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# TED L. STEIN ON THE IRAN-U.S. CLAIMS TRIBUNAL—SCHOLARSHIP PAR EXCELLENCE

Mark B. Feldman\*

## I. IN MEMORIAM

I am fortunate to have known Ted Stein as professional colleague and friend during his years at the Office of the Legal Adviser, where he was one of the brightest of a very bright group of young staff attorneys. His analysis of legal problems relating to the conduct of United States foreign relations was always original and helpful, and his contribution was beyond his years. We have been deprived of a great deal by Ted's untimely death, but the work he was able to accomplish in so short a time was extraordinary.

In the pages that follow, I would like to recognize one of Stein's works that is particularly impressive—his 1984 article on the Iranian-forum clause decisions of the Iran-U.S. Claims Tribunal.<sup>1</sup> The special appeal of Ted's scholarship was his ability to synthesize traditional analysis of text and negotiating history with a practical appreciation of the diplomatic and political characteristics of the process of international arbitration. The article is a model for all legal scholars of thoroughness, clarity, and objectivity.

## II. THE ISSUE

The issue before the Tribunal in the forum clause cases was whether the Claims Settlement Agreement between the United States and Iran<sup>2</sup> gave the Tribunal jurisdiction to decide claims of American nationals arising under contracts made with Iranian entities that provided, in one form of words or another, for dispute settlement by the courts of Iran. The power of the two governments to supersede the contract clauses in question was not disputed. The sole question was the scope of the intergovernmental agreement.

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1. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984).

2. 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, United States-Iran, *reprinted in* 75 AM. J. INT'L L. 422 (1981) [hereinafter cited as Declaration].

This was one of the few issues that was articulated in the negotiation of the Claims Settlement Agreement between the United States Government and the Algerian officials that mediated the hostage-release negotiations with Iran. From an early stage in the fall of 1980, the Algerians indicated that Iran wanted to exclude from the jurisdiction of the Tribunal contracts that provided for the resolution of disputes by the courts of Iran. The American negotiators consistently maintained that such an exclusion was unacceptable to the United States and was not in Iran's interest. They explained that Iran could not achieve its objective of terminating the contract litigation in the United States courts unless the claimants were provided an alternative forum in the Tribunal, and asserted that the United States courts would not defer to the courts of Iran and the President could not compel them to do so. Ultimately, the two sides agreed to leave it to the Tribunal to determine the scope of its jurisdiction on the basis of the text of the Claims Settlement Agreement.<sup>3</sup>

Article II of the Agreement, as it appeared in early January, 1981, gave the Tribunal broad jurisdiction, with certain exceptions not material to this issue, over all claims of nationals of one party against the other party that "arise out of debts, contracts . . . expropriations or other measures affecting property."<sup>4</sup> Further, Article V of the Agreement provided that: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."<sup>5</sup>

The reference to "changed circumstances" in this text proposed by the United States was included by its authors specifically to authorize the Tribunal to disregard Iranian law that might give effect to an Iranian-forum clause even if the contract specified, as many did, that Iranian law was the proper law of the agreement. The cases supported the proposition that the courts would not enforce a choice-of-forum clause where circumstances had changed so much that a party could not have a fair hearing of its case in the forum designated in the contract.<sup>6</sup> With the revolutionary conditions prevailing in Iran and the violent anti-American feelings associated with

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3. All of the negotiations were conducted by the United States and Iran through the good offices of the Algerians. We do not know precisely what the Algerian intermediaries told the Iranians, and we may never know.

4. Declaration, *supra* note 2, at 423.

5. *Id.* at 424.

6. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16 Ch.

the hostage taking, it was clear that no American claimant could have an effective remedy in an Iranian court.

The issue became more complicated when the Iranian parliament (the “Majlis”) adopted a resolution on January 13, 1981, approving the hostage release agreements with the stipulation that “differences which are to be investigated by competent Iranian courts” be excluded from international arbitration.<sup>7</sup> After a tense exchange of proposals and counterproposals,<sup>8</sup> the parties finally agreed in the last days of the negotiations to amend Article II of the Claims Settlement Agreement to exclude “claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.”<sup>9</sup>

The final words on this subject were exchanged between Deputy Secretary of State Warren Christopher and Algerian Foreign Minister Mohammed Benyahia at Algiers on January 15, 1981. The counterproposals presented by the United States side had so altered the command of the Majlis that the Foreign Minister deemed it necessary to specifically state that this text was “in response to the Majlis position.”<sup>10</sup>

He also focused on the words “binding contract” that the United States team relied upon to preserve the authority of the Tribunal, conferred by Article V, to disregard a contract provision for dispute resolution in the courts of Iran on the ground that conditions in Iran precluded an effective remedy for American claimants in the courts of that country. As recounted by former Legal Adviser Roberts B. Owen, “Benyahia asked Christopher directly whether he would ‘insist’ on the inclusion of the word binding”—he anticipated an Iranian objection—and Christopher said flatly that he would.”<sup>11</sup>

The United States negotiators were relieved when Iran accepted this compromise language. They believed there were good legal reasons why the Iranian-forum clauses in the contracts made by American claimants with the Shah’s government should not be enforced, and they considered the phrase “binding contract” sufficient grounds for the Tribunal to address

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7. It is not clear this action of the Majlis was required as a matter of Iranian law, and it was unexpected by the United States negotiators.

8. See Stein, *supra* note 1, at 5–6.

9. Declaration, *supra* note 2, at 423.

10. *Id.*

11. Owen, *The Final Negotiation and Release in Algiers*, in *AMERICAN HOSTAGES IN IRAN—THE CONDUCT OF A CRISIS* 297, 319 (P. Kreisberg ed. 1985).

the issue.<sup>12</sup> However, the negotiators also recognized the risk that an international tribunal presided over by neutral third parties acceptable to Iran would be reluctant to characterize the Iranian legal system as hopelessly unfair, however obvious the fact.

### III. THE TRIBUNAL DECISION

This concern proved to be well founded. By a majority of 7-2, the Tribunal concluded that the Agreement did not confer upon it the competence to review the enforceability of Iranian-forum clauses in the contracts.<sup>13</sup> The Tribunal justified its conclusion by asserting, without citation of any supporting authority or reasoning, a presumption of incompetence: "It is not generally the task of this Tribunal, or of any arbitral tribunal, to determine the enforceability of choice of forum clauses in contracts . . . ." <sup>14</sup> The Tribunal concluded that the words "binding contract" were too ambiguous to provide the "clear mandate" from the parties it deemed necessary to address this issue. The word "binding" was deemed "redundant."<sup>15</sup>

At the same time, the Tribunal took pains to limit the effect of its decision upon the claimants as much as possible. It construed the words "*specifically* providing that *any* disputes thereunder shall be within the *sole* jurisdiction of the competent Iranian *courts*"<sup>16</sup> so restrictively that many claims that might have been excluded were allowed to proceed before the Tribunal. The exclusion was held not to apply to clauses providing for arbitration in Iran or for adjudication by "competent courts according to Iranian law," because they did not specify Iranian courts.<sup>17</sup> Further, a claim referring to "all disputes and differences between the two parties arising out of the interpretation of the Contract or execution of the Works" was held not to exclude the Tribunal's jurisdiction because it did not refer all disputes to the Iranian courts.<sup>18</sup> Some of these decisions may be poor precedents for

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12. [W]e deliberately drafted the claims settlement declaration in such a way as to allow a U.S. claimant an opportunity to try to persuade the proposed international arbitral tribunal that an Iranian-courts clause should not be treated as binding (that is, that the tribunal should hear his case), because the Iranian revolution had effectively destroyed the remedial mechanism to which the parties had agreed.

*Id.* at 312.

13. *E.g.*, *Halliburton Co. v. Doreen/IMCO*, 1 Iran-U.S. C.T.R. 242 (1982). Two United States appointed Judges dissented, Howard Holtzmann and Richard Mosk. Judge George Aldrich concurred.

14. *Id.* at 245.

15. *Id.* at 246.

16. Declaration, *supra* note 2, at 423 (emphasis added).

17. Stein, *supra* note 1, at 9-12.

18. *Id.*

other cases, arising in more ordinary circumstances, where the scope of an arbitration clause is at issue.

#### IV. STEIN'S TREATMENT

Professor Ted Stein's assessment is that the Claims Settlement Agreement provided a sufficient basis for the Tribunal to determine whether the Iranian-forum clauses of the claimants' contracts were binding to the extent that they ousted the Tribunal of jurisdiction over claims based on the contracts containing such clauses, and that the Tribunal's refusal to do so was contrary to the weight of legal authority.<sup>19</sup> He also makes a convincing case that international law would not require the enforcement of such forum clauses in the circumstances of this case.<sup>20</sup>

The Tribunal's major premise—that arbitral tribunals generally are not empowered to consider the enforceability of choice-of-forum clauses—is peculiar, to say the least. It is widely recognized that arbitral tribunals are competent to determine their own jurisdiction, and it follows that they may decide any issue of law or fact necessary to exercise that authority. Article 21 of the arbitration rules of the United Nations Commission on International Trade Law, which are adopted for the Tribunal by Article III(2) of the Claims Settlement Agreement, confirms that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction.”<sup>21</sup>

As Stein points out: “The Claims Tribunal's assertion that it could not ‘consider’ the enforceability of Iranian forum clauses involves a fundamental paradox; the consequence of refusing to consider’ enforceability is the enforcement of those clauses by the Tribunal itself.”<sup>22</sup> However, Stein carefully examines the reasons for the Tribunal's action, which it was unable to articulate, and essentially approves of it. “For what it is then worth, I regard the overall outcome reached not as a dereliction of duty, but as a responsible, though costly, choice.”<sup>23</sup> The most fascinating part of Stein's article is the analysis that leads him to this conclusion.<sup>24</sup>

He puts the question bluntly: “How is it that a tribunal composed of highly competent individuals, further enlightened by the parties' presentations, can do so woeful a job?”<sup>25</sup> Drawing on the thesis developed by

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19. *Id.* at 12–16.

20. *Id.* at 18–25, 30–32.

21. 15 INT'L LEGAL MATERIALS 701, 709 (1976).

22. Stein, *supra* note 1, at 16–17.

23. *Id.* at 52.

24. *Id.* at 32–49.

25. *Id.* at 35.

Professor Martin Shapiro in his 1981 book entitled *Courts: A Comparative and Political Analysis*, Stein discusses the tendency of tribunals, and particularly of arbitral tribunals, to legitimize their decisions by seeking to elicit the consent of the losing party to the decision. The task facing the Tribunal in this regard was extraordinary as Revolutionary Iran does not subscribe to the most elementary norms accepted in the West. Thus, "the Tribunal must in large measure create, rather than draw upon, a base of respect for legal norms whose sources are regarded as secular and predominantly Western."<sup>26</sup> Moreover, Iran made it plain that

a complete repudiation of the Majlis position would give rise to substantial difficulties . . . . It is difficult to imagine an argument whose acceptance more obviously aligns a tribunal with one of the parties than does the argument that the courts of the other party are so hopelessly biased or inadequate that no one can in conscience be remitted to his remedies there.<sup>27</sup>

Stein intimates, correctly in my view, that the Tribunal was concerned that the decision sought by the United States, and supported by the Agreement and relevant authority, could have driven Iran from the Tribunal. Such a breakdown of the arbitral process would not have prevented adjudication of the claims, but it would have complicated enforcement of the Tribunal's awards once the security account of a billion dollars was exhausted. Stein confronts and rejects the notion that "the Tribunal was simply cowed by threatening noises from one of the parties."<sup>28</sup> Rather, he seems to conclude that "the need to elicit consent subsists and should be expected to exert a powerful influence" on the behavior of all tribunals, particularly in the circumstances of this case.<sup>29</sup> "The U.S. arguments necessarily posed special risks to the stability of the triadic structure and Iran's statements merely reinforced this fact."<sup>30</sup>

It must be noted that Stein's ultimate assessment of the validity of the Tribunal's approach is powerfully influenced by the perception, based on the information available at the time, that "no claimant was in fact excluded from the Tribunal."<sup>31</sup> This leads Stein to speculate that "[a] majority of the Tribunal's members may in fact have accepted the United States arguments both on the law and as applied to the facts."<sup>32</sup> Thus, he credits the Tribunal

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26. *Id.* at 38.

27. *Id.* at 38-39. As Stein recognizes, the alternative argument made by the United States, that a fundamental change of circumstances had occurred, did not require such a characterization of the Iranian courts. *Id.* at 40-41.

28. *Id.* at 39.

29. *Id.* at 37.

30. *Id.* at 39.

31. *Id.* at 42 (emphasis omitted).

32. *Id.* at 44 (emphasis in original).

with a “richly mediated” solution<sup>33</sup> that “may not have involved any compromise of the claimants’ interests.”<sup>34</sup>

As events developed, it appears more likely that a few of the claimants were hurt, but not many. The best information available at this writing is that the Tribunal has issued final awards dismissing a party’s claims on account of an Iranian-forum clause in seven cases. The issue has been litigated in another twenty cases, in sixteen of which the Iranian objection to the Tribunal’s jurisdiction was clearly rejected. At least one of the seven disappointed claimants, Dames & Moore, was able to achieve a settlement by other means.<sup>35</sup>

Another consideration, given great weight by Stein in his ultimate assessment of these decisions, is the perception that the Tribunal acted with awareness of a larger mission to facilitate the gradual normalization of relations between Iran and the United States and, ultimately, Iran’s reintegration into the international economy.<sup>36</sup>

## V. A PERSONAL COMMENT

I am impressed both by Stein’s research and by his sophisticated analysis, which enrich our understanding of the process of international arbitration. This brief review does not do justice to either. However, unlike Stein, I am not entirely reconciled to the Tribunal’s decision.

There is no doubt Stein accurately describes how an arbitral tribunal can be expected to act. Attorneys must advise their clients accordingly, and the United States negotiators certainly understood the risks. However, there remains a question whether the Tribunal properly understood its responsibilities. The arbitration process was established for the benefit of the claimants, not for broader diplomatic objectives. The United States and Iran contracted for a series of adjudications of particular cases in accordance with law, not for a more flexible process of accommodation of national interests involving elements of third party diplomacy.

In order to release the hostages, the United States was required to shut down the claimants’ litigation in the United States courts. The Tribunal was established as an alternative forum for their benefit.<sup>37</sup> The United States

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33. *Id.* at 42.

34. *Id.* at 45.

35. Interview with David Stewart, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, in Washington, D.C. (Feb. 11, 1986). The original *Dames & Moore* case is cited *infra* note 37.

36. Stein, *supra* note 1, at 51–52.

37. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).



draftsmen took great pains to construct a procedure that could function without Iran's participation. Indeed, arguably the process would function considerably better if Iran walked out. To the extent the Tribunal denied any claim that was encompassed by the Claims Settlement Agreement in order to encourage the normalization of relations between Iran and the United States, the Tribunal assumed a responsibility that neither government intended it to have.

On the other hand, both governments will benefit greatly if Stein's hopes for the Tribunal's work are borne out. Stein closes his article with the thought that a final judgment on the wisdom of the Tribunal's decision can only be made later, when we can see whether the Tribunal has made good use of the "opportunity it has purchased so dearly to promote [these objectives and] the growth of the law."<sup>38</sup>

Respect for the Tribunal reached a nadir on Labor Day, 1984, when two of the Iranian judges physically assaulted one of their Swedish colleagues. The Tribunal suspended its work for a few weeks, but the Iranian judges were replaced in December 1984. The Tribunal has resumed its work under new leadership,<sup>39</sup> and it is beginning to make progress on its cases in a professional manner.

In 1985 the Tribunal held more than fifty prehearing conferences and hearings. It rendered fifty final or partial awards and awarded more than \$86.3 million to successful United States claimants. At year's end, the Tribunal had rendered a total of 189 final awards (including around thirty settlements embodied in agreed awards), eighteen partial awards and fifty-six interim awards. More than forty percent of the "large" claims (above \$250,000) of United States nationals against Iran had been resolved, and United States claimants had received more than \$395 million from the security account established under the Algiers Accords.<sup>40</sup>

A number of substantial settlements and contested awards in recent months have brought total disbursements from the security account to more than \$592 million. Iran is obligated by the hostage-release agreements to replenish the security account "to maintain a minimum balance of \$500 million" whenever the balance falls below that amount.<sup>41</sup> The first replenishment of \$100 million was completed in mid 1986.

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38. Stein, *supra* note 1, at 52.

39. The current President of the Tribunal is Prof. Dr. Karl-Heinz Bockstiegel (W. Ger.). The other third-party arbitrators are Prof. Michel Virally (Fr.) and Dr. Robert R. Briner (Switz.).

40. Interview with David Stewart, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, in Washington, D.C. (Feb. 24, 1986). For a detailed review of the earlier work of the Tribunal, see Stewart, *The Iran-U.S. Claims Tribunal: A Review of Developments 1983-84*, in 16 *LAW & POL'Y INT'L BUS.* 677 (1984).

41. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, United States-Iran, para. 7, *reprinted in* 75 *AM. J. INT'L L.* 418, 420 (1981).

## Iran-U.S. Claims Tribunal

It is premature to make a final judgment on the success of the Claims Settlement Agreement, but as of this writing the Tribunal is working well. It has set an ambitious schedule for 1986, and if the present pace of adjudication and settlement continues, the Tribunal may be able to dispose of the "large" claims of United States nationals in two or three years. Unfortunately, very little progress has been made on the 2795 "small" claims originally filed, and there are substantial intergovernmental claims that could strain the Tribunal's resources.<sup>42</sup> The most controversial matters are the claims of dual nationals, persons with both American and Iranian citizenship. Hopefully, the Tribunal will be equal to the challenge.

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42. Interview with David Stewart, *supra* note 40.