Iranian Assets Litigation Reporter

Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 26, 1990

Gould

SUPREME COURT LETS STAND RULING ON ENFORCEABILITY OF AWARDS IN U.S.

The U.S. Supreme Court denied without comment on March 5 a petition for a writ of certiorari by Gould Inc. to a Ninth Circuit U.S. Court of Appeals ruling that awards by the Iran-U.S. Claims Tribunal against an American party are enforceable in the United States (Gould Inc. et al. v. Ministry of Defense of the Islamic Republic of Iran, U.S., No. 89-1103; see Iranian Assets LR, Nov. 3, 1989, P. 18,011).

(See P. 18,665 for petition for cert and brief in opposition.)

In the underlying suit, Iran was awarded $3.6 million on July 29, 1984, from Gould Inc.

Iran sought to enforce the award in U.S. courts, because the Algiers Accords, the instrument through which the Tribunal was established, provided no specific vehicle for the enforcement of awards in favor of Iran.

Iran had appealed a lower court ruling that denied federal question jurisdiction on grounds that an agreement becomes part of United States law only if it is self-executing. The Ninth Circuit had ruled earlier that the Algiers Accords are not self-executing.

Gould had appealed a finding that the court has jurisdiction under the New York Convention.

On Oct. 23, 1989, the Ninth Circuit held that a Tribunal award is enforceable under the New York Convention and the Federal Arbitration Act.

In a petition for cert, Gould maintained that the central questions were 1) whether the Algiers Accords were a voluntary written arbitration agreement as required by the New York Convention and 2) whether a Tribunal award is enforceable in a state when the validity of that award cannot be challenged.

"Until this case," Gould said, "no American court had interpreted the New York Convention to apply to an award which was neither the product of an arbitral proceeding to which the parties had voluntarily agreed in writing nor subject to judicial supervision in the state in which the proceeding took place."

Gould asked the high court to grant the writ to "correct the serious abuse of judicial authority...and to reaffirm the core principle that the federal courts are courts of limited jurisdiction."

In opposing the position for cert, Iran maintained that a party initiating an arbitration, in this case, Gould, cannot be said not to have agreed to the agreement establishing the forum for the arbitration.

Iran said that "Gould's filing of its petition (to the Tribunal) would at least constitute Gould's ratification of the agreement of the United States on its behalf, and so constitute an agreement on the part of Gould."

Iran added that Gould could have sought another forum or another jurisdiction.

Also, Iran said, "Gould is estopped from questioning the 'nationality' of the award because it failed to avail itself of the opportunity to raise the issue in the one forum competent to decide the matter - the Netherlands."

Gould is represented by Marc S. Palay, Thomas L. Abrams and Thomas Jay Barrymore of Jones, Day, Reavis & Pogue of Washington, DC.

Iran is represented by Anthony J. Van Patten of Arndt & Van Patten of Los Angeles and by Richard E.M. Brakefield of the Law Offices of Richard E.M. Brakefield of Long Beach, California.

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Technical Laboratory & Soil Mechanics

$96,000 AWARD ON AGREED TERMS AWARDED TO IRAN

Chamber Three of the Iran-U.S. Claims Tribunal issued an award on agreed terms Feb. 21 settling all claims between the Technical laboratory & Soil Mechanics of the Ministry of Roads & Transport of the Islamic Republic of Iran and the Federal Highway Administration of the U.S. Department of Transportation (Case No. B41, Award No. 470-B41-3).

(See P. 18,695 for award on agreed terms.)

The award on agreed terms directs that the U.S. pay Iran $96,000.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ___

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION and GOULD INTERNATIONAL, INC.,
Petitioners,

v.

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc. (collectively "Gould"), petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on October 23, 1989.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 887 F.2d 1357. (App., *infra*, 1a-20a). The order of the United States District Court for the Central District of California is not reported. (App., *infra*, 21a-26a.) The district court amended its order on March 3, 1988, certifying an immediate appeal pursuant to 28 U.S.C.A. § 1292(b) (West Supp. 1989). (App., *infra* 27a-28a.)

JURISDICTION

The Ministry of Defense of the Islamic Republic of Iran ("Iran") brought this proceeding to enforce an award of the Iran-United States Claims Tribunal ("Claims Tribunal") in the United States District Court for the Central District of California on June 9, 1987, invoking federal question jurisdiction (28 U.S.C. § 1331) under the Claims Settlement Declaration forming part of the so-called Algiers Accords,[1] and Chapter 2 of the Federal Arbitration Act ("FAA") 9 U.S.C. §§ 201 *et seq.* (1988). The district court issued an order on January 14, 1988, holding that the Algiers Accords did not vest it with subject matter jurisdiction to enforce an award of the Claims Tribunal, but that the award was enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention" or "New York Convention"),[2] which the United States has implemented through Chapter 2 of the FAA. On March 3, 1988, the district court certified both questions for immediate appeal pursuant to 28 U.S.C. § 1292(b). (App., *infra*, 27a-28a.)

[1] The Algiers Accords consist of: (1) Declaration of the Democratic and Popular Republic of Algeria ("General Declaration") and (2) Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"). Dept. of State Bull. No. 2047 (Feb. 1981).

[2] June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38.

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 20, 1990

The Court of Appeals for the Ninth Circuit agreed to review both questions on April 13, 1988 (App., *infra*, 29a-31a) and, on October 23, 1989, affirmed the order of the district court, holding that the award of the Claims Tribunal was enforceable under the Convention. (App., *infra*, 1a-20a.) The court of appeals did not reach the question of whether the Algiers Accords provided a jurisdictional basis for enforcing the award. (App., *infra*, 20a.)

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1989).

STATUTES AND TREATIES INVOLVED

Article II of the New York Convention provides in pertinent part:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Articles I through VI of the New York Convention are reprinted in the Appendix hereto. (App., *infra*, 38a-41a.)

Chapter 2 of the FAA, which implements the New York Convention, provides in pertinent part:

> § 201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.
>
> § 202. Agreement or Award Falling Under the Convention
>
> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. . . .
>
> § 203. Jurisdiction; Amount in Controversy
>
> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

The United States Accession to the New York Convention, 21 U.S.T. 2566, 9 U.S.C.A. § 201, note 43 (West 1987), provides in pertinent part:

> The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

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The Claims Settlement Declaration is reprinted in its entirety in the appendix hereto. (App., *infra*, 32a-37a.)

STATEMENT OF THE CASE

A. Nature of the Case.

This is the first action in a U.S. court to enforce an award of the Claims Tribunal, a creature of international law brought into being by the United States and Iran on January 19, 1981, as part of their overall resolution of the "hostage crisis." The award found Gould Marketing, Inc. ("GMI") liable to Iran in the amount of $3,640,247.13 and purported to require GMI to deliver certain military equipment to Iran, the export of which is prohibited by applicable U.S. export control regulations. *Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, Cases No. 49 and 50, 6 Iran-U.S. C.T.R. 272, 288 (1984).[3] (*See* App., *infra*, 8a n.4, 9a.) To date, the Claims Tribunal has issued awards in favor of Iran against at least twenty-two U.S. claimants.[4]

[3] The Decisions and awards of the Claims Tribunal and certain other material filed with the Tribunal are reported in the Iran-United States Claims Tribunal Reports ("Iran-U.S. C.T.R."), published by Grotious Publications Limited of Cambridge, United Kingdom.

[4] It was recently reported that in 22 cases the Claims Tribunal had awarded a total of about U.S. $50 million in damages to Iran either for counterclaims against U.S. claimants or as costs of arbitration. *International Briefings: Iran-U.S. Claims Tribunal Update*, Int'l Fin. L. Rev. 41 (March 1989); *see also* Lewis, *What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?*, 26 Colum. J. Transnat'l L. 515, 516 n.9 (1988). To the best of Gould's knowledge, at this time no other action to enforce a Claims Tribunal award is pending in a U.S. court.

B. The Underlying Dispute.

The dispute between Gould and Iran arises out of two contracts between Hoffman Export Corporation ("Hoffman"), GMI's predecessor, and the Ministry of War of the former Government of Iran. The first was a May 1975 purchase agreement for radio communications equipment; the second, an April 1978 contract for installation in Iran of an integrated fixed station military communications system. In December 1978, riots and civil strife, which culminated in the overthrow of the Iranian Government and the taking hostage of American diplomatic personnel, interrupted performance, and Iran suspended progress payments, under both contracts. (App., *infra*, 4a.) On February 13, 1980, Hoffman commenced an action against Iran in the United States District Court for the Central District of California and, like many other similarly situated U.S. parties, succeeded in attaching Iranian assets frozen pursuant to Presidential order.[5]

C. Establishment of the Claims Tribunal and Dismissal of Hoffman's U.S. District Court Action.

On January 19, 1981, the United States and Iran entered into the Algiers Accords, resolving the hostage crisis and establishing the Claims Tribunal. (App. *infra*, 5a.) The General Declaration portion of the Accords provided for the release of the American hostages in return for a number of actions and under-

[5] *See Security Pacific Nat'l Bank v. Iran*, 513 F. Supp. 864 (C.D. Cal. 1981). On November 14, 1979, President Carter issued an Executive Order declaring a national emergency and freezing Iranian assets in the United States and abroad worth approximately $12 billion. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 2, 1990

takings by the United States, including the termination of legal proceedings against Iran in the United States, the nullification of attachments of Iranian assets and the transfer of certain Iranian assets that had been frozen by executive order. The Claims Settlement Declaration provided for the formation of the Claims Tribunal to serve as a forum "for determination of claims by United States nationals or by the United States itself against Iran" as well as "claims against the United States, including both official contract claims and disputes arising under the Declaration."[6]

Pursuant to Paragraph 7 of the General Declaration, one billion dollars of the transferred Iranian assets were placed in an Algerian-administered security account to be "used for the sole purpose of securing payment of, and paying, claims against Iran in accordance with the claims settlement agreement." The Claims Settlement Declaration provided for Claims Tribunal jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [a] national's claim." The Algiers Accords, though, made no provision for payment of any awards which the Claims Tribunal might render in favor of Iran against U.S. nationals, a possibility which appears not to have been contemplated when the Algiers Accords were executed. Claims Settlement Declaration, Article II(1). (App., *infra*, 32a.)

[6] Opinion of Attorney General Benjamin R. Civiletti to the President, January 19, 1981, *reprinted in The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 167, 173 (1981).

The Algiers Accords were not self-executing, being "merely executory agreements between two nations" having "no effect on domestic law absent additional governmental action." *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985), *cert. dismissed*, 479 U.S. 957 (1986). Thus, in order to implement the General Declaration, on February 24, 1981, President Reagan issued an Executive Order "suspending" all claims against Iran in U.S. courts which could be presented to the Claims Tribunal.[7] The President's Order was upheld by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In accordance with that Executive Order, the district court thereafter dismissed Hoffman's action against Iran. *See Security Pacific*, 513 F. Supp. at 884.

Article VI(1) of the Claims Settlement Declaration provided that "[t]he seat of the [Claims] Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States." As noted by one American negotiator of the Algiers Accords, "[u]pon examination of Dutch law, it became apparent that awards rendered pursuant to the Claims Settlement Agreement would not meet certain procedural requirements for valid arbitral awards under the Dutch civil code."[8] It was first proposed that provision be made for an "agreement among the United States, Iran, and the Netherlands to qualify the awards of the Claims Tribunal as valid awards under Dutch law without meeting those particular require-

[7] Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

[8] M.B. Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues, and Lessons: View from Government's Perspective*, in Symposium on Private Investors Abroad: Problems and Solutions 75, 98 (1981).

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 21, 1990

ments."[9] When this agreement failed to materialize, Dutch legislation was introduced which would have rendered proceedings of the Claims Tribunal partially subject to Dutch law, while exempting the Tribunal from many Dutch procedural requirements and sharply limiting Dutch judicial review of Tribunal awards.[10]

The efforts to provide a Dutch legal framework for the activities of the Claims Tribunal failed when Iran protested that the Netherlands had "no right to interfere" with the proceedings of the Claims Tribunal and that the proposed legislation would constitute a "violation of established principles of international law."[11] Iran informed the Dutch Government that "the Tribunal is an international court in the strict sense and is essentially governed by public international law" (*id.* at 405) and that "a civil law or international trade arbitration was not meant by the parties to the Declaration" (*id.* at 407). As a result of Iran's protests, efforts to enact legislation were abandoned, and the Claims Tribunal to this date has operated outside the mandatory requirements of Dutch arbitration law.

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[9] *Id.* Among the infirmities of the proceedings of the Claims Tribunal under Dutch law are the absence of any written arbitration agreements between the parties to those proceedings and insufficient procedures for raising challenges to individual members of the Claims Tribunal.

[10] Bill, Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States, *reprinted in* 4 Iran-U.S. C.T.R. 306 (1983).

[11] Letter from Mohammad Eshragh (Agent of the Islamic Republic of Iran at the Claims Tribunal) to Legal Adviser's Office, Ministry of Foreign Affairs, The Netherlands, 5 Iran-U.S. C.T.R. 405, 411 (1984).

D. The Proceedings at the Claims Tribunal

Deprived by executive order of its chosen forum, the United States District Court for the Central District of California, and faced with the probability of permanently losing its claims due to a filing deadline at The Hague, Hoffman lodged two claims with the Claims Tribunal on November 16, 1981.[12] Iran, in turn, filed two counterclaims vastly in excess of the amount of Hoffman's claims.[13] On June 29, 1984, the Claims Tribunal issued a final combined award which made a net award to Iran of $3,640,247.13[14] even though the Claims Tribunal expressly dismissed Iran's counterclaims. Moreover, the Claims Tribunal directed Gould to turn over to Iran various items of military equipment being held in this country because of export control regulations prohibiting its delivery to Iran.[15]

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[12] Under the terms of Executive Order 12,294 and the terms of the district court's order dismissing its claims against Iran, Hoffman would have likely lost its claims forever had it failed to refile them with the Claims Tribunal.

[13] The Claims Tribunal issued an interlocutory award on July 27, 1983, holding that it had jurisdiction over counterclaims filed by Iran, even in excess of a U.S. national's claim, when the counterclaim arose out of "the same contract, transaction, or occurrence that constitutes the subject matter of that national's claim." *Gould Marketing Inc. v. Ministry of National Defense of Iran*, Case No. 49, 3 Iran-U.S. C.T.R. 147, 152 (1983), *quoting* Claims Settlement Declaration, Art. II(1).

[14] 6 Iran-U.S. C.T.R. at 273-75, 282 (1984). The award was based on a *sua sponte* "equitable accounting" by the Claims Tribunal, which cited no jurisdictional basis for an award not based on Iran's counterclaims.

[15] *Id.* at 288. Gould's application to export these items to Iran in 1981 was refused by the Office of Munitions Control for the

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19023 March 21, 1990

More than a year later, on July 19, 1985, Iran filed a "Request for Interpretation" of the Algiers Accords with the Claims Tribunal, in which it contended that the United States should be held liable for satisfying Claims Tribunal awards rendered against U.S. nationals. *The Islamic Republic of Iran v. United States*, Case A/21, 14 Iran-U.S. C.T.R. 324 (1987) ("Case A/21").[14] Iran asserted "that the Algiers Declarations establish a 'reciprocal system of commitments' that obligates the United States to pay awards if its nationals fail to do so" and that the United States could fulfill its supposed duty to see that awards in favor of Iran are satisfied by either "elect[ing] to pay such awards directly" or "enact[ing] special legislation enabling the enforcement of Tribunal awards on a 'full faith and credit' basis as it has done in the case of awards rendered pursuant to the ICSID Convention."[15] The Claims Tribunal rejected these arguments, concluding on May 4, 1987:

stated reason that "[c]urrent U.S. policy precludes issuance of export licenses for Munitions List items destined for Iran." (CR 4, Ex.2) The export of these items to Iran is still prohibited under U.S. law. Pursuant to 22 U.S.C. § 2780 (Supp. V 1987), no item on the United States Munitions List, which includes the items ordered returned to Iran by the Claims Tribunal award, may be exported to any country which the Secretary of State has determined has repeatedly provided support for acts of international terrorism. The Secretary of State made such a determination with regard to Iran on January 23, 1984, 49 Fed. Reg. 2,836 (1984), which remains in effect.

[14] The Claims Settlement Declaration provides that the Claims Tribunal shall decide "[a]ny question concerning the interpretation or application" of the agreement at the request of either government. Art. VI(4). (App., *infra*, 35a.)

[15] 14 Iran-U.S. C.T.R. at 326, *citing* the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* August 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. *See*, *infra*, note 22.

> [We] cannot find that any obligation of the United States to satisfy Tribunal awards against its nationals flows from the 'international' character of the Tribunal, or from any principle of customary international law based on the United States having been a party to the treaty that established the Tribunal.

Id. at 330.

The Claims Tribunal further reasoned that "in establishing a Security Account as the source for payment of awards against . . . Iran" while "not imposing an identical obligation . . . upon the United States," the parties to the Algiers Accords "clearly contemplated something other than parity of treatment of the two States Parties as regards enforcement mechanisms." *Id.* at 329. Finally, the Claims Tribunal found that it had "no authority under the Algiers Declarations to prescribe the means by which each of the States provides for . . . enforcement" of Tribunal awards, although it believed it "incumbent on each State Party to provide some procedure or mechanism" for enforcement in its national jurisdiction. *Id.* at 331. To date, Congress has not been presented with proposed legislation providing for the enforcement of Claims Tribunal awards against U.S. nationals.

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 29, 1990

E. The Proceedings Below.

On June 9, 1987, Iran filed a "Petition for Order Confirming Arbitrial [sic] Award" in the United States District Court for the Central District of California, seeking judicial confirmation of the award rendered by the Claims Tribunal against GMI in favor of Iran.[12] In its petition, Iran alleged that the district court possessed subject matter jurisdiction under 28 U.S.C. § 1331 by virtue of the Claims Settlement Declaration and under 9 U.S.C. § 203.

On July 31, 1987, Gould moved for dismissal on the grounds, *inter alia*, that the district court lacked subject matter jurisdiction to enforce the award under the Claims Settlement Declaration, which is not self-executing, and that the award of the Claims Tribunal was not subject to recognition or enforcement under the terms of the New York Convention in the absence of a voluntary written agreement for GMI to arbitrate or in the absence of a governing national arbitration law. On January 14, 1988, Gould's motion was denied in part and granted in part by the district court.[13] The district court declined to find the Algiers Accords self-executing, determining that the Ninth Circuit's holding in *Boeing* was controlling on this issue, but

[12] Iran's petition alleges that Gould and Gould International are *alter egos* of GMI and seeks an order confirming the award against these parties also, including specific performance of the award's requirement that GMI provide certain military communications equipment to Iran. CR 1.

[13] The United States filed an *amicus curiae* brief urging the district court to find jurisdiction under both bases asserted by Iran.

found jurisdiction to confirm the award under the New York Convention. (App., *infra*, 23a-26a.) The district court held that the Algiers Accords themselves constituted the requisite agreement in writing and that the "interest in effective arbitral proceedings" should override what it termed a "form v. substance" defense concerning the Claims Tribunal's operation outside of any national arbitration law. (App., *infra*, 26a.)

On October 23, 1989, the court of appeals affirmed the district court's finding of subject matter jurisdiction under the New York Convention.[14] The court of appeals acknowledged that "the Accords provide no specific vehicle for the enforcement of awards *in favor of* Iran," (App., *infra*, 9a), but found that the "three basic requirements" for jurisdiction under the New York Convention were met: "The award (1) must arise out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope." (App., *infra*, 12a.) The court of appeals acknowledged that Articles II(1) and IV(1)(b) of the Convention "do indeed seem to indicate that the award referred to in Section 203 emanate from a written agreement," but attempted to surmount this obstacle by construing "the Accords themselves as representing the written agreement so required, on the strength on the President's authority to settle claims on behalf of United States nationals through international agreements." (App., *infra*, 14a.) According to the court of appeals, the "real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but

[14] The court of appeals did not reach the question of whether there was jurisdiction under 28 U.S.C. § 1331.

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 28, 1990

whether the President—acting on behalf of Gould—entered into such an agreement. The answer is clearly yes." (App., *infra*, 15a.) The court of appeals, moreover, read this Court's opinion in *Dames & Moore* as broad enough "to encompass the authority of the President to settle claims under the facts before us." (App., *infra*, 16a.)

On the issue of the voluntariness of the "agreement," the court of appeals acknowledged that the legislative history of the Convention "lends some support to Gould's view" that "the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily," but nonetheless concluded that the Convention "did not preclude the United States from entering into an agreement on behalf of its nationals, as authorized by *Dames & Moore*." (App., *infra*, 15a n.9.)

On the issue of whether the New York Convention could be applied to arbitral awards which are not rendered in accordance with the national arbitration law of a party state, the court of appeals termed it "a close question," but concluded that "the fairest reading of the Convention itself appears to be that it applies to the enforcement of non-national awards." (App., *infra*, 17a-18a.)

REASONS FOR GRANTING THE WRIT

This case raises issues of general importance concerning the power of the President, the subject matter jurisdiction of the federal courts, and the implementation of the Algiers Accords. If the United States intends to vest the federal courts with jurisdiction to enforce awards of the Claims Tribunal in favor of Iran, it is required to enact legislation implementing the Claims Settlement Declaration to give effect to that intention. That it has never done. Through their tortured interpretation of the New York Convention, which was never intended by its framers to encompass international claims proceedings to which the parties were compelled to refer their disputes, the courts below in effect usurped a role—implementing the Algiers Accords—that is exclusively the preserve of the Executive and Legislative branches. The Court should issue the writ to correct the serious abuse of judicial authority that has occurred in this case and to reaffirm the core principle that the federal courts are courts of limited jurisdiction.

The questions raised by this case are of immediate significance to those American claimants that have Claims Tribunal awards pending against them. More generally, they are important to safeguarding the limited jurisdiction of the federal courts, and to the proper application of the New York Convention and administration of international arbitrations. Until this case, no American court had interpreted the New York Convention to apply to an award which was neither the product of an arbitral proceeding to which the parties had voluntarily agreed in writing nor subject to judicial supervision in the state in which the proceeding took place.

In their zeal to find Iran's award enforceable in the federal district court, both lower courts played fast and loose with the language of the New York Convention and paid scant heed to the requirements which any award must meet in order to become enforceable thereunder. Thus, the district court dismissed Gould's contentions as "form v. substance"

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 23, 1990

and, rather than thoughtfully analyzing whether Iran's award and the proceeding from which it issued met the minimum criteria for enforceability under the New York Convention, opted instead to rely upon what it termed "the overriding judicial interest in effective arbitral proceedings." (App., *infra*, 26a.) The lower courts' expansive view of their power to gloss over imperfections in the award and the proceedings of the Claims Tribunal under the laws of the state in which it sits does violence to the Convention and represents an unwarranted judge-made enlargement of federal subject matter jurisdiction.

1. The lower courts have usurped the roles of the Executive and Congress in implementing the Algiers Accords. The Claims Settlement Declaration is not self-executing, and Claims Tribunal awards can be enforced in U.S. federal district courts only upon a specific grant of jurisdiction by the Congress, along with appropriate procedures and standards for review. The limited jurisdiction of the federal courts is "a fundamental precept" which "must be neither disregarded nor evaded." *Owen Equip. & Erection v. Kroger*, 437 U.S. 365, 374 (1978).

a. Because it is an executory agreement, the Claims Settlement Declaration has no U.S. domestic force or effect. *See Boeing*, 771 F.2d at 1284; *Electronic Data Sys. Corp. Iran v. Social Sec. Org.*, 651 F.2d 1007, 1009-10 & n.1 (5th Cir. 1981). Moreover, even if the Algiers Accords were "self-executing, Federal jurisdiction under § 1331 will not lie where it is not provided for in the treaty." *Dreyfus v. von Finck*, 534 F.2d 24, 30 (2nd Cir.), *cert. denied*, 429 U.S. 835 (1976), *citing Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2nd Cir. 1971). The failure

of the Claims Settlement Declaration—which *does* provide an enforcement mechanism for awards against Iran—to provide for enforcement of Claims Tribunal awards against a Party State's nationals, cannot be remedied through judicial fiat.

b. In the absence of a self-executing enforcement scheme, it is incumbent upon the Congress to determine the standards for enforcement of Claims Tribunal awards and to provide, if desirable, federal jurisdiction to enforce them.[21] This was how the United States implemented the ICSID Convention, a multilateral treaty providing for arbitration of international commercial disputes.[22] Similarly, after the United States ratified the Inter-American Convention

[21] At the Claims Tribunal, the United States took the position that the Algiers Accords "do not create a United States-funded security account, do not provide special enforcement mechanisms for awards entered against U.S. or Iranian nationals, and do not require Iran or the United States to pass domestic legislation guaranteeing access to their courts for award enforcement purposes." Response of the United States to the Memorial of the Islamic Republic of Iran, Case A/21, Iran-United States Claims Tribunal (Sept. 4, 1986), *reprinted in* Iranian Assets Lit. Rep. 13,130, 13,138 (October 10, 1986).

[22] The signatories to the ICSID Convention agreed that ICSID awards would be enforceable in the national courts of any State Party (Art. 54(1)) and each State Party would be required to "take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories." Art. 69. The United States enacted implementing legislation which provides that "[an ICSID] award . . . shall create a right arising under a treaty of the United States . . . [and] shall be enforced . . . as if the award were a final judgment of a court of general jurisdiction of one of the several states." 22 U.S.C. § 1650a(a) (1982). The legislation further provides for exclusive federal jurisdiction regardless of the amount of controversy. Id. at § 1650a(b).

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 21, 1990

on Commercial Arbitration (Panama Convention), the President determined that "[n]ew legislation will be required . . . in order to implement the provisions of the Convention within the United States. . . ."[21]

c. The attempt by the district court and court of appeals to implement the Algiers Accords indirectly, through the use of New York Convention, is an exercise in expediency and an unwarranted expansion of the Convention's applicability. The New York Convention was never intended to apply to the awards of an international claims tribunal operating outside any municipal arbitration law, and deriving its jurisdiction from an international agreement to which national claimants are not parties. The Convention cannot serve as a proxy for specific U.S. legislation providing for enforcement of Claims Tribunal awards. As adopted by the United States, the Convention applies only to awards rendered in a proceeding to which the parties have consented in writing and which was held in the territory of another signatory state. Iran's award possesses neither of these prerequisites to recognition.

2. The requirement that there be a writing signed by the parties serves to establish the consensual nature of the proceeding, a *sine qua non* to enforceability under the Convention. The court of appeals acknowledged that application of the Convention requires that an award "emanate from a written agreement,"[22] but then eviscerated this requirement by construing "the Accords themselves as representing the written agreement so required, on the strength of the President's authority to settle claims on behalf of United States nationals through international agreements." (App., *infra*, 14a.) This interpretation confuses the President's power to "suspend" claims of U.S. nationals pending in our courts and to require such claims to be referred to the Claims Tribunal with the power to bind Gould to a written agreement to resolve its dispute with Iran through arbitration. In the process, the court of appeals misconstrues this Court's holding in *Dames & Moore*. The *Dames & Moore* Court was careful to emphasize the narrowness of its decision (453 U.S. at 688), which simply upheld the lawfulness of the President's orders *suspending* claims against Iran in U.S. courts (453 U.S. at 674, 676).[23]

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[21] Message from the President of the United States transmitting the Inter-American Convention on Commercial Arbitration, Senate Treaty Doc. No. 97-12, 97th Cong., 1st Sess. 1 (1981); *see also* Bill to Implement the Inter-American Convention on International Commercial Arbitration, S. 2204, 100th Cong., 2nd Sess. (1988).

[22] A party seeking recognition of a foreign arbitral award under the New York Convention must file with the court in which recognition is sought "[t]he original agreement referred to in Article II or a duly certified copy thereof." New York Convention, Art. IV(1)(b) (App., *infra*, 39a.) The Convention's requirement that the agreement be signed by the parties is absolute. *See* A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 192-207 (1981).

[23] This Court visited the Algiers Accords for a second time last term in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). Sperry claimed, *inter alia*, that § 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. 438, note following 50 U.S.C. § 1701 (Supp. V 1987), was unconstitutional under the Just Compensation Clause because it authorized the United States to charge Sperry "for the use of procedures that it ha[d] been forced to use." 110 S. Ct. at 395. The Court rejected Sperry's claim on the grounds that "a rea-

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 2, 1990

a. GMI did not choose to arbitrate its dispute with Iran. Rather, Hoffman, GMI's predecessor in interest, filed suit for breach of contract in federal district court and successfully attached Iranian assets. The President, acting pursuant to the Algiers Accords, divested Hoffman of its chosen remedy and barred it from its chosen forum. At the Claims Tribunal, Iran has conceded "the absence of any written agreement between the arbitrating parties when one party is not a state having adhered to the Algiers Declaration" and has acknowledged:

> Any assertion that a claim brought before the Iran-United States Claims Tribunal by an American national (whose remedies before American courts were barred by an Executive Order of the President of the United States) *is voluntarily submitted* to the International Tribunal would require a rather ingen[i]ous construction of the terms of Article II of the New York Convention.[20]

b. Because of the consensual nature of arbitration (or at least arbitration within the scope of the New

sonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services ... [and] ... Sperry benefit[ted] directly from the existence and functions of the Tribunal." *Id.* Neither *Dames & Moore* nor *Sperry*, however, resolved the questions presented in this case. The President's authority to compromise claims and the government's authority to exact a reasonable user fee are utterly distinct from whether or not the President has the authority to act as an agent for purposes of the New York Convention.

[20] Memorial of the Islamic Republic of Iran, Case A/21, Iran-U.S. Claims Tribunal (Oct. 18, 1985), *reprinted in* Iranian Assets Lit. Rep. 12,682, 12,721 (July 25, 1986) (emphasis added).

York Convention), to find that the President had the power to execute an "agreement" to arbitrate on behalf of Hoffman would require that he had acted as Hoffman's authorized agent, and was subject to Hoffman's direction and control.[21] Indeed, rather than having "ratified the actions of the United States" (App., *infra*, 16a.), at the time the Algiers Accords were issued Hoffman was pursuing its claims in a U.S. federal district court. Hoffman did not embrace the Claims Settlement Declaration, but contested the Government's right to suspend its claim. It thus cannot seriously be maintained that Hoffman authorized the President to enter into an agreement with Iran referring its disputes to arbitration before the Claims Tribunal or that Hoffman had any control over the President in that regard.

c. The lower courts' holdings are at odds with the legislative history of the Senate's consent to ratification of the Convention, and the accompanying amendments to the FAA, which make clear that the "convention applies only in those cases where the persons involved have voluntarily accepted arbitration."[22] The State Department spokesman who appeared before the Senate Foreign Relations

[21] It is settled that "ordinary contract and agency principals determine which parties are bound by an arbitration agreement ..." under the Convention. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985). Where there is no agreement with or control over the agent by the principal, there is no agency. Restatement (Second) of Agency, §§ 1, 5 (1981); *Nelson v. Serwold*, 687 F.2d 278, 282 (9th Cir. 1982).

[22] S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 1 (Sept. 27, 1968).

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 25, 1990

Committee in support of ratification of the Convention, Ambassador Richard D. Kearney, emphasized this point: "[T]here is nothing in the convention which imposes any burden on an individual which he had not voluntarily agreed to assume."[29] Ambassador Kearney elaborated on this point in a subsequent hearing:

> The Chairman: Whether or not this comes into effect at all depends upon an agreement entered into voluntarily b[y] the parties. Is that correct?
>
> Mr. Kearney. That is correct, sir.
>
> The Chairman: In other words, you are not imposing this on people who do not wish any particular procedure; is that correct?
>
> Mr. Kearney: That is absolutely correct.
>
> . . . .
>
> The Chairman: So there is no possible opposition based on the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?
>
> Mr. Kearney: That is correct.[30]

[29] *Id.*, App. at 3. (Statement of Richard D. Kearney).

[30] S. Rep. No. 702, 91st Cong., 2d Sess., App. at 10 (1970) (statement of Richard D. Kearney). In considering S. 3274, which amended the FAA to implement the Convention, Representative Fish likewise "emphasized" the following point: "[U]nder the proposal before us, no person would be compelled to enter into any arbitration agreement nor required to submit to the jurisdiction of any court under circumstances in which he himself had not voluntarily agreed to the court's jurisdiction. As a result, this bill is directed only toward implementing procedures which the parties to arbitration agreements have themselves agreed on." 116 Cong. Rec. 22,731, at 22,732.

The same point was made in the Official Report of the United States Delegation to the United Nations Conference on International Arbitration, at which the Convention was drafted:

> It is definitely understood . . . that the convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. *If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently would not come within the purview of the convention.*[31]

The proceedings of the Claims Tribunal bear scant resemblance to traditional international commercial arbitration. Because of their compulsory character, the proceedings of the Claims Tribunal are, indeed, "judicial rather than arbitral" in nature.

d. The court of appeals' holding is contrary to the only previous decision that has considered whether an award of the Claims Tribunal is capable of enforcement under the New York Convention, a decision which the court of appeals attempted to dismiss as mere "dictum." In *Dallal v. Bank Mellat*, [1986] 1

[31] *Quoted in* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049, 1061 n.54 (1961).

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 21, 1990

Q.B. 441, 2 W.L.R. 745, 1 All E.R. 239, the English High Court refused enforcement of an award of the Claims Tribunal under the New York Convention, finding that "the recognition of the proceedings and award of the tribunal at The Hague" cannot be justified based on "the application of the ordinary principles applicable to consensual arbitration." [1986] 1 All E.R. at 250. Since the English court, nonetheless, accorded res judicata effect to the award of the Claims Tribunal based upon its belief that the proceedings at The Hague had been "competent," its holding on the Convention question may be dictum, but it is surely studied dictum.

3. Review by this Court is also required to correct the erroneous holding that the New York Convention can be applied to awards resulting from arbitrations detached from the ambit of national arbitration law, an issue of widespread importance to international arbitrators, lawyers and businessmen, and to the orderly administration of international arbitrations.[24] The issue of whether so-called "a-national" awards can be enforced under the New York Convention has been hotly debated in the academic and legal communities, but until now no U.S. court has spoken to the issue. While the court of appeals termed it a "close question" (App., *infra*, 17a), it is submitted that the New York Convention simply does not apply to awards that have been rendered outside the supervisory jurisdiction of the courts of the state in which the proceedings have taken place. The concept of a "stateless" award—like the award at issue here—

[24] *See generally* W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647 (1989).

is anathema to the Convention. "Under . . .[the] scheme" of the Convention "the arbitral seat gives the award an international currency merely by letting the award be rendered within its territory" and "provides support to the arbitral process by allowing an award to take on a presumptive validity under the New York Convention."[25] Since the proceedings of the Claims Tribunal take place wholly outside the ambit of Dutch law,[26] its awards cannot be enforced under the Convention. Moreover, confronted with an award that is defective on its face,[27] Gould was without power to seek redress in the Dutch courts.

a. By necessary implication, the New York Convention does not apply to enforcement of awards that have resulted from proceedings not subject to a national arbitration law. According to the leading authority on the Convention:

[25] *Id.* at 657. Park notes: "An arbitrator's binding decision has world-wide legal consequences for all the parties to the dispute. It would seem anomalous that the country in which this decision is made should exempt it from any judicial review, even for gross procedural defects such as arbitrator fraud or lack of a valid arbitration agreement." *Id.* at 657-58.

[26] The United States, Iran and the Netherlands have all recognized that, although the Claims Tribunal conducts its proceedings at The Hague, in no sense are its proceedings subject to Dutch arbitration law. *See, supra*, notes 8 through 11 and accompanying text. The *Dallal* court also recognized that the proceedings of the Claims Tribunal are not "Dutch" in character: "It is beyond argument that there is no legislative or other authority under Dutch municipal law for these arbitration proceedings." [1986] 1 All E.R. at 251.

[27] The Claims Tribunal *dismissed* all of Iran's counterclaims yet rendered a positive award in Iran's favor.

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 29, 1990

The New York Convention must be deemed to apply to arbitral awards which are governed by a national arbitration law only. . . . It is true that the text of the Convention, as far as its field of application is concerned, does not require that the award be governed by a national arbitration law. However, if the Convention's scope is read in conjunction with the Convention's other provisions, it becomes evident that this requirement is implied. Enforcement of an award may be rejected if the respondent can prove that the arbitration agreement is invalid "under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made." Enforcement of an award may also be refused if the respondent can prove that the award has been set aside by a court of "the country in which, or under the law of which, that award was made."

* * *

The New York Convention not being a basis for enforcement of stateless awards, the only realistic approach to giving this category of awards a sufficient legal backing is an appropriate international convention.[36]

[36] A.J. van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 62-63 (1985) (citing Articles V(1)(a) and V(1)(e) of the Convention; emphasis in original). *See also* A.J. van den Berg, *supra*, note 24 at 37 ("[T]he Convention is built on the presumption that the award is governed by a national arbitration law . . ."); G. Gaja, *International Commercial Arbitration: New York Convention*, pt. I.A.3 (1984).

b. In acceding to the New York Convention, the United States adopted a "reciprocity" reservation, limiting application of the Convention to awards that are "made in the territory of another Contracting State." 21 U.S.T. 2566. While the Claims Tribunal sits at The Hague, and the Netherlands is party to the New York Convention, the Claims Tribunal essentially sits as an international court, and its awards do not qualify as "Dutch" awards so as to be entitled to recognition under the Convention. This conclusion is confirmed by the fact that, as noted, the Claims Tribunal has not even attempted to comply with mandatory provisions of Dutch arbitration law.[37] The reciprocity reservation is rendered meaningless if an arbitration proceeding insulated from a forum's municipal arbitration law is nonetheless considered an arbitration conducted in the territory of a Contracting State.

[37] The court of appeals suggests that a decision of the Netherlands highest court, the Hoge Raad, *Société Européenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia*, Hoge Raad, October 26, 1973, 14 Int'l Leg. Mat. 71 (1975), supports the decision reached below. That case dealt with the enforceability of a Swiss award that had been refused registration by a Swiss court because the arbitral tribunal had been improperly constituted under Swiss law. Ultimately, after a series of appeals, in one of which it offered *obiter dictum* on the enforceability in Holland of an a-national award, the Hoge Raad declined to enforce the award. The *obiter dictum* is discussed and criticized at length by van den Berg, *supra*, note 24 at 41-43, who concludes that "[i]f it can be proven that an award is not governed by an arbitration law, *it cannot be enforced under the Convention*." *Id.* at 43 (emphasis added).

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 20, 1990

CONCLUSION

For all the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NO. 89-1103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION and GOULD INTERNATIONAL, INC.,
Petitioners,

v.

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 2, 1990

STATEMENT OF THE CASE

On November 16, 1981, Hoffman Export Corporation ("Hoffman") brought two separate claims against Respondent herein before the Iran-United States Claims Tribunal ("Tribunal") for breach of contract. The Tribunal had been established pursuant to the Algiers Accords[1]. The claims, numbered 49 and 50,

[1]As used herein, "Algiers Accords" or "Accords" refers to the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981 Department of State Bull. No. 2047, Feb. 1981 at 2, 1 Iran-U.S. C.T.R.3 (1983) ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, Department of State Bull. No. 2047, February 1981 at 3, 1 Iran-U.S. C.T.R.9 (1983) ("Claims Settlement Declaration")

respectively, were under the name of HOFFMAN EXPORT CORPORATION, A DIVISION OF GOULD, INC. of El Monte, California. Hoffman, as claimant, identified itself variously throughout the proceedings as "a Division of Gould Inc.", "a subsidiary of Gould, Inc." and as "Gould Marketing, Inc., as successor to Hoffman Export Corporation" ("Gould Marketing").

Iran answered in defense of the claim and filed a counterclaim against the claimant. The two cases, though initiated separately, were decided jointly by the Tribunal. The Tribunal awarded Iran the net amount of US$3,640,247.13.

Hoffman, at the time it brought the actions, had already been merged into Gould Marketing, Inc. and began signing

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 29, 1990

its papers as Gould Marketing, Inc., as successor to Hoffman. When Hoffman was merged into Gould Marketing, Inc., a number of other corporations were also merged. The shares held by the stockholders of Hoffman and the other corporations were converted to shares not in Gould Marketing, Inc. but in Gould International, Inc. Hereafter, Petitioner herein will be referred to as "Gould", and Respondent herein will be referred to as "Iran".

The award of the Tribunal was made against Hoffman and Gould Marketing. On June 9, 1987, Iran filed a Petition in the United States District Court for the Central District of California seeking confirmation of the award against those

named therein and against their successors and real parties in interest alleging jurisdiction under the Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 entered into force for the United States December 29, 1970, 21 U.S.T. 2517, TIAS 6997, (hereinafter referred to as the "Convention"), implemented in 9 U.S.C. §§201-208, and under 28 U.S.C. §1331.

Gould filed a motion to dismiss the Petition in the District Court. The motion, contrary to petitioner's characterization of the court's action in the Statement of the Case portion of the Petitions filed with this court, was denied in toto. Both parties then petitioned the District Court for

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 29, 1990

b. In acceding to the New York Convention, the United States adopted a "reciprocity" reservation, limiting application of the Convention to awards that are "made in the territory of another Contracting State." 21 U.S.T. 2566. While the Claims Tribunal sits at The Hague, and the Netherlands is party to the New York Convention, the Claims Tribunal essentially sits as an international court, and its awards do not qualify as "Dutch" awards so as to be entitled to recognition under the Convention. This conclusion is confirmed by the fact that, as noted, the Claims Tribunal has not even attempted to comply with mandatory provisions of Dutch arbitration law.[37] The reciprocity reservation is rendered meaningless if an arbitration proceeding insulated from a forum's municipal arbitration law is nonetheless considered an arbitration conducted in the territory of a Contracting State.

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[37] The court of appeals suggests that a decision of the Netherlands highest court, the Hoge Raad, *Société Européenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia*, Hoge Raad, October 26, 1973, 14 Int'l Leg. Mat. 71 (1975), supports the decision reached below. That case dealt with the enforceability of a Swiss award that had been refused registration by a Swiss court because the arbitral tribunal had been improperly constituted under Swiss law. Ultimately, after a series of appeals, in one of which it offered *obiter dictum* on the enforceability in Holland of an annational award, the Hoge Raad declined to enforce the award. The *obiter dictum* is discussed and criticized at length by van den Berg, *supra*, note 24 at 41-43, who concludes that "[i]f it can be proven that an award is not governed by an arbitration law, *it cannot be enforced under the Convention.*" *Id.* at 43 (emphasis added).

CONCLUSION

For all the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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if so, can such an award be deemed to have been "made in the territory of another Contracting State" as required by the U.S. Accession to the New York Convention?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioners Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, Gould International, Inc., and "Does One Through Ten."*

* Hoffman Export Corporation was merged into Gould International, Inc. on January 27, 1978. On October 3, 1988, Nippon Mining Co., Ltd., acquired approximately 96% of the issued and outstanding stock of Gould Inc. Gould Inc. has [illegible] wholly owned subsidiaries: Barnes/Sightmaster Ltd. (Rhode Island); Clevite de Mexico, S.A. de C.V. (Mexico).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ___

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION and GOULD INTERNATIONAL, INC.,
Petitioners,

v.

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc. (collectively "Gould"), petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on October 23, 1989.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 887 F.2d 1357. (App., *infra*, 1a-20a). The order of the United States District Court for the Central District of California is not reported. (App., *infra*, 21a-26a.) The district court amended its

order on March 3, 1988, certifying an immediate appeal pursuant to 28 U.S.C.A. § 1292(b) (West Supp. 1989). (App., *infra* 27a-28a.)

JURISDICTION

The Ministry of Defense of the Islamic Republic of Iran ("Iran") brought this proceeding to enforce an award of the Iran-United States Claims Tribunal ("Claims Tribunal") in the United States District Court for the Central District of California on June 9, 1987, invoking federal question jurisdiction (28 U.S.C. § 1331) under the Claims Settlement Declaration forming part of the so-called Algiers Accords,[1] and Chapter 2 of the Federal Arbitration Act ("FAA") 9 U.S.C. §§ 201 *et seq.* (1988). The district court issued an order on January 14, 1988, holding that the Algiers Accords did not vest it with subject matter jurisdiction to enforce an award of the Claims Tribunal, but that the award was enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention" or "New York Convention"),[2] which the United States has implemented through Chapter 2 of the FAA. On March 3, 1988, the district court certified both questions for immediate appeal pursuant to 28 U.S.C. § 1292(b). (App., *infra*, 27a-28a.)

[1] The Algiers Accords consist of: (1) Declaration of the Democratic and Popular Republic of Algeria ("General Declaration") and (2) Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"). Dept. of State Bull. No. 2047 (Feb. 1981).

[2] June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38.

The Court of Appeals for the Ninth Circuit agreed to review both questions on April 13, 1988 (App., *infra*, 29a-31a) and, on October 23, 1989, affirmed the order of the district court, holding that the award of the Claims Tribunal was enforceable under the Convention. (App., *infra*, 1a-20a.) The court of appeals did not reach the question of whether the Algiers Accords provided a jurisdictional basis for enforcing the award. (App., *infra*, 20a.)

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1989).

STATUTES AND TREATIES INVOLVED

Article II of the New York Convention provides in pertinent part:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Articles I through VI of the New York Convention are reprinted in the Appendix hereto. (App., *infra*, 38a-41a.)

Chapter 2 of the FAA, which implements the New York Convention, provides in pertinent part:

> § 201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.
>
> § 202. Agreement or Award Falling Under the Convention
>
> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. . . .
>
> § 203. Jurisdiction; Amount in Controversy
>
> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

The United States Accession to the New York Convention, 21 U.S.T. 2566, 9 U.S.C.A. § 201, note 43 (West 1987), provides in pertinent part:

> The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

The Claims Settlement Declaration is reprinted in its entirety in the appendix hereto. (App., *infra*, 32a-37a.)

STATEMENT OF THE CASE

A. Nature of the Case.

This is the first action in a U.S. court to enforce an award of the Claims Tribunal, a creature of international law brought into being by the United States and Iran on January 19, 1981, as part of their overall resolution of the "hostage crisis." The award found Gould Marketing, Inc. ("GMI") liable to Iran in the amount of $3,640,247.13 and purported to require GMI to deliver certain military equipment to Iran, the export of which is prohibited by applicable U.S. export control regulations. *Gould Marketing, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, Cases No. 49 and 50, 6 Iran-U.S. C.T.R. 272, 288 (1984).[3] (*See* App., *infra*, 8a n.4, 9a.) To date, the Claims Tribunal has issued awards in favor of Iran against at least twenty-two U.S. claimants.[4]

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[3] The Decisions and awards of the Claims Tribunal and certain other material filed with the Tribunal are reported in the Iran-United States Claims Tribunal Reports ("Iran-U.S. C.T.R."), published by Grotious Publications Limited of Cambridge, United Kingdom.

[4] It was recently reported that in 22 cases the Claims Tribunal had awarded a total of about U.S. $50 million in damages to Iran either for counterclaims against U.S. claimants or as costs of arbitration. *International Briefings: Iran-U.S. Claims Tribunal Update*, Int'l Fin. L. Rev. 41 (March 1989); *see also* Lewis, *What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?*, 26 Colum. J. Transnat'l L. 515, 516 n.9 (1988). To the best of Gould's knowledge, at this time no other action to enforce a Claims Tribunal award is pending in a U.S. court.

B. The Underlying Dispute.

The dispute between Gould and Iran arises out of two contracts between Hoffman Export Corporation ("Hoffman"), GMI's predecessor, and the Ministry of War of the former Government of Iran. The first was a May 1975 purchase agreement for radio communications equipment; the second, an April 1978 contract for installation in Iran of an integrated fixed station military communications system. In December 1978, riots and civil strife, which culminated in the overthrow of the Iranian Government and the taking hostage of American diplomatic personnel, interrupted performance, and Iran suspended progress payments, under both contracts. (App., *infra*, 4a.) On February 13, 1980, Hoffman commenced an action against Iran in the United States District Court for the Central District of California and, like many other similarly situated U.S. parties, succeeded in attaching Iranian assets frozen pursuant to Presidential order.[5]

C. Establishment of the Claims Tribunal and Dismissal of Hoffman's U.S. District Court Action.

On January 19, 1981, the United States and Iran entered into the Algiers Accords, resolving the hostage crisis and establishing the Claims Tribunal. (App. *infra*, 5a.) The General Declaration portion of the Accords provided for the release of the American hostages in return for a number of actions and under-

[5] *See Security Pacific Nat'l Bank v. Iran*, 513 F. Supp. 864 (C.D. Cal. 1981). On November 14, 1979, President Carter issued an Executive Order declaring a national emergency and freezing Iranian assets in the United States and abroad worth approximately $12 billion. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

takings by the United States, including the termination of legal proceedings against Iran in the United States, the nullification of attachments of Iranian assets and the transfer of certain Iranian assets that had been frozen by executive order. The Claims Settlement Declaration provided for the formation of the Claims Tribunal to serve as a forum "for determination of claims by United States nationals or by the United States itself against Iran" as well as "claims against the United States, including both official contract claims and disputes arising under the Declaration."[6]

Pursuant to Paragraph 7 of the General Declaration, one billion dollars of the transferred Iranian assets were placed in an Algerian-administered security account to be "used for the sole purpose of securing payment of, and paying, claims against Iran in accordance with the claims settlement agreement." The Claims Settlement Declaration provided for Claims Tribunal jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [a] national's claim." The Algiers Accords, though, made no provision for payment of any awards which the Claims Tribunal might render in favor of Iran against U.S. nationals, a possibility which appears not to have been contemplated when the Algiers Accords were executed. Claims Settlement Declaration, Article II(1). (App., *infra*, 32a.)

[6] Opinion of Attorney General Benjamin R. Civiletti to the President, January 19, 1981, *reprinted in The Implementation Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 167, 173 (1981).

The Algiers Accords were not self-executing, being "merely executory agreements between two nations" having "no effect on domestic law absent additional governmental action." *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985), *cert. dismissed*, 479 U.S. 957 (1986). Thus, in order to implement the General Declaration, on February 24, 1981, President Reagan issued an Executive Order "suspending" all claims against Iran in U.S. courts which could be presented to the Claims Tribunal.[7] The President's Order was upheld by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In accordance with that Executive Order, the district court thereafter dismissed Hoffman's action against Iran. *See Security Pacific*, 513 F. Supp. at 884.

Article VI(1) of the Claims Settlement Declaration provided that "[t]he seat of the [Claims] Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States." As noted by one American negotiator of the Algiers Accords, "[u]pon examination of Dutch law, it became apparent that awards rendered pursuant to the Claims Settlement Agreement would not meet certain procedural requirements for valid arbitral awards under the Dutch civil code."[8] It was first proposed that provision be made for an "agreement among the United States, Iran, and the Netherlands to qualify the awards of the Claims Tribunal as valid awards under Dutch law without meeting those particular require-

[7] Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

[8] M.B. Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues, and Lessons: View from Government's Perspective*, in Symposium on Private Investors Abroad: Problems and Solutions 75, 98 (1981).

ments."[9] When this agreement failed to materialize, Dutch legislation was introduced which would have rendered proceedings of the Claims Tribunal partially subject to Dutch law, while exempting the Tribunal from many Dutch procedural requirements and sharply limiting Dutch judicial review of Tribunal awards.[10]

The efforts to provide a Dutch legal framework for the activities of the Claims Tribunal failed when Iran protested that the Netherlands had "no right to interfere" with the proceedings of the Claims Tribunal and that the proposed legislation would constitute a "violation of established principles of international law."[11] Iran informed the Dutch Government that "the Tribunal is an international court in the strict sense and is essentially governed by public international law" (*id.* at 405) and that "a civil law or international trade arbitration was not meant by the parties to the Declaration" (*id.* at 407). As a result of Iran's protests, efforts to enact legislation were abandoned, and the Claims Tribunal to this date has operated outside the mandatory requirements of Dutch arbitration law.

[9] *Id.* Among the infirmities of the proceedings of the Claims Tribunal under Dutch law are the absence of any written arbitration agreements between the parties to those proceedings and insufficient procedures for raising challenges to individual members of the Claims Tribunal.

[10] Bill, Applicability of Dutch Law to the Awards of the Tribunal Sitting in The Hague to Hear Claims Between Iran and the United States, *reprinted in* 4 Iran-U.S. C.T.R. 306 (1983).

[11] Letter from Mohammad Eshragh (Agent of the Islamic Republic of Iran at the Claims Tribunal) to Legal Adviser's Office, Ministry of Foreign Affairs, The Netherlands, 6 Iran-U.S. C.T.R. 405, 411 (1984).

D. The Proceedings at the Claims Tribunal

Deprived by executive order of its chosen forum, the United States District Court for the Central District of California, and faced with the probability of permanently losing its claims due to a filing deadline at The Hague, Hoffman lodged two claims with the Claims Tribunal on November 16, 1981.[12] Iran, in turn, filed two counterclaims vastly in excess of the amount of Hoffman's claims.[13] On June 29, 1984, the Claims Tribunal issued a final combined award which made a net award to Iran of $3,640,247.13[14] even though the Claims Tribunal expressly dismissed Iran's counterclaims. Moreover, the Claims Tribunal directed Gould to turn over to Iran various items of military equipment being held in this country because of export control regulations prohibiting its delivery to Iran.[15]

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[12] Under the terms of Executive Order 12,294 and the terms of the district court's order dismissing its claims against Iran, Hoffman would have likely lost its claims forever had it failed to refile them with the Claims Tribunal.

[13] The Claims Tribunal issued an interlocutory award on July 27, 1983, holding that it had jurisdiction over counterclaims filed by Iran, even in excess of a U.S. national's claim, when the counterclaim arose out of "the same contract, transaction, or occurrence that constitutes the subject matter of that national's claim." *Gould Marketing Inc. v. Ministry of National Defense of Iran*, Case No. 49, 3 Iran-U.S. C.T.R. 147, 152 (1983), *quoting* Claims Settlement Declaration, Art. II(1).

[14] 6 Iran-U.S. C.T.R. at 273-75, 282 (1984). The award was based on a *sua sponte* "equitable accounting" by the Claims Tribunal, which cited no jurisdictional basis for an award not based on Iran's counterclaims.

[15] *Id.* at 288. Gould's application to export these items to Iran in 1981 was refused by the Office of Munitions Control for the stated reason that "[c]urrent U.S. policy precludes issuance of export licenses for Munitions List items destined for Iran." (CR 4, Ex.2) The export of these items to Iran is still prohibited under U.S. law. Pursuant to 22 U.S.C. § 2780 (Supp. V 1987), no item on the United States Munitions List, which includes the items ordered returned to Iran by the Claims Tribunal award, may be exported to any country which the Secretary of State has determined has repeatedly provided support for acts of international terrorism. The Secretary of State made such a determination with regard to Iran on January 23, 1984, 49 Fed. Reg. 2,836 (1984), which remains in effect.

More than a year later, on July 19, 1985, Iran filed a "Request for Interpretation" of the Algiers Accords with the Claims Tribunal, in which it contended that the United States should be held liable for satisfying Claims Tribunal awards rendered against U.S. nationals. *The Islamic Republic of Iran v. United States*, Case A/21, 14 Iran-U.S. C.T.R. 324 (1987) ("Case A/21").[16] Iran asserted "that the Algiers Declarations establish a 'reciprocal system of commitments' that obligates the United States to pay awards if its nationals fail to do so" and that the United States could fulfill its supposed duty to see that awards in favor of Iran are satisfied by either "elect[ing] to pay such awards directly" or "enact[ing] special legislation enabling the enforcement of Tribunal awards on a 'full faith and credit' basis as it has done in the case of awards rendered pursuant to the ICSID Convention."[17] The Claims Tribunal rejected these arguments, concluding on May 4, 1987:

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[16] The Claims Settlement Declaration provides that the Claims Tribunal shall decide "[a]ny question concerning the interpretation or application" of the agreement at the request of either government. Art. VI(4). (App., *infra*, 35a.)

[17] 14 Iran-U.S. C.T.R. at 326, *citing* the Convention on the

> [We] cannot find that any obligation of the United States to satisfy Tribunal awards against its nationals flows from the 'international' character of the Tribunal, or from any principle of customary international law based on the United States having been a party to the treaty that established the Tribunal.

Id. at 330.

The Claims Tribunal further reasoned that "in establishing a Security Account as the source for payment of awards against . . . Iran" while "not imposing an identical obligation . . . upon the United States," the parties to the Algiers Accords "clearly contemplated something other than parity of treatment of the two States Parties as regards enforcement mechanisms." *Id.* at 329. Finally, the Claims Tribunal found that it had "no authority under the Algiers Declarations to prescribe the means by which each of the States provides for . . . enforcement" of Tribunal awards, although it believed it "incumbent on each State Party to provide some procedure or mechanism" for enforcement in its national jurisdiction. *Id.* at 331. To date, Congress has not been presented with proposed legislation providing for the enforcement of Claims Tribunal awards against U.S. nationals.

Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* August 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. *See, infra*, note 22.

E. The Proceedings Below.

On June 9, 1987, Iran filed a "Petition for Order Confirming Arbitrial [sic] Award" in the United States District Court for the Central District of California, seeking judicial confirmation of the award rendered by the Claims Tribunal against GMI in favor of Iran.[18] In its petition, Iran alleged that the district court possessed subject matter jurisdiction under 28 U.S.C. § 1331 by virtue of the Claims Settlement Declaration and under 9 U.S.C. § 203.

On July 31, 1987, Gould moved for dismissal on the grounds, *inter alia*, that the district court lacked subject matter jurisdiction to enforce the award under the Claims Settlement Declaration, which is not self-executing, and that the award of the Claims Tribunal was not subject to recognition or enforcement under the terms of the New York Convention in the absence of a voluntary written agreement for GMI to arbitrate or in the absence of a governing national arbitration law. On January 14, 1988, Gould's motion was denied in part and granted in part by the district court.[19] The district court declined to find the Algiers Accords self-executing, determining that the Ninth Circuit's holding in *Boeing* was controlling on this issue, but

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[18] Iran's petition alleges that Gould and Gould International are *alter egos* of GMI and seeks an order confirming the award against these parties also, including specific performance of the award's requirement that GMI provide certain military communications equipment to Iran. CR 1.

[19] The United States filed an *amicus curiae* brief urging the district court to find jurisdiction under both bases asserted by Iran.

found jurisdiction to confirm the award under the New York Convention. (App., *infra*, 23a-26a.) The district court held that the Algiers Accords themselves constituted the requisite agreement in writing and that the "interest in effective arbitral proceedings" should override what it termed a "form v. substance" defense concerning the Claims Tribunal's operation outside of any national arbitration law. (App., *infra*, 26a.)

On October 23, 1989, the court of appeals affirmed the district court's finding of subject matter jurisdiction under the New York Convention.[20] The court of appeals acknowledged that "the Accords provide no specific vehicle for the enforcement of awards *in favor of* Iran," (App., *infra*, 9a), but found that the "three basic requirements" for jurisdiction under the New York Convention were met: "The award (1) must arise out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope." (App., *infra*, 12a.) The court of appeals acknowledged that Articles II(1) and IV(1)(b) of the Convention "do indeed seem to indicate that the award referred to in Section 203 emanate from a written agreement," but attempted to surmount this obstacle by construing "the Accords themselves as representing the written agreement so required, on the strength on the President's authority to settle claims on behalf of United States nationals through international agreements." (App., *infra*, 14a.) According to the court of appeals, the "real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but

[20] The court of appeals did not reach the question of whether there was jurisdiction under 28 U.S.C. § 1331.

whether the President—acting on behalf of Gould—entered into such an agreement. The answer is clearly yes." (App., *infra*, 15a.) The court of appeals, moreover, read this Court's opinion in *Dames & Moore* as broad enough "to encompass the authority of the President to settle claims under the facts before us." (App., *infra*, 15a.)

On the issue of the voluntariness of the "agreement," the court of appeals acknowledged that the legislative history of the Convention "lends some support to Gould's view" that "the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily," but nonetheless concluded that the Convention "did not preclude the United States from entering into an agreement on behalf of its nationals, as authorized by *Dames & Moore*." (App., *infra*, 15a n.9.)

On the issue of whether the New York Convention could be applied to arbitral awards which are not rendered in accordance with the national arbitration law of a party state, the court of appeals termed it "a close question," but concluded that "the fairest reading of the Convention itself appears to be that it applies to the enforcement of non-national awards." (App., *infra*, 17a-18a.)

REASONS FOR GRANTING THE WRIT

This case raises issues of general importance concerning the power of the President, the subject matter jurisdiction of the federal courts, and the implementation of the Algiers Accords. If the United States intends to vest the federal courts with jurisdiction to enforce awards of the Claims Tribunal in favor of Iran, it is required to enact legislation im-

plementing the Claims Settlement Declaration to give effect to that intention. That it has never done. Through their tortured interpretation of the New York Convention, which was never intended by its framers to encompass international claims proceedings to which the parties were compelled to refer their disputes, the courts below in effect usurped a role—implementing the Algiers Accords—that is exclusively the preserve of the Executive and Legislative branches. The Court should issue the writ to correct the serious abuse of judicial authority that has occurred in this case and to reaffirm the core principle that the federal courts are courts of limited jurisdiction.

The questions raised by this case are of immediate significance to those American claimants that have Claims Tribunal awards pending against them. More generally, they are important to safeguarding the limited jurisdiction of the federal courts, and to the proper application of the New York Convention and administration of international arbitrations. Until this case, no American court had interpreted the New York Convention to apply to an award which was neither the product of an arbitral proceeding to which the parties had voluntarily agreed in writing nor subject to judicial supervision in the state in which the proceeding took place.

In their zeal to find Iran's award enforceable in the federal district court, both lower courts played fast and loose with the language of the New York Convention and paid scant heed to the requirements which any award must meet in order to become enforceable thereunder. Thus, the district court dismissed Gould's contentions as "form v. substance"

and, rather than thoughtfully analyzing whether Iran's award and the proceeding from which it issued met the minimum criteria for enforceability under the New York Convention, opted instead to rely upon what it termed "the overriding judicial interest in effective arbitral proceedings." (App., *infra*, 26a.) The lower courts' expansive view of their power to gloss over imperfections in the award and the proceedings of the Claims Tribunal under the laws of the state in which it sits does violence to the Convention and represents an unwarranted judge-made enlargement of federal subject matter jurisdiction.

1. The lower courts have usurped the roles of the Executive and Congress in implementing the Algiers Accords. The Claims Settlement Declaration is not self-executing, and Claims Tribunal awards can be enforced in U.S. federal district courts only upon a specific grant of jurisdiction by the Congress, along with appropriate procedures and standards for review. The limited jurisdiction of the federal courts is "a fundamental precept" which "must be neither disregarded nor evaded." *Owen Equip. & Erection v. Kroger*, 437 U.S. 365, 374 (1978).

a. Because it is an executory agreement, the Claims Settlement Declaration has no U.S. domestic force or effect. *See Boeing*, 771 F.2d at 1284; *Electronic Data Sys. Corp. Iran v. Social Sec. Org.*, 651 F.2d 1007, 1009-10 & n.1 (5th Cir. 1981). Moreover, even if the Algiers Accords were "self-executing, Federal jurisdiction under § 1331 will not lie where it is not provided for in the treaty." *Dreyfus v. von Finck*, 534 F.2d 24, 30 (2nd Cir.), *cert. denied*, 429 U.S. 835 (1976), *citing Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2nd Cir. 1971). Failure

of the Claims Settlement Declaration—which *does* provide an enforcement mechanism for awards against Iran—to provide for enforcement of Claims Tribunal awards against a Party State's nationals, cannot be remedied through judicial fiat.

b. In the absence of a self-executing enforcement scheme, it is incumbent upon the Congress to determine the standards for enforcement of Claims Tribunal awards and to provide, if desirable, federal jurisdiction to enforce them.[21] This was how the United States implemented the ICSID Convention, a multilateral treaty providing for arbitration of international commercial disputes.[22] Similarly, after the United States ratified the Inter-American Convention

[21] At the Claims Tribunal, the United States took the position that the Algiers Accords "do not create a United States-funded security account, do not provide special enforcement mechanisms for awards entered against U.S. or Iranian nationals, and do not require Iran or the United States to pass domestic legislation guaranteeing access to their courts for award enforcement purposes." Response of the United States to the Memorial of the Islamic Republic of Iran, Case A/21, Iran-United States Claims Tribunal (Sept. 4, 1986), *reprinted in* Iranian Assets Lit. Rep. 13,130, 13,138 (October 10, 1986).

[22] The signatories to the ICSID Convention agreed that ICSID awards would be enforceable in the national courts of any State Party (Art. 54(1)) and each State Party would be required to "take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories." Art. 69. The United States enacted implementing legislation which provides that "[an ICSID] award . . . shall create a right arising under a treaty of the United States . . . [and] shall be enforced . . . as if the award were a final judgment of a court of general jurisdiction of one of the several states." 22 U.S.C. § 1650a(a) (1982). The legislation further provides for exclusive federal jurisdiction regardless of the amount of controversy. Id. at § 1650a(b).

on Commercial Arbitration (Panama Convention), the President determined that "[n]ew legislation will be required . . . in order to implement the provisions of the Convention within the United States. . . ."[23]

c. The attempt by the district court and court of appeals to implement the Algiers Accords indirectly, through the use of New York Convention, is an exercise in expediency and an unwarranted expansion of the Convention's applicability. The New York Convention was never intended to apply to the awards of an international claims tribunal operating outside any municipal arbitration law, and deriving its jurisdiction from an international agreement to which national claimants are not parties. The Convention cannot serve as a proxy for specific U.S. legislation providing for enforcement of Claims Tribunal awards. As adopted by the United States, the Convention applies only to awards rendered in a proceeding to which the parties have consented in writing and which was held in the territory of another signatory state. Iran's award possesses neither of these prerequisites to recognition.

2. The requirement that there be a writing signed by the parties serves to establish the consensual nature of the proceeding, a *sine qua non* to enforceability under the Convention. The court of appeals acknowledged that application of the Convention requires that an award "emanate from a written agree-

[23] Message from the President of the United States transmitting the Inter-American Convention on Commercial Arbitration, Senate Treaty Doc. No. 97-12, 97th Cong., 1st Sess. 1 (1981); *see also* Bill to Implement the Inter-American Convention on International Commercial Arbitration, S. 2204, 100th Cong., 2nd Sess. (1988).

ment,"[24] but then eviscerated this requirement by construing "the Accords themselves as representing the written agreement so required, on the strength of the President's authority to settle claims on behalf of United States nationals through international agreements." (App., *infra*, 14a.) This interpretation confuses the President's power to "suspend" claims of U.S. nationals pending in our courts and to require such claims to be referred to the Claims Tribunal with the power to bind Gould to a written agreement to resolve its dispute with Iran through arbitration. In the process, the court of appeals misconstrues this Court's holding in *Dames & Moore*. The *Dames & Moore* Court was careful to emphasize the narrowness of its decision (453 U.S. at 688), which simply upheld the lawfulness of the President's orders *suspending* claims against Iran in U.S. courts (453 U.S. at 674, 676).[25]

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[24] A party seeking recognition of a foreign arbitral award under the New York Convention must file with the court in which recognition is sought "[t]he original agreement referred to in Article II or a duly certified copy thereof." New York Convention, Art. IV(1)(b) (App., *infra*, 39a.) The Convention's requirement that the agreement be signed by the parties is absolute. *See* A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 192-207 (1981).

[25] This Court visited the Algiers Accords for a second time last term in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). Sperry claimed, *inter alia*, that § 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. 438, note following 50 U.S.C. § 1701 (Supp. V 1987), was unconstitutional under the Just Compensation Clause because it authorized the United States to charge Sperry "for the use of procedures that it ha[d] been forced to use." 110 S. Ct. at 395. The Court rejected Sperry's claim on the grounds that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services ... [and] ... Sperry benefit[ted] directly from the existence and functions of the Tribunal." *Id.* Neither *Dames & Moore* nor *Sperry*, however, resolved the questions presented in this case. The President's authority to compromise claims and the government's authority to exact a reasonable user fee are utterly distinct from whether or not the President has the authority to act as an agent for purposes of the New York Convention.

a. GMI did not choose to arbitrate its dispute with Iran. Rather, Hoffman, GMI's predecessor in interest, filed suit for breach of contract in federal district court and successfully attached Iranian assets. The President, acting pursuant to the Algiers Accords, divested Hoffman of its chosen remedy and barred it from its chosen forum. At the Claims Tribunal, Iran has conceded "the absence of any written agreement between the arbitrating parties when one party is not a state having adhered to the Algiers Declaration" and has acknowledged:

> Any assertion that a claim brought before the Iran-United States Claims Tribunal by an American national (whose remedies before American courts were barred by an Executive Order of the President of the United States) *is voluntarily submitted* to the International Tribunal would require a rather ingen[i]ous construction of the terms of Article II of the New York Convention.[26]

b. Because of the consensual nature of arbitration (or at least arbitration within the scope of the New

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[26] Memorial of the Islamic Republic of Iran, [illegible], Iran-U.S. Claims Tribunal (Oct. 18, 1985), *reprinted in* [illegible] Assets Lit. Rep. 12,682, 12,721 (July 25, 1986) (emphasis added).

York Convention), to find that the President had the power to execute an "agreement" to arbitrate on behalf of Hoffman would require that he had acted as Hoffman's authorized agent, and was subject to Hoffman's direction and control.[27] Indeed, rather than having "ratified the actions of the United States" (App., *infra*, 16a.), at the time the Algiers Accords were issued Hoffman was pursuing its claims in a U.S. federal district court. Hoffman did not embrace the Claims Settlement Declaration, but contested the Government's right to suspend its claim. It thus cannot seriously be maintained that Hoffman authorized the President to enter into an agreement with Iran referring its disputes to arbitration before the Claims Tribunal or that Hoffman had any control over the President in that regard.

c. The lower courts' holdings are at odds with the legislative history of the Senate's consent to ratification of the Convention, and the accompanying amendments to the FAA, which make clear that the "convention applies only in those cases where the persons involved have voluntarily accepted arbitration."[28] The State Department spokesman who appeared before the Senate Foreign Relations

[27] It is settled that "ordinary contract and agency principals determine which parties are bound by an arbitration agreement . . ." under the Convention. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 70, 78 (S.D.N.Y. 1985). Where there is no agreement with or control over the agent by the principal, there is no agency. Restatement (Second) of Agency, §§ 1, 5 (1981); *Nelson v. Serwold*, 687 F.2d 278, 282 (9th Cir. 1982).

[28] S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 1 (Sept. 27, 1968).

Committee in support of ratification of the Convention, Ambassador Richard D. Kearney, emphasized this point: "[T]here is nothing in the convention which imposes any burden on an individual which he had not voluntarily agreed to assume."[29] Ambassador Kearney elaborated on this point in a subsequent hearing:

> The Chairman: Whether or not this comes into effect at all depends upon an agreement entered into voluntarily b[y] the parties. Is that correct?
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> Mr. Kearney. That is correct, sir.
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> The Chairman: In other words, you are not imposing this on people who do not wish any particular procedure; is that correct?
>
> Mr. Kearney: That is absolutely correct.
>
> . . . .
>
> The Chairman: So there is no possible opposition based on the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?
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> Mr. Kearney: That is correct.[30]

[29] *Id.*, App. at 3. (Statement of Richard D. Kearney).

[30] S. Rep. No. 702, 91st Cong., 2d Sess., App. at 10 (1970) (statement of Richard D. Kearney). In considering S. 3274, which amended the FAA to implement the Convention, Representative Fish likewise "emphasized" the following point: "[U]nder the proposal before us, no person would be compelled to enter into any arbitration agreement nor required to submit to the jurisdiction of any court under circumstances in which he himself

The same point was made in the Official Report of the United States Delegation to the United Nations Conference on International Arbitration, at which the Convention was drafted:

> It is definitely understood . . . that the convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. *If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently would not come within the purview of the convention.*[31]

The proceedings of the Claims Tribunal bear scant resemblance to traditional international commercial arbitration. Because of their compulsory character, the proceedings of the Claims Tribunal are, indeed, "judicial rather than arbitral" in nature.

d. The court of appeals' holding is contrary to the only previous decision that has considered whether an award of the Claims Tribunal is capable of enforcement under the New York Convention, a decision which the court of appeals attempted to dismiss as mere "dictum." In *Dallal v. Bank Mellat*, [1986] 1

had not voluntarily agreed to the court's jurisdiction. As a result, this bill is directed only toward implementing procedures which the parties to arbitration agreements have themselves agreed on." 116 Cong. Rec. 22,731, at 22,732.

[31] *Quoted in* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049, 1061 n.54 (1961).

Q.B. 441, 2 W.L.R. 745, 1 All E.R. 239, the English High Court refused enforcement of an award of the Claims Tribunal under the New York Convention, finding that "the recognition of the proceedings and award of the tribunal at The Hague" cannot be justified based on "the application of the ordinary principles applicable to consensual arbitration." [1986] 1 All E.R. at 250. Since the English court, nonetheless, accorded res judicata effect to the award of the Claims Tribunal based upon its belief that the proceedings at The Hague had been "competent," its holding on the Convention question may be dictum, but it is surely studied dictum.

3. Review by this Court is also required to correct the erroneous holding that the New York Convention can be applied to awards resulting from arbitrations detached from the ambit of national arbitration law, an issue of widespread importance to international arbitrators, lawyers and businessmen, and to the orderly administration of international arbitrations.[32] The issue of whether so-called "a-national" awards can be enforced under the New York Convention has been hotly debated in the academic and legal communities, but until now no U.S. court has spoken to the issue. While the court of appeals termed it a "close question" (App., *infra*, 17a), it is submitted that the New York Convention simply does not apply to awards that have been rendered outside the supervisory jurisdiction of the courts of the state in which the proceedings have taken place. The concept of a "stateless" award—like the award at issue here—

[32] *See generally* W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647 (1989).

is anathema to the Convention. "Under . . .[the] scheme" of the Convention "the arbitral seat gives the award an international currency merely by letting the award be rendered within its territory" and "provides support to the arbitral process by allowing an award to take on a presumptive validity under the New York Convention."[33] Since the proceedings of the Claims Tribunal take place wholly outside the ambit of Dutch law,[34] its awards cannot be enforced under the Convention. Moreover, confronted with an award that is defective on its face,[35] Gould was without power to seek redress in the Dutch courts.

a. By necessary implication, the New York Convention does not apply to enforcement of awards that have resulted from proceedings not subject to a national arbitration law. According to the leading authority on the Convention:

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[33] *Id.* at 657. Park notes: "An arbitrator's binding decision has world-wide legal consequences for all the parties to the dispute. It would seem anomalous that the country in which this decision is made should exempt it from any judicial review, even for gross procedural defects such as arbitrator fraud or lack of a valid arbitration agreement." *Id.* at 657-58.

[34] The United States, Iran and the Netherlands have all recognized that, although the Claims Tribunal conducts its proceedings at The Hague, in no sense are its proceedings subject to Dutch arbitration law. *See, supra*, notes 8 through 11 and accompanying text. The *Dallal* court also recognized that the proceedings of the Claims Tribunal are not "Dutch" in character: "It is beyond argument that there is no legislative or other authority under Dutch municipal law for these arbitration proceedings." [1986] 1 All E.R. at 251.

[35] The Claims Tribunal *dismissed* all of Iran's counterclaims yet rendered a positive award in Iran's favor.

> The New York Convention must be deemed to apply to arbitral awards which are governed by a national arbitration law only. . . . It is true that the text of the Convention, as far as its field of application is concerned, does not require that the award be governed by a national arbitration law. However, if the Convention's scope is read in conjunction with the Convention's other provisions, it becomes evident that this requirement is implied. Enforcement of an award may be rejected if the respondent can prove that the arbitration agreement is invalid "under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made." Enforcement of an award may also be refused if the respondent can prove that the award has been set aside by a court of "the country in which, or under the law of which, that award was made."
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> * * *
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> The New York Convention not being a basis for enforcement of stateless awards, the only realistic approach to giving this category of awards a sufficient legal backing is an appropriate international convention.[36]

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[36] A.J. van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 62-63 (1985) (citing Articles V(1)(a) and V(1)(e) of the Convention; emphasis in original). *See also* A.J. van den Berg, *supra*, note 24 at 37 ("[T]he Convention is built on the presumption that the award is governed by a national arbitration law . . ."); G. Gaja, *International Commercial Arbitration, New York Convention*, pt. I.A.3 (1984).

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION and GOULD INTERNATIONAL, INC.,
Petitioners,

v.

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 12, 1990

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Plaintiff-Appellee/Cross-Appellant,

v.

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION, and GOULD INTERNATIONAL, INC.,
Defendants-Appellants/Cross-Appellees.

Nos. 88-5879; 88-5881

D.C. No. 87-0363-RG-GX

OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
February 9, 1989—Pasadena, California

Filed October 23, 1989

Before: William C. Canby, Jr., Charles Wiggins and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

International Law/Jurisdiction

Affirming the district court's finding of subject matter jurisdiction, the court held that the New York Convention and the

Federal Arbitration Act provided the district court with subject matter jurisdiction to enforce an award favoring Iran against a U.S. domestic company.

In an action filed by appellant Hoffman Export Corporation/Gould Inc. (Gould) against the Islamic Republic of Iran (Iran) for breach of contract the Iran-United States Claims Tribunal (Tribunal) issued a consolidated final award favoring Iran. Following the Tribunal's judgment, Iran sought a ruling that the U.S. government was required to satisfy awards issued under the 1981 "Algiers Accords" (Accords). The Accords provided a specific vehicle for the enforcement of awards against Iran, but failed to discuss awards "in favor" of Iran. Although the Tribunal determined that the U.S. had no specific obligation under the Accords, the U.S. had a general obligation to provide an enforcement mechanism for such awards within its national jurisdiction. Iran then filed an action in district court seeking confirmation and enforcement of its award against Gould. Gould moved to dismiss, arguing the district court lacked subject matter jurisdiction. The district court held it did have jurisdiction over the petition under 9 U.S.C. § 203, as a consequence of its ruling that the Tribunal's award satisfied the requirements of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Section 203 provides that district courts have original jurisdiction over any action or proceeding falling under the New York Convention, as such an action is deemed to arise under the laws and treaties of the U.S. On appeal, Gould contended the Accords did not provide the district court with jurisdiction because Gould did not agree in writing to be subject to the Accords. Gould also contended the award was required to be made subject to national law to fall under the Convention.

[1] The three conditions under section 203 exist for jurisdiction were clearly satisfied. The award arose out of a legal relationship, which was commercial in nature, and which was not entirely domestic in scope. [2] When the Accords were

executed, the President acted, in writing, on behalf of nationals like Gould, to agree to submit its claims against Iran to arbitration within the framework of the Accords. [3] Gould, in filing its claim and arbitrating it before the Tribunal, ratified the actions of the U.S. in executing the Accords. [4] Under section 203, the award rendered by the Tribunal was not subject to national law and appears to apply to the enforcement of non-national awards. [5] There remained defense safeguards, such as due proces protections and public policy considerations, in place to guard against enforcement of an otherwise unfair arbitration award. [6] These defenses applied to arbitral awards made under municipal domestic law or to the law of the parties' choosing. [7] Therefore, the award need not be made under a national law for a court to entertain jurisdiction over enforcement subject to the Convention.

COUNSEL

Marc S. Palay, Jones, Day, Reavis & Pogue, Washington, D.C., for the defendants-appellants/cross-appellees.

Richard E.M. Brakefield, Long Beach, California, for the plaintiff-appellee/cross-appellant.

Abraham D. Sofaer, Legal Adviser to United States Department of State, Washington, D.C. filed a brief for the United States as Amicus Curiae.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to determine whether an award against an American corporation entered by the Iran-United States

Claims Tribunal can be enforced in federal court. The district court ruled that subject matter jurisdiction to enforce such award vests under the New York Convention and the Federal Arbitration Act. We agree.

I

A clear understanding of this dispute requires some examination of recent Iranian and American history. The former Shah of Iran, Mohammed Reza Pahlavi, ruled the Imperial Republic of Iran from 1953, when he assumed control of the government, until shortly before his death in 1979. Unrest developed and intensified in Iran during the Shah's rule. Led by conservative Moslem protests, the unrest eventually began to erupt in the late 1970s. In response, the Shah in 1978 declared martial law in twelve cities and set up a military government to deal with striking oil workers. Thereafter, he appointed Prime Minister Shahpur Bakhtiar to head a regency council and left the country, never to return, on January 16, 1979.

Meanwhile, exiled religious leader Ayatollah Ruhollah Khomeini named a provisional government council; he returned to Iran shortly after the Shah's departure. On February 11, less than two weeks after his return, Khomeini's supporters routed the imperial Guard, bringing about the collapse of Bakhtiar's government. Khomeini emerged victorious in the struggle to fill in the resultant power vacuum, as the Moslem clergy oversaw the drafting of an Islamic Constitution that vested final authority to rule in the Ayatollah and established the Islamic Republic of Iran.

Rampant unrest in Iran continued, and on November 4, 1979, Iranian militants seized the United States Embassy in Tehran and took as hostages members of the United States diplomatic corps stationed there. The hostage takers vowed to retain control of the fifty-two United States nationals and the embassy until the deposed Shah was returned to Iran. The

United States retaliated with a series of actions. First, on November 14, President Carter issued an Executive Order declaring a national emergency and calling for the freezing of some $12 billion worth of Iranian assets in the United States and abroad. Exec. Order No. 12,170, 3 C.F.R. 457 (1980), note following 50 U.S.C. § 1701, 44 Fed. Reg. 65,729 (1979). In April 1980, the United States failed in an attempted military rescue operation and broke off diplomatic relations with Iran. The impasse dragged on even as the Shah died in Egypt in July. Finally, on January 19, 1981, more than one year after the storming of the American embassy in Tehran, representatives of the United States and Iran, through the intermediary Government of Algeria, reached an agreement that provided for the release of the American hostages. The agreement, known as the Algiers Accords ("the Accords"), comprised principally two documents: The Declaration of the Democratic and Popular Republic of Algeria (Jan. 19, 1981), *reprinted in* Dept. of State Bull. No. 2047, Feb. 1981, at 1 ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of Islamic Republic of Iran (Jan. 19, 1981), *reprinted in* Dept. of. State Bull. No. 2047, Feb. 1981 at 3 ("Claims Settlement Declaration").

The General Declaration set forth two principles that encompass the basic thrust of the agreement and which provide, in relevant part, as follows:

> A. . . . [T]he United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. . . .
>
> [T]he United States commits itself to ensure the mobility and free transfer of all [illegible] within its jurisdiction . . . .

> B. It is the purpose of both parties . . . 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 involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.
>
> Dept. of State Bull. at 2.

The General Declaration also laid out procedural details concerning the return of Iranian assets and United States nationals. Basically, it provided that once the Algerian Central Bank certified to an escrow bank in which the Iranian assets would be held that all 52 U.S. nationals had departed Iran safely, the escrow bank would transfer most of those assets back to Iran. The escrow bank would then hold the balance of the assets in a "Security Account" for the purpose of allowing U.S. nationals who prevailed on claims against Iran to satisfy their awards.[1]

The Claims Settlement Declaration set up the mechanism by which nationals of either country could present their claims against the government of the other. It established the Iran-United States Claims Tribunal, in which it vested jurisdiction over such claims and any counterclaims arising out of the same transaction. It also provided the details concerning the operation of the Tribunal.

[1]The parties agreed to use the Central Bank of the Netherlands (De Nederlandsche Bank) for maintaining the Security Account.

The same day that Warren Christopher, Deputy Secretary of State, initialed the Accords to signal United States assent to their terms, President Carter issued a series of Executive Orders providing for their implementation. Exec. Orders No. 12.276-85, 46 Fed. Reg. 7913-32 (Jan. 19, 1981).[2] The next day, President Reagan was inaugurated, and shortly thereafter, on February 24, 1981, he issued an Executive Order ratifying the implementing Orders President Carter had issued. Exec. Order 12.294, Fed. Reg. 14,111 (Feb. 24, 1981). President Reagan's Order also "suspended" all claims within the jurisdiction of the Tribunal, provided that such claims were of no legal effect in a United States court, and mandated that the Tribunal's determination on the merits of any claim validly before it "shall operate as a final resolution and discharge of the claim for all purposes." *Id.* The Supreme Court upheld the authority of the President to issue these Executive Orders. *Dames & Moore v. Regan*, 453 U.S. 654, 674, 686 (1981).

In the early 1970s, when somewhat more tranquil relations prevailed between the United States and Iran, the Ministry of War of the Imperial Government of Iran and Hoffman Electric Corporation entered into two contracts whereby Hoffman agreed to provide and install certain military equipment. The Iranian revolution disrupted progress payments and performance called for under the agreements. In early 1980, Hoffman filed an action against Iran for breach of contract in the United States District Court for the Central District of California, eventually obtaining a writ of attachment on Iranian assets held in the United States to satisfy its claim. *See Security Pacific Nat'l Bank v. Government & State of Iran*, 513 F. Supp. 864, 866 (C.D. Cal. 1981). After President Reagan issued the Executive Order suspending all claims in U.S. courts, however, the district court vacated the attachment and dismissed without prejudice Hoffman's action "subject

[2]These Executive Orders were later implemented by amendments to the Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101 *et seq.* (1981). *See* 46 Fed. Reg. 14,330-37 (Feb. 26, 1981).

to the right of any party to move to reopen the action at any time prior to the entry and satisfaction of a judgment of the Arbitral Tribunal . . . on the grounds that the settlement has failed of its essential purpose." *Id.* at 884.

Hoffman in turn filed Claims 49 and 50 with the Tribunal at the Hague, seeking damages from Iran for breach of contract. In response, in a series of actions over the next year, Iran filed Statements of Defense to both of Hoffman's claims, and pursuant to Art. II, sec. 1 of the Claims Settlement Declaration, filed counterclaims for breach of contract in which it sought in excess of $80 million against Hoffman.[3] By way of counterclaim, Iran also sought to obtain certain military radio equipment in Hoffman's possession.[4] During the pendency of the proceedings before the Tribunal, Hoffman was merged into Gould Marketing, Inc. ("Gould"), a wholly-owned subsidiary of Gould International, Inc. ("GII").[5]

[3]Hoffman argued to the Tribunal that this section of the Declaration only allows Iran to use a counterclaim as a means to obtain a setoff, and that is does not give the Tribunal jurisdiction to render a positive award in favor of Iran. The Tribunal rejected this argument in an interlocutory award in Case No. 49. 3 Iran-U.S. C.T.R. at 151-52.

[4]Because this equipment falls within the items on the United States Munitions List, domestic export restrictions forbade its exportation to Iran. Items on the Munitions List may not be exported to any country that the Secretary of State has determined repeatedly provides support for acts of international terrorism. 22 U.S.C. § 2780. The Secretary of State determined that Iran fit this definition on January 23, 1984. 49 Fed. Reg. 2836 (1984).

Even prior to the Secretary's determination, the Office of Munitions Control refused to grant Gould's application for a license to enable it to export this equipment to Iran in 1981.

[5]A factual dispute apparently exists as to which appellees are actually legitimate successors in interest to Hoffman; the resolution of that issue is not necessary or appropriate to decide on this interlocutory appeal. Because the Tribunal substituted Gould Marketing, Inc. as the claimant in these cases, hereinafter we will refer to appellee[s] simply as "Gould."

The Tribunal eventually issued a consolidated final award in Claims 49 and 50 in which it ruled that Gould was to pay $3.6 million and return the military radio equipment to Iran.[6] The monetary award in favor of Iran constituted a net accounting of the amounts the Tribunal found that Iran owed Gould under Claim No. 49 and that Gould owed Iran under the counterclaim to Claim No. 49.

Unlike the provision creating the Security Account at the escrow bank, the funds of which are to be used for the sole purpose of securing the payment of claims *against* Iran, the Accords provide no specific vehicle for the enforcement of awards *in favor of* Iran. Thus, following the Tribunal's judgment, Iran sought a ruling that the United States government was required to satisfy awards issued under the Accords in Iran's favor by filing a "Request for Interpretation" with the Full Tribunal, pursuant to Art. II(3) of the Claims Settlement Declaration. Request of the Islamic Republic of Iran for Interpretation, Iran-U.S. Claims Tribunal, Case A/21, July 1985, *reprinted in* Iranian Assets Lit. Rep. 10,897, 10,901-02 (1985).

[6]The Tribunal's final award reads in relevant part as follows:

> The Claimant, Gould Marketing, Inc., is obligated to pay the Respondent, Ministry of Defence of the Islamic Republic of Iran, U.S. $3,640,247.13.
>
> The Counterclaims are dismissed on the merits.
>
> . . . .
>
> The Claimant, Gould Marketing, Inc., is obligated to make available to the Respondent, Ministry of Defence of the Islamic Republic of Iran, the 21 VCS radios, the two ARC radios, the teleprinter, the one front panel assembly and the miscellaneous equipment and materials acquired under the contract involved in case number 50 which were not returned for credit or economically disposed of and therefore belong to the Respondent.

6 Iran-U.S. C.T.R. at 288.

The Full Tribunal determined that the United States had no such specific obligation under the Accords. *Islamic Republic of Iran v. United States*, Case No. A/21, 14 Iran-U.S. C.T.R. at 330. Nonetheless, the Tribunal went on to state that it considered the United States to have a more general obligation to provide some sort of enforcement mechanism for such awards "within its national jurisdiction."

> The Tribunal has no authority under the Algiers Declarations to prescribe the means by which each of the States provides for ... enforcement. Certainly, if no enforcement procedure were available in a State Party, or if recourse to such procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations under the Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto.

Id. at 331.

II

The Tribunal's ruling led to the filing of the current action in the United States District Court for the Central District of California, in which Iran seeks confirmation and enforcement of its award against Gould. Gould responded to the petition by filing a motion to dismiss on the ground that the district court lacks subject matter jurisdiction to decide such a matter. Gould set forth three grounds in support of its motion. First, it argued that because Iran is not recognized formally by the United States government, neither it nor any of its instrumentalities may maintain any action in a United States Court.[7] Second, it argued that because the Algiers Accords are

[7]The district court, relying on the unequivocal Statement of Interest of the United States Government in support of access of Iran to the federal

not self-executing, no federal question exists over which the district court can assert jurisdiction. Third, it argued that because the Tribunal proceedings leading up to the award in favor of Iran did not comply with certain terms of the New York Convention, the district court improperly exercised jurisdiction under 9 U.S.C. § 203.

The district court granted Gould's motion in part and denied it in part. The court held that it did not possess federal question jurisdiction over the matter, stating that it considered itself to be bound by language of this court concerning the nonself-executing nature of the Accords in *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985). Nonetheless, the court held that it did have jurisdiction over the petition under section 203, as a consequence of its ruling that the Tribunal's award satisfied the requirements of the New York Convention.

Both parties moved for certification of an immediate appeal to this court. Gould moved for interlocutory review of the issue of whether the district court properly could enforce the Tribunal award under the New York Convention; Iran moved for interlocutory review of the issue of whether the Algiers Accords are self-executing. The district court granted both motions, and issued an order certifying both questions for an immediate appeal.

We agreed to hear these interlocutory appeals pursuant to 28 U.S.C. § 1292(b).

III

In New York in 1958, the United Nations facilitated the creation of an international agreement providing for enforce-

district courts for the purpose of enforcing Tribunal Awards, found this argument unpersuasive. *Ministry of Defense* [illegible] 87-03673 (C.D. Cal. Jan. 14, 1988) (order denying Gould's motion to dismiss). The issue was not certified under section 1292(b) and thus does not form a portion of the basis of this interlocutory appeal.

ment of foreign arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ("the New York Convention" or "the Convention"). Party-States to the Convention agree to "recognize arbitral awards as binding and enforce them in accordance with [their own] rules of procedure." New York Convention, Art. III. The United States became a party to the Convention in 1970, and Congress soon after enacted legislation implementing the provisions of the Convention into domestic law, codified as Chapter II of the Federal Arbitration Act, 9 U.S.C. sections 201-208.

As part of this legislation, Congress vested federal district courts with original jurisdiction over any action or proceeding "falling under the Convention," as such an action is "deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. The starting point for our interpretation is a supplementary statutory provision which provides that an "arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, *falls under* the Convention." 9 U.S.C. § 202 (emphasis supplied). The provision goes on to except from the definition of "falls under" certain awards made pursuant to a domestic legal relationship which have no foreign nexus. *Id.*

[1] Under the plain meaning of the statute then, three basic requirements exist for jurisdiction to be conferred upon the district court: the award (1) must arise out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope. These three conditions are clearly satisfied here.

Congress has provided that the New York Convention, with minor modifications, shall be enforced in United States Courts. 9 U.S.C. § 201. Article I discusses the scope of the

Convention, stating that it "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal . . . [and those awards] not considered as domestic awards in the State where their recognition and enforcement are sought." Article I, ¶ 1. The Convention defines "arbitral awards" to include those "made by permanent arbitral bodies." Article I, ¶ 2. The United States imposes an additional related condition on the award: it must be "made in the territory of another Contracting State." 21 U.S.T. 2566, *reprinted* at notes following 9 U.S.C.A. § 201. Because of the "shall apply" language of Article I, we read these requirements into the jurisdictional mandate of section 203.

The Tribunal's award satisfies these requirements as well. That is, the Tribunal sits at The Hague, which is in the Netherlands, which is a contracting State. In addition, the award is obviously not domestic in nature because Iran is one of the parties to the agreement.

IV

Gould sets forth two basic arguments to support its position that the district court lacks jurisdiction over the enforcement of the award under the Convention. First, relying on language in Articles II and IV, Gould argues that the Convention applies, and hence, jurisdiction to enforce exists, only as to those awards that derive from an arbitral agreement in writing to which the parties voluntarily submitted. It contends that the Accords documents themselves do not satisfy this requirement. Second, Gould argues that the arbitral award was not arrived at in compliance with the Convention's supposed requirement that the proceedings be subject to a "national" arbitration law.

A

The Convention does make several pronouncements concerning the form of the agreement leading up to the award. For example, it places upon each contracting State the obligation to recognize an arbitral agreement in writing between the parties. Convention, Article II, ¶ 1.[8] In addition, the party seeking enforcement must file with the court "[t]he original agreement referred to in article II . . . or a duly certified copy thereof." Convention, Article IV, ¶ 1(b). These provisions do indeed seem to indicate that the award referred to in section 203 emanate from a written agreement.

We construe the Accords themselves as representing the written agreement so required, on the strength of the President's authority to settle claims on behalf of United States nationals through international agreements. "[I]nternational agreements settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.' " *Dames & Moore*, 453 U.S. at 679 (quoting L. Henkin, Foreign Affairs & the Constitution (1972)). More specifically, the Court in *Dames & Moore* held that the President possessed the authority to nullify attachments and order the transfer of Iranian assets, *id.* at 674, and to suspend claims of American citizens against Iran. *Id.* at 686.

[2] Gould contends that *Dames & Moore* should be more narrowly construed. Indeed, the Court itself chose to

[8]The full text of the paragraph reads as follows:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

New York Convention, Article II ¶ 1.

"re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." *Id.* at 688. Nevertheless, the Court went on to make clear that its holding extends broadly enough to encompass the authority of the President to settle claims under the facts before us. *Id.* Thus, because the President acted within his authority on behalf of United States citizens, the real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but whether the President —acting on behalf of Gould—entered into such an agreement. The answer is clearly yes. Deputy Secretary of State Warren Christopher initialed the Accords in his role as an agent for the President; and thus, the requirements of Article II, ¶ 1 are satisfied.[9] In addition, the Final Tribunal Rules of Procedure state that "[t]he Claims Settlement Declaration constitutes an agreement in writing by Iran and the United

[9]Gould argues that the Convention envisages that the parties themselves will have entered the requisite written agreement to arbitrate. It relies on the history of negotiations leading to the Convention. *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1061 n.54 ("It is definitely understood, however, that the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently could not come within the purview of the Convention")(quoting the Official Report of the United States Delegation to the Convention).

The quotation lends some support to Gould's view, but we nevertheless conclude that the Convention does not preclude the United States from entering an agreement on behalf of its nationals, as authorized by *Dames & Moore*. We do not view the arbitration as having been converted from a consensual to a judicial process. The process is not comparable to one in which a nation with a planned economy requires all disputes to be settled by a state arbitral tribunal, a prospect that concerned some of the delegates negotiating the Convention. *See* Notes & Comments, *Fifty-third annual Meeting of the Society*, 53 Am. J. Int'l L. 396, 416 & n.20 (1959).

States, on their own behalfs *and on behalf of their nationals* submitting to arbitration within the framework of the Algiers Declarations and in accordance with the Tribunal Rules." Final Tribunal Rule of Procedure 1.3 (emphasis supplied).[10]

Gould urges further that the only court to have considered the issue, the High Court of England, ruled that the Accords do not satisfy the "agreement in writing" standard of the Convention. *See Dallal v. Bank Mellat*, 1 All E.R. 239 (Q.B. 1986). This is a mischaracterization of the High Court's opinion, however. First, the High Court in *Dallal* engaged in a ruling on the merits of whether a Tribunal award barred a proceeding in English courts as res judicata based on the same claim; the Court was not ruling on whether it possessed jurisdiction under the Convention. Second, the Court's analysis focused on an evaluation of whether the "conduct of the parties in the arbitration and, in particular, their written pleadings"—not, as argued here, the Accords themselves—constituted the "agreement in writing." *Id.* Finally, the Court's entire discussion appears to be dictum. "*If it were necessary* for me to decide the question at this stage, *I would decide* that the proceedings were a nullity in Dutch law." *Id.* (emphasis supplied).

[3] Moreover, even if the United States government lacked authority to enter into the agreement in writing required under the Convention, we find persuasive the argument that Gould, in filing its claim and arbitrating it before the Tribunal, "ratified" the actions of the United States. *See id.* at 254; Lewis, "What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?," 26 Colum. J. Transnat'l L. 515, 546 (1988).

[10]Although these rules were not finalized until May 3, 1983, some time after Hoffman filed its claim with the Tribunal, they likely constitute specific memorializations of the agreement that was reached at the time the United States assented to the Accords.

B

The second basic argument Gould makes is premised on language contained in Article V, which lists the defenses available to the party against whom enforcement of a Tribunal Award is sought.[11] Gould asserts that these defensive provisions contain an implicit requirement that the Convention applies only to arbitral awards made in accordance with the national arbitration law of a Party State. In particular, Gould seeks to buttress its position by looking to Article V, ¶ 1(e), which provides that the party against whom enforcement is sought may establish that enforcement should not be granted if it can show that "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or *under the law of which*, that award was made." New York Convention, Article V, ¶ 1(e) (emphasis supplied). Gould argues that this subparagraph would be rendered devoid of practical meaning if the Convention calls for the recognition of awards other than those which are made under a foreign municipal law. Thus, it concludes that because the Tribunal's award in favor of Iran was a creature of international law, and not national law, it does not "fall under" the Convention pursuant to section 203.

[4] Section 203 does not contain a separate jurisdictional requirement that the award be rendered subject to a "national law." Language pertaining to the "choice of law" issue is not mentioned, or even alluded to, in Article I, which lays out the Convention's scope of applicability. In addition, although it is a close question, the fairest reading of Convention itself

[11]A party seeking to avoid enforcement is limited to the seven defenses as listed in article V of the Convention, and also has the burden of proof to establish any defense. *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (Rakta)*, 508 F.2d 969, 973 (2d Cir. 1974); *Biotronik Messund Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 136 (D.N.J. 1976). Courts construe such defenses to enforcement narrowly. *Parsons & Whittemore*, 508 F.2d at 973-77.

appears to be that it applies to the enforcement of non-national awards. Indeed, a Dutch court has so held. *See Societe Europeenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia*, HR (Hoge Raad der Nederlanden) NJ 74, 361 (1974)(hereinafter "*Societe*").[12] In *Societe*, the Hoge Raad, the highest court of the Netherlands, reversed the Court of The Hague, which had ruled that the Dutch trial court erred in recognizing an arbitral award that was not issued according to the law of Switzerland. The Hoge Raad held that the strictures of Article V do not come into effect unless and until "the party against whom the award is invoked furnishes proof of the existence of one of the impediments specified under (a) to (e) [in Article V]." *Id.* at 1006-07. "The relationship between the award and the law of a particular country need only be examined in the framework of an investigation to be carried out following a plea that the impediments mentioned in Article V(1) exist . . . in respect of which questions may arise which can be answered only with reference to the law of a particular country." *Id.*

[5] In addition, allowing the parties to untether themselves from a pre-existing "national law" still leaves certain safeguards in place to guard against enforcement of an otherwise unfair arbitration award. The Convention contains several due process protections requiring notice and the opportunity to be heard as well as a defense to guard against enforcement of awards contrary to public policy. Article V, ¶¶ 1(b), 2(b). Also, while the Tribunal at times may function as a forum for the resolution of interstate disputes, *e.g.*, when it is called upon to render an opinion as between the United States and Iran under Article II, § 2 of the Claims Settlement Declara-

[12] *See also* Lewis, "What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?," 26 Colum. J. Transnat'l L. 515, 550 (1988); Lake & Dana, "Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal Awards Dutch?," 16 Law & Policy Int'l Bus. 755, 796-800 (1984); *but see* A.J. Van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation at 28-40 (1981).

tion, it primarily is concerned with the resolution of private law rights based on contractual arrangements relating to the provision of goods and services. Article II, ¶ 1. It certainly has served this latter function in this case.

[6] Finally, as they are laid out, the defenses seem to apply to arbitral awards made pursuant to municipal domestic law *or* those made pursuant to law of the parties' choosing, as in this case. In particular, Article V ¶ 1(d) allows a party against whom enforcement is sought to defend against enforcement if "the arbitral procedure was not in accordance with the agreement of the parties, *or*, failing such agreement, was not in accordance with the law of the country where the arbitration took place" (emphasis supplied).

Although this language seems to be at loggerheads with that of Article V ¶ 1(e) concerning "the country . . . under the law of which, [the] award was made," it is possible to reconcile the two provisions in accordance with an interpretation that holds that the Convention applies to "non-national law" awards. That is, if the parties choose not to have their arbitration governed by a "national law," then the losing party simply cannot avail itself of certain of the defenses in subparagraphs (a) and (e).

[7] Thus, we conclude that an award need not be made "under a national law" for a court to entertain jurisdiction over its enforcement pursuant to the Convention.[13]

[13] In addition, we are reluctant to read into the statute a jurisdictional requirement based on language contained in a defensive clause of the Convention, for fear of ruling on the merits. To do so might well allow Gould to avoid its burden of proof. After all, it is Gould that carries the burden of proving that the award is not consistent with the law of the nation in which it is rendered. Article V, ¶ 1 ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if that party furnishes* to the competent authority where the recognition and enforcement is sought, proof that . . .")(emphasis supplied); *see also* A. van

V

The district court properly denied that portion of Gould's motion to dismiss for lack of jurisdiction over this matter under 9 U.S.C. § 203, because the award of the Iran-United States Claims Tribunal that Iran seeks to enforce "falls under" the New York Convention. Because we conclude that jurisdiction exists under section 203, we do not reach the question of whether there was jurisdiction under 28 U.S.C. § 1331. Therefore, we do not consider Iran's cross-appeal on the question of whether the Algiers Accords are self-executing.

AFFIRMED.

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den Berg, *The New York Arbitration Convention of 1958* at 30 ("[T]he only possibility to oppose the enforcement on the ground that the award is not governed by an arbitration law is to obtain a declaration of the court in the country in which the award was made that the award is not an award within the purview of its arbitration law").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-03673 RG

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner,

v.

GOULD, INC., GOULD MARKETING INC., HOFFMAN EXPORT CORPORATION, GOULD INTERNATIONAL, INC. and DOES ONE THROUGH TEN,
Respondents.

[FILED JANUARY 14, 1988]

ORDER

For the reasons stated below, this court denies the defense motion to dismiss the petition of the Ministry of Defense of the Islamic Republic of Iran to enforce the arbitral award entered in its favor by the Iran-U.S. claims tribunal.

This case involves a petition to confirm an award granted by the Iran-United States Claims Tribunal (Tribunal). The Tribunal was created as part of the agreement that resolved the hostage crisis between the United States and Iran. The agreement was announced in declarations that are known collectively as the Algerian Accords. The function of the Tribunal is to adjudicate claims between nationals of one country and the government of the other,

as well as claims between the two governments. Under the Algerian Accords, however, the two governments are not permitted to file claims before the tribunal against nationals of the other country. The governments are permitted, however, to file counterclaims arising out of the same occurrence or transaction. Therefore, Iran could not have directly brought its claim before the Tribunal in this action. Hoffman filed the initial claim before the Tribunal after its action in federal court was directed there by reason of the settlement process.

The petition that is the subject of this action is based upon an award granted in favor of Iran on its counterclaims. Hoffman's claims involved two contracts. Iran instituted counterclaims, over which, Hoffman argued, the Tribunal did not have jurisdiction. Finding that *force majeure* had terminated the contracts, the Tribunal issued an interlocutory award announcing its intention to conduct an equitable accounting between the two parties.

Subsequent to the interlocutory award, Hoffman was merged into Gould Marketing Inc. (GMI), a wholly-owned subsidiary of Gould International, Inc. (Gould). As a result of the merger shares of stock in Hoffman were converted into shares in Gould.

The Tribunal issued its award in favor of Iran on June 22, 1984, referring to GMI as the claimant. The award consolidated the claims arising from the contracts, and awarded Iran $3,640,247.13, along with specific performance of part of one contract.

Iran has filed this petition seeking to enforce the award. The motion to dismiss asserts two principal positions:

1. The Republic of Iran is not entitled to access to the courts of the United States, and

2. There is no legal mechanism for enforcement of the Tribunal's award available to a United States court.

Access

Defendants are, of course, correct in stating that the United States has not formally recognized the Republic of Iran and that, indeed, the nations have engaged in recent months in acts of mutual hostility, attended by substantial casualties on each side. It is likewise correct that, as an historical general principle, access to United States courts has been restricted to nations enjoying recognition by and diplomatic relations with this country. Whether that principle retains significant vitality in the turbulent years since World War II, which have seen wholesale departures from the niceties of 19th century diplomacy, might be debated. It is not necessary to engage in that analysis, however, because the crystal-clear governing rule is that access to our courts is a matter strictly within the purview of the Executive Branch. In *Pfizer v. Government of India*, 434 U.S. 308 (1978), the Supreme Court stated—immediately after it restated the rule for which the case is cited by defendants here—that it is the exclusive power of the Executive Branch to determine which nations are entitled to sue in this country. The Court went further to state the rule of complete judicial deference to the Executive Branch. That ends the inquiry. The Government's Statement of Interest in this case is an unequivocal request for access to the courts for Iran in matters arising from Tribunal counterclaim awards which are not voluntarily paid.

Jurisdiction for Enforcement

Two bases of federal court enforcement jurisdiction have been suggested. The first is subject matter jurisdiction afforded by 28 U.S.C. § 1331—"federal question." The second is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

I. The court must decline to exercise federal question jurisdiction in this case. It is clear that the Presidents' adoption of the Accords as an executive agreement was a constitutional act, giving the Accords in some instances,

the status of a treaty notwithstanding noncompliance with Article II, Section 2, Clause 2. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Such an agreement, however, becomes a part of the law of the United States only if it is self-executing and requires nothing further to implement it. The Ninth Circuit has concluded that this was not the case with the Accords. In *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (1985), the court stated:

> We conclude that the language, purpose and intention behind the Accords was to make them executory agreements, and that they are not self-executing, either in whole or in part.

The Department of Justice suggests that this court overlook that rather direct and unqualified statement on several grounds:

1. The statement is *dictum*: That may be true from a strictly technical standpoint, in the sense that it was not necessary to reach the result that obtained. The fact is that the court used the quoted conclusion to ground its decision, and the statement was hardly a "throwaway line."

2. The Ninth Circuit's holding was inconsistent with the decision in *Dames & Moore v. Regan*, which should be read to say that the Accords are self-executing: That argument has a bit more appeal, but the Panel obviously had studied *Dames & Moore*, since it was cited. It is generally the province of a court of appeals to tell district courts within its circuit what a Supreme Court decision means—not vice-versa.

3. The court here should give "great weight" to the opinion of the Executive Branch as to interpretation of an international agreement: That is true, to some extent. Suffice it to say that the view of *Iran v. Boeing* is probably quite a bit different from a soft chair in DOJ headquarters than it is from a district bench within the confines of the Ninth Circuit. One might speculate that the Panel deciding

the case would at least have stated its conclusion in different terms were it considering the facts of the matter at bench, but this court is bound by the decision as it stands.

II. The court is of the opinion that jurisdiction to consider this case is offered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), [1970] 3 U.S.T.S. 2517, T.I.A.S. No. 6997. In the implementing legislation it is clear that actions arising under provisions of the Convention are deemed to arise under the laws of the United States. 9 U.S.C. § 203.

The Convention certainly is applicable to the claim here in that the Tribunal is a permanent arbitral body, the dispute involved legal persons and a commercial relationship, and the decision was rendered in the territory of a contracting state. The defense objection to this basis of jurisdiction is two-fold:

1. There was no agreement in writing: The fact that neither Presidents Carter nor Reagan physically signed the Accords is irrelevant. The history of those proceedings teaches that they both embraced the agreement at least as fully as if they had done so. The question whether the Executive can bind U.S. persons to such an arrangement as if they were signatories is quite effectively dispatched by the *Dames & Moore* decision. The power to exercise sovereign authority to the objective of settlement of nationals' claims against foreign governments is not subject to serious doubt. The Claims Settlement Declaration is specific that it constitutes a written agreement between the nations on their own behalf and on behalf of their nationals.

2. The Tribunal must have applied the law of The Netherlands for the award to be enforceable under the Convention: While the Tribunal made explicit reference to international law, it was sitting in the Hague. If it had

applied Dutch arbitration principles the result would have been identical. The defense objection on this point has some appeal, but the form v. substance tension should be resolved in favor of the overriding judicial interest in effective arbitral proceedings, even on this scale. The court is not at all convinced, in any event, that reliance on the body of international law would take this award out of the ambit of the Convention.

The defendants' objection to the form of pleadings here, while strictly correct, is unavailing to secure dismissal. The issue is fully before the court and has been met by extensive briefs and arguments of the defense. F.R.C.P. 1.

The motion to dismiss on the grounds discussed above is denied. There remain the issues of which parties are properly bound by the award and affirmative defenses to enforcement. A status conference to discuss the future progress of this case is ordered for February 10, 1988, at 3:00 p.m. The parties will submit status memoranda with recommendations no later than 5 days prior to conference.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: January 14, 1988

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 87-03673 RG

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner,

vs.

GOULD INC., GOULD MARKETING, INC., HOFFMAN EXPORT CORPORATION, GOULD INTERNATIONAL, INC. and DOES ONE THROUGH TEN,
Respondents.

[FILED MARCH 3, 1988]

AMENDED ORDER

On January 14, 1988, this court entered an Order denying the motion of respondents Gould Inc., Gould Marketing, Inc. ("GMI"), Hoffman Export Corporation and Gould International, Inc. to dismiss the petition of the Ministry of Defense of the Islamic Republic of Iran ("Iran") to enforce an award against GMI rendered by the Iran-United States Claims Tribunal (the "Claims Tribunal") in The Hague (the "Award"). This court stated in its Order that it does not have federal question subject matter jurisdiction to enforce the award under the terms of Algiers Accords, pursuant to 28 U.S.C. § 1331, but that jurisdiction is offered by the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517,

T.I.A.S. 6997, 330 U.N.T.S. 3 (the "New York Convention") and 9 U.S.C. § 203.

On February 9, 1988, respondents moved this court for an Order, pursuant to 28 U.S.C. § 1292(b), certifying to the United States Court of Appeals for the Ninth Circuit the court's ruling that it has jurisdiction to enforce the Award under the New York Convention.

For the reasons stated below, this court GRANTS the motion of respondents and hereby AMENDS its Order to provide for certification for interlocutory appeal, as provided in 28 U.S.C. § 1292(b), of the question of whether this court has jurisdiction to enforce the Award under the New York Convention and 9 U.S.C. § 203; furthermore, at the request of Iran, this court also certifies for interlocutory appeal the question of whether the court has subject matter jurisdiction to enforce the Award under the terms of the Algiers Accords, pursuant to 28 U.S.C. § 1331.

The Court is of the opinion that these two issues involve controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

It is further ORDERED that, pursuant to the provisions of 28 U.S.C. § 1292(b), these proceedings will be stayed pending resolution of the certified issues by the United States Court of Appeals for the Ninth Circuit.

Pursuant to respondents' application to recertify and in the interest of judicial efficiency, the amended order of the court issued on February 17, 1988 is hereby vacated and this order substituted. *In re Benny*, 812 F.2d 1133, 1136-37 (9th Cir. 1987).

Dated: March 3, 1988 /s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-8049

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioners,

vs.

GOULD, INC., et al.,
Respondents.

No. 88-8063

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioners,

vs.

GOULD, INC., et al.,
Respondents.

New Docket No. for both petitions:
C.A. No. 88-5881

[FILED APRIL 13, 1988]

ORDER

Before: GOODWIN and SCHROEDER, Circuit Judge

These petitions for permission to appeal the district court's order of January 14, 1988, as amended March 7, 1988, are granted. The petitions shall result in a single appeal. Petitioners shall perfect the appeal in accordance with Fed. R. App. P. 5(d). This appeal shall be calendared before the same panel for disposition on the merits that hears the appeal that results from the petition for permission to appeal, no. 88-8058.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-8058

New Docket No. 88-5879

GOULD, INC., et al.,

Petitioners,

vs.

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

[FILED APRIL 13, 1988]

ORDER

Before: GOODWIN and SCHROEDER, Circuit Judge

This petition for permission to appeal the district court's order of January 14, 1988, as amended March 7, 1988, is granted. The petitioner shall perfect the appeal in accordance with Fed. R. App. P. 5(d). This resultant appeal shall be calendared before the same panel for disposition on the merits that hears the appeal resulting from petitions No. 88-8049 and 88-8063.

APPENDIX E

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (Claims Settlement Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I

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

Article II

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and

arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and 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. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Article V

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

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, more than 50 percent in such

corporation or entity equivalent to fifty per cent or more of its capital stock.

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

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

Initialed on January 19, 1981
by Warren M. Christopher

Deputy Secretary of State of the Government of the United States By virtue of the powers vested in him by his Government as deposited with the Government of Algeria

APPENDIX F

ARTICLES I THROUGH VI OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, NEW YORK, JUNE 10, 1958.

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined

legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is

relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

QUESTIONS PRESENTED

This case results from the first effort to enforce an award of the Iran-United States Claims Tribunal in a United States court. The two circuit courts that have addressed the issue of the nature of the Algiers Accords have ruled that the Accords are not self-executing, and no mechanism for enforcement of Claims Tribunal awards has yet been enacted by Congress. In the absence of implementing legislation, the courts below have held that the award may be enforced by means of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). This raises the following questions:

I. Do the Algiers Accords, the international agreements by which the United States and Iran brought about the release of American diplomatic hostages and the unfreezing of Iranian assets, constitute a voluntary written arbitration agreement signed by the parties, as required by the New York Convention, when one of the parties is a private American entity that was not a signatory to the Algiers Accords and was required to submit its claims to the Iran-United States Claims Tribunal after the President had suspended its claims and had barred it from prosecuting those claims in its chosen forum, the U.S. district court?

II. Is an award rendered by the Iran-United States Claims Tribunal in a state which is a signatory to the New York Convention enforceable when the validity of the award cannot be challenged or established under that country's municipal law and,

Certification for interlocutory appeal. Certification was granted, the 9th Circuit accepted the Appeal. Gould et al appealed the court's jurisdiction contending that Iran could not bring that action under the terms of the Convention and 9 USC §§201-208. Iran, on the other hand, appealed the District Court's finding that it lacked jurisdiction under 28 USC §1331.

The United States Justice Department filed an amicus curiae brief supporting the position of Iran and argued that both 9 U.S.C. §§201-208 and 28 USC §1331 conveyed jurisdiction for the District Court to hear Iran's petition for an order confirming the arbitral award.

The Court of Appeals found for Iran by affirming the District Court's holding

that the Convention and 9 USC §§201-208 conveyed jurisdiction but did not rule on Iran's cross appeal regarding the 28 USC §1331 issue. Gould's petition for a writ properly only concerns the decision of the Court of Appeals regarding the Convention and Gould's apparent argument about 28 U.S.C. §1331 addresses matters not at issue here.

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 20, 1990

SUMMARY OF THE ARGUMENT

The Convention requires that an award enforceable under its terms be the result of proceedings pursuant to a written arbitration agreement. Gould initiated the proceedings with a written document and thereafter submitted many documents to the Tribunal, all or most of which were responded to by Iran in writing. The purpose of requiring a written agreement is a statute of frauds type of requirement and is to assure that a default is not taken with respect to a party who didn't agree that particular disputes might be resolved by arbitration. A party initiating an arbitration cannot be said not to have agreed to it, and the submission of the initiating petition is

sufficient evidence of that agreement.

In any event, the United States government did agree to it and Gould's filing of its petition would at least constitute Gould's ratification of the agreement of the United States on its behalf, and so constitute an agreement on the part of Gould.

Had Gould not wanted to initiate a Tribunal proceeding it could have sought another forum such as the Claims Court or another jurisdiction such as England. The Executive, in the exercise of its foreign policy powers removed the case from the District Court in which it was originally filed but this no more vitiates the "voluntariness" of Gould's filing at the Tribunal than do other more ordinary

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 26, 1990

restrictions of jurisdiction, venue, etc. Because Iran could not initiate an action against Gould in the Tribunal Gould had the luxury of doing nothing at all and so avoiding the adjudication of Iran's claims against it. It chose, however, to initiate the arbitration and now cannot say that it did not agree to it.

The purpose of arbitration is to reduce the litigation burden on the judicial system and to simplify the resolution of disputes. The purpose of the Convention is to permit judicial enforcement of awards against parties who having submitted to the presumably simpler and less complex proceeding of arbitration now refuse to abide by the arbitrator's decision.

The thrust of Gould's argument is that additional layers of foreign and domestic law should be added to the process thereby adding to its complexity rather than reducing it. The Convention provides for adequate safeguards in the country in which enforcement is sought. Nothing is to be gained by metaphysical speculation as to the necessity and characteristics of a "nationality" of an award. The parties agreed to a procedure for the solution of their dispute. If it was carried out in accordance with that agreement in a signatory state other than the one in which enforcement is sought, it should be enforced if it meets the due process requirements spelled out in the Convention.

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 20, 1990

In any case Gould is estopped from questioning the "nationality" of the award because it failed to avail itself of the opportunity to raise the issue in the one forum competent to decide the matter - the Netherlands. Probably because the one court in the Netherlands that has considered the matter, the highest court in the Netherlands, has shown little sympathy for the position advanced by Gould.

ARGUMENT

This case raises no issues of general importance justifying the attention of this Court. The courts below have adequately addressed the issue of the enforceability of the award under the Convention. Their deliberations have been fully informed of the intentions of the Executive branch by representations of the State Department and the amicus brief of the Justice Department. Gould initiated the action in a forum not available to Iran as a court of first instance, the Iran-U.S. Claims Tribunal ("Tribunal"), and forced Iran to appear or face a possible default. In the event, the Tribunal found that the damages suffered by Iran exceeded those of Gould. Gould

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 29, 1990

should not be permitted to escape the adverse consequences of its imprudent act by further wasting the time of our courts in an attempt to avoid payment of its just debts.

The Convention was intended to permit satisfaction of arbitral awards made within the territories of signatory states so long as (as adopted by the United States - See 9 USC §202) they arise out of commercial disputes. The subject of this petition is such an award.

I.

1. The arbitration was conducted pursuant to a voluntary written agreement under the terms of the Convention.

Paragraph 2 of Article II of the

Convention provides that the term "agreement in writing" shall include "an exchange of letters or telegrams". It is clear from the plain meaning of this provision that the communications initiated by Gould and responded to by Iran, directly and through the Tribunal, were adequate to constitute an agreement under the Convention. It is patently absurd to contend that the party initiating the arbitration did not agree to it.

Article II is clearly intended to permit a party who does not desire arbitration to abstain from appearing without prejudicing his right later to raise the issue that he had never agreed to it. The enumeration of factors, not

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 29, 1990

necessarily exclusive, constituting an agreement simply recognizes the fact that an agreement may be had in various ways that would justify holding a non-appearing defendant to what is, in effect, a default award. Gould initiated the instant arbitration, participated in it over an extended period of time, filed many papers, briefs and arguments, and appeared for oral argument. To maintain that it did not agree to the arbitration, or that it agreed only to an arbitration in which it would be successful, may pose interesting metaphysical questions but has no place in the real world.

It can also be argued that the Claims Settlement Declaration itself is the agreement of the parties by each

government acting on behalf of itself and as agent of its nationals. If so, initiation of the arbitration by a national could be viewed as (i) the party availing itself of the valid agreement theretofore made by its government on its behalf; or (ii) ratification by the private party of its agent's prior agreement. See van den Berg, Proposed Dutch Law on the Iran-United States claims Settlement Declaration, a reaction to Mr. Hardenberg's Article. Int'l Bus Law 341 (Sept. 1984)

2. Gould was not required to submit its claim to the Iran-United States Claims Tribunal.

Gould has argued at length (Petition at 24-26) on the basis of language in a

Iranian Assets Litigation Reporter
Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 26, 1990

Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 27, 1990

case, Dallal v. Bank Mellat 1 All E.R. 239, 1 Q.B. 441 (1986) addressing issues not before that court. The court's language in addressing issues germane to its decision, however, demonstrates that Gould would not have been foreclosed from suing in an English court so long as it did not abuse the privilege by trying to relitigate issues decided in a forum it had earlier selected.

Dallal, a United States national like Gould, had sued in the English courts on a cause of action that had already been decided adversely to him in an arbitration he had initiated at the Iran-United States Claims Tribunal. The English court had no trouble accepting jurisdiction of the

cause but found that the decision at the Hague was res judicata as to the issues considered there. In arriving at this decision the court said:

> "It is true that he may have had no other alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it any the less a voluntary act. Most plaintiffs who commence proceedings are in a similar position. They have to commence proceedings in the appropriate municipal court or be without remedy. It can also be commented that before me Mr. Dallal has submitted that there

is nothing in United States law which prevents him from litigating the present matters in the courts of the United Kingdom. He says that is the position now and, as I understand his case, he does not suggest that the position was any different at the time that he chose to go to the Hague tribunal." id., at 254 and 460.

There is no reason to suppose that the court that welcomed Mr. Dallal's claim would have been less hospitable to Gould had it initiated its action there rather than in the Hague. Presumably other judicial systems might have been equally responsive to Gould's plight.

But it is not necessary to look abroad to appreciate the choices available to Gould. This Court has earlier addressed the claims of litigants that their rights have been abridged by the Executive's exercise of its foreign policy powers:

> "Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." Dames & Moore v. Regan 453 U.S. 654, 689-690 (1981).

Thus it would appear that far from

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 26, 1990

reducing Gould's choices, it had two more after the President's action than it had before, viz., it had the action at the Hague which the President, in the exercise of his power over foreign affairs, substituted for the normal District Court action; it had a residual action in the District Court if the action at the Hague "failed of its essential purpose" Security Pacific Nat'l Bank v. Government & State of Iran 513 F. Supp. 864,884 (C.D. Cal 1981); and it had the Claims Court action. No doubt Gould carefully weighed the relative merits of the various courses. In weighing them the relative certainty of the availability of the security account for satisfaction of an award must have been a significant factor. As this

Court has pointed out the existence of the Tribunal assured a United States party initiating an action there "that any award made to it whether the result of a settlement or otherwise could be enforced in the courts of any nation and actually paid in this country....[Otherwise, such a party] would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible." United States v. Sperry ___U.S.___, 110 S.Ct. 387, 395 (1989).

Gould had yet another option not hitherto discussed. That option was to do nothing. If it had been truly "forced" to appear at the Tribunal the issue between Iran and Gould could have been

decided whether or not it appeared, with Iran in the position of being able to obtain a default award in the event of Gould's non-appearance. Under the terms of the Claims Settlement Declaration, however, only a national of one of the state parties may invoke the jurisdiction of the Tribunal against the other state party; a state party has no right to invoke the jurisdiction against a national of the other state. Claims Settlement Declaration Article II.1. Far from being "required" to resort to the Tribunal, Gould calculated the various options available at home and abroad and freely and eagerly chose what it must have considered to be the most attractive. Unfortunately, its claim was not

meritorious.

II.

1. The award was "made in the territory of another Contracting State".

It is difficult to see how there can be a question regarding the meaning of the term "made in the territory". "Territory" does not have any legal or jurisdictional connotation. To the extent that it does have any reference to a legal system it usually connotes a status outside the normal legal or jurisdictional system with which it is associated, as in "Northwest Territory" or "Oklahoma Territory". Given the variety of legal formula available to the drafters of the Convention, such as "in accordance with the arbitration laws

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Published by Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 26, 1990

Andrews Publications, P.O. Box 208, Edgemont, PA 19028 March 25, 1980

issue of the validity of the award under Dutch law because it failed to raise it in a timely manner in the proper forum, the Netherlands.

Once again, Gould is in the unenviable position of urging that the forum it chose, and forced Iran to appear in to avoid the risk of having a default taken, is not competent to render a valid award. Moreover, it requests this court to make determinations of Dutch law on subjects that are not clearly settled in Dutch law, and to the extent they are addressed, seem to be contrary to the

(including safeguards) of a national jurisdiction. In contrast, in the case of a truly "non-national" award, the parties have opted not to subject the proceeding to local judicial oversight and, hence, cannot complain of a lack of supervision by municipal courts over their arbitral proceedings. In addition, it should be noted that the Convention itself contains certain safeguards, e.g., Article V(1)(b), V(2)(b), which can be applied by the enforcing State to insure the requisite fairness in arbitral awards subject to enforcement under the Convention. See

contentions of Gould. Societe Europeene, SUPRA.

This is particularly troubling because if Gould actually had confidence in the proposition it asserts here it could have raised the issue in a forum peculiarly well suited to make an authoritative ruling on the matter - the Dutch courts. Under Dutch law an action could have been brought in the Dutch courts within three months of the issuance of the award to have it set aside. See IV Dutch Code of Civil Procedure 1064(3) (1986). Gould's failure to seek the most authoritative declaration of the state of Dutch law in the matter is a clear demonstration that it has little faith in the argument it puts forth.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Published by Andrews Publications, P.O. Box 200, Edgemont, PA 19028 March 26, 1990

which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Sperry's contention was based on the Senate's having added section 502 as an amendment to a bill that originated in the House and contained no revenue-raising provisions at that time. The Court declined to consider the merits of Sperry's contention, because the threshold question of the justiciability of claims based on the Origination Clause had yet to be decided in the case of *United States v. Munoz-Flores*.[10]

• • • •

The Supreme Court's holding is sensible and well reasoned. Unlike the court of appeals, the Supreme Court perceived the benefits offered Sperry by the Algiers Accords. As the Court pointed out, Sperry had no assurance that it could enforce its district court judgment against Iran without the benefit of the Accords. Moreover, Sperry had no district court judgment to enforce after the Supreme Court's decision in *Dames & Moore v. Regan*. Thus, the Court quickly recognized that the only taking that could have occurred was as a result of the 1.5 percent deduction. With respect to this issue, the Court's decision is unequivocal in concluding that (1) a reasonable user fee based on a rational classification, such as success in obtaining an award, does not constitute a taking under the Just Compensation Clause; and (2) such a fee may be imposed retroactively without violating the Due Process Clause if it is supported by a rational legislative purpose, such as a more equitable distribution of burdens among users. Finally, in concluding that the deduction did not cause a taking, the Court provided additional useful clarification of the Just Compensation Clause by dismissing as "artificial" the argument, accepted by the court of appeals, that the deduction was akin to a "permanent physical occupation" of Sperry's property pursuant to *Loretto*.

ROSE C. CHAN
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Jurisdiction—1958 New York Convention—enforcement of award by Iran-U.S. Claims Tribunal in United States courts

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN v. GOULD INC. 887 F.2d 1357; *certiorari denied*, 110 S.Ct. 1319.
U.S. Court of Appeals, 9th Cir., October 23, 1989; U.S. Supreme Court, March 5, 1990.

The Islamic Republic of Iran's Ministry of Defense (Ministry) sought to enforce an award of the Iran–United States Claims Tribunal against Gould Inc. and its subsidiaries (Gould). In a motion to dismiss on the ground that the district court lacked subject matter jurisdiction, Gould contended that (1) the Iranian Government was not recognized by the United States and was thus barred from access to the federal courts; (2) the Tribunal's constituent

[10] 110 S.Ct. 48 (1989) (order granting certiorari).

instrument, the 1981 Algiers Accords,[1] was not self-executing and hence did not provide a source of federal question jurisdiction; and (3) the Tribunal's awards were unenforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] The district court found that it had jurisdiction under the Federal Arbitration Act (9 U.S.C. §§201–208), which implements the 1958 Convention in the United States. On interlocutory cross-appeals, the Court of Appeals for the Ninth Circuit affirmed and *held* (per O'Scannlain, J.) that the district court has subject matter jurisdiction to enforce an award of the Tribunal against an American corporation under the Federal Arbitration Act.

In the early 1970s, Hoffmann Electric Corp., later merged with Gould, concluded two contracts with the Ministry to supply specified radio equipment. During the Iranian Revolution, performance of the contracts was interrupted. Gould sued in the United States for breach of contract. The action was dismissed without prejudice when President Reagan, pursuant to the Algiers Accords, ordered that claims by Americans against Iran pending before U.S. courts be suspended and referred to the Claims Tribunal in The Hague.[3] Gould filed two claims before the Tribunal; the Ministry counterclaimed for amounts owing for breach of contract and sought the return of certain Iranian equipment held by Gould.[4] The Tribunal set off the amounts due and awarded $3.6 million to the Ministry, and also ordered return of the equipment. Because the Algiers Accords do not provide for the payment of awards to Iranian counterclaimants from the Security Account, the Ministry was obliged to seek enforcement of its judgment in the United States.[5]

The Ninth Circuit first determined that the basic requisites for jurisdiction under the Federal Arbitration Act had been satisfied in this case. The court held that the award arose "out of a legal relationship . . . which is

[1] The Algiers Accords include the (1) Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) (the General Declaration), and (2) Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) (the Claims Settlement Declaration), *both reprinted in* DEP'T ST. BULL., No. 2047, February 1981, at 1, and 1 IRAN-U.S. CLAIMS TRIBUNAL REPORTS [hereinafter IRAN-U.S. C.T.R.] 3 (1983).

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38 [hereinafter New York Convention or Convention].

[3] Exec. Order No. 12,294, 3 C.F.R. 139 (1981). *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding the President's authority to issue that order).

[4] The Tribunal had earlier decided that a counterclaim for an amount in excess of that sought by the claimant was within its jurisdiction. Gould Marketing, Inc. and Ministry of National Defense, ITL 24-49-2 (July 27, 1983), *reprinted in* 3 IRAN-U.S. C.T.R. 147, 151–52 (1983 II), *summarized in* 77 AJIL 893 (1983).

[5] *See* Islamic Republic of Iran and United States (Case A21), Dec. 62-A/21-FT (May 4, 1987), *reprinted in* 14 IRAN-U.S. C.T.R. 324, 330–31 (1987 I) (confirming that automatic payment from the Security Account, created by the Algiers Accords, was unavailable to Iran, but that the United States had an obligation "to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto").

commercial in nature and . . . which is not entirely domestic in scope."[6] Additionally, the award, having been made in the Netherlands, satisfied the requirement that it be made in the territory of another state party to the Convention.[7]

The Ninth Circuit then considered Gould's two objections to the enforceability of the Tribunal's award under the New York Convention.[8] First, Gould contended that because it did not voluntarily submit in writing to arbitration by the Tribunal, the Convention was inapplicable. The court of appeals agreed that the New York Convention indeed requires an agreement in writing so as to obtain the recognition and, later, the enforcement of an award.[9] The panel held, however, that the Algiers Accords themselves constituted such an agreement. The court relied on the President's power to conclude international claims settlements and thus act on behalf of Gould and other U.S. citizens in entering into such agreements. While this presidential power is not plenary, it does extend to obliging American claimants either to seek redress before the Tribunal or to drop their claims. The Ninth Circuit also noted that, in filing and arbitrating its claim before the Tribunal, Gould had ratified the actions of the United States in signing the Accords.

Next, Gould suggested that it was an implicit requirement of the Convention that arbitral awards be made in accordance with the national law of a state party. Since the Tribunal's award in favor of Iran was "a creature of international law, and not national law," Gould argued, it could not be enforced under the Convention.[10] Gould relied on the provision in the Convention allowing refusal to enforce when an "award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made."[11] Gould argued that this defense would be unavailable against Tribunal awards because they are not made under a national law; thus, the Convention could not apply to such awards since it would be contrary to the intent of its drafters to deprive parties of this defense.

The Ninth Circuit agreed that the award of an "a-national" arbitration could not be challenged on all the grounds available to attack an award

[6] 887 F.2d 1357, 1362.

[7] This condition was attached by the United States as a reservation to its accession to the Convention, *supra* note 2. *See* 21 UST at 2566, *reprinted in* notes following 9 U.S.C.A. §201.

[8] The question of Iran's access to the courts of the United States was not certified on appeal. 887 F.2d at 1361 n.7. The issue of federal question jurisdiction based on the self-executing nature of the Algiers Accords, raised in the Ministry's cross-appeal, was not reached because of the holding of jurisdiction based on the Federal Arbitration Act. 887 F.2d at 1366. *But see* Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283–84 (9th Cir. 1985) (which held that the Accords are not self-executing).

[9] *See* Convention, *supra* note 2, Art. 2, para. 1 ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . between them in respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration"); and *id.*, Art. 5, para. 1(a).

[10] 887 F.2d at 1364.

[11] Convention, *supra* note 2, Art. 5, para. 1(e).

under a national law. This result, however, was entirely consistent with the purposes of the Convention, which allows parties to "untether" themselves from a particular national law.[12] The other defenses contained in the Convention, including those requiring procedural fairness, would still be available. The court of appeals thus held that even though the Tribunal's awards are not made under a national law, they are nonetheless enforceable under the New York Convention.

* * * *

This decision seems correct on all counts. The court of appeals properly emphasized that Gould had voluntarily brought proceedings before the Tribunal pursuant to the Algiers Accords. While Gould did not expect that the Iranian Ministry would win an award on its counterclaims, that was precisely the risk that Gould assumed when filing its claim. This voluntary conduct distinguishes this case from those instances where a party is coerced into arbitration, a concern raised by the United States when negotiating the Convention and later by some writers.[13] Other cases may arise where a party's voluntary submission to arbitration is not so manifest,[14] but this was hardly problematic in *Gould*.

The Ninth Circuit also contributed to promoting international arbitration generally by rejecting Gould's strained interpretation of Article V of the New York Convention. Gould's position would have demanded that, to be enforceable, every arbitration be made under a national law. Although this contention is not frivolous,[15] it ignores the wording of the Convention itself.[16] As Judge O'Scannlain's opinion notes, substantial procedural safe-

[12] *See* 887 F.2d at 1365. The panel also cited a decision of the Hoge Raad (Supreme Court) of the Netherlands, which held that review of an award under national law is necessary only when one of the grounds for setting it aside has been shown and reference to national law is required to evaluate that ground. The Hoge Raad thus confirmed that anational awards are enforceable, but could be challenged on the remaining grounds specified in Article V. *See* Société européenne d'entreprises v. Socialist Fed. Republic of Yugoslavia, 1974 Nederlandse Jurisprudentie [N.J.], No. 361 (H.R. 1973), *summarized in* 5 NETH. Y.B. INT'L L. 290, 295 (1974), *modified on other grounds*, 1976 N.J., No. 274 (H.R. 1975), *summarized in* 7 NETH. Y.B. INT'L L. 349 (1976).

[13] *See, e.g.*, Lewis, *What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?*, 26 COLUM. J. TRANSNAT'L L. 515, 545–46 (1988); and sources cited in *Gould*, 887 F.2d at 1363 n.9.

This point was made in Dallal v. Bank Mellat, a 1985 British High Court decision that the Ninth Circuit took pains to explain, and that had held that Tribunal decisions operated as *res judicata*. 1986 Q.B. 441, 460–61, [1986] 1 All E.R. 239, 254 (Hobhouse, J.) ("[A] person can make . . . a tribunal competent by voluntarily resorting to it . . . . Dallal chose to resort to the Hague tribunal, and thereby submitted to its jurisdiction; it is not now open to him to say that it was incompetent").

[14] *See* A. J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 170–232 (1981).

[15] *See, e.g., id.* at 28–43.

[16] *See* Lewis, *supra* note 13, at 548–51; Lake & Dana, *Judicial Review of Awards of the Iran–United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 LAW & POL'Y INT'L BUS. 755, 792–805 (1984) (identifying commentators who support the court's conclusion and citing municipal decisions to that effect).

guards are available to an aggrieved party in an anational arbitration. For parties before the Tribunal, that might include recourse to the Dutch courts.[17] More and more arbitrations are, in fact, being established without reference to a particular national law. The decision of the court of appeals means that the awards emanating from these proceedings will not be found inherently defective.

This decision undoubtedly comes as a relief to the United States Government, which was obliged under the Algiers Accords to provide some enforcement machinery to Iranian parties awarded damages based on counterclaims. Iran will now be able to seek enforcement of awards in five other cases.[18] The Ninth Circuit has provided not only a useful analysis to other U.S. courts facing such Iranian enforcement actions but also a well-articulated contribution to the dialogue under the Convention regarding non-national arbitrations.

DAVID J. BEDERMAN
Of the District of Columbia Bar

Sovereign immunity—waivers of immunity—agency—apparent authority of ambassador—default judgment against foreign sovereign

FIRST FIDELITY BANK, N.A. v. GOVERNMENT OF ANTIGUA & BARBUDA—PERMANENT MISSION. 877 F.2d 189.
U.S. Court of Appeals, 2d Cir., June 7, 1989.

Plaintiff First Fidelity Bank brought an action to enforce a default judgment and consent order against defendant, the Government of Antigua and Barbuda. The default judgment held the defendant liable on a note signed by the defendant's ambassador to the United Nations and validated his purported waiver of the defendant's sovereign immunity in the consent order. Defendant moved to dismiss the claim for lack of subject matter jurisdiction, arguing that it could not be bound by the unauthorized and fraudulent actions of its ambassador. The district court denied defendant's motion. The U.S. Court of Appeals for the Second Circuit reversed and *held* (2-1) (per Oakes, C.J.) that factual issues relevant to whether the ambassador had the apparent authority to obtain the loan and to waive the defendant's sovereign immunity warranted setting aside the default judgment. Judge Newman dissented on the ground that the ambassador had "inherent agency power" to commit his government to private third parties in a commercial matter.

In November 1983, Antigua's ambassador to the United Nations, Lloydstone Jacobs, obtained a loan for $250,000 from First Fidelity's predecessor, First National State Bank of New Jersey. He signed the note as the

[17] *Cf.* Convention, *supra* note 2, Art. 5, para. 1(e). The possibility that Tribunal awards can be successfully challenged in Dutch courts is not settled. *See* Lake & Dana, *supra* note 16, at 759–82. See also Caron, *The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL 104 (1990), who argues that they can be. To date, none has been. *See* 10 Y.B. COM. ARB. 181 (1985).

[18] *See* Lewis, *supra* note 13, at 516 n.9.