

Chapter 8

International Claims and State Responsibility

A. IRAN-U.S. CLAIMS TRIBUNAL

On November 4, 1979, Iranian militants seized the U.S. Embassy in Tehran, holding diplomatic and consular personnel and other persons hostages. See *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 12. On November 14, 1979, President Jimmy Carter issued Executive Order 12170. This order temporarily blocked all “property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which . . . come within the possession or control of persons subject to the jurisdiction of the United States.” 44 Fed. Reg. 65,729 (Nov. 15, 1979).

On January 19, 1981, the United States and Iran entered into an international executive agreement embodied in two declarations of the Government of Algeria, known as the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States (“General Declaration”) and Declaration 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 (“Claims Settlement Declaration”). 20 I.L.M. 223 (1981). The Algiers Accords brought about the release of the American hostages and established the Iran-U.S. Claims Tribunal (“Tribunal”) at The Hague, the Netherlands, to resolve existing disputes between the two countries and their nationals. See *also Cumulative Digest 1991-99* at 1086-87 and *Digest 2001* at 381-82. Under the Algiers Accords, the United States released the vast majority of Iran’s blocked assets and transferred them directly to Iran or to various accounts to pay outstanding claims. The claims addressed by the Tribunal include claims of U.S. nationals against the Government of Iran, and government-to-government claims between the United States and Iran. See *III Cumulative Digest 1981-88* at 3189.

On July 17, 2009, the nine-member Tribunal largely rejected a \$2.5 billion claim filed by Iran, known as Case B/61, in which Iran alleged that the United States violated the Algiers Accords by failing to arrange the transfer of certain properties (mostly military properties) that Iran purchased from private U.S. companies before the Iranian Revolution. After the Accords were concluded, the United States unblocked Iranian assets located in the United States, but on March 26, 1981, the United States informed Iran, through the Government of Algeria, that the United States

would not approve licenses for the export of Iranian military equipment located in the United States because of the export controls imposed by the Arms Export Control Act and its implementing regulations. Iran sought the return of these items, or in the alternative, their alleged replacement value. For prior developments in the case, including the U.S. Rebuttal filed on September 1, 2003, see *Digest 2003* at 441–45.

The Tribunal dismissed Iran’s claim for compensation based on the U.S. refusal to license the export of Iran’s export-controlled properties, concluding that Iran had failed to establish that U.S. action resulted in any compensable loss to Iran’s pre-November 14, 1979 financial position with respect to those properties. Accordingly, the Tribunal did not award any damages to Iran. However, the Tribunal deferred to further proceedings the question of whether certain provisions of the Treasury Department’s regulations issued on February 26, 1981 had caused Iran to suffer any harm in connection with its export-controlled properties. In a related case, Case A/15 (II:A), the Tribunal had determined that these regulations were improper. See *Digest 2003* at 443*n*, 444*n* for discussion of the Tribunal’s determination in Case A/15 (II:A). The full text of the Tribunal’s partial award in Case B/61 is available at www.iusct.com/, the Tribunal’s database of awards.

On August 3, 2009, Iran requested that the Tribunal reconsider the decision to dismiss Iran’s claim to compensation based on the U.S. refusal to license the export of Iran’s export-controlled properties. On August 14, 2009, the United States objected to this request because the Tribunal’s Rules of Procedure provide no basis for such a review. The United States also requested that the Tribunal issue an additional award dismissing any Iranian claim with respect to the Treasury Department’s regulations.

B. LIBYA CLAIMS SETTLEMENT

During 2009 the United States continued to implement the Claims Settlement Agreement between the United States of America and the Great Socialist People’s Libyan Arab Jamahiriya (“Agreement”), signed on August 14, 2008, in Tripoli, Libya. The Agreement, together with the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110–301, 122 Stat. 2999, and Executive Order 13477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), established a framework for resolving claims against Libya brought in U.S. courts by family members of victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and other claims related to other alleged terrorist acts. See *Digest 2008* at 399–410 for background. By the end of 2009, the State Department had distributed slightly more than \$1 billion of the approximately \$1.5 billion received under the settlement. This distribution included payment of claims from settlements concerning the bombings of Pan Am Flight 103 and the LaBelle Disco, and claims of U.S. nationals who were named parties in

wrongful death actions pending in U.S. courts on the date of the LCRA's enactment.

In addition, the State Department defined categories of other terrorism-related claims by U.S. nationals against Libya that would be eligible for compensation and referred those claims to the Department of Justice's Foreign Claims Settlement Commission ("FCSC") on January 15, 2009. This referral followed the State Department's December 11, 2008 referral of claims of U.S. nationals for physical injury that were pending on the date of enactment of the LCRA. Following a notice and comment period, the FCSC issued its forms and instructions for claims under both referrals and began adjudicating claims in the referred categories. 74 Fed. Reg. 12,148 (Mar. 23, 2009); 74 Fed. Reg. 32,193 (July 7, 2009).

In 2009 the Justice Department also continued efforts to secure the dismissal of terrorism-related lawsuits against Libya involving claims that were settled under the Agreement, consistent with Congress's elimination of jurisdiction over such claims under the Foreign Sovereign Immunities Act pursuant to the LCRA. *See Digest 2008* at 399-402 for discussion of the relevant provision of the LCRA.

C. NAZI ERA CLAIMS

On October 27, 2009, the United States submitted a supplemental letter brief to the U.S. Court of Appeals for the Second Circuit. *In re Assicurazioni Generali S.P.A.*, Nos. 05-5602-cv, 05-5310-cv (2d Cir.). The U.S. submission responded to the court's July 29, 2009 letter to Secretary of State Hillary Rodham Clinton, which asked whether the current administration adhered to the position expressed in a letter brief the United States had submitted on October 30, 2008. *See Digest 2008* at 418-24 for discussion of the 2008 U.S. submission, which is available as document 41 for *Digest 2008* at www.state.gov/s//c8183.htm. The supplemental letter brief summarized U.S. views as follows:

The position of the United States continues to be that set out in our original letter brief. As we explained, "[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview." [citation omitted] Holocaust-era insurance claims against the defendant, Assicurazioni Generali ("Generali"), fall within this category.

The full text of the government's brief is available at www.state.gov/s/l/c8183.htm. The case was pending at the end of 2009.*

D. REPUBLIC OF THE MARSHALL ISLANDS

On January 29, 2009, the U.S. Court of Appeals for the Federal Circuit affirmed a lower court's dismissal of claims against the United States in two cases, *Bikini v. United States* and *John v. United States*, consolidated on appeal, concerning claims related to U.S. nuclear testing in the Marshall Islands from 1946–1958. *Bikini v. United States*, 554 F.3d 996 (Fed. Cir. 2009). For prior developments in the two cases, see *Digest 2006* at 316–25, *Digest 2007* at 256–63, and *Digest 2008* at 245–47. The briefs the United States filed in 2008 in both cases are available as documents 22.a. and b. for *Digest 2008* at www.state.gov/s/l/c8183.htm.

The court of appeals concluded that the Section 177 Agreement, a claims settlement agreement implementing § 177 of the Compact of Free Association that the United States and the Republic of the Marshall Islands entered into in 1978, removed the jurisdiction of U.S. courts over the claims. As the court explained:

The Section 177 Agreement states: “This Agreement constitutes the *full settlement* of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program” Section 177 Agreement, Art. X (emphasis added). This enacted Agreement has the force of law. Compact Act, § 175.

Addressing the “United States Courts,” Article XII of the settlement agreement instructs, “All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed.*” Section 177 Agreement, Art. XII (emphasis added). Article XII thus represents the parties’ agreement to extinguish any judicial power to hear these claims.

* Editor’s note: On January 15, 2010, the U.S. Court of Appeals for the Second Circuit affirmed the district court’s judgment, holding that “under authority of *Garamendi* . . . Plaintiffs’ claims . . . are preempted by the foreign policy of the United States.” In so holding, the Second Circuit drew upon the views the United States had expressed to the court in 2008 and in 2009. *In re Assicurazioni Generali S.P.A.*, 592 F.3d 113, 120 (2d Cir. 2010). Errata were filed on February 9, 2010.

Id. at 999. Further excerpts follow from the court’s opinion. On October 23, 2009, the plaintiffs in the two cases filed separate petitions for certiorari in the U.S. Supreme Court.*

The people and descendants of the Bikini and Enewetak Atolls seek just compensation for the taking of their land and their legal claim by the United States government. The Nuclear Claims Tribunal has awarded, but not completely funded, compensation for the Atolls’ inhabitants due to bomb testing in the 1940s and 1950s. Because the parties clearly and unambiguously agreed to extinguish any judicial jurisdiction over the claims presented in these appeals, this court affirms the United States Court of Federal Claims’ dismissal of these complaints.

I.

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The Plaintiffs-Appellants represent the people and descendants of the Bikini and Enewetak Atolls. In the early 1980s, both groups filed claims in the United States Court of Claims. The Plaintiffs sought just compensation for the Fifth Amendment taking of their land and damages for the United States’ breach of its fiduciary duties. . . .

The Section 177 Agreement created a Nuclear Claims Tribunal to render final determination upon all “past, present and future” claims related to the Nuclear Testing Program. Congress committed \$150 million to initiate a trust fund to support the Tribunal’s operations and awards. Section 177 Agreement, Art. I, § 1. Congress designated \$45.75 million of that amount for the payment of awards. *Id.* at Art. II, § 6(c). Even from its inception, many critics recognized that the Tribunal fund would not satisfy all of the claims.

On August 3, 2000, the Tribunal awarded the Plaintiffs-Appellants, the People of Enewetak, \$385,894,500, including \$244,000,000 for past and future loss of Enewetak Atoll, \$107,810,000 for restoration costs and radiation cleanup, and \$34,084,500 for hardships suffered during the relocation from the atoll. In February 2002 and 2003, the Tribunal paid only \$1,078,750 and \$568,733 on those awards—less than 1% of their total award.

In March 2001, the Tribunal awarded the Plaintiffs-Appellants, the People of Bikini, \$563,315,500 in compensation, including \$278,000,000 for the past and future loss of their land. Due to inadequate funding, however, the Tribunal paid only \$1,491,809 in 2002, recognizing that the fund is “insufficient to make more than a token payment.” The fund made a second payment of \$787,370.40 in 2003, approximately 0.4% of the total award. As of October 2006 only \$1 million remained in the Tribunal fund.

Article IX of the Section 177 Agreement provides an avenue for seeking additional funding from Congress. A “Changed Circumstances” petition can be submitted to Congress if “such injuries render the provisions of this Agreement manifestly inadequate.” Section 177 Agreement, Art. IX. Article IX goes on to say that it “does not commit the Congress of the United States to authorize and appropriate funds.” *Id.* The Government of the Marshall Islands submitted a Changed Circumstances petition to Congress requesting additional funding in 2000. To date, Congress has not acted on that petition.

* Editor’s note: The Supreme Court denied certiorari on April 5, 2010. *Bikini v. United States*, 130 S. Ct. 2340 (2010); *John v. United States*, 130 S. Ct. 2340 (2010). *Digest 2010* will discuss relevant aspects of the decision.

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II.

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On appeal, the parties do not contest the amount awarded by the Nuclear Claims Tribunal. Rather they seek enforcement of the award—in spite of the Claims Tribunal’s award of amounts beyond the funding limits of the settlement agreement. Moreover the parties contemplated the prospect of inadequate funding for full compensation when entering into the Section 177 Agreement. In the event that “such injuries render the provisions of this Agreement manifestly inadequate,” Article IX provides an avenue for submitting a changed circumstances petition to Congress.

The “Changed Circumstances” provision acknowledges that “this Article does not commit the Congress of the United States to authorize and appropriate funds.” Section 177 Agreement, Art. IX. The parties expressly agreed to this procedure and in doing so trusted the U.S. Congress to weigh and evaluate and act upon any changed circumstances. Thus, the settlement agreement entrusted the funding remedy to a procedure outside the reach of judicial remedy.

Indeed on that point, the language of the settlement agreement is clear: “All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed*.” Section 177 Agreement, Art. XII (emphasis added). This statement represents not only the United States’ removal of its consent to be sued in the courts over these claims but also the claimants’ waiver of their right to sue over these claims in any U.S. court. Thus, this court has no authority in this matter, except to dismiss for lack of jurisdiction.

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. . . The power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of nationals. *See United States v. Pink*, 315 U.S. 203, 229–30 (1942). The Plaintiffs-Appellants, the People of Enewetak, challenge the validity of that espousal. However, that challenge raises a political question beyond the power of this or any court to consider. *Id.* at 229

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Cross References

Alien Tort Statute litigation, Chapter 5.D.2.

Differences between responsibility of states and of international organizations, Chapter 7.A.1.

Amendments to terrorism exception of Foreign Sovereign Immunities Act, Chapter 10.A.1.b.(3), c.(1)(ii), c.(3), and c.(6)

Litigation relating to issues before Iran–U.S. Claims Tribunal or the Algiers Accords, Chapter 10.A.1.c.(1) and c.(5)

Claims under NAFTA, Chapter 11.B.1.

Claims under WTO dispute settlement, Chapter 11.C.

Arbitration with Canada relating to compliance with Softwood Lumber Agreement, Chapter 11.D.7.

U.S. export controls relating to Iran, Chapter 16.A.1.b.(3)(iv), b.(3)(v), and f.(1)