

**Arbitration — Enforcement of award — Award by Iran — United States Claims Tribunal — Action for enforcement in municipal courts — New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V — Conditions for refusal of enforcement — Burden of proof — Requirement that award be based upon written arbitration agreement between parties — Iran-United States Algiers Accords, 1981 — Whether constituting written arbitration agreement between United States claimant and Iran — Decision turning on whether the President of the United States acting on behalf of United States nationals when signing Accords — Requirement that award of tribunal not exceed scope of dispute submitted to arbitration — Whether requirement that award be based on the national law of a signatory to the Convention**

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**International tribunals — Iran-United States Claims Tribunal — Awards — Whether award of Claims Tribunal enforceable under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 — Procedure — Failure by claimant to amend pleadings so as to reflect final submission to Claims Tribunal—Claims Tribunal basing its award on claimant's final submission—Whether failure to amend pleading constituting ground for refusal to enforce award under New York Convention**

**Treaties — Interpretation — Objects and purposes — New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 — The law of the United States**

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UNITED STATES (COURT OF APPEALS)

MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN *v.* GOULD  
INC AND OTHERS*United States Court of Appeals, Ninth Circuit.* 23 October 1989(Canby, Wiggins and O'Scannlain, *Circuit Judges*)*United States Court of Appeals, Ninth Circuit.* 30 June 1992(Brunetti, O'Scannlain and Nelson, *Circuit Judges*)

**SUMMARY:** *The facts:*—In 1975 and 1978 Hoffman Electric Corporation (“Hoffman”), a United States corporation, concluded two contracts with the Iranian Ministry of Defence pursuant to which it agreed to supply Iran with radio equipment. Performance of the contracts was interrupted, however, due to the Iranian revolution. In 1980, Hoffman filed an action against the Ministry in the United States District Court alleging breach of contract. The action was dismissed when President Reagan, acting pursuant to the Algiers Accords, 1981 (“the Accords”), issued an Executive Order suspending all claims by United States nationals against Iran which were pending before the United States courts and referring any such claims to the Iran-United States Claims Tribunal which had been established in The Hague.

Hoffman, which had by then been acquired by Gould Inc, a United States corporation, lodged a breach of contract claim with the Claims Tribunal. Iran counterclaimed for breach of contract and sought the return of certain radio equipment (“the equipment”) held by Hoffman. After rejecting the breach of contract claims of both parties the Claims Tribunal allowed the parties to submit supplemental briefings concerning the consequences that would flow from a finding that the performance of the contracts was no longer possible due to frustration or impossibility. In response Iran, without formally amending its pleadings, submitted a brief contending that the Claims Tribunal should make an equitable accounting by determining the amount owing to Hoffman for its performance under the contracts up to and including the time of their frustration and deduct from such sum any overpayments made by Iran. In 1984, the Tribunal made its final award which followed the equitable accounting principle submitted by Iran and, having set off the amounts due to both parties, ordered Gould Marketing Inc (“GMI”), the successor corporation to Hoffman, to pay Iran US \$3.6 million. The Claims Tribunal also dismissed the counterclaim and ordered GMI to return the equipment to Iran.

Iran sought confirmation and enforcement of the award against Gould Inc, and various of its subsidiaries including GMI (“the respondents”) in the United States District Court. The District Court held, *inter alia*, that it had jurisdiction under the Federal Arbitration Act (9 USC 201-208) which implemented the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958 (“the Convention”). The respondents appealed contending, *inter alia*, that the District Court lacked

jurisdiction to enforce the award as the terms of Articles II and IV of the Convention<sup>1</sup> indicated that the Convention was only applicable to arbitral awards which had been issued pursuant to a voluntary written arbitration agreement between the parties and that the Accords did not satisfy that requirement. The respondents further contended that it was implicit from Article V(1)(e) of the Convention,<sup>2</sup> that the Convention only applied to arbitral awards that had been made in accordance with the national arbitration law of a signatory State and that the award of the Claims Tribunal, which had been created pursuant to international law, did not satisfy this requirement

*Decision of the Court of Appeals; 23 October 1989*

*Held:*—The appeal was dismissed. The District Court had jurisdiction to hear the dispute.

(1) The Convention only applied to arbitral awards which had been made pursuant to a written arbitration agreement. However, *Dames and Moore v. Regan*<sup>3</sup> had established that the President of the United States had the power to conclude international claims settlements on behalf of United States nationals by entering into international agreements. Accordingly, the Convention requirement of a written arbitration agreement was satisfied by the Accords which constituted a written agreement that had been entered into by the President of the United States on behalf of all United States nationals with Iran (pp. 10-11).

(2) The provisions of the Convention did not require an award to be based on the national arbitration law of a signatory State in order for it to be enforceable. Although this meant that the award of an international arbitral tribunal could not be challenged on certain of the defences enumerated in Article V of the Convention, other defences, such as those requiring procedural fairness, were still available. This result was consistent with the purposes of the Convention which allowed parties the option of not having their arbitration governed by a particular national law (p. 12).

*Decision of the Court of Appeals; 30 June 1992*

The case was subsequently remanded to the District Court for it to determine the merits of Iran's claim. On remand the District Court held that as Gould Inc was not the *alter ego* of Hoffman or GMI it was dismissed as a party to the case. It also confirmed the Claims Tribunal's US \$3.6 million award and relieved the respondents of their obligation to return the radio equipment to Iran until such time as its return would be permitted under United States arms export legislation.

Iran appealed against the dismissal of Gould Inc as a party to the case and the fact that the Court did not affirm the entire award of the Claims Tribunal.

<sup>1</sup> See p. 10.

<sup>2</sup> Article V(1)(e) allows the court of a signatory State to refuse to enforce an award that has "been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

<sup>3</sup> 72 *ILR* 270.

The respondents appealed against the monetary portion of the confirmation of the award, contending that as the award had not been based on Iran's pleadings, which alleged breach of contract, the District Court should have applied Article V(1)(c) of the Convention which allowed a court to refuse to recognize and enforce an award if it dealt "with a difference not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration". The respondents further contended that, as the Claims Tribunal had rejected Iran's counterclaim, it had eliminated its authority to make an award under Article II of the Claims Settlement Declaration<sup>4</sup> which constituted part of the Accords. The respondents also submitted that the District Court should have rejected in its entirety the Claims Tribunal's order that GMI return the equipment to Iran.

During proceedings before the Court of Appeals the United States Government filed an *amicus curiae* brief suggesting that the portion of the Claims Tribunal award concerning the equipment could be satisfied if such equipment were to be sold by a third party in the United States on behalf of Iran.

*Held:*—The District Court's decision was affirmed in part, vacated in part and remanded.

(1) Gould Inc was not the *alter ego* of GMI or Hoffman. Accordingly, the District Court had acted correctly in dismissing it from the case (pp. 15-17).

(2) Once the Claims Tribunal had made an award the Court was bound to enforce its provisions unless the respondents could show that the award should not be enforced on one of the grounds enumerated in Article V(1) of the Convention (p. 17).

(3) Iran's counterclaims had arisen out of the contracts which formed the basis of GMI's claims and it had submitted a brief asking the Claims Tribunal to base its award on equitable accounting. Accordingly, the monetary award of the Claims Tribunal, which had resolved the claims and counterclaims and had been based on an equitable accounting, did not exceed the scope of the dispute that had been submitted to the Tribunal. The fact that Iran had not amended its counterclaim was irrelevant. The Court, when determining whether an award exceeded the scope of the submission to arbitration, could not take into account a technical pleading error (p. 18).

(4) The Claims Tribunal's statement that it was dismissing Iran's counterclaim did not eliminate its authority to make an award to Iran. It was clear from the context of the statement that the Claims Tribunal had only intended to reject Iran's breach of contract claims (pp. 18-19).

(5) The Court could not consider the submissions of the United States Government concerning the proposed disposal of the equipment held by GMI as it raised questions of fact and law that had not yet been considered by the District Court (pp. 20-1).

<sup>4</sup> See p. 18.

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The text of the judgment of 30 June 1992 commences at p. 13. The following is the text of the judgment of 23 October 1989, delivered by Circuit Judge O'Scannlain:

[1358] We are asked to determine whether an award against an American corporation entered by the Iran–United States Claims Tribunal can be enforced in federal court. The district court ruled that subject matter jurisdiction to enforce such award vests under the New York Convention and the Federal Arbitration Act. We agree.

## I

A clear understanding of this dispute requires some examination of recent Iranian and American history. The former Shah of Iran, Mohammed Reza Pahlavi, ruled the Imperial Republic of Iran from 1953, when he assumed control of the government, until shortly before his death in 1979. Unrest developed and intensified in Iran during the Shah's rule. Led by conservative Moslem protests, the unrest eventually began to erupt in the late 1970s. In response, the Shah in 1978 declared martial law in twelve cities and set up a military government to deal with striking oil workers. Thereafter, he appointed Prime Minister Shahpur Bakhtiar to head a regen-

cy council and left the country, never to return, on January 16, 1979.

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

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

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

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

A. . . . [T]he United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. . . .

[T]he United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction. . . .

B. It is the purpose of both parties . . . to terminate all litigation as between the

Government of each party and the na- [1359]  
tionals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. . . . [T]he United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Dept. of State Bull. at 2.

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

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

The same day that Warren Christopher, Deputy Secretary of State, initialed the Accords to signal United States assent to their terms, President Carter issued a series of Executive Orders providing for their implementation. Exec. Orders No. 12,276-85, 46 Fed.Reg. 7913-32 (Jan. 19, 1981).<sup>2</sup>

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

2. These Executive Orders were later implemented by amendments to the Iranian Assets Control

Regulations, 31 C.F.R. §§ 535.101 *et seq.* (1981). See 46 Fed.Reg. 14,330-37 (Feb. 26, 1981).

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[1360] The next day, President Reagan was inaugurated, and shortly thereafter, on February 24, 1981, he issued an Executive Order ratifying the implementing Orders President Carter had issued. Exec. Order 12,294, Fed.Reg. 14,111 (Feb. 24, 1981). President Reagan's Order also "suspended" all claims within the jurisdiction of the Tribunal, provided that such claims were of no legal effect in a United States court, and mandated that the Tribunal's determination on the merits of any claim validly before it "shall operate as a final resolution and discharge of the claim for all purposes." *Id.* The Supreme Court upheld the authority of the President to issue these Executive Orders. *Dames & Moore v. Regan*, 453 U.S. 654, 674, 686, 101 S.Ct. 2972, 2983, 2990, 69 L.Ed.2d 918 (1981).<sup>15</sup>

In the early 1970s, when somewhat more tranquil relations prevailed between the United States and Iran, the Ministry of War of the Imperial Government of Iran and Hoffman Electric Corporation entered into two contracts whereby Hoffman agreed to provide and install certain military equipment. The Iranian revolution disrupted progress payments and performance called for under the agreements. In early 1980, Hoffman filed an action against Iran for breach of contract in the United States District Court for the Central District of California, eventually obtaining a writ of attachment on Iranian assets held in the United States to satisfy its claim.

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

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

Even prior to the Secretary's determination, the Office of Munitions Control refused to grant

*See Security Pacific Nat'l Bank v. Government & State of Iran*, 513 F.Supp. 864, 866 (C.D.Cal.1981). After President Reagan issued the Executive Order suspending all claims in U.S. courts, however, the district court vacated the attachment and dismissed without prejudice Hoffman's action "subject to the right of any party to move to reopen the action at any time prior to the entry and satisfaction of a judgment of the Arbitral Tribunal . . . on the grounds that the settlement has failed of its essential purpose." *Id.* at 884.

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

The Tribunal eventually issued a consolidated final award in Claims 49 and 50 in which it ruled that Gould was to pay \$3.6 million and return the military radio equipment to Iran.<sup>6</sup> The monetary award in

Gould's application for a license to enable it to export this equipment to Iran in 1981.

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

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

The Claimant, Gould Marketing, Inc., is obligated to pay the Respondent, Ministry of Defence of the Islamic Republic of Iran, U.S. \$3,640,247.13.

The Counterclaims are dismissed on the merits.

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favor of Iran constituted a net accounting of the amounts the Tribunal found that Iran owed Gould under Claim No. 49 and that Gould owed Iran under the counterclaim to Claim No. 49.<sup>6</sup>

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

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

The Tribunal has no authority under the Algiers Declarations to prescribe the means by which each of the States provides for . . . enforcement. Certainly, if no enforcement procedure were available in a State Party, or if recourse to such procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations un-

<sup>6</sup> The Claimant, Gould Marketing, Inc., is obligated to make available to the Respondent, Ministry of Defence of the Islamic Republic of Iran, the 21 VCS radios, the two ARC radios, the teleprinter, the one front panel assembly and the miscellaneous equipment and materials acquired under the contract involved in case number 50 which were not returned for credit or economically disposed of and therefore belong to the Respondent.  
6 Iran-U.S.C.T.R. at 288.

der the Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto.

*Id.* at 331.

## II

The Tribunal's ruling led to the filing of the current action in the United States District Court for the Central District of California, in which Iran seeks confirmation and enforcement of its award against Gould. Gould responded to the petition by filing a motion to dismiss on the ground that the district court lacks subject matter jurisdiction to decide such a matter. Gould set forth three grounds in support of its motion. First, it argued that because Iran is not recognized formally by the United States government, neither it nor any of its instrumentalities may maintain any action in a United States Court.<sup>7</sup> Second, it argued that because the Algiers Accords are not self-executing, no federal question exists over which the district court can assert jurisdiction. Third, it argued that because the Tribunal proceedings leading up to the award in favor of Iran did not comply with certain terms of the New York Convention, the district court improperly exercised jurisdiction under 9 U.S.C. § 203.

The district court granted Gould's motion in part and denied it in part. The court held that it did not possess federal question jurisdiction over the matter, stating that it considered itself to be bound by language of this court concerning the nonself-executing nature of the Accords in *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279

<sup>7</sup> The district court, relying on the unequivocal Statement of Interest of the United States Government in support of access of Iran to the federal district courts for the purpose of enforcing Tribunal Awards, found this argument unpersuasive. *Ministry of Defense v. Gould, Inc.*, No. 87-03673 (C.D.Cal. Jan. 14, 1988) (order denying Gould's motion to dismiss). The issue was not certified under section 1292(b) and thus does not form a portion of the basis of this interlocutory appeal.



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[1362] (9th Cir.1985). Nonetheless, the court held that it did have jurisdiction over the petition under section 203, as a consequence of its ruling that the Tribunal's award satisfied the requirements of the New York Convention.

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

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

## III

In New York in 1958, the United Nations facilitated the creation of an international agreement providing for enforcement of foreign arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ("the New York Convention" or "the Convention"). Party-States to the Convention agree to "recognize arbitral awards as binding and enforce them in accordance with [their own] rules of procedure." New York Convention, Art. III. The United States became a party to the Convention in 1970, and Congress soon after enacted legislation implementing the provisions of the Convention into domestic law, codified as Chapter II of the Federal Arbitration Act, 9 U.S.C. sections 201-208.

As part of this legislation, Congress vested federal district courts with original jurisdiction over any action or proceeding "falling under the Convention," as such an action is "deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. The starting point for our interpretation is a supplementary statutory provision which provides that an "arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transac-

tion, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202 (emphasis supplied). The provision goes on to except from the definition of "falls under" certain awards made pursuant to a domestic legal relationship which have no foreign nexus. *Id.*

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

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

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

## IV

Gould sets forth two basic arguments to support its position that the district court

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

## A

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

We construe the Accords themselves as representing the written agreement so required, on the strength of the President's authority to settle claims on behalf of United States nationals through international

agreements. "[I]nternational agreements [1363] settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.'" *Dames & Moore*, 453 U.S. at 679, 101 S.Ct. at 2986 (quoting L. Henkin, *Foreign Affairs & the Constitution* (1972)). More specifically, the Court in *Dames & Moore* held that the President possessed the authority to nullify attachments and order the transfer of Iranian assets, *id.* at 674, 101 S.Ct. at 2983–84, and to suspend claims of American citizens against Iran. *Id.* at 686, 101 S.Ct. at 2990.

Gould contends that *Dames & Moore* should be more narrowly construed. Indeed, the Court itself chose to "re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." *Id.* at 688, 101 S.Ct. at 2991. Nevertheless, the Court went on to make clear that its holding extends broadly enough to encompass the authority of the President to settle claims under the facts before us. *Id.* Thus, because the President acted within his authority on behalf of United States citizens, the real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but whether the President—acting on behalf of Gould—entered into such an agreement. The answer is clearly yes. Deputy Secretary of State Warren Christopher initialed the Accords in his role as an agent for the President; and thus, the requirements of Article II, ¶ 1 are satisfied.<sup>9</sup>

8. The full text of the paragraph reads as follows:

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

New York Convention, Article II ¶ 1.

9. Gould argues that the Convention envisaged that the parties themselves will have entered the requisite written agreement to arbitrate. It relies on the history of negotiations leading to the Convention. See Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1061 n. 54 ("It

is definitely understood, however, that the Convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently could not come within the purview of the Convention") (quoting the Official Report of the United States Delegation to the Convention).

The quotation lends some support to Gould's view, but we nevertheless conclude that the Convention does not preclude the United States from entering an agreement on behalf of its nationals, as authorized by *Dames & Moore*. We do not view the arbitration as having been