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

Bridie McAsey (Arnold & Porter) · Monday, March 21st, 2016

Part I of this two-part post looked at the recent settlement at the Iran-United States Claims Tribunal ("IUSCT" or Tribunal). This Part II looks at past settlements (one significant and unique settlement in particular) and the future of the Tribunal.

Past Settlements at the IUSCT

The Iran-US relationship over the past few decades has undoubtedly been difficult. But perhaps that difficulty is just a little belied by the continued operation of the Tribunal over that period, and perhaps a little more so by the multiple settlements that have occurred during that time. The US has entered into several settlements at the IUSCT, which it does when it "believes they are justified on a legal and technical basis, and have no political significance" (35 ILM 553 (1996), p.554). Similarly, Iran has settled many of the private cases against it, agreeing to payments to American claimants on multiple occasions. In *Murphy Middle East Oil Company v National Iranian Oil Company and the Islamic Republic of Iran*, for example, the claimant received $36,000,000 under a settlement reflected in Award No. 272-22-1 (28 November 1986).

As noted above, Case B1 has been the subject of two settlements. The US paid Iran $7,800,000 in connection with Claim 1 (Award No. 452-B1-FT) and $278,000,000 in connection with Claim 5 (Award No. 525-B1-FT). These were significant achievements, and are buttressed by the recent settlement which may have disposed of B1 entirely, or a further significant part of it.

One of the most significant, and in many ways novel, settlements at the Tribunal, occurred in 1996. The background was the tragic downing of Iran Air Flight 655 on 3 July 1988 by the USS Vincennes. All 290 passengers aboard the Airbus A300B perished. Iran sought condemnation and other declarations from the International Civil Aviation Organization (ICAO). Unhappy with ICAO's response to the tragedy, Iran brought a case before the International Court of Justice (ICJ) initially under two international aviation treaties. (Iran's application to the ICJ is available here).

On 8 August 1994 Iran and the United States jointly advised the ICJ Registrar that they had entered into negotiations and asked that the court postpone hearings *sine die*. On 9 February 1996 the United States and Iran executed various settlement agreements. One of these was to settle the ICJ case and was submitted to the ICJ accordingly. Two further agreements were submitted to the IUSCT, one titled a "General Agreement on the Settlement of Certain ICJ and Tribunal Cases" and

the other a "Settlement Agreement on Certain Claims Before the Iran-US Claims Tribunal." As the title suggests, the former describes the overall settlement including the interlocking actions that would be taken to effect it. The latter contains the terms for settlement of the IUSCT cases, such as releases.

The global settlement amount was $131,800,000, $61,800,000 of which was for payments to the "heirs and legatees" of victims of Flight 655. The settlement agreement submitted to the ICJ listed those beneficiaries in an annex. A further annex set forth how the funds would be distributed to the beneficiaries. It appears that neither of these annexes were ever made public, but a contemporaneous US State Department fact sheet indicated that "[n]o money will be paid to the Government of Iran under the settlement," suggesting that payments were somehow to be made directly to the beneficiaries. The settlement is uninteresting in terms of substantial law (e.g. international humanitarian law or the law of State responsibility) because it was stated to be *ex gratia*. By contrast, from an international dispute resolution and procedural perspective, its direct benefit to individuals is interesting given that the parties (and therefore the recipients of any relief granted) in a contentious ICJ case, can only ever be States, as opposed to individuals. The apparent requirement that payment be made directly to individuals disrupts the traditional operation of diplomatic protection, whereby a State claims on behalf of its citizens.

The US paid $70,000,000 to settle the IUSCT cases. The bundled nature of the settlement, and the fact that the award on agreed terms to an extent covered claims in a case not before the IUSCT is a further interesting aspect of this settlement, and one that the Tribunal was well aware of. A footnote in the award on agreed terms stated that *"[t]he authority of this Tribunal to issue Awards on Agreed Terms is strictly limited to settlements submitted by the Parties with respect to disputes within its jurisdiction and properly pending before it."* One can imagine the Tribunal might have been in a tricky position; it was wary of extending its authority to claims in another forum, but it would not have wanted to disrupt the possibly fragile settlement. Of course this was not the only time that the ICJ and IUSCT had been intertwined; the case brought by the US at the ICJ in relation to the detention of hostages (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*) was, in effect, settled by the Algiers Declarations.

The Future

So what does the recent settlement mean for the Tribunal, set against the background that this two-part post has described? First and foremost it is settlement of only one case (or part thereof), and others remain. The factors inhibiting a global settlement of all remaining claims are presumably a mix of political and legal. Evidently those factors trump the continued expense of the Tribunal. This means that the work of the IUSCT will go on. The Tribunal plainly has a history of significant and sometimes innovative settlements, but a global settlement that would wrap up the Tribunal could be a more complicated proposition, as much as it appears a logical and desirable solution.

But how long will the Tribunal go on? This perennial question is probably that most often put to those involved with the work of the Tribunal. In so far as this distracts and detracts from the substantive work of the Tribunal, it is somewhat of a shame, given that the Tribunal continues to generate interesting and relevant decisions (e.g. the Revision Request decision discussed in Part I of this post). Nonetheless, it is an obvious and pertinent question. The Tribunal has challenges ahead. Part I of this post discussed the difficult path of the "implicit obligation" holding. As noted, the Tribunal's upcoming tasks include determining losses (quantum) in Case No. A15 (II:A and II:B). In doing so, the Tribunal will likely have to consider the import of the controversial Partial

Award in Case No. B61 and its approach to the "implicit obligation." Challenges such as this may slow the Tribunal's progress.

In his recent resignation statement (available here), Judge Charles Brower stated that it is estimated that the Tribunal will take five years to hear each remaining case. Assuming that the Tribunal has around 14 cases or sub-cases still to dispose of, and that it deals with them *seriatim* (which would largely reflect the practice to date), the Tribunal still has around 70 years of work ahead of it. This is plainly a remarkable amount of time. Obvious questions about the relevance and value of an award issued over 100 years after the fact (the Tribunal has already been operating for 35 years) arise. Such a long passage of time would also exacerbate issues which the Tribunal may already be facing. With the effluence of time, evidence is lost or is difficult to locate, for example, and fact witnesses pass away or their memories fade. Furthermore, the Tribunal's docket of outstanding cases appears to include cases dealing with highly politicised and potentially volatile issues. Case No. A30, for example, is based in part on allegations that the United States breached the Algiers Declarations by authorising covert Central Intelligence Agency operations (see Charles Brower and Jason Brueschke, *The Iran United States Claims Tribunal* (Martinus Nijhoff, 1998), fn 465; the US' statement of defense in Case No. A30 is available here). One wonders if the further litigation of such claims would be detrimental to the current détente between Iran and the United States. The risk of this may need to be weighed against the value of a final determination of such claims.

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.

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