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The Iran-United States Claims Tribunal 1981-1983

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Book Reviews

THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983, edited by R.B. Lillich. Charlottesville, Virginia: University of Virginia Press (1984). Pp. 175. $25.00.

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It is in the nature of publishing schedules that this volume of papers presented at a colloquium in April of 1983 was printed in 1984, distributed in 1985, and reviewed in an issue to appear in early 1986. Those who have actively followed the work of the Iran-United States Claims Tribunal are necessarily familiar with a large portion of the contents of this book. Not only were three of the seven chapters previously published elsewhere,[1] but much of the descriptive and some of the analytical material throughout the book has been dealt with in a more timely fashion in the periodical literature, where intervening—indeed sometimes superseding—developments have been discussed.[2] This review, therefore, is directed not at the relatively small group of avid Tribunal-watchers, but at the much larger audience of

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1. Chapter I previously appeared as Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1 (1984). Chapter II was previously published as Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 VA. J. INT'L L. 259 (1984). Chapter III appeared as Lowenfeld, *The Iran-United States Claims Tribunal: An Interim Appraisal*, ARB. J., Dec. 1983, at 14.

2. A series of major substantive decisions in the area of state responsibility appeared after the essays in this volume were already in final form. These decisions include several by the three chambers of the Tribunal concerning the entitlement of claimants to compensation for the value of expropriated property (discussed by Clagett in the articles cited *infra* note 24). A decision by the full Tribunal that the test of dominant and effective nationality would be applied to determine the Tribunal's jurisdiction over the claims of dual nationals was essentially consistent with the treatment of the issue at the chamber level discussed in several chapters of the book. Other subsequent decisions have dealt with important contract law issues, including the application of force majeure clauses in military and other contracts to events such as the disintegration of public order in Iran and the sanctions imposed by the United States during the hostage crisis. *Cf.* Straus, *Causation as an Element of State Responsibility*, 16 LAW & POL'Y INT'L BUS. 893 (1984) (discussing the Tribunal's treatment of Iran's liability where claimant's injury may have been caused at least in part by U.S. government's reponse to

those who are not yet conversant with the Tribunal's work and who have the most to learn from informed commentary about this unusual institution. What can lawyers, legal scholars, and students learn from papers written in the second year of existence of a body that is now in its fifth year?

The value of the volume lies more in the questions it raises than in the answers it supplies. The authors acknowledge that at the time of preparation of their papers it was premature to present definitive conclusions about the Tribunal's work. As of that time, the Tribunal's most important decisions involved threshold questions of interpretation of its own charter, usually arising in the context of jurisdictional disputes.[3] Even these early cases, however, foreshadowed important substantive trends.[4] Just as important as the Tribunal's direct rulings on substantive law were the indications of its attitudes toward its own function and the methodology it would follow for determining and applying legal rules. Where possible, the authors have formulated tentative evaluations based on the Tribunal's output to date, while recognizing that these might have to be revised as the Tribunal's jurisprudence takes shape over time. They strike a good balance between commending the Tribunal for what it has done right and criticizing it for what they feel it is doing wrong—such as processing cases too slowly, reaching objectionable results, or (the most frequent criticism) rendering opinions that are deficient in the quality of reasoning.

The major themes running through the volume are:

(1) *the nature of the Tribunal*: To what extent does it reflect attributes of private arbitral bodies, courts, mixed claims commissions, or supranational institutions?

(2) *the Tribunal as a processor of claims*: Are its procedures efficient? How could they be improved?

(3) *the Tribunal as a body bound by law*: To what extent has it been faithful to its mandate to decide all cases "on the basis of respect

Iranian acts). Texts of the awards are available from several sources, described *infra* at note 23.

3. Among these are the Tribunal's decision that Iran could not bring direct claims against U.S. nationals before the Tribunal, and the series of decisions concerning the extent to which claims based on contracts providing for dispute settlement in Iranian courts are within the Tribunal's jurisdiction. These and many other decisions are cited and discussed in chapter I of the volume.

4. An example is the Tribunal's attitude toward issues in the law of treaties, where principles already established by the Tribunal at the jurisdictional phase necessarily have ramifications for future substantive decisions in which the interpretation and application of intergovernmental agreements are relevant to the existence and extent of the parties' liability.

for law" ?[5] Are its decisions consistent with applicable law?[6] Is its reasoning persuasive to lawyers?

Most of the essays touch on each of these themes. The opening chapter, written by the head of the State Department's Office of Iranian Claims and a colleague,[7] reviews major procedural and substantive developments through September of 1983. The succinct summaries of the major decided and then-pending cases give the reader an overview of the matters within the Tribunal's purview, which include important issues of the international law of state responsibility as well as commercial, financial, remedial, and other issues. Interspersed in the largely descriptive text are some well-placed criticisms of the Tribunal, including its failure to adopt more sophisticated systems for managing its 3000-case docket and inconsistencies and inadequate reasoning in its opinions.

Chapters by a law professor with expertise in international arbitration[8] and by a practitioner responsible for some of the largest cases before the Tribunal[9] contain qualified praise and a few pointed complaints, including concerns from the latter about the dangers and dysfunctions of secrecy in the Tribunal's proceedings. Other chapters include a review of the Tribunal's major decisions in an effort to determine whether it is essentially conservative or innovative in its jurisprudential approach,[10] and a chapter—somewhat out of place in this volume—that chronicles the history of the Iran claims litigation in the United States from the time of the Iranian revolution through the aftermath of the Supreme Court's decision in *Dames & Moore v. Regan*[11] confirming the constitutionality of the executive acts by which the Tribunal was created and by which domestic litigation was suspended.[12]

One of the authors explores the implications of the Tribunal's

5. Article V of the Claims Settlement Agreement establishing the Tribunal's terms of reference requires that the Tribunal decide all claims "on the basis of respect for law." The Agreement is reprinted at 81 DEP'T ST. BULL. 1, 3 (1981) and at 20 I.L.M. 230 (1981).

6. Article V of the Claims Settlement Agreement authorizes the Tribunal to apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

7. Ch. I, Stewart & Sherman, *Developments at the Iran-United States Tribunal: 1981-1983.*

8. Ch. III, Lowenfeld, *The Iran-United States Claims Tribunal: An Interim Appraisal.*

9. Ch. VI, Clagett, *The Iran-United States Claims Tribunal: A Practitioner's Perspective.*

10. Ch. IV, Sohn, *The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law.*

11. 453 U.S. 654 (1981).

12. Ch. VII, Hertz, *The Hostage Crisis and Domestic Litigation: An Overview.*

ambiguous character at the border of private and public law.[13] He offers three possibilities: (1) that the Tribunal is analogous to a private arbitral tribunal created to resolve disputes under private law; (2) that it is an international tribunal charged with determining state responsibility under public international law; or (3) that it is a hybrid of the first two forms. Determination of which of the attributes predominates may be relevant in any given case to: the choice of applicable substantive law (either public international law, a particular national law, general principles, or some combination), the required elements and level of the claimant's proof (either the same as in proving a private law claim or a differential standard under the public law of state responsibility), the relationship between the Tribunal's proceedings and proceedings in national courts (for example, whether the Tribunal can require Iran to stay proceedings in its own courts on claims and counterclaims pending before the Tribunal), and the eventual enforceability of the Tribunal's awards in national courts. The problem of the nature of the Tribunal with respect to enforceability of its awards has attracted considerable attention since the paper was written, precipitated in part by an abortive Iranian effort to challenge the awards under Dutch law, on the assumption that a national procedural law must govern the arbitral proceedings.[14] Scholars will undoubtedly be debating the implications of the Tribunal's unusual blend of public and private features for years to come.

Another chapter argues that the Tribunal should undertake the fashioning of an international commercial law using comparative methodology.[15] This piece is essentially a meditation on contributions that the Tribunal could make to creation of an international law merchant based on principles common to various legal systems. The author assumes that the Tribunal need not give effect to contract provisions selecting a national law to govern the relationship—a preference that some claimants with Iranian choice-of-law clauses would share, but one that requires a more careful analysis of the provisions in the Tribunal's constitutive instrument concerning choice of law and

13. Ch. II, Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility.*

14. For a discussion of the nature of the Tribunal for purposes of judicial enforceability of its awards, see Lake & Dana, *Judicial Review of the Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 LAW & POL'Y INT'L BUS. 755 (1984).

15. Ch. V, Carbonneau, *The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal.* This chapter's author has continued his advocacy of arbitral development of an international law merchant in a more recent article. *See* Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985).

contract provisions.[16] Interestingly, one application for comparative law methodology could be found in the claimants' efforts to defeat contractual provisions specifying Iranian courts as the forum for dispute resolution. In the test cases concerning the relationship between those provisions and the Tribunal's own jurisdiction, claimants argued that under principles common to many municipal legal systems a choice-of-forum clause will not be enforced where doing so would deprive the claimant of any meaningful remedy.[17] The Tribunal declined to endorse this argument, but took a more textually-based approach that is described in some of the other chapters.[18]

Most of the authors feel strongly that the Tribunal could be doing a better job in articulating the reasons for its decisions. This complaint has considerable merit, with respect both to specific problematic decisions and probably to the Tribunal's jurisprudence as a whole. It is not surprising that a group of scholars and practitioners of international law crave opinions worthy of inclusion in the casebooks and capable of serving as precedent in future cases before this and other bodies. One may hope that the Tribunal could find ways to respond to this concern without prejudice to other important objectives. But it is important not to overlook or minimize significant factors that may militate against the detailed specification of reasons in some or most cases. Some of the very authors who urge increased quantity and quality of reasoning in awards are also impatient with the speed of the proceedings and give at most only a passing nod to the necessity of a trade-off. There is little recognition of what is an obvious byproduct of the politically-charged nature of the circumstances in which the Tribunal was born and must live—that the articulation of detailed reasons in some kinds of cases may not only make it less likely to achieve consensus among the arbitrators, but also may run the risk that the Tribunal will lose credibility in the eyes of one or both governments, with unknowable but potentially adverse consequences for its primary task of processing and paying the claims.

16. Article V of the Claims Settlement Declaration, quoted *supra* at note 6, seems to contemplate flexibility for the Tribunal, allowing it either to apply an established body of national law, as where a contract provision specifies that New York or Iranian or some other law should apply, or to derive general principles from diverse sources including trade usage. The Tribunal's awards have combined these approaches, often without explaining the process by which the Tribunal has determined that a particular principle or rule is "applicable" under Article V.

17. For the most thoughtful discussion of the arguments of the parties and the Tribunal's disposition of them, see Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984).

18. The cases concerning the forum selection clauses are discussed in the chapters by Stewart & Sherman, Lowenfeld, Sohn, and Clagett.

From the vantage point of several additional years of experience with the Tribunal, it is easier now than it was in April of 1983 to offer evaluative judgments on whether the Tribunal has been striking an appropriate balance among the demands of its several constituencies, whose concerns have not always coincided with the law professors' insistence upon transparency and quality of reasoning.[19] To ask this question is not to prejudge its answer, but is simply to suggest that it is worth examining the assumptions underlying the view that the creation of precedent for the future is in itself a value for which the Tribunal should be striving.

Undoubtedly it is desirable for the Tribunal to follow its own precedents, because consistency of outcome among similarly situated claimants is all the more important in view of the essentially arbitrary order in which claims are heard. Based on the Tribunal's activity to date, it is reasonable to conclude that the Tribunal has been sensitive to this aspect of precedent. Its concern in this regard is evidenced by the frequent reference to prior decisions on a stare decisis basis, as well as by the development of procedures for resolution of issues that entail significant precedential potential by the full Tribunal rather than separately by the three chambers. An appropriate amount of detail in awards may also assist other similarly situated claimants and respondents in making assessments of probabilities of success that could facilitate settlement of claims.[20] These uses of precedent and elaboration of reasons facilitate the Tribunal's primary responsibility for ensuring that valid claims are satisfactorily resolved.

But should the Tribunal be concerned with the extent to which its opinions will carry persuasive force outside its own framework? Presumably, if it can improve the quality of presentation of its reasoning without impairing its dispute-settlement function, the Tribunal would enhance its standing with its own constituencies as well as with outside observers. How to do so, however, is a delicate matter.

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19. The late Professor Ted L. Stein drew attention to the theme of "the reasons for reasons" in his *Remarks at a Panel on the Decisions of the Iran-United States Claims Tribunal*, 1984 PROC. AM. SOC'Y INT'L L. (forthcoming). His article on the forum-clause decisions, *supra* note 17, challenges the assumption that adequacy of reasoning is the appropriate parameter for evaluating the work of the Tribunal, and points out the complex relationship between the process of crafting a decision and the Tribunal's diplomatic, political, and other functions. For a discussion of the relationship between specification of reasons and the enforceability of arbitral awards in national courts, see Carbonneau, *Rendering Arbitral Awards With Reasons, supra* note 15.

20. Article I of the Claims Settlement Declaration gives priority to settlements between the directly interested parties, with binding arbitration as the method of last resort. The Tribunal has taken steps to facilitate settlement through its pre-hearing conference procedure as well as through a mechanism for recording "awards on agreed terms," which have the same status for enforcement purposes as contested awards.

One of the distinct contributions of the authors, in this volume as well as in their continuing commentary, is to keep the Tribunal on its toes. There is no doubt that ongoing critical scrutiny has long-term beneficial effects on what will surely be a very long-term process of resolving all the pending claims. Without attempting to demonstrate direct cause-and-effect relationships, it is possible to infer that the Tribunal is paying attention to what it hears, not only from counsel but from outside commentators.[21] It is important to encourage dissemination of critical commentary on the work of the Tribunal, through such means as convening this colloquium and publishing its papers, both to try to bring positive influences to bear on the Tribunal's work, and also to bring its activities to the attention of a wider audience. This objective is all the more important in view of the general perception of the inaccessibility of the Tribunal, stemming from its distant location in The Hague, the relative infrequency of publication of its opinions in a form suitable for library purchase,[22] and the expense or inconvenience of keeping up-to-date by other means.[23]

Perhaps this volume's most important contribution will be to stimulate further critical writing. After all, the hardest step in most scholarly efforts is usually the formulation of provocative questions to be addressed. These authors have suggested a considerable number of thoughtful and difficult questions that could only be answered partially, tentatively, or not at all at the time that the papers were delivered. To their credit, most of the authors have updated their answers in subsequent writings.[24] But there is ample room for more points of

21. One of the authors explicitly endeavors to measure the extent to which the Tribunal has implemented his suggestions in a previous article concerning management of a docket of complex cases, and he finds a fair degree of acceptance of his ideas. Lowenfeld, ch. III, referring to Lowenfeld, *The U.S.-Iranian Dispute Settlement Accords: An Arbitrator Looks at the Prospects for Arbitration*, ARB. J., Sept. 1981, at 3.

22. Tribunal decisions are published in a series entitled IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS (Grotius Press), which appears sporadically.

23. Two bi-weekly looseleaf services publish Tribunal awards and other key documents at a subscription fee that is beyond the budget of most law libraries: IRANIAN ASSETS LITIGATION REPORTER (Andrews Publications); MEALY'S LITIGATION REPORTS: IRAN CLAIMS. Some of the most significant awards are published in INTERNATIONAL LEGAL MATERIALS or are summarized in the AMERICAN JOURNAL OF INTERNATIONAL LAW. THE YEARBOOK OF COMMERCIAL ARBITRATION (Kluwer) publishes selected Tribunal documents, including awards, on an annual basis. Copies of awards can also be obtained from the Department of State or from the Tribunal upon request, but this is a cumbersome method for all concerned.

24. Subsequent writings relevant to the Tribunal's work by these authors include: Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-84*, 16 LAW & POL'Y INT'L BUS. 677 (1984); Stewart, *The Iran-United States Claims Tribunal: Accomplishments and Prospects*, 1984 SYMP. PRIVATE INVESTORS ABROAD 525; Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984); Jones, *Remarks at Panel on Decisions of the Iran-United States Claims Tribunal*, 1984 PROC. AM. SOC'Y INT'L L. (forthcoming); Carbonneau, *Arbitral Adjudication: A*

view on the jurisprudence of the Tribunal, the most ambitious arbitral program ever established.

Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce, 19 TEX. INT'L L. J. 33 (1984); Carbonneau, *Rendering Arbitral Awards with Reasons, supra* note 15; Clagett, *The Expropriation Issue Before the Iran-United Claims Tribunal: Is "Just Compensation" Required by International Law or Not?* 16 LAW & POL'Y INT'L BUS. 813 (1984); Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73 (1984); Clagett, *Remarks at Panel on Decisions of the Iran-United States Claims Tribunal*, 1984 PROC. AM. SOC'Y INT'L L. (forthcoming).