

**LEGAL STATUS OF THE ARBITRATION TRIBUNAL
UNDER THE INTERNATIONAL LAW: CAN THE
ARBITRATION TRIBUNAL BE AN INTERNATIONAL
LEGAL PERSON?**

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Abstract in original language

International law has been formed also by the activities of the arbitration tribunals created by states to decide bindingly the disputes between the states or international organizations. But what is the status of arbitration tribunals? This paper will try to assess their status by testing the characteristics of the tribunal to the requirements of the international legal personality.

Key words in original language

international legal personality, arbitration tribunal.

INTRODUCTION

It has been for long time thought that the states are the only legal persons under the international law.¹ Then the states have created international organizations which have become international legal persons.² And nowadays also individuals are considered as having international legal personality to some extend.³

But the international arena is occupied also by other entities. One of them is the arbitration tribunal. There are not so many of them and their existence is limited by time. Nevertheless, they are vital part of the international legal system. They are created by the states to bindingly solve their dispute and after the final decision they ceased to exist.

¹ SHAW, Malcolm N.: *International law*. Cambridge: 6 ed. Cambridge University Press, 2008. ISBN 9780521899291. p. 197.

² SHAW, Malcolm N.: *International law*. Cambridge: 6 ed. Cambridge University Press, 2008. ISBN 9780521899291. p. 259. Reparation for injuries suffered in teh service of the United Nations, Advisory opinion: I.C.J. Reports 1949. p. 178-179.

³ SHAW, Malcolm N.: *International law*. Cambridge: 6 ed. Cambridge University Press, 2008. ISBN 9780521899291. p. 259.

This paper will try to assess their status under the international law. Firstly, I will try to test the characteristics of the arbitration tribunal to the requirements for the international legal personality.

International legal personality consists of the capacity to bear the rights and obligations under the international law, the capacity to perform legal transactions, to be capable to bear the responsibility and finally to sue and be sued under the international law.

However, not every legal person has identical rights and obligations. There is not only one legal personality but the legal personality of each legal person differs accordingly with its functions in the legal system. So is the legal personality of the arbitration tribunal same as other existing entities or it is separate type? As a consequence does the arbitration tribunal have the same international legal personality as an inter-governmental organization or is it a legal person *sui generis*?

To test the legal personality of the arbitration tribunal, I will use the Iran - United States Claims Tribunal and the proposed arbitration tribunal between Slovenia and Croatia. This article will not test the characteristics of the permanent arbitration courts like Permanent Court of Arbitration⁴ or Court of Conciliation and Arbitration⁵.

1 LEGAL PERSONALITY

Before I start to elaborate on what status the arbitration tribunal does have under the international law, it is necessary to describe what I mean by legal personality.

One of the general characteristics of the international law is the non-existence of the centralized legislator. This means that the legal rules are created by the mutual activities of the states and as a consequence to find what the norms really are it is necessary to use different legal sources like treaties and judicial decisions but and also plenty of non-legal materials like treatises and articles written by scholars.

There is no authoritative source describing what the international legal personality is. So, to find what this concept is about, it is necessary to go through academic texts. In the words of Klabbers, the academic community

⁴ More on the work of Permanent Court of Arbitration can be find on <http://www.pca-cpa.org/>.

⁵ More on the work of Cout of Conciliation and Arbitration can be find on <http://www.osce.org/cca/>.

makes up the international legal system⁶ and therefore through the academic writing we are able to understand the legal personality.

And here lies the problem. Each author uses slightly different way of describing this concept and it is not uncommon to find discrepancies in their understanding what the legal personality means.

Klabbers firstly distinguishes notions “subjects of international law – the subjectivity” and “personality”. For him, notion “subject” is only an academic label – status conferred by the academic community and means that the subject of international law is the legitimate subject of international legal research and reflection. On the other hand, “personality” is a status conferred by the legal system.⁷

And according to him, the subjectivity could be determined by the help of the three indicators: the right to enter into international agreements, the right to send and receive legations and the right to bring and receive international claims.⁸ “Presumably, then, those indicators are best viewed as the result of inductive analysis: all subjects of international law are seen to possess at least one of those characteristics, together they become a decent yardstick with which to measure the degree of subjectivity. Whereas states possess all three simply by being states, other subjects usually do not, at least not in an unlimited fashion.”⁹

In case of international legal personality, Klabbers, recognises three different theories. Under the will theory (subjective theory), to find whether the entity has the legal personality, the will of the founders is decisive.¹⁰ Secondly, under the objective theory, proposed firstly by Finn Seyersted, when the entity exists as a matter of law – meets the requirements attached to its establishment, the entity possesses the international legal personality.¹¹ And thirdly, the pragmatic approach to international personality is represented by “presumptive personality” – as soon as entity performs acts which can be explained only on the basis of international legal personality, such entity will be presumed to be in possession of international legal personality.¹²

⁶ KLABBERS, Jan: *An Introduction to International Institutional Law*. Cambridge: 1 ed. Cambridge University Press, 2002. ISBN 0521520932. p. 44.

⁷ Ibid, p. 43.

⁸ Ibid, p. 44.

⁹ Ibid, p. 44-45.

¹⁰ Ibid, p. 53.

¹¹ Ibid, p. 55.

¹² Ibid, p. 55-56.

Similarly, also Rama-Montaldo separates subjects and persons in international law. But he does not distinguish the notions as academic and legal term. On his view, personality is a legal concept, under which the international legal order recognizes the factual presuppositions as qualifying for the capacity to enjoy international rights and duties.¹³ He sees “subject” of international law as a holder or bearer of at least one international right and duty. So in this sense, also individuals, belligerent and insurgent communities, NGOs are subjects of international law. The international persons are distinguished from these by the fact that they “enjoy without restriction the rights concerning the capacity to enter into relationship and operate on an international plane as distinct entities”.¹⁴

Other authors do not distinguish these notions. According to Sands and Klein: “[t]he attribution of international legal personality simply means that the entity upon which it is conferred is a subject of international law and that it is capable of possessing international rights and duties.”.

Kelsen uses the concept of juristic person as “an auxiliary concept of juristic thinking, an instrument of legal theory”.¹⁵ According to him, the personality means the capacity of being a subject of legal duties and legal rights, of performing legal transactions, and of suing and being sued at law.¹⁶ According to Kelsen, the international law subjects are primarily individuals. Furthermore, states are subjects of international law as juristic person in the same way as corporations in national law.¹⁷ Additionally to states and individuals, also communities of individuals or states which do not have characteristics of states are subjects of international law.¹⁸ This is underlined by the variability of the concept of judicial personality – the duties, rights, and competences constitutive to the personality are subject to considerable variations.¹⁹

Based on Kelsen, Nijman argues that the realist theory of international legal personality helps to ground the concept of international legal personality. With the reference to the Advisory Opinion on Reparation for Injuries, Nijman refers to the international legal personality as created by the international legal system (the legal system addresses an actor through an international norm, or attributes rights, duties, and/or competences). So the

¹³ RAMA-MONTALDO, Manuel: International Legal Personality and Implied Powers of International Organizations. In: *British Yearbook of International Law* 44 (1970), p. 124.

¹⁴ Ibid, p. 138.

¹⁵ KELSEN, Hans ; TRUCKER, Robert W. (revision and editor): *Principles of International Law*. 2 ed. Holt, Rinehart and Winston, Inc., 1967. p. 180.

¹⁶ Ibid, p. 282.

¹⁷ Ibid, p. 194.

¹⁸ Ibid, p. 251.

¹⁹ Ibid, p. 284.

international legal personality is a formal/fictional “notion”. It is created by international law by way of attribution of specific rights and/or duties. As a result, not a certain reality causes a legal person to emerge but merely the law.²⁰

And this is the view this paper adopts for the assessment of the legal status of the arbitration tribunal.

The legal personality is a formal concept stating who the legal person is under the international law (in the “eyes of international law”²¹) – subject of international law.

To be a subject of international law means that the entity is capable of having/bearing the rights and duties conferred on it by the international law.²² There is no need of any other special capacity/competence to be part of the characteristic of the international legal person.

Another level of qualities of each legal person is the capability of performing its rights and duties. These are the competences of the entity, its ability to act in its own name without help of any other entity – to be able to do legal acts (acts recognized by law and having consequences under the law).

In my view, under this category fall the three indicators suggested by the Klabbers as indicators of subjectivity. They represent the activities of legal persons as capable of being involved in the international legal transactions. However, they do not say that the entity is legal person or not. As Klabbers said, the subject does not have to be bearer of all of the characteristics²³. So, not each legal person has the full capacity to act under the international law. But this is the same as in the national legal order. It is generally valid that even toddler is a legal person and no one disputes that it is not capable of entering into the sales contract e.g. for pacifier. Similarly under the international law, the entity addressed by the international law is legal person but this does not automatically means that every entity could enter in any possible international legal transaction.

Other level of the qualities of the legal person is the right to sue and to be sued. On my opinion, this is just the representation of the capacity to act

²⁰ NIJMAN, Janne Elisabeth: Non-state actors and the international rule of law. (2010) [cit. 2010-04-26]. Available at: <<http://ssrn.com/abstract=1522520>>. p. 20.

²¹ Ibid, p. 21.

²² SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p. 992. The authors put this view only in the context of international organizations, but in my opinion, it is valid generally.

²³ KLABBERS, Jan: *An Introduction to International Institutional Law*. Cambridge: 1 ed. Cambridge University Press, 2002. ISBN 0521520932, p. 44-45.

under the law in the procedural aspects of law. Also the capacity to be responsible for its act is just the special variation of the general capacity to act.

2 ARBITRATION TRIBUNALS

2.1 IRAN - UNITED STATES CLAIMS TRIBUNAL

The Islamic Revolution in Iran caused deep freeze of the relations between the United States of America and Iran. The lives of the staff of U.S. embassy in Tehran and also the millions of dollars were in stake. Both involved countries asked Algerian to serve intermediate the contacts between alienated governments.

After Algeria heavily consulted the matters with both of the involved governments, the consensus on problem solution was finally reached. The agreed consensus between Iran and United States was communicated in form of two declarations - the General Declaration and the Claims Settlement Declaration (together referred as Algiers Declaration) - made on 19 January 1981. Subsequently, both Iran and United States adhered to these declarations.

One of the measures taken to solve the crisis, additional to the agreed commitments, was also the establishment of the Iran - United States Claims Tribunal. Parties agreed that any dispute to the fulfilment of the General Declaration may Iran submit to the arbitration tribunal.²⁴ Furthermore, under the point 17 of the General Declaration the parties (Iran and United States) may submit their disputes arising from the General Declaration (interpretation or performance of any provision) to the arbitration tribunal.

The arbitration tribunal is established under the Art. II of the Claims Settlement Declaration. This article stipulates that the purpose of the tribunal is to decide the claims of the nationals of the involved countries against the other country²⁵ and also disputes arising from the contractual arrangements between the Iran and United States²⁶. The biggest part of the Tribunals docket is formed by the claims of the nationals against the respective governments but still the Tribunal serves also as a classical inter-

²⁴ *Declaration of the Government of the Democratic and Popublic of Algeria (General Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/general-declaration.pdf>>, par. 16.

²⁵ *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. II, par. 1.

²⁶ *Ibid*, Art. II, par. 2.

state arbitration tribunal when to 29 January 2010 it has dealt with 17 cases which aroused from the points 16 and 17 of the General Declaration.²⁷

Which makes this Tribunal interesting in the view of topics of this paper is the fact that, as I am aware of, only this Tribunal has been ever tested to its international legal personality. The Tribunal was sued by the former employee in the Netherlands courts. The case went from the Local court of the Hague to the Supreme Court of the Netherlands. And the Dutch courts found that the Tribunal is a joint institution of the two States and has a legal personality derived from international law.²⁸ This case will be part of further analysis.²⁹

2.2 SLOVENIA – CROATIA ARBITRATION TRIBUNAL

Second example of the arbitration tribunal used in this paper is the one of the newest cases of utilizing arbitration to solve the interstate disputes.

The dispute between Slovenia and Croatia about the territorial and maritime boundary and respective maritime areas has been poisoning the relations between these neighbours for decades since the break-up of the Yugoslavia. This dispute has also reached the European dimension when the Slovenia was blocking the Croatian EU-accession negotiations.³⁰

As the latest stage of the dispute, the governments of Slovenia and Croatia under the auspice of the European Union (especially the Swedish presidency of the Council of European Union) agreed to submit the dispute to the *ad hoc* arbitration tribunal. The arbitration agreement was concluded on 4 November 2009. Now the process of domestic ratifications is running. Croatia has already ratified the agreement. The procedure in Slovenia is still

²⁷ *Communique 29 January 2010* [online]. IRAN – UNITED STATES CLAIMS TRIBUNAL, 2010 [cit. 2010-05-29]. Available at: <<http://www.iusct.org/communique-english.pdf>>.

²⁸ A.S. v. the Iran-United States Claims Tribunal, Local Court of The Hague, 8 June 1983 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1982-1983. In: *Netherlands Yearbook on International Law* 15 (1984), p. 429; The Iran-United States Claims Tribunal v. A.S., District Court of The Hague, 9 July 1984 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1983-1984. *Netherlands Yearbook of International Law*, 16 (1985), p. 471; A.S. v. Iran-United States Claims Tribunal, Supreme Court, 20 December 1985 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1985-1986. *Netherlands Yearbook of International Law*, 18 (1987), p. 471.

²⁹ Chp. 4.2.

³⁰ The Internet is full of news articles and blog posts dealing with the dispute from Slovenian, Croatian and several other angles. In this paper, I am not dealing with the substantive part of the dispute, but only with the procedure which hopefully will solve the problem.

pending (the Slovenia-Croatia compromise was approved by the people in referendum).

Under the Art. I of Slovenia-Croatia compromise, the parties set up the arbitration tribunal. The tribunal shall be also supported by a Secretariat that is going to be provided by the European Commission.³¹

3 ARBITRATION TRIBUNAL AS A LEGAL PERSON

As was stated above, to be a legal person under international law means to be able to bear the rights and duties conferred by the international law. Is the arbitration tribunal capable of bearing any rights and duties?

Every arbitration tribunal is established by some instrument of the international law - the international treaty (arbitration agreement). Furthermore, international law recognises the existence of the arbitration tribunal and its functions not only in treaty law but also in the general international law – customary law.³² So, arbitration tribunal exists in the eyes of international law.

Thus, makes this recognition by law the arbitration tribunal a legal person? Certainly not just by this recognition. The international law also recognizes the sea³³ or celestial bodies³⁴ but this does not make them international legal person.

However, arbitration tribunal is recognized in different way. International law creates arbitration tribunals to promote peaceful settlement of disputes among states and other entities of the international law.³⁵ The tribunal is not recognized as a factual matter but has been actively created by the law and under the law.

³¹ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18]

Available at:

<http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>. Art. 6, par. 7.

Croatia has publicized this agreement in *Narodne novine - Međunarodni ugovori* No. 12/2009.

³² SHAW, Malcolm N.: *International law*. Cambridge: 6 ed. Cambridge University Press, 2008. ISBN 9780521899291, p. 1048-1049.

³³ United Nations Convention on the Law of the Sea of 10 December 1982; Geneva Conventions of Law of Sea of 29 April 1958.

³⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 27 January 1967; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 18 December 1979.

³⁵ e.g. Convention for the Peaceful Settlement of Disputes 29 July 1899; Convention for the Peaceful Settlement of Disputes 18 October 1907.

To be able to facilitate the peaceful settlement of the dispute, international law endows arbitration tribunal with several abilities/capabilities. And to be able to bear these capabilities, arbitration tribunal must at the beginning be able to bear them – to bear these rights and duties conferred on it by the international law.

First and foremost, arbitration tribunal has right and even duty to hear certain types of disputes. These types of disputes are described in the arbitration agreements under the title of jurisdiction of the arbitration tribunal³⁶. Secondly, the arbitration tribunal most important goal is to issue the binding decision of the legal dispute between involved entities. The arbitration tribunal is obliged to do so. The Slovenia – Croatia compromise states it expressly in art. 7 (1): “The Arbitral Tribunal shall issue its award ...”.

To be able to function properly to the desired end – to the final and binding decision of the dispute, the arbitration tribunal must exercise many other powers, which could be commonly addressed as “conduct of the proceedings”. The rights and duties of the arbitration tribunal involved in the conduct of the proceedings can be described in the arbitration agreement³⁷ or the more precise description of them is provided in the arbitration rules pursuant to which the arbitration tribunal shall conduct its business³⁸.

Other rights and duties of the arbitration tribunal are tied with its judicial function. To ensure impartiality and non-interference from the involved parties, the usual seat of the arbitration tribunal and the place of the

³⁶ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 3; *Declaration of the Government of the Democratic and Popublic of Algeria (General Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/general-declaration.pdf>> , par. 16 and 17; *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. II.

³⁷ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 6 (3).

³⁸ *Ibid*, Art. 6 (2); *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. II (2).

arbitration is agreed to be in the third non-involved and neutral country. So the Iran – United States Claims Tribunal has been seated in The Hague.³⁹ To be established Slovenia-Croatia tribunal is going to conduct the arbitration in the third country – in Belgium.⁴⁰ And when the tribunal is to be hosted by the third country, it has to have the right to deal with this third country independently, to ensure the proper conduct of the proceedings. Furthermore, the Slovenia-Croatia tribunal will also deal with the international organization – the European Union, which is asked by the involved states to provide secretariat support through the European Commission.⁴¹

The arbitration tribunal must conduct the arbitration proceedings independently and without any improper influence from any involved and even uninvolved entity. But to do so, the tribunal is required to maintain contacts also with third countries and international organizations. To do so in proper manner, the tribunal must clearly be on the same legal level as the opposite party. And the only way how to ensure it, is to recognize the international legal personality of the arbitration tribunal. The tribunal is also the person under the international law as the hosted state or assisting international organization.

This was clearly shown by the conduct of the Dutch government when dealing with the Iran – United States Claims Tribunal. These two entities maintain the diplomatic contacts channelled through the Ministry of Foreign Affairs on the side of Netherlands and the Secretary-General on the side of Tribunal.⁴²

Moreover, the arbitration tribunal is also capable of transferring the diplomatic contacts into the binding treaty. The Iran – United States Claims Tribunal concluded several treaties with the Netherlands.⁴³ As a result, this

³⁹ *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. VI (1).

⁴⁰ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf>, Art. 6 (7) infine.

⁴¹ *Ibid*, Art. 6 (7).

⁴² Letter of the Secretary-General of the Ministry of Foreign Affairs to the Secretary-General of the Tribunal, 2 February 1983 mentioned in *A.S. v. the Iran-United States Claims Tribunal*, Local Court of The Hague, 8 June 1983 in BARNHOORN, L.A.N.N.: *Netherlands judicial decisions involving questions of public international law, 1982-1983. In: Netherlands Yearbook on International Law* 15 (1984), p. 429, supra. 20.

⁴³ *A.S. v. the Iran-United States Claims Tribunal*, Local Court of The Hague, 8 June 1983 in BARNHOORN, L.A.N.N.: *Netherlands judicial decisions involving questions of public*

arbitration tribunal clearly possesses also one of the key characteristics indicating the international legal personality – the treaty-making power.⁴⁴ Well, this power only manifested that the arbitration tribunal is capable to bear the rights and duties under the international law. And in this case this tribunal was conferred by the international law by the right to conclude an international treaty. And there is no obstacle to conclude, that the similar right will have also the Slovenia-Croatia arbitration tribunal. This tribunal will also have to adjust its relations with the Belgium and the European Union. The most suitable way how to do it is by the treaty.

In this part of the article, I tried to show, that the arbitration tribunal is vested by the international law with the capacity to be a bearer of the rights and duties under the international law. Arbitration tribunals are created by the international law. Furthermore, they are obliged to hear the international dispute – have the international obligation to do so. Secondly, each arbitration tribunal is allowed to issue several procedural decisions and in the final stage of proceedings it is obliged to issue binding award. All of these decisions are acts under the international law. Thirdly, arbitration tribunal has right to adjust its relationship with the host country and with international organization. This could be even done by the treaty-making. So, the arbitration tribunal has characteristics that lead to conclusion of international legal personality by the most of the authorities. Simply, arbitration tribunal is capable of bearing rights and duties under the international law.

4 ARBITRATION TRIBUNAL AS AN INTER-GOVERNMENTAL ORGANIZATION

4.1 LEGAL PERSONALITY OF INTER-GOVERNMENTAL ORGANIZATION

There is not one authoritative definition what the inter-governmental organization is. The situation is similar as in the case of the term “international legal personality”. So each author uses its own slightly different definition.

In some time, it is possible that there will be an official definition of the inter-governmental organization. International Law Commission within the work on the articles on the responsibility of the inter-governmental organizations proposed also the definition of it. The proposed meaning of the term international organization is: “an organization established by a treaty or other instrument governed by international law and possessing its

international law, 1982-1983. In: *Netherlands Yearbook on International Law* 15 (1984), p. 429, supra. 20; *Tractatenblad van het Koninkrijk der Nederlanden*, 1988, Nr. 25, 1990 Nr. 150, 2004 Nr. 158.

⁴⁴ KLABBERS, Jan: *An Introduction to International Institutional Law*. Cambridge: 1 ed. Cambridge University Press, 2002. ISBN 0521520932, p. 44.

own legal personality. International organization may include as members, in addition to states, other entities.”⁴⁵

Academic writing endorsed similar characteristics of the international organizations with possible additional.

In general, scholars agree that inter-governmental organization is established by international agreement.⁴⁶ Secondly, they agree that international organization must have at least one organ independent from the members expressing the will of the international organization.⁴⁷ Third common characteristic is the establishment under the international law.⁴⁸ In my view, this characteristic is a little bit superfluous because when the organization is established by international agreement which is governed by international law from its beginning also the consequence of such instrument must be governed by international law.

These three characteristics are not the only which the scholars connect with the international organizations. But there is no common understanding on them.

⁴⁵ *Responsibility of International Organizations: Titles and text of the draft articles 1, 2 and 3 adopted by the Drafting Committee* [online]. ILC, 2003 [cit. 2010-05-18] Available at: <<http://www.law.muni.cz/dokumenty/6406>>, Art. 2.

⁴⁶ AMERASINGHE, Chittharanjan Felix: *Principles of the Institutional Law of International Organizations*. Cambridge: 2 ed. Cambridge University Press, 2005. ISBN 0521837146. p. 10; RAMA-MONTALDO, Manuel: International Legal Personality and Implied Powers of International Organizations. In: *British Yearbook of International Law* 44 (1970). p. 154; SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p. 26; SANDS, Philippe; KLEIN, Pierre: *Bowett's law of international institutions*. London: 5 ed. Sweet & Maxwell, 2001. ISBN 042153690X. p. 16.

⁴⁷ AMERASINGHE, Chittharanjan Felix: *Principles of the Institutional Law of International Organizations*. Cambridge: 2 ed. Cambridge University Press, 2005. ISBN 0521837146. p. 10; RAMA-MONTALDO, Manuel: International Legal Personality and Implied Powers of International Organizations. In: *British Yearbook of International Law* 44 (1970). p. 154; SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p. 26.; SANDS, Philippe; KLEIN, Pierre: *Bowett's law of international institutions*. London: 5 ed. Sweet & Maxwell, 2001. ISBN 042153690X. p. 16.

⁴⁸ AMERASINGHE, Chittharanjan Felix: *Principles of the Institutional Law of International Organizations*. Cambridge: 2 ed. Cambridge University Press, 2005. ISBN 0521837146, p. 10; SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285, p. 26.

Amerasinghe lists among the characteristics of the IGO also a possession of some kind of constitution and at least predominant membership of states or governments.⁴⁹

He also adds that sometimes the international personality and treaty-making capacity is stated as a characteristic of IGO. But himself does not consider them as part of definition but as the consequences of being an IGO.⁵⁰

Rama-Montaldo adds also that IGO must be an association of States which has defined aims or purposes to be attained through the fulfilment of functions or powers of it.⁵¹ Similarly, this conditions is mentioned by Sands and Klein.⁵²

Also Schermers and Blokker⁵³ and Sands with Klein⁵⁴ add that IGO has been created usually as a new legal person. They further state that there could be an exceptional case when international organization is not a legal person.⁵⁵

It is not the main concern of this paper, but in my view, every international organization when it is established by international agreement, has its own will represented by own independent organ, is a legal person separate from its members states, because it is addressed under the international law and its is capable of bearing rights and duties under it. It is another question, what rights and duties it can actually enjoy. And this depends on its powers.

The constitution of the IGO is in most case the same treaty which established it. Or at least the treaty establishing international organization is part of its institutional constitution which is then supplemented with other instruments. And it is generally accepted that the aims and purposes of the organization are mentioned in its constitution, mostly in the establishing instrument. So, in my opinion, also these two characteristics are only

⁴⁹ AMERASINGHE, Chittharanjan Felix: *Principles of the Institutional Law of International Organizations*. Cambridge: 2 ed. Cambridge University Press, 2005. ISBN 0521837146. p. 10.

⁵⁰ Ibid, p. 11.

⁵¹ RAMA-MONTALDO, Manuel: International Legal Personality and Implied Powers of International Organizations. In: *British Yearbook of International Law* 44 (1970). p. 154-155.

⁵² SANDS, Philippe; KLEIN, Pierre: *Bowett's law of international institutions*. London: 5 ed. Sweet & Maxwell, 2001. ISBN 042153690X. p. 16.

⁵³ SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p.26.

⁵⁴ SANDS, Philippe; KLEIN, Pierre: *Bowett's law of international institutions*. London: 5 ed. Sweet & Maxwell, 2001. ISBN 042153690X. p. 16.

⁵⁵ SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p. 34.

additional and are derived from the fact that each IGO must have its establishing instrument.

Only one definition mentioned in this article specifically mentions that the international organization is established as a form of cooperation.⁵⁶ In my opinion, this is the key element which distinguishes other entities of international relations from the inter-governmental organizations. Only international organizations have been established to facilitate the cooperation of states, to assist and help them to solve problems affecting all or at least a group of them.⁵⁷

4.2 IRAN – UNITED STATES CLAIMS TRIBUNAL AS AN IGO

The international legal personality of arbitration tribunal was considered for the first, and to my knowledge only, time in the case of Iran – United States Claims Tribunal. This Tribunal was sued in the Dutch court by its former employee who challenged the validity of the dismissal. The claim was filed in the Local Court in The Hague.

The Local Court issued its ruling on 8 June 1983.⁵⁸ In this judgement, court at first had to deal with its own jurisdiction over the dispute. The Local Court proceeded from the fact that the Tribunal was instituted by the Claims Settlement Agreement between Iran and United States (embodied in the form of declaration of Algerian government). The Local Court stated that the Tribunal was established as a joint institution of the two States and added that this institution has a legal personality derived from international law. Furthermore, according to the Local Court it had been established, that the Tribunal enjoyed the same immunity from jurisdiction as international organization.

The question of the legal personality of the Tribunal was only a prejudicial question for the Local Court, but is of great importance for this contribution. Just in brief, the Local Court then proceeded with the question whether the proceedings against the Tribunal is covered by the immunity. According to the Local Court's opinion, the agreement between the plaintiff and the Tribunal was *acta iure gestionis* and as a consequence was not covered by the immunity.

⁵⁶ SCHMERMERS, HENRY G.; BLOKKER, Niels M.: *International Institutional Law*. Boston/Leiden: 4 ed. Martinus Nijhoff Publishers, 2004, ISBN 9004138285. p.26.

⁵⁷ AMERASINGHE, Chittharanjan Felix: *Principles of the Institutional Law of International Organizations*. Cambridge: 2 ed. Cambridge University Press, 2005. ISBN 0521837146. p. 7.

⁵⁸ A.S. v. the Iran-United States Claims Tribunal, Local Court of The Hague, 8 June 1983 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1982-1983. In: *Netherlands Yearbook on International Law* 15 (1984). p. 429.

The Tribunal was naturally not satisfied with this outcome and appealed to the District Court of The Hague.⁵⁹ The District Court issued its judgement on 9 July 1984. The opinion of the District Court differs from the one of the Local Court. Contrary to the Local Court's in District Court's opinion this agreement did not fall within the category of *acta iure gestionis* and as a consequence the Dutch courts did not have jurisdiction over the dispute.

This outcome was not satisfactory for the plaintiff, so this time he appealed to the Dutch Supreme Court.⁶⁰ The Supreme Court ruled on 20 December 1985. In its opinion, the Tribunal was an international organization with the legal personality deriving from international law. Then the Court went to assess the immunities to which the Tribunal was entitled. This is the longest part of the Court's reasoning, but as such not relevant for this article. In brief, the Supreme Court confirmed the opinion of the District Court, so the Dutch courts did not have jurisdiction over the dispute.

4.3 ARBITRATION TRIBUNAL AS AN IGO

The arbitration tribunals have a lot common with international organizations.

At first, each arbitration tribunal is established by the international instrument. Just to use examples introduced in the second part of this paper, the Iran – United States Claims Tribunal was established by the agreement concluded by Iran and United States of America. It does not matter that this agreement was publicized by the third state – Algeria in form of declaration. The Claims Settlement Declaration only gives form to the agreement of two states. The proposed arbitration tribunal between Croatia and Slovenia will be established by the international agreement concluded between these two states. So the first characteristic of the inter-governmental organization is met.

Secondly, also the arbitration tribunal has the organ which is capable to speak the independent will of it. It is true, that the whole entity – the arbitration tribunal, could be the organ required. But there could be other organs, like secretary-general of the organ or whole secretariat⁶¹.

⁵⁹ The Iran-United States Claims Tribunal v. A.S., District Court of The Hague, 9 July 1984 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1983-1984. *Netherlands Yearbook of International Law*, 16 (1985), p. 471.

⁶⁰ A.S. v. Iran-United States Claims Tribunal, Supreme Court, 20 December 1985 in BARNHOORN, L.A.N.N.: Netherlands judicial decisions involving questions of public international law, 1985-1986. *Netherlands Yearbook of International Law*, 18 (1987), p. 471.

⁶¹ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at:

Another organ acting on behalf of the arbitration tribunal could be the president of the organ. The Iran – United States of America has communicated with the organs of other states through its secretary-general⁶² or by its president⁶³. But most importantly the independent will of the arbitration tribunal is manifested by the decisions, especially awards, that the tribunal issues⁶⁴. These are clearly expression of the opinion and the will of the tribunal completely separate from the will of the states that established the tribunal. The award is usually in favour of only one party and it is not expressing the will of the state that loosed. But the losing state must comply with such and decision.⁶⁵ Also the separate will of this entity is confirmed and second characteristic of the IGO is met.

Arbitration tribunals are established by the international treaties so they are from the beginning part of the international legal setting. Their international character, their boundedness by international law, is usually confirmed by the instruction to use international law in their work.⁶⁶ The third characteristic is also met.

The requirement that the international organization is established as an association of predominantly states is also fulfilled in case of arbitration

<http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 6 (7).

⁶² E.g. letter of the Secretary-General of the Ministry of Foreign Affairs to the Secretary-General of the Tribunal, 2 February 1983 mentioned in supra. 20

⁶³ Like agreement concluded in form of exchange of letters - Netherlands coll. of treaties 29 (1990)

⁶⁴ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 10 (2).

⁶⁵ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 7; *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. IV.

⁶⁶ *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November 2009* [online]. [cit. 2010-05-18] Available at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitrazni_sporazum_-_podpisan_EN.pdf>, Art. 4; *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. V.

tribunals. The examples mentioned in this article have been established by the states, Iran and United States or Croatia and Slovenia respectively. There could be also situation when the tribunal is not established exclusively by states. Also other international organizations could be involved with the arbitration tribunals.⁶⁷

As was stated in part 3.1, the requirement of the some kind of constitution of IGO is mostly fulfilled by the founding agreement. And the arbitration tribunals also have their own founding agreements. Furthermore, these agreements usually state also the aims and purposes of the tribunals. In the case of Slovenia-Croatia compromise it is Art. 3 defining the tasks of the tribunal and Art. 7 (2) stating the ultimate goal of the tribunal – the definitive settlement of the dispute. In case of Iran – United States Claims Tribunal, the ultimate goal is also to settle the disputes between involved countries and their subjects. This ultimate goal elaborated in several provisions of both declarations.⁶⁸

So, the arbitration tribunal does have its own purpose and goals to achieve. But is the tribunal established as a mean of mutual cooperation? I do not think so. States (and sometimes IGO) resort to the establishment of the arbitration tribunal when the mutual cooperation is not fully possible. The existence of the tribunal is determined by the existence of the dispute between the parties not the will to cooperate together. It could be argued that there is a mutual will to cooperate in the peaceful settlement of the dispute between the involved states. However, this will is not the overall will attached to the international organizations – the will to sit together and discuss the possible solutions and then together carry out them. In case of arbitration tribunal the involved states stand opposite each other as adversaries, not communicating together, but communicating to the tribunal and through the tribunal with each other. There is only the will to utilize this mean of dispute settlement, nothing more. Another thing attached to this is the time-span of their existence. The mutual cooperation and communication among states is not limited by the time. The states can and they should communicate together for unlimited time. On the other hand, the existence of the arbitration tribunal is limited by the existence of the dispute. When the tribunal solves the dispute, the reason for its establishment ceased to exist, so also the tribunal is dissolved. It is true, that the founding instruments of the arbitration tribunals, like the two used as

⁶⁷ E.g. UN with United States under the United Nations Headquarters Agreement of 26 June 1947.

⁶⁸ *Declaration of the Government of the Democratic and Popublic of Algeria (General Declaration) 19 January 1981*[online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/general-declaration.pdf>>, par. 16 and 17; *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981* [online] [cit. 2010-05-29]. Available at: <<http://www.iusct.org/claims-settlement.pdf>>, Art. II.

examples in this paper, do not have special provision limiting its existence, but it comes with their goals – to settle the disputes, that when they finish their goals and there will be no more disputes falling under their purpose, they ceased to exist, too.

In my opinion, this is the most important difference between the inter-governmental organization and the arbitration tribunal. As a consequence, the arbitration tribunal can not be an inter-governmental organization.

CONCLUSION

This paper tries to assess the legal status of the *ad hoc* arbitration tribunal. As examples I use the Iran – United States Claims Tribunal and the proposed Slovenia – Croatia arbitration tribunal. As the starting point of the analysis, the concept of legal personality is chosen. There is no clearly stated definition of the international legal personality stated in the international law. But several scholars tried to describe this concept. As the most suitable description, I used the formal concept of the legal personality. To be a legal person means that the entity is capable of bearing the rights and duties conferred on it by the international law. And the arbitration tribunal is clearly capable of bearing this. As the examples showed, international law has conferred on the arbitration tribunal several rights and duties and the tribunals have dealt with them. As a result, it can be drawn, that the arbitration tribunal is a international legal person. But what kind of legal person? The most resembling entity in the international field is the inter-governmental organization. And the arbitration tribunal has many of the characteristics as the IGO. But the most important is missing. It is the general aim of mutual cooperation of the involved states. The arbitration tribunal is not established as a tool of mutual cooperation but a as tool of peaceful settlement of existing international dispute. From this distinction, I conclude that the arbitration tribunal is the legal person *sui generis*.

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