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Diplomatic Adjudication

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Former Secretary of State Madeleine Albright recently made headlines by announcing that the United States would seek to better its relations with Iran by, among other things, attempting to negotiate a global settlement of the legal claims outstanding between the two countries. The claims to which she referred are currently pending before the Iran-United States Claims Tribunal ("Tribunal") in The Hague. For nearly twenty years now, the Tribunal has been arbitrating the claims of the two countries and their nationals and will continue to do so if no global settlement is forthcoming. After clerking for two judges in United States courts, I elected to move to The Hague to begin a very different sort of legal experience as legal adviser to one of the American judges at the Tribunal.

The Tribunal came about as part of the deal freeing the United States citizens held hostage in Iran for 444 days between 1979 and 1981. But how Iran went from holding American hostages to agreeing to establish an arbitral tribunal to hear the claims of Americans against Iran requires a little background.

Prior to Iran's 1979 Islamic Revolution, the United States and Iran were close allies. For years, Iran purchased vast quantities of United States military equipment,[1] and during the 1970s in particular, Iran sought American technology, equipment, and investment for a variety of large-scale projects such as road construction, factory modernization, and communications systems.[2] Consequently, by the late 1970s, Iran was home to a considerable number of American business interests, and more than 40,000 American citizens.[3] But the Islamic Revolution in Iran brought those commercial relations to an abrupt end and by the end of 1978, most Americans living

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1. George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 2–3 (Clarendon 1996).
2. See, for example, Philip F. Napoli, *A Historical Overview*, in Andreas F. Lowenfeld et al, eds, *Revolutionary Days: The Iran Hostage Crisis and the Hague Claims Tribunal: A Look Back* 1–5 (Juris 1999).
3. See Andreas F. Lowenfeld, *Trade Controls for Political Ends* 542 (M. Bender 2d ed 1983).

in Iran had fled the country.[4] The new government established by the Ayatollah Khomeini instituted many "reforms" that would have severe consequences for the American companies that had been doing business there. For instance, it nationalized numerous industries, expropriated the property of American corporations, and cancelled government contracts with American companies.[5]

These events were no doubt troubling to the affected Americans, but few took any legal action to recover their losses. Then, on November 4, 1979, militant Iranian students stormed the United States Embassy in Tehran and took the American nationals there hostage. President Carter soon responded by, inter alia, blocking the transfer of all Iranian funds in American banks, both in the United States and abroad. He froze more than $12 billion,[6] and the news of these frozen assets sent many of the victimized American companies to United States courts bringing breach-of-contract and expropriation claims, and often seeking attachment of the frozen assets.[7] By the time the hostages were released in early 1981, more than 400 suits against Iran were pending in American courts,[8] with approximately $4 billion of Iranian assets the subject of pre-judgment attachments.[9]

Thus, when Iran and the United States began to negotiate in earnest to resolve the hostage crisis in the autumn of 1980, each state had something the other wanted. The United States wanted its citizens released. Iran wanted its money back and wanted to get out from what it viewed as burdensome litigation before American judges. However, the United States could not simply return Iran's assets upon the release of the hostages because most of the assets had been judicially attached. Consequently, after lengthy and complicated negotiations, the two countries concluded an agreement in January 1981—the Algiers Declarations—which ordered the release of the hostages, the return of most of Iran's money, and the creation of the Iran-United States Claims Tribunal. The Tribunal has jurisdiction over claims then outstanding by nationals of each country against the government of the other; claims between the two governments arising out of contracts between them for the purchase and sale of goods and services; and any subsequent disputes between the two

4. See David D. Caron, *The Iran-United States Claims Tribunal and the International Arbitral Process* 29 (Leiden 1990).

5. Roberts B. Owen, *The Final Negotiation and Release in Iran*, in Paul H. Kreisberg, ed, *American Hostages in Iran* 297, 299 (Yale 1985).

6. See Lowenfeld, *Trade Controls* at 548 (cited in note 3).

7. See Lawrence W. Newman, *A Personal History of Claims Arising out of the Iranian Revolution*, 1995 NYU J Intl L & Polit 631, 633 (1995).

8. See 4A Op Off Legal Counsel 71, 92 (1984).

9. The Iran Agreements, Hearings before the Senate Committee on Foreign Relations, 97th Cong, 1st Sess 20 (1981) (prepared testimony of Richard D. Harza).

governments concerning the interpretation or performance of the Algiers Declarations.[10]

The Tribunal began hearing cases in 1982, and most of the cases it has heard have involved claims of American business interests against Iran alleging an expropriation or breach of contract. The Tribunal is composed of nine judges, three appointed by the United States, three by Iran, and the remaining three by the six Iranian and American judges, or, if they fail to agree, by a person designated as the Tribunal's appointing authority. The Tribunal is divided into three chambers, each consisting of an American judge, an Iranian judge, and a third-country judge. Claims brought by United States nationals or Iranian nationals are heard by one of the Tribunal's chambers while claims brought by Iran or the United States against the other state are heard by all nine judges—or the "Full Tribunal." Each Tribunal judge has a legal adviser who drafts documents and advises the judge on the resolution of the various cases. I have been serving as legal adviser to Judge George H. Aldrich, the only judge to have served on the Tribunal since its inception.

As is evident by my brief description of a Tribunal legal adviser, the position in many ways resembles that of a law clerk in a United States court. Legal advisers write bench memoranda advising their judges on the legal and factual issues in a given case, and we prepare first drafts of memoranda and other documents. Of course, there are some differences. For instance, law clerks in United States courts would love to but cannot attend the conferences at which their judges discuss and eventually decide the cases before them. By contrast, legal advisers not only attend such conferences but at times also participate in their discussions. In addition, it should go without saying that the law to be applied to Tribunal cases in most instances is international, not domestic, law. I was aware of these differences when I arrived, but I rather naively assumed that the Tribunal otherwise functioned much like an American court; that is, that it expeditiously resolved cases by engaging in a straightforward application of law to fact. I soon realized, however, that although the Tribunal, like a national court, is charged with adjudicating legal claims, the Tribunal carries out its mission in a unique way, appropriate to its particular circumstances. In this essay, I will touch on a few of the Tribunal's more idiosyncratic features.

In part because the Tribunal is an arbitral institution, the parties tend to have more control over the proceedings than do litigants in national courts. At the Tribunal, what is particularly evident—and at times exceedingly frustrating—is the influence that the parties—and especially the States parties—exert over the timing of proceedings. Whereas a party before a United States court might be given 30 or 60

10. The 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, Jan 19, 1981, Art II, paras 1-3, 81 Dept St Bull, No 2047 at 3 (1981), reprinted in 1 Iran-US CTR 9.

days to file a brief, after which time it would forfeit its opportunity to be heard, parties before the Tribunal routinely take more than a year to submit briefs and evidence in support of their claims. The Tribunal typically sets an initial three-month deadline for the filing of briefs, but it is extremely generous in granting extensions upon requests by the parties.

On the one hand, it is understandable that parties before the Tribunal would need more time to prepare their submissions than litigants before national courts because the Tribunal's proceedings are of first and last resort. The Tribunal hears both factual testimony and legal arguments in the same proceeding, and its decisions are not appealable. Further, in the Tribunal's early days, most of its docket consisted of claims by American nationals against Iran. As a consequence, American claimants had their pick of American law firms to bring their claims while Iran's defenses to all of the claims had to be prepared by the same relatively small number of Iranian government lawyers. These considerations notwithstanding, the time taken for briefing has often been far greater than what could reasonably be considered necessary, and in the early 1980s, the Tribunal's American judges would sometimes dissent to the Tribunal's grants of extensions to Iran. Although all of the Tribunal's judges likely wondered whether Iran's requests were primarily motivated by a desire to delay the proceedings, one can imagine their reluctance to confront Iran, especially because, for many years, there was reason to fear that Iran would cease participating in the Tribunal. Now the bulk of the claims remaining before the Tribunal have been brought by Iran against the United States, yet Iran continues to seek lengthy periods of time to prepare its submissions. The United States, as Respondent, not surprisingly, rarely objects to these delays, and, in fact, regularly seeks its own extensions. Consequently, the extensions are granted without controversy; after all, if the states funding the Tribunal are in no rush for it to hear their claims, the Tribunal itself is in a poor position to force them to expedite proceedings.

The Tribunal's reluctance to confront Iran on its tactics of delay is just one example of the diplomatic considerations that influence arbitral proceedings involving hostile state parties. Indeed, on the topic of delay, the Tribunal has itself delayed deciding certain politically sensitive questions presumably until it concluded that their resolution would not unduly disrupt Tribunal proceedings. The most noteworthy instance of such strategic postponement involved the cases brought by Iranian-United States dual nationals against Iran. Iran argued that the Tribunal had no jurisdiction to hear the claims of dual nationals, but in 1984, the Tribunal concluded, as a general matter, that it had jurisdiction over claims against Iran brought by Iranian-United States dual nationals so long as the claimants' dominant and effective nationality during the relevant period was that of the United States. Iran's vitriolic reaction to this decision caused the Tribunal to delay for several years the resolution of specific

dual national claims. The Tribunal's course proved a wise one; although Iran had initially threatened to boycott Tribunal proceedings involving dual nationals,[11] by the time the Tribunal took up the cases several years later, tempers had cooled and Iran participated fully in the proceedings.

The drafting of Tribunal awards can also be an exercise in diplomacy. For example, in order to show respect for the parties, Tribunal awards often recite their contentions at such length and detail as would never be tolerated in a United States court opinion. Further, in disposing of those contentions, the Tribunal shows far more deference than one would see in a national court judgment. For instance, Iran often includes among its reasonable arguments some that are patently frivolous—a number of which have been rejected outright in previous cases and others which are new but are just as improbable. As one would expect, the Tribunal rejects these arguments, but it generally does so deferentially without indicating just how frivolous the arguments are. While recognizing the need for such kid gloves, I have also at times found the required diplomatic drafting rather unsatisfying. So it was with pleasure that I recently read an opinion by the United States District Court for the District of Columbia in a case involving an American company's expropriation claim against Iran. District Judge Thomas Flannery gave Iran's frivolous arguments no more than the back of his hand, and I enjoyed his direct approach.[12]

One of the most disquieting features of the Tribunal concerns the voting pattern of its Iranian judges. Although some judges in United States courts are known for their tendencies, say, to uphold criminal convictions or to rule against Title VII plaintiffs, any such tendencies are just that—tendencies—and pale in comparison to the Iranian judges' eighteen-year near-universal refusal to concur in an award in favor of the United States or an American party.[13] In each Tribunal case and on virtually every issue in each case, the Iranian judges vote for Iran's position and vehemently advance that position to their non-Iranian colleagues.[14] By contrast, the Tribunal's

11. Statement by the Prime Minister of Iran, Mr. Musavi, Regarding the Tribunal's Decision in Case A/18, reprinted in 5 Iran-US CTR 428, 430 (1984).

12. *McKesson Corp v Islamic Republic of Iran*, 1997 WL 361177 (D DC June 23, 1997). Of course, Iran is not the only party to make frivolous arguments. Some American claimants have brought highly unlikely claims or have shamelessly exaggerated the value of their claims. In my experience, however, the Tribunal is more likely to comment negatively when such arguments are made by private parties than by a state party.

13. See Aldrich, *Jurisprudence* at 43 (cited in note 1). I recognize that it is not uncommon for party-appointed arbitrators to share the legal outlook of the party that appointed them; however, the Iranian judges' voting pattern can at best be considered an extreme case of this phenomenon.

14. Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 661 (Martinus Nijhoff 1998).

American judges are under no such constraints and regularly vote for either Iranian or American positions as the merits of the case dictate.[15]

I suspect that as a result of both Iran's and the Iranian judges' unwillingness to concede any point, some American claimants feel the need to respond by making unjustifiable claims or by wildly exaggerating the value of their legitimate claims. For example, with respect to the valuation of expropriated property, both parties normally submit expert opinions, and Iran's experts virtually always conclude that the subject property was worth nothing or very close to nothing. American claimants in recent cases have responded by hiring experts who, just as unjustifiably, reach highly inflated values for the subject properties. In such cases, the Tribunal may be left to value the properties without adequate evidence or reasoned expert opinions.

That the Iranian judges consistently and passionately advance Iran's positions also can influence the way the non-Iranian judges present their views. Say you are an American judge at the Tribunal who believes that a property should be valued at $10 million. You know that your Iranian colleague will argue that the property was worth nothing, or at most $1 or $2 million. In presenting your position to the third-country judge, do you honestly state your conclusion of $10 million, or do you advance an inflated value in the hope that the third-country judge will adopt a "compromise" position that better reflects the value that you actually think appropriate? In light of the Tribunal's unique voting patterns, a bit of posturing can seem a tempting course. However, I work for a judge who has steadfastly refused to engage in such gamesmanship. Because he calls them as he sees them in a fair and objective way, he has enormous credibility with his third-country colleagues, and his views are treated with great respect. I have tried to follow his lead in my dealings with the third-country legal advisers and am satisfied that, even in the diplomatically charged atmosphere of the Tribunal, honesty is the best policy. Although a strategic presentation of views may gain short-term benefits, it is apt also to diminish long-term credibility. In my view, the best way to serve the United States' interests at the Tribunal is to behave like a judge, not an advocate: by consistently stating honest opinions and voting to dismiss non-meritorious American claims, the Tribunal's American judges preserve their integrity and enhance the weight of their legitimate pro-American positions. Put another way, by voting to dismiss American claims that should be dismissed, the American judges advance American claims that should prevail.

When I first arrived at the Tribunal, I viewed many of the features that I have described rather negatively. I saw the legal issues before the Tribunal as requiring a simple application of law to fact. Indeed, in this essay, I have at times contrasted the

15. See Letter of Richard C. Allison, 92 Am J Intl L 488-89 (1998) (noting that the American judges voted against the American party on all of its claims in more than 30 percent of contested Tribunal cases and voted against the American party on at least one of its claims in more than 60 percent of contested Tribunal cases).

Tribunal with an American court, not because such a contrast is appropriate, but because that is just what I did when I first arrived. The American judicial system was my frame of reference, and when some feature of the Tribunal displeased me, I would grumble that such a thing would never be tolerated in an American court. However, for both better and worse, the Tribunal is not a national court. It is a unique international arbitral body that is subject to a myriad of pressures unknown to most national courts. Indeed, at the Tribunal's outset, some commentators questioned whether it would even get off the ground. The history of international claims arbitration contains many examples, going back to the Jay Treaty Commissions, of tribunals that broke up after completing only a small fraction of the task set before them,[16] and the Tribunal faced particularly worrisome obstacles as a result of the hostility that characterized Iran-United States relations. The United States and Iran have not only had no diplomatic relations during the entire period of the Tribunal's operation, but actual hostilities have occasionally erupted between the countries. However, the Tribunal did begin and has persevered to adjudicate and facilitate the settlement of thousands of claims over a nearly twenty-year period. By the end of 2000, the Tribunal had disposed of nearly 4,000 cases, awarding more than $2.5 billion to the United States and United States nationals and more than $900 million to Iran and Iranian nationals.

The Tribunal is sometimes slow, sometimes inefficient, and sometimes motivated as much by diplomatic considerations as legal rules. I have come to see, however, that these less attractive features of the Tribunal have in large measure enabled it to endure to carry out its mission. If the United States and Iran are able to negotiate a global settlement of their remaining claims, they will do so by building upon a foundation of accommodation that has been established by the Tribunal.

16. Remarks by Ted L. Stein, Decisions of the Iran-United States Claims Tribunal, 78 Proc Am Socy Intl L 221, 230 (1984). See generally J.L. Simpson & Hazel Fox, International Arbitration: Law and Practice 1-24 (Stevens 1959).