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Lessons From The Hague—An Update on the Iran-United States Claims Tribunal

Richard M. Mosk*

The Iran-United States Claims Tribunal was established pursuant to the 1981 Algiers Accords (which led to the release of the fifty-two American hostages from Iran) in order to adjudicate claims by Americans against Iran, Iranians against the United States, and the two governments against each other. I was one of the original three United States members of that Tribunal and resigned after almost three years to return home to California. I continued to return to The Hague to complete cases I had heard prior to my resignation. I was appointed as a substitute member of the Tribunal and was selected by Iran and the United States to sit on a number of cases as a substitute. I will discuss some of the practical lessons for the international business lawyer that have emerged from the Tribunal's formation and operation.

During the 1970's American investments in Iran expanded greatly. Indeed, by the late 1970's, there were American construction companies, architects, accountants, agricultural experts, lawyers, computer specialists, and engineers working on Iran's development. In addition, the United States Government and United States defense contractors were supplying Iran with modern weaponry.

During and after the revolution in Iran, which reached fruition in February of 1979, American contractors were unable to complete services and did not receive payments they claimed were owing. Accordingly, they commenced litigation against Iran in United States courts and attached Iranian assets. Ultimately, there were close to 400 such actions. It is unclear whether or not the American claimants ultimately would have succeeded in United States courts in view

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of the defenses of Iran, such as sovereign immunity and act of state. Interestingly, many of the contracts in issue evidenced a lack of attention to dispute resolution and choice of law. Also, many American contractors had caused standby letters of credit to be issued in favor of Iranian entities to guarantee performance. The Iranian entities began calling the letters of credit so that the American companies had to commence legal actions to attempt to enjoin the payment of these letters of credit.

In November of 1979, the American hostages were taken. Shortly thereafter, President Carter froze or blocked Iranian assets subject to United States jurisdiction. The disposition of the American private claims against Iran and the return of frozen Iranian assets became a major issue in resolving the hostage crisis, which was finally concluded by an agreement referred to as the Algiers Accords or Algiers Declarations.

The Algiers Accords consist of two declarations issued by the Government of Algeria, together with a number of technical implementing agreements, to which the Governments of the United States and Iran adhered. The first declaration (General Declaration) provided for the release of the hostages and a number of United States undertakings, which included the nullification of attachments, the cessation of litigation against Iran in United States courts, and the transfer of Iranian assets. Of the billions of dollars of blocked funds, a large portion went to pay certain American bank loans; some of the funds were put into escrow in connection with disputed interest on these loans; some were returned to Iran; and \$1 billion was placed in a "security account" to insure payment of awards in favor of United States claimants before a Tribunal to be established by the second declaration. Iran is required to replenish this security account when the balance in the account falls below \$500 million.

The second declaration (Claims Settlement Declaration) established an international arbitral entity, the Iran-United States Claims Tribunal, to resolve various claims by the nationals of one country against the other and the two countries against each other. The United States Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), subsequently upheld the power of the President to suspend United States litigation and enter into the Algiers Declarations.

The Tribunal was to be composed of nine members—three were to be designated by the United States, three were to be designated by Iran, and the final three, presumably from other countries, were to be chosen by the six government appointed arbitrators. Pursuant to the Algiers Declarations, the security account was established in The Netherlands Central Bank.

In May of 1981, the United States and Iran each named three mem-

bers to the Tribunal. The first three third country members consisted of two high court judges from Sweden—one of whom was also Marshall of The Realm—and the Chief Justice of France. Their successors included the Legal Adviser to the Dutch Foreign Ministry and member of the International Law Commission, a Swiss lawyer, a German law professor, and a French law professor. The Iranian members had either been judges, law professors or government officials.

The claims filed by American claimants generally involved alleged breaches of contract and expropriations. Claimants included many of the largest United States companies. Claims under \$250,000, the "small claims," are, unlike the other claims, presented by the government on behalf of the claimants. Iran often counterclaimed for defective performance and taxes and frequently filed claims related to the return or delivery of equipment. There have also been filed with the Tribunal disputes between the two governments relating to prior commercial relations and concerning the interpretation and implementation of the Algiers Declarations. Iran has filed one claim for over 10 billion dollars arising out of the United States Foreign Military Sales Program and another claim concerning the Shah's assets. Iran has also brought a claim concerning the United States' possession of the Iranian Embassy in Washington.

The Tribunal divided into panels of three to hear cases, although certain important issues were heard and decided by the full Tribunal of nine. Although the Tribunal has been referred to as an arbitral body because of its caseload, it more nearly resembles a judicial system. All claims, however, were required to be filed within one year of the Algiers Declarations. The arbitrators are often referred to as judges.

Certainly the Tribunal faced major obstacles from the outset. International arbitration involving governments, even under the best of circumstances, has had mixed results throughout history. The tribunals most likely to succeed are between friendly countries—or at least states that are no longer hostile—and which are created to resolve boundary disputes or a dispute involving a single incident. Some claims mechanisms between victor and vanquished nations have operated successfully.

The Iran-United States Claims Tribunal was created under more difficult circumstances. Iran and the United States do not have normal relations, and their contacts appear chilly at best. Some in Iran believed the Tribunal was imposed upon it. American claimants

were skeptical about presenting their cases to an unknown and distant body. Americans were also concerned that despite the requirement in the Claims Settlement Declaration that cases be decided on the basis of principles of law, decisions would be based instead on compromises. For the most part, Iran, which generally has been the defendant, has had little incentive to have the Tribunal operate efficiently. Defendants rarely are interested in speed or efficiency. The parties have also had to deal with different languages, different legal systems, and difficulties in obtaining and presenting evidence.

The Tribunal faced decisions which involved domestic political significance. There have been over 521 major claims (those over \$250,000), 2,795 small claims (those for less than \$250,000), 445 bank claims arising under a specific provision of the Algiers Declarations, seventy-eight intergovernmental claims, and thus far twenty-two disputes over the interpretation of the Algiers Declarations. The rest of the original 5000 cases were Iranian claims that were dismissed or withdrawn because of lack of jurisdiction. A number of the claims presented were extremely complex, involving millions and even billions of dollars. Thus, as one can see, the obstacles have been formidable.

The Tribunal, which is an international entity, obtained premises, appointed an international staff, received and processed the claims, developed procedures, promulgated rules, and made provisions for the translation and interpretation of documents and proceedings into two languages—English and Farsi. Each country appointed a representative to the Tribunal known as the Agent. The two governments (Iran and the United States) have been contributing funds in equal amounts to support the Tribunal, and both countries supply personnel.

As noted above, a number of Iranian claims were dismissed or withdrawn on jurisdictional grounds. Many bank claims were settled, some involving hundreds of millions of dollars. As of the fall of 1986, close to two-thirds of the major claims have been resolved. The Tribunal also issued partial and interim awards. The Tribunal has facilitated the settlement of a number of disputes. It held hearings or trials and issued awards which were paid out of the security account. The Tribunal has awarded in excess of 600 million dollars. Iran has replenished the security account as required by the Algiers Declarations. There have been decisions involving important commercial and international law issues.

Moreover, the Tribunal has developed procedures which may serve as guides for future tribunals. Those who seek to reform judicial systems, in which trials sometimes last months, might study the Tribunal procedures, which reduced the hearing time of a complicated case

to a few days. This was done by a greater reliance on written submissions. The procedures, which had to accommodate different legal systems, were workable, although adherence to and enforcement of the rules were at times erratic. In addition to the foregoing, the Tribunal has been the only place where the United States and Iran have had overt relations.

The Tribunal has now been operating for over five years. It provides a number of lessons that are generally useful for international business lawyers. Perhaps the most important of those lessons is that it works. The fact is that it is operating with the cooperation and involvement of the governments and the parties. Routinely, hearings are held and awards issued. The awards in favor of claimants are being paid promptly.

The Tribunal demonstrates that special arbitral tribunals can be established, outside the channel of traditional diplomatic protection, to which investors can bring their own claims. This is in comparison with prior claims mechanisms at which governments espoused the claims of their citizens within the framework of diplomatic protection. The Tribunal also shows the workability of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which were modified to accommodate certain specific aspects of the Tribunal.

At the Iran-United States Claims Tribunal, only two countries are involved. Typically, however, revolutions affect investors from many nations. It would, of course, be more complex to organize a tribunal for multinational claims, but it could be done. Also, a tribunal could be established for noncommercial claims. One can imagine the formation of such tribunals for such matters as Bhopal, Chernobyl or the claims against the Marcos family.

The Tribunal has grappled with some interesting legal issues. A number of these problems arose out of the interpretation of the Algiers Declarations. For example, the Iranians insisted that the interest on the \$1 billion in the security account should be paid to Iran as that interest accrued. Iran argued it should receive interest on its own monies. The United States argued that interest follows principal and should go into the security account. The interest has exceeded \$600 million. The majority of the Tribunal held that as the Algiers Declarations were silent on this subject, the interest should accumulate in a separate bank account until the governments could agree on the disposition of such monies or until the claims were all resolved, in which event the interest would be returned to Iran. Iran could, of

course, elect to use the money to replenish the security account, and it has done so.

Some other important contested issues involved jurisdictional questions. Claims could be made by United States nationals, such as a United States citizen and a United States entity, so long as natural persons who were United States citizens had "an interest in such corporation or entity equivalent to fifty percent or more of its capital stock." Iran argued that actual proof of citizenship was required. This, of course, is not practicable for a major United States publicly-held corporation, with tens or even hundreds of thousands of shareholders. The Tribunal has utilized certain inferences and rebuttable presumptions to establish the nationality of corporations.

Iran has argued that the strict wording of the Claims Settlement Declaration, which referred to entities that could make claims in terms of "capital stock or other proprietary interests," precluded jurisdiction over claims of nonprofit and nonstock entities, such as the many universities that made claims based on alleged obligations which related to Iranian students. By a five to four majority, the Tribunal rejected this contention. There have been other significant decisions involving jurisdiction. These include decisions regarding jurisdiction over indirect claims, counterclaims, and claims by Iran for taxes and social insurance premiums.

A most interesting case was whether someone who had both United States and Iranian nationality (i.e., a dual national) could maintain a claim against Iran. The United States contended that under the Claims Settlement Declaration, anyone who was a United States citizen could assert a claim against Iran, whether or not he or she happened also to be an Iranian citizen. Iran maintained that under the Claims Settlement Declaration and international law, one who had Iranian citizenship could not maintain a claim against Iran, any more than a United States citizen could bring before the Tribunal a claim against the United States. A majority of the Tribunal held, in effect, that whether or not a dual national could maintain a claim depended on that person's dominant and effective nationality. Thus, one must look at the person's contact with each country. The resolution of these jurisdictional questions should provide guidance in the future to defining jurisdiction in other claims tribunals.

There are other important international and commercial issues that have faced the Tribunal. These include whether and when a nationalization or expropriation had occurred, and if it had, the standard of compensation; the validity and effect of monetary exchange controls; the application of the doctrine of *force majeure*; the effect of exchange rates; the ascertainment of damage remedies; the effect of forum selection clauses; and which laws to apply to a transaction.

The awards, including dissenting and concurring opinions, have been published¹ and provide a rich deposit of legal authority on international commercial transactions. These opinions should be of value to practitioners who advise on international transactions, to those who are involved in international commercial litigation, and to those who will be involved in establishing dispute resolution mechanisms in the future.

The Iran-United States Claims Tribunal is unique in a number of respects. Unlike most prior mixed commissions, most of the claims are presented to the Tribunal directly by the claimants and not by the governments. The security account is a novel feature. The sheer size and amount of claims surpasses any prior international claims mechanism. In addition, although established by governments, the Tribunal has utilized, in large part, practices of private international commercial arbitrations. The Tribunal involves an amalgam of public and private international law.

The Iran-United States Claims Tribunal has provided an opportunity for many lawyers to become involved in international commercial arbitration. Many company executives also became familiar with the process. Thus, the Iran-United States Claims Tribunal has done much to arouse interest in international commercial arbitration.

The Iran-U.S. Claims Tribunal deals with subjects that should be of interest to those involved with international commercial transactions and arbitration. More study and commentary on the Tribunal should enhance the development of international commercial arbitration and increase the likelihood that such mechanisms will be used for the peaceful settlement of disputes.

1. Iran-U.S. Claims Tribunal Reports, Vols. 1-7 (Grotius Publications Limited); Iran Assets Litigation Reporter (Andrews Publications); Mealey's Litigation Reports—Iranian Claims (Mealey Publications). I am informed the Tribunal opinions will be available on WESTLAW in the fall of 1987.

