2019
Volume 1, Issue 2

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 1 2019 NO. 2

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ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law
5201 Democracy Drive
Plano, TX 75024-3561

2018-2019 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" WINNER

A DATA ANALYSIS OF THE IRAN-US CLAIMS TRIBUNAL'S JURISPRUDENCE: LESSONS FOR INTERNATIONAL DISPUTE-SETTLEMENT TODAY

by Damien Charlotin

I. INTRODUCTION

On January 19, 1981, representatives of the United States (US) and Iran assembled in Algiers at the invitation and good offices of the Algerian government to sign what became known as the Algiers Accords.[1] Most of the Accords' provisions dealt with diplomatic relations and the main focus then provided that the US would unfreeze Iranian assets held in the US in exchange for the release of 52 American hostages in Iran.

One set of provisions would however go on to acquire greater importance.[2] Given the number of ongoing proceedings before US and Iranian courts, the Algiers Accords provided for an Iran-United States Claims Tribunal that would hear the "claims of nationals of the US against Iran and claims of nationals of Iran against the United States,"[3] as well as certain disputes between the two governments.[4]

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[1] The Algiers Accords was a set of agreements that included the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 75 AM. J. INT'L L. 422 (1981) [hereinafter Claims Settlement Declaration]. Iran previously signed a similar agreement with Iran. *See* Bernard Gwertzman, *U.S. and Iran sign accord on hostages: 52 Americans could be set free today*, NEW YORK TIMES (Jan. 19, 1981).

[2] *See generally* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998). For a good summary of the events leading to the Algiers Accord and the beginning of the Tribunal, see generally Gunnar Lagergren, *The Formative Years of the Iran-United States Claims Tribunal*, 66 NORDIC J. INT'L L. 23 (1997).

[3] Claims Settlement Declaration, *supra* note 1, art. II(1).

[4] These were named "B disputes." A third set of disputes, "A disputes," concerned the interpretation of the Algiers Accords.

Thirty-seven years running, the Tribunal's output of more than 800 reasoned decisions, the bulk of which were rendered at a time when arbitral awards were relatively unavailable, is a remarkable resource for arbitration scholars and practitioners.[5] This corpus has contributed to arbitration practice[6] and in particular to the development of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[7] The Tribunal's jurisprudence has been cited by international courts and tribunals on substantive and procedural issues,[8] and scholars analyze its jurisprudence as a source of international judicial practice.[9]

This role and importance has fallen from view as the number of scholarly works on the Tribunal has dropped in recent years.[10] Furthermore, the Tribunal has entered a "long twilight" phase where few, gargantuan and seemingly intractable disputes remain pending. Still, the Tribunal's history and practice remain relevant and warrant our interest as a remarkable and under-investigated dataset. Retracing that history and practice with data analysis methods, this paper revisits past questions on the Tribunal and its work to inform today's international arbitration practice and scholarship.

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[5] Richard Lillich, in one of the earliest yet major works on the subject, called this jurisprudence "a goldmine of information for perceptive lawyers." RICHARD LILLICH, *Preface*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 i, vii (Richard B. Lillich ed., 1984). But doubts about the relevance of the tribunal's jurisprudence have arisen. *See* BROWER & BRUESCHKE, *supra* note 2, at 650; *infra* part V.

[6] *See* BROWER & BRUESCHKE, *supra* note 2, at 653 ("The mushrooming literature on the Tribunal's decisions is further testimony that the Tribunal's awards are sufficiently substantive for many commentators on international law.").

[7] *See*, generally, STEWART A. BAKER & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1 (1992); *see also* Karl-Heinz Böckstiegel, *Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 4 BERKELEY J. INT'L L. 266, 266-67 (1986). An earlier version of the UNCITRAL arbitration rules applied to the Tribunal proceedings.

[8] *See*, *e.g.*, UP & C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, ¶ 315 (Oct. 9, 2018) (citing Too v. Greater Modesto Ins. Assocs. & United States, Award No. 460-880-2 (Dec. 29, 1989), 23 Iran-U.S. Cl. Trib. Rep. 378 (1991)).

[9] *See*, *e.g.*, Timothy G. Nelson, *The Defector, the Missing Map and the "Hidden Majority" – Coping with Fragmented Tribunals in International Disputes*, TRANSNAT'L DISP. MGMT. (2018).

[10] *But see* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 183 (2014).

Part II below introduces the dataset and reviews in particular the overall outcome of the disputes before the Tribunal. Part III studies the Tribunal's most important personnel: the judges, their terms on the bench, their coalitions, and the decisions they supported or opposed. This part also probes the Tribunal's decision to share its work between chambers and the many advocates who appeared before the Tribunal. These two parts indicate that the Tribunal has been mostly successful at dealing with hundreds of cases without breaking down or be abandoned by one of the parties.

Part IV looks further into the Tribunal's decisions and outcomes by studying the judges' concurring and dissenting opinions and it discusses their role in shaping the Tribunal's jurisprudence. Part V covers the topics treated in Tribunal awards and in the separate opinions. Part VI draws on the preceding material to explore whether the Tribunal's experience should be discounted for its alleged political outlook—a common reproach that will likely accompany discussions of the Tribunal's legacy and a reflection that is relevant to any dispute resolution system with party-appointed judges.

II. THE CLAIMS

A. *The Dataset*

Under the Algiers Accords, all claims needed to be lodged with the Tribunal before January 19, 1982 or be deemed time-barred.[11] The claims that were registered were then sorted between small claims valued at less than US$250,000 where the US and Iranian governments would represent their respective nationals; claims exceeding US$250,000 where the individual claimants could stand on their own; and State-to-State claims.

More than 3,800 claims were filed before that cut-off date.[12] Most claims did not

[11] Disputes between the US and Iran as to the interpretation of the Accords, however, could, and have been, filed at any time.

[12] David D. Caron & John R. Crook, *The Tribunal at Work*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 133, 136 (David D. Caron & John R. Crook eds., 2000) [hereinafter Caron & Crook, *The Tribunal at Work*] (stating that there were 3,948 claims total); Maciej Zenkiewicz, *Judge Skubiszewski at the Iran-United States Claims Tribunal*, 18 INT'L CMTY. L. REV. 151, 154 (2016) (stating that 3,860 claims were filed, but

result in an award, however, as many were settled. One of the Tribunal's great successes was to encourage the parties to settle their disputes[13] and to provide a "relatively apolitical setting substantially walled off from other areas of bilateral conflict" between the two governments.[14] This development is readily observable from Figure 1 below, which records the full dataset of published decisions broken down by type of document. A sizeable 33% of the Tribunal's output consisted of awards on agreed terms, which sanctioned the settlement of the parties.[15]

Of the cases that were not settled or abandoned, the judges have dealt (so far) with several hundreds of them, with just a few claims, all of them between the US and Iran directly, still pending as of late 2018. This impressive output goes a long way to explaining the importance of the Tribunal's practice for international dispute settlement. Although some judges and parties originally expected the Tribunal to last for no more than three years,[16] the importance of the Tribunal's work came to exceed its contemporary equivalents,[17] especially at a time when arbitration, albeit on a rise,

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they acknowledge the discrepancies between different authors on the exact figure); Lagergren, *supra* note **Error! Unknown switch argument.**, at 27 (stating that 3,836 claims were filed: "2,782 claims of less than U.S. US$250,000, so-called 'small claims', 964 larger claims and 70 state-to-state claims"). The Tribunal's website remains vague about the exact number, only mentioning that "[a]pproximately 1,000 claims were filed for amounts of US$250,000 or more, and approximately 2,800 claims for amounts of less than US$250,000." *About the Tribunal*, IRAN-UNITED STATES CL. TRIB., https://www.iusct.net/Pages/Public/A-About.aspx.

[13] Awards on agreed terms did not enter the analyses below—although some of these awards have elicited interesting separate and dissenting opinions.

[14] Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 140; *but cf. id.*, at 145 (criticizing the Tribunal's willingness to push for settlements). The Iranian and U.S. governments notably agreed to a lump-sum payment that settled most small claims and some B claims between them. United States v. Iran, Award No. 483-CLTDs/86/B38/B76/B77-FT (June 22, 1990), 25 Iran-U.S. Cl. Trib. Rep. 328, 330.

[15] According to Brower and Brueschke, nearly half of the awards issued by the Tribunal were on agreed terms. BROWER & BRUESCHKE, *supra* note 2, at 14.

[16] *See* George H. Aldrich, *The Selection of Arbitrators*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 65, 68 (David Caron & John R. Crook eds., 2000).

[17] Over the same course of 12 years when the Tribunal rendered 90% of its awards (i.e., 1981 to 1993), the International Court of Justice (ICJ) issued a dozen judgments and orders on

had not reached the prevalence it has today.

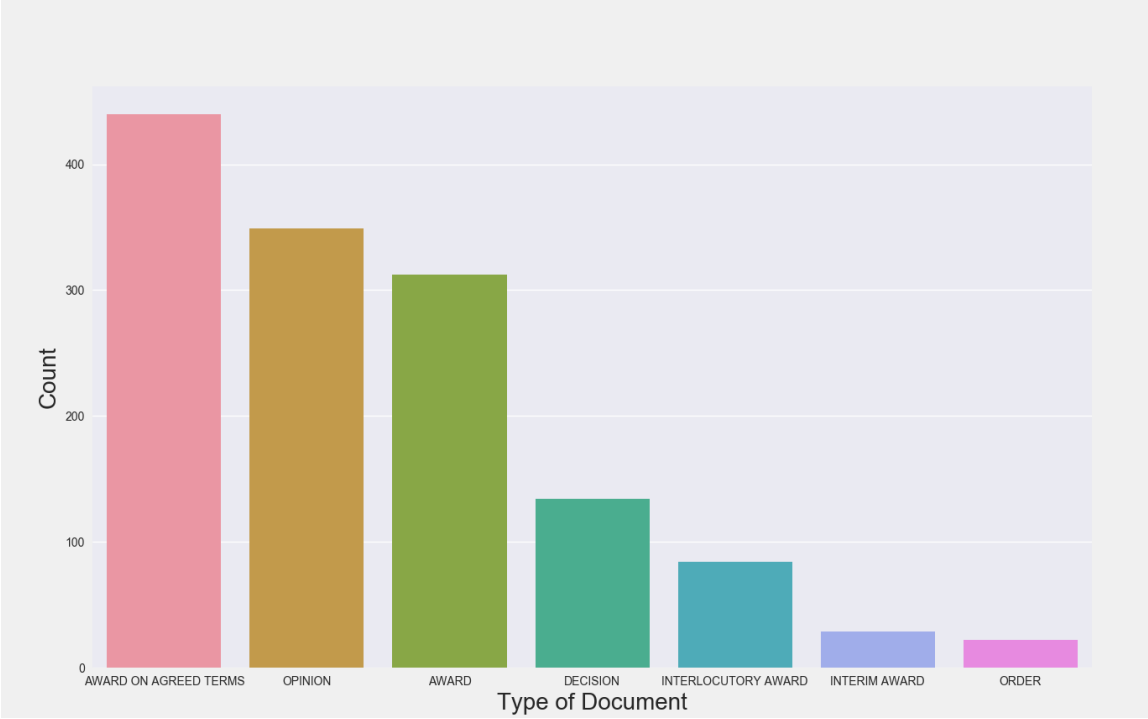

Figure 1: Full dataset

Most of this output came in the Tribunal's first decade. After slow beginnings, the Tribunal reached an impressive pace until 1991-1992[18] when it started its long twilight. Since then the Tribunal has been facing cases directly between the US and Iran, often based on sensitive contracts (e.g., weapons) and more politically fraught disputes. Figure 2 retraces the distribution of awards and decisions published over time, distinguishing between awards on agreed terms and other decisions.

provisional measures, and the International Centre for Settlement of Investment Disputes (ICSID) oversaw less than 10 arbitrations. *See* Michael Waibel & Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (2017), http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf. *Cf.* Brice M. Clagett, *The perspective of the claimant community*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 59, 62 (David Caron & John R. Crook eds., 2000) ("All in all, disposition of virtually all of the large private claims . . . within twelve years is not a disgraceful record.").

[18] Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 133 (describing the period between mid-1982 to 1991 as "the Tribunal's most productive period").

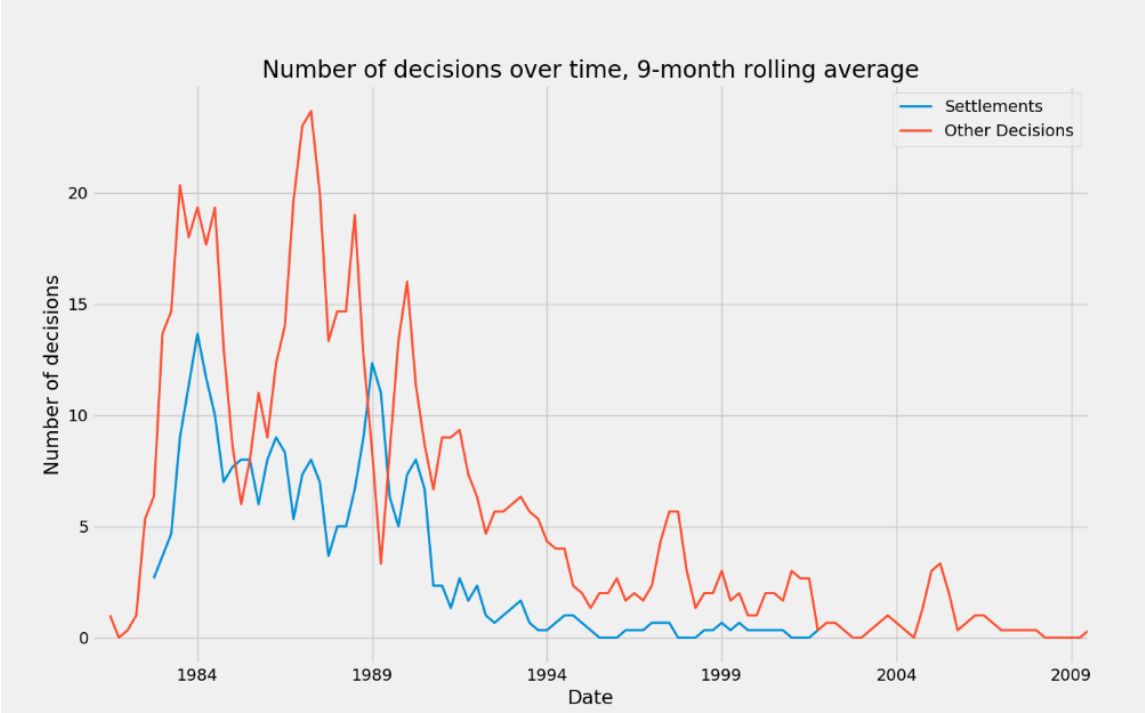

Figure 2: Distribution of awards and decisions

Remarkably, Figure 2 marked a slump in 1984, which represents the aftermath of the "Mangard incident" where two judges appointed by Iran assaulted third-party judge Nils Mangard on the steps of the Tribunal on September 3, 1984. This incident "pretty well shut [the Tribunal] down for several months until the two Iranian judges on the Tribunal who were involved in the incident were removed from the scene and replaced by gentler sorts."[19]

B. *Outcomes*

Another interesting feature of the Tribunal's organization was that Iran's liabilities as decided by the Tribunal or under settlement agreements were supposed to be paid out of a US$1 billion fund initially seeded with Iranian assets in the US That fund, however, had to be replenished as soon as its assets fell under US$500 million, and Iran's failure to do so starting in the 1990s led to several disputes aimed at interpreting Iran's obligations in this respect.[20]

[19] *See* BROWER & BRUESCHKE, *supra* note 2, at 657.

[20] Sean D. Murphy, *Securing Payment of the Award*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL

The sums awarded ran from US$100[21] to US$68.2 million[22] without interest, which was often set at 10% or 12%. The amounts awarded to US claimants in contentious proceedings, however, are dwarfed by those resulting from settlement: US$495 million out of a total of US$2.14 billion as of 1998.[23]

Based on these numbers, it might seem that the US and its nationals were the winners before the Tribunal—and indeed, many commentators have concluded as much. For instance, Judge Brower explained the willingness of Iran to challenge judges given the State's numerous losses: [T]he Iranians have become very discouraged when they keep losing, losing, and losing, that's all about, but they don't take well to it, which is the reason for all of these challenges [to other judges.][24]

In the same vein, a former assistant to Judge Holtzmann opined that "[i]t is not a secret that in the eighteen-year history of the Tribunal, no Iranian arbitrator has ever voted to deny the claims of an Iranian claimant (or, conversely, to award damages to a US national or the United States.)"[25] This perception likely fed the Iranian judges' frequent accusations of bias towards the American judges and, in their words, the

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AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 299, 301-02 (David Caron & John R. Crook eds., 2000).

[21] Baygell v. Iran, Award No. 231-10212-2 (May 2, 1986), 11 Iran-U.S. Cl. Trib. Rep. 72, 75 (reimbursing the claimant an outstanding debt for an unused plane ticket).

[22] Sedco Inc. v. Nat'l Iranian Oil Co., Award No. 309-129-3 (July 2, 1987), 15 Iran-U.S. Cl. Trib. Rep. 23, 185.

[23] Koorosh H. Ameli, *The Iran-United States Claims Tribunal*, *in* THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION: SUMMARIES OF AWARDS, SETTLEMENT AGREEMENTS AND REPORTS (P. Hamilton et al. eds., 1999), 246 (1999) [hereinafter Ameli, *The Iran-United States Claims Tribunal*]. No particular arrangement was made for paying successful Iranian claimants and counterclaimants, who occasionally had to enforce their awards in the U.S.

[24] Remarks of Charles N. Brower, *Plenary Keynote: Decision making in International Courts and Tribunals: A Conversation with Leading Judges and Arbitrators*, 105 PROCEEDINGS ANN. MEETING-AM. SOCIETY INT'L L. 215, 221 (2011) (alterations added).

[25] Jeffrey L. Bleich, *Reflections on the Tribunal's Waning Years*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 345, 347 (David Caron & John R. Crook eds., 2000) (alteration added). Part **V** below probes that claim and reviews its significance.

"so-called 'neutral' arbitrators."[26] Accusations of bias recur in numerous dissents authored by Iranian judges,[27] with no equivalent in the opinions written by American judges.

Yet when a few points are clarified, the picture that arises from the Tribunal's output is more balanced. First, the large majority of cases were brought by US claimants or the US government, on its own or on behalf of claimants for minor claims, against an Iranian party. Out of the 670 cases or groups of cases in the dataset, 579 had a US claimant whereas only 89 had an Iranian claimant against the US government.[28] Even if every case had an equal chance of success with a similar expectation of gains, US claimants would have gained more. An analysis of the Tribunal's overall result should take into account this asymmetry of claims.

Second, Iran was far from losing dramatically at all turns, and it was even awarded around US$1 billion in claims and counter-claims from the Tribunal.[29]

Under the 581 documents with a Tribunal decision (awards and decisions), there are 365 victories (including partial victories) for US claimants against 210 victories for Iran, on the assumption that every defeat on jurisdiction or the merits for a US

[26] *See* Iran v. United States, Decision No. DEC 32-A18-FT (Apr. 6, 1984), 5 Iran-U.S. Cl. Trib. Rep. 251, 277 n. 1 (dissenting opinion by Iranian arbs.).

[27] *See*, *e.g.*, Economy Forms Corp. v. Iran et al., Award No. 55-165-1 (June 13, 1983), 3 Iran-U.S. Cl. Trib. Rep. 42, 54 (dissenting opinion by Kashani) ("The majority carries its breach of impartiality, and its bias in favour of the Claimant, to such an extreme that in its Award it openly proceeds to make statements contrary to fact."); Watkins Johnson Co. et al. v. Iran, Award No. 429-370-1 (Jan. 8, 1990), 22 Iran-U.S. Cl. Trib. Rep. 257, 258 (dissenting opinion by Noori) ("The majority's findings in this Case . . . are so unjust and inequitable, and so contrary to the Contract, the law and principles of logic accepted by all mankind that I cannot concur in the Award, . . . if this arbitral Tribunal had approached the Case equitably, totally without bias and prejudice[.]").

[28] It was always against the U.S. government because the full Tribunal decided (over the dissent of the three Iranian arbitrators) that it had no jurisdiction over the claims of Iran against U.S. nationals. *See* Iran v. United States, Decision No. DEC 1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. Cl. Trib. Rep. 101, 104.

[29] *See* Ameli, *The Iran-United States Claims Tribunal*, *supra* note 24, at 247 (noting that "at least in monetary terms, the outcome of the Tribunal's operation appears to have resulted in some balance between the two sides, despite controversy over a number of Tribunal awards").

claimant was a win for the Islamic Republic.[30] Counting only formal partial or final awards, the picture is even more balanced with 167 victories for US claimants and 145 for Iranian defendants. The numbers are summarized in Table 1 below.

	Winner (all decisions)		Winner (final awards only)	
Claimant Nationality	**Iran**	**US**	**Iran**	**US**
Iran	26	60	9	23
US	184	313	136	145
Total	**210**	**373**	**145**	**168**

Table 1: Win rates

Figure 3 further retraces this distribution of outcomes over time for both groups of claimants. There were more positive outcomes for US claimants at the outset because many of these decisions were interlocutory or partial awards that upheld the Tribunal's jurisdiction—even if the case was eventually dismissed on the merits.[31]

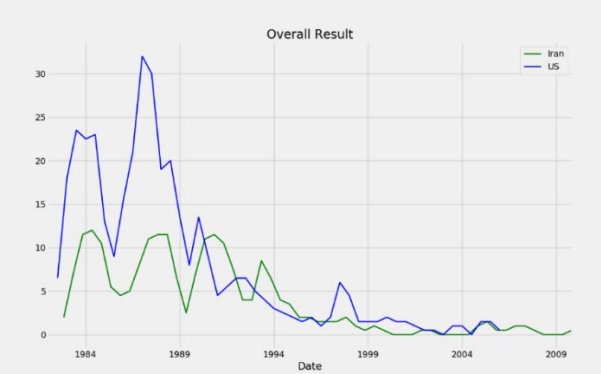

Figure 3: Outcome distribution, six-month rolling average

[30] Every decision on jurisdiction that left at least some claims of U.S. nationals standing was coded a "U.S. winner" because anything but a full-fledged dismissal of the claims was a defeat from Iran's point of view. *See* Nils Mangard, *The Interpersonal Dynamics of Decision-Making (II)*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 253, 257 (David Caron & John R. Crook eds., 2000) ("[Iran], I have been told, counted a case as lost if one single dollar was awarded to the American party.") (alteration added). Not all cases were clear and some decisions were reinterpreted from defeat to victories by arbitrators. *See* Iran v. United States, Decision No. DEC. 62-A21-FT (May 4, 1987), 14 Iran-U.S. Cl. Trib. Rep. 324, 334 (separate opinion by Bahrami-Ahmadi & Mostafavi).

[31] *See*, *e.g.*, Behring Int'l Inc. v. Iran et al., Award No. 523-382-3 (Oct. 29, 1991), 27 Iran-U.S. Cl. Trib. Rep. 219, 246 (dismissing the claims and ordering the claimant to pay Iran's costs despite winning on jurisdiction and interim measures).

We can delve further: not all loses carry the same weight. The more "political" claims between the two governments ("B" cases) or the cases on the interpretation of the Algiers Accords ("A" cases), for instance, were presumably more likely to sting. Yet, I find that the Iranian government lost (on the whole) 49 of the 68 decisions in B and A cases, and only won in 19 other cases.

These considerations suggest that the Tribunal's experience has *not* been entirely negative for Iran.[32] Despite some high-profile cases and important defeats for Iran on the interpretation of the Algiers Accords, and more than US$2 billion in compensation (mostly from settlements), the figure that emerges from the Tribunal's jurisprudence is more balanced than a simple win rate would suggest.

The same discrepancy between perceptions and reality can be found in investment arbitration today. There are stakeholders arguing that the system favors investors, but a sober review of the facts suggests a more balanced picture. To a larger extent even than the IUSCT, investment arbitration is asymmetrical[33] such that a win rate of 50% for each party should not be treated as a proper benchmark. Pointing out that asymmetry makes things worse because states can only "not lose," as many do, is nothing more than a talking point—it has no bearing on the question of whether individual tribunals are set to decide in favor of one particular party.[34]

The Tribunal set an important precedent for establishing that an asymmetrical dispute-settlement system can work well[35] despite occasional tensions between its

[32] Likewise, see T Schultz and E Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 4: "[…] findings [about winning rates] would say strictly nothing about any perception of bias, which is a different question altogether […]."

[33] *Id.* ("[Respondent states] are the claimant in less than 1 per cent of the claims and accordingly we consider such situations to be statistically irrelevant.") (alteration added).

[34] With respect to investment arbitration, commentators have tried to change the picture of overall balanced outcomes between states and investors by discounting disputes won on jurisdictional objections, see, e.g., Howard Mann, *ISDS: Who Wins More, Investors or States?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT at [1] (2015), but this is misleading because winning on jurisdiction is still a "win."

[35] The Tribunal had predecessors in the mixed claims commissions that started in the 19th century.

judges.

III. THE TRIBUNAL

A. *Judges*

Nine judges sit on the Tribunal. Three are appointed by the US, three by Iran, and the last three are "third-country judges."[36]

US Judges		**Third-party Judges**		**Iranian Judges**	
Name	*Chamber*	*Name*	*Chamber*	*Name*	*Chamber*
Salans	III	Arangio-Ruiz	III	Enayat	III
Holtzmann	I	Bellet	II	Sani	III
Allison	III	Riphagen	II	Shafeiei	II
Duncan	I	Mangard	III	Kashani	I
Mosk	III	Virally	III	Ahmadi	II
Aldrich	II	Lagergren	I	Mostafavi	I
Brower	III	Briner	II	Khalilian	II
McDonald	I	Ruda	II	Ansari	III
		Böckstiegel	I	Noori	I
		Broms	I	Aghahosseini	III
		Skubiszewski	II	Ameli	I
				Yazdi	II

Table 2: list of judges 1981-2009

There were fewer US judges than Iranian judges over the Tribunal's lifespan, which is explained by their longer average term on the Tribunal.[37] The US judges (more than double the Iranians' average stay) – and thus, perhaps, a more central place when it comes to their influence "on the ground"; since they participated in more proceedings and sat with more co-judges than the others.

A network analysis reveals which judges were central to the Tribunal's work based

[36] *See* Claims Settlement Declaration, *supra* note 1, art. III(1).

[37] With an end date of July 17, 2009 (date of the last decision in the dataset), U.S. judges had an average of 5,619 days on the Tribunal, against 3,700 for third-country judges and 2,763 days for Iranian judges.

on how often they were hearing a case. Figure 4 reproduces this analysis with nodes colored according to their connections with other nodes.

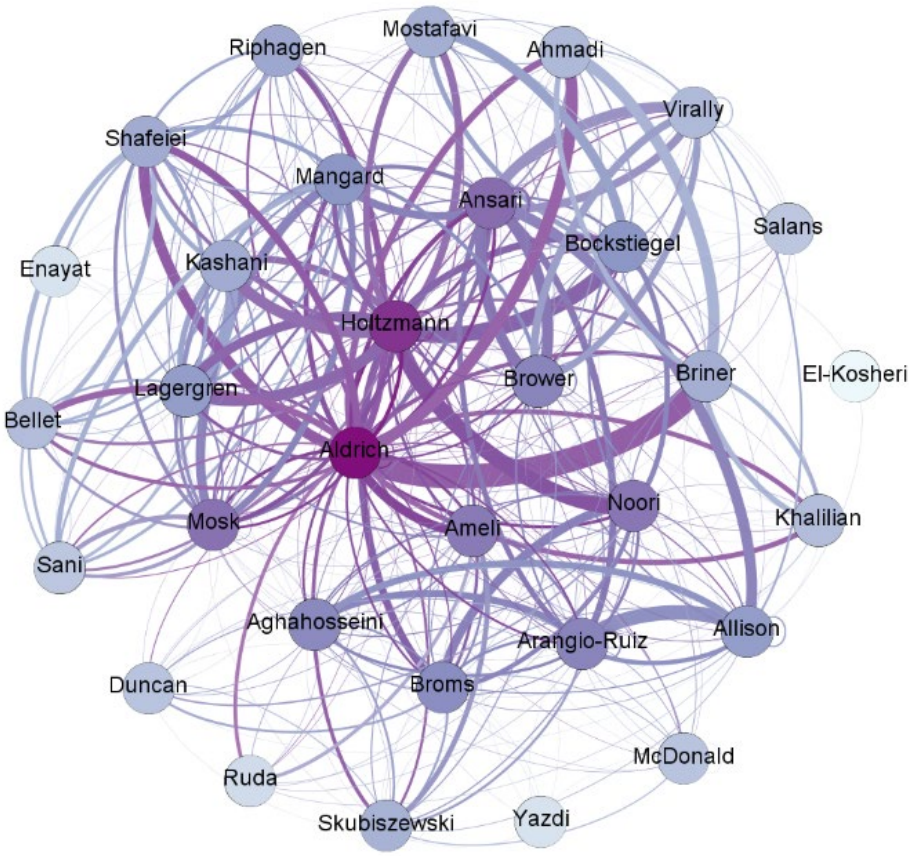

Figure 4: Network analysis of judges[38]

The algorithm behind Figure 4 puts the more important individuals based on connections in the center, placing more marginal ones outward. As expected, the US judges have stronger links with co-judges. At any point, parties were more likely to encounter the same US judge who could draw from broader experience on the Tribunal.[39]

B. *Chambers*

As contemplated in the Algiers Accords, the President of the Tribunal split his

[38] Judge El-Kosheri from Egypt was picked to replace the Iran-appointed judge in Case Nos. 20 & 21.

[39] Until the appointment of Judge Gabrielle McDonald in 2001, there were only male judges on the tribunal. Aldrich recounts that the American delegation in 1981 would not propose female third-party judges over the objections of the Iranian judges. Aldrich, *supra* note 17, at 68.

eight colleagues into three chambers with semi-random case assignments. Each chamber was composed of an Iran-appointed judge, a US-appointed judge, and a third-country judge as chair. Because of complicated arrangements, departures, recusals, etc., however, many party-appointed judges sat on panels different from the one originally designated. Third-country judges, by contrast, could not move because they chaired the panels.

The division into chambers could have occasioned problems in at least two respects. First, it could affect the outcomes of the cases depending on the inclinations of the chair to side with either the US or Iranian judge.[40] In practice, however, the outcomes varied little between chambers, which treated nearly equal number of cases.[41]

Overall Result	**Majority Awards**	**Unanimous Awards**	**All awards**
CHAMBER ONE	91	84	175
Iran	20	44	64
US	71	40	111
CHAMBER THREE	108	68	176
Iran	22	37	59
US	86	31	117
CHAMBER TWO	77	96	173
Iran	13	59	72
US	64	37	101
FULL TRIBUNAL	44	13	57
Iran	7	7	14
US	37	6	43

[40] Clagett, *supra* note 18, at 63 n. 24 ("Iran has chosen its candidates [for third-party judge] skilfully; they proved disastrous for claimants unlucky enough to have cases in their chambers.").

[41] The sums awarded also did not differ dramatically once we account for the fact that different cases have different expectations of gains. In total, Chamber I awarded US$132 million to American claimants and US$20 million to Iranian claimants and counterclaimants; Chamber II awarded respectively US$144 million and US$12 million; and Chamber III respectively US$246 and US$7 million in compensation.

Total	**320**	**261**	**581**

Table 3: Outcomes per Chamber

Looking at the figures of each individual chair, two deviate from the general pattern and saw US claimants win less than 2/3 of the disputes. With Judges Broms and Ruda, Iranian claimants prevailed in 2/3 of the decisions.

	Winning side				
	Iran		**US**		**Total**
Chair	**Count**	**Percentage**	**Count**	**Percentage**	
Bellet	10	37.04%	17	62.96%	27
Bockstiegel	21	23.60%	68	76.40%	89
Briner	37	42.05%	51	57.95%	88
Broms	**29**	**67.44%**	**14**	**32.56%**	**43**
Lagergren	18	23.08%	60	76.92%	78
Mangard	18	28.13%	46	71.88%	64
Riphagen	8	38.10%	13	61.90%	21
Ruda	**14**	**66.67%**	**7**	**33.33%**	**21**
Ruiz	27	42.86%	36	57.14%	63
Skubiszewski	9	30.00%	21	70.00%	30
Virally	14	28.57%	35	71.43%	49
Total	**205**	**35.78%**	**368**	**64.22%**	**573**

Table 4: Outcomes per Chair

These numbers should not be over-interpreted: Judge Ruda, for instance, chaired the fewest number of cases,[42] and he favored Iran overall with 14 unanimous decisions. Meanwhile, 19 of Mr. Brom's decisions in favor of Iran were unanimous. Further, while Judges Broms and Ruda were among those who least found for US claimants, they also did not award great sums to Iranian parties. Mr. Ruda actually never awarded any sum to an Iranian claimant or counterclaimant.

[42] Aldrich surmised that Mr. Ruda left the tribunal prematurely after being subject to the "pervasive Iranian tactics of verbal and psychological abuse." Aldrich, *supra* note 17, at 72.

Moreover, the precedential value of the Tribunal's awards might have been less than what it would have been had the awards been rendered by the full Tribunal, as the Tribunal's jurisprudence could have fragmented between the different chambers.[43]

A network analysis of all citations in the Tribunal's jurisprudence shows that this was not the case. Figure 5 below displays every citation between the Tribunal's awards and decisions, represented as nodes of varying size[44] and color according to the issuing chamber.[45] The algorithm places groups of decisions that mostly cite themselves out towards the edge.

Figure 5 shows that there is no coherent block of decisions by chamber that only cite themselves. Except with the Tribunal's decision on dual national claims (the large orange node on the left), decisions by the full Tribunal were not central to the Tribunal's jurisprudence.

Figure 5: Awards and decisions, network analysis

[43] A similar point was made about the ICJ and its ad hoc chamber procedure. *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 171 (2008).

[44] Node size depends on the number of incoming citations to a given node.

[45] Chamber I's decisions are blue, II's are green, and III's are black; the full Tribunal's awards and decisions are orange.

C. *Counsel*

Finally, this section turns to those who appeared as counsel before the Tribunal. Counting every appearance, more than 1,300 advocates appeared on behalf of US claimants, against 241 for Iranian respondents. This proved important. The Tribunal was one of the first international bodies before which a large number of private law advocates, often unfamiliar with arbitration, came to plead—and in the process many became international arbitration practitioners.[46] Likewise, another commentator stated that the Tribunal's "long twilight" proved to be "a rare training ground for young attorneys who wish to participate meaningfully in the making of decisional, international law" and that "the Tribunal's twilight has expanded the ranks of international arbitration-trained attorneys who will hopefully contribute to this field in the future."[47]

Many of today's regulars of international arbitration have engaged with the Tribunal on behalf of a party or as a judge or clerk. Out of a list of today's 170 most frequently appointed investment arbitrators,[48] more than 20 have crossed the Tribunal's path in some capacity.[49]

IV. CONCURRENCES AND DISSENTS

A striking aspect of Figure 1: Full dataset is the number of concurring and dissenting opinions written by the judges. For every three decisions by the Tribunal (including awards, orders, etc.), the dataset has two separate opinions by judges in their individual or joint capacity.[50]

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[46] *See* James Crawford, *The International Law Bar*, *in* INTERNATIONAL LAW AS A PROFESSION 338, 342 (Jean d'Aspremont et al. eds., 2017).

[47] Bleich, *supra* note 26, at 352.

[48] This is Investment Arbitration Reporter's list of arbitrators where only individuals with three or more appointments to an investment tribunal are included. *Arbitrator Profiles*, IA REPORTER, https://www.iareporter.com/arbitrator-profiles-directory/.

[49] This is likely underestimated because the names of the Tribunal's clerks do not appear in the dataset, which records only the judges and counsel present at the hearing.

[50] Lack of consistency in the titles and designation of opinions (many are only described as "Separate Opinion"), and the fact that some opinions dissent only in part means that the opinion labels are not clear. The difficulty was noted by the first President of the Tribunal.

This number however only accounts for fully written opinions. Not all concurrences and dissents were written, and statements of dissent recorded under the judge's signature at the end of the award were sometimes the only indication that an award was not adopted unanimously.[51] When all these dissents (accompanied or not by an opinion) are tallied up, there were nearly more decisions with dissents than unanimous decisions. Of the decisions on jurisdiction and the merits, 259 were unanimous (of which 92 occasioned a concurrence) while 322 were accompanied by a dissent. Figure 6 below plots the number of unanimous and majority decisions over time.

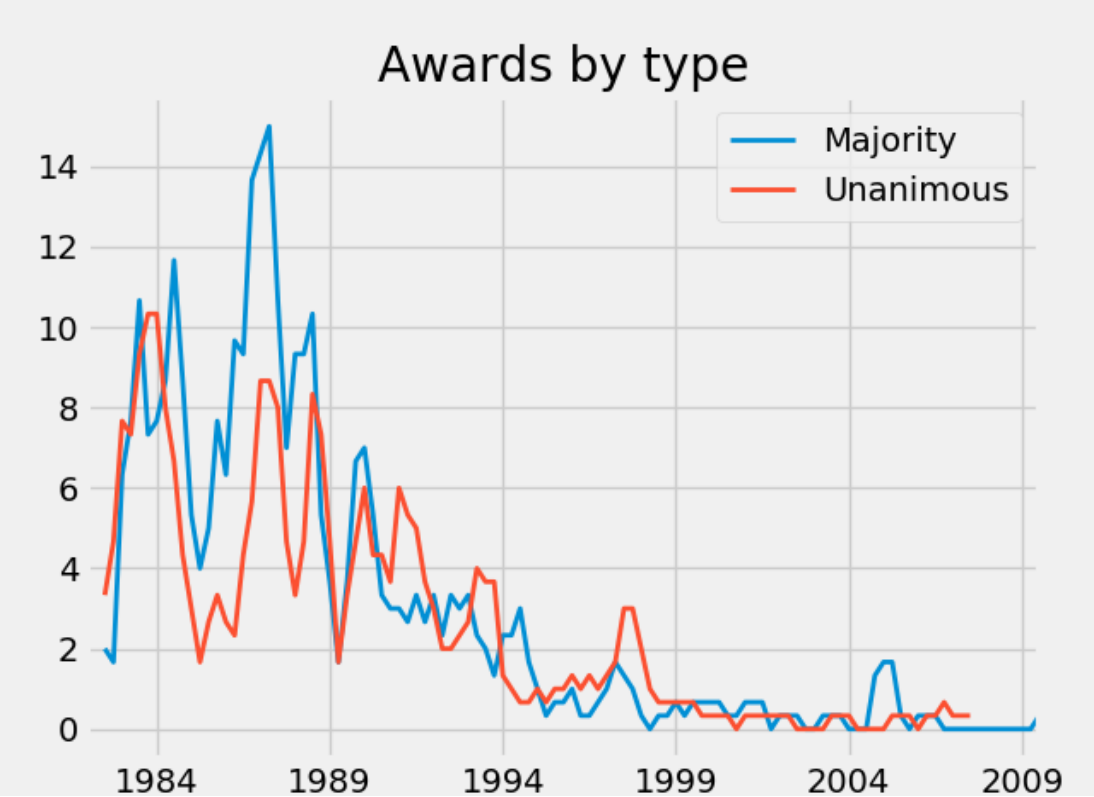

Figure 6: Awards by type, over time

Lagergren, *supra* note 2, at 31 ("And, indeed, many opinions labelled 'concurring' are in reality dissenting opinions." *Cf.* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 357 (note by Shafeiei) ("On principle, a 'concurring opinion' applies when one member of the Tribunal concurs with the other members of the Tribunal in regard to the conclusion arrived at, but does not concur with its reasoning.").

[51] *See* Lagergren, *supra* note 2, at 28 (suggesting that judges "failed to develop a genuine sense of collegiality").

Table 5 further breaks down separate opinions according to the nationality of the judges (rare opinions by neutral judges are omitted) and the outcome of the case to reveal who dissented in what circumstances.

Overall Result	**# Docs (awards only)**	**Concurrences**		**Dissents**	
		US *arb.*	*Iran arb.*	US *arb.*	*Iran arb.*
US	373 (167)	46 (28)	27 (3)	49 (40)	263 (150)
Iran	210 (145)	9 (4)	70 (55)	47 (36)	28 (12)
Total	**581 (312)**	**55 (32)**	**97 (58)**	**96 (76)**	**291 (162)**

Table 5: Concurrences and Dissents per judge nationality and overall outcome[52]

These numbers support the observation that "[i]n practice, the Iranian members recorded a dissenting vote in virtually every case in which the decision was against Iran."[53] Indeed, when it came to final awards, only 17 cases saw no dissent from the Iranian judge—and often in cases when the respondent was not the Iranian government (typically, a US respondent),[54] or when the outcome was such that, even if Iran lost, it was on terms broadly favorable to it. [55]

A. *Role of Individual Opinions*

Why write a dissenting opinion?[56] It was not necessarily to influence the majority decision because it was common for judges to file their dissent after, sometimes much after, the award was rendered.[57] Judges might rather have wanted to influence future

[52] The "Concurrences" column records every instance where the award explicitly records an judge as concurring.

[53] Howard M. Holtzmann, *Drafting the Tribunal Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 75, 91 (David Caron & John R. Crook eds., 2000) (alteration added).

[54] Iran Touring & Tourism Org. v. United States, Award No. 347-B63-3 (Feb. 25, 1988), 18 Iran-U.S. Cl. Trib. Rep. 84, 87.

[55] Schering Corp. v. Iran, Award No. 122-38-3 (Apr. 13, 1984), 5 Iran-U.S. Cl. Trib. Rep. 361, 375 (dissenting opinion by Mosk) (clarifying that Iran's liability was very limited compared to the original claims).

[56] *See generally* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE 821 (Mahnoush Arsanjani et al. eds., 2010).

[57] *See*, *e.g.*, Watkins Johnson et al. v. Iran et al., Award No. 429-370-1 (July 27, 1989), 22 Iran-U.S.

awards and decisions[58] or to undermine the authority of a solution for later panels.[59] Some judges explicitly described opinions as strategic tools[60] because they were conscious that the Tribunal was setting precedent.[61]

Some separate opinions are telling here. Judge Khalilian wrote in his dissent referring to the majority decision, "in light of the blatant defects therein, . . . it will not be possible to rely upon this Award as precedent."[62] Judge Bahrami once opined that he "would hope that such an award which is, as set forth above in this Opinion, devoid of legal reasoning and legal justification, will not be held up as a precedent in

Cl. Trib. Rep. 257, 257 (dissenting opinion by Noori) (filed on Jan. 8, 1990).

[58] *See* Parviz Ansari Moin, *The Interpersonal Dynamics of Decision-Making (III)*, *in Drafting the Tribunal Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 263, 266 (David Caron & John R. Crook eds., 2000) (describing some opinions as "putting psychological pressure on the panel and paving the way for the next cases and awards"); *see also* BROWER & BRUESCHKE, *supra* note 2, at 661 (explaining how the existence of third-country judges created "predictable dynamic, namely competition for the 'hearts and mind' of" these judges and asserting that "[w]here the vast bulk of claims is asserted against one side, namely Iran, clearly it is the Iranian side that must display the greater concern as regards the attitude of the third-country judges").

[59] *See* Lagergren, *supra* note 2, at 31 ("However, the authority of the awards is limited by the fact that the awards mostly are accompanied by forceful dissenting and concurring opinions. . . . Accordingly, care must be exercised in concluding from the Tribunal's awards that an opinio juris commune's is emerging.").

[60] *See* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 357 (note by Shafeiei) ("Instead, the fact is that Mr. Aldrich proceeded to state his opinions on the merits under the guise of submitting a 'Concurring Opinion,' and that he thereby condemned the Respondent in favour of the American Claimant. There, Mr. Aldrich gives his opinion on such issues as expropriation, control and the method of valuation, all which are matters at issue in other cases. This act is in violation of the interests and defences of the Respondent, and in fact constitutes prejudgement.).

[61] Peter D. Trooboff, *Settlements*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 283, 297 (David Caron & John R. Crook eds., 2000) ("One point is clear – the Iranians were acutely sensitive to the precedent that would be set by an averse Tribunal award in certain key cases including those involving the legal principles governing expropriation and breach or [sic] contract. It seems clear, as Judge Aldrich's *ITT* concurrence emphasizes, that some settlements that occurred late in the proceedings resulted from an Iranian effort to avoid the issuance of such precedent-setting awards.").

[62] Phillips Petroleum Co. Iran v. Iran, Award No. 425-39-2 (June 29, 1989), 21 Iran-U.S. Cl. Trib. Rep. 79, 196 (statement by Khalilian).

the Tribunal's future proceedings."[63]

This approach might however actually backfire. Providing the majority of the Tribunal is mindful of the persuasiveness of its approach and decision, an award that prompts a contemporaneous dissenting opinion might actually be better reasoned in order to answer the dissent's criticism.[64]

One way to test this proposition is to observe the importance of awards based on how many times they were cited in subsequent decisions. This reveals that majority awards were cited nearly twice as often in subsequent awards and nearly four times as often when counting subsequent citations in separate opinions. The very award that Judge Khalilian hoped would not be seen as a precedent eventually became one of the most cited by the Tribunal in later awards. Majority awards are also nearly three times longer than unanimous awards, reaching 9,500 words on average compared to 3,500 words for unanimous awards, which might explain why they were relied on more.[65]

The direct impact of separate opinions on a given debate is likely limited because separate opinions are rarely cited in later awards.[66] The dissent of Judge Lagergren, the neutral judge and Tribunal chair in *INA Corp. v. Iran*, is cited, for instance, in *Sedco Inc. v. National Iranian Oil Co.*, but only to suggest that the proper compensation standard for expropriation was not firmly established. Tellingly, when it was cited in *Philipps Petroleum Co. v. Iran*, it was followed shortly by Judge Holtzmann's concurring opinion criticizing Lagergren's views as obiter dicta.[67] Likewise, today's

[63] Gen. Dynamics Tel. Syst. Ctr. Inc. v. Iran, Award No. 192-285-2 (Oct. 4, 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 180 (dissenting opinion by Bahrami).

[64] *See* BAKER & DAVIS, *supra* note 2, at 154.

[65] This accords with what can be observed at the United States Supreme Court and Federal Court of Appeals. *See* Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 103 (2011).

[66] The same occurs in the American judicial context. *Id.*

[67] It was not, however, that the Tribunal shied away from citing separate opinions as proper authority because individual judges at the ICJ were sometimes cited in awards. *See*, *e.g.*, Bank Markazi Iran v. Fed. Reserve Bank of New York, Iran-U.S. Cl. Trib., Award No. 595-823-3 (Nov. 16, 1999), 26 Y.B. Com Arb. 689, 670-71 (2001) (quoting Barcelona Traction, Light & Power Co.

individual opinions in investment arbitration are rarely cited.[68]

Concurrences and dissents had greater importance in other separate opinions, although party-appointed judges were more likely to cite judges from their side. This is reflected in Figure 7 below, which retraces all the citations from one judge (individually and in joint opinions), to another.[69] There were few opinions by neutral judges, and fewer were cited later, although Judge Lagergren's opinion in *INA Corp.* became a focus of debate for both US and Iranian judges as can be observed from its central position in Figure 7.

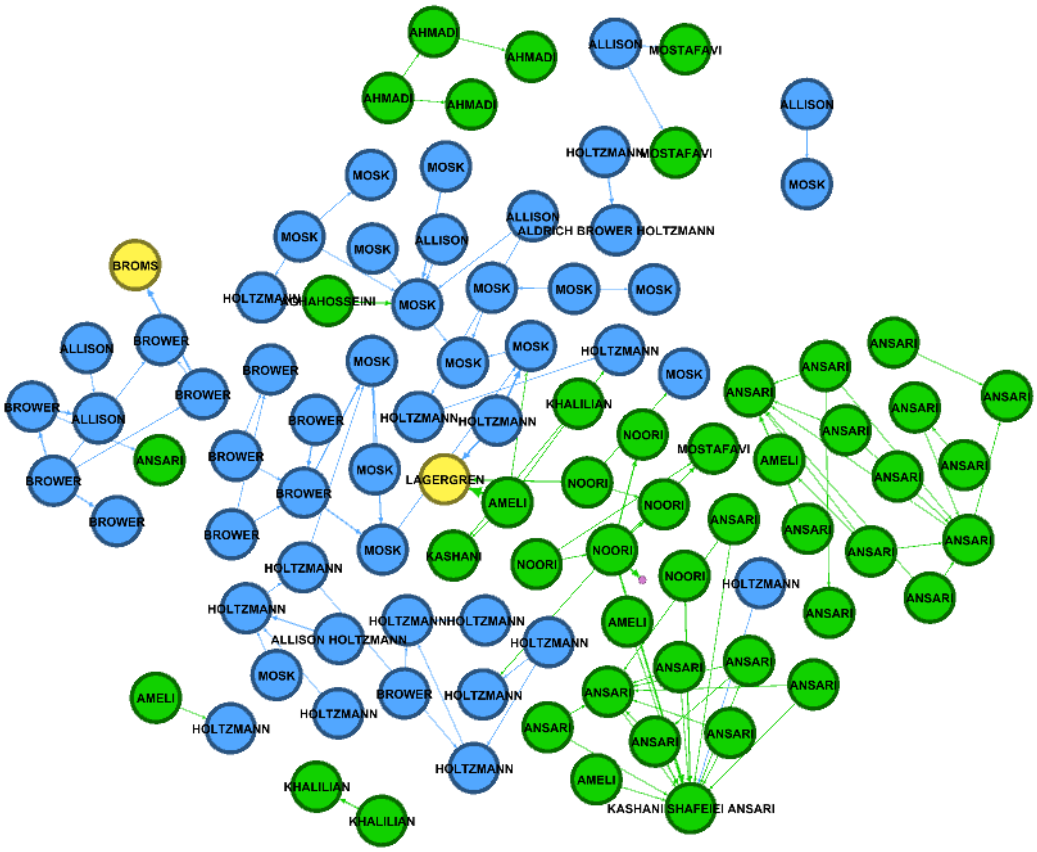

Figure 7: Citations between individual judges' opinions

(Belg. v. Spain), Preliminary Objections, 1964 I.C.J. Rep. 6, 99 (July 24) (dissenting opinion by Morelli, J.)).

[68] *See* van den Berg, *supra* note 58, at 826.

[69] Each node represents a separate opinion. Green nodes are opinions from Iranian judges, blue from American judges, and yellow from neutral judges.

On the face of it, there was surprisingly little engagement between the two sides, which tended to rely on judges of their own nationality in their opinions. And many dissents resorted to broad disagreements between the Iranian and US blocs.

The clearest example is with dual national claims, which were allowed following the full Tribunal's decision in Case No. A18 and which "generated tremendous controversy."[70] In a strong dissent, the Iranian judge condemned the notion of allowing Iranian nationals (albeit dual nationals) to bring claims against their own government,[71] and they often voiced their opposition thereafter.[72] The decision is often offered as a reason for the "Mangard incident" mentioned above in Part I.

The strength of this dissent, however, means that what became known as "The dissent of the Iranian judge in Case No. A18 was the opinion most cited by other opinions (17 times), even long after the decision on dual national claims was taken. The Iranian judge continuously found against jurisdictional decisions involving dual nationals, [73] and given the sensitivity of the issue, many of the claims were postponed until the 1990s.[74]

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[70] BROWER & BRUESCHKE, *supra* note 2, at 32.

[71] In an important point of background, Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 141, opines that the Iranian judges also suspected that many dual nationals were from powerful and well-connected families that had supported the deposed Shah.

[72] *See* BROWER & BRUESCHKE, *supra* note 2, at 296 (calling it a continuous "source of acrimony" and citing, e.g., Golshani v. Iran, Award No. ITL 72-812-3 (Oct. 24, 1989), 22 Iran-U.S. Cl. Trib. Rep. 155, 160 (dissenting opinion by Ansari)); *see also* MOHSEN AGHAHOSSEINI, CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW: ISSUES BEFORE THE IRAN-UNITED STATES CLAIMS TRIBUNAL 33 (2007) ("Of all the cases litigated before the Tribunal, and those include Cases in which giant multi-national oil companies sued Iran for hundreds of millions of dollars, none was so hotly and passionately contested as this interpretative Case between the two States."). No case was brought by a dual national against the U.S. government.

[73] *See* BROWER & BRUESCHKE, *supra* note 2, at 41-42 ("Because the Tribunal's analysis is a fact intensive inquiry into what is largely a subjective and emotional belief on the part of the claimant, its conclusions have frequently divided the Members of the Chambers. The Iranian Members of the Tribunal, in fact, regularly dissent from the finding of dominant and effective United States nationality, evidencing what appears to be continuing dissatisfaction with the Full Tribunal's decisions in *Case No. A18*.").

[74] *See* Zenkiewicz, *supra* note 13, at 159 n. 37.

B. *Tone*

A final aspect of the separate opinions to investigate is the tone adopted by the judges. Acrimony has permeated the Tribunal, which is evinced by the fact that "[u]nanimous decisions were rare in contested cases and the awards were usually accompanied by aggressively drafted dissenting opinions."[75]

Aggressiveness is a factor that can be measured by performing a sentiment analysis, which ranks text based on how relatively positive or negative it is. Dissents presumably should be more negative in tone than concurrences, which are expected to be more positive than majority decisions.

A sentiment analysis was performed over the first 500 characters of every concurring and dissenting opinion with the hypothesis that the introduction would better reveal the sentiments of the judge authoring the opinion. While sentiment analyses as applied to long texts are usually less instructive than for sentence long texts, the difference in mean scores between the categories of texts remains instructive. *The results can be seen* below in Table 6. As expected, dissents, and notably dissents by Iranian judges, were much more negative than other separate opinions.[76] To the extent that these opinions were strategically used to undermine the precedential value of a given decision, it is unclear whether more negativity was a winning strategy.[77]

	Dissenting	**Concurring**
Iranian judge	0.029	0.051
US judge	0.056	0.112

Table 6: Average Sentiment score

[75] *See* Mangard, *supra* note 31, at 255 (alteration added).

[76] The differences between the mean score of the set of dissenting opinions is statistically significant. The survey had a t-score of 2.5 and a p-value of 0.01.

[77] Instead, these findings might indicate that opinions from Iranian judges were directed at a different audience, e.g., domestic interests in Iran. *See* Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253, 268 (1988) (suggesting that Iranian judges were scrutinized for their actions by their government).

C. *Sources*

Separate opinions also differed starkly on the sources cited for arguing their point of view. An overview of all the sources cited in awards and separate opinions indicates that separate opinions cited the Tribunal's precedents markedly less than in majority and unanimous decisions. Concurring opinions in particular drew from a varied pool of resources.

This presumably stems from a different need to persuade. Concurring opinions were seemingly less constrained, and the authors were free to discuss sources with less authority, while dissenting opinions focused more on proper precedent to highlight contradictions in the Tribunal's jurisprudence.

Citation Target	Concurring	Dissenting	Award
Tribunal's Precedents	37.5	63.6	85.3
Doctrinal Sources	26.0	15.5	4.5
ICJ	11.6	8.4	3.2
Other Awards	14.3	6.8	2.6
Domestic Judgment	5.3	2.6	1.3
Positive Law	2.1	2.4	2.3
ICSID	3.1	0.4	0.7
ECHR	0.2	0.3	0.1

Table 7: Sources cited by type of document, percent

The judges were also likely to cite different sources depending on their nationality as shown in Table 8. Iranian judges, for instance, were unlikely to cite jurisprudence of the International Court of Justice (ICJ). This is perhaps unsurprising given that in the mid-1980s, the Court's reputation with non-Western states had reached a nadir. US judges, conversely, have been more familiar with or have tended to rely more on decisions by tribunals of the International Centre for Settlement of Investment Disputes (ICSID), which might also be because some of the US judges were themselves involved in those disputes.[78]

[78] Judge Brower, for instance, had been counsel for Indonesia in the long-running arbitration

Citation Target	Iran	Neutral	US
Tribunal's Precedents	60.9	28.6	57.3
Doctrinal Sources	16.4	28.6	18.8
ICJ	9.7	23.8	8.2
Other Awards	7.4	9.5	7.7
Domestic Judgment	2.2	4.8	4.2
Positive Law	2.2	/	2.4
ICSID	0.6	/	1.2
ECHR	0.5	4.8	0.1

Table 8: Sources cited by Judge's nationality, percent[79]

V. SUBJECTS AND TOPICS

The limited scope of the Algiers Accords means that only a limited set of disputes went before the Tribunal and thus the judges have often faced the same questions.[80]

To shed light on this, an analysis was performed that identified sets of words and phrases that commonly occur together and at significant rates across the dataset, indicating a distinct topic. The analysis identified 30 core topics, which are listed in Table 9 below.[81] Next, each document (award, opinion, etc.) was reviewed at the paragraph level for these topics to detect the most important of the 30 topics.[82] The analysis relied on the number of times these topics appeared in the Tribunal's documents to gauge their relative importance.

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of *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

[79] The numbers for neutral judges should be qualified by the fact that individual opinions by these judges are scant. Interestingly, the proportion of scholarly sources found in awards matches those found in other contexts. *See* Nora Stappert, *A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals*, 31 LEIDEN J. INT'L L. 963, 971-972 (2018).

[80] *See*, *e.g.*, Zenkiewicz, *supra* note 13, at 154 (identifying three categories of claims).

[81] Several topics identified by the algorithm were very closely related to particular cases and I discounted them as "Other." The search for topics in individual documents later ignored these "Other" topics to focus on the next most important topic.

[82] More precisely, the analysis is probabilistic, with every document having a probability of "x" of dealing with a given topic "y." The analysis only retained the topics that were above a certain significant probability threshold. Only paragraphs with a citation were parsed to filter out fact-heavy paragraphs and focus on legal topics.

A. *In awards and decisions*

Unsurprisingly, the major topics discussed in awards and decisions align with the topics of scholarly works.[83] The analysis confirms that chambers were often tasked with verifying their jurisdiction over claimants and, following a decision by the full Tribunal on dual national claims, with the dominant nationality of US claimants. On the merits, the Tribunal heard many contract-based cases and counterclaims, and the occasional argument on expropriation. Claims brought by Iranian claimants often focused on principles (A) and (B) of the Accords.[84]

The analysis confirms that the prevalence of the topics varied over time. Looking at the topic "oil," for example, which refers to disputes over oil reserves, productions, etc., indicates that it peaked in early disputes, especially in 1990, when *Philips Petroleum* was decided. The fraught topic of dual national claims peaked in April 1984 when the full Tribunal ruled on its jurisdiction over those claims and then became sporadic before rising again in the 1990s as if the Tribunal had decided to defer the claims until tensions abated – which is exactly what happened according to most commentators.[85]

B. *In opinions*

With some exceptions, concurrences and dissents often focused on more abstract questions of interpretation, jurisdiction, and, in particular, applicable law. While topics like contract, ownership, and counterclaims were among the main matters discussed in the awards themselves, they came up at lower rates in dissents and rarely in concurrences.

Table 9 retraces the total number of topics in concurrences, dissents, and awards, as well as the rate of separate opinions treating a given topic compared to awards–

[83] See, generally, BROWER & BRUESCHKE, *supra* note 2.

[84] Principle (A) obliged the U.S. to restore the financial position of Iran as it was prior to the diplomatic break, while Principle (B) mandated the termination of all external litigation between the parties and their nationals.

[85] *Cf.* David D. Caron & John R. Crook, *Moving to End Game*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 331, 335 (David D. Caron & John R. Crook eds., 2000) ("Following the events of 1984, arbitrators were not inclined to push the dual national cases forward rapidly.").

giving an idea of their importance for individual judges. For instance, questions of unjust enrichment surfaced nearly half as much in dissents as in awards, but barely in concurring opinions.

Topic	Concurrence	Dissent	Award	Concurrence Rate	Dissent Rate
Jurisdiction	54	108	720	7.50	15.00
Procedure	23	69	430	5.35	16.05
Counterclaims	17	59	422	4.03	13.98
Contract	25	85	372	6.72	22.85
Ownership	14	40	347	4.03	11.53
Evidence	23	135	299	7.69	45.15
Interpretation	95	170	233	40.77	72.96
Control	15	50	188	7.98	26.60
Dual Nationality	14	43	180	7.78	23.89
Banking	28	46	164	17.07	28.05
Choice of Forum	14	32	156	8.97	20.51
Force Majeure	15	68	152	9.87	44.74
Interests	39	48	127	30.71	37.80
Principle B	30	32	121	24.79	26.45
Expropriation	11	24	112	9.82	21.43
Interim	13	20	110	11.82	18.18
Request	1	10	109	0.92	9.17
Transfers	6	39	90	6.67	43.33
Caveat	8	27	79	10.13	34.18
Applicable Law	41	52	71	57.75	73.24
Quantum	8	13	70	11.43	18.57
Unjust Enrichment	4	28	59	6.78	47.46
Standard	15	17	59	25.42	28.81
Award	25	9	39	64.10	23.08
Signature	11	13	37	29.73	35.14
Nationality	1	14	34	2.94	41.18
Principle A	4	10	32	12.50	31.25
Litigation	2	13	27	7.41	48.15
Challenge	14	6	26	53.85	23.08
Oil	2	0	9	22.22	0.00
Authenticity	4	5	4	100.00	125.00

Table 9: Topics, number of observations, and as a ratio of observations in awards

Dissents often discussed questions of evidence, which is not surprising. The Tribunal never formally identified a standard of proof,[86] so judges had some discretion in assessing the evidence. Judge Mangard opined that US judges often dissented on this point when stricter European standards were applied.[87] Judge Brower echoed this point, adding that evidential matters left room for the third-country judges to "give in" in the context of always "saying no" to Iran.[88] All this gave judges space to write dissenting opinions on evidence questions.

Interest in topics also differed depending on the author's nationality:

Iran				**US**			
Concurring		*Dissenting*		*Concurring*		*Dissenting*	
Interest	47	Interpretation	154	Standard	232	Evidence	107
Unjust Enrichment	24	Evidence	149	Choice of Forum	94	Control	102
Award	23	Dual	131	Applicable Law	83	Procedure	102
Dual	19	Expropriation	103	Interpretation	62	Interpretation	89
Jurisdiction	6	Standard	103	Interests	52	Nationality	86
Control	5	Principle A	95	Award	40	Applicable Law	83
Counterclaims	5	Jurisdiction	92	Contract	39	Counterclaims	63
Choice of Forum	4	Caveat	85	Jurisdiction	33	Request	63
Interpretation	4	Contract	85	Expropriation	32	Dual	56
Principle B	3	Procedure	85	Control	31	Ownership	56
Applicable Law	2	Control	70	Interim	24	Quantum	46
Banking	2	Counterclaims	62	Principle B	24	Force Majeure	45
Transfers	2	Force Majeure	52	Banking	19	Banking	39
Challenge	1	Choice of Forum	42	Oil	15	Transfers	34

[86] Koorosh H. Ameli, *The Application of the Rules of the Iran-United States Claims Tribunal*, *in* INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY 263, 272 (Wybo P. Heere ed., 1999) ("In various cases, the Tribunal has simply concluded from its interpretation of the evidence what in its view should be the fact, without reference to any standard of proof and justifications for it. Thus, an independent examination of the evidence, even as presented in some of the awards, may allow a different conclusion from what the award has reached.").

[87] Mangard, *supra* note 31, at 259; *and see generally* ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (2009).

[88] *See* BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 662 ("Further up the line, decisions may be made on evidentiary issues or regarding damages that legitimately might have been decided either way."). In the same context, Judge Brower also contends that the president in his first full Tribunal case voted with the Iranians only after being sure to be in the minority. *See* Mangard, *supra* note 31, at 259.

Procedure	1	Interests	32	Quantum	15	Caveat	32
		Quantum	30	Counterclaims	14	Interests	32
		Transfers	28	Procedure	11	Choice of Forum	28
		Award	27	Evidence	10	Interim	28
		Ownership	27	Ownership	10	Jurisdiction	27
		Signature	23	Signature	9	Contract	22
		Principle B	15	Force Majeure	6		
		Applicable Law	14	Caveat	5		
		Unjust Enrichment	12	Challenge	4		
		Oil	7	Litigation	4		
		Interim	6	Transfers	1		
		Banking	5	Unjust Enrichment	1		

Table 10: Topics, number of observations, per type and author nationality

The topic of evidence remained one of the most popular, not only in US dissents but also in Iranian ones. It is noteworthy that Durward Sandifer's book, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS, is by far the most cited scholarly authority in the dataset even though it was cited only in separate opinions and rarely in awards.

There are however also marked discrepancies in interests depending on the judge's nationality. Iranian dissents focused more on the topic of dual nationals that the Tribunal ruled it had jurisdiction over, which was also closely related to the issue of dual national claims.[89] US dissents, meanwhile, were often concerned with the topic of control, considering that the Tribunal often denied expropriation claims based on a claimant's failure to show sufficient control of the expropriated entity. The topic of unjust enrichment, which was often an alternative claim against Iranian defendants, arose mostly in Iranian opinions and was relatively ignored by the US judges.

The significance of the differing interests is examined in the next and last parts, which suggest that there were extra-legal motivations that likely motivated the judges.

VI. WAS THE TRIBUNAL POLITICAL AND DOES IT MATTER?

The numbers above shed light on one of the most fraught questions in the

[89] The full Tribunal "caveated" its position on dual national claims by holding that a claimant's dual nationality might be relevant in matters of liability or quantum.

scholarship surrounding the Tribunal's work, standing to undermine its importance and legacy: whether the Tribunal was political and whether this should discount its legacy.[90]

This criticism remains relevant today as it shares much in common with a perennial debate about the role, motives, and influence of party-appointed judges in investment arbitration today.[91]

A. *The Charge*

Some scholars suggest that the Tribunal's awards and decisions were merely the outcome of an adjudicative body permeated by politics and tainted by each side's motivation of winning at all costs.[92] The background of the Tribunal's operations informs these criticisms: relations between Iran and the US have been marked by great tensions since the Iranian Revolution,[93] making it hard to believe the Tribunal was immune. As recounted above in Part II, accusations of impartiality have occasionally flared between the judges themselves.[94]

Several ways to answer this charge have surfaced in the literature. First, it is

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[90] *See* MUTHUCUMARASWAMY SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 202 (1986).

[91] *See* Waibel & Wu, *supra* note 18, at 8; Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 339-48 (2010) (arguing that the politicization in unilateral arbitrator appointments undermines the legitimacy of arbitration).

[92] *See* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 105 (1990); *see also* BROWER & BRUESCHKE, *supra* note 2, at 648 (making similar criticisms); Ameli, *The Iran-United States Claims Tribunal*, *supra* note 24, at 246 (noting the "controversies over the precedential value of [the Tribunal's] jurisprudence") (alteration added). The notion that the tribunal was politicized was accepted, for example, by Judge Brower who opined that the tribunal was bound to be "politically affected" due to its structure and the circumstances of its birth. Charles N. Brower, *The Interpersonal Dynamics of Arbitral Decision-Making* (I), *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 249, 250 (David D. Caron & John R. Crook eds., 2000).

[93] *See* Zenkiewicz, *supra* note 13, at 173 ("The relationship between those two States can be characterized as unusually tense, if not openly hostile. In that framework, especially when the only cases left were the intergovernmental disputes, the Tribunal members sensed the constant and increasing pressure to decide cases on grounds that were more political than legal.").

[94] *See* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 358 (note by Shafeiei).

sometimes pointed out that the charge is a *non sequitur*: the "political" outlook of the judges, if any, does not necessarily mean the solutions adopted and their reading of the law was deficient.[95]

It also bears noting that the principle of coherence should function to refrain judges' willingness to always rule in favor of a party, lest to be accused of deciding contrary to their past decisions. For some authors, the more the Tribunal became a permanent court, the more legitimate it became and the more independent it could venture to be.[96]

Another answer that is more common in the literature denies that the Tribunal was political and insists that judges generally worked and ruled in a professional manner, regardless of the claims before them. [97] Judge Mosk, for instance, said that "[g]enerally, despite diplomatic differences between Iran and the United States and some sharply worded opinions (which are not unheard of in American appellate cases), Iranian and United States representatives to the Tribunal and the arbitrators work together in a civil and courteous manner."[98]

Judge Mosk observed that the US judges (read: "at least") understood that they were not supposed to be representing their government,[99] and he offers several

[95] *See* Caron, *supra* note 98, at 105 n. 1 ("I believe the combativeness of the Iranian arbitrators did not politicize substantive decisions."); *see also* BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 650 ("There would appear in any event to be natural limits to how far political considerations can, in the long run, successfully pervert a publicly carried out process of adjudication controlled ultimately by third-country nationals of high distinction.").

[96] *See* Alter, *supra* note 11, at 186.

[97] BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 655 ("[P]ersonalities, politics and psychological pressures have played a role in some of the Tribunal's more difficult decisions," but that is a "very minute group. . . . In the vast majority of cases, however, the presence of these pressures has not affected the award in any significant way. . . . [I]t is human nature that no person can bear it well to be on the losing side year in and year out. . . . Similarly, few would be comfortable in the position, potentially occupied by third-country judges of the Tribunal, of more or less continually 'saying no' to a party, i.e., Iran.") (alterations added).

[98] Mosk, *supra* note 80, at 270 (suggesting that the argument itself is a *non sequitur* because a tribunal could be highly politicized and still remain "courteous and professional").

[99] *Id.* at 267.

decisions where they voted against the US party.[100] He added, diplomatically, that the Iranian judges "may have been in a more delicate situation" ascribing their difficulties to the revolutionary government at the time, and noting that they rarely voted against Iran and if so only in small cases.[101]

B. *Lessons from the Data*

The data analyzed above lends to Judge Mosk's observation that Iranian judges largely dissented in cases won by the US party. The same discrepancy can to some extent be observed in the voting pattern of the American judges.

While raw statistics should not be overstated,[102] going beyond them confirms that the rare instances of an judge authoring a dissent when its government was broadly successful were often directed at few findings going in the direction of the losing party, who appointed that judge. Thus, if Judge Bahrami wrote a dissent in *FMC Corp. v. Ministry of National Defense*,[103] where Iran's counterclaims exceeded the value of the claimant's claim, it was to undermine the Tribunal's findings on the merits of the claimant's case. On the other hand, in cases won by US claimants, a substantial

[100] *Id.* at 267, nn. 49-50. Mosk notes that the American judges voted for levying a large award against the U.S., but he does not clarify whether the judges dissented from the award. *Cf.* Iran v. United States, Award No. 306-A15(I:G)-FT (May 4, 1987), 14 Iran-U.S. Cl. Trib. Rep. 311, 320 (concurring opinion by Holtzmann et al.) ("This Partial Award implements an earlier Interlocutory Award in this Case from which all three American members of the Tribunal disagreed for the reasons set forth in their Dissenting Opinion.").

[101] Mosk, *supra* note 80, at 268 ("Iranian arbitrators have joined in some awards against Iran, but this occurred infrequently, and generally only when the award was substantially less than the amount claimed.").

[102] This statistical approach to the question has been criticised. *See* Commentary by Kryzysztof Skubiszewski, *The Role of ad hoc Judges*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, PROCEEDINGS OF THE ICJ 378, 389 (Connie Peck at al. eds., 1997) ("I am not very convinced that the statistics about voting behaviour, like statistics about the number of ratifications of treaties and similar statistical games, tell us much about the law and the real posture[.]"). But Mr. Skubiszewski's point cuts both ways: some awards were unanimous in appearance, but that could have been, for instance, because a "losing" judge thought it was a win considering that the liability could have been higher. Nevertheless, the "statistics" themselves seemingly mattered greatly to the parties and to the tribunal. *See* Mangard, *supra* note 31, at 261.

[103] FMC Corp. v. Ministry of Nat'l Def. et al., Award No. 292-353-2 (Feb. 12, 1987), 14 Iran-U.S. Cl. Trib. Rep. 111, 103 (dissenting opinion by Bahrami).

number of dissents by the US arbitrators were actually due to Judge Holtzmann on the question of costs (of which, he opined, claimants should be able to recover a larger portion).[104]

Party-appointed judges were also more likely to dissent in high-stake decisions, but not necessarily in disputes between the two governments[105] where the proportion of dissents tracks that of other cases and with Iranian judges even agreeing to find Iran liable.[106] Iranian judges dissented however in all but three of the 149 decisions that ended with a financial outcome in favor of a US claimant. These were presumably higher-stake decisions because Iran reportedly disapproved of any dollar that went the American way. US judges, by contrast, were more inclined to join a decision that found the US government liable.

In short, virtually every separate opinion supported the side that appointed the judge. As Albert Jan van den Berg noted:

> In a tribunal of three, one could imagine that there is about a 33 percent chance that the dissenting opinions would be in favor of that party; or, if one eliminates the presiding arbitrator, the chance may be about 50 percent. It is said that 'the parties are careful to select arbitrators with views similar to theirs.' Assuming—generously—that such a factor influences half of dissenters, the percentage could be assessed to be about 75 percent.[107]

A rate of nearly 100% indicates that something else was the matter. The pattern of dissents supports the observation that the appointment method created partiality.[108]

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[104] *See*, *e.g.*, Sylvania Tech. Sys. Inc. v. Iran, Award No. 180-64-1 (June 27, 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, 329 (separate opinion by Holtzmann).

[105] *But cf.* Allen S. Weiner, *The Iran-United States Claims Tribunal: What Lies Ahead?*, 6 L. & PRAC. INT'L CTS. & TRIBS. 89, 96 (2007) ("As the docket narrows to cases involving only two parties, Tribunal Members may perceive increasing pressure to decide cases on grounds that are more political than legal.").

[106] *See*, *e.g.*, Iowa St. Univ. v. Ministry of Culture & Higher Ed. et al., Award No. 276-B72-2 (Dec. 16, 1986), 13 Iran-U.S. Cl. Trib. Rep. 271, 276.

[107] Van den Berg, *supra* note 57, at 824.

[108] *See id.* at 834 ("Unilateral appointments may create arbitrators who may be dependent in some way on the parties that appointed them.").

As seen in Part IV above, party-appointed judges created two blocks of separate opinions on which to rely and cite—blocks which were aligned with nationality. Table 11 below indicates that the US and Iranian judges were slightly more likely to cite precedent that supported their appointing party, but in all cases, decisions won by the US are over-cited compared to those won by Iran. As also seen in Part IV, Iranian and US judges drew from different types of authorities when supporting their opinions.

Overall Result	# of decisions won	# citations in Iranian opinions	# citations in American opinions	# citations in awards and decisions
Iran	209	250	201	736
US	365	581	825	2783
Ratio	0.57	0.43	0.24	0.26

Table 7: Citations of precedent by cited authority's overall winner

Part V, meanwhile, indicated how the blocks of judges had varying interests in the matters handled by the Tribunal. This is to be expected of judges from different legal systems and traditions. But the fact that some topics (e.g., dual national claims and standards of compensation) remained crucial in separate opinions long after they have, seemingly, been disposed of by an award indicates that this was more than a question of varying interests. Rather, it is hard not see there a certain motivation to relitigate past issues.

All this suggests that at least two of the three judges in a given case cared more about their nationality and the nature of the claims than the pure legal merits.

C. *Does it matter?*

Being politicized does not mean that the Tribunal's findings were tainted. As found in Part IV above, majority decisions tended to be longer and with more citations than unanimous decisions and presumably better reasoned. The advocate attitude of the party-appointed judges might have ensured that the final outcome in the award was all the more reasoned and grounded in law.

In other words, the clear conflicts on the law between irreconcilable judges might have ensured the logical soundness of awards. Later, the precedent also constrained the margin of appreciation of future panels. Ultimately, the outcomes were relatively

balanced, and the political underpinnings of individual cases could not translate into a general political bias that smeared the Tribunal's work.

The assertion that because of the appointment method judges acted based on political affinity, undermining the integrity of awards, goes too far—especially considering that appointing judges with diverging views is often the very aspect of arbitration that is appealing to disputing parties.[109] The Tribunal's experience with hundreds of awards often accompanied by separate opinions was one of balanced outcome, strengthening the merits of the system of party appointments.

VII. CONCLUSION

The Tribunal achieved a remarkable output despite challenges to its legitimacy and function.[110] Past and present tribunals have declined, but the Iran-US Claims Tribunal achieved most of what it was set up for in deciding and settling hundreds of claims. In the process, the Tribunal offered scholars and practitioners an opportunity to gain experience and a corpus of precedent that has influenced the institution of new adjudicating bodies.[111]

The Tribunal's record of decisions and awards is an invaluable dataset. It confirms the Tribunal's success in settling hundreds of claims in a balanced way, even considering the asymmetry of claims, while building jurisprudence *constante*. This dataset is also relevant to the discussion on the role of party-appointed judges and the impact of concurring and dissenting opinions in international dispute-settlement.

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[109] Waibel & Wu, *supra* note 8, at 4.

[110] Those challenges have not abated. *See* Michael Ottolenghi, *Islamic Republic of Iran v. United States: Case Nos. A3, A8, A9, A14, and B61*, 104 AM. J. INT'L L. 474, 478 (2010) (commenting on a 2009 partial award) ("This partial award, issued after Case No. B61 had been on the Tribunal's docket for twenty-seven years, with thousands of pages of pleadings and sixty days of hearings, is a monument to the Tribunal's legitimacy. That the full Tribunal managed to have a partial award signed by all nine members is a tribute to the leadership of late President Krzysztof Skubiszewski, who persevered through two Iranian challenges against him and a scathing attack on the appointing authority (Willem Haak of the Netherlands) who rejected those challenges, all while the full tribunal was deciding Case No. B61.").

[111] *See* David D. Caron & John R. Crook, *Concluding Reflections*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 363, 369 (David D. Caron & John R. Crook eds., 2000) (citing, e.g., the Tribunal's influence on the UN Compensation Commission).

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