The Recent Settlement at the Iran-United States Claims Tribunal: Historical Context, Implications, and the Future – Part I

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Part I of this two-part post examines the recent settlement at the Iran-United States Claims Tribunal ("IUSCT" or Tribunal) and the case it likely pertains to. Part II will look at past settlements and the future of the Tribunal.

The Tribunal

The IUSCT was established in 1981 to address the crisis in relations between Iran and the United States arising out of the detention of 52 hostages in the US embassy in Tehran and the freezing of Iranian assets by the US. To resolve the crisis, the Algiers Declarations (a "General Declaration" and "Claims Settlement Declaration" ("CSD")) were recorded by Algeria (acting as intermediary) on 19 January 1981. The General Declaration set out each State's undertakings (Iran would secure the release of the hostages, and the US would, *inter alia*, return Iranian assets in order to restore Iran's financial position). The CSD established the Tribunal. The Tribunal has been operating since 1 July 1981. Although the Tribunal's jurisdiction includes claims brought by a national of Iran against the US

and *vice versa* (the so called "private cases" in which the Tribunal has issued thousands of awards), the only cases remaining before the Tribunal are State-to-State disputes. Those remaining disputes are referred to as either "A cases" (involving interpretation of the Algiers Declarations) or "B cases" (arising out of contractual arrangements between the two States for the purchase of goods and services).

The Settlement

On 17 January 2016, the United States and Iran reached a significant settlement in relation to a claim at the Tribunal. A press statement from the US Secretary of State John Kerry on the settlement is here, and the Iranian Foreign Ministry statement is here. The full details of the settlement have not been released, but official statements and media reports indicate that the US has agreed to pay Iran $400,000,000 (all amounts herein are in US Dollars), representing the amount Iran paid into a trust account which was used to purchase military equipment and services. Additionally, the US will pay Iran $1,300,000,000 in accrued interest. The settlement has attracted some controversy. Some have commented that whilst the settlement is a positive step, its close proximity to the release of prisoners from Iranian prisons gives the appearance of ransom.

A review of publicly available tribunal awards indicates that it is likely that the settlement relates to the case (or part thereof) known as Case No. B1 (hereafter "Case B1" or "B1"). Case B1 is the only remaining case before the Tribunal that involves both military sales to Iran and a trust account used for those sales. The achievement of this settlement gives pause to examine this complex and significant case, and the position and future of the Tribunal more generally.

Case B1

Case B1, filed by Iran in 1981, consists of 6 sub-claims (IUSCT Interlocutory Award No. 60-B1-FT of 4 April 1986 (the "Interlocutory Award"), ¶ 1) and a US counterclaim. The factual background to Case B1 is the foreign military sales program ("FMSP") between Iran and the US. In 1964, with the Shah still in power in Iran, the FMSP between Iran and the US began. FMSPs are managed by US government departments and the US has many of them operating with States all around the world; they are said to be a useful foreign policy tool. By 1979 the value of the Iranian FMSP was 20 billion. Iran kept a trust account funded for

purchases and disbursements were made from the account to pay the charges agreed under "Letters of Offer and Acceptance" (LOAs) (effectively sales contracts).

Case B1 Deconstructed

The complicated sub-claim structure of B1 is emblematic of the remaining State-to-State cases before the Tribunal. In grappling with these complex cases, the Tribunal has often employed consolidation, has split cases, or has hived off issues that might prove dispositive. The discussion below gives a brief outline of the sub-claims but focusses on significant or interesting holdings in the history of B1 and is non-exhaustive.

Claim 1. This claim was settled relatively early and it is difficult to glean much about it other than that it involved a claim by Iran for "refund of a payment made by Iran for the purchase of aircraft spare parts."

Claims 2 & 3. Similarly, little information is publicly available regarding Claim 2, but it is clear from publicly available awards (e.g. Interlocutory Award, ¶ 5) that the Tribunal deals with it together with Claim 3. Claim 3 concerns items Iran says it was billed for but did not receive (to the value of $1,428,800,000).

Claim 4. Claim 4 has been settled. Prior to settlement, in August 1988, the Tribunal issued Award No. 382-B1-FT. Certain findings in this award would go on to be of great significance in subsequent cases. In Claim 4, Iran requested the return of military equipment sold to it under the FMSP that had been sent to the US for repair. The US advised Iran in 1981 that it was unable to license the export of Iranian military equipment located in the US and the equipment therefore could not be returned. The Tribunal found that this refusal to export was lawful in the light of paragraph 9 of the General Declaration that made the obligation to return Iranian property subject to US law in effect prior to November 1979. In the Tribunal's view, the refusal to export fell within this proviso. However, the Tribunal found that paragraph 9 of the General Declaration created an implicit obligation for the US to compensate Iran for any non-returnable property.

This "implicit obligation" finding would go on to feature in two subsequent awards to very controversial ends. Its serpentine path saw it applied in Case No. A15 (II:A and II:B) (a case involving tangible Iranian property located in the US) in 1992. The

Tribunal is yet to determine losses (quantum) in this case and will do so in a second phase of the proceedings. A subsequent partial award in another case, Case No. B61 (in full, Cases nos. A3, A8, A9, A14 and B61) found that the "implicit obligation" was applicable as *res judicata* (a holding that has been criticised as a misapplication of *res judicata* under international law) but that Iran was nonetheless due no compensation (Award No. 601-A3/A8/A9/A14/B61-FT ("Partial Award")). The Partial Award was the subject of a request for revision and challenges to two arbitrators in the majority. Those challenges failed and the Tribunal unanimously refused the Revision Request on procedural grounds, finding that it had no inherent power to revise its awards. The Tribunal's decision on the Revision Request, issued 1 July 2011 (available here) is a useful resource on the issue of inherent powers to revise, examining extensive practice and jurisprudence.

Claim 5 concerned the purchase by Iran of 332 allegedly defective Bell helicopters. Iran's claim for $241,205,410 plus interest was dismissed by the Tribunal in an award issued on 16 June 1988 (Award No. 370-B1-FT).

Claim 6. Although there appear to be no publicly available Tribunal awards that deal with the subject matter of Claim 6, it reportedly entails a claim by Iran of $5,000,000,000 for non-delivery (see Charles Brower and Jason Brueschke, *The Iran United States Claims Tribunal* (Martinus Nijhoff, 1998), fn 482).

US Counterclaim. In 1982 the United States filed a counterclaim in Case B1, asserting that Iran had breached contractual obligations to maintain the security of certain classified material and information provided to it under the FMSP. The Tribunal dealt with preliminary objections to the counterclaim in an interlocutory award issued 9 September 2004 (Award No. ITL-B1-FT). One of the interesting aspects of this interlocutory award is the Tribunal's consideration of the interplay between the Tribunal's procedural rules (modified UNCITRAL arbitration rules) and the CSD. The US argued that the procedural rules were incorporated into the CSD. The Tribunal disagreed, but using the framework of the Vienna Convention on the Law of Treaties ("VCLT") found that the procedural rules *should* be taken into account in interpreting the CSD as "relevant rules of international law applicable in the relations between the parties" (VCLT Article 31(3)(c)). The Tribunal also considered other aspects of the VCLT interpretive canon, such as subsequent practice, finding that such practice needs to be "concordant, common and consistent" to be of interpretive value.

The author is an associate at Arnold & Porter and former Legal Adviser to the President of the IUSCT. The views expressed herein are the author's and do not necessarily reflect those of Arnold & Porter or its clients.