III. TRIBUNAL JURISPRUDENCE RELATING TO SELECTED PRINCIPLES OF THE LEX MERCATORIA

A.

If non-performance of a party is due to an impediment which is beyond the control of that party and could not have reasonably been foreseen by that party at the time of conclusion of the contract, such as war, civil war, strike, acts of governments, accidents, fire, explosions, natural disasters etc., and neither the impediment nor its consequences could have been avoided or overcome ("acts of God"; "force majeure", "höhere Gewalt"), that party's non-performance is excused. If non-performance is temporary, performance of the contract is suspended during that time and that party is not liable for damages to the other party. If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract. 27

Given that virtually all the commercial claims asserted before the Tribunal arose during the Islamic Revolution or the period of political, social, and economic turmoil that followed, the plea of force majeure has featured prominently in many of those claims. 28 Frequently, American contractors who did not complete performance of their contracts and Iranian parties who failed to make contractually-stipulated payments have invoked force majeure as an excuse for their non-performance. Generally, the Tribunal has had little difficulty in holding that force majeure conditions existed in Iran during the months leading to the success of the Islamic Revolution in February 1979 and during some months thereafter; similarly, the Tribunal has concluded that the events in Iran following the 4 November 1979 seizure of the United States Embassy in Tehran and the economic sanctions that the United States imposed on Iran in response constituted force majeure conditions. 29 The Tribunal has recognized that the defence of force majeure is a general principle of law 30 and that "the right to invoke force majeure does not depend on, or arise out of, an express contractual provision." 31

The first award in which the Tribunal addressed force majeure was Gould Marketing, Inc. ("Gould"). 32 In that case, which involved a contract for the delivery of radios and related equipment and services to the Iranian Ministry of Defence, both parties denied the existence of force majeure conditions excusing the other party's non-performance. The claimant, Gould Marketing, Inc., withdrew its field service representative from Iran in December 1978, alleging that conditions were unsafe; it argued, however, that those conditions did not represent force majeure because they were not due to events beyond the control of either party but rather were acts attributable to the government of Iran. Gould Marketing, Inc.
contended that the Ministry of Defence had breached the contract by failing to pay certain invoices, while the Ministry argued that Gould Marketing, Inc. had breached by withdrawing its field service representative. Chamber Two of the Tribunal rejected both parties' allegations of breach and concluded that force majeure conditions prevailing in Iran in late December 1978 and early 1979 excused both parties' non-performance. The Tribunal defined force majeure in the following terms:

By December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By "force majeure" we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the operation [of] such forces are therefore not attributable to the state for purposes of its responding for damages. Similarly, as between private parties, one party cannot claim against the other for injuries suffered as a result of delays in or cessation of performance during the time force majeure conditions prevail, unless the existence of these conditions is attributable to the fault of the Respondent party.33

In a later award, Sylvania Technical Systems, Inc. ("Sylvania"),34 involving a contract for the provision of training services to the Iranian Air Force, Chamber One of the Tribunal elaborated on the force majeure pronouncements made by Chamber Two in Gould. In Sylvania, the Tribunal emphasized that "[t]he invocation of force majeure as an excuse for failure to perform under a contract must always be analyzed in the context of the circumstances causing the force majeure, taking into account the particular party affected by those circumstances and the specific obligations that party is prevented from performing."35 It also pointed out that, "[f]orce majeure being an exception to the obligation to perform, a party that invokes it has the burden of proving that conditions of force majeure existed with regard to its various contractual obligations."36 The Tribunal, quoting Gould,37 went on to hold that force majeure conditions existing in Iran from late December 1978 until 15 February 1979, including a general disruption of banking operations, suspended both parties' performance under the contract. Thus, the Tribunal determined that the respondent's failure to pay certain invoices due during that period and the claimant's withdrawal from Iran on 10 February 1979 were excused by force majeure.38 The Tribunal, however, rejected for lack of proof the respondent's contention that force majeure conditions extended beyond 15 February 1979 so as to prevent the respondent from making contractual payments and releasing letters of credit.39

In International Technical Products Corp., the Tribunal held that force majeure conditions in Iran justified the claimant's suspension of performance and departure from Iran in December 1978 as well as the respondent's failure to make contractual payments for work not yet performed by the claimant. The parties had presented "[n]o detailed evidence as to when the force majeure ceased to exist or changed into something else,"40 nonetheless, the Tribunal excused the claimant's subsequent failure to return to Iran on the ground that it had not been invited by the respondent to resume performance until 30 October 1979, which was only a few days before 4 November 1979, the date when militant Iranian students seized the United States Embassy in Tehran.41 Quoting Starrett Housing Corp.,42 the Tribunal noted that "at least after 4 November 1979 those American companies which had remained in Iran were forced to leave their projects and had to evacuate their personnel." It proceeded to hold that, while the situation that had started on 4 November 1979 excused the claimant from performing, in that "new situation [the respondent], on the other hand, was precluded from invoking force majeure in its contractual relationship" with the claimant.43 Thus, by this finding, the Tribunal concluded that Iran was at least partially responsible for the conditions that arose after 4 November 1979. The Tribunal went on to grant the claimant's claim for lost profits on unperformed contractual services.

The Tribunal has consistently found that the actions of the United States in refusing, after 14 November 1979,44 to issue licences for export to Iran of military equipment and other items subject to United States national-security export controls created force majeure conditions. Thus, under those circumstances, the Tribunal has held that American companies holding such items in the United States were excused from any obligation to export them to Iran.45 Where Iran held title to the items, the Tribunal usually ordered the American companies, as bailees or Iran's properties, to deliver them to Iran's freight forwarder in the United States.46

In Blount Brothers Corp.,47 the Tribunal addressed the question of the invocation of force majeure by an agency of the state where the agency is prevented from performing the contract by acts of its own government. In that case, which
involved a contract for the construction of houses, the Tribunal held that the respondent, Iran Housing Company, an entity controlled by the government of Iran, was not responsible for delays in contractual performance attributable to cement shortages resulting from Iranian government allocations. Given the significance of the question before the Tribunal, it is worth quoting in full the Tribunal's ruling on the matter:

The position of a state enterprise in circumstances of force majeure has been widely discussed. The starting point is acknowledged to be the principle that the separation between a state enterprise and the state itself should be respected, with the result that acts of public authority by the state may operate as force majeure and excuse the state enterprise from liability. In examining the facts in any given case to determine whether they do, the state enterprise generally must be neither privileged nor discriminated against in comparison with the private enterprise. Certain general presumptions may be taken to apply in such cases, perhaps the strongest of which is that a state is unlikely to act in the exercise of its executive powers to the detriment of its own trading organs. Here, however, it is not disputed that the measures taken by the Government of Iran were intended as a response to a widespread problem of general application, and that [the respondent] was only one of a number of enterprises affected by them. The Tribunal therefore accepts the cement shortage as a circumstance of force majeure and one for which [the respondent] should not be held responsible.

Concerning the question of the legal status of the contracts in cases where the Tribunal found force majeure conditions to exist, while some contracts contained force majeure provisions specifying the consequences of force majeure for the operation of the contracts, many did not. Thus, in scores of cases the Tribunal had the opportunity to determine what those consequences were. Where force majeure existed with respect to a particular contractual obligation, the Tribunal has consistently held that, during the force majeure period, performance of that obligation was suspended and non-performance by the affected party excused.

Beyond this general conclusion, the Tribunal in several cases has found that the contracts at issue had been frustrated as a result of prolonged force majeure. The seminal case among such frustration cases is Gould. In the interlocutory award in that case, after finding that, through no fault of either party, there were no realistic prospects for resumption of work on the contract, the Tribunal concluded that "the continued existence of force majeure conditions had by mid-1979 ripened into a termination of the ... contract. Performance had become essentially impossible." In several awards that followed, the Tribunal has confirmed the rule that protracted force majeure conditions may lead to the termination of a contract by reason of frustration or impossibility of performance, even if the parties did not invoke force majeure, or the contract does not provide for such termination. The Tribunal's consistent application of that rule suggests that the Tribunal regarded it as a general principle of law. The Tribunal's jurisprudence in this regard is influential, because the CENTRAL-List force majeure Rule does not deal with the way in which continued suspension of performance due to prolonged force majeure affects the legal status of a contract.

Commentators have remarked, some critically, that, in Gould and in the long series of awards that followed the principles laid down therein, the Tribunal took an "expansive" approach to the consequences of force majeure conditions in Iran. They contrast Gould's frustration-approach with the supposedly "narrower" and "more cautious" view taken by Chamber One of the Tribunal in Sylvania. As noted, Sylvania emphasizes that the invocation of force majeure "must always be analyzed in the context of the circumstances causing the force majeure, taking into account the particular party affected by those circumstances and the specific obligations that party is prevented from performing". Westberg, in particular, believes that in Gould Chamber Two concluded "mistakenly that [force majeure conditions in Iran] had permanently prevented the parties from performing the contract and thus ripened into a termination of the contract"; and that Chamber One in Sylvania "took a narrower and more realistic approach ... rejecting the conclusion that the same force majeure conditions had terminated performance of the contract, finding instead that performance had been suspended only for a short period of time after which Iran's contract obligation to pay was no longer prevented by those conditions." Westberg's comments are not convincing. In Sylvania, inter alia, a general disruption of banking operations in Iran, resulting from the general upheaval in the country, prevented the respondent from paying certain outstanding invoices. The Tribunal held that, after force majeure conditions had lifted, the respondent was no longer prevented from paying the claimant for work previously performed under the contract.

In Gould, in contrast, the respondent's non-performance of its contractual payment obligations was justified, not as a
result of a general disruption of banking operations, as in Sylvania, but rather as a result of the claimant's inability, due to *force majeure*, to provide certain contractually-required services in Iran. The Tribunal held: "Since there remained in great part the field and spare part services to supply, [the claimant's] inability to do so due to the social upheaval in Iran justified non-performance by both parties." The Tribunal found that the continuing presence of the claimant's representatives in Iran had become impossible, at least temporarily, and their absence had adversely affected the entire repair-service operation. "In those circumstances, the Respondent cannot be held to have been required to continue payments." The respondent's "suspension of its performance obligations as to the payment schedule ... must therefore be considered a result of the same *force majeure* conditions which led to the ... departure [of the claimant's representatives]."

Because, according to the Tribunal, there were no realistic prospects for the claimant's return to Iran in light of the conditions in the country, it concluded - correctly, in my view - that by mid-1979 the contract had terminated because of frustration or impossibility of performance. Consequently, not the same *force majeure* conditions, as Westberg argues, but rather quite different "circumstances causing the *force majeure*" in effect justified the different conclusions reached by the Tribunal in Gould and Sylvania with respect to the effects of *force majeure* on the contracts at issue.

Where the Tribunal found that a contract had been frustrated as a result of protracted *force majeure* or had become impossible to perform for any other reason, it had to determine who owed what to whom as a result of such termination. As noted, in many cases the contracts contained no provisions delineating the consequences of *force majeure* for the operation of the contracts, so the Tribunal was left with wide latitude in determining the way in which the final accounting between the parties was to be carried out. Early on, in Queens Office Tower Associates, the Tribunal articulated the following rule for determining the rights and the liabilities of the parties in light of the premature termination of the contract: "The governing rule is that the loss must "lie where it falls". The apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point." The Tribunal elaborated on this rule in its final award in Gould. In determining who owed what to whom as a result of the frustration of the contract in that case, the Tribunal applied the following rule, which it had found to exist in United States, English and French law:

Under American law, as under English law since 1943, the general principle applied to equitably allocate such consequences of frustration of contract is that amounts due under the contract are to be proportioned to the extent the contract was performed. If no payment has been made, the Party which has performed is entitled to receive payment to the extent of that performance. If payment has been made, the Party which received such payment is entitled to retain that amount of money proportionate to its performance and must return any money in excess of that amount.

Thus, in the Tribunal's practice, the governing rule in frustration cases, where the contract does not provide otherwise, is that the parties' losses must lie where they fall, subject to the Tribunal's discretion to allocate equitably any such losses in proportion to the extent the contract was performed by the date of termination.

Concerning the methodology that the Tribunal has employed in determining who owes what to whom as a result of contract frustration, the Tribunal's award in Westinghouse Electric Corp. provides valuable insights. In the detailed and complex award in that case, which concerned a project for the establishment of maintenance capability for the Iranian Air Force's electronic equipment, the Tribunal determined the extent of performance and the extent of payments under 14 frustrated contracts (plus two contracts that had terminated otherwise). An analysis of the way in which the Tribunal determined the extent of the claimant's performance, which involved the provision of a multitude of different electronic maintenance equipment as well as all kinds of engineering and training services, is particularly instructive and may prove to be useful to other international tribunals faced with the difficult task of determining who owes what to whom as a result of premature contract termination when there is a paucity of evidence.

Because one of the legal consequences of contract frustration "is that as of [the date of termination, the parties are] excused from further performance ... [and are] discharged from their duty to perform contractual obligations not yet
due,"71 in frustration cases, the Tribunal has dismissed claims for specific performance.72

B.

If a party is unjustifiably enriched at the expense of another, that party has to pay a sum of money equal to the value of the enrichment to be determined according to the contractually agreed price or market price, including full compensation for the use (usufruct) of the subject matter of the enrichment ("Nemo sine causa alterius jactura locupletari debet"; "condictio indebiti"; "unjust enrichment").73

The Tribunal has awarded compensation based on unjust enrichment or quantum meruit in several cases, when it found that other theories of recovery were unavailable and not to award compensation would be inequitable.74 Thus, in the Tribunal's jurisprudence, unjust enrichment and quantum meruit are theories of "last resort",75 which "may not be maintained when a valid and enforceable contract exists".76 The Tribunal explained the reasons for this limitation in T.S.C.B., Inc.:

Where a valid contract exists, unjust enrichment is a derivative, or at best a secondary alternative, legal theory to an action on the contract. While there are some precedents, particularly in the United States, for permitting a claimant, if he so chooses, to sue on the basis of unjust enrichment, rather than on the contract, the preponderance of authority is to the contrary.77

The first case in which the Tribunal decided a claim for unjust enrichment was Benjamin R. Isaiah.78 In that case, the Tribunal found that the claimant was the beneficial owner of funds represented by a bank cheque drawn in January 1979 by the respondent bank's predecessor on an American bank, which cheque was subsequently dishonoured for insufficient funds. Because the payee of the cheque, a business associate of the claimant's, was an Israeli national, the Tribunal had no jurisdiction over a claim based on the cheque, as such claim would not satisfy the jurisdictional requirement of continuous ownership of the claim by a United States national from the date it arose until 19 January 1981, the date of the Algiers Declarations.79 So, the claimant asserted a claim for unjust enrichment against the Iranian bank, arguing that the bank had been given funds of which he was the beneficial owner and that it retained those funds for its own benefit and to his detriment. Citing authorities, the Tribunal noted that "[r]estitutionary theories such as unjust enrichment and enrichissement sans cause are found in the laws of many nations" and that "[i]n international law unjust enrichment is an important element of state responsibility."80 The Tribunal concluded that unjust enrichment was a "general principle[] of law."81 In awarding the claimant of the cheque, the Tribunal observed that "it would be inequitable for such a bank to be able to escape liability to the beneficial owner of the funds represented by such a dishonored check and retain the funds to which the bank has no claim."82

In Sea-Land Service, Inc., the Tribunal further explored unjust enrichment. In that case, the Tribunal found that the respondent had been unjustly enriched because, after the claimant had prematurely left Iran, the respondent used a container terminal that the claimant had constructed and operated in Iran. The Tribunal, citing authority, noted the equitable nature of the theory of unjust enrichment, which, it found, "is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to

be applied by international tribunals."83 The Tribunal emphasized that the rule against unjust enrichment involves a duty to compensate that "is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question."84 Consequently, "the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages."85 The Tribunal held that international tribunals may apply the principle of unjust enrichment in the following circumstances:

There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or
other remedy available to the injured party whereby he might seek compensation from the party enriched. 86

The Tribunal has followed the rule that a subcontractor generally has no right to recover against the party that has contracted with the main contractor - i.e., against the ultimate purchaser. 87 In one case, Schlegel Corp., the Tribunal has deviated from that rule and has awarded damages to a subcontractor based on unjust enrichment. The unique set of circumstances of that case, however, should be distinguished from those of the subcontractor claims rejected by the Tribunal. In Schlegel Corp., the respondent, an Iranian government agency, hired an Iranian contractor to carry out a water development project. The contractor, in turn, engaged a subcontractor - the claimant - to provide and install lining material in a reservoir. Although the claimant fully performed, the contractor failed to pay. The claimant then sought to recover against the respondent before the Tribunal based on unjust enrichment. The Tribunal found in favour of the claimant, concluding that the link between the claimant's performance and the respondent's enrichment was "sufficiently direct". In making this determination, the Tribunal highlighted three factors: first, that the respondent had itself provided for the reservoir liner specifications into the main contract with the contractor; second, that the respondent's consulting engineers had ordered the contractor to make the claimant, a "nominated subcontractor" as defined in the main contract; and, third,

that the respondent's consulting engineers had supervised the claimant's work. 88 Thus, when the claimant "had performed its work, the result was that the [respondent] had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work supervised and approved by its own engineers". 89 Moreover, the Tribunal found that the respondent's enrichment was unjust, noting that the respondent had never paid either the contractor or the claimant for the work. 90 The Tribunal also noted that the main contract protected the respondent from any risk of double liability. 91

With respect to quantum meruit, the Tribunal has awarded compensation on that theory where services had been performed by a contractor at the request of and with the knowledge of the other party even though they were not covered by an existing contract. 92 The Tribunal noted in this connection that "[i]t is well established under . . . general principles of law that under the doctrine of quantum meruit there may be recovery for work performed." 93

Concerning the computation of damages in unjust enrichment and quantum meruit cases, the Tribunal's practice has been to compensate claimants based on the extent to which the respondent state has been enriched by virtue of acquiring the property. 94 In determining the compensation owed a claimant in the circumstances of a particular case, the Tribunal by and large took an approach similar to that reflected in the CENTRAL-List unjust enrichment Rule. 95 For example, in Morrison-Knudsen, the Tribunal awarded compensation for expenses incurred in supplying an additional set of drawings of a planned motorway. While the contract provided that payment adjustments for extra services should be mutually agreed, there had been no such agreement between the parties. Nevertheless, the Tribunal held that, because the respondent had requested and accepted the additional work, the claimant was "entitled to its share of a reasonable sum for such work on the basis of quantum meruit". 96 The Tribunal estimated the amount of compensation based on cost information provided by the claimant. In DIC of Delaware, which involved contracts for the construction of a large development of apartment buildings, the Tribunal awarded damages in quantum meruit to the claimants for work performed at the request and with the knowledge of the respondent, even though there was insufficient evidence that an enforceable contract had been signed. The Tribunal said that evidence of the value of the claimants' work was the formula used by the parties to determine compensation under contracts for the other phases of the project and was reflected in the relevant requisitions that the claimants submitted to the respondent. The Tribunal went on to award the amount of those requisitions. 97 In Futura Trading Inc., the Tribunal awarded compensation on the theory of unjust enrichment for the value of 2000 wooden poles which were delivered but not paid for, although the Tribunal found that no contract had been concluded concerning the sale of the wooden poles to the respondent. The Tribunal considered "the invoiced amount of $542,809 to be a reasonable measure of the extent to which [the respondent] was enriched" 98 and awarded that sum to the claimant.

In one case, Sea-Land Service, Inc., Chamber One of the Tribunal formulated what it considered general rules for determining damages for unjust enrichment. It stated:

Opinions differ as to the basis of computation of damages. The predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched. ▼ Important factual
circumstances to be taken into account are the level of investment; the period during which the foreign investor has been able to make a profit; and the benefit actually derived by the host country from its acquisition. ... Compensation for unjust enrichment cannot encompass damages for loss of future profits. The Tribunal must aim instead to place a monetary value on the extent to which [the respondent] was enriched by its premature acquisition of the facility. ... The Tribunal must establish whether [the respondent] did in fact avail itself of the facility after [the claimant's] departure.  

The Tribunal went on to award the claimant USD 750000, which the Tribunal stated was an "approximation"; of the compensation due the claimant for the 

respondent's 'actual use and benefit' of a container terminal between November/December 1980 and 28 November 1982, when the terminal, developed and improved by the claimant, was to revert to the respondent in accordance with the contract.  

Chamber One, in the same composition, once again relied on the "actual-use" standard some two years later in *Flexi-Van Leasing, Inc*.  

C.

No one may set himself in contradiction to his own previous conduct ("non concedit venire contra factum proprium"; "l'interdiction de se contredire au detriment d'autrui").  

A right that has been forfeited may not be raised.  

In deciding questions of formation, validity, and interpretation of contracts, the Tribunal, rather than relying on the parties' assertions before it, has often relied on the parties' conduct during the course of the contract. In *Pomeroy Corp.*, the respondent contended that the contract at issue was invalid because the official who had signed it on its behalf lacked the authority to do so. The Tribunal noted that, even if the respondent's assertions of invalidity of the contract were correct, the respondent had conducted itself in a manner that indicated that it considered the contract to be valid, by making substantial contractual payments and by 

accepting the claimant's services. In concluding that the respondent's conduct constituted a ratification of the contract, whether or not its signatories lacked proper authority, the Tribunal stated: It is a general principle of law recognized in the law of Iran and the United States that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract.  

In *Shifflette*, the respondent Iranian university disputed the existence of an enforceable contract for teaching services, *inter alia*, on the ground that its regulations did not recognize oral agreements. The evidence showed that the claimant had worked for some two weeks in Iran in October 1978 and that the university had accepted his services. In holding that the parties had concluded an enforceable contract, the Tribunal said: The Tribunal has previously held that the existence of an oral contract can be proven through evidence demonstrating part performance, and that, under the circumstances, the other party was estopped from invoking invalidity of the agreement on merely formal grounds.  

In *Intrend International, Inc.*, the Tribunal dismissed for lack of proof a counterclaim for a contract tax allegedly due on dollar payments made pursuant to the contract but never claimed by the respondent during contract performance. In reaching that conclusion, the Tribunal noted that the behavior of the (respondent) in not deducting the tax on the U.S. dollar payments and in not demanding the amount of such tax prior to bringing this counterclaim casts doubts on its present assertion that the tax is applicable to the U.S. dollar payments.  

In *General Dynamics Corp.*, the Tribunal granted a claim for the reimbursement of cash advances that the claimant had paid to the respondent to cover certain expenses, although the contract did not provide for such reimbursement. Noting that, at the time of contractual performance, the respondent had not objected to the claimant's invoices for reimbursement of some of the advances, the Tribunal said that, in light of this course of conduct, the (respondent) cannot now object to making full reimbursement for the overtime advances. The Tribunal did not say
whether it considered the parties' conduct to have varied the terms of the Contract or to amount to a new agreement.\(^{107}\)

The Tribunal has also relied on the parties' contemporaneous conduct in deciding disputes concerning performance, breach, and termination of contracts. In *Rexnord Inc.*, the Tribunal held the respondent liable for freight charges claimed to be exorbitant because the respondent had not objected contemporaneously to those charges.\(^{108}\) In *John Carl Warnecke and Associates*, the Tribunal dismissed counterclaims for defective performance, noting that the counterclaimant had paid for the work and had not complained contemporaneously about it.\(^{109}\)

In *Collins Systems International, Inc.*, the Tribunal deemed it unnecessary to examine the claimant's argument, based on the language of the contracts, that the contracts had terminated in March 1980, because, "[e]ven if [the claimant's] interpretation of the contracts were accepted, the practice of the Parties both after and before November 1979 convinces the Tribunal that the contracts did not terminate prior to January 1981."\(^{110}\) In *Westinghouse Electric Corp.*, the claimant, who had acquiesced in the respondent's termination of the contract in June 1977, failed to impress the Tribunal with its contention in the arbitration that the respondent had breached the contract. Noting that the claimant's contentions of breach were inconsistent with its contemporaneous conduct in electing to regard the contract as terminated by the respondent, the Tribunal held that the claimant, in effect, waived any right now to raise a claim ... for breach of contract.\(^{111}\)

The Tribunal has held in several other cases that a party had waived a contractual right by failing to assert it prior to the commencement of the arbitral proceedings. In *Oil Field of Texas, Inc.*, the Tribunal concluded that the claimant had waived whatever rights it might have had to rental payments for equipment that had been destroyed on the ground that the claimant had invoiced the lessee for the replacement cost of the equipment only.\(^{112}\) In *Combustion Engineering, Inc.*, the Tribunal held that, by their conduct, the claimants had waived whatever rights they might have had to claim damages from the respondent for nonperformance.\(^{113}\) In *Collins Systems International, Inc.*, the Tribunal found that the claimant had waived its claim for payment of certain invoices by failing to include them in a list of outstanding invoices that it had submitted contemporaneously to the respondent.\(^{114}\)

The Tribunal has also considered the contemporaneous conduct of the parties in evaluating evidence of contractual performance. In this context, it has consistently held that, in the absence of contemporaneous objections or disputes, invoices or payment documents presented during the course of the contract are presumed to be correct and constitute *prima facie* evidence of the debt.\(^{115}\) For example, in *Westinghouse Electric Corp.*, the Tribunal dismissed for want of proof a counterclaim alleging non-completion by the claimant of the contractually-required engineering services. The respondent had not objected contemporaneously either to the claimant's invoice covering the 'final 20 man-months' of such services or to the letter that accompanied the invoice, stating that the claimant had completed its contractual engineering-service obligations; indeed, the respondent had paid the invoice. In these circumstances, the Tribunal concluded that the claimant's invoice and accompanying letter were presumed to be correct and established a *prima facie* case that the claimant had rendered all of the engineering services required by the contract.\(^{116}\)

Further, the Tribunal has regarded a party's delay in making complaints about the quality or timeliness of the other party's contractual performance as evidence undermining the credibility of those complaints\(^{117}\) or raising serious doubts as to the existence of (the alleged) defects.\(^{118}\)

**IV. CONCLUSION**

The Iran United St. Claims Tribunal, by consistently applying principles of commercial law in deciding many of the commercial cases before it, has contributed significantly to the stabilization and development of a multitude of principles and rules of the lex mercatoria.\(^{119}\) Indeed, the development of a body of international commercial law has 'made a quantum advance due to the work of the Tribunal',\(^{120}\) and its jurisprudence in commercial cases represents a veritable horn of plenty for those who are called to research and apply transnational commercial law, such as international arbitral
commercial arbitration. No less importantly, the Tribunal's experience has shown that an international arbitral tribunal can efficiently decide cases 'on the basis of respect for law'\textsuperscript{21} by applying general principles of commercial law rather than national law.


\textsuperscript{28} For a comprehensive discussion of the Tribunal's jurisprudence in \textit{force majeure} cases, see Aldrich, supra note 6, at pp. 306-320.


30 See, e.g., Anaconda Iran, Inc., supra note 29, 13 Iran-U.S. Cl. Trib. Rep. 211 para. 43 ("Under a variety of names most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law"); Mobil Oil Iran Inc., supra note 29, 16 Iran-U.S. Cl. Trib. Rep. 39 para. 117. Anaconda Iran Inc., supra note 29, 16 Iran-U.S. Cl. Rep. 211 para. 43. See also Mobil Oil Iran Inc., supra note 29, 16 Iran-U.S. Cl. Trib. Rep. 39 para. 117 (force majeure is a general principle of law that applies "even when the contract is silent").

31 Gould Marketing, Inc. (Interlocutory Award), supra note 29, 3 Iran-U.S. Cl. Trib. Rep. 147. Id. at pp. 152-53.

32 Sylvania Technical Systems, Inc. supra, note 29, 8 Iran-U.S. Cl. Trib. Rep. 298. Id. at p. 309.

33 Id. at p. 312.

34 See text accompanying note 33.


36 Id. at p. 312. In rejecting the respondent's plea of force majeure, the Tribunal noted that the Iranian government had terminated the contract at issue as a result of a "deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations" and that such a decision had been taken in view of an historic development, and do[es] not convey that performance by the [respondent] was prevented by events beyond its control. Id. at pp. 312-13.


38 See ibid.


43 See e.g., Gould Marketing, Inc. (Final Award), supra note 45, 6 Iran-U.S. Cl. Trib. Rep. 279; Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 171-72 paras. 367-68.

44 Blount Brothers Corp. v. Islamic Republic of Iran, Award No. 215-52-1, 10 Iran-U.S. Cl. Trib. Rep. 56 (6 March 1986).


46 Blount Brothers Corp., supra note 47, 10 Iran-U.S. Cl. Trib. Rep. 75. See also Bank Markazi Iran, supra note 29, at paras. 75-76 (holding, even if the Federal Reserve Bank of New York were considered an entity controlled by the government of the United States, it could, in the circumstances, invoke force majeure since it has its own legal personality distinct from the state). Accord C. Czarnikow Ltd. v. Centrala Handlu Zagranieznego Rolimpex, 1979 A.C. 351, discussed in Delaume, supra note 48, at p. 55, and Carbonneau, supra note 48, at pp. 116-17.


48 The CENTRAL-List force majeure Rule provides that the affected party's "non-performance is excused" and that, "[i]f non-performance is temporary, performance of the contract is suspended during that time". See text accompanying note 27.

49 See supra notes 29 and 32.


Note 39.

See, e.g., Gould Marketing, Inc. (Final Award), supra note 29, 9 Iran-U.S. Cl. Trib. Rep. 197-99 (awarding costs incurred after such date, including transportation and moving expenses, and for lost profits); Stephen G. Shiflett, supra note 29, 22 Iran-U.S. Cl. Trib. Rep. 115-16 para. 19 (awarding compensation for the two weeks the claimant worked pursuant to a contract for teaching services in Iran, but not lost wages for the remainder of the semester); Combustion Engineering, Inc., supra note 29, 26 U.S. Cl. Trib. Rep. 77 paras. 62, 207 (dismissing claims for licence fees due subsequent to the termination of the licensing agreement); Unidyne Corp., supra note 29, 29 Iran-U.S. Cl. Trib. Rep. 344 paras. 102-103 (awarding compensation for work performed but not paid for, but denying a claim for lost profits); Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 81 para. 64, 126 para. 216 (awarding compensation for work performed but not paid for, but denying claim for lost profits).


The CENTRAL-List force majeure Rule, however, does deal with the situation where continued suspension of contractual performance becomes attributable to one of the parties: "If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract." See text accompanying note 27.

Note 49.


Westberg, supra note 57, at p. 182.


Ibid.

See ibid. at p. 154.

Sylvania-test, see supra note 58.


Gould Marketing, Inc. (Final Award), supra note 45, 6 Iran-U.S. Cl. Trib. Rep. 274 (footnote omitted).

See International School Services I, supra note 29, 9 Iran-U.S. Cl. Trib. Rep. 196-97; Phelps Dodge International Corp., supra note 29, 10 Iran-U.S. Cl. Trib. Rep. 173 para. 52; International Schools Services II, supra note 29, 14 Iran-U.S. Cl. Trib. Rep. 73-74 para. 30; William J. Levitt, supra note 29, 27 Iran-U.S. Cl. Trib. Rep. 167-68 paras. 74-76; Unidyne Corp., supra note 29, 29 Iran-U.S. Cl. Trib. Rep. 342-43 para. 99; Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 80-81 paras. 63-64. In Westinghouse Electric Corp., ibid. at p. 81 para. 64, the Tribunal set forth in clear and simple terms how it would determine who owed what to whom as a result of the frustration of the contracts at issue: "[The Tribunal] will determine the extent to which [the claimant] performed its obligations under each ... contract ... until such performance was made impossible, and whether, based on such performance, [the claimant] is entitled to receive further payments or, on the contrary, must return to the [respondent] part of the payments it received." See also Lockheed Corp., supra note 29, 18 Iran-U.S. Cl. Trib. Rep. 303 para. 40 (holding that whether a contract is considered ultimately frustrated or expired by its own terms makes no difference in the settlement of accounts between the parties and the determination of what one owes to whom).

See, e.g., International School Services I, supra note 29, 9 Iran-U.S. Cl. Trib. Rep. 197-99 (awarding costs incurred prior to the date of termination of a contract to operate a school for American children in Iran, but rejecting claims for costs incurred after such date, including transportation and moving expenses, and for lost profits); Stephen G. Shiflett, supra note 29, 22 Iran-U.S. Cl. Trib. Rep. 115-16 para. 19 (awarding compensation for the two weeks the claimant worked pursuant to a contract for teaching services in Iran, but not lost wages for the remainder of the semester); Combustion Engineering, Inc., supra note 29, 26 U.S. Cl. Trib. Rep. 77 paras. 62, 207 (dismissing claims for licence fees due subsequent to the termination of the licensing agreement); Unidyne Corp., supra note 29, 29 Iran-U.S. Cl. Trib. Rep. 344 paras. 102-103 (awarding compensation for work performed but not paid for, but denying a claim for lost profits); Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 81 para. 64, 126 para. 216 (awarding compensation for work performed but not paid for, but denying claim for lost profits).


Ultrasonics Inc. v. Islamic Republic of Iran, Award No. 27-84-3, 2 Iran-U.S. Cl. Trib. Rep. 100, 111 (4 March 1983);

5. Article VII, para. 2, of the Claims Settlement Declaration provides that “[c]laims of nationals of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state. ..." Claims Settlement Declaration, supra note 12, art. VII, para. 2.
7. Id. at p. 237.
8. Id.
11. See Morgan Equipment Co., supra note 74, 4 Iran-U.S. Cl. Trib. Rep. 278 (rejecting a claim based on unjust enrichment by an equipment supplier who shipped parts to a purchaser who was acting as a contractor, not an agent, for the Iranian Navy); Shannon and Wilson, Inc., supra note 74, 9 Iran-U.S. Cl. Trib. Rep. 402-3 paras 20-22 (rejecting a claim for lack of proof that the respondent had been unjustly enriched, but noting, in dicta, that, by contracting only with a third party, and not with the respondent, the claimant assumed the risk that the third party might not be able to collect all the funds it considered due from the respondent); SeaCo, Inc., supra note 74, 28 Iran-U.S. Cl. Trib. Rep. 206-8 paras 25-30 (denying a claim based on unjust enrichment for want of proof that the respondent's enrichment and the claimant's detriment arose as a consequence of the same act or event and distinguishing on the facts the Tribunal's award in Schlegel Corp., supra note 74).
13. Id.
14. Id. at pp. 182-83 para. 17.
See Ultrasystems Inc., supra note 74, 2 Iran-U.S. Cl. Trib. Rep. 111 (holding that the respondent's request for work, and the claimant's performance provided in accordance with that request, rendered the respondent liable at least in quantum meruit, without regard to the contract); Morrison-Knudsen Pacific Ltd.; supra note 74, 7 Iran-U.S. Cl. Trib. Rep. 76 (holding that the claimant was entitled to a reasonable sum as compensation in quantum meruit for additional work performed at the respondent's request where the contract provided that payment adjustments for extra services should be mutually agreed upon by the parties and where no such agreement was made); DIC of Delaware, Inc., supra note 74, 8 Iran-U.S. Cl. Trib. Rep. 161-62 (holding that the claimant was entitled to compensation in quantum meruit for work performed at the request and with the knowledge of the respondent, even though there was insufficient evidence that an enforceable contract had been signed).

The Tribunal's practice in unjust enrichment and quantum meruit cases to compensate claimants based on the extent to which the respondent state has been enriched stands in stark contrast to its practice in expropriation cases, where the Tribunal took the view that "compensation had to be measured by the loss to property owner rather than the gain, if any, by the expropriating State." Aldrich, supra note 6, at p. 227. In an early expropriation award, Tippettts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Tribunal stated with respect to the standard of compensation: The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived. The Tribunal prefers the term "deprivation" to the term "taking," although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. Tippettts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (29 June 1984) (footnote omitted). See also Amoco International Finance Corp. v. Islamic Republic of Iran, Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189, 269 para. 259 (14 July 1987) (rejecting the theory of unjust enrichment as an appropriate basis for compensation in expropriation cases).

The CENTRAL-List unjust enrichment Rule provides that the value of the enrichment shall be determined "according to the contractually agreed price or market price, including full compensation for the use (usefruit) of the subject matter of the enrichment." See text accompanying note 73.

Morrison-Knudsen Pacific Ltd., supra note 74, 7 Iran-U.S. Cl. Trib. Rep. 76.

DIC of Delaware, Inc., supra note 74, 8 Iran-U.S. Cl. Trib. Rep. 162.


See ibid. at p. 172. In a powerful dissent, Arbitrator Howard M. Holtzmann took issue with what he called the majority's "transmogrification"; of the measure of "actual benefit" into "actual use". Separate opinion of Howard M. Holtzmann, 6 Iran-U.S. Cl. Trib. Rep. 175, 215-16. He agreed that, in a situation where one party has been enriched at the expense of another in the absence of wrongdoing, it was "not a novelty" to measure compensation, not by injured party's loss, but rather by the enriched party's "actual benefit". Citing authority, he went on to say: "Actual benefit", however, has seldom if ever been equated with "actual use", the standard the Majority purports to apply. This is probably so because of the injustice that would result to the injured party if property with a determinable value could be cheapened by reference to the potentially wasteful or improvident uses to which it may be put by the party acquiring it. Another reason that an "actual use" standard has seldom if ever been adopted is its inherent difficulty in application. Evidence of "actual use"- if that is understood, as it is by the Majority, to mean the actual frequency of use given a piece of property- is almost always difficult to obtain and is generally available only to the respondent State. Thus, such evidence is actually lacking, as it is in the case. For this reason, even in this cases which mention the "use" by a respondent of the property at issue, the evidence has generally indicated- as in this case- only that the property had come into the respondent's hands and had been used to some extent by it. Having ascertained this fact, tribunals have not itemized and valued such "uses", but have awarded injured parties the value of the transferred property. Ibid. at pp. 213-14. In Mr. Holtzmann's view, the figure of USD 750000, which he stated the majority had pulled out of the air, was "derisory". Id. at p. 213.

Flexi-Leasing, Inc., supra note 74, 12 Iran-U.S. Cl. Trib. Rep. 354. See also Dissenting Opinion of Howard M. Holtzmann in Flexi-Leasing, Inc., 12 Iran U.S. Cl. Trib. Rep. 356, 363 (stating, citing authority, that other international tribunals, rather than requiring proof of "actual use", have held that a benefit constituting unjust enrichment occurs when goods are available for use by a state, regardless of whether the claimant can show particular instances of that use).

CENTRAL-List Rule, reprinted in Berger, Creeping Codification, supra note 2, at p. 295, and Berger, "Introduction", supra note 4, at p. 149.


105 Stephen G. Shifflette, supra note 29, 22 Iran-U.S. Cl. Trib. Rep. 115 para 18. See also DIC of Delaware, Inc., supra note 74, 8 Iran-U.S. Cl. Trib. Rep. 161 and Combustion Engineering, Inc., supra note 29, 26 Iran-U.S. Cl. Trib. Rep. 106 paras 161-63 (both holding that it is general principle of law that one can prove the existence of an enforceable contract through evidence demonstrating part performance) and Woodward - Clyde Consultants v. Islamic Republic Iran, Award No. 73-67-3, 3 Iran-U.S. Cl. Trib. Rep. 239, 247 (2 September 1983) (holding that where the respondent orally consented to the claimant’s services and paid for some of them, the respondent could not now avoid liability merely because neither party observed contract formalities).


108 Rexnord Inc. v. Islamic Republic of Iran, Award No. 21-132-3, 2 Iran-U.S. Cl. Trib. Rep. 6, 12 (10 January 1983). See also Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 154 para. 317 (rejecting for want of proof a claim that the claimant had charged exorbitant prices for spare parts on the ground that the respondent, as late as 1979, long after it had complained to the claimant about the prices, paid a number of the claimant's spares invoices).


110 Collins Systems International, Inc., supra note 29, 28 Iran-U.S. Cl. Trib. Rep. 31 para. 29. See also ibid. at p. 32 para 34 (While the Tribunal has not considered itself bound by the parties’ view as to whether a contract terminated, ... it has generally taken into account contemporaneous behavior in deciding that question'). Accord Westinghouse Electric Corp., supra note 29, 33 Iran-U.S. Cl. Trib. Rep. 78 para. 53. See also Itel International Corp. v. Social Security Organization of Iran, Award No. 479-476-2, 24 Iran-U.S. Cl. Trib. Rep. 272, 283 para. 38 (23 May 1990); General Electric Co., supra note 29, 26 Iran-U.S. Cl. Trib. Rep. 158-61 paras. 32-40.


112 See Oil Field of Texas, Inc. v. Islamic Republic of Iran, Award No. 258-43-1, 12 Iran-U.S. Cl. Trib. Rep. 308317 para. 35 (8 October 1986).


115 See, e.g. R.J. Reynolds Tobacco Co. v. Islamic Republic of Iran, Award No. 145-35-5, 7 Iran-U.S. Cl. Trib. Rep. 181, 190-91 (6 August 1984); DIC of Delaware, Inc., supra note 74, 8 Iran-U.S. Cl. Trib. Rep. 164; Sylvania Technical
Referring Principles:

- I.1.2 - Prohibition of inconsistent behavior
- VI.3 - Force majeure
- IX.1 - Basic rule