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Book Review

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BOOK REVIEW

The Iran-United States Claims Tribunal, 1981-83. Richard B. Lillich, ed. Charlottesville: The University Press of Virginia, 1985. Pp. 175. $25.

International public attention has long been diverted from the events of 1979 through 1981 which saw the seizure of the U.S. Embassy in Teheran, the holding of U.S. diplomatic and consular personnel hostage and the subsequent release of these hostages. However, the resolution of claims arising from those events continues to be of major significance, both in terms of the number of claims and the possible impact of the legal issues on the development of international law. The essays collected in *The Iran-United States Claims Tribunal* attempt to review not only the legal framework established in 1981 to resolve these disputes, but also how this system has worked in practice during its first three years. This publication is a product of the Seventh Sokol Colloquium on Private International Law held at the University of Virginia School of Law in April 1983.

The best overviews of the legal history surrounding disputes affected by and arising from the hostage crisis are contained in the first and last chapters of the book. The first chapter, entitled "Developments at the U.S.-Iran Claims Tribunal, 1981-1983," provides a good background of the creation of the Claims Tribunal by the Algiers Accords[1] in 1981 and the activities of the Claims Tribunal through September of 1983. Originally published in the *Virginia Journal of International Law*,[2] this chapter is particularly useful for its description of the caseload of the Tribunal during its early years as well as the major jurisdictional and substantive issues that have been resolved.

The authors of this first chapter, David P. Stewart and Laura B.

[1] The Algiers Accords consist primarily of two declarations, the second of which established the Iran-United States Claims Tribunal. *See* 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, *reprinted in* 20 I.L.M. 230 (1981) [hereinafter cited as Claims Settlement Agreement].

[2] Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1 (1983).

Sherman, bring into focus very early the magnitude of the task facing the Tribunal: "[the] caseload numbered about 3,850 as of mid-1983 . . ." (p. 9). While the pace of the Tribunal's resolution of these claims is described as "unquestionably slow and frustrating" during the first year, during which the Tribunal issued only nine awards, the second and third years saw more progress. This progress took place particularly with the so-called "large claims", that is, claims of private individuals and corporations of $250,000 or more.

Particularly helpful in understanding the types of disputes which faced the Tribunal in its first several years of existence is Stewart and Sherman's overview of the Tribunal's jurisdictional decisions. While more critical analysis would have added to the value of this chapter, the authors admit that most of their chapter is descriptive, concentrating on the historical development of the Tribunal. The authors do, however, comment that the decisions of the Tribunal have been "encouraging because by and large the results have been consistent with and demonstrate a respect for law" (p. 17). However, the authors also find the decisions "discouraging because some of the Tribunal's opinions have been neither as reasoned nor as jurisprudential as might have been expected and because the standards of proof imposed have been very high" (p. 17). Examples of jurisdictional issues include interpretation of Article II(1) of the Claims Settlement Agreement[3] which excludes from the jurisdiction of the Tribunal claims "arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the Iranian courts in response to the Majlis position" (p. 18).

The final chapter of this volume is also a valuable contribution to the understanding of the legal history surrounding the hostage crisis. Unlike the first chapter, which concentrates on the establishment of and issues before the international Claims Tribunal, author Michael Hertz focuses on litigation pending against Iran in U.S. courts at the time of the hostage taking in November 1979, the subsequent increase in litigation once the hostages were taken and the effect of the Claims Settlement Agreement[4] on this domestic litigation. Thus Hertz provides a different perspective from which to view the development of legal disputes arising from the hostage crisis. For example, Hertz discusses cases involving the former hostages' claims against Iran in U.S. courts and the former hostages' claims that the President lacked authority to settle the hostages' tort claims against Iran. Hertz also outlines pending litigation concerning suits against the United States in the Claims Court that are based on the Taking Clause of the Constitution.

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[3] Claims Settlement Agreement, *supra* note 1.

[4] *Id.*

The remaining five chapters of this volume consist of studies of particular aspects of the Iran-U.S. Claims Tribunal. "The Iran-U.S. Claims Tribunal: Private Rights and State Responsibility" raises the issue of whether the Claims Tribunal is a private arbitral body, an international tribunal or a hybrid of the two. The author of this chapter, David Jones, finds this issue to be of import because the type of remedies available and the applicability of international law depend upon the nature of the Tribunal. Jones finds that the Tribunal has characteristics of both an international tribunal and a private arbitral body. For example, the fact that litigation in U.S. courts was terminated by the Algiers Accords and transferred to the Tribunal would seem to indicate that the Tribunal is "seized of jurisdiction in disputes that are private law disputes transferred to a transnational arbitral tribunal" (p. 56). However, the author also points out that the Tribunal is described as an international tribunal in Article II(1) of the Claims Settlement Agreement.

While Jones does provide a good comparative analysis of the Tribunal as a private arbitral body and international tribunal, his conclusion fails to bring together this analysis in a way which would help clarify the role and nature of the Tribunal. Instead, the author merely calls on the Tribunal itself to clarify its nature and function as well as the rules which it is to apply.

Andreas Lowenfeld's chapter presents a rather loosely organized comment from the perspective of one who made suggestions "about procedures, about the qualities one would look for in the arbitrators, and about how to deal with those legal issues that seemed likely to arise in many of the cases" (p. 77) before the Claims Tribunal had been established. While Lowenfeld does discuss each of these areas, much of the impact of the article is lost because at least two of the three major points are covered by chapter one. Thus the discussion of the Tribunal's organization into three chambers and the choice-of-forum issues add little new information or analysis. The one area of possible new contribution is the author's discussion of relations between the arbitrators themselves, but this point is not well developed and only cursory observations are made.

The Claims Tribunal has been of interest to more than just those party to the cases filed before it. In particular, the contribution of the Tribunal to the development of international law is being closely watched. In this volume, the task fell upon Louis Sohn to consider this issue in light of the admittedly small number of decisions rendered between 1981 and 1983 by the Tribunal. Sohn's "tentative assessment" is that "like other international tribunals, this Tribunal is very careful about issues of jurisdiction, and that on issues of procedure and substance the Tribunal is less conservative and on occasion does not hesitate to invent new rules to fit unprecedented situations" (p. 103). In the course of his article Sohn reveals several decisions by the Tribunal which

have in fact made new contributions to international law. For example, Sohn discusses the case of the *Oil Field of Texas, Inc. v. Iran*,[5] in which the court created the doctrine of de facto succession as the basis for ruling that the National Iranian Oil Company (NIOC) could be held liable for contracts of the Oil Service Company of Iran which NIOC had gradually taken over. The Tribunal said that the "development of international law has always been a process of applying such established legal principles to circumstances not previously encountered" (p. 101).

Also of interest in the Tribunal's decisions has been the possible contribution to the development of international commercial law principles. The very ability of this Tribunal to make any contribution to or encouragement of the elaboration of an international law merchant is questioned by Thomas Carbonneau. Indeed, he asserts that "the awards rendered by the Tribunal have been essentially devoid of substantive legal content and, as a result, incapable of having much precedential value" (p. 128). The value, however, of Carbonneau's chapter is not in the conclusion that the Tribunal has so far failed to contribute to international commercial norms, but rather in his analysis of how the Tribunal could contribute to the elaboration of international law in the concepts of force majeur and mitigation of damages. The author's treatment of force majeur provides an especially well analyzed study of common and civil law rules, its role in recent European practice and its status in private international law, all to the end of considering how the Tribunal might apply the concept. Carbonneau concludes that the Tribunal could formulate a rule of force majeur where "the political turmoil and the social and political upheaval that characterized Iran during the revolution created a situation in which it was impossible to pursue commercial dealings" (p. 119).

For international legal practitioners, the Claims Tribunal has been of particular value because it provides a forum for resolution of disputes which otherwise might not be adjudicated. Brice Clagett finds, however, that the practitioner may face special problems when guiding a case through the Tribunal's legal system. For example, under the Arbitration Rules of the U.N. Commission on International Trade Law which were adopted by the Claims Settlement Agreement, the pleadings and proceedings of the Tribunal are secret. The problem here of course is that "each claimant has to be concerned that an issue of decisive importance to it may be decided in a prior case without his participation or even knowledge, and that such a decision, while perhaps not binding in theory, will control the result in his case" (p. 131). Moreover, Clagett points out that since Iran is a party to almost all of the claims filed, Iran does presumably know what issues occur in the same cases. Perhaps the

[5] Interlocutory Award No. 10-43-FT (Dec. 23, 1982), at 21-22.

most crucial issue affected by this secrecy is the determination of a standard of valuation of expropriated property, which is by no means settled under international law.

While Clagett's chapter is generally well written and provides an interesting analysis of the secrecy of pleadings issue, the author provides little discussion of other aspects of the Tribunal which would be helpful to the practitioner. For instance, no mention is made of evidentiary issues, the filing of documents, the withdrawal of claims or even the general sequence of proceedings before the Tribunal. In this regard, practitioners may find more useful information in other sources.[6]

The Iran-United States Claims Tribunal, 1981-83 provides a good historical overview of the establishment and development of the Claims Tribunal during its first three years, as well as a closer look at various substantive and procedural issues facing the Tribunal. The volume does, however, need to be read in light of two caveats. First, because this volume's analysis stops with decisions reached in 1983, the value of the book as a current reference is undermined by the one and one-half year gap between its analysis and publication. Second, as the authors themselves repeatedly point out, because only one percent of the Tribunal's decisions had been reached by 1983, many of their conclusions are only tentative. This is not to say that the book does not merit consideration, however, because it does collect essays which concern many aspects of the Iran-United States Claims Tribunal given all too little attention since the well publicized events of 1979 through 1981.

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[6] *See, e.g.*, Selby & Stewart, *Practical Aspects of Arbitrating Claims before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211, 219-44 (1984).

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