Confidentiality of Arbitral Proceedings before the Iran –United States Claims Tribunal
By K. H. Ameli, February 2010

If one were to distinguish between privacy and confidentiality of arbitral proceedings and to subject non-disclosure of the proceedings to an explicit confidentiality provision, then such confidentiality would be restricted to the secrecy of deliberations of the Iran-United States Claims Tribunal, as will be shown below.

1. Regulatory framework

Under the constituent instrument of the Tribunal, the Claims Settlement Declaration, Article III(2) provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out." Thus, the Tribunal Rules Article 1(1) provides that "Within the framework of the Algiers Declarations, the initiation and conduct of the proceedings before the arbitral tribunal shall be subject to the following Tribunal Rules which may be modified by the Full Tribunal or the two Governments."

The Tribunal Rules Introduction and Definitions, paragraph 3(c) provides that "'Arbitrating party'" means, in a particular case, the party or parties initiating recourse to arbitration (the claimant), or the other party or parties (the respondent)."

Under the Tribunal Rules Article 2 copies of all documents filed with the Tribunal in particular cases are delivered to the Agents of the two Governments in The Hague for service upon the arbitrating parties in their countries, as the filing of documents with the Tribunal Registrar constitutes service on all of the other arbitrating parties in the case. Thus, from the outset the Agents of the two governments retain a copy of all the documents filed with the Tribunal even where they are not a party to the case.

Similarly, under the Tribunal Rules Article 15, Note 5, the Tribunal may permit one of the two governments or under special circumstances any other person, who is not an arbitrating party in a particular case, to present oral or written statements which are likely to assist the Tribunal in carrying out its task.

Further, where the Tribunal Rules Article 25(4) provides that "Hearings shall be held in camera unless the parties agree otherwise," Article 24, Note 1, ensures that the Agents of the two governments are not excluded from the hearing of a case by agreement of the parties by defining the term "parties" in Article 25(4) as including the two governments. And Article 25, Note 5, emphasizes this when indicating that nonetheless their presence is not required by providing that "The Agents of the two Governments are permitted to be present at pre-hearing conferences and hearings" and so they may not represent or assist a party at the hearing unless that party is the respective government of the Agent.

Thus, it is only natural for the Tribunal Rules Article 32(5) not to maintain the UNCITRAL provision under which "The award may be made public only with the consent of both parties," but to provide, as it has, that "All awards and other decisions shall be made available to the public, except that upon the request of one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties, other identifying facts and trade or military secrets have been deleted." Further, in spite of its decision that its awards are not subject to Dutch law but to international law,[1] the Tribunal has maintained as a precautionary measure the UNCITRAL provision, Tribunal Rules Article 32(7), pursuant to which the arbitral tribunal must file the award with the local court if it is so required under the arbitration law of that country. However, such a filing is not generally considered as publication of the award, consistent with the provision of the UNCITRAL Rules Article 32(5).

Moreover, the Tribunal Rules Article 31, Note 2, makes it explicit that "The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret. Only the members of the arbitral tribunal shall take part in the deliberations. The Secretary-General may be present. No other person may be admitted except by special decision of the arbitral tribunal. [] The minutes of the private sittings of the arbitral tribunal shall be secret."

However, the Tribunal Rules Articles 9-12 and Notes 1-7 thereto on challenge proceedings against the arbitrators before the Appointing Authority of the Tribunal are silent as to the privacy, confidentiality or publication of the proceedings and the challenge decision. It is so whether the challenge, per Note 1, is limited to a particular case by a party thereto or is based on general grounds by one of the two governments, except that under Note 7 "Disclosure statements filed as to each member shall be made available by the Registrar to each arbitrating party in each case."

2. Tribunal practice

A. Written pleadings and evidence

Absent explicit confidentiality or privacy provision in the Tribunal Rules, the public disclosure of written pleadings and evidence of the arbitrating parties has rarely, if ever, officially arisen as an issue before the Tribunal, considering the sheer number of the arbitrating parties and the state of relations between the two countries. The United States private journal, Iranian Assets Litigation Reporter (Andrews Publications), later Mealey's Litigation Reports – Iranian Claims (Mealey Publications) and now Mealey's International Arbitration Report have been publishing reports of the Tribunal proceedings, in addition to its awards and decisions, at times sensationally from anonymous sources from 1981 when the Tribunal was established until recently. They also occasionally published the Unites States' legal briefs in the cases. From some time the Iranian parties unofficially complained to the Tribunal about the disclosures by these journals, their

[1] See, The Islamic Republic of Iran and The United States of America, Award No. 586- A27-FT (5 Jun 1998), 34 Iran-US CTR 39 and Decision No. DEC 62-A21-FT (4 May 1987), 14 Iran-US CTR 324.

partiality and even the veracity of their reports. However, as they found no way by the Tribunal to stop such reporting by the journals, perhaps at times the Iranians also joined in to tell their side of some of the stories. The Tribunal only unofficially and occasionally raised its concerns with the United States when the reports talked about the presiding judges or did not accurately describe their decisions. By and large the Tribunal and the Iranian parties had to ignore them.

Further, the thirty major U. S. law firms, led by Baker & McKenzie, that represented the private U.S. claimants before the Tribunal soon established a joint archive of the records of their cases against the Iranian parties so that they also share the pleadings and evidence that the Iranian parties in those cases presented to the Tribunal not only for strategic and cost efficiency purposes but also to establish an equilibrium with the Iranian parties which enjoyed such a position as agencies and instrumentalities of the Iranian Government and their coordination by Iran's Bureau for International Legal Services, presently called, Center for International Legal Affairs. The private U. S. claimants however had the advantage of their separate personality such that their arguments in different cases against the same Iranian parties could not be invoked against them in the other cases, even when they were represented by the same U. S. counsel or law firms.

However, the Tribunal itself has consistently denied access to the records of pending or terminated cases to any persons other than the arbitrating parties and those they have authorized to represent or assist them in their cases before Tribunal under Article 4 of the Tribunal Rules. This obligation is buttressed and may arguably extend to the parties, where all documents and demonstrative aides presented at the hearing, held in camera unless otherwise agreed by the parties, must subsequently be submitted to the Registry as part of record of the case under the Tribunal Rules Article 2(4), Article 25(4) and Article 25, Notes 3 and 4, discussed below.

The practice of the Tribunal as to privacy of the cases vis-à-vis each other before its three Chambers and the Full Tribunal has not been uniform. At times the Tribunal has accepted a party's reference to the unpublished position, argument or evidence of the other party in another case before it even where the parties are not identical and the case is not before the same Chamber. At other times it has not allowed the submission, even where the parties have been the two governments before the Full Tribunal, especially when it has not been presented in the ordinary course of the written proceedings, but partly due to the different approaches of the judges or their perception of the equities of the case.[2] Yet this has not discouraged the parties from invoking the arguments of each other or of other parties in other cases before the Tribunal.

As the Tribunal works progressed and the terminated cases accumulated, the judges' personal copies of the record of these cases were destroyed or moved outside of the Tribunal on their request. However, the United States judges sent their copies of these records to the University of California, School of Law at Berkeley, for archiving, where they have become accessible to the

[2] The Islamic Republic of Iran and The United States of America, Cases Nos. A3, A8, A9, A14 and B61, Full Tribunal Order of 1 April 2005 and my dissent thereto (14 Apr 2005), although the Order eventually admitted the evidence.

public. The entirety and completeness of these salvaged records and the authority to use them officially nonetheless remain and the Tribunal does not release a copy of its docket sheets in these cases.

For some time at the outset of its operation, the Tribunal also resisted releasing to the two governments a complete list of the identity of the parties to the cases before it, when Iran needed it for presentation to United States courts for termination of the claimants' lawsuits before them. Under the Claims Settlement Declaration Article VII(2), "Claims referred to the arbitration 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." This took even longer in connection with the list of the U.S. private claimants in claims of less than $250,000, the so-called "small claims," which were presented by the United States under the Claims Settlement Declaration Article III(3). The issue was especially acute in claims or attachments over Iranian assets and interests before U.S. or foreign courts where the claimant's identity had been under seal, using pseudonyms such as John Doe, a practice followed by some claimants even before the Tribunal.[3] Under the General Declaration, General Principle B, the United Sates undertook to terminate all proceedings in U.S. courts by U.S. persons against Iran and its enterprises and to nullify all attachments and judgments obtained therein.

The fate of the Tribunal archives, the Master Files, of its cases upon conclusion of its mandate, however has remained unresolved. From the outset of its operation, the Tribunal has been unable to decide whether upon the winding up of its affairs to deposit the archives of its Master Files with the Permanent Court of Arbitration and limit their access to the two governments sharing their safekeeping costs, to convert them to digital electronic files or to destroy them altogether, absent their agreement, however invaluable these records are.

B. Common issues, test cases and amicus curiae

The Tribunal Rules Article 15, Note 5, provision for the Tribunal to allow non-arbitrating parties in a particular case to present amicus submissions, although limited to special circumstances, is based on the assumption that they already have access to the written pleadings of the parties in the case and that they are not limited to the two governments. Thus, in practice, this has been restricted to the two governments, private parties with other cases before the Tribunal or outsiders with legal

[3] See, Gabay and Iran, Award No. 515-771-2 (10 Jul 1991), 27 Iran-US CTR 40, 41, n. 3, where the statement of claim submitted initially identified the claimant as Bernard G. Martin, a pseudonym, was amended two months after the treaty deadline; Kay Lerner and Iran, Order of 6 Aug. 1982, 1 Iran –US CTR 215 and Award No. 592-249-2 (11 Jun 1999), 34 Iran-US CTR 135, where the claimant as a nominal assignee saved the identity of the true claimant for many years until it was disclosed, he represented the assignee and they jointly quit the claims in settling the case; Gordon Williams and Iran Bank Sepah and Bank Mellat Award No. 342-187-3 18 Dec 1987, 17 Iran-US CTR 269 and Federal Reserve Bank of New York v. Gordon Williams, Husband & Harris, Leonard H. W. van Sandick and Loef & van der Ploeg (SDNY 1989) , Iranian Assets Litigation Rpt., pp. 17185-17201, where the US litigation discovered that the identity of dead person had been used for a bogus claim and the award proceeds were returned by the US court to the Security Account.

interest in the case, especially in view of the fundamental requirement that the arbitrating parties are treated with equality under Article 15(1). For example, in dual nationality cases, the Chambers accepted the United States submission in various cases before them and rendered two awards until Iran filed its interpretative Case A18 before the Full Tribunal, where the issue of jurisdiction over such claims was decided by it.[4] In HAUS,[5] where the case involved jurisdiction of the Tribunal over the claims of US nationals in partnerships or joint-ventures with non-nationals, Chamber One admitted the United States request for a submission in the case under Article 15, Note 5, as it raised an important question of interpretation of the Algiers Accords with potential application in other cases. In Case A15:IG between the two governments, where Iran sought the excess funds resulting from the payments of its syndicated bank loans by the Federal Reserve Bank, some of the interested banks submitted a memorial which was accepted by the Tribunal.[6]

Moreover, aside from Article15, Note 5, a Chamber may under the Tribunal Presidential Order No.1 (19 October 1981) Paragraphs 6(a) and (b) decide to relinquish its jurisdiction to the Full Tribunal in a pending case where it "raises an important issue" or "the resolution of an issue [before it] might result in inconsistent decisions or awards by the Tribunal." Under these provisions, common issues in nine test cases among more than thirty so-called Forum Selection Clause Cases were together briefed by the parties and jointly heard and decided by the Full Tribunal.[7] The Chamber had relinquished the nine cases to the Full Tribunal for the interpretation and application of the provision of the Claims Settlement Declaration Article II (1) which excluded from the Tribunal jurisdiction claims of nationals "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." The test case procedure also was applied in the Expulsion Cases by the Chambers, and since these small claim cases were represented by the two governments the issue of the privacy or confidentiality of their proceedings did not arise.

C. Hearings

In practice, the privacy of the hearings and pre-hearing conferences is strictly observed by the Tribunal and such it extends to all of those present at them. As provided under the Tribunal Rules Article 25(4), "Hearings shall be held in camera, unless the parties agree otherwise." While the Agents of the two governments are also present at the hearings by virtue of Article 25, Notes 1 and 5, they may not represent a party or otherwise assist it at the hearings unless that party is their

[4] The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT (6 Apr 1984), 5 Iran-US CTR 251.

[5] Housing and Urban Services International, Inc. and TRC, Award No. 201-174-1 (22 Nov 1985), 9 Iran-US CTR 313, 316.

[6] The Islamic Republic of Iran and The United States of America, Award No. 63-A15-FT (20 Aug 1986), 12 Iran-US CTR 40, 43.

[7] Forum Selection Clause Cases, Gibbs & Hill, Award No. ITL 1-6-FT, Halliburton Co., Award No. ITL 2-51-FT, Howard, Needles, Award No. ITL 3-68-FT, G.W. Drucker, Award No. ITL 4-121-FT, TCSB, Inc., Award No. ITL 5-140-FT, Ford Aerospace, Award No. ITL 6-159-FT, Zokor Int'l, Award No. ITL 7-254-FT, Stone & Webster, Award No. ITL 8-293FT, and Dresser Industries, Award No. ITL 9-466-FT (5 Nov. 1982), 1 Iran-US CTR 236-283.

respective governments. Thus, the agreement of the parties is required for the presence of any persons other than the parties, those who represent or assist them (Article 4), the witnesses (Articles 25(5) and Article 27), the Agents of the two governments (Article 25, Notes 1 and 5) and the arbitrators and their staff at the hearings and pre-hearing conferences. In such cases, the outsiders are listed as observers in the list of participants in the hearing and in the award.

Under Article 25, Note 5, the Tribunal "may at its discretion permit representatives of arbitrating parties in other cases which present similar issues of fact or law to be present to observe all or part of the hearing in a particular case, [but again] subject to the prior approval of the arbitrating parties in the particular case." For this reason, this provision has rarely been applied as well as for the provisions of amicus curiae under Article 15, Note 5, and common issues and test cases under Presidential Orders Nos. 1 and 8, discussed above.

Further, the transcript or tape-recording of the hearing made under the Tribunal Rules Article 25, Notes 3 and 4, and all documents and demonstrative aides presented at the hearing are also subsequently submitted to the Registry as part of the case record under Article 2(4) and the practice of the Tribunal.

Therefore, the privacy of the hearings and pre-hearing conferences equally applies to all of those present at them, that is, the parties and their representatives, the witnesses, the amicus curiae, the observers, the two governments and the Tribunal as well as to the transcript of the hearings and all materials submitted at them. It is also clear that under the Tribunal Rules Article 25(4) the contents of the hearings, including transcript of the hearings and documents submitted at them, may not be disclosed without the agreement of the parties. Consequently, the written pleadings of the parties filed with the Registry should arguably, a priori, be assumed to enjoy equal privacy and not disclosed without the agreement of the parties.

However, as a matter of principle, such agreement is not necessary for recourse by a party to legal authorities to challenge the award or an arbitrator on the basis of matters transpired at the hearing. This once arose in Avco, where a U. S. court, though erroneously, refused recognition and enforcement of a Tribunal award rendered against the private U. S. claimant on the basis of an alleged bench ruling of the Tribunal at a pre-hearing conference, "evidenced" by a tape-recording transcription of the conference and written pleadings of the parties "not adhered to" by the Tribunal, which were submitted by the claimant ostensibly without the agreement of the award winner Iranian respondent.[8] The conduct of the hearings, supported by hearing transcripts, also has been subject of challenges against presiding arbitrators without agreement of the other arbitrating parties in the cases, although the challenges as usual have been unsuccessful.[9]

[8] See,The Islamic Republic of Iran and The United States of America, Award No. 586-A27-FT (5 Jun 1998), 34 Iran-U.S. CTR 39.

[9] See, e.g., Decision of the Appointing Authority, Sir Robert Jennings (30 August 1999), on the Challenge of Judge Skubizsewski, Mealey's Int'l Arb. Rpt. Vol. 14, No. 9, Sept. 1999.

D. Deliberations of the Tribunal

Absent in the UNCITRAL Rules, the Tribunal Rules Article 31, Note 2, provides the cardinal principle of arbitration that "The arbitral tribunal shall deliberate in private. Its deliberations shall be and remain secret." This provision makes it clear that in addition to the general confidentiality and privacy of arbitration regarding third parties, the arbitrators are obligated to maintain the secrecy of their deliberations vis-à-vis the arbitrating parties and third parties during and after the arbitration has come to an end.

However, the meaning and scope as well as the exceptions to the fundamental rule of secrecy of deliberations have remained controversial. In this connection, as observed by the Appointing Authority of the Tribunal, Judge Willem E. Haak, in a recent challenge decision "It is widely accepted that the raison d étre of the secrecy of deliberations is to protect the members of the Tribunal from outside influence and enable them to freely exchange their views and arguments to reach a decision. Departing from the confidentiality rule laid down in Article 31, note 2 of the Tribunal Rules would prevent a true discussion between the arbitrators, undermine the principle of arbitral collegiality, and jeopardize the independence of the arbitrators."[10] He welcomed the Black's Law Dictionary definition of "deliberations" as "[t]he weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of act or means," as "reflect[ing] the concern" that "[i]n order for the confidentiality rule to serve its purpose, the notion of 'deliberation' has to be understood broadly," so as to cover not only discussion of "substantive" but also "procedural and administrative" matters such as "the organization of the deliberation work and , inter alia, the timing and sequence of deliberations."[11] Yet, he was "prepared to accept that a serious violation of due process amounting to the exclusion of an arbitrator can conceivably be an exception to the rule of secrecy of deliberations,"[12] but not the subject request for postponement of the deliberations by one of the arbitrators in the case, denied by the presiding arbitrator after the Tribunal discussion and voting thereon, as the requesting arbitrator's communication to the parties indicated before the award was rendered.

Nevertheless, the secrecy of deliberations should not prevent the dissenting opinion or reasons for refusal to sign the award under the Tribunal Rules Article 32(3) and (4) to state the arbitrator's reasons vis-à-vis the award or decision. Understandably, this is a delicate area that also can be used against an innocent dissenting arbitrator in challenging him for the disclosure, as the experience has shown.[13] In cases of such disclosures, the majority or the presiding arbitrator at times has

[10] Joint Decision of the Appointing Authority, Judge Willem E. Haak, on the Challenges of Judge Skubiszewski and Judge Oloumi Yazdi, (2 Apr 2008), p. 15, Mealey's Int. Arb. Rpt. Vol.23, No.4, Apr 2008.
[11] Id., pp. 16-17.
[12] Id., p. 18.
[13] Decision of the Appointing Authority, Sir Robert Jennings (7 May 2001) on the Challenge of Judge Broms, Mealey's Int'l Arb. Rpt., vol. 16, No. 5, May 2001.

issued a statement to defend itself or "set the record straight," which more often has dragged or highlighted the controversy after expiry of its mandate in the case.

E. Awards and other decisions

As stated above, the Tribunal Rules Article 32(5) provides that "All awards and decisions shall be made available to the public, except that upon the request one or more arbitrating parties, the arbitral tribunal may determine that it will not make the entire award or other decision public, but will make public only portions thereof from which the identity of the parties other identifying facts and trade or military secrets have been deleted."

In practice, Article 32(5) has raised two issues, one as to the scope of its principal provision and one as to the application of its exception. While without a question the term "award" in the context here has included all types of awards, i.e., interim, interlocutory, partial and final awards as well as awards on agreed terms, the terms "other decisions" have justifiably been interpreted by the then President of the Tribunal, K.H. Bockstiegel, as including not only the Tribunal's so-called decisions, but also its orders in the cases, when the issue of their electronic publication by West Law arose in 1987. However, even before such a presidential direction, the Tribunal released these orders for publication by its official publisher, the Grotius Publications, which has published most of them, as can be seen from its first volume of the Iran-US Claims Tribunal Reports.

As to the exception, the issue has arisen mainly in connection with publication of settlement agreements, recorded as part of the award on agreed terms under the Tribunal Rules Article 34(1), where the parties have jointly requested that the settlement agreement be withheld from the public. In this connection, Tribunal practice has not been uniform among the Chambers. While Chamber One and at times Chamber Three have read the provision justifiably to allow the requests, Chamber Two has limited it to literally trade and military secrets to withhold from the awards made available to the public. Taking it to the extreme, ostensibly in its own support, the Chamber I dissent in some of these cases has disclosed in detail parts of the settlement agreement withheld by the Tribunal.[14]

F. Challenge proceedings and decisions

In contrast to the Tribunal case, the records of the challenge proceedings against the arbitrators under the Tribunal Rules Article 10 are not field with the Tribunal Registry even where the challenge is by a party in a particular case, as the Rules' filing procedure does not refer to them explicitly. The pleadings in the challenge proceedings are submitted only in English and in limited number of copies under Articles 11-12, free from the bilingual, greater number of copies and other

[14] See, Opinion of Howard M. Holtzmann in The Government of the United States of America on behalf of and for the benefit of Shipside Packing Company and The Islamic Republic of Iran, Award on Agreed Terms No. 102-11875-1 (12 Jan. 1984), 5 Iran-US CTR 80, 82-84. See also his opinion in Chevron, Award on Agreed Terms No. 48-18-1 (1 Jun. 1983), 2 Iran-US CTR 364 (1983-I) and his joint opinion to awards on agreed terms in Cases Nos. 19 (Chevron), 387 (Carrier Corp.) and Case No. 15 (VSI) (17 Jun. 1983), 3 Iran-UC CTR 78-83.

general requirements of the case pleadings. This however has not stopped the parties from invoking the pleadings of each other in other challenge proceedings acrimoniously before the Appointing Authority, where the challenged arbitrators at times also join the fury, whether or not the full record of the earlier challenge proceedings have been published.

The records of the challenge proceedings and the challenge decisions have been regularly released by the Tribunal for publication until a few years ago when they were stopped without any decision or direction by the Tribunal, although even these have been extensively treated elsewhere.[15] There is no question that the challenge decisions should continue to be published as "awards and other decisions" of the Tribunal are under the Tribunal Rules Article 32(5). The fact that such decisions are rendered by the Appointing Authority of the Tribunal, seating at the Permanent Court of Arbitration, rather than by and at the Tribunal itself is immaterial as his office is part of the Tribunal structure and he is paid by the Tribunal. The publication of the challenge proceedings or making them available to the public by the Tribunal without the consent of the parties and the challenged arbitrator is however a difficult one absent support under the Tribunal Rules, especially when the Tribunal does not allow third party access to the record of the cases before it. However, it is also understandable and indeed commendable that publication of the entire record, white paper, may be the only way to prevent at least selective and biased reporting by a party or by others in the same interest when as usual in such cases the integrity of the Tribunal is at stake in the challenge proceedings against its members in the politically sensitive interstate arbitration.

[15]See, e.g., D.D. Caron, L.M. Caplan, M.Pellonpaa, THE UNCITRAL ARBITRATION RULES – A COMMENTARY, 191-193 (Oxford University Press 2006).