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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy

Warren Christopher and Richard M. Mosk*

We are pleased to honor Judge Robert Weil, a leader in our community, a highly regarded jurist and author, and a renowned neutral in alternative dispute resolution. This is the twenty-fifth anniversary of what has become known as the Iranian Hostage Crisis. We shall look back on those events in order to point to possible issues, lessons and solutions for the future.

CHRONOLOGY OF EVENTS AFFECTING THE IRANIAN HOSTAGE CRISIS AND THE ESTABLISHMENT OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

In 1925 Reza Khan, a semi-literate military officer, ousted the existing dynasty of Iran and had himself enthroned as Reza Shah Pahlavi. Early in World War II, British and Soviet troops, in effect, occupied Iran and secured the Iranian oil fields for Allied use. The Shah had become too pro German for the Allies. So they had Mohammad Reza Pahlavi, Reza Shah Pahlavi's son, replace him at the age of 22.

In the early 1950s, Mohammed Mossadegh, an elected leftist prime minister, nationalized British and American oil operations in Iran and refused to pay compensation. The Shah did not back Mossadegh, and mobs called for the Shah's removal. He fled Iran.

In 1953, the Iranian military, with C.I.A. support, overthrew Mossadegh, and the Shah was restored to the throne. With a grateful Shah in power, the United States and Iran signed a Treaty of Amity.

* This article is adapted from the program at the inaugural DRS Robert I. Weil Lecture sponsored by the Los Angeles County Bar Association Dispute Resolution Services, Inc. on September 25, 2006. Warren Christopher was Deputy Attorney General (1967-69), Deputy Secretary of State (1977-81), and Secretary of State (1993-97), and is now the Senior partner in the law firm of O'Melveny & Myers. Richard M. Mosk was a judge on the Iran-United States Claims Tribunal and is an Associate Justice of the California Court of Appeal.

In 1963, the Shah began his “White Revolution” of reform. Clerics led by Ayatollah Khomeini challenged the Shah’s reform programs. Rioting in Qom was suppressed, and in 1964, Ayatollah Khomeini was exiled to Iraq.

By 1972, the United States decided to allow Iran access to U.S. military weapons. In return, the Shah became a strong ally of the United States in the Gulf region. Meanwhile, American businesses invested heavily, and did substantial business in Iran. The Shah began to increase his powers and used a feared secret police apparatus, SAVAK.

President Carter had criticized the Shah’s abuses of human rights but determined that his value as a military ally outweighed his autocratic measures. On January 1, 1978, President Carter, meeting the Shah in Tehran, described Iran as an “island of stability in a turbulent corner of the world.”

After the Government-controlled press published an article ridiculing Khomeini, rioting erupted in Qom. It was suppressed by the Shah’s security forces, triggering a 40 day cycle of protests in ensuing months. On May 15, 1978 a general strike was called by religious leaders. On August 2, 1978 the Shah declared his commitment to free elections and greater political freedom. There were sharp disagreements in the United States government over what the United States should do. Some predicted the Shah was doomed and that we should no longer support him. Others maintained we should continue to support the Shah, even by force if necessary.

In October of 1978, Ayatollah Khomeini was expelled from Iraq and he ended up in France. In November, in an attempt to end spreading disorder, including strikes and sabotage, the Shah fired his cabinet and installed a military government. In Paris, Ayatollah Khomeini said that an Islamic republic would be formed by force, if necessary. He announced that all contracts with foreigners would be renegotiated under an Islamic Republic. He added that when his forces took over Iran, oil shipments to Israel would be stopped and military ties to the United States would be re-examined. At the end of November 1978, President Carter reaffirmed his full confidence in the Shah and said the United States would not interfere in Iranian affairs.

In January 1979, the Shah left Iran on an “extended vacation,” and lived for a time in Egypt, Morocco, the Bahamas, and finally Mexico. On February 1, the Ayatollah Khomeini triumphantly returned to Iran and was deemed the Imam. The revolution was completed as the Islamic Republic of Iran was declared. Shortly thereafter, Iranian students briefly occupied the American Embassy, but soon withdrew. The Embassy then advised unofficial Americans to leave Iran for reasons of safety. The revolution can be traced to the repressive and corrupt regime of the Shah, the perception of Iranians that the Shah was a threat to their culture and religion, and the real and perceived intervention by foreign powers into Iranian internal affairs.

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On October 22, 1979, the exiled Shah left Mexico and arrived in New York to undergo treatment for cancer at New York Hospital-Cornell Medical Center. On November 1, 1979, Khomeini's office in Qom issued a statement encouraging Iranian students to "expand their attacks" against the United States to force the U.S. to return the deposed Shah. On November 4, 1979, Iranian students captured the U.S. Embassy in Tehran, taking approximately 100 hostages, including 63 Americans. On November 5, Ayatollah Khomeini sent a message of support for the students who had captured the Embassy, saying that "if they do not give up the criminal [Shah] . . . then we shall do whatever is necessary" The Ayatollah Khomeini later ordered the release of 10 women and African-American hostages, leaving 53 hostages incarcerated. One American hostage was later released because of ill health.

When the hostages were not released, the United States announced it would stop importing oil from Iran and froze Iranian assets in United States banks and their foreign branches. Iran, in turn, repudiated all foreign debts. Americans began filing about 400 actions against Iran in United States courts and attaching, and enjoining the transfer of, Iranian assets.

The United Nations Security Council appealed to the Iranian government for the release of the hostages. On November 29, 1979, the U.S. petitioned the International Court of Justice at The Hague for a speedy legal judgment against Iran demanding the immediate release of the hostages. The International Court of Justice unanimously ruled in favor of the United States and ordered Iran to release the hostages and restore United States property.

On December 15, 1979, the White House announced that the Shah had left the United States for Panama, where he established residence. On March 23, 1980, the Shah left Panama for Egypt, one day before Iran was to present Panama with formal extradition papers. The Shah later died in Egypt.

On April 7, 1980, Ayatollah Khomeini declared that the hostages must remain in the hands of the students at the Embassy. In response, the United States severed diplomatic relations with Iran, implemented an economic embargo against Iran, and imposed other economic sanctions. The President ordered the Iranian Embassy in Washington and Iran's five consulates closed and Iran's 35 diplomats and 209 military students in the United States out of the country.

On April 24-25, the U.S. military launched an operation to rescue the hostages. It was aborted in the Iranian desert after the breakdown of several helicopters and a collision between two aircrafts resulted in eight deaths. Secretary

of State Cyrus Vance resigned his post a few days thereafter because of his opposition to the rescue mission.

On September 12, 1980, Ayatollah Khomeini listed four conditions for the hostages' release: return of the late Shah's wealth, cancellation of U.S. claims against Iran, unfreezing of Iranian funds in the United States, and U.S. guarantees of non interference in Iran. On September 15 and 17, Deputy Secretary of State Warren Christopher met with an Iranian representative in Bonn, Germany, and opened a dialogue on release of the hostages. On September 22, 1980, however, Iraq invaded Iran's Khuzistan province, and a full-scale war between the countries began. This outbreak of the war caused the channel opened by Christopher's meetings to dry up.

On November 4, 1980, Ronald Reagan defeated President Jimmy Carter in the U.S. presidential election. At about the same time, Iran named Algeria as an intermediary for hostage negotiations. On November 10, 1980, Deputy Secretary Christopher led a party of Americans to Algiers and delivered the U.S. response to Iran's conditions for the release of the hostages. On November 20, the United States confirmed that it had accepted in principle the four conditions as "a basis for resolution of the crisis." On November 27, according to a spokesman for the militants, the hostages had been turned over to the Iranian Government, and the militants no longer had anything to do with them. Intense negotiations continued.

On December 21, 1980, Iran delivered a note to the United States demanding \$24 billion in assets and guarantees to be deposited in Algeria. The United States rejected the demand.

On January 6, 1981, Algeria said that Iran was ready to complete a deal if it received \$9.5 billion in assets at once (down from \$14 billion), and the \$10-billion guarantee for the return of the Shah's wealth. On January 15, Iran reduced its demands to \$8.1 billion. The United States offered \$7.9 billion and Tehran agreed, dropping altogether the \$10-billion guarantee requirement.

On January 18, the United States and Iran signed an agreement for freeing the fifty-two American hostages in Tehran and providing for the return to Iran of billions of dollars in frozen assets. It was agreed that all claims by Americans against Iran, by the Iranian government against the United States, and by the two governments against each other would be submitted to a Tribunal to be established in The Hague. Thus, claims existing on the date of the agreement January 19, 1981, could no longer be heard in U.S. courts. Deputy Secretary Christopher signed the documents in Algiers a few hours before Behzad Nabavi, chief Iranian negotiator, signed them in Iran. The two negotiators never communicated directly until years later when they met informally in a hallway in The Hague during a Tribunal hearing.

On January 20, 1981, last-minute difficulties with the exchange of funds were overcome. The fifty-two American hostages were released one half hour after

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Ronald Reagan became President of the United States. Deputy Secretary Christopher greeted the released hostages as they arrived in Algiers from Tehran.¹

The Algiers Accords (or Algiers Declarations) 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 frozen 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 at a Tribunal to be established by the second declaration. Iran was required to replenish this security account when the balance in the account falls below \$500 million. The United States declared its policy not to interfere with the internal affairs of Iran.

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 country and the two countries against each other. The United States Supreme Court in *Dames & Moore v. Regan* subsequently upheld the power of the President to suspend United States litigation and enter into the Algiers Accords.²

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, to be chosen by the six government-appointed arbitrators.³ Pursuant to the Algiers Declarations, a security account for payment of claims was established in The Netherlands Central Bank.

In May of 1981, the United States and Iran agreed upon the three third country members to the Tribunal. The first 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, an Argentine former President of the International Court of

¹ See WARREN CHRISTOPHER ET AL., *AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* (1985); WARREN CHRISTOPHER, *CHANCES OF A LIFETIME* 96-123 (2001).

² See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

³ See Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 *TRANSNAT'L L. REV.* 253 (1988).

Justice, a Swiss Lawyer, a German law professor, a French law professor, a Finnish lawyer, a former Polish foreign minister and an Italian professor. The Iranian members had either been judges, law professors or government officials in Iran. On July 1, 1981, the Iran-U.S. Claims Tribunal met for the first time at The Hague in the Netherlands.

HISTORICAL BACKGROUND ON ARBITRATION

Modern international arbitration began with the three joint commissions that were established in 1794 by the Jay Treaty between Great Britain and the United States. During the nineteenth century numerous arbitral or claims tribunals were established by Governments. One of the most successful was the *Alabama* arbitration under the 1871 Treaty of Washington between the United States and Great Britain to resolve claims arising out of the American Civil War.

During the late nineteenth century, Governments often either submitted an existing dispute or group of disputes to arbitration, or provided for arbitration in a treaty to cover disputes that might arise. During the nineteenth and twentieth centuries, a quasi-public international process developed whereby claims of individuals against foreign States were adjudicated. Originally the claimants were not parties; rather the State in which they were nationals was the party, and the state espoused their nationals' claims. These so-called mixed commissions were established to deal with claims for injuries to nationals of one or another Government.

A significant instance of a settlement on a large scale was the Venezuelan arbitrations of 1903. Various Governments claimed their nationals had been injured by Venezuelan authorities during a civil war. The commissions sat in Caracas to determine these claims. Claims commissions were also established to deal with damages to foreign property arising out of the Boxer Rebellion in China.

In 1899, a Convention for the Pacific Settlement of International Disputes established a body known as the Permanent Court of Arbitration in The Hague. The court was created to promote and facilitate international arbitration among Governments. The Permanent Court of International Justice was established in 1921. It was an adjudicative mechanism for Governments to resolve disputes. Its successor, the International Court of Justice, was established after World War II. Also, following World War I, several mixed arbitral tribunals to adjudicate claims associated with the combatants of that war were established by the Treaty of Versailles.

There have been a number of claims commissions arising out of injury to nationals of States from the Mexican revolutions. Following World War II there were also various tribunals to resolve disputes and claims. Often gov-

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ernments agreed to settle claims by paying a lump sum, with the government receiving the funds distributing them to its nationals, often through a claims mechanism.

Among Governments, there have been *ad hoc* arbitrations, quasi-permanent tribunals and other forms of claims mechanisms. There are also specialized bodies, such as the European Commission and Court of Human Rights and the Law of the Sea Tribunal. The number and variety of intergovernmental dispute mechanisms have been extensive. They are often provided for in Bilateral Investment Treaties (BITs). In addition, War Crimes Tribunals have been established.

THE IRAN-U.S. CLAIMS TRIBUNAL

The Iran-United States Claims Tribunal is a modern and highly developed claims tribunal. Professor Richard Lillich referred to the Tribunal as “the most significant arbitral body in history.”⁴ The Tribunal is the largest bilateral international claims adjudication program ever. Until the creation of the United Nations Compensation Commission, it was the largest claims program in history. It is unique in being a program between a Western country and a non-Western country.⁵ It is a hybrid international arbitration mechanism involving, on the one hand, commercial and non-public international law issues and, on the other hand, intergovernmental disputes and other disputes that call for the application of public international law. Nationals present their own claims, except for claims under \$250,000 (“small claims”), which are presented by the governments. The Tribunal has been referred to as “a unique institution, representing one of the most ambitious and complex international claims adjudication programs ever undertaken.”⁶

There were 3844 claims filed, of which 2795 were small claims. An additional large number of claims by Iranian nationals against American nationals were dismissed as being outside the jurisdiction of the Tribunal. The Iran-United States Claims Tribunal has resolved all of the claims of nationals of one Government against the other and many of the inter-governmental claims. The total amount of the awards to American claimants exceeds \$2.5 billion, all of which have been paid. The Tribunal is still dealing with large inter-

⁴ THE UNITED STATES CLAIMS TRIBUNAL 1981-1983 vii (Richard Lillich ed., 1984).

⁵ *Id.* at 8.

⁶ David P. Stewart and Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1, 6 (1983).

governmental claims, generally by Iran claiming damages arising out of the Foreign Military Sales program and properties allegedly not returned to Iran. These claims involve thousands of individual transactions.

Operation of the Tribunal

The Claims Settlement Declaration provided that the United Nations Commission on International Trade Arbitration Rules or UNCITRAL Rules, as modified, would apply. The Tribunal adopted these rules with some modification. 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 were required to be filed within one year of the Algiers Declarations.

In their claims, responses, rebuttals and surrebuttals, the parties supplied their contentions and evidence; these included witness statements, documents, and legal arguments. A party could request the Tribunal to order the other party to produce certain documents. Because the UNCITRAL Rules provide that either side could demand a hearing, hearings were invariably held at which each side was expected to produce as a witness anyone whose statement had been submitted. This person could amplify upon his or her statement, be subjected to cross-examination by the other side and be available for questions by the Tribunal. Although the Tribunal could and did appoint experts, each side often presented its own experts. The civil law process of submitting all material in writing reduced the length of hearings substantially. The Tribunal applied choice-of-law principles that it deemed applicable.⁷

Accomplishments of the Tribunal

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

The Iran-United States Claims Tribunal was created under difficult circumstances. Iran and the United States did not have diplomatic relations and they were hostile to one another. Both Iranians and Americans were skeptical about the Tribunal and often criticized it.

⁷ See Richard M. Mosk, *Lessons from the Hague—An Update on the Iran-United States Claims Tribunal*, 14 PEPP. L. REV. 819 (1987).

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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 Persian. Each country appointed a representative to the Tribunal known as the Agent. Iran and the United States have been contributing funds in equal amounts to support the Tribunal, and both countries have supplied personnel.

The Tribunal rendered numerous published written opinions, including dissenting and concurring opinions. All of these opinions included discussion of international and commercial law and have had a substantial effect on the clarification of the law of state responsibility for damaged aliens. The Tribunal generally did not resolve issues on the basis of municipal or local law. Thus, the Tribunal has had an influence on the development of general principles of commercial law, or what some have referred to as "Lex Mercatoria."

Although there was a reluctance to deal with politically sensitive issues, ultimately the Tribunal did so. These issues included the application of the Treaty of Amity, the standard of compensation, interest, the application of the International Monetary Fund agreement, expropriation, standard of compensation, dual nationals, exchange controls and rates, wrongful expulsion, treaty interpretation, force majeure, and many more. There were also many significant procedural and evidentiary issues, including questions of jurisdiction.

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, the Tribunal has been the only place where the United States and Iran have had overt relations and maintained a place for contact.

The Tribunal has exposed many lawyers to international arbitration, thereby expanding the use of international arbitration as an alternative dispute resolution mechanism and increasing the opportunities for lawyers in that field. It has been the model for subsequent tribunals such as the Ethiopian-Eritrean Tribunal and, in part, for the United Nations Compensation Commission.

REFLECTIONS ON THE HOSTAGE CRISIS

Prior to the crisis and at the time of the revolution, the United States re-evaluated its relationship with Iran. In view of Iran's location and resources,

the United States did not sever its ties with that country, either before or after the Revolution, before the November 1979 hostage taking.

Following the November 4, 1979 hostage taking, the United States government expected Iranian authorities to rescue embassy personnel as they had in a similar incident the prior February. When that did not occur, the United States froze Iranian assets, imposed other economic sanctions and sought international support, including filing a case in the International Court of Justice. Thereafter, U.S. businesses and banks were required to curtail their activities in Iran.

The United States explored every possible diplomatic avenue to free the hostages. While military options were rejected initially, the President's threat of military retribution if the hostages were harmed or brought to trial had a deterrent effect.

Because of internal political maneuvering in Iran, meaningful negotiations did not take place until September of 1980, but those initial discussions in Germany collapsed after the outbreak of the Iraq-Iran war in late September. In November 1980 negotiations resumed, with the Algerians serving as skilled intermediaries and facilitators, and to some extent as mediators.

The negotiations proceeded even after President Carter had been defeated in the election by Ronald Reagan. The negotiations entailed issues concerning the return of the foreign assets, repayment of debts owed by Iran to U. S. banks, the resolution of claims by Americans, the return of the Shah's assets and nonintervention by the United States in Iranian internal matters. Intense negotiations led to the signing of the Algiers Declarations on January 19, 1981—one day before the inauguration of President Reagan.

On January 20, 1981, after various transfers of funds, the hostages were released in Algiers, and the incoming Reagan administration complied with the agreements. In retrospect, it appears that the United States was able to respond flexibly to Iran's demands, while preserving American honor by returning only frozen assets and thus not paying blackmail. The reciprocal claims were resolved under favorable terms for American claimants.

The Tribunal proved to be a creative way of dealing with a difficult situation. Americans insisted on recourse, and Iran refused to litigate in American courts. Even if the cases had been allowed to be pursued in United States courts, defenses such as sovereign immunity made recovery uncertain. Moreover, there undoubtedly would have been multiple claims on the Iranian assets.

American claimants, for the most part, were satisfied with the Tribunal. While the Tribunal has not completed its work and so we cannot finally evaluate its performance, it has resulted in many positive contributions.

In sum, the Iranian hostage crisis demonstrates that through hard work, patience, persistence and creativity, even the most intractable situation may be subject to a favorable resolution. Whether comparable crises can be resolved favorably

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depends on the rationality of adversaries, available leverage, the support of the international community, and the resolve of the American public.

