

## INTERNATIONAL LAW

## U.S.-Iran Claims Tribunal: Recent Developments

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It is a privilege to appear before you today to testify in support of the proposed legislation relating to the settlement of claims against Iran.

### The Algiers Accords

As you know, under the Algiers accords, which led to the release of the American hostages held in Tehran, the United States and Iran agreed to establish an international arbitral tribunal, the Iran-U.S. Claims Tribunal. This tribunal—composed of three members appointed by the United States, three by Iran, and three third-country arbitrators chosen by the six party-appointed members—was empowered by the accords to decide claims of U.S. nationals against Iran arising out of debts, contracts, expropriations, and other measures affecting property rights. The tribunal may also hear certain Iranian claims against the United States. Awards issued by the tribunal are binding on the parties and are enforceable in the courts of any nation. To assure payment of awards in favor of U.S. nationals, a security account was established at a subsidiary of the Netherlands Central Bank, with an initial deposit of \$1 billion, using certain Iranian assets which had been frozen in the United States. Under the accords, Iran has an obligation to replenish the security account when payments to successful U.S. claimants cause the amount in that account to fall below \$500 million.

The accords established the basic framework for the operation of the tribunal. They set filing deadlines for claims, adopted the arbitration rules of the U.N. Commission on International Trade Law (UNCITRAL) as the basis for the tribunal's procedural rules, designated The Hague as the seat of the

tribunal, and provided that the expenses shall be borne equally by the two governments. In addition, the accords stipulated that claims under \$250,000—so-called small claims—must be presented to the tribunal by the government of the claimant. So-called large claims—those of \$250,000 or more—were to be presented directly to the tribunal by the claimant. The accords also gave the tribunal the authority to decide disputes between the parties concerning interpretation or application of this agreement.

### Operation of the Tribunal

When the tribunal first convened in May 1981, the arbitrators confronted the monumental task of "setting up shop"—establishing a claims registry, hiring essential staff, finding competent interpreters and translators to enable proceedings to be conducted in both official languages, adopting special rules of procedure, and deciding a series of threshold issues of jurisdiction and interpretation on which the parties could not agree.

More than 4,000 claims have been filed with the tribunal: 2,795 small claims and approximately 650 large claims of U.S. nationals against Iran; about 100 contract disputes between the two governments; more than 200 claims of Iranian banks based on standby letters of credit and some 200 based on disputed amounts of deposits in U.S. banks; and several hundred claims raised by Iran and Iranian nationals. In order to expedite hearing this tremendous case load, the tribunal divided itself into three chambers, each headed by a third-country arbitrator and containing an American and an Iranian arbitrator. While the chambers hear the individual claims, the full tribunal convenes to decide interpretation disputes and significant legal issues common to many claims when those issues are relinquished by the chambers.

The tribunal is a unique institution, representing one of the most ambitious and complex international claims adjudication programs ever undertaken. To appreciate its progress to date, you

must keep in mind that it labors under difficult circumstances. The tribunal's operation is affected by the continued absence of diplomatic relations between the United States and Iran and the ongoing domestic revolution and external war of Iran.

Against this background, the tribunal has made considerable progress in the past year and a half. During its first year of operation, the full tribunal ruled on several major issues, setting the framework for future decisions.

In an important decision protecting U.S. nationals who chose not to file claims with the tribunal, the tribunal decided that it had no jurisdiction over claims by one government against the nationals of the other. As a result of this decision, Iran withdrew over 1,400 claims from the tribunal.

In another decision, the tribunal held that settlements between arbitrating parties could be paid from the security account when the tribunal approves the settlement and issues an award on agreed terms. This decision benefits American claimants in two ways. It encourages settlements by making the security account available for this purpose. At the same time, it assures American claimants who are unable to obtain settlements that the security account will not be depleted unfairly, since all settlements to be paid from the account are subject to tribunal review.

The tribunal has also decided that interest earned on the security account should not be paid to Iran but should continue to be credited to a separate suspense account in the depository bank. Interest may be used by Iran to replenish the security account. Until all claims are decided and all awards paid, however, use of the interest for any other purpose will require the agreement of both the United States and Iran.

The tribunal recently issued another major decision in the choice-of-forum or forum selection cases. Here, the tribunal had to decide whether its jurisdiction included claims brought under contracts within contained language referring contractual disputes to Iranian courts. In essence, the tribunal held that only those contracts which explicitly state that all disputes are to be referred only to competent Iranian courts are outside the

jurisdiction of the tribunal. It should be noted that the tribunal did not dismiss any of the claims found to contain such a forum selection clause but remanded each of them to the individual chambers for a determination of whether any other legal bases exist under which the tribunal may retain jurisdiction. The tribunal declined to decide whether any contractual election of an Iranian forum is enforceable in light of the dramatic changes in the Iranian court system since the contract was signed and the doubts concerning the ability of American claimants to obtain a fair hearing in the present Iranian courts. Therefore, the tribunal's decision will not operate to bar a claimant from raising such arguments in another forum, such as a U.S. court, if the claim is ultimately found to be outside the tribunal's jurisdiction.

With a number of interpretive questions resolved, the tribunal has turned its attention to arbitrating the individual claims of Americans. There is no question that the pace has been slow. The Iranians have repeatedly requested extensions of filing dates, interposed many jurisdictional and procedural questions, and made numerous untimely demands. These delaying tactics probably reflect both the real burden faced by Iran in dealing with so many claims and the Iranian desire to defer rulings on the merits of claims they oppose. We have repeatedly expressed our concern in the strongest possible terms to the tribunal about its tolerance of Iranian delays and the resulting slow pace of operation. We have seen some progress, for example, in less automatic approval of requests for time extensions.

Despite the delays, the tribunal has made progress in arbitrating the private claims. It has assigned all 650 large claims to the individual chambers for hearing, and the chambers have set Iranian response dates for almost all of these claims. Iran has filed approximately 250 statements of defense so far. By the end of the year, the three chambers will have held approximately 75 prehearing conferences. Over 20 more have already been scheduled for early next year. While only about 20 hearings on the merits have been held so far, about 35 more are scheduled for the coming months. To date, the tribunal has issued 11 awards in favor of American claimants, 9 approving settlements, and 2

contested awards, for a total of about \$8 million. In addition, the tribunal has dismissed 2 claims for lack of jurisdiction.

The tribunal registry has completed serving the statements of claim for the 2,795 small claims on the Iranian agent in The Hague. The tribunal is currently deciding how most efficiently to handle the arbitration of the small claims and is considering the appointment of experts or special masters to assist in this process.

The tribunal's record to date, while less than satisfactory in several respects, compares favorably with previous claims proceedings. Historically, Americans who have asserted claims against foreign governments have normally had to wait many years and often have recovered only a fraction of their actual losses. Here, only 4 years have passed since the beginning of the Iranian revolution, in which longstanding commercial ties were destroyed and huge losses were incurred by Americans living or working in Iran. Resolution of their financial disputes with Iran is now foreseeable. An agreement to adjudicate American claims against Iran has been signed, a fund from which to pay awards has been established, an arbitration tribunal has been set up and is now operational, and arbitration of individual claims has begun in earnest.

#### Costs to the U.S. Government

The U.S. Government has incurred, and will continue to incur, substantial expenses in seeking to make the tribunal an effective forum in which deserving American claimants can obtain timely relief. As I mentioned earlier, the accords divided the tribunal expenses equally between Iran and the United States. The United States also pays one-half of the security account management fees. The Federal Reserve Bank of New York incurred expenses in transferring Iranian assets and will incur further expenses in processing payments of tribunal awards. The State Department and other government departments have devoted, and will continue to devote, substantial resources to maintaining the arbitral process. The exact total of future U.S. expenses depends on the lifespan of the tribunal and the extent to which some claims can be settled

through negotiation rather than arbitration. However, we estimate that the government's expenses may well exceed \$80 million.

**Tribunal Expenses.** Tribunal costs, shared by the United States and Iran, consist primarily of the salaries and allowances of tribunal personnel; rental, operation, and maintenance of the tribunal building; and necessary supplies and equipment.

During FY 1981, the U.S. contribution was \$303,000; during FY 1982, it was \$2.05 million. The tribunal's recently adopted budget calls for payment of \$2.083 million during the period July 1, 1982, to June 30, 1983. The Department had originally anticipated that a higher contribution would be required for this fiscal period on the assumption that agreement would be reached during this period to expand the tribunal's decision-making capacity, by adding additional arbitrators, employing special masters, or through some other mechanism.

While no such agreement has yet been reached, some form of expansion is considered likely during the next year or two, requiring a corresponding increase in the contributions of both the United States and Iran.

#### Security Account Management

**Fees.** The management fees of the N.V. Settlement Bank of the Netherlands the depositary for the security account, are now set by agreement of Iran, the United States, and the Dutch Central Bank. These fees amount to \$1.8 million per year, of which the United States pays \$900,000—or \$75,000 a month. That amount reflects considerable front-end "start-up" expenses incurred by the Central Bank and is not tied to the amount of principal or interest in the account. We would expect, then, that any increase in the fees due to inflation will be largely offset by actual reductions in expenses incurred.

**Expenses of the Federal Reserve Bank.** In its capacity as fiscal agent of the United States for purposes of implementing the Algiers accords, the New York Fed has incurred certain expenses, primarily in connection with the marshaling of Iranian assets and the processing of awards of the tribunal. To date these expenses have totaled approximately \$100,000. This figure in large part represents one-time costs and will

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be subject to a substantial reduction beginning in FY 1983. We project annual expenses directly related to processing tribunal awards to be between \$20,000 and \$40,000.

**State Department.** The State Department has made Iran claims one of the top priorities in the Legal Adviser's office. The Office of Iranian Claims, staffed by 10 full-time attorneys, five paralegals, and other support personnel, has incurred sizable expenses in terms of personnel, services, and equipment in connection with the establishment of the tribunal and its continuing operation.

Apart from the presentation and defense of the official claims and interpretation disputes between the two governments, the office devotes substantial resources to the preparation and presentation of U.S. positions on major common issues of importance to both large and small claimants. The office monitors tribunal activities, analyzes Iranian factual and legal arguments, and prepares factual and legal materials to support U.S. positions. It acts as a coordination point for the presentation of American claims before the tribunal. In addition, the office analyzes and distributes tribunal decisions and other information about the tribunal.

The U.S. agent in The Hague provides invaluable assistance to attorneys for large claimants and essential representation of U.S. interests across the entire range of tribunal issues. The agent receives and serves tribunal documents on the claimants, briefs attorneys on procedural and substantive matters, attends prehearing conferences and hearings, and addresses issues of a general nature that inevitably arise in the adjudication of individual claims.

In addition to the services I just mentioned, the Office of the Legal Adviser is now preparing to present before the tribunal the 2,795 small claims.

For FY 1982, the costs attributable directly to the office totaled approximately \$1 million. The FY 1983 and 1984 estimates are \$1.2 million each.

### **Other U.S. Government Expenses.**

Both the Treasury and Justice Departments have incurred, and will continue to incur, direct and indirect costs in connection with the establishment and operation of the tribunal. These agencies

have substantial responsibilities for assuring U.S. compliance with the provisions of the claims settlement agreement and the various technical agreements. And the State Department relies heavily on their expertise in preparing U.S. positions on interpretive questions before the tribunal. In addition, Treasury plays a major coordinating role in matters relating to banks and their customers.

### **The Proposed Legislation**

The legislative proposal before the subcommittee authorizes the Foreign Claims Settlement Commission to adjudicate any category of claims by U.S. nationals against Iran that may be settled by lump sum agreement between the United States and Iran. It also authorizes the Secretary of the Treasury to make payments to individual claimants in satisfaction of the commission's determinations.

Of course, the exercise of these authorities will depend upon the ability of the two governments to come into agreement on a settlement of some category of claims. We expect settlements of large claims to occur only through direct negotiations by claimants on a case-by-case basis. Such individual settlements will not involve the authorities contained in this bill. We do, however, hope to avoid for both governments the time, effort, and expense of arbitrating each one of the more than 2,700 small claims now before the tribunal. While we are prepared to go forward with arbitration of the small claims and to represent the claimants vigorously before the tribunal, there are obvious advantages to settlement of the small claims. And if such a settlement can be achieved, we believe the fastest, most economical, and fairest way to divide the amount received in the settlement among the members of the class of claimants will be through adjudication by the Foreign Claims Settlement Commission.

The proposed legislation also provides authority and procedures for reimbursement to the U.S. Government of expenses incurred by the Departments of State and the Treasury, the Federal Reserve Bank of New York, and other agencies for the benefit of U.S. nationals who have filed claims with the tribunal. This cost recovery would be achieved by deducting 2% from each arbitral award against Iran paid from the security account to a successful U.S. claimant.

We have transmitted with the Administration's draft bill a detailed sectional analysis. Chairman Bell is here to address the grant of standby authority to the Foreign Claims Settlement Commission. With respect to recovery of the governor's costs, this legislation is intended to help finance the efforts of the United States to provide American claimants with an appropriate and effective forum for the resolution of their disputes with Iran. In proposing a recovery of 2% of each tribunal award in favor of an American claimant, the bill seeks to recover an amount that is expected to approximate the costs to the government of this arbitration. While the Department cannot predict the aggregate amount the tribunal ultimately will award to American claimants, we have based our projections on the expectation that the tribunal will award \$1 billion during its first 4 years of operation and an additional \$1 billion for each subsequent 3-year period. At the 2% rate of recovery of costs which we are proposing, the maximum amount of U.S. expenses exceeds our projection of costs recovered.

### **Conclusion**

In sum, we think that the tribunal can provide American claimants with an effective forum for the resolution of their financial disputes with Iran. The Department of State and other concerned government agencies are providing substantial services to claimants in connection with the operation of the tribunal and are incurring significant costs in this regard. We believe that the proposed legislation will facilitate this arbitral process and will fairly allocate among the claimants the costs of providing this forum.

<sup>1</sup>The complete transcript of the hearings will be published by the committee and will be available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. ■