Foremost throughout the relevant period." (Para. 84. Emphasis added.) Likewise, in attempting to distance itself from its pronouncements in Phelps Dodge the Tribunal notes that "[n]one of these conditions [referring to retention of ten percent beneficial ownership, the right to receive any excess recovered over the insured amount and the holding of legal title] are satisfied in the present Case." (Para. 83.) In directing itself to the Case here at issue the Tribunal is quite explicit (paras. 80, 85):

. . . [After the effective date of the proposal] SHL no longer retained any legal or beneficial interest in its claims

* * * * *

. . . [T]he Claimant [had] neither legal nor beneficial ownership during the relevant period. The issue here presented is thus . . . that of [Claimant's] continuous³⁰ ownership, legal or beneficial, of the claim. (Emphasis added.)

30. If it remains true to these precepts of international law the Tribunal can reach the result it does only by

³⁰The Tribunal found that after the proposal took effect legal title was in the trustee, "the beneficial owners . . . expressly being the creditors of the company." (Para. 80.) An arrangement to ensure payment to SHL's creditors, however, ultimately is to the benefit of the debtor, SHL, who is thereby relieved of such debts. Thus, even on its own analysis the Tribunal's disposition is incorrect. Heretofore no Tribunal case involving a bankruptcy has concerned itself with the creditors' nationality.

misapplying Canadian law. In the final analysis, the only way the Award can be explained, consistent with the Claims Settlement Declaration, international practice and our own precedents, is that the Tribunal concluded as a matter of Canadian federal law that SHL has no beneficial interest in the claim here asserted, i.e., specifically that it has no entitlement to any of its property not ultimately applied by the trustee for the satisfaction of creditors. Such a conclusion has been expressly refuted, however, by Claimant's and Respondent's Canadian law experts alike, who agree that under that law any amount in excess of what is required ultimately by the trustee to satisfy creditors and his own expenses is automatically remitted to Claimant. Dr. C. H. Morawetz, Q.C., co-author of Bankruptcy Law in Canada and an editor of Canadian Bankruptcy Reports, the expert presented by Claimant, concluded in his affidavit of 13 March 1984 (para. 24):

In sum, despite the broad language of paragraphs 8 and 9 of the Amended Proposal, there was no absolute transfer of ownership from [SHL] to the trustee Once the creditors have been satisfied, any surplus would go to [SHL] and indirectly to its shareholders [SHL] (and through it, ISC) continues to beneficially own the claim against Iran (Emphasis added.)

Respondents' expert, too, Prof. Albert Bohemier of the University of Montreal, in his subsequent affidavit of 26 July 1984, after having "taken cognizance of" Dr. Morawetz' affidavit quoted just above, confirmed that

Under the proposal of [SHL] . . . the assets of the company are transferred to the trustee for the purposes of satisfying the claims of the secured, privileged and ordinary creditors [A]ny surplus accrues to the debtor (Emphasis added.)

31. It strains credulity in the extreme for the Tribunal to adopt an interpretation of the municipal law of a State

where the courts of that State have not passed on the issue³¹ and the highly qualified experts in such law presented by all Parties have rejected such interpretation unanimously. The Award's disclaimer (para. 77) that it "will not venture an excursion into Canadian law," and its consequent omission to discuss such law, cannot change the fact that it necessarily has decided a point of Canadian law.

32. Adding immeasurably to the accumulated distress on this point is the fact that the rejection of jurisdiction by the Tribunal flies in the face of certain actions by the Canadian trustee himself and by the Canadian court under whose supervision he functions. After the trustee initially

³¹Prof. Bohemier's affidavit of 26 July 1984 expressly acknowledges that "up until now, it is true, the courts have never been called upon to pronounce itself [sic] on the nature of the transfer of ownership in the case of 'basket' proposal containing terms to that effect."

The experts therefore have relied on arguments derived from Canadian judicial holdings on other points. Respondents, for example, have relied on Henfrey Samson Belair Ltd. v. Wedgewood Village Estates Ltd., 51 B.C.L.R. 389, 393, 51 C.B.R. (N.S.) 285 (1984), a decision of the British Columbia Court of Appeal, for the proposition that a proposal in bankruptcy can "vest" assets in the trustee if the language of the proposal so provides. The decision was concerned, however, with whether a proposal "vesting" assets in the trustee gave him a sufficient interest in the assets to invalidate a prior fraudulent conveyance by the insolvent. Claimant, for its part, points especially to a decision of the Ontario Supreme Court, Re Mercantile Steel Products Ltd., 27 C.B.R. (N.S.) 161, 164 (1978), to support its contention that a proposal "is fundamentally a mechanism for the advantage of the debtor making it," although the proposal in that case appears not even to have purported to vest or transfer assets to the trustee. Apart from the fact that both cases deal with the rights of trustees vis-à-vis third parties, rather than with the rights of the proponent, neither, we are advised, necessarily is governing in the Province of Quebec, where both SHL and the trustee are situated, and under the bankruptcy jurisdiction of which the proposal is jurisdictionally administered.

resisted a demand of SHL for access to its documents, which SHL had requested for the express purpose of assisting Claimant to present the instant claim to the Tribunal,³² he subsequently was ordered by the Superior Court (sitting in Bankruptcy), District of Montreal, Province of Quebec to accede to that request. Mr. Justice Alphonse Barbeau expressly concurred, on 26 August 1983, upon motion made by SHL in its suit brought against the trustee 26 July 1982, that Article VII(2) of the Claims Settlement Declaration "has the effect of authorizing ISC to include in its claim that of [SHL] which it wholly owns."³³ Mr. Justice Barbeau thereupon ruled as follows:

. . . THE COURT
. . . .

ORDERS the trustee to give access to [SHL] to the documents and exhibits necessary for the purpose of making proof of its parent company ISC's claim before the Tribunal at The Hague and to permit [SHL] to take copies of such exhibits and documents.

Thereafter, by letter of 31 January 1984, countersigned by Claimant, the trustee agreed as follows:

In my capacity as Trustee acting in and under the Proposal of [Stadler Hurter Limited], I hereby

³²This stance arguably was inconsistent with his "Report To The Creditors" issued 13 November 1981, in which he referred to "The Company's principal assets" and "[a]nother substantial asset of the Company." (Emphasis added.)

³³The fact, noted in the Award (para. 73), that Mr. Justice Barbeau also stated that there had been transferred "to the trustee exclusive ownership of the assets of [SHL], including the right of action against the Iranian corporations" is at best dictum for present purposes. Like other Canadian decisions to which the Parties have referred (see supra note 31) that statement clearly relates to the trustee's rights vis-à-vis third parties and not to the respective positions of the trustee and SHL.

agree to cooperate with ISC in preparing its claim before the Iran-U.S. Claims Tribunal without prejudice to my rights to continue the proceedings I have instituted against Industrial Development and Renovation Organization of Iran et al in Case number 500-05-017071-794 of the files of the Superior Court for the District of Montreal (hereinafter referred to as the "Proceedings").

I hereby undertake and agree to desist from the Proceedings upon receipt of the sums necessary to pay all creditors' claims in accordance with the terms of the Bankruptcy Act, the fees and the disbursements related to the Proposal lodged by [Stadler Hurter Limited].

In the event that the sums received are not sufficient under the terms of the preceding paragraph, I hereby undertake and agree, upon receipt of a sum not less than the sum under seizure at the time of receipt, to give mainlevée of the seizure in case number 500-05-017071-794. Any lesser sum received will be applied on account of the claims made in case number 500-05-017071-794 and the Proceedings continued.

In addition, the Parties have advised the Tribunal that to all intents and purposes the trustee has suspended prosecution of the Canadian proceedings pending our disposition of this Case. These actions, partly judicial, should have given the Tribunal comfort that the substantive premises regarding ownership of the claims asserted on the basis of which our jurisdiction is invoked are not, in the end, inimical to Canadian law.

33. It remains to note that assertion of jurisdiction over the indirect claims here asserted would be consistent with the purposes underlying the requirement of nationality, which the Claims Settlement Declaration has in common with nearly all other international claims settlements. In traditional diplomatic practice, that the claimant have the nationality of the State presenting its claim is considered

the "first essential of an international claim"³⁴ and is the bond which "confers upon the state the right of diplomatic protection."³⁵ That requirement has the following purposes, which would be served here:

(1) It recognizes the traditional basis of diplomatic protection, i.e., that injury to a national is injury to the State. A national's claim espoused by a State becomes the State's claim, and enters into its relations with other nations. Nationality of the claim ensures that only claims genuinely connected with a State's foreign relations are espoused.³⁶ There can be little doubt about the connection between this claim and United States foreign policy interests. As previously recounted, this claim was one of the cases pending in United States courts prior to the conclusion of the Claims Settlement Declaration. It was suspended and transferred here pursuant to the United States' obligations under the Algiers Accords.

(2) It protects the respondent State from multiple liability by determining, in general, the one State entitled to assert a claim. In this connection it also prevents "forum shopping" by an injured person, who might otherwise attempt to have his claim brought by the government likely to be most influential over the

³⁴ Hackworth, Digest of International Law 802 (1944).

³⁵ Panevezys-Saldutiskis Railway, 1939 P.C.I.J., ser. A/B, No. 76, p. 16. See 1 R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements 44-45 (1975).

³⁶ Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 24 (judgment of 6 April 1955); Barcelona Traction Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 32-33 (judgment of 5 February 1970); 8 Whiteman, supra, p. 1233; Borchard, supra, p. 351.

respondent State rather than the government with which the person is most closely connected.³⁷ Here there is no practical risk of double liability against Iran. Because of the agreement among ISC, its Canadian subsidiary, and the subsidiary's trustee, an award to ISC of its claim here will, as a practical matter, be final and determinative in the Canadian lawsuit.³⁸ While it may be true that Canada, the State of SHL's "siège social," has the potential right to assert its diplomatic protection in SHL's behalf against Iran, such a possibility always exists in the context of indirect claims where the direct owner of the claims is a non-United States national. It is also evident here that Claimant has not engaged in forum shopping. It did not choose this forum; its claim was involuntarily transferred here by virtue of the Algiers Accords.

(3) In settlements where a "lump sum" or finite settlement fund is at stake, it protects the fund from dilution by interests extraneous to the States accepting or funding the settlement.³⁹ Here there is no concern over access to a limited fund, given the

³⁷Nottebohm, p. 21; Barcelona Traction, pp. 49-50; Ohly, A Functional Analysis of Claimant Eligibility, in International Law of State Responsibility for Injuries to Aliens 285 (R. Lillich, ed. 1983).

³⁸I appreciate that the trustee declared his intention to pursue his lawsuit on these claims in Canada if a monetary award in this Case were insufficient to satisfy creditors and defray his own costs (see supra para. 32). The Claims Settlement Declaration provides, however, in Article IV(1) that "All . . . awards of the Tribunal shall be final and binding," and in Article VII(2) that claims referred to this Tribunal "shall . . . be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court." (Emphasis added.) Furthermore, any award on the merits of this Case should be considered res judicata.

³⁹8 Whiteman, supra, p. 1240-41; Ohly, supra, p. 284.

unlimited nature of the Security Account established by Paragraph 7 of the General Declaration. To the extent that either State Party has an interest in precluding strangers from benefiting from that fund, it may be noted that originally it was funded by Iranian assets which previously were subject to attachment in litigation in the United States and were released by the Algiers Accords. Claimant's own suit in the United States against Respondents on these same claims was one of those suspended. Far from being a stranger to the fund, Claimant is an expressly anticipated beneficiary.

Although these traditional reasons for the nationality requirement in diplomatic protection are not necessarily relevant to the nationality requirement in the Claims Settlement Declaration,⁴⁰ the fact that they would not be disserved by a finding that ISC's indirect claims are claims of nationals within the Tribunal's jurisdiction is supportive of its jurisdiction.

34. In summary, the Tribunal's finding that it does not have jurisdiction over the indirect claims asserted here either (1) grossly misreads the terms of the Claims Settlement Declaration, having due regard to its context and also its object and purpose, improperly rejects a wealth of historical international claims practice, and completely

⁴⁰The Tribunal has expressly contrasted its own situation with that involved in traditional practice of espousal of claims of nationals by their governments, and concluded:

[T]he object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense.

departs from the Tribunal's (and indeed this very Chamber's) own recent precedents; or (2) makes a finding of Canadian law unanimously and expressly rejected by all of the evidence, the one pertinent Canadian judicial act and all of the testimony on Canadian law presented to us. No decision so thoroughly and evidently unsound in law can hope to evade speculation, if not indeed suspicion, as to its actual motivations. Cf. Stein, Jurisprudence and Jurists' Prudence: The Iranian Forum Clause Decisions of the Iran-U.S. Claims Tribunal, 78 Am. J. Int'l L. 1, 39 n.177 (1984). The author's assessment of the majority opinion in Mexican Union Ry. Co. (U.K. v. Mex.), 5 R. Int'l Arb. Awards 115, 128-29 (1930) is apposite:

One balks . . . at ascribing so consistently dismal a record to the incompetence of presumably competent jurists. Is it not more persuasive to explain such results as attempts to avoid offense to the strongly held and irreconcilable positions of the states concerned?

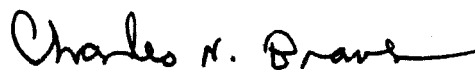
III.

35. The practical result of today's decision is that after Claimant, the trustee and the Canadian judiciary, struggling over a period exceeding five years, finally succeeded in having this dispute fully heard in a single forum with full ability to enforce its award they now must go back to where they were in 1980: SHL's claims must be pursued anew in duplicative proceedings in multiple municipal fora with all the resultant potential for judicial conflict and uncertain possibilities of enforcing any judgment and its creditors thus be further prejudiced.⁴¹

⁴¹ Presumably Claimant's suit (including SHL's claims) against Iran in the United States will be revived, (see (Footnote Continued)

36. Surely the States Parties to the Claims Settlement Declaration cannot have contemplated such an absurd result.

I dissent.⁴²



Charles N. Brower

(Footnote Continued)

Executive Order 12294, Section 3 (24 February 1981), reprinted in 31 C.F.R. §535.222(e) (1982)), and the trustee's duplicative action in Canada will now proceed, in which, the Tribunal was informed at the Hearing, \$33 million (Canadian) has been provisionally attached.

Some measure of the economic impact involved is provided by Claimant's submission evidencing expenditure of \$263,927 in legal fees and disbursements in this Case as of 31 July 1984.

⁴²I dissent also from the finding that we have no jurisdiction over Claimant's direct claim for constructive expropriation of its Iranian business. It is ironic that this Award embraces the earlier Award of another Chamber in Grimm and Islamic Republic of Iran, Award No. 25-71-1 (22 February 1983), reprinted in 2 Iran-U.S. C.T.R. 78, with alacrity, while repudiating this Chamber's quite recent pronouncement in Phelps Dodge. Whatever one may think of Grimm, it is evident in the record that Claimant has pleaded at least a "constructive expropriation" within the meaning of Article II(1) of the Claims Settlement Declaration. The Tribunal should have proceeded to evaluate the evidence on the merits of this claim. It did not do so.