



**The UNCITRAL Arbitration Rules: A Commentary (2nd Edition)**

David D Caron and Lee M Caplan

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CHAPTER

## 13 Statements of Claim and Defence

David D Caron, Lee M Caplan

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## 1. Introduction

p. 410 In an overwhelming majority of cases, the arbitral procedure begins with an exchange of written submissions. Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all. Even when a more comprehensive hearing is envisaged, efficient arbitral proceedings require that the parties, in writing and prior to the hearing, specifically determine the issues to sufficiently delineate their scope. Thus, written pleadings are an essential part of virtually every arbitration.<sup>1</sup> Written pleadings are regulated in Articles 20, 21, 22, and 23 of the UNCITRAL Rules. The present chapter addresses Articles 20 and 21, while the other articles are dealt with in Chapters 14 and 15.

The UNCITRAL Rules emphasize the distinction between the statement of claim and the notice of arbitration addressed in Article 3.<sup>2</sup> As discussed in Chapter 10, it is no longer possible under the Rules, as it once was, to elect when filing the notice of arbitration to treat the notice as the statement of claim. However, the decision to do so may be made later, after constitution of the arbitral tribunal. In this situation, the distinction between the two types of submissions loses its relevance. Otherwise, the basic distinction remains: the notice of arbitration signals the commencement of the arbitral proceedings, whereas the statement of claim is the first step in the written pleadings after the appointment of arbitrators.<sup>3</sup>

## 2. The Statement of Claim—Article 20

### A. Text of the 2010 UNCITRAL Rule<sup>4</sup>

Article 20 of the 2010 UNCITRAL Rules provides:

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in Article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.
2. The statement of claim shall include the following particulars:
  - a () The names and contact details of the parties;
  - b () A statement of the facts supporting the claim;
  - c ↪ () The points at issue;
  - d () The relief or remedy sought;
  - e () The legal grounds or arguments supporting the claim.
3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
4. The statement of claim should, as far as possible, be accompanied by all documents and

other evidence relied upon by the claimant, or contain references to them.

## B. Commentary

### 1 ( ) Submission of the statement of claim

The statement of claim must be prepared in writing<sup>5</sup> and communicated to the respondent(s) and to all of the arbitrators. The claimant may elect to treat its notice as its statement of claim,<sup>6</sup> so long as the notice satisfies the requirements of a statement of claim.<sup>7</sup> In that case, the notice should be communicated to the arbitrators as soon as they have been appointed. The rules in Article 20(1) apply to the mode of communication of the statement of claim.

If the statement of claim is submitted separately, this must be done “within a period of time ... determined by the arbitral tribunal.” According to Article 25, such a period should not exceed 45 days. Although Article 25 allows the arbitral tribunal the discretion to extend time limits for various filings, an extension for a statement of claim is likely to be granted only in exceptional circumstances. First, because the claimant decides whether, and at what moment, to commence the proceedings, it is responsible for ensuring that enough time remains to submit the claim.<sup>8</sup> Where the language of the arbitration is as yet undetermined and the notice (including the statement of claim) is submitted in another language, a translation of the statement of claim in the language(s) of the arbitration<sup>9</sup> must be submitted within a period determined by the tribunal.<sup>10</sup>

### 2 ( ) Contents of the statement of claim

Article 20, sub-paragraphs (2)–(4) identify the information to be included in the statement of claim and the documentation to be annexed to the statement of claim. Sub-paragraphs (2) and (3), respectively, set forth the essential elements which a statement of claim *must* contain and the documentation that *must* be annexed to the statement of claim. Sub-paragraph (4) indicates additional evidence, which to the extent possible, *should* accompany the statement of claim.

The annexation of such materials was made discretionary on the grounds that it may be “impossible for a claimant to determine at such an early stage of arbitral proceedings what would be all the relevant documents; for example, the relevance of certain documents would depend on the position taken by the respondent in his defence.”<sup>11</sup> However, since the claimant is normally interested in avoiding delays, it is advisable that the claimant annex as many relevant materials as possible to the statement of claim.<sup>12</sup> In this spirit, the Iran–US Claims Tribunal has amended the provision in question to make it “advisable” to annex documentary evidence to the statement of claim.<sup>13</sup>

The claimant must include in its statement the particulars listed in Article 20(2), ie, the name and contact details of the parties,<sup>14</sup> a statement of the facts supporting the claim, the points at issue, the relief or remedy sought,<sup>15</sup> and the legal grounds or arguments supporting the claim.<sup>16</sup> While mandatory, these elements need not be fully elaborated at the time the statement of claim is submitted.<sup>17</sup> Thus, in place of the “full statement of facts and a summary of evidence supporting the facts” envisaged in an early draft of the rule,<sup>18</sup> a more general description of the alleged facts is sufficient at this stage.<sup>19</sup> The requirement concerning the “legal grounds or arguments” requires an explication of the legal arguments, but not a final elaboration of the legal theories supporting the claim. Similarly, although it is necessary to specify whether monetary damages are sought as a remedy, the exact amount of damages claimed can be determined at a later point in the proceedings.<sup>20</sup> Nevertheless, it is essential that the statement of claim be specific enough that the respondent can reply adequately in its statement of defence.<sup>21</sup> Further elaboration of the case can be left to subsequent written statements, which are usually ordered in keeping with Article 22.<sup>22</sup>

Article 20(3) requires the claimant to annex “[a] copy of the contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement” to the statement of claim. The purpose of this provision is to “apprise the arbitrators of the scope of their jurisdiction and the frame of reference for the dispute.”<sup>23</sup> References to the contract or other legal instrument, as well as the arbitration agreement, are meant to correspond with similar references made in Article 3 of the Rules.<sup>24</sup>

p. 414 Article 20(4) provides that the claimant “should, as far as possible,” attach to the statement of claim (or make reference to) all the “documents” and “other evidence”<sup>25</sup> it will rely on in the arbitration. The provision is thus discretionary, accounting for the fact that “it was impossible for a claimant to determine at such an early stage of arbitral proceedings what would be all the relevant documents; for example, the relevance of certain documents ↵ would depend on the position taken by the respondent in his defence.”<sup>26</sup> An earlier version of the provision used the word “shall,”<sup>27</sup> consistent with the approach of other leading arbitration rules.<sup>28</sup> Concerns were raised, however, that the word “shall” might be interpreted as requiring the claimant to communicate a “comprehensive” statement of claim, thereby precluding the opportunity to communicate additional materials after the statement of claim is submitted.<sup>29</sup> The phrase “should, as far as possible” in Article 20(4) represents a compromise, by strongly encouraging claimants to communicate additional documents and evidence “without imposing rigid consequences for departures from that standard.”<sup>30</sup> As a general rule, providing as many documents and as much evidence as possible in the statement of claim can enhance the efficiency of the arbitral process.<sup>31</sup>

### 3 () Sanctions for an inadequate statement of claim

Although the requirements of Article 20(2) may be somewhat flexible depending on the nature of the case, a statement that fails to meet these requirements is not a “statement of claim” within the meaning of Article 20.<sup>32</sup> If the 45-day time limit (or any other time limit required by the arbitral tribunal) passes, the consequences envisaged in Article 30(1) can, in principle, be applied.<sup>33</sup>

p. 415 It is accepted, both in theory and in practice,<sup>34</sup> that a claimant who has submitted a defective statement of claim may cure the shortcomings by submitting supplementary ↵ information. This practice is dictated by the most elementary principles of justice and is rarely prejudicial to the respondent. Authorization to allow the claimant to cure defects to the statement of claim may be inferred from Article 17(1), which provides that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.”<sup>35</sup>

Sanctions imposed under Article 30 for failure to submit a claim in a timely manner presuppose that no “sufficient cause” has been presented for the delays. As noted above, the claimant need not elaborate all of his arguments fully in the statement of claim. Additionally, a claimant may have a *bona fide* expectation that his submission, though sketchy, fulfils the requirements of Article 20(2).<sup>36</sup> Moreover, the exact contents of these requirements, as interpreted by the arbitral tribunal, depend on the nature of the case. Therefore, rather than equating a defective submission with non-submission of the statement of claim, the arbitral tribunal should ask the claimant to clarify his position with respect to specified issues. Even if the submission is manifestly defective and does not amount to a statement of claim under any interpretation,<sup>37</sup> a tribunal should consider granting an extension of time to cure the defect. An extension can more easily be justified under Article 25 where at least some kind of document purporting to be a statement of claim has been submitted. Defects in what purports to be the original statement of claim rarely justify termination of the proceedings under Article 30.<sup>38</sup>

#### 4 ( ) A note on the Iran–US Claims Tribunal

The 1983 Tribunal Rules of the Iran–US Claims Tribunal modify the 1976 UNCITRAL Rules to dispense with a separate notice of arbitration and to require insertion of relevant information from Article 3 (Notice of Arbitration) into the modified version of Article 18 (Statement of Claim). Although essential to *ad hoc* arbitration, a distinct notice of arbitration requirement (ie, demand for arbitration and notice of intention to proceed with arbitration), was deemed superfluous in the Tribunal process established by interstate treaties.<sup>39</sup>

p. 416 Explanations of other features of Tribunal regulation concerning the statement of claim may be derived from the specific nature of the Tribunal's claims settlement proceedings. For example, the provision reducing the importance of the exact date of filing of the statement of claim, now contained in paragraph 4 of Note 2 of the 1983 Tribunal Rules,<sup>40</sup> can best be understood in light of the fact that the Claims Settlement Declaration (Article III, paragraph 4) requires all claims to be filed within a short period of time.<sup>41</sup> Without this provision, there might have been a chaotic “rush to the court room,” with all the claimants wishing to be “heard first and have clear access to the billion dollar fund set aside to pay awards.”<sup>42</sup> Apart from such features, however, the modified 1983 Tribunal Rule 18 contains essentially the same elements as the 2010 UNCITRAL Rules dealing with the notice of arbitration (Article 3) and statement of claim (Article 20). Accordingly, we agree that the “UNCITRAL procedures for filing claims are capable of providing a framework for tribunals with a large caseload as well as *ad hoc* individual arbitrations.”<sup>43</sup>

#### 5 ( ) Comparison to the 1976 UNCITRAL Rules

Article 20 differs in only minor respects from corresponding Article 18 of the 1976 UNCITRAL Rules. Both versions of the rule recognize that a claimant may choose to have its notice of arbitration function as a statement of claim. Original Article 18(1) does so implicitly by beginning with the phrase “Unless the statement of claim was contained in the notice of arbitration,” whereas revised Article 20(1) more directly states that the claimant “may elect” to treat its notice of arbitration as a statement of claim. Revised Article 20(1) also clarifies expressly what is implied in original Article 18(1)—that to function as a statement of claim the claimant's notice of arbitration must satisfy the requirements for constituting a statement of claim contained in the article.

Article 20(2), unlike Article 18(2) of the 1976 Rules, contains a subparagraph (e), requiring that the statement of claim include “[t]he legal grounds or arguments supporting the claim.”

This provision undoubtedly adds an item to the list of particulars to be included in the statement of claim. Arguably, however, the requirement concerning “the points at issue,” which was already contained in original Article 18, presupposes explication of the legal arguments to some degree.

The addition of the phrase “or other legal instrument out of or in relation to which the dispute arises” to revised Article 20(3) (which does not appear in the last sentence of original Article 18(1)) is a change to the Rules that is necessary to accommodate the practicalities of non-contractual disputes, such as disputes arising under international investment agreements.

Finally, claimants are encouraged more strongly in Article 20(4), than in original Article 18(2), to supply with the statement of claim the evidence (or at least references to the evidence) it intends to rely on.

p. 417 Whereas according to original Article 18(2) the claimant “may” provide such additional information, revised Article 20(4) now provides that the claimant “should, as far as possible” do so. Notably, neither formulation is mandatory. Moreover, since the claimant is often interested in avoiding delays, it may in any event choose to attach as many relevant materials as possible to the statement of claim.<sup>44</sup>

## C. Extracts from the Practice of Investment Tribunals

*Ethyl Corp and Government of Canada*, Award on Jurisdiction (June 24, 1998), (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 46, reprinted in (1999) 38 ILM 708, 730:

94. ... Article 18 of [the 1976 UNCITRAL Arbitration] Rules, likewise unmodified by Part B, requires (at (1)(b) and (c)) that a statement of claim set forth a “statement of the facts supporting the claim” and the “points in issue.” Thus, greater elaboration of detail in the Statement of Claim is permissible, if not, indeed, required.

*Methanex Corp and United States of America*, Partial Award on Jurisdiction (August 7, 2002), (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 78, reprinted in (2002) 14(6) World Trade & Arbitration Materials 109, 186–87.

161. *Fresh Pleading*: First, the effect of the Tribunal's decision on Article 1101(1) NAFTA in this Award will require Methanex to re-plead its case in a fresh Statement of Claim. Its Original Statement of Claim fails the jurisdiction test under Article 1101; and potentially only a part of its Amended Statement of Claim. In our view, a fresh pleading is required both for the Tribunal and as a matter of procedural fairness to the USA, which is entitled to know precisely the case advanced against it.
162. The fresh pleading must not exceed the limits of Methanex's existing case (pleaded and unpleaded); and we do not intend Methanex to make any new claim in its fresh pleading. It must comply with our decisions in this Award and Articles 18 and 20 of the [1976] UNCITRAL Arbitration Rules. As regards the statement of the facts supporting its claim under Article 18(2)(b), Methanex's fresh pleading must set out its specific factual allegations, including all specific inferences to be drawn from those facts.

*Methanex Corp and United States of America*, Communication to the Parties Regarding Claimant's Request for Interpretation (September 25, 2002), (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven) at 6–7:

12. As to form, the meaning of the term “fresh pleading” is self-evident. The phrase is indeed absent from the [1976] UNCITRAL Arbitration Rules (as Methanex rightly comments); but that can scarcely be the cause of any practical difficulty in this case. As explained in the Partial Award, it will be a pleading “more limited” than the Amended Statement of Claim because that pleading asserts claims for which (as we decided in the Partial Award) the Tribunal had no jurisdiction; and it will be “different” because, as to the intent underlying the US measures, we anticipate that it will include allegations made by Methanex orally and in written submissions subsequent to (and therefore not included in) the Amended Statement of Claim. Accordingly, it will be a new pleading of part of an existing case, partly pleaded and partly unpleaded; and the term “fresh pleading” is a convenient description for that pleading, consistent with ↪ Articles 18, 20 and 22 of the [1976] UNCITRAL Arbitration Rules. If the position were otherwise, the Tribunal might have had no alternative but to reject Methanex's Amended Statement of Claim *in toto*.
13. As to content, subject to the outward boundaries permitted by the Tribunal in the Partial Award, it cannot be for this Tribunal to instruct Methanex what should and should not be pleaded in its fresh pleading, as explained in Paragraph 166 of the Partial Award (page 76). Nonetheless, the Tribunal is prepared to reiterate the following guidelines, taken from the Partial Award.

14. As appears from Paragraphs 46–70 of the Partial Award (pages 18 to 24), Methanex's factual case on “intent” is only comprehensible from certain parts of the Amended Statement of Claim, Methanex's Rejoinder of 25th May 2001, the transcript of the Jurisdictional Hearing of July 2001 and Methanex's Reply Submission of 27th July 2001. It is therefore essential for Methanex to reduce its case into one coherent, formal document, i.e. a fresh pleading to stand as its statement of claim in these arbitration proceedings.
15. The pleading requirements of that statement of claim are set out in Article 18(2) of the [1976] UNCITRAL Rules. These do not call for extended argument, whether factual or legal. Moreover, as to legal argument, only brief cross-references need be made to Methanex's existing legal materials. It is Methanex's factual case which needs to be pleaded, however succinctly. Inevitably, it will be an important pleading; possibly it may be difficult to draft; but given that it will plead a case Methanex has already advanced in these proceedings, the task should be relatively uncomplicated and achievable within a relatively short time. (It may be noted that the period of ninety days exceeds the maximum period of 45 days usually allowable under Article 23 of the [1976] UNCITRAL Arbitration Rules).

*United Parcel Service of America Inc and Government of Canada, Award on Jurisdiction (November 22, 2002), (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven) at 38–41:*

#### Minimum requirements of pleading

123. In its Memorial Canada sought to strike the Amended Statement of Claim [“ASC”] for failure to comply with the requirements of Chapter 11 and [1976] UNCITRAL Rules for advancing a claim. In particular, UPS has failed to
  - ...
    - ii ( ) plead the minimum required facts and damages flowing from the alleged breach with sufficient particularity.
 

According to the Memorial, this objection and that relating to the US Subsidiaries (which we have already rejected) “are, alone, a sufficient basis on which to strike the Amended Statement of Claim in its entirety”.

...
127. A statement of claim must be specific enough to put the respondent properly on notice so that it can reply adequately in its statement of defence. The tribunal also must be informed of the essence of the claim. An exhaustive statement of facts or of the evidence supporting the claim is not required. What is required, according to Article 18(2) of the [1976] UNCITRAL Arbitration Rules, is the following:
 

The statement of claim shall include the following particulars:

  - a ( ) The names and addresses of the parties;
  - b ( ) A statement of facts supporting the claim;
  - c ( ) The points at issue;
  - d ( ) The relief or remedy sought.

↳ The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

128. The ASC follows the list of particulars set out in article 18(2). Thus it has parts headed *The Parties*, Relevant Entities, Procedural History of Dispute and Jurisdiction, Overview—Breaches of NAFTA, Canada's NAFTA Obligations (under which it states *facts* as well as legal obligations and alleges breaches by reference to both), *Points in Issue* and *Relief Sought and Damages Claimed*. (The italics indicate the four elements included in the list in article 18(2) of the Rules.) The Investor used essentially the same structure in its initial Statement of Claim which was much longer (75 pages plus 26 pages of appendices). ... In the formal sense at least, the Investor complies with the [1976] UNCITRAL article.

...

132. Looking at the ASC as a whole and in the context of principle and the relevant [1976] UNCITRAL Rules [namely Articles 18(2), 20, 22, and 15], the Tribunal considers that it does adequately give notice to Canada of the essential elements of the claim it must meet. It does enable Canada to formulate a statement of defence. As the process of the production of evidence and of proof proceeds (a process supported by the Tribunal's powers mentioned earlier and also article 24 of the [1976] UNCITRAL Rules), the Investor will have the opportunity to give its claims greater precision. It is of course in its interest to do so if it is to establish its claims as a matter of fact.

## D. Extracts from the Practice of the Iran–US Claims Tribunal

### 1 ( ) Tribunal Rules (1983), Article 18(1)

*Re Refusal to File Claim Concerning Sara Helali*, DEC 3-REF11-2 (May 7, 1982), reprinted in 1 Iran-US CTR 134 (1981-82):

The Tribunal decides that the Registrar was correct in refusing the Statement of Claim submitted by Sara Helali. The Statement of Claim fails to meet the requirements of Article 18 of the [1983] Provisional Rules of Procedure. To the extent that the Tribunal can understand the claim, it is directed primarily against various individuals, some of them Iranian, for refusal to account for or return funds obtained from Claimant and invested in property within the United States. No Claim against Iran is stated such that a Statement of Defence could reasonably be requested.

*Arthur Young & Co and Islamic Republic of Iran*, Award No 338-484-1 (December 1, 1987), reprinted in 17 Iran-US CTR 245, 253-54 (1987-IV):

37. ... Article 20, read together with Article 18, 19 and 28 of the [1983] Tribunal Rules, makes it clear that the arbitrating parties are obliged to present their claim or defence, in principle, as early as possible and appropriate under the circumstances in each case. Compliance with this obligation is indispensable, in the Tribunal's view, to ensure an orderly conduct of the arbitral proceedings and equal treatment of the parties.

### 2 ( ) Tribunal Rules (1983), Article 18(2)

*Mishik Movsessian and Islamic Republic of Iran*, Case No 272, Chamber Three, Order of July 9, 1982:

Claimant is hereby ordered to file with the Tribunal by 16 August 1982 a Statement clarifying the basis for his claim and, in particular, the grounds upon which he asserts the liability of Iran and the ultimate relief sought.

*Kay Lerner and Islamic Republic of Iran*, Case No 242, Chamber Three, Order of August 6, 1982, reprinted in 1 Iran-US CTR 215 (1981–82):

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If the Claimant does not provide additional factual information, the Tribunal must consider whether the claim has been presented with sufficient particularity to be capable of adjudication. The Claimant is therefore requested to address this point and to file by 7 September 1982 further written submissions which should also include any proposals the Claimant may have for procedures which will both meet the Claimant's asserted need for safeguards and fully protect the Respondent's right of defence.

*Amoco Iran Oil Co and Islamic Republic of Iran*, Case No 55, Chamber Two, Order of February 22, 1983:

The Respondents in this case filed with the Tribunal on 14 February 1983 a request that the Claimant be required to provide more detailed explanation not only as to the amount of the claim but also as to the manner in which liability is alleged against both Respondents.

The Tribunal notes that the Statement of Claim contains forty pages of explanation dealing with the demand for arbitration (p. 1); the parties (p. 1 and following); the Tribunal's jurisdiction (p. 6); the basis and general nature of the claim (p. 7 to p. 10); the applicable law (p. 11); a statement of the facts (p. 12 to p. 37); the points at issue (p. 38); and the relief sought (p. 39 to p. 40). These explanations have since been supplemented by written and oral submissions particularly concerning the issue of jurisdiction.

Article 18 of the [1976] UNCITRAL Rules, as modified by the Tribunal, imposes on the Claimant the sole obligation of giving the following particulars ...

It appears that in the present case the Claimant has complied with that Rule.

*Jonathan Ainsworth and Islamic Republic of Iran*, Case No 454, Order of November 7, 1983, reprinted in 4 Iran-US CTR 26 (1983-II):

1. By an Order of January 18, 1983, the Tribunal ordered the Statement of Claim to be amended in conformity with Article 18 of the Tribunal Rules by March 4, 1983. The time limit for such amendment was later extended to April 29, 1983.
2. On May 23, 1983, the Claimant filed a copy of a telex from Claimant together with materials which had previously been filed as an annex to the Statement of Claim. On July 18, 1983, the Tribunal received a telex from Claimant Jonathan Ainsworth, containing, *inter alia*, a request for a 30 days' extension "to file supplemental papers in support of claim."
3. On July 18, 1983, the Tribunal also received a number of video tapes from Claimant and on September 5, 1983 a written submission supplementing his previous filings.
4. Noting that Tribunal Rules do not provide for filing a Statement of Claim or supplements to such Statement through use of video tapes, the Tribunal finds that Claimant has not as yet amended his Statement of Claim in accordance with Article 18 of the Tribunal Rules. In particular, the Statement of Claim and the Claimant's subsequent filings do not contain a satisfactory reference to the "debt, contract ... expropriations or other measures affecting property rights out of or in relation to which the dispute arises" or a statement of the facts supporting the claim. Furthermore, the points at issue have not been stated by Claimant.
5. In view of the foregoing, the Claimant is hereby ordered to file by December 1, 1983 a written Statement containing the items mentioned under paragraph 4 above.

*The Cyrus Petroleum Ltd and The Islamic Republic of Iran*, Case No 624, Chamber One, Order of May 30, 1985:

The Respondent on 17 January 1983 filed a Statement of Defence stating, *inter alia*, that it was unable to respond to the Statement of Claim, which it said was “totally vague, the relief sought is unknown, and the action allegedly taken by Respondent is rather obscure and unclear.” By Order filed 15 February 1983 Claimant was ordered to respond to these objections by 14 March 1983. Claimant failed to comply with that Order, or even to seek an extension of the time within which to do so. By further Order filed 31 August 1984, the Claimant was ordered to file a Response by 1 October 1984 and was informed that if a Response was not filed by that date the Tribunal would proceed to decide this case on the basis of the pleadings and documents submitted.

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↳ ...

The Tribunal informs the Parties that it now intends to decide this case on the basis of the pleadings and documents before it.

*Questech, Inc and Ministry of National Defence*, Award No 191–59–1 (September 25, 1985) at 3, reprinted in 9 Iran-US CTR 107, 109 (1985-II):

[T]he language of Article 18, paragraph 2 [of the 1976 UNCITRAL Rules as modified by the Iran-United States Claims Tribunal], is merely advisory in nature, not mandatory. While it is conceivable that Article 18 might be viewed as setting forth certain minimum requirements of an orderly understandable submission, so that in exceptional cases non-conforming submissions might be refused, the submission of the Claimant in this case is not of such an exceptional nature.

*United States of America and Islamic Republic of Iran*, Case No A/28, Full Tribunal, Order of December 3, 1993:

The Tribunal notes that the Claimant's submission consists of the following elements: a brief introduction outlining the claims; a section on jurisdiction; statement of facts; points at issue; and the relief sought. The Tribunal is satisfied that the Claimant's submission, which is labelled as a “Statement of Claim”, substantially meets the requirements in Article 18 [of the 1976 UNCITRAL Rules] ...

*Islamic Republic of Iran and United States of America*, Case No B1 (Counter-Claim), Award No ITL 83-B1-FT (September 9, 2004) (footnotes omitted):

67. The United States maintains that the Counter-claim meets the requirements of Article 18 of the [1983] Tribunal Rules.
68. In the United States' view, Tribunal practice demonstrates the general nature of, and the low threshold for, the pleading requirements for statements of claim. In particular, the United States contends, it is not necessary to include a detailed statement of facts. In the rare cases where the Tribunal has dismissed preliminarily a claim for defects in pleadings, the claimant typically failed to provide extremely basic information (for instance, the claimant failed to identify clearly the respondent parties). The United States also submits that the Tribunal has indicated that it will refuse cases on the basis of Article 18 of the Tribunal Rules only in “exceptional circumstances.”
69. The United States contends that such circumstances are not present in this Case and that sufficient information has been provided in the Counter-claim for Iran to respond to its particulars. The Counter-claim devotes distinct sections to each of the Article 18 requirements and explains with sufficient detail the facts supporting the Counter-claim,

the general nature of the claim, the amount requested, and the points at issue. The United States recalls that the annexation of additional evidentiary material is a discretionary matter under Article 18(2) of the [1983] Tribunal Rules. The United States notes that Iran has been able to respond to the Counter-claim repeatedly and not just on jurisdictional issues.

### 3. The Statement of Defence—Article 21

The second written pleading required in every case is the statement of defence, which represents the second opportunity (after the response to the notice of arbitration) for the respondent to state its views and its last opportunity to raise a jurisdictional objection pursuant to Article 23. Counterclaims relating to the principal claim or claims for the purpose of a set-off must be brought in connection with the submission of the statement of defence.<sup>45</sup> The UNCITRAL Rules therefore address questions concerning the statement of defence, the counterclaim, and the claim for a set-off together.

#### A. Text of the 2010 UNCITRAL Rule<sup>46</sup>

Article 21 of the 2010 UNCITRAL Rules provides:

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.
2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.
4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2(f), and a claim relied on for the purpose of a set-off.

## B. Commentary

### 1 ( ) Submission of the statement of defence

After a statement of claim fulfilling the conditions of Article 20 has been submitted, the arbitral tribunal issues an order requiring the respondent(s) to submit a statement of defence both to each claimant and to each arbitrator by a prescribed date. In determining the time frame for the submission of a statement of defence, the arbitrators must consider Article 25,<sup>47</sup> according to which such a period normally “should not” exceed 45 days. If, however, it is clear at the outset that this period is inadequate under the circumstances, the parties may modify the rules to extend it pursuant to Article 1(1).<sup>48</sup> Pursuant to Article 21(1), a respondent may elect to treat its response to the notice of arbitration as its statement of defence, so long as the response qualifies as a statement of defence. This right, which is new to the Rules, corresponds with the new requirement that respondents communicate a response to the notice of arbitration.<sup>49</sup>

According to Article 25, the time limit for submitting the statement of defence may be extended if the tribunal finds that such an extension is “justified.” Such a determination is left to the discretion of the arbitral tribunal and depends on the circumstances of each case. Generally speaking, an extension of the 45-day time limit is more likely to be permitted for the submission of the statement of defence rather than the statement of claim.<sup>50</sup> Note 1 to Article 19 of the 1983 Tribunal Rules of the Iran–US Claims Tribunal contains a useful list of factors to be taken into account when deciding whether or not to extend the period of time for the submission of the statement of defence.<sup>51</sup> In case of non-compliance with the time limit, the arbitral tribunal has the power to order that proceedings continue notwithstanding the lack of the statement of defence.<sup>52</sup>

### 2 ( ) Contents of the statement of defence

The intent of Article 21 is to ensure that the statement of defence responds to the information and contentions included in the statement of claim.<sup>53</sup> If a document purporting to be the statement of claim does not fulfil the requirements of Article 20, then there is no duty to submit a statement of defence in accordance with Article 21.<sup>54</sup> The correspondence between Articles 20(2)–(3) and 21(2) is heightened by the fact that the latter encourages the respondent to provide any documents on which it relies, or to add references to the documents or other evidence it will submit.<sup>55</sup>

Although from the point of view of effective arbitral proceedings it is advisable that the respondent do so,<sup>56</sup> the permissive wording of the second sentence of Article 21(2) makes it clear that the provision is “without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceedings.”<sup>57</sup> According to Article 23(2), the respondent should make any objections to the arbitral tribunal's jurisdiction at the latest when submitting its statement of defence. Whether the filing of a statement of defence should be postponed pending the resolution of jurisdictional objections depends on the circumstances of the case.<sup>58</sup>

Article 21(2) more strongly encourages respondents to include in the statement of defence the “documents or other evidence” that it will rely on, or at least contain references to these materials. A similar provision appears in Article 20(4) on the statement of claim and, as explained above, is meant to enhance efficiency of the arbitral proceedings by avoiding delay and surprise.<sup>59</sup> The second sentence of Article 21(2) serves the same goals.<sup>60</sup>

### 3 ( ) Submission of counterclaims and claims for the purpose of set-off

#### a ( ) General issues

Article 21(3) establishes the respondent's right to present counterclaims or claims relied on for the purpose of a set-off.<sup>61</sup> Generally speaking, a counterclaim is a separate claim, whereas a set-off "claim" is a defensive pleading that money owed by the main claimant to the defendant is to be counter-balanced against the claim.<sup>62</sup> Sanders indicates the hypothetical difference between the two: unlike a set-off, "the counter-claim must still be decided upon by the arbitrators when the original claim is withdrawn or settled."<sup>63</sup> Another difference is that a demand based on a counterclaim may exceed the amount of the original claim while a set-off demand may not.<sup>64</sup>

p. 425 Counterclaims can only be presented by parties against other parties to the arbitration case.<sup>65</sup> Article 21(3) indicates that counterclaims and demands for set-off should be asserted in the statement of defence. This means only that counterclaims should be asserted at the same time as the statement of defence. The respondent is not prevented from submitting his counterclaim in a document ("statement of counterclaim") separate from the statement of defence. Moreover, exceptions to the obligation to raise counterclaims in connection with the statement of defence are possible "if the arbitral tribunal decides that the delay was justified under the circumstances."

Since counterclaims submitted after the statement of defence are rarely admitted, "the Respondent has the burden of justifying the delay."<sup>66</sup> Accordingly, in the practice of the Iran-US Claims Tribunal, late counterclaims have frequently been rejected for failure to show circumstances that would justify the delay.<sup>67</sup> If a counterclaim is raised after the submission of the statement of defence without any effort to explain the delay, it will normally be dismissed.<sup>68</sup> Exceptions are, however, conceivable when the delay is minimal.<sup>69</sup>

Where the party does submit explanations to justify its delay, it is up to the arbitral tribunal to judge their sufficiency in light of Article 21(3). Three kinds of considerations must be taken into account and balanced against each other in making such a determination: (1) the respondent's reasons for the delay, (2) possible prejudice caused to the claimant by the acceptance of the late submission of the counterclaim, and (3) the effect of the delay on the arbitral proceedings as a whole.

As to the first consideration, failure to assert the counterclaim in the statement of defence may be justified if the evidence supporting the counterclaim only becomes accessible to the respondent after the submission of the statement of defence. The complicated nature of the case and the volume of the record surrounding it may also provide the respondent and its counsel with an excuse for failing to detect the basis for a counterclaim until after the submission of the statement of defence.<sup>70</sup>

From the respondent's point of view, reasons that would excuse the late submission of the counterclaim necessarily justify delay under Article 21(3). The question of whether the late submission will prejudice the other party must also be taken into account. Such prejudice is most evident where the untimely presentation of the counterclaim makes it difficult for the other party to properly defend itself against the counterclaim. The concept of prejudice must be understood in this procedural sense. On the other hand, the "prejudice" caused to the claimant by the meritorious strength of the counterclaim as such is not an argument against the admissibility of the counterclaim. On the contrary, the weaker the counterclaim appears to be, the less reason there is to burden the other party with the obligation to reply.<sup>71</sup> The award of the Iran-US Claims Tribunal in *American Bell International Inc*<sup>72</sup> illustrates these various considerations. The assertion, slightly more than a month before the hearing, of an apparently *prima facie* meritorious<sup>73</sup> and factually simple counterclaim in a per se authorized "Counter-claim Memorial" was justified in view of the fact that the other party had ample time to respond to the counterclaim in a rebuttal memorial that was due about a week before the hearing.<sup>74</sup>

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A counterclaim presenting more complicated factual and legal issues should not, however, routinely be admitted as late as three years after the presentation of the statement of defence and one month prior to the hearing, as happened in *American Bell International Inc.* Counterclaims not raised until the very eve of the hearing, at the hearing, or subsequent to it, should be admitted only in exceptional circumstances. Thus, the Iran–US Claims Tribunal “has been particularly reluctant to accept late counterclaims filed shortly before the Hearing, during the Hearing or after the Hearing.”<sup>75</sup> Untimeliness, which makes it difficult or impossible for the other party to reply to the counterclaim fully in a written pleading, and to prepare a proper oral defence for the hearing, would normally be considered prejudicial. Postponement of the proceedings in order to provide the second party with an opportunity to prepare a defence has negative effects on the arbitral proceedings as a whole. Thus, the longer the lapse of time following the submission of the statement of defence, the weightier the reasons required to justify admitting a counterclaim.<sup>76</sup>

### **b () The counterclaim or the claim for a set-off must be within the jurisdiction of the arbitral tribunal**

Article 21(3) states the self-evident rule that the respondent may present a counterclaim or a claim for a set-off “provided that the arbitral tribunal has jurisdiction over it.” The Rules themselves therefore place no restrictions on a disputing party's ability to raise counterclaims or claims for a set-off, save for possible limitations when such claims are filed late, as described above. Rather, the arbitral tribunal's jurisdiction over counterclaims and claims for a set-off is determined by reference to the governing law, the terms of the arbitration agreement between the disputing parties, the mandatory requirements of the domestic law, or the terms of a governing international treaty, such as an investment treaty.

The phrase “provided that the arbitral tribunal has jurisdiction over it” was added to the 2010 UNCITRAL Rules primarily to account for increased use of the Rules in investor–state arbitration under investment treaties. Corresponding Article 19(3) of the 1976 UNCITRAL Rules was conceived of in the context of international commercial arbitration and thus limited the disputing parties' ability to raise counterclaims and claims for a set-off to those “arising out of the same contract.” The Working Group viewed this phrase as “too narrow” in the context of investor–state arbitration “where it might be necessary to adopt a particularly broad understanding of the range of counterclaims and set-off that could be dealt with in the same proceeding.”<sup>77</sup>

Various proposals to broaden the arbitral tribunal's potential scope of jurisdiction over counterclaims and claims for set-off were considered by the Working Group.<sup>78</sup> One draft of Article 21(3) included two options: either a counterclaim or a set-off claim could be heard when “arising out of the same defined legal relationship, whether contractual or not” or “provided that [such claim] falls within the scope of the arbitration agreement.”<sup>79</sup> Some support was expressed for the second option, subject to textual revisions clarifying that the term “arbitration agreement” was not limited to the arbitration agreement out of which the main claim arose.<sup>80</sup> Others opposed this approach, however, proposing instead to combine the two options in order to restrict the admissibility of counterclaims or claims of set-off in cases of broadly drafted arbitration agreements.<sup>81</sup>

The Swiss delegation proposed yet another version of the rule that would treat set-off claims and counterclaims on different terms to reflect the distinct approaches to set-off claims and counterclaims under different legal systems. In some countries, for example, a claim for a set-off was considered to be a defence that could be raised, regardless of whether it fell within the scope of the arbitration agreement; if proven, the set-off would operate to extinguish the main claim.<sup>82</sup> To reflect this practice, the Swiss proposal allowed claims for a set-off “even if the claim on which the set-off is based does not fall within the scope of the arbitration agreement, and even if such claim is the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim are fulfilled.”<sup>83</sup> By contrast, counterclaims were subject to different substantive rules under

p. 428 the proposal because a counterclaim was a claim in its own right, not merely a defence. To be valid under the Swiss proposal, a counterclaim had to fall within the scope of an arbitration agreement between the parties and have a “sufficient link” to the main claim.<sup>84</sup>

A number of concerns about the Swiss proposal were raised. Because set-off claims and counterclaims are regulated by domestic procedural law, and such laws can vary from jurisdiction to jurisdiction, some Working Group delegates argued that the proposed rule might not be readily incorporated into all legal systems.<sup>85</sup> Thus, the feasibility of a universal rule on the matter was doubtful. Further, others believed the Swiss proposal “might invite challenges under the New York Convention with respect to the scope of the arbitration agreement even if the parties would have accepted such extension by agreeing on the application of the Rules.”<sup>86</sup> In other words, despite the arguably indirect agreement of the parties over counterclaims, such an extension might be viewed, for example, as an excess of jurisdiction.

The problems with the Swiss proposal, along with other proposals, moved the Working Group toward considering a proposal that placed no substantive restrictions on the arbitral tribunal's competence to address counterclaims and set-off claims; such claims could be heard “provided that the tribunal has jurisdiction.”<sup>87</sup> Some concern was expressed that such an open-ended approach would not offer sufficient guidance to the arbitral tribunal on the limits of its competence.<sup>88</sup> The proposal ultimately found wide support, however, because it was considered to be “broad enough to encompass a wide range of circumstances,” ie, it did not require substantive definitions of the terms “counterclaim” and “claim for purpose of a set-off” and could address the situation in which the main claim had been extinguished by a set-off.<sup>89</sup>

In practice, investor–state tribunals have interpreted the 1976 UNCITRAL Rule, with its narrower language (“arising out of the same contract”), along with applicable investment treaties, as allowing the filing of at least counterclaims.<sup>90</sup> Nevertheless, the revisions in Article 21(3) bring clarity to an important area of the Rules which will undoubtedly enhance the efficiency and flexibility of UNCITRAL arbitration as intended by the drafters.<sup>91</sup>

#### **4 ( ) Supplementary provisions on counterclaims and claims for the purpose of set-off**

p. 429 Insofar as it fulfils the aforementioned conditions relating to the arbitral tribunal's jurisdiction, the arbitral tribunal should treat a counterclaim or a set-off claim on a commensurate basis with the principal claim.<sup>92</sup> In this spirit, Article 21(4) provides that a counterclaim shall follow the structure of the statement of claim as prescribed in Article 20(2) and (4). In Note 2 to Article 19 of the 1983 Tribunal Rules of the Iran–US Claims Tribunal, this main provision has been supplemented by additionally providing that the “counterrespondent” (ie, the claimant) has the right to reply to the counterclaim, whereby Article 19(2) on the statement of defence is correspondingly applicable. The same basic principles apply to claims and counterclaims under the UNCITRAL Model Law.<sup>93</sup>

#### **5 ( ) Comparison to the 1976 UNCITRAL Rules**

The principal difference between Article 21 and corresponding Article 19 of the 1976 UNCITRAL Rules is the elimination of any substantive rules that regulate the arbitral tribunal's jurisdiction over counterclaims and set-off claims. Whereas revised Article 21 requires only that the arbitral tribunal “have jurisdiction over” counterclaims or set-off claims, original Article 19 allows such claims to be heard only if they arise “out of the same contract” on which the main claim is based.

The requirement that the counterclaim relate to the cause of action of the main claim is in keeping with the general function of a counterclaim. Thus, with respect to counterclaims, the practical differences between revised Article 21(3) and original Article 19(3) are likely to be minimal.

The treatment of a set-off claim may be more complex and, in some cases, may reveal greater differences in approach between the 2010 and 1976 Rules. In some legal systems, such a direct connection between the main contract and the set-off claim is not necessary. For example, a debt<sup>94</sup> owed by a claimant to the respondent need not be based on the contract at issue in the main claim in order to be relied on for the purpose of set-off.<sup>95</sup> Unlike revised Article 21, original Article 19(3) forecloses jurisdiction over such a set-off claim.<sup>96</sup> ↵ If the parties wish to make it possible to rely on such debts as set-off claims, they should modify original Article 19(3) accordingly. In some cases, this may be a practical way of avoiding several proceedings.<sup>97</sup>

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Modifications of this kind have not been made to the 1983 Tribunal Rules of the Iran–US Claims Tribunal, which interprets original Article 19(3) in light of Article II(1) of the Claims Settlement Declaration.<sup>98</sup> Where set-off claims and counterclaims are governed by the same jurisdictional standards, the relevance of the separate concept of set-off is somewhat limited.<sup>99</sup> In this case it is preferable to assert a counterclaim instead, which will survive possible withdrawal or dismissal and may exceed the amount of the main claim.

To arise “out of the same contract,” a counterclaim or a set-off claim presented under original Article 19 cannot be based on a contract which is not covered by the arbitration clause or agreement, notwithstanding a close connection with the subject matter of the claim.<sup>100</sup> However, original Article 19(3) need not necessarily be construed to mean that a counterclaim must without exception be based on the same contract as the original claim. One could argue that the extent of the arbitral tribunal's jurisdiction as defined in the arbitration clause or agreement should be decisive. Thus where one arbitration agreement covers two contracts, a counterclaim based on either of them should be admissible regardless of whether the claim relies on both. In order to avoid uncertainty, parties contemplating an arbitration agreement comprising several contracts are advised to consider modifying original Article 19(3), for example, to allow counterclaims “arising out of any contract included in the arbitration agreement.”

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If the arbitration clause or agreement is formulated to cover non-contractual claims, the parties should modify original Article 19(3) accordingly. This has occurred in the context of the proceedings of the Iran–US Claims Tribunal, which has a wide jurisdiction over “debts, contracts expropriations or other measures affecting property rights.”<sup>101</sup> The counterclaim jurisdiction of the Tribunal has correspondingly been extended in Article II(1) of the Claims Settlement Declaration to counterclaims arising out of the “same contract, transaction or occurrence that constitutes the subject matter” of the claimant's claim. In the practice of the Tribunal, a series of separate contracts has occasionally been treated as one “transaction” for the purpose of counterclaims.<sup>102</sup> ↵

In most cases, the determination of whether a counterclaim arises “out of the same contract” in the sense of Article 19(3) of the 1976 UNCITRAL Rules, or out of the contract or transaction relied on by the claimant in the Iran–US Claims Tribunal, is relatively unproblematic. Where the claimant makes a claim for a payment due under contract A, and the respondent submits a counterclaim for defective performance under the same contract, the fulfilment of the jurisdictional requirement in question is apparent. It may be, however, that a purported counterclaim that is related to the contract cannot be said to “arise out” of it. For example, the Iran–US Claims Tribunal has held that obligations to pay taxes or social security premiums in connection with the performance of a contract do not normally fall within the Tribunal's jurisdiction, as these obligations arise out of the application of law to the contract rather than the contract itself. Exceptions to this rule occur when “the contract includes provisions which create specific obligations, which do not exist in the law, of one party towards the other, in relation to the burden of taxes to be paid, or provisions which set forth conditions for payment of amounts earned under the contract in relation to the payment of taxes.”<sup>103</sup> Contractual obligations regarding payment of withholding taxes are examples of such obligations.<sup>104</sup>

The above discussion shows that the treatment of counterclaims under the 1976 Rules may raise difficult jurisdictional issues. Where the counterclaim is clearly without merit, arbitrators may avoid taking a stand on jurisdictional issues by dismissing the counterclaim with a reference to the merits. Occasionally, the Iran–US Claims Tribunal has done so and concluded that it need not decide the jurisdictional issues in question.<sup>105</sup>

In addition to the substantive rules on the admissibility of counterclaims and set-offs, Revised Article 21 differs from original Article 19 in two other ways. First, a new sentence in Article 21(1) recognizes that the respondent may elect to treat its response to the notice of arbitration, a new procedural step under the Rules, as its statement of defence, so long as the response satisfies the criteria for a statement of defence outlined in Article 21(2), which requires responses to particulars in the statement of claim. Second, the Rules more strongly encourage (“should, as far as possible” in Article 21(2) as compared to “may” in original Article 19(2)) that the statement of defence include all documents and evidence (or references to such materials) relied upon by the respondent.

p. 432 **C. Extracts from the Practice of Investment Tribunals**

*United Parcel Service of America Inc and Government of Canada*, Decision on Filing of Statement of Defence (October 17, 2001) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 3–7:

3. Canada contends that it should not be required to file its statement of defence until the Tribunal rules on whether the claim submitted by UPS is within the terms of NAFTA. ...
4. Along with its initial submissions, Canada filed its Notice of Motion objecting to the jurisdiction of the Tribunal to address UPS's statement of claim. It had earlier advised the Tribunal that, given the extensive nature of its jurisdictional objections, to file the statement of defence at that stage in the proceedings would be inconsistent with the [1976] UNCITRAL Rules and established practice in both NAFTA and other international arbitrations. Later, it noted that, because substantial parts of the UPS claim are outside the terms of NAFTA Chapter 11 and the statement of claim as a whole is deficient and impossible to respond to, it was premature for it to submit a statement of defence. The only appropriate response was an objection to the jurisdiction of the Tribunal by a notice of motion. [In sum, Canada submitted that compelling the filing of a statement of defence at this stage “would require a disputing party to defend on the merits in the face of a live question whether it is required to do so.” (Para 8).]
5. UPS has requested throughout that Canada be required to file its statement of defence. ... It refers to the general time limits fixed by the [1976] UNCITRAL rules for the communication of written statements, including the statement of defence. It is also concerned that, were the Tribunal to adopt Canada's proposed procedure, Canada would be entitled to raise its jurisdictional objections to the Tribunal immediately but would presumably still reserve its ability to make further jurisdictional objections in its statement of defence. That would further frustrate the process, including the ability of the disputing parties to create or commence an effective documentary production process to further the hearing of the claim. ...
11. It will be seen that [Article 21 of the [1976] UNCITRAL Rules] does not say that the plea to jurisdiction may be made only in the statement of defence. Rather the filing of the statement of defence marks the latest time at which such a plea may be made. Further, in general, jurisdictional pleas are to be resolved as a preliminary matter, whether they are

raised in a statement of defence or in some other way. The parties indeed accept that the rules are not decisive on the present issue.

...

16. We do not see this issue as a matter of clear rules or of precise right. The frequent practice, as the cases to which UPS has referred us demonstrate, is for jurisdictional issues to be raised in the statement of defence and not by separate proceedings. They are then however frequently, as the [1976] UNCITRAL rules indicate they should be, dealt with as a preliminary matter. ... [I]n the context of the present case, Canada has, we take it, pleaded all the possible jurisdictional arguments that it would want to raise. It says in both of its submissions that “all of its jurisdictional objections can be efficiently and effectively resolved on the statement of claim alone.”

...

19. UPS submits that Canada would not suffer any prejudice, were it to file its statement of defence, in respect of its ability to make jurisdictional arguments to the Tribunal. Canada responds by saying that, regardless of prejudice, there is no legal principle requiring the filing of a defence to matters beyond the Tribunal's authority. In any event, requiring the submission of a statement of defence in these circumstances is prejudicial since it would be compelled to proceed on the assumption that all allegations in the statement of claim are relevant and within the jurisdiction of the Tribunal. Canada would have to waste significant time and effort responding to lengthy complex allegations that prima facie are not properly before the Tribunal and also, according to UPS, begin the document discovery process. ...
20. ↪ In the end the Tribunal has to have in mind the practical administration and determination of the arbitration, while applying the underlying principles. The objections made by Canada are so extensive that it seems to the Tribunal that it is better for them to be resolved in advance and for any necessary amendments to be made to the statement of claim before Canada pleads it.

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*Canfor Corp and United States of America*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (January 23, 2004) (ICSID administered, 1976 UNCITRAL Rules, NAFTA Chapter Eleven), at 10–12 (citations to submission omitted):

45. The Tribunal is not convinced by the Claimant's reading of the provisions of the [1976] UNCITRAL Arbitration Rules. Article 19(1) of the [1976] Rules provides that “[w]ithin a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.” This provision simply recognizes an arbitral tribunal's discretion to define a period of time for a respondent to submit its statement of defence, the timely submission of which is therefore subject to the deadline fixed by the tribunal. Article 23 of the [1976] Rules provides that “[t]he periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.” ...
46. Further, the Tribunal does not consider that, in this case, the submission of a statement of defence by the Respondent is a prerequisite to the issue of whether or not it can decide the bifurcation of the proceedings. Article 21(3) of the [1976] Rules makes it possible for a respondent to raise jurisdictional objections “not later than in the statement of defence”, which indicates that it may raise such objections in a separate document before it files its statement of defence. Article 21(4) further allows an arbitral tribunal to rule on its

jurisdiction as a preliminary question. Nothing in these provisions limits the Tribunal's power to determine whether it may decide to hold a preliminary phase without having ordered the prior submission of a statement of defence. As a legal as well as practical matter, a statement of defence that would be a formality and that would simply deny all of the Claimant's allegations would not be of great assistance to either the Tribunal or the Claimant.

47. As a result, the Tribunal considers that bifurcation of the proceedings between a preliminary phase on the Respondent's jurisdictional objections and a merits phase—each phase involving issues of a different nature—may be ordered without the submission of a statement of defence. In particular, the Tribunal considers that the bifurcation of the proceedings with respect to the Respondent's Objection to Jurisdiction on the basis of Chapter Nineteen of the NAFTA may be decided without the submission of a statement of defence. ...
48. The Tribunal's acceptance that the proceedings may be bifurcated in no way implies that, should the Tribunal decide that it has jurisdiction to hear the merits of the Claimant's allegations, the Respondent may seek to raise new jurisdictional objections at the merits phase. Indeed, the Tribunal shares the Claimant's legitimate concern that “*all jurisdictional issues that the United States intends to raise [be] articulated now*” and that the Respondent in this case has “*reserved its ability to advance other arguments that may be characterized as jurisdictional, but without articulating what they might be*”. ...
49. Unlike the respondent in *UPS v. Canada* (Decision on the Filing of a Statement of Defence, October 17, 2001, paras 16–17 ... ), the Respondent in this case has not presented the Tribunal with all of its jurisdictional arguments and has made [a] reservation of rights in its Objection to Jurisdiction ...
- ...
51. ... The Tribunal has no reason to doubt that the Respondent is in a position, at this stage, to make every jurisdictional argument it may have, including those relating to whether or not the Claimant has made investments in the territory of the United States as contemplated by the provisions of the NAFTA ....
52. ↳ The Respondent may find a strategic advantage in presenting the Tribunal, at this stage, with one jurisdiction argument, “*the only one for which it seeks preliminary treatment*” ... However, the Tribunal should not be constrained, when conducting the arbitration, by any of the parties' procedural and strategic choices ...
54. On the basis of the above, the Tribunal decides that:
- 1 ( ) The Respondent shall file a Statement of Defence limited to and setting forth all of its jurisdictional objections; ...

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*Saluka Investments B V and Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (May 7, 2004) (PCA administered, 1976 UNCITRAL Rules, Netherlands–Czech Republic BIT), at 9 (citations omitted):

37. The first issue which the Tribunal has to determine is whether, in principle (and irrespective of the particular counterclaim advanced in these proceedings by the Respondent), it has jurisdiction under Article 8 of the Treaty to hear and determine counterclaims. The parties were agreed that, as it was put by the Respondent, “there is not a wealth of precedent concerning the specific question whether a State may bring a

counterclaim against an investor pursuant to a BIT.” Moreover, such precedent as exists is often either based on treaty language different from that in Article 8 of the Czech-Netherlands Treaty, or does not arise in an arbitration applying the [1976] UNCITRAL Rules, or both. To a considerable extent, therefore, this issue has to be dealt with by the Tribunal on a ‘first impressions’ basis.

38. Both parties have, however, accepted that counterclaims might fall within the scope of the Tribunal's jurisdiction under Article 8: the Respondent has done so by virtue of having presented such a counterclaim, and the Claimant has done so by acknowledging that circumstances could be envisaged in which a counterclaim could properly be made, as where a primary claim was presented on the basis of an investment contract and a counterclaim was presented on the basis of that same contract.
39. The Tribunal agrees that, in principle, the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the [1976] UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to “All disputes,” is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal's jurisdiction, to be “between one Contracting Party and an investor of the other Contracting Party” carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims.

## D. Extracts from the Practice of the Iran-US Claims Tribunal

### 1 ( ) Tribunal Rules (1983), Article 19(1)

*Pepsico, Inc and Islamic Republic of Iran*, Case No 18, Chamber One, Order of June 30, 1982, reprinted in 1 Iran-US CTR 173 (1981–82):

The Tribunal extends the time within which the Respondents shall file their Statements of Defence to 18 August 1982.

In view of the fact that the Statement of Claim and the Exhibits attached thereto set forth what is owed by each of the Respondents as well as the grounds for each claim, the Tribunal does not find reasons to grant the Respondents' request that the Claimant be directed to address its claims separately to each Respondent.

*Pepsico, Inc and Islamic Republic of Iran*, Howard M Holtzmann, Dissent from Decision Granting Second Extension of Time for Filing Statement of Defence (July 9, 1982), reprinted in 1 Iran-US CTR 174 (1981–82):

I dissent from the decision of the Chamber granting a second extension of time for filing the Statement of Defence in this case.

↳ This claim is one of the earliest cases before the Tribunal, having been filed November 3, 1981. It involves transaction between Pepsico, Inc. and a number of Iranian bottling companies.

...

Article 19 of the [1983] Provisionally Adopted Tribunal Rules provides that a Chamber may extend time limits for filing Statements of Defence only “if it concludes that such an extension is justified.” note 1 to Article 19 sets forth certain criteria which will be taken into account in this

regard. The first criterion is the “complexity of the case.” That criterion is not met in this instance because the transactions are relatively simple, the underlying contracts are identical and the Statement of Claim includes quite detailed documentation thereby facilitating response.

The second criterion of note 1 to Article 19 justifying extension is any “special circumstances, including demonstrated hardship.” The fact that operations of some of the Iranian bottling companies covered by the claim may have been in what later became a war zone, as alleged by Respondents for the first time on June 3, does not excuse the Respondents not so located from filing their Statements of Defence on time, and may not even be a basis for delay as to those few Respondents who were in the war zone because, as noted above, all of the contracts are identical and there has been no showing that the same basic defences are not applicable to all.

note 1 to Article 19 also provides that if a Chamber determines that a requirement to file a large number of cases would impose an unfair burden on a Respondent, “it will in some cases extend the time periods.” That clearly means that extension will be granted in some, not all, cases. That criterion was never intended to justify delay in responding to even the earliest claims filed, such as this, but was designed to relieve proven cumulative burden, if any, arising in later cases.

In summary, there is no showing to justify permitting a total of over eight months—more than twice the time originally granted—for filing the Statement of Defence in this case.

*Phillips Petroleum Co, Iran, et al and The Islamic Republic of Iran, Cases Nos 39 and 55, Chamber Two, Order of April 27, 1983, reprinted in 2 Iran-US CTR 283 (1983-I):*

In reply to your request for an extension of four months from 30 April 1983 to file a Defence in this case, I confirm by the present letter what I told you in my office and what I told Mr. Kashan in Mr. Lagergren's office, as well as what I told Mr. Mouri yesterday.

Since there were already three extensions of time, it seems difficult to grant a new one. Moreover, as the last given date was ordered by an award, it is impossible to modify it without the consent of all the Parties.

It should be on the other hand possible for the Respondents to give before the deadline a written statement with your counter-claim, if any, even if it is very short, to be completed in your further statements.

I regret not to be able to grant you the requested extension but legally I cannot do anything else.

*Phillips Petroleum Co, Iran, et al and Islamic Republic of Iran, Cases Nos 39 and 55, Chamber Two, Order of April 27, 1983, Dissenting Opinion of Shafei Shafeiei (June 1, 1983), reprinted in 2 Iran-US CTR 284 (1983-I):*

It is incumbent upon the Tribunal to provide all the parties to any given claim with sufficient time to defend its case properly. The interests of justice dictate that this Tribunal offer its sincere co-operation to the parties.

In your letter of 27 April 1983, issued in response to the request by the Agent of the Islamic Republic of Iran for an extension, you write:

Since there were already three extensions of time, it seems difficult to grant a new one. Moreover as the last given date was ordered by an Award, it is impossible to modify it without the consent of the parties.

I wonder to what extension your phrase, “three extensions of time” refers!

...

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↳ Therefore, by virtue of the facts briefly dealt with in this letter, I am obliged to point out that the reasons adduced in the Chamber's letter of 27 April 1983, issued in response to Mr. Eshragh's request for an extension, are entirely unjustified and that the Chamber's refusal of an extension is unconscionable on the grounds of justice and legality.

## 2 ( ) Tribunal Rules (1983), Article 19(2)

*The Cyrus Petroleum Ltd and Islamic Republic of Iran*, Case No 624, Chamber One, Order of May 30, 1985:

The Respondent on 17 January 1983 filed a Statement of Defence stating, *inter alia*, that it was unable to respond to the Statement of Claim, which it said was “totally vague, the relief sought is unknown, and the action allegedly taken by Respondent is rather obscure and unclear.” By Order filed 15 February 1983 Claimant was ordered to respond to these objections by 14 March 1983. Claimant failed to comply with that Order, or even to seek an extension of the time within which to do so. By further Order filed 31 August 1984, the Claimant was ordered to file a Response by 1 October 1984 and was informed that if a Response was not filed by that date the Tribunal would proceed to decide this case on the basis of the pleadings and documents submitted.

...

The Tribunal informs the Parties that it now intends to decide this case on the basis of the pleadings and documents before it.

(See also related Award No 230–624–1 above, n 38):

## 3 ( ) Tribunal Rules (1983), Article 19(3)

*Intrend Intl, Inc and Imperial Iranian Air Force*, Award No 59–220–2 (July 27, 1982) at 12, reprinted in 3 Iran-US CTR 110, 116 (1983–II):

Finally, in a Rejoinder filed 12 October 1982, the Air Force supplemented its Statement of Defence filed 20 April 1982 and added an additional counter-claim for Social Security insurance premium payments. The Tribunal notes that this counter-claim was filed six months after the Statement of Defence. Pursuant to Article 19 of its [1983] rules of procedure, the Tribunal can accept a late counter-claim if satisfied that the delay was justified under the circumstances, but in the present case the Tribunal finds no such justification and declines to accept the late counter-claim.

*William L Pereira Associates, Iran and Islamic Republic of Iran*, Case No 1, Chamber Three, Order of September 22, 1982:

In the Statement of Claim the Islamic Republic of Iran and the Ministry of Housing and Urban Development are named as Respondents. The Ministry of Housing and Urban Development as well as some other government ministries and agencies have filed Statements of Defence, two of which contain counter-claims.

On 12 July the Claimant filed a “Motion to exclude extraneous parties and strike improper pleadings,” stating that only the Ministry of Housing and Urban Development is proper Respondent in this case.

The Tribunal, however, sees no reason for not allowing the Islamic Republic of Iran to file Statements of Defence and/or Counter-claims through the ministries and agencies in question. The Claimant's Motion is therefore dismissed.

*Richard D Harza and Islamic Republic of Iran*, Award No ITL 14-97-2 (February 23, 1983) at 5, reprinted in 2 Iran-US CTR 68, 71 (1983-I):

No experts will be appointed to study the counter-claims relating to seismology insofar as those counter-claims were presented too late within the terms of Article 19(3) [of the 1983 Tribunal Rules], and our own Order of June, 1982 scheduling the proceedings. The use of our discretion under 19(3), to admit the late filing would be inappropriate in view of the uncertain and speculative nature of the alleged damages.

p. 437 *Blount Brothers Corp and Ministry of Housing and Urban Development*, Award No 74-62-3 (September 2, 1983) at 2-3, reprinted in 3 Iran-US CTR 225, 226 (1983-II):

On 31 January 1983, Claimant and MHUD filed their arguments and evidence.

On 1 March 1983, Gostaresh Maskan filed a Statement of Defence and sought to raise a counter-claim. MHUD also filed additional papers.

On 11 and 14 March 1983, Gostaresh Maskan filed additional material. Claimant objected to such late filings and moved to strike them from the proceedings. The hearing was held on 14 and 15 March 1983. During the course of the Hearing Gostaresh Maskan submitted a second counter-claim. The matter was submitted to the Tribunal at the conclusion of the Hearing.

By an Order of 19 April 1983, the Tribunal determined that the late filings of Gostaresh Maskan would be accepted, but that its late filed counter-claims would be rejected pursuant to Article 19(3) of the [1983] Tribunal Rules, no justification for the delay in presenting them having been shown. The Tribunal further decided that Claimant would have an opportunity to submit a reply to the accepted late filings, and it did so.

*TCSB, Inc and Islamic Republic of Iran*, Award No 114-140-2 (March 16, 1984) at 15, 23-24, reprinted in 5 Iran-US CTR 160, 168, 173 (1984-I):

As stated above, the Claimant was entitled to receive 255,205,242 rials for its supervisory services under the contract. It has already received 163,748,479 rials, including the 9,864,867 rials withheld for the 5.5 percent contract tax. From the balance of 91,456,763 rials still owing to the Claimant, 5.5 percent of the total amount due under the contract, representing the Iranian contract tax, must be deducted, because the parties agreed that it was to be withheld from all payments made to the Claimant, and it was in fact withheld from all such payments. 5.5 percent of 255,205,242 rials is 14,036,288 rials, of which 9,864,867 rials have already been withheld. Thus, 4,171,421 rials additional should be deducted. The Claimant is thus entitled to receive 87,285,342 rials from the Housing Organization.

...

The Housing Organization has also presented a counter-claim alleging, *inter alia*, that TCSB did not pay social insurance contributions due to the Social Security Organization in respect of TCSB's employees in Iran and owes a sum of money "as his due tax". The former allegation was elaborated upon in a memorial filed 11 November 1983, it appears from a "Supplement" filed on 29 December

1983 that the latter allegation was meant to refer to “taxation in respect of revenues arising out of its (i.e., TCSB's) operations.”

Under Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal has jurisdiction to decide

... any counter-claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counter-claims ... arise out of debts, contracts ... expropriations or other measures affecting property rights. ...

Accordingly, a distinction must be made, in particular, between legal relationships arising out of the application of the law to a situation in which either party individually finds itself and the contractual relationship between the parties to the contract *inter se*. In the present case, the Tribunal holds:

- i () that only the 5.5 percent tax withholdings referred to above may be said to arise out of the contractual relationship between the parties to the contract; and
- ii () that the remaining part of the taxes and social insurance contributions referred to in the counter-claim, in the absence of satisfactory evidence establishing the contrary, must be deemed to arise out of the application of the law to the contractor's particular situation and hence to be outside the jurisdiction of the Tribunal.

Since the 5.5 percent tax has been taken into account in the present Award, the tax and social security counter-claims must be dismissed for lack of jurisdiction.

p. 438 *American Bell Intl, Inc and Islamic Republic of Iran, Award No ITL 41-48-3 (June 11, 1984) at 16-18, reprinted in 6 Iran-US CTR 74, 83-84 (1984-II) (footnotes omitted):*

- 4. Issue: Does the Tribunal lack jurisdiction over any of the counter-claims on the ground that they do not arise out of the same contracts, transactions or occurrences which constitute the subject matter of the claims?

- (i) Counter-claims based on Contract No 112.

Respondents base their counter-claims in part on Contract Nos 112, 118 and 138; however, they do not specify which amounts are sought under each of these contracts.

ABII has not challenged the Tribunal's jurisdiction over the counter-claims insofar as they are based on the latter two contracts. The dispute concerns whether or not any counter-claim can be asserted on the basis of Contract No 112. More specifically, the issue is whether such a counter-claim can be held to arise out of “the same contract, transaction or occurrence that constitutes the subject matter of that national's claim,” as required under Article II, paragraph 1, of the Claims Settlement Declaration.

The three contracts now mentioned were entered into successively. The first contract, No 112, was a short term contract intended to cover ABII work under the Seek Switch Program during the negotiations of Contract No 118. The Government of Iran entrusted the carrying out of that program to one company only, originally AT & T and later in actual fact ABII. Thus it was apparently foreseen that all the successive contracts would go to ABII. The subject matters of the three contracts were closely interrelated, within the framework of the Seek Switch Program.

In light of these particular circumstances, the Tribunal finds that the linkage between all three contracts must be considered sufficiently strong so as to make them form one single “transaction”

within the meaning of the Claims Settlement Declaration.

Accordingly, the Tribunal *concludes* that it has jurisdiction over the counter-claims in so far as they are based on Contract No 112.

*Morrison-Knudsen Pacific Ltd and Ministry of Roads and Transportation*, Award No 143-127-3 (July 13, 1984) at 51-54, reprinted in 7 Iran-US CTR 54, 82-84 (1984-III):

Article II, paragraph 1, of the Claims Settlement Declaration gives the Tribunal jurisdiction over certain claims of nationals of the United States or Iran and over counter-claims which “arise out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim.”

It is clear from both this language and from the Tribunal Rules that the Tribunal's jurisdiction extends only to counter-claims which are presented against claimants. Therefore, to the extent that the counter-claims seek recovery from Cofraran, they must be dismissed.

...

Claimant also contends that Contract 81 constitutes the subject matter of its claim and that the Tribunal's jurisdiction is limited to counter-claims which arise out of the same contract. Consequently, Claimant argues, counter-claims based on Contracts 87 and 88 do not fall within the Tribunal's jurisdiction.

MORT contends that Contracts 81, 87 and 88 are all part of the same “transaction”, that the claims arise out of this transaction and, therefore, that the counter-claims arise out of the same transaction which constitutes the subject matter of this claim.

The Tribunal, however, cannot share the view that Contracts 81, 87 and 88 are part of one single transaction. Although an early intention, as reflected in MORT's letter of intent of 14 April 1976, was to treat the whole motorway project as one whole in the sense that all the four contracts contemplated were to be given to the consortium, this intention was later abandoned. Thus, by the time that Contract 81 was signed, the prospects for the remaining contracts was a matter to be negotiated. This is supported by the language of Article 2(3) of Contract 81, which provides as follows:

After the performance of *this* Contract, the EMPLOYER will have no other obligation towards the CONTRACTOR, except what may derive from EMPLOYER's Letters of Intent to the CONTRACTOR, No 6155 of 9 February 1975 and No 1045/2 of 14 April 1976 to the CONTRACTOR, and from any subsequent contracts or agreements the parties hereto may have entered into. (Emphasis supplied.)

...

The contracts were executed on different dates, and involved different services to be performed at different times. There is no relation between the disputes concerning Contract 81, on the one hand, and those concerning Contracts 87 and 88 on the other hand. Findings with respect to Contract 81 would have no effect on claims and defences made in connection with Contracts 87 and 88. That the Contracts may refer to one another or may even contemplate the execution of another does not necessarily make the linkage between them sufficiently strong so as to make them form one single transaction within the meaning of the Claims Settlement Declaration. *Compare American Bell International Inc. and The Government of the Islamic Republic of Iran*, Interlocutory Award No 41-48-3 (11 June 1984).

Therefore the Tribunal concludes that, to the extent that they arise out of Contacts 87 and 88, the counter-claims do not arise out of the same contract, transaction or occurrence which constitutes the subject matter of any of the claims.

*Anaconda-Iran, Inc and Islamic Republic of Iran, et al*, Case No 167, Chamber Three, Order of October 11, 1984:

Without prejudice to the final decision the Tribunal ... notes that the specific issue raised by the Agent of the Islamic Republic of Iran, a period of delay of one or two days in filing counter-claims, would not by itself ordinarily result in the dismissal of counter-claims.

*Behring Intl, Inc and Islamic Republic Iranian Air Force*, Award No ITM/ITL 52-382-3 (June 21, 1985) at 38, reprinted in 8 Iran-US CTR 238, 265 (1984-I):

The indisputable fact remains that Claimant invoked the jurisdiction of the Tribunal by filing a Statement of Claim here and, under the Claims Settlement Declaration and Tribunal Rules, Respondents were thus entitled to file certain counter-claims. While Claimant remains free to withdraw any and all of its claims for relief, such withdrawal can have no effect on the Tribunal's jurisdiction over the counter-claims, unless the Tribunal were to determine that it had no jurisdiction over the claims as originally filed. To date, the claims have not been withdrawn and in any event the Tribunal finds no basis for holding that they do not fall within the scope of its jurisdictional grant.

*Questech, Inc, and Ministry of National Defence of the Islamic Republic of Iran*, Award No 191-59-1 (September 25, 1985) at 38-40, reprinted in 9 Iran-US CTR 107, 134-36 (1985-II):

cc) Taxes

...

Pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal's jurisdiction over counter-claims is limited to those counter-claims "which arise[] out of the same contract, transaction or occurrence that constitutes the subject matter of" the main claim. The asserted obligation to pay taxes in this case is imposed not by the contract that is the subject matter of the claim, but by operation of the applicable Iranian tax law. The Respondent itself states that "[t]he claim is based on the taxation laws of the Islamic Republic of Iran." The obligation to pay taxes is a legal relationship that arises out of the application of the law to a factual situation of a person or legal entity rather than a contractual relationship that exists between the parties to a contract by virtue of that contract. For these reasons, the Respondent's counter-claim for taxes is outside the Tribunal's jurisdiction.

dd) Social security premiums

...

↳ Pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal's jurisdiction over counter-claims is limited to those counter-claims "which arise[ ] out of the same contract, transaction or occurrence that constitutes the subject matter of" the main claim. The asserted obligation to pay social security premiums in this case is imposed not by the contract that is the subject matter of the claim, but by operation of the applicable Iranian Social Security law. Any such obligation is, as the Tribunal found in Award No 114-140-2 of 16 March 1984 in *T.C.S.B., Inc., and Iran*, at 24, and confirmed in Award No 180-64-1 of 27 June 1985 in *Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran*, at 41, a "legal relationship arising

out of the application of the law to a situation in which either party individually finds itself” rather than a “contractual relationship between the parties to the contract *inter se*.” The Tribunal thus has no jurisdiction over the Respondent's counter-claim for social security premiums.

*International Technical Products Corp and Islamic Republic of Iran*, Award No 196–302–3 (October 28, 1985) at 29–30, reprinted in 9 Iran-US CTR 206, 226–27 (1985-II):

In its Memorial filed 2 January 1985, just 22 days before the Hearing, AFIRI sets forth for the first time several counter-claims for damages allegedly caused by ITP Export's breaches of the Civil Works Contract. These counter-claims were not timely filed, and no explanation for the delay has been provided. Tribunal Rules, Article 19, paragraph 3. The Tribunal orders that they be dismissed.

*Computer Sciences Corp and Islamic Republic of Iran*, Award No 221–65–1 (April 16, 1986) at 51–54, reprinted in 10 Iran US CTR 269, 309–11 (1986-I):

The Claimant contends that public law debts may not be offset against private law claims. Even if a tax counter-claim was justifiable as a claim for set-off, in the Claimant's view it is clear from Article II, paragraph 1, of the Claims Settlement Declaration that such a set-off is governed by the same jurisdictional standards as a counter-claim. According to the Claimant, Article 19, paragraph 3, of the Tribunal Rules subjects counter-claims and claims for the purpose of a set-off to the same jurisdictional restrictions.

The Tribunal determines that as far as its jurisdiction is concerned claims for set-off are generally governed by the same standards as counter-claims. The concept of set-off necessarily presupposes the existence of a claim that can be used for such set-off. When a respondent seeks to offset alleged tax arrears against contract claims, he can use his alleged right to the payment of taxes for set-off only if this right is an admissible claim under the Claims Settlement Declaration. As the Full Tribunal has decided in Case No A2, Decision DEC 1-A2-FT (13 Jan. 1982), the Claims Settlement Declaration does not grant the Tribunal jurisdiction over claims against nationals of either State party unless those claims are brought as counter-claims. Claims for taxes can thus only be used for set-off if they fulfil the requirements for counter-claims as laid down in Article II, paragraph 1, of the Claims Settlement Declaration. This conclusion is confirmed by the provision of Article 19, paragraph 3, of the Tribunal Rules which states that

... the Respondent may make a counter-claim or a claim for the purpose of a set-off, *if such counter-claim or set-off is allowed under the Claims Settlement Declaration* (emphasis added).

This provision incorporates by explicit reference the requirements of the Claims Settlement Declaration for counter-claims. The Claims Settlement Declaration does not mention set-off explicitly. But it is clear from a comparison of Article 19, paragraph 3, of the [1976] UNCITRAL Rules with that provision as modified in the Tribunal Rules that counter-claims and claims for the purpose of set-off must meet the same jurisdictional requirements. Article 19, paragraph 3, of the [1976] UNCITRAL Rules stipulates that

... the Respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of set-off.

Because the description of the qualification of admissible counter-claims in the Claims Settlement Declaration was different from the one in the [1976] UNCITRAL Rule, this qualification was modified accordingly. By substituting the two identical qualifications in the [1976] UNCITRAL Rules of counter-claims and claims for the purpose of set-off with the single reference to the Claims Settlement Declaration, Article 19, paragraph 3, of the Tribunal Rules makes clear that,

as under the original [1976] UNCITRAL Rule, both counter-claims and claims for the purpose of set-off are governed by the same jurisdictional standards.

...

The Tribunal has held in a number of cases that the obligation to pay taxes other than withholding taxes specifically provided for in the parties contract arises from the tax laws of Iran rather than from the contract, even where the contract otherwise identifies which contractual party is responsible for the payment of taxes. It consequently has dismissed, tax counter-claims other than counter-claims for such withholding taxes for lack of jurisdiction, see *International Technical Products Corporation et al* and *The Government of the Islamic Republic of Iran*, Final Award No 196–302–3; p. 29 (28 October 1985), and decisions cited therein. The Tribunal confirms these holdings in the present case and finds that the Ministry's tax counter-claim does not arise out of the Contracts, none of which required IACI or ISIRAN to deduct income tax from payments.

*American Bell Intl Inc, and Islamic Republic of Iran*, Award No 255–48–3 (September 19, 1986), reprinted in 12 *Iran-US CTR* 170, 225 (1986-III):

182. This counter-claim, as admitted by Respondents, was not raised until TCI's counter-claim Memorial submitted on 30 August 1985. Therefore it raises questions under Article 19, paragraph 3 of the Tribunal Rules which requires a counter-claim to be made “[i]n the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances.” In the assessment of the circumstances, among other things, the possible prejudice caused to Claimant by the late presentation of the counter-claim has to be taken into account as an important factor.

183. The Tribunal notes that the counter-claim was presented about five weeks before the Hearing, and four weeks before ABII was due to submit its rebuttal. As to the factual issues involved, this counter-claim belongs to one of the least complicated parts of the whole case. Thus the preparation of a defence would not have caused to ABII such hardships as would amount to undue prejudice, and such prejudice is not even alleged by Claimant. In view of this, and accepting that Respondents may not, at the time of the presentation of the Statement of Defence, have detected the evidence (mainly letters of ABII) supporting this counter-claim among voluminous documentary materials relating to the Seek Switch Program, the Tribunal decides that the late presentation of the Counter-claim was acceptable under the circumstances.

*Collins Systems Intl, Inc, and Navy of the Islamic Republic of Iran*, Case No 431, Chamber Two, Order of September 23, 1987:

The Tribunal notes two Counter-claims filed on 16 June 1987 by the Government of the Islamic Republic of Iran, The Islamic Republic of Iran Navy and Bank Tejarat naming as Counter-Respondents Collins Systems International (“Collins”) and City Bank of New York in one and Collins and Bank of America, International, Houston, Texas (“Bank of America”) in the other. The Tribunal also notes the Claimant's comments on these Counter-claims filed on 15 September 1987.

The Tribunal further notes that Bank Tejarat, the Government of the Islamic Republic of Iran, City Bank of New York and Bank of America are not Parties in this Case. Therefore, the Counter-claims against City Bank of New York and Bank of America cannot be admitted and neither Bank Tejarat nor the Government of the Islamic Republic of Iran have standing to assert counter-claims in this Case.

*Interfirst Bank Dallas, NA and Islamic Republic of Iran*, Decision No DEC 66–338–2 (October 9, 1987), reprinted in 16 Iran-US CTR 291 (1987-III):

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8. With regard to Bank Markazi's argument concerning counter-claim jurisdiction, the Tribunal has already held that claims can “only be used for set-off if they fulfil the requirements for counter-claims as laid down in Article II, paragraph 1, of the Claims Settlement Declaration.” *Computer Sciences Corporation and The Government of the Islamic Republic of Iran, et al.*, Award No 221–65–1 (16 April 1986); *Howard Needles Tammen & Bergendoff and The Government of the Islamic Republic of Iran, et al.*, Award No 224–68–2 (8 August 1986). However, in view of the fact that the Claim has been withdrawn the question of a possible set-off has become moot.

*Harris Intl Telecommunications Inc, and Islamic Republic of Iran*, Award No 323–409–1 (November 2, 1987), reprinted in 17 Iran-US CTR 31, 57–61 (1987-IV) (footnotes omitted):

#### c) Late Counter-claim

88. The Tribunal now turns to an examination of the counter-claim filed by the Ministry of Defence on 3 April 1986 on behalf of itself, the Islamic Republic of Iran, and Bank Melli, naming Harris and Chase Manhattan Bank as Respondents.

89. The Claimant and Chase Manhattan Bank contend that this counter-claim should be dismissed because it is untimely, because no reason has been offered for the delay in its filing, and because Chase Manhattan Bank is not a party to this Case.

90. Again, the principles guiding the Tribunal's determination of this issue are to be found in the Tribunal Rules. Article 19, paragraph 3, of the Rules require that a counter-claim be made

[i]n the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances.

91. In the normal course of events, then, a counter-claim must be contained in the Statement of Defence. When counter-claims are filed late, the Respondent has the burden of justifying the delay. Again, considerations of equality in treatment, prejudice to the other party, and delay of the proceedings underlie this requirement that delays be justified.

92. Consequently, the Tribunal has uniformly rejected late-filed counter-claims when it concludes that the delay was not justified under the circumstances, although it has occasionally rejected late-filed counter-claims without entering into such an analysis.

93. The Tribunal has been particularly reluctant to accept late-filed counter-claims which are filed shortly before the Hearing, during the Hearing, or after the Hearing. *Amman & Whitney and Ministry of Housing and Urban Development*, Award No 248–198–1, pp. 8–9 (25 Aug 1986), is a good example of the Tribunal's practice in this area. In that Case, one day after the Hearing, the Respondent filed a “counter-claim arising out of letter of guarantee” on behalf of itself and Bank Melli against the Claimant and Citibank of New York concerning a failure to make payment under a letter of guarantee securing an advance payment made to the Claimant under the contract in question. Neither Bank Melli nor Citibank was a party to the Case. The Tribunal rejected the Counter-claim, that

[A]side from any question as to the Tribunal's jurisdiction over a counter-claim thus formulated and the parties named in it, the Tribunal is bound to reject a

pleading filed not only considerably later than the Statement of Defence (see Article 19 and 20 of the Tribunal Rules), but, indeed, after the Hearing itself the more so since no explanation has been advanced as to why such a delay may be justified.

94. Indeed, cases are rare in which the Tribunal accepted late counter-claims. In *Starrett Housing Corp. and Government of the Islamic Republic of Iran*, Interlocutory Award No ITL 32-24-1, p. 35 (19 Dec. 1983), the Tribunal, without further explanation, admitted four counter-claims “[i]n accordance with Article 19, paragraph 3, of the Tribunal Rules ... although they were not included in the Statement of Defence” and not filed until approximately six weeks before the Hearing. But see Concurring Opinion of Howard M Holtzmann, *Starrett Housing Corp.*, *supra*, at pp. 45-46 (arguing that the late-filed counter-claims should not have been admitted). *Starrett*, however, is a unique case in many respects. Given the drawn-out nature of the proceedings in that case, the Tribunal may have concluded that prejudice to the Claimant was unlikely. In any event, *Starrett* represents the exception rather than the rule. ↵ The predominant practice of the Tribunal is that when it accepts a late-filed counter-claim it bases such a determination on an examination of the possible prejudice to the other party and the explanation, if any, for the delay.
95. A more representative example of this practice is *American Bell International, Inc. and Islamic Republic of Iran*, Award No 255-48-3, pp. 78-79 (19 Sep. 1986), in which the Tribunal accepted a late-filed counter-claim.

In the Case the Counter-claim was filed five weeks before the Hearing and four weeks before the Claimant's rebuttal was due. The Tribunal examined the possible prejudice to the Claimant that might result from the counter-claim, but concluded that there was little likelihood of prejudice because the counter-claim related to one of the least complicated portions of the case and because the Claimant had not alleged prejudice. Further, the Tribunal noted that the Respondent may not have been able to find the evidence supporting the counter-claim earlier. Consequently, the Tribunal accepted the counter-claim.

96. The Tribunal has been less hesitant to accept counter-claims which clarify or provide detail for previous timely-filed counter-claims, or amend previous timely-filed counter-claims.
97. In applying these principles to the Case at hand, the Tribunal notes that this Counter-claim was filed for the first time more than 39 months after the Statement of Defence. Thus, it is apparent that this Counter-claim does not comply with Article 19, paragraph 3, unless the delay can be justified by Iran.
98. The Tribunal notes, however, that this Counter-claim may be distinguished from other late-filed counter-claims as it was originally filed as several direct claims by Bank Melli against Chase Manhattan Bank in Cases Nos 510, 534, 540, 541, 543, 548, and 556. These direct claims were later determined to be outside of the Tribunal's jurisdiction in Award No 108-A-16/582/591-FT, p. 21 (25 Jan. 1984). The Tribunal, however, expressly left open the possibility that the claims might be filed as counter-claims. It stated that

Whether an Iranian bank claim on a standby letter of credit can be joined as a counter-claim against the relevant United States contractor is a matter that each Chamber will have to deal with in accordance with Tribunal Rules concerning jurisdiction over counter-claims. It is up to the Chambers to take the necessary steps in each case, in accordance with the Tribunal Rules and this decision.  
*Id.* at 21.

99. By Order filed on 2 July 1985, Chamber One terminated Cases Nos 510, 534, 536, 540, 541, 543, 548, and 556, among a series of other bank claims, in accordance with Article 34 of the Tribunal Rules. In those Orders the Tribunal drew the Parties' attention again to a paragraph of its Order filed on 24 April 1985 providing: "[i]f a letter of credit involved in the present claim relates to any other claim pending before the Tribunal, then the consequences of that letter of credit should be decided as part of the decision on that other claim, and any request to submit a counter-claim with respect thereto should be made in the case where that other claim is pending." It further announced that it would consider as soon as possible what guidance could be given for the submission of such requests.
100. The Ministry of Defence alleges that the Tribunal failed to issue any clear guidelines concerning the filing of such counter-claims. This is incorrect, at least as far as the Cases in question are concerned. On 16 August 1985, following the Termination Orders and in response to a request of the Agent of the Islamic Republic of Iran for further guidance, the Tribunal, again drawing the Parties' attention to the above-quoted paragraph, stated that the request to submit a counter-claim must be made by a Party to the Case in which the underlying, related claim is pending, and filed in the Case while such Case is still pending. The Tribunal did not specify the precise form in which the request should be made but left this to the discretion of the Parties. It noted, however, that such requests "must be timely filed, not later than six months from the date of this communication."
101. As far as the Cases at issue are concerned, this period expired on 16 February 1986. The Counter-claim filed on 3 April 1986 was therefore submitted late with no justification for the delay offered by the Respondent. In such a case the Tribunal's practice is clear. To permit ↘ such late counter-claims might prejudice the Claimant and would in any event run directly contrary to the plain meaning of Article 19, paragraph 3, of the Tribunal Rules. Accordingly, the Counter-claim is dismissed as untimely.

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*Houston Contracting Co and National Iranian Oil Co*, Award No 378-173-3 (July 22, 1988), reprinted in 20 Iran-US CTR 3, 36-38 (1988-III):

115. The Tribunal has consistently held that it has no jurisdiction over counter-claims relating to allegedly unpaid taxes, when the obligation to pay such taxes does not arise out of the contract, transaction or occurrence that constitutes the subject matter of the claim in the same proceedings. (See *International Technical Products Corp. and Islamic Republic of Iran*, Award No 196-302-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 206; *General Dynamics Telephone Systems Center and Islamic Republic of Iran*, Award No 192-285-2 (4 October 1985), reprinted in 9 Iran-U.S. C.T.R. 153; *Questech, Inc. and Ministry of National Defence*, Award No 191-59-1 (25 September 1985); reprinted in 9 Iran-U.S. C.T.R. 107; *Sylvania Technical Systems, Inc. and Islamic Republic of Iran*, Award No 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298; *T.C.S.B., Inc. and Iran*, Award No 114-140-2 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160.) The three Chambers fully concurred on

this finding. The Tribunal does not see any reason to depart from these precedents in the instant case.

116. The two States Parties to the Algiers Accords deliberately refrained from giving jurisdiction to the Tribunal over claims of one of them against nationals of the other (see Case A12, Decision No DEC 1-A2-FT (26 January 1982), *reprinted in* 1 Iran-U.S. C.T.R. 101.) This exclusion obviously extends to claims arising out of unpaid taxes. The only exception to this negative rule relates to counter-claims. In order to be admissible, such counter-claims, however, have to meet the conditions set forth in the Claims Settlement Declaration, namely to arise out “of the same contract, transaction or occurrence that constitutes the subject matter” of the claim of the national who initiated the proceedings (Article II, paragraph 1).
117. The obligation to pay taxes finds its source in the domestic law of the State concerned. In the case of income taxes, it arises out of the earning of revenues by a person subject to the law. The fact that these revenues are earned as the result of the performance of a contract is immaterial: it does not change the legal nature of the obligation, which remains statutory and not contractual, and creates no legal link between such an obligation and the contract which allowed the revenue to be earned. It cannot be said, therefore, that the obligation to pay taxes “arises out of” this contract and, accordingly, the conditions set forth by the Claims Settlement Declaration for the admissibility of a counter-claim for allegedly unpaid taxes are not fulfilled. The same is true if reference is made to the “transaction” to which the contract relates since the obligation to pay taxes exists independently of the dealings between the parties to a transaction. The fact that such parties include the amounts to be paid as taxes among the costs to be taken into consideration for the calculations of the price of the contract does not suffice to change the legal situation: as with all the other costs, such as the cost of the items to be delivered or labor costs, the taxes to be paid do not constitute a legal obligation of one party to the contract vis-a-vis the other.
- ...
120. On the other hand, the situation is quite different if the contract includes provisions which create specific obligations, which do not exist in the law, of one party towards the other, in relation to the burden of the taxes to be paid, or provisions which set forth conditions for payment of amounts earned under the contract in relation to the payment of taxes. Examples of such provisions are those, very frequently encountered, that a certain percentage (usually 5.5%) of the amounts due will be withheld by the buyer and directly paid by it to the Ministry of Economic Affairs and Finance, or that the buyer will reimburse the seller the amount of the taxes paid by it, either as a general rule, or if there is an increase in the rate of these taxes after the execution of the contract. Like all other contractual obligations, ↴ such provisions must be enforced by the Tribunal and may be the subject matter of counter-claims. The counter-claim in this case is not based upon a provision of this kind and, accordingly, is dismissed.

*The First National Bank of Boston and Islamic Republic of Iran*, Decision No DEC 83-202-2 (September 19, 1988), Separate Opinion of Seyed Khalil Khalilian (September 23, 1988) at 3-4, *reprinted in* 19 Iran-US CTR 310, 311-12 (1988-II):

Distinction between the concepts of “Set-off” and “Counter-claim”

“Set-off. Remedy employed by defendant to discharge or reduce plaintiff's demand by an opposite one arising from transaction *extrinsic to plaintiff's cause of action*. *Edmonds v. Stratton*, MO. APP., 457 S.W. 2d 228, 232.” *Black's Law Dictionary*.

“Set-off. A defence or an independent demand made by the defendant to counterbalance that of plaintiff, in whole or in part. *Mack v. Hugger Bros. Constr.* S. 153 Tenn. 260, 283 SW 448, 46 ALR 389.” *Ballentine's Law Dictionary*.

“A counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, 20 Am J2d Council section 2.” *Ibid*.

“When two persons are indebted to one another, their mutual debts are to be set off in the manner provided for in the following Articles.” *Civil Code of Iran, Article 294*.

“In this connection, it will be immaterial whether the two debts arise from the same or different causes, because a difference of cause does not lead to a different effect. Therefore, [even] if one of those two debts arises from a sale and the other from a loan or lease, the two debts are set off against one another.” Emani, *Hoquq-e Madani*, vol. I, p. 345.

“La compensation s'opère de plein droit par la seule force de la loi, même a l'insu des débiteurs; les deux dettes s'éteignent réciproquement, à l'instant où elles se trouvent exister à la fois, jusqu'à concurrence de leurs quotités respectives.” Article 1290, *French Civil Code*.

“No counter-claim is required if the defendant wants to set off liquidated debt against the plaintiff's claim. Such a set-off, called compensation legale, is considered a *defence on the merits* (Dalloz, *Repertoire de procedure civile et commerciale*, Demande reconventionnelle, at No 14).” P Herzog, *Civil procedure in France*, Martinus Nijhof, 1967, p. 277.

“Set-off. Generally, in set-off, it is not necessary that the defendant's claim arise from the contract or transaction sued on or be connected with the subject matter thereof.” 80 C.J.S., Section 35.

“The distinguishing feature of counter-claim, as *opposed to set-off*, is that it arises out of the same transaction as that described in the complaint. ...” *Ibid.*, Section 36.

The Distinction between the two concepts of “counter-claim” and “set-off” can be clearly understood from the legal texts cited above. That is to say, the counter-claim is an independent claim which is brought vis-à-vis the original claim. In other words, the original claim provides the motive or justification for bringing the counter-claim, and the latter must therefore be related to it. As for the set-off, it is brought as a distinct claim as well, but it indicates the existence of a debt which in itself, by the operation of law, sets off and extinguishes all or part of the claimant's claims in advance. Thus, the legal set-off constitutes a substantive rule and principle and, as we saw in the above cited texts, it is one of the respondent's grounds of defence.

*CBS Inc and Islamic Republic of Iran*, Award No 486-197-2 (June 28, 1990), reprinted in 25 Iran-US CTR 131, 149-50 (1990-II):

56. The Tribunal notes that, apart from alleging that the foreign managers violated Article 141 of the Commercial Code of Iran by not calling an extraordinary general meeting of the shareholders after CBS SSK had lost over 50 percent of its share capital, CBS SSK does not indicate the acts and omissions for which it reproaches the foreign managers, and that allegedly led to the damages it claims to have suffered. At any rate, CBS SSK tendered no evidence to prove its alleged damages. Accordingly, the Tribunal must dismiss CBS SSK's Counter-claims for lack of proof. In view of this finding, the Tribunal need not decide the jurisdictional issues related to these Counter-Claims.

*Islamic Republic of Iran and United States of America* (Case No B1 (Counter-Claim)), Award No ITL 83-B1-FT (September 9, 2004) (footnotes omitted):

97. Article 19(3) of the [1983] Tribunal Rules provides that “the respondent may make a counter-claim or rely on a claim for the purpose of a set-off if such counter-claim or set-off is allowed under the Claims Settlement Declaration.” This could be read merely as confirming that the Claims Settlement Declaration governs which counter-claims are permitted; pursuant to this interpretation, Article 19(3) of the [1983] Tribunal Rules does not provide any additional information as to whether counter-claims are permitted under Article II, paragraph 2, of the Claims Settlement Declaration.
98. On the other hand, Article 19(3) of the [1983] Tribunal Rules could be read as indicating that official counter-claims are permitted so long as the substantive claim made therein is of the type that could be heard by the Tribunal under Article II, paragraph 2, of the Claims Settlement Declaration, i.e. a claim of one State against the other “arising out of contractual arrangements between them for the purchase and sale of goods and services.” Therefore, according to this second interpretation, Article 19(3) of the [1983] Tribunal Rules would confirm that a counter-claim that could have been filed as an autonomous claim under Article II, paragraph 2, of the Claims Settlement Declaration would fall within the Tribunal's jurisdiction.
99. The Tribunal does not consider it necessary to decide which of these interpretations should be adopted; suffice it to say that consideration of Article 19(3) of the [1983] Tribunal Rules does not provide a clear answer to the question of the Tribunal's jurisdiction over official counter-claims.
100. It may also be noted that Article 19(3) of the [1983] Tribunal Rules is a modified version of Article 19(3) of the [1976] UNCITRAL Rules, which provides that “the respondent may make a counter-claim arising out of the same contract.” It appears doubtful that the modification of Article 19(3) of the [1976] UNCITRAL Rules was intended to prevent counter-claims arising out of the same contract as the claim. Rather, it seems that this modified version was adopted only to ensure that Article 19(3) conformed with the special jurisdictional regime of Article II, paragraph 1, of the Claims Settlement Declaration. First, the modification was adopted in response to the suggestion of the Iranian Members that the defence of set-off be allowed even if that set-off did not arise out of the same contract, transaction or occurrence that formed the subject matter of the national's claim. Second, because Article II, paragraph 1, of the Claims Settlement Declaration provides that claims and counter-claims must arise out of “debts, contracts ..., expropriations or other measures affecting property rights,” whereas Article 19(3) of the [1976] UNCITRAL Rules only refers to “contract[s],” Article 19(3)'s counter-claim authorization would otherwise have been inconsistent with the terms of the Claims Settlement Declaration absent modification. This being noted, even if the history of the modifications to Article 19(3) of the [1976] UNCITRAL Rules shows that the Tribunal's concerns were related to Article II, paragraph 1, of the Claims Settlement Declaration, it still does not tell us how—in the face of a general reference to the Claims Settlement Declaration by Article 19(3) of the Tribunal Rules—Article II, paragraph 2, of the Claims Settlement Declaration is to be interpreted. Therefore, the Tribunal cannot draw any firm conclusion from the history of the modifications to Article 19(3) of the [1976] UNCITRAL Rules.
101. In light of the foregoing, the Tribunal finds that the context of Article II, paragraph 2, of the Claims Settlement Declaration does not provide a clear answer to the question of the

Tribunal's jurisdiction over official counter-claims.

p. 447 **4 ( ) Tribunal Rules (1983), Article 19(4)**

*Herman Blum Consulting Engineers, Inc and Islamic Republic of Iran*, Case No 138, Chamber One, Order of September 20, 1982:

The Respondents in this case are hereby ordered to submit to the Tribunal by 15 December 1982 their Rejoinder to the Claimant's Reply filed on 9 August 1982. The Respondents are requested in particular to substantiate the basis for the counter-claim.

## Notes

- 1 The so-called “look-sniff” arbitrations arising from trading on international commodity markets are, in practice, an exception. N Blackaby and C Partasides with A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (5th edn 2009) 378. On the function and role of written submissions in international arbitrations, see generally 378–84.
- 2 See *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules*, UNCITRAL, 8th Session, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 173 (Commentary on Draft Article 13); *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 173 (Commentary on Draft Article 17). On Article 3, see Chapter 10.

For a general discussion on the UNCITRAL's use of the statement of claim and the notice of arbitration as compared with other arbitral rules, see G Born, *International Commercial Arbitration* (2009) 1795–800.

- 3 Note that the relevance of the distinction may be limited in domestic law. See M Aden, *Internationale Handelsschiedsgerichtsbarkeit* (1988) 234.
- 4 Corresponding Article 18 of the 1976 UNCITRAL Rules provides:

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
2. The statement of claim shall include the following particulars:
  - a ( ) The names and addresses of the parties;
  - b ( ) A statement of the facts supporting the claim;
  - c ( ) The points at issue;
  - d ( ) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

- 5 See *Jonathan Ainsworth* (1983 Tribunal Rules), reprinted in section 2(D)(2). If the parties specify that a non-written statement of claim shall suffice, they should modify Article 20 accordingly. Only in special situations (eg, so-called quality arbitrations) can exceptions to the requirement of a written statement of claim be recommended. In the UNCITRAL Model Law, the corresponding provision has been intentionally worded so as not to preclude the potential sufficiency of a non-written “statement of claim.” See H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 646–8. Article 23(1) of the Model Law, as amended, provides as follows:

Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall

state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

6 An express sentence to this effect was added to the 2010 UNCITRAL Rules. As the *travaux préparatoires* explain:

The purpose of that sentence was to allow a claimant to postpone its decision on whether its notice of arbitration constituted a statement of claim until the time the arbitral tribunal required the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. It was said that that provision was useful in practice, as it clarified that a party did not need to produce a statement of claim if it considered that its notice of arbitration already fulfilled that purpose.

*Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session* (New York, February 9–13, 2009), UNCITRAL, 42nd Session, UN Doc A/CN.9/669, at 6, para 19 (2009).

7 The words “provided that the notice of arbitration also complies with the requirements of paragraphs 2, 3, and 4 of this article” were added to the 2010 UNCITRAL Rules “to clarify that a notice of arbitration treated as a statement of claim should also comply with the requirements of ... article 20, paragraphs (2) to (4).” *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.154.Add.1 at 3, para 5 (2009). Whereas some questioned the need for such language since the arbitral tribunal has discretion to address the problem of an incomplete statement of claim, others saw value in expressly stating the condition. UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 6–7, para 20–22.

8 See N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration*, n 1, 383.

9 P Sanders, “Commentary on UNCITRAL Arbitration Rules,” (1977) II Ybk Commercial Arb 192. See also K Rauh, *Die Schieds- und Schlichtungsordnungen der UNCITRAL* (1981) 83. See also *Arthur Young & Co* (1983 Tribunal Rules), reprinted in section 2(D)(1).

10 See M Aden, *Internationale Handelsschiedsgerichtsbarkeit*, n 3, 233.

11 *Report of the UNCITRAL*, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/10017, para 116 (1975), reprinted in (1975) VI UNCITRAL Ybk 24, 36. Draft Article 16(1) of the Preliminary Draft envisaged in a mandatory form that “all relevant documents” shall be annexed to the statement of claim together with the contract.

12 See H van Houtte, “Conduct of Arbitral Proceedings,” in P Šarčević (ed), *Essays on International Commercial Arbitration* (1989) 113, 121 (“A wise claimant presents all relevant facts and documents at the first stage because failure to do so will inevitably give the respondent opportunities to create delays.”).

13 See 1983 Rules of Procedure of the Iran–US Claims Tribunal, art 18(2), reprinted in Appendix 5. See also H Holtzmann, “Fact-Finding by the Iran–United States Claims Tribunal,” in R Lillich (ed), *Fact-Finding before International Tribunals* (1991) 101, 103.

14 In revising the UNCITRAL Rules, the Working Group decided to use the phrase “contact details,” instead of the word “addresses,” to ensure consistency with Article 3 of the Rules. *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth Session* (New York, February 5–9, 2007), UNCITRAL, 40th Session, UN Doc A/CN.9/619, at 28, para 148 (2007).

15 For discussion on potentially available types of relief, see T Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (2010) 306–7.

16 The requirement to identify the “legal grounds or arguments supporting the claim” is new to the 2010 Rules. Its inclusion was thought to be important in light of the various pleading practices that existed under different legal systems. UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 28, para 149–150. An early version of Article 20 included the phrase “legal principles,” which was considered to be too vague and was thus replaced by the final language “legal grounds or arguments.” *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.145/Add.1 at 6, para 12 (2006); UNCITRAL, 40th Session, UN Doc A/CN.9/619, at 28, para 149–150.

17 See N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration*, n 1, 345 (“The UNCITRAL Rules clearly envisage that the initial written pleadings submitted by the parties are not to be considered final and definitive statements of the parties’ respective positions.”).

18 *Report of the Secretary-General: Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade*, UN Doc A/CN.9/97 (1974), reprinted in VI UNCITRAL Ybk 163, 173 (1975) (Draft Article 16(2)(b)).

19 Indeed, the Statement of Claim must at least inform the arbitral tribunal of “the essence of the claim.” See *United Parcel Service of America, Inc* (1976 Rules), para 127; and *Ethyl Corp* (1976 Rules); both reprinted in section 2(C). See also *United*

*States and Islamic Republic of Iran*, Case No A/28; and *Islamic Republic of Iran and United States*, Case No B1 (1983 Tribunal Rules); both reprinted in section 2(D)(2).

- 20 Note, however, that the governing arbitration law may impose heightened requirements. For example, the Turkish Act on International Arbitration, based on the UNCITRAL Model Law, requires the amount of the dispute to be included in the statement of claim. M Ozsunay, “Chapter III: The Arbitration Procedure: Principles and Rules of the UNCITRAL Model Law as Essentially Adopted by the Turkish Act on International Arbitration,” in C Klausegger et al (eds), *Austrian Arb Ybk* 2008 (2008) 358.
- 21 *United Parcel Service of America, Inc* (1976 Rules), para 127, reprinted in section 2(C).
- 22 See Chapter 15. Because of the flexibility needed with regard to the application of the Article 29(5) “points at issue” requirement, the utility of this requirement has been questioned with reference to the practice of the Iran–US Claims Tribunal. See S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992) 85 (“other arbitral tribunals applying the UNCITRAL Rules would do well to follow the Tribunal’s practice declining to attach any special significance to this part of the statement of claim.”).
- 23 *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 173 (Commentary on Draft Article 17) (describing nearly identical Article 18(1) of the 1976 UNCITRAL Rules).
- 24 UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 28, para 147.
- 25 An earlier version of the rule used the words “evidentiary materials,” but the Working Group reverted back to “other evidence,” as used in the 1976 UNCITRAL Rules, because that term was believed to “cover[] all evidence that could be submitted at the stage of the statement of claim, whereas the term ‘evidentiary materials’ might be construed in a more limitative manner, for instance, excluding testimony or written witness statements.” UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 7, para 24.
- 26 *Report of the UNCITRAL*, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/10017, para 116 (1975), reprinted in (1975) VI UNCITRAL Ybk 24, 36 (commenting on a corresponding provision of the 1976 UNCITRAL Rules similarly discretionary).
- 27 UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 152.
- 28 Compare to Article 41(c) of the 2002 WIPO Rules and Article 15.6 of the 1998 LCIA Rules.
- 29 UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 153.
- 30 UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 153. Castello notes that “the more forceful language” in Article 20(4) is “partly justified by the Working Group’s decision to require a response to the notice of arbitration, so that the claimant will be aware of the defence before it has to submit supporting documents with its statement of claim.” J Castello, “UNCITRAL Rules,” in F Weigand (ed), *Practitioner’s Handbook on International Commercial Arbitration* (2nd edn 2009) 1478.
- 31 Waincymer observes that “[i]t is highly desirable that international arbitration force early submission of arguments and documents on which a party intends to rely to minimise delay and surprise and help the other party prepare and determine its final position, including as to settlement.” J Waincymer, “The New Uncitral Arbitration Rules: An Introduction and Evaluation,” (2010) 14 *Vindobona J Intl Commercial Law and Arb* 223, 239. See also J Castello, “Unveiling the 2010 UNCITRAL Arbitration Rules,” (May/October 2010) 65 *Dispute Resolution J* 147, 152.
- 32 See *Jonathan Ainsworth* (1983 Tribunal Rules), Order, reprinted in section 2(D)(2). Reference to an “amendment” of the statement of claim in accordance with corresponding Article 18 of the 1976 UNCITRAL Rules seems to imply that the existing submission did not amount to a statement of claim; if it had, any amendment would have been considered under Article 20 of the 1976 UNCITRAL Rules. See also *Questech, Inc* (1983 Tribunal Rules), reprinted in section 2(D)(2) (observing that corresponding Article 18 of the 1983 Tribunal Rules could be viewed as establishing minimum requirements). For a description of a statement of claim that was not inadequate under the 1983 Procedural Rules of the Iran–US Claims Tribunal, see *Amoco Iran Oil Co* (1983 Tribunal Rules), reprinted in section 2(D)(2).
- 33 Article 30(1) provides that: “If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:
- a () The claimant has failed to communicated its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so[.]”
- For an example under the 1983 Procedural Rules of the Iran–US Claims Tribunal, see *Cyrus Petroleum Ltd* (1983 Tribunal Rules), reprinted below, section 2(D)(2).
- 34 See K Rauh, *Die Schieds- und Schlichtungsordnungen der UNCITRAL*, n 9, 84, and the *Mishik Movsession* (1983 Tribunal Rules); *Kay Lerner* (1983 Tribunal Rules); and *Jonathan Ainsworth* (1983 Tribunal Rules); all reprinted in section 2(D)(2).
- 35 One example from the practice of NAFTA tribunals is the *Methanex* case. There, various portions of the claimant’s original

and amended statement of claim were found to fail the jurisdictional test under Article 1101(1) of the NAFTA. As an alternative to rejecting the claimant's amended statement of claim, the tribunal ordered the claimant to file a "fresh pleading" consistent with its jurisdictional ruling and Articles 18, 20, and 22 of the 1976 UNCITRAL Rules. See *Methanex Corp* (1976 Rules), Partial Award and Communication regarding Interpretation, reprinted in section 2(C).

36 See generally, N Blackaby and C Partasides, n 1, at 378–80.

37 See *Kay Lerner* (1983 Tribunal Rules), reprinted in section 2(D)(2).

38 In *Cyrus Petroleum*, the Iran–US Claims Tribunal dismissed the claim, *inter alia*, on the ground that "[n]either in the statement of claim nor in subsequent filings does the Claimant detail the substance of its allegations," but (as the quotation implies) the claimant had been given ample time to correct the defects in his statement of claim. *The Cyrus Petroleum Ltd and The Islamic Republic of Iran*, Award No 230–624–1 (May 2, 1986), reprinted in 11 Iran-US CTR 70, 71 (1986-II). In *Re Helali* (1983 Tribunal Rules), reprinted in section 2(D)(1), the Registry of the Iran–US Claims Tribunal refused to file an unclear claim at the outset. See also J van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (1991) 123.

39 See G Aksén, "The Iran-United States Claims Tribunal and the UNCITRAL Rules—An Early Comment," in J Schultz and A van den Berg (eds), *The Art of Arbitration* (1982) 6.

40 See 1983 Rules of Procedure of the Iran–US Claims Tribunal, reprinted in Appendix 5. Originally, the particulars concerning the statement of claim, many of which are now defunct, were contained in the Administrative Directives, but were later transferred to the Tribunal Rules when they were adopted. The Administrative Directives in question are annexed to G Aksén, "The Iran-United States Claims Tribunal and the UNCITRAL Rules," n 39.

41 According to Article I of the Claims Settlement Declaration, no claim could be filed until the expiration of a six-month settlement period ending July 19, 1981, which could be "extended once by three months at the request of either party." In Administrative Directive No 1 the period was extended, by agreement between the two governments, by three months. Therefore, no claim could be filed before October 20, 1981 or after January 20, 1982. See note 1 to Article 18 of the 1983 Rules of Procedure of the Iran–US Claims Tribunal, reprinted in Appendix 5.

42 See G Aksén, "The Iran-United States Claims Tribunal and the UNCITRAL Rules," n 39, 10.

43 G Aksén, "The Iran-United States Claims Tribunal and the UNCITRAL Rules," n 39, 7.

44 See H van Houtte, "Conduct of Arbitral Proceedings," n 12, 113, 121 ("A wise claimant presents all relevant facts and documents at the first stage because failure to do so will inevitably give the respondent opportunities to create delays."). In this spirit, the Iran–US Claims Tribunal has amended the provision in question to make it "advisable" to annex documentary evidence to the statement of claim. See para 2 of Article 18 of the 1983 Tribunal Rules. See H Holtzmann, "Fact-Finding by the Iran-United States Claims Tribunal," in R Lillich (ed), *Fact-Finding before International Tribunals* (1991) 101, 103.

45 This Article is silent on the permissibility of cross claims. For a discussion on the treatment of cross claims in UNCITRAL proceedings, see T Webster, *Handbook of UNCITRAL Arbitration*, n 15, 314–15.

46 Corresponding Article 19 of the 1976 UNCITRAL Rules provides:

1. Within a period of time determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

47 See Chapter 16, section 3.

48 Such modifications have occurred in the arbitration process before the Iran–US Claims Tribunal, which involves many respondents who must reply to several claims. Article 19(1) of the 1983 Tribunal Rules sets the time limit at 135 days.

49 See Chapter 10, section 2, for relevant discussion on Article 3.

50 See N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration*, n 1, 383 ("While a claimant should know how long it will take to prepare its initial written pleading (and indeed will often delay starting the arbitral until it is ready to do so) the respondent may not be able to make a realistic evaluation of how long it will take to prepare its answer until

- it has seen the written material delivered by the claimant.”). In the Iran–US Claims Tribunal, where the provision on extensions has been incorporated in Article 19(1) of the modified 1976 UNCITRAL Rules, reprinted in Appendix 5, extensions even of the 135-day period have been rather frequent, probably due to the somewhat unusual nature of this arbitration process. See also S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice*, n 22, 86 (“Iranian respondents’ deadlines were often extended for periods that added up to several years.”). The relevant practice of that Tribunal is critically discussed by J Selby and D Stewart, “Practical Aspects of Arbitrating Claims Before the Iran–United States Claims Tribunal,” (1984) 18 Intl Lawyer 211, 221. Some of the US-appointed arbitrators have also demonstrated their criticism by dissenting to orders granting extensions, while Iranian arbitrators have occasionally held that the Tribunal has been too strict in rejecting extension requests. See Orders issued in *Pepsico* (1983 Tribunal Rules); and *Phillips Petroleum* (1983 Tribunal Rules); and Dissenting Opinions attached to the Orders (1983 Tribunal Rules); all reprinted in section 3(D)(1).
- 51 According to the 1983 Tribunal Rules, note 1 to Article 19: “In determining and extending periods of time pursuant to this Article, the arbitral tribunal will take into account (i) the complexity of the case, (ii) any special circumstances, including demonstrated hardship to a claimant or respondent, and (iii) such other circumstances as it considers appropriate.” 1983 Rules of Procedure of the Iran–US Claims Tribunal, Notes to Article 19, reprinted in Appendix 5.
- 52 According to Article 30(1)(b): “If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause ... The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant’s allegations; the provisions of this subparagraph also apply to a claimant’s failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.”
- 53 *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 173 (Commentary on Draft Article 18(2)). On Article 23(1) of the UNCITRAL Model Law, where both the claim and defence are dealt with in the same provision, see n 5.
- 54 See, eg, *Cyrus Petroleum Ltd* (1983 Tribunal Rules), reprinted in section 3(D)(2).
- 55 On the desired contents, see T Webster, *Handbook of UNCITRAL Arbitration*, n 15, 313.
- 56 See Article 19(2) of the 1983 Tribunal Rules of the Iran–US Claims Tribunal, reprinted in Appendix 5.
- 57 *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), reprinted in (1976) VII UNCITRAL Ybk 166, 173 (Commentary on Draft Article 18(2)) (commenting on corresponding Article 19(2) of the 1976 UNCITRAL Rules which was substantially similar in content).
- 58 Compare *United Parcel Service of America, Inc* (1976 Rules), at para 20, (postponing filing of statement of defence because respondent’s jurisdictional objections were “so extensive”) with *Canfor Corp* (1976 Rules), para 49; both reprinted in section 3(C) (requiring filing of statement of defence setting forth all jurisdictional objections because respondent “ha[d] not presented the Tribunal with all of its jurisdictional arguments and has made [a] reservation of rights [to raise jurisdictional objections]”).
- 59 See discussion in section 2(B)(2).
- 60 See J Castello, “UNCITRAL Rules,” n 30, 1481.
- 61 For a general discussion on counterclaims and set-offs in arbitral proceedings, see N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration*, n 1, 383–4.
- 62 See, eg, B Garner (ed), *Black’s Law Dictionary* (9th edn 2009) 402, 1496.
- 63 P Sanders, “Commentary on UNCITRAL Arbitration Rules,” n 9, 205. See also I Dore, *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis* (1986) 73, n 76. This has been confirmed in the practice of the Iran–US Claims Tribunal. See *Behring Intl, Inc* (1983 Tribunal Rules); and *Interfirst Bank Dallas* (1983 Tribunal Rules); both reprinted in section 3(D)(3). According to Article 32(2)(a) of the UNCITRAL Model Law, as amended, “[t]he arbitral tribunal shall issue an order for the termination of the arbitral proceedings when: (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute. ...” Presumably the existence of a counterclaim would normally mean such “a legitimate interest.” For the discussion of whether the Tribunal has jurisdiction over counterclaims brought by state parties, see *Islamic Republic of Iran and United States*, Case No B1 (Counterclaim) (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 64 The Iran–US Claims Tribunal has confirmed that a counterclaim otherwise falling within its jurisdiction is within that jurisdiction even if it exceeds the amount of the claim. See A Avanesian, *Iran–United States Claims Tribunal in Action* (1993) 63–4. The *Gould Marketing* case (1983 Tribunal Rules), which led to an award against the US party on the basis of counterclaims, is discussed in Chapter 2, in connection with Article 17(1) (the tribunal’s power to conduct the proceedings as appropriate).
- 65 See *Collins Systems Intl, Inc* (1983 Tribunal Rules); and *Morrison–Knudsen Pacific Ltd* (1983 Tribunal Rules); both reprinted

- in section 3(D)(3). However, if a state or government is a party, it presumptively does not matter through which legally non-independent state entity a counterclaim is asserted. See also *William L Pereira Associates, Iran* (1983 Tribunal Rules), reprinted in section 3(D)(3). As one investment tribunal observed: “It is a cardinal principle relating to the bringing of counterclaims ... that the necessary parties to the counterclaim must be the same as the parties to the primary claim.” *Saluka Investments B V and Czech Republic*, Decision on Jurisdiction over the Czech Republic’s Counterclaim (May 7, 2004) (PCA administered, 1976 UNCITRAL Rules, Netherlands-Czech Republic BIT), at 11, para 49.
- 66 *Harris Intl Telecommunication, Inc* (1983 Tribunal Rules), para 91, reprinted in section 3(D)(3).
- 67 See, eg, *Intrend Intl* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 68 See, eg, *International Technical Products* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 69 See, eg, *Anaconda-Iran, Inc*, (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 70 See *American Bell Intl, Inc* (1983 Tribunal Rules), Award No 255–48–3, para 183, reprinted in section 3(D)(3).
- 71 See *Richard D Harza* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 72 *American Bell Intl Inc* (1983 Tribunal Rules), reprinted in section 3(D)(3). See also *Harris Intl Telecommunications, Inc* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 73 The counterclaim in question was eventually granted in the amount of US \$3,500,000. *American Bell Intl Inc*, Award No 255–48–3, paras 184–85.
- 74 Some further light is shed in the Concurring Opinion of Judge Brower who stated that “[t]his counter-claim was raised only a month or so before the Hearing and was documented at that time with admissions of Claimant in its correspondence as well as contemporaneous memoranda of meetings. In a subsequent Rebuttal Memorial and evidence Claimant would appear at least tacitly to have conceded this liability.” Award No 255–48–3, Concurring Opinion of Judge Brower, at 3 n 5 (September 19, 1986), reprinted in 12 Iran-US CTR 233, 234 (1986–III).
- 75 *Harris Intl Telecommunications, Inc* (1983 Tribunal Rules), para 93, reprinted in section 3(D)(3).
- 76 Compare the cases just cited with *Anaconda-Iran Inc* (1983 Tribunal Rules), reprinted in section 3(D)(3) (one or two days’ delay “would not by itself ordinarily result in the dismissal of counter-claims”). See also *Blount Brothers Corp* (1983 Tribunal Rules), reprinted in section 3(D)(3). In this case a counterclaim submitted some 20 days after the statement of defence (April 28 and April 6, 1982 respectively) did not seem to cause problems, whereas counterclaims raised about a year later—two weeks before and at the Hearing—were “rejected pursuant to Article 19(3) of the 1983 Tribunal Rules, no justification for the delay in presenting them having been shown.” On the Tribunal’s practice, see J van Hof, *Commentary on the UNCITRAL Arbitration Rules*, n 38, 128–31; see also S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice*, n 22, 90–1.
- 77 *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session* (Vienna, September 11–15, 2006), UNCITRAL, 40th Session, UN Doc A/CN.9/614, at 20, para 96 (2007); UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 158. See J Castello, “UNCITRAL Rules,” n 30, 1481.
- 78 UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 158.
- 79 *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.145/Add.1 at 7, para 16 (2006). (Draft Article 19(3)). Another proposed variation was that it “falls within the scope of the arbitration agreement.” *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.151/Add.1 at 4, para 3 (2008), (Draft Article 19(3), option 2).
- 80 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 8–9, para 30.
- 81 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 8–9, para 30.
- 82 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 8, para 28.
- 83 *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Proposal by the Government of Switzerland, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.152 at 2, para 3 (2008).
- 84 UNCITRAL, UN Doc A/CN.9/WG.II/WP.152, n 83, at 2, para 3. Another similar proposal was to modify the language such that counterclaims were “substantially connected to (or arose out of) the initial claim. UNCITRAL, 40th Session, UN Doc A/CN.9/619, n 14, at 29, para 158. On the other hand, another suggestion was that “the provision should not require that there be a connection between the claim and the counterclaim of set-off, leaving to the arbitral tribunal the discretion to decide that question.” Para 158.
- 85 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 8, para 29.
- 86 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 8, para 29. In another context the term “sufficient link” was thought to give rise to interpretive problems. 8–9, para 30.
- 87 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 9, para 31. (Concerned that such substantive rules “could be understood in a variety of manners under different legal systems.”)
- 88 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 9, para 31.
- 89 UNCITRAL, 42nd Session, UN Doc A/CN.9/669, n 6, at 9, para 31.
- 90 See, eg, *Saluka Investments* (1976 Rules), reprinted in section 3(C).

- 91 *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.143/Add.1 at 4, para 8 (2006). (citing *Possible Future Work in the Area of International Commercial Arbitration*, UNCITRAL, 32nd Session, UN Doc A/CN.9/460 (1999), paras 72–79, reprinted in (1999) XXX UNCITRAL Ybk 395, 405, and citing “procedural efficiency” and the “desirability of eliminating disputes between parties”).
- 92 See Chapter 2 on Article 17(1). For an example in which a counterclaim was filed, see *Herman Blum* (1983 Tribunal Rules), reprinted in section 3(D)(4).
- 93 The Model Law, as amended, does not contain a provision comparable to Article 21(4) of the UNCITRAL Rules. Article 2 provides, however, that “[f]or the purposes of this Law: ... (f) where a provision of this Law, other than in Article 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.” Article 25(a) deals with the termination of the proceedings on the ground of failure to submit the statement of claim. See also H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, n 5, 153.
- 94 See L B Curzon, *Dictionary of Law* (6th edn 2002) 401 (“Nothing which is not a money claim may be set off.”).
- 95 See M Aden, *Internationale Handelsschiedsgerichtsbarkeit*, n 3, 235. See also the quotation of the authorities by Judge Khalilian in his Separate Opinion in the *First National Bank of Boston* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 96 This interpretation of original Article 19(3) is also implicit in later UNCITRAL discussions:  
76. The UNCITRAL Arbitration Rules ... do not state expressly that the set-off claim must be covered by the same arbitration agreement as the main claim. If the parties have modelled the arbitration agreement on the model arbitration clause ..., both the principal claim and the claim invoked for the purpose of a set-off would be covered by the same arbitration agreement. If, however, the arbitration agreement covering the principal claim does not cover the set-off claims, the question will arise also under the UNCITRAL Arbitration Rules whether the arbitral tribunal has the competence to consider the set-off claim that is not covered by the arbitration agreement.  
*Possible Future Work in the Area of International Commercial Arbitration*, UNCITRAL, 32nd Session, UN Doc A/CN.9/460 (1999), para 76, reprinted in (1999) XXX UNCITRAL Ybk 395, 405.  
This is also true if the parties have adopted the UNCITRAL model arbitration clause, which covers “[a]ny dispute, controversy or claim arising out of or relating to *this contract*.” Footnote to Article 1 of the UNCITRAL Rules (emphasis added).
- 97 See M Aden, *Internationale Handelsschiedsgerichtsbarkeit*, n 3, 235. Note that UNCITRAL has identified issues concerning set-off claims as part of its future work in the area of international commercial arbitration. *Possible Future Work in the Area of International Commercial Arbitration*, UNCITRAL, 32nd Session, UN Doc A/CN.9/460 (1999), paras 72–79, reprinted in (1999) XXX UNCITRAL Ybk 395, 405.
- 98 See *Computer Sciences Corp* (1983 Tribunal Rules), reprinted in section 3(D)(3).
- 99 See S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice*, n 22, at 89–90; see also J van Hof, *Commentary on the UNCITRAL Arbitration Rules*, n 38, at 133–4. In his Separate Opinion in *The First National Bank of Boston* (1983 Tribunal Rules), reprinted in section 3(D)(3), Judge Khalilian criticized the majority of the Tribunal for failing to make a distinction between the concepts of “counter-claim” and “set-off.” If directed against the Rules as such the criticism perhaps would have more merit.
- 100 In discussions concerning the Preliminary Draft the suggestion was made that the phrase “same contract” be replaced by the “same transaction” to clarify that there may be jurisdiction over counterclaims not arising out of the same contract on which the principal claim is based. The suggestion was made with a view to cases “where there was a series of separate contracts arising out of the same transaction between the same parties, each of which contained an arbitration clause in identical terms.” The UNCITRAL Secretariat intervened stating that the intention behind the provision was not to allow counterclaims based on such other contracts. The wording remained unchanged. It was noted that “normal arbitral practice” would be to keep such a counterclaim as a separate claim but to consolidate the hearings of the two claims.  
*Report of the United Nations Commission on International Trade Law*, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/10017, paras 136–37 (1975), reprinted in (1975) VI UNCITRAL Ybk 24, 37–8.
- 101 Article II(1) of the Claims Settlement Declaration.
- 102 It should also be noted that in the practice of the Iran–US Claims Tribunal several contracts have been regarded as a “transaction” only exceptionally. This was the case in *American Bell Intl Inc* (1983 Tribunal Rules), (Award No ITL 41–48–3, reprinted in section 3(D)(3)), where three subsequent contracts on the same subject matter meant the implementation of one ten-year project. But see Concurring and Dissenting Opinion of Judge Mosk, reprinted in 6 Iran-US CTR 95, 100–3 (1984–II). Also in *Westinghouse Electric Corp and Islamic Republic of Iran*, Award No ITL 67–389–2 (February 2, 1987), reprinted in 14 Iran-US CTR 104 (1987-I), several contracts were held to constitute a transaction for the purpose of counterclaims. See J van Hof, *Commentary on the UNCITRAL Arbitration Rules*, n 38, 132. In *Morrison-Knudsen Pacific Ltd* three contracts were not considered to form a transaction, although they related to the construction of one motorway. See *Morrison-Knudsen Pacific Ltd* (1983 Tribunal Rules), reprinted in section 3(D)(3).

- 103 *Houston Contracting Co* (1983 Tribunal Rules), para 120, reprinted in section 3(D)(3).
- 104 See *Houston Contracting Co* (1983 Tribunal Rules), para 120. See also *Questech, Inc* (1983 Tribunal Rules); and *TCSB Inc* (1983 Tribunal Rules); both reprinted in section 3(D)(3).
- 105 See *CBS Inc* (1983 Tribunal Rules), reprinted in section 3(D)(3).