SPECIAL FEATURE: ARBITRATION

Recent Developments at the Iran-United States Claims Tribunal

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It is the purpose of this paper to present an update on developments at the Iran-United States Claims Tribunal in the Hague. Other papers in this program give ample testimony to the growing importance of international arbitration as a mechanism for the settlement of disputes. In this regard, the Iran-United States Claims Tribunal offers, I believe, an excellent, if not unique, case study. Without doubt, it represents a major challenge for the resolution of international disputes through arbitration, and the Tribunal's ability to meet that challenge is very likely to have significant implications for the future use of arbitration by the United States and other governments. It is in part for this reason that the United States is committed to making the Tribunal an effective and functioning forum in which deserving American claimants can obtain timely relief.

There are undoubtedly among the audience today claimants, and attorneys representing claimants, who are concerned about the pace and direction of Tribunal activities. We in the administration share those concerns and I will speak to them in just a few moments. My basic message today is that, despite the difficulties and some troublesome developments, the Tribunal is functioning, and is beginning to deal with the large volume of claims before it.

By way of background, the Iran-United States Claims Tribunal represents one of the most ambitious and complex international claims adjudication programs ever undertaken. During the course of the Islamic Revolution in Iran, the entire range of economic and commercial relationships between the United States and Iran was disrupted — and those relationships had been extensive indeed. Under the terms of the Algiers Declarations, which resulted in the release of the fifty-two hostages illegally detained in Teheran, the Tribunal was given the enormous task of adjudicating disputes involving billions of dollars in commercial debts, breached

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Editor's Note: The following papers were presented at the Section's Joint Showcase Program, August 1982. Significant further developments have occurred at the Tribunal since that time.

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contracts, nationalizations, expropriations and other measures affecting property rights.

Our latest count indicates that the Tribunal's caseload now includes over 4000 claims: the 2,795 so-called "small" claims of less than $250,000 each which the Department of State filed on behalf of U.S. nationals, approximately 650 "large" claims of U.S. nationals of $250,000 or more (some of which range into the hundreds of millions or even billions of dollars), nearly 100 "official" claims between the two governments for breach of contracts, more than 350 "bank" claims based on Iranian indebtedness, and several hundred claims by Iran and Iranian nationals. The legal issues raised by these claims include many difficult questions of international law, private as well as public. The Tribunal's decisions will set precedents of importance for the bar, the private sector and governments for many years to come.

The Tribunal is exceptional in other respects as well. It is the first mixed claims commission in which the United States has participated since World War II. It is also the first arbitration for the United States in which the basic agreement between the governments expressly provides for the presentation of the larger claims directly by the claimants themselves, while smaller claims are presented by the governments. Its jurisdictional provisions are broader in many respects than comparable predecessors. And it is the first international arbitral tribunal to function under the UNCITRAL rules—with modifications to conform those rules to the special circumstances of this arbitration.

Finally, the Tribunal must operate against the background of a continued disruption in diplomatic relations between its two High Contracting Parties, one of which remains in the throes of revolution while it is also at war. The strained political relationship between the United States and Iran adds a further dimension to the difficulty faced by the Tribunal in performing its novel and complex task. The fact that the Tribunal operates with two official languages adds yet another burden.

Considering these circumstances, I think it fair to say that the Tribunal has come a long way since the three American and three Iranian members first met in May of 1981 to discuss selection of three third-country arbitrators. In the intervening months, a new arbitral institution has been established; permanent quarters have been found and furnished; staff employees have been selected and put to work; rules of procedure have been provisionally adopted; several thousand claims have been received and processed by the Registry; the adjudication of those claims has been put in motion; several important hearings have been held and several major decisions have been rendered.

The Tribunal has set at least initial deadlines for the submission of Iran's statements of defense in more than 400 claims, or some two-thirds of the large U.S. claims. It has held more than fifty prehearing conferences, hearing on the merits, and settlement conferences. Hearings in more than sixty

claims are scheduled for this coming fall. Most important, U.S. claimants are now seeing the first tangible results of that process. Claims are being paid. To date the Tribunal has issued seven awards in favor of U.S. nationals: six are awards on agreed terms embodying settlements reached directly by the parties concerned, and one is an adjudicated award. While these numbers are not large in absolute terms, they are evidence that the claims settlement process is underway and is beginning to produce results.

In addition, the Tribunal has devoted a substantial amount of its time and energy to considering three major interpretive disputes concerning the Algiers Accords: these include issues affecting the security account, the Tribunal's jurisdiction over "direct" claims by Iran against U.S. nationals, and the "choice of forum" case. Since my focus today is on "recent developments" at the Tribunal, let me take a moment to describe the security account issues. The Tribunal rendered its decision on the last three of these issues on July 30 and notified the parties of this decision just last week.

The Algiers Accords provided for the establishment of a security account, the sole purpose of which is to pay and secure the payment of Tribunal awards against Iran. The account was initially funded with $1 billion transferred from frozen accounts. Iran is obliged to replenish the account whenever it drops below $500 million. During the course of negotiating the technical agreements for the administration of the security account by the N.V. Settlement Bank of The Netherlands last summer, the U.S. and Iranian representatives were unable to agree on four issues relating to the account: (1) whether the interest earned on that initial $1 billion (and interest on that interest) would remain in the account as further security for American claimants or would be paid over to Iran as earned; (2) whether and under what circumstances settlements reached directly between the parties concerned could be paid from the account; (3) how the fees of the depositary bank should be allocated as between Iran and the United States; and (4) how the burden of indemnifying the Dutch bank against potential losses should be allocated between the two governments. These questions were submitted to the Tribunal for decision, in case no. A/1.

As most of you probably know, the question of whether settlements could be paid from the account was decided by the Tribunal on May 14, 1982. While this decision is not a model of clarity, it does define a general procedure which is responsive to U.S. concerns. Settlements may be paid from the security account only where the Tribunal issues an award on agreed terms, based on the settlement, as permitted by article 34 of the UNCITRAL Rules. The Tribunal has to examine whether it has jurisdiction over the claim before issuing such an award. It will also review the terms of settlement generally, and may refuse to accept a settlement for reasons other than lack of jurisdiction.

The decision on the other three security account issues was released only last week. The Tribunal decided that interest earned on the security

account should continue to be credited to the separate suspense account established in accordance with the interim technical arrangements negotiated last August. The Tribunal further decided that any such interest may be used by Iran to replenish the security account, until the security account is finally closed or until the U.S. and Iran agree to some other use of the interest earned. The Tribunal decided, in essence, that there was no sufficient basis in the Algiers Accords either to credit the interest as it accrued directly to the security account or to pay it to Iran, and that the status quo should be continued since it preserved the rights of both parties. While this result does not make the interest immediately and automatically available to satisfy awards to U.S. claimants, as the United States argued the Algiers Accords required, the decision does prevent the diversion of the interest to any other purpose without the agreement of both the United States and Iran until all claims are decided and all awards paid.

On the questions of management fees and indemnification, the Tribunal decided that fees should be borne equally by the two governments and that indemnification should be joint and several, leaving open until an actual case arises the question of how ultimate responsibility for indemnification should be allocated between the United States and Iran.

With respect to the other two interpretive issues, the Tribunal decided case no. A/2 last December, holding that under the Accords it does not have jurisdiction over so-called "direct" claims by one government against nationals of the other, an important protection for U.S. nationals who have not filed claims with the Tribunal and are thus not subject to Iranian counterclaims. The Tribunal is currently considering the "choice of forum" issue, which concerns the interpretation of the Claims Settlement Agreement's exclusion from the Tribunal's jurisdiction of "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts." The Tribunal decided to address this issue in the context of nine specific claims, and cases involving a representative range of choice of forum clauses were consolidated for this purpose. In our view, this was a good way for the Tribunal to approach this issue—in the context of specific claims, rather than in the abstract, and in an effort to adjudicate a common issue of fact and law in an efficient, judicious manner.

In other respects, the choice of forum case illustrates some of the deeper difficulties confronting the Tribunal. In April, the Tribunal set June 21 for hearing oral argument in the case, calling for briefs from the two governments and the nine U.S. claimants by June 1. The United States and the nine claimants complied with that order.

The U.S. memorial, submitted on June 1, takes the position that few, if any, of the contractual provisions meet the narrow terms of the exclusion clause, and that in view of the fundamental changes in the Iranian legal system, even those few clauses are not "binding." In preparing the Memorial, we worked closely with the claimants and were pleased with the coop-

erative relations which developed.

However, Iran has not been very cooperative. Although it initially agreed with the schedule set by the Tribunal in April, it subsequently failed to file a memorial on June 1, and interposed objections to virtually every aspect of the procedure, including particularly a strong objection to participation by the U.S. government. Notwithstanding those objections, the hearing went forward as scheduled, with the claimants and the government presenting their case. Iran declined to offer oral argument, however, and, only after the hearing had concluded, made a request for additional time for submitting its memorial. The Tribunal ultimately did give Iran until August 10 to file its written statement, and at our demand gave the United States and the claimants until September 10 to submit a rejoinder.

Viewed most favorably, this incident could represent a cautiousness on the part of the Tribunal in approaching a fundamental and sensitive jurisdictional question, and a desire to encourage full participation by Iran. Nonetheless, in our view, the Tribunal has allowed Iran to gain an unfair procedural advantage and we have protested the handling of the matter in very strong terms. This is unfortunately not our only cause for complaint and we have had repeated occasion to express similar concerns. It is our hope that the Tribunal's tendency to grant extensions and allow delays at Iran's urging will not long persist, and that the Tribunal will insist that its orders be complied with by all the parties.

While the Tribunal has to its credit substantial accomplishments, the pace of Tribunal operations remains a matter of most serious concern. We have consistently and vigorously opposed Iran's delaying tactics and urged more efficient handling of claims. I can assure you that we will continue to direct our attention to such matters.

The problem of delay is, of course, not unique to this Tribunal. We are all aware of the fact that, even in our own fully organized and functioning court system, a single complex, vigorously contested litigation can be many years in coming to trial. By comparison, the Tribunal now has thousands of cases in the stage or jurisdictional objections and preliminary pleadings. Some of these proceedings will rise to the level of complexity of a major antitrust case. While delay is potentially a serious danger here, I think that it is still too early to reach any conclusions as to the ultimate effectiveness of the Tribunal. The Tribunal has made progress towards establishing more efficient operations, and we continue to be hopeful that the Tribunal can and will be able to handle its large and difficult task within a reasonable time.

In closing, let me attempt to draw a few conclusions about the Tribunal. To date, two significant lessons seem to be emerging from our experience. First, there has been an encouraging tendency not to decide questions in the abstract, where there is neither a factual record nor a concrete setting. This was evident most recently in the Tribunal's ruling on the question of

responsibility between the two governments for indemnifying the Dutch bank against losses and expenses caused by lawsuits. Although the Tribunal decided the two governments should be liable to the bank on a joint and several basis, it refused to prejudge what right of contribution, if any, the governments would have against each other. The Tribunal said it wanted, instead, to await an actual case in which contribution might be sought so as not to address an issue which had not arisen or which might never arise. This same cautious tendency was evident in the Tribunal's decision to consolidate the nine claims for argument in addressing the choice of forum issue. This consolidation has permitted the Tribunal to review the range of contractual provisions that may be in issue before setting a broad precedent that could affect many claimants. To a common-law trained lawyer, the Tribunal has a healthy instinct in this regard. The Tribunal's ability to understand the implications of its decisions is enhanced by the presence of actual parties with a live dispute between them. Moreover, for the claimant community, it offers a wider opportunity to participate in precedent-setting decisions.

The second lesson should come as a surprise to no one. The Tribunal is not insulated from, nor insensitive to, the extraordinary political dimensions of the task before it. The claims it has been asked to resolve arose in the context of a major international crisis between the United States and Iran, as well as revolutionary upheaval within Iran itself. To a large extent, the Tribunal's efforts are directed to resolving the consequences of an abrupt break in what had been close commercial and financial relations. That fact alone sets this particular arbitral process apart from the more typical commercial or intergovernmental arbitration.

Thus far, the Tribunal has generally overcome the aggressive adversarial aspects of procedural battles and tactical maneuvering when addressing the merits of legal questions. It has also generally devoted fair and full consideration to the substantive arguments of claimants and the governments. There has been, however, a tendency to acquiesce in Iran's repeated procedural demands that have no foundation either in the Tribunal's rules or in general concepts of procedural justice. This can be viewed as an unsettling development by those accustomed to conducting legal proceedings in strict conformity with well-established rules. If unchecked, continuing tolerance for unwarranted delay could lead to more serious problems when the Tribunal moves on to the time-consuming task of full evidentiary hearings on pending claims.

In sum, then, a mixed picture emerges. The Tribunal's positive judicial approach to the substance of sending issues is still burdened by a slowness of pace, with the result that while there has been unmistakable progress, much remains to be accomplished. An important element in ensuring that the Tribunal continues to make progress will be increased cooperation and coordination both among the claimants themselves and between the government and the claimant community. In that regard, the establishment of

the United States-Iranian Claimants Coordination Committee is a positive step. Our own Office of Iranian Claims will be working with the Committee, and with other claimants, on issues of importance to us all. I urge claimants to be in touch with our office.

In the Algiers Declarations, the two governments agreed that, under the circumstances, the Tribunal offered the best mechanism for resolving the outstanding disputes between them and their respective nationals. Despite the difficulties that have been encountered over the course of the past year, we continue to believe that the Tribunal can be successful in its endeavor. I can assure you that Iran claims will remain among our top priorities in the legal adviser's office. We will do our best to work with the American claimants, and the Tribunal, to see that a fair resolution of claims is achieved as soon as practicably possible within a complex setting.

Thank you.