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General Observations on the Iran-United States Claims Tribunal and a Review of the Tribunal's Jurisprudence on Arbitration Procedure*

Jamal Seifi

Arbitrator at the Iran-United States Claims Tribunal, Hague, Netherlands;
Formerly Professor of Global Law Chair and Distinguished Visiting Professor at Tilburg University, Tilburg, Netherlands
Visiting Professor at Hull University, Kingston upon Hull, England, United Kingdom
Former Associate Professor at Shahid Beheshti University, Tehran, Iran | jseifi@iusct.nl

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ABSTRACT

This article aims to address theoretical and practical issues arising from the author's "lived experience" in dealing with the developments and intricacies of international arbitration, with a particular focus on experiences related to the Iran-United States Claims Tribunal. These discussions are presented in two parts. The first part consists of general observations that emphasize, on the one hand, the unique importance of the Tribunal in contributing to the maintenance of international peace and security through the peaceful resolution of disputes between two predominantly adversarial states. The Tribunal is referred to as a symbolic institution embodying the "ideal of arbitration for peace." On the other hand, this section highlights the hybrid and multifaceted nature of the Tribunal and its manifestations, noting that the Iran-United States Claims Tribunal is a multifunctional institution. It simultaneously serves as an international commercial arbitration tribunal, an international investment arbitration tribunal, a tribunal with jurisdiction over contractual disputes between two states, and a public international law tribunal. This multifaceted nature allows its awards to be examined from various perspectives. The second part primarily examines the Tribunal's jurisprudence from the perspective of the interaction between distinct legal cultures involved in international arbitration and the mutual influence of their legal backgrounds on the arbitration process. This selection is made with consideration of the judicial issues prevalent in Iran and seeks to highlight the Tribunal's unparalleled role in deepening the legal knowledge and practical skills of Iranian lawyers in dealing with international claims. In this regard, issues such as the non-requirement of power of attorney for legal representatives, the admissibility of written witness testimony (affidavit) by the parties, the submission of written witness testimony and oral testimony by individuals with a personal interest in the case or a master-servant relationship with the parties, the ability to cross-examine witnesses during hearings regarding the content and veracity of their testimony, and the standard applied by the Tribunal for meeting the burden of proof and the burden of production are all examined in light of the Tribunal's various rulings.

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Introduction

The following is the full version of a lecture delivered by the author on the inaugural day of the "International Arbitration Conference with an Emphasis on the Jurisprudence of the Iran-United States Claims Tribunal," held on November 28, 2023. Unfortunately, due to the author's presence in The Hague, it was not possible to deliver the lecture in person, and due to time constraints, the final section on "issues related to the standards applied by the Tribunal for meeting the burden of proof and the burden of production" was presented in a very concise manner. Taking this opportunity, the full text of this section is now made available to interested readers. In any case, the primary objective of this lecture is to address theoretical and practical issues arising from the author's "lived experience" in dealing with the developments and intricacies of international arbitration, with a particular focus on experiences related to the Iran-United States Claims Tribunal.

At the outset, let me reiterate that the reason for dedicating the first part of this discussion to general observations on the Iran-United States Claims Tribunal is to re-emphasize the Tribunal's unique importance in contributing to the maintenance of international peace and security through the peaceful resolution of disputes between its two founding states by means of international arbitration. This is a topic that I have previously addressed in my remarks at international forums, including a lecture delivered in 2013 at the Peace Palace on the occasion of the centennial anniversary of its inauguration, the written report of which was published in Issue 24 of the Iranian Legal Research Journal in 2013.[1] In this section, I will elaborate on two general observations regarding the Iran-United States Claims Tribunal. The first observation pertains to the overall context of the Tribunal's activities as one of the most significant manifestations of the realization of the ideal of "arbitration for peace." The second observation concerns the hybrid and multifaceted nature of the Tribunal and its manifestations.

The second part of the discussion focuses on selected aspects of the Tribunal's jurisprudence on arbitration procedure. This selection is primarily made from the perspective of the interaction between distinct legal cultures involved in international arbitration and the mutual influence of their legal backgrounds on the arbitration process. This selection is made with consideration of the judicial issues prevalent in Iran and seeks to highlight the Tribunal's unparalleled role in deepening the legal knowledge and practical skills of Iranian lawyers in dealing with

1 Seyed Jamal Seifi, 'Arbitration and the Peaceful Settlement of Disputes' [2013] Legal Research Journal 12(24), 6–19.

international claims. This is also a topic that I have addressed in my previous writings, including an article published in Issue 35 (2023) of the Journal of Comparative Studies in Islamic and Western Law.[1]

1. Part One: General Observations on the Iran-United States Claims Tribunal

1.1. Observation One: The Tribunal as a Key Manifestation of the Ideal of "Arbitration for Peace"

The idea that recourse to arbitration by states can lead to the peaceful resolution of international disputes and, consequently, prevent the use of force in interstate relations, is an ideal that led to the establishment of the Permanent Court of Arbitration in 1899. As Article 1 of the 1899 Hague Convention on the Pacific Settlement of International Disputes states, "With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences."

Indeed, it is for this reason that Judge Bockstiegel, who served as President of the Tribunal from 1984 to 1988, noted in a book chapter that since its establishment in 1981, the Tribunal has always been at the center of attention beyond its legal literature and purely legal activities, particularly due to its operation in a highly politically charged environment. The Tribunal was established to resolve a crisis that arose following the hostage-taking of American diplomats in Tehran and, in response, the freezing of Iranian assets by the U.S. government.[2] In describing the nature of this crisis, Mr. Roberts Owen, Legal Adviser to the U.S. Department of State and one of the American negotiators in the process leading to the Algiers Accords, used the term "Mutual Taking of Hostages."[3] Anyway, in this brief overview, I will limit myself to noting that, given the violation of Iran's sovereignty and territorial integrity in the failed Tabas Operation, which occurred just five months after the hostage crisis, the failure to resolve this crisis peacefully through the Algiers Accords, which led to the establishment of the Tribunal, would have resulted in even more severe consequences. In any event, scholars such as Judge Bruno Simma have described the establishment of the Iran-United States Claims Tribunal in 1981 as a successful experience through which the parties, despite viewing each other as adversaries, chose to adhere to the law and engage with each other in a systematic manner rather than resorting to war—a lesson that should inspire adversarial parties worldwide in the current context.[4]

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1 Seyed Jamal Seifi, 'Cultural Diversity of Arbitrators and Judges in International Arbitration and Judicial Proceedings' [2023] Comparative Studies in Islamic and Western Law 10(1), 191–214. See also: Jamal Seifi, 'Globalization of International Arbitration: Trends and Implications' in Christoph Benike and Stephan Huber (eds), *National, International, Transnational: Harmonischer Drieklang im Recht* (Verlag Ernest und Werner Gieseking Bielefeld GmbH 2020) 1571–1578.; Jamal Seifi, 'Legitimacy of Investor-State Arbitration: Addressing Development Bias Among International Arbitrators' in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who is the Judge?* (OUP 2020) ch 9, 165–178.

2 Karl-Heinz Bockstiegel, 'The Iran-United States Claims Tribunal: A Unique Example of Arbitrating for Peace' in Ulf Franke, Annette Magnusson, and others (eds), *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International 2016) 92.

3 See, Roberts B Owen, 'The Final Negotiation and Release in Algiers' in Warren Christopher and Paul H Kreisberg (eds), *American Hostages in Iran: The Conduct of a Crisis* (Yale University Press 1985) 299–300: "*In one sense the situation was like a mutual taking of hostages*. It was as though, in April 1980, when President Carter decided to sever diplomatic relations with Iran and expel all Iranian diplomats from the United States, he had decided instead to seize those diplomats and hold them in custody pending release of our fifty-two nationals." (emphasis added)

4 See, Bruno Simma and Jan Ortgies, 'The Iran-United States Claims Tribunal' in Chiara Giorgetti and others (eds), *Research*

1.2. Observation Two: The Hybrid and Multifaceted Nature of the Tribunal

The hybrid nature of the Iran-United States Claims Tribunal stems from the fact that it simultaneously functions as an international commercial arbitration tribunal, an international investment arbitration tribunal, a tribunal with jurisdiction over contractual disputes between two states, a public international law tribunal, and an interpretive arbitration tribunal (through its Board). Indeed, it is for this reason that the Tribunal's awards can be examined from various perspectives. It is worth noting that all the functions of the Tribunal are enumerated in Article 2 of the Claims Settlement Declaration. With respect to the first two functions, paragraph 1 of Article 2 of the Declaration states:

> *" An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaetion or occurrence that constitutes the subject matter of that national's claim, if such claims and counter-claims are outstanding on the date of this Agreement,... , and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights."*

For instance, the most significant feature related to the Tribunal's public international law dimension can be found in Article 1 of the General Declaration, which, under the title "Non-Intervention in Iranian Affairs," states: "The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs." It is evident for scholars that the text of this article was, in fact, a modified version of a commitment demanded by the Islamic Consultative Assembly for the resolution of the hostage crisis, as the Assembly's proposed commitment, although solely prospective, was drafted in a manner that implied validation of prior U.S. interventions in Iran's internal affairs. Thus, Article 1 of the "Four Conditions of the Islamic Consultative Assembly for the Resolution of the Hostage Crisis," dated November 2, 1980, stated:

> *"Since the U.S. government has in the past repeatedly intervened in Iran's internal affairs through various political and military means, it must therefore pledge and guarantee that henceforth it will not intervene, directly or indirectly, politically or militarily, in the internal affairs of the Islamic Republic of Iran."*

Ultimately, the text of Article 1 of the General Declaration, containing the U.S. commitment to non-intervention in Iran's internal affairs, was included in the General Declaration as set forth above. It is worth noting that in 1996, Iran filed Case A/30 before the Tribunal, alleging a violation of the principle of non-intervention by the United States. However, after the exchange of pleadings, Iran did not insist on setting a date for the hearing, and the case remains pending before the Tribunal.

It should be noted that while the provisions of the Algiers Accords played a significant role

Handbook on International Claims Commissions (Edward Elgar Publishing 2023) ch 4, 75–89, 89.

in creating a framework for the adjudication and resolution of past disputes, such as financial, banking, commercial, and contractual claims, the provisions addressing future disputes, such as paragraph 1 of the General Declaration, have thus far had little impact on alleviating tensions or resolving the escalating political and military crises between the two states.

Moreover, with respect to the Tribunal's investment law dimension, as one scholar has noted, the Claims Settlement Declaration can be considered, in this regard, a bilateral investment treaty focused on the past. This characterization is used because, unlike the usual practice in investment protection treaties, which anticipate future disputes, the Declaration did not grant the Tribunal jurisdiction over future disputes but only authorized it to adjudicate pre-existing disputes.[1]

Indeed, due to this hybrid nature, Article 5 of the Claims Settlement Declaration, which pertains to the applicable law, was drafted to cover a much broader scope than the standard text of the UNCITRAL Rules:

> *" 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."*

For this reason, Article 33 of the Tribunal's Rules of Procedure, which concerns the applicable law, replaced paragraph 1 of Article 33 of the UNCITRAL Rules with the provisions of Article 5 of the Claims Settlement Declaration. By way of comparison, it is worth noting that Article 33 of the UNCITRAL Rules, concerning the applicable law, in paragraph 1, employs the standard formula for international commercial arbitration:

> *"The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."*

It should be added that the final part of Article 5 of the Declaration is largely drawn from paragraph 3 of Article 33, which states: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." In any case, due to time constraints, I will avoid delving into other aspects of the Tribunal's activities and proceed to the second part of the discussion.

2. Part Two: A Review of the Tribunal's Jurisprudence on Arbitration Procedure

As an introduction, it should be noted that the Iran-United States Claims Tribunal began its operations not long after the adoption of the UNCITRAL Arbitration Rules in 1976. As a result, many of the issues that arose in the course of the Tribunal's proceedings were not explicitly

1 David D Caron, 'The Iran-U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT' in Christopher Drahozal and Christopher Gibson (eds), *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (OUP 2007) 375–376.

addressed in those rules. In this regard, the Tribunal's activities significantly enriched the UNCITRAL Rules. However, in this brief review, I will focus only on certain practices relevant to Iranian law.

2.1. The Defense of Failure to Submit or Delay in Submitting a Power of Attorney

In addressing this issue, it is fitting to recall the late Professor Dr. Jafar Niaki. In a meeting with him in the mid-1980s, the late professor, while emphasizing the need for training and increasing the experience of Iranian lawyers, expressed some frustration that the lawyers representing Iranian entities in cases before the Tribunal (though not the Iranian legal advisers of the Legal Services Office at the time) were defending their cases in the same manner as they would before Iranian courts, without considering the requirements of international arbitration. For example, they would raise objections such as why the opposing party's lawyer had not attached a power of attorney to the case file. The late professor, quoting Mr. Pierre Bellet, President of Chamber Two of the Tribunal and former President of the French Court of Cassation, noted that international arbitration has its own flexibility and specific requirements, and the procedural rules of one party's domestic legal system are not necessarily applicable.

In many cases, particularly in the Tribunal's first decade of operation, Iranian respondents' lawyers, while defending the merits of the case, sought to raise procedural objections and obstacles based on the tactics commonly used in Iran and relying on their own legal culture. As a result, objections such as the failure to submit a power of attorney or delay in submitting a power of attorney (within the framework of the defense of lack of authority) were very common. For example, in the well-known "Starrett" case, which concerned a project to construct apartment complexes, one of the objections raised by the Iranian respondents was that the claimant's lawyer had submitted the power of attorney in April 1982, while the claimant's first memorial, signed by the same lawyer, had been filed with the Tribunal on November 9, 1981, and in any case, the deadline for filing claims with the Tribunal was only until January 19, 1982.[1] On this basis, the second objection raised by the respondents was that two other lawyers who had joined the claimant's lead lawyer during the pre-hearing conference and participated in the discussions lacked authority.

In response to the first objection, Chamber One of the Tribunal, in its Order of December 8, 1982, initially noted that the contents of the submitted power of attorney indicated that the lawyer had been authorized to act continuously from the outset of the case. Subsequently, Chamber One stated that the Tribunal's Rules of Procedure do not explicitly require the submission of a power of attorney, whether before the January 19, 1982 deadline for filing claims or thereafter. With respect to the second objection, the main flaw in the defense of lack of authority regarding the two other lawyers assisting the claimant's lead lawyer was that the names and titles of these individuals had been listed on the last page of the claimant's first memorial (filed on November 9, 1981) under the heading "Members of the Claimant's Counsel." In any event, Chamber One, in rejecting the second objection, also noted that the Tribunal's Rules of Procedure do

1 *Starrett Housing Corporation v The Government of the Islamic Republic of Iran and others*, Case No 24, Order, 8 December 1982, 1 Iran-US CTR 386.

not contain any provision prohibiting the lead lawyers of the parties from using assistants in providing legal services related to the case.

2.2. Submission of Written Witness Testimony Prior to the Tribunal's Hearings

One issue that Iranian respondents faced in the early years of the Tribunal's operation was the extensive use by American claimants of written witness testimonies prepared before relevant authorities, known as "affidavits," and their attachment to the written submissions in the case file at the time of filing the written pleadings. These written witness testimonies must be prepared and certified before competent authorities, which is why the Tribunal's translation department has used the term "Notarized Affidavit" for them. Naturally, the probative value of these written witness testimonies depends on various considerations, including their consistency with the circumstances of the case and, in particular, their consistency with the documents in the case file, which will be discussed in the next section regarding how the Tribunal, following the common law system, applies a substantive standard to assess their probative value. At the same time, as provided in Article 25 of the Tribunal's Rules of Procedure, it is also possible to give "oral testimony" directly (without prior submission of a written witness testimony) during the hearing. In this regard, paragraph 2 of Article 25 of the Tribunal's Rules of Procedure states that each party must provide the Tribunal and the other party with the names and addresses of the witnesses and the subject of their testimony in writing at least thirty days before the date of the hearing.

2.3. Submission of Written Witness Testimony or Oral Testimony by Individuals with a Personal Interest in the Case

The inadmissibility of testimony by individuals with a personal interest in the case is a well-established rule in Iranian law. Article 1313 of the Iranian Civil Code provides that the testimony of five categories of persons is inadmissible, including "a person who has a personal interest in the case." As Professor Sheikh Nia has explained in his book "Evidence in Litigation," the rationale for this limitation is that "when a person has an interest in the matter of testimony, there is a possibility that they will refrain from telling the truth, and therefore their testimony cannot be relied upon to reveal the truth."[1] Thus, it was not surprising that Iranian respondents strongly objected to the acceptance of written witness testimony by interested parties prior to the hearing or their oral testimony during the hearing. It should be added that even before the establishment of the Tribunal, Professor Sandifer, in the second edition of his book on evidence before international tribunals, noted that the nature of the activities of international tribunals, in which claimants often face the problem of lack of access to evidence without any fault on their part and usually have access only to evidence derived from interested parties, requires that the rule of inadmissibility of testimony by interested claimants, which exists in some legal systems, not be applied, as adherence to such a rule would be contrary to fairness and unwarranted.[2]

1 Amir Hossein Sheikh Nia, *Evidence in Litigation* (1st edn, Sahami Publishing Company 1994) 121.

2 Durward V Sandifer, *Evidence before International Tribunals* (rev edn, University Press of Virginia 1975) 364: "A rule denying any weight to the testimony of interested parties or excluding it altogether may have some justification in municipal procedure, where other evidence will usually be available. … In international procedure, where the claimant through no fault of his own so frequently has no evidence except his own or that of parties intimately interested in the case upon which to base a claim for redress, such a rule is surely inequitable and unsound."

As we will see, the Tribunal, by preferring the substantive standard of the *common law* legal system over the procedural standard of *civil law* legal systems, particularly Iranian law, instead of prohibiting the submission of written witness testimony or oral testimony by interested parties, accepted such evidence and, by applying a substantive standard, including by providing the opportunity for cross-examination of a party's witnesses by the opposing party's lawyers to reveal any inconsistencies between the contents of the witness testimony and other evidence, enabled the assessment of their probative value.

Moreover, particularly in the early years of the Tribunal's operation, in response to objections by Iranian respondents, the Tribunal's chambers adopted the practice that in cases where individuals had a personal interest in the case, instead of giving formal testimony before the Tribunal, they could make "statements" regarding the substantive aspects of the claimant's claims during the hearing. Following this distinction, in some cases these individuals were referred to as "claimant-witnesses." For example, in the case of "Allen Craig v. Ministry of Energy, MAHAB Company, and Khuzestan Water and Power Authority,"[1] his statements as a consulting engineer regarding the details of the engineering services he had provided, the reasons he had been forced to leave Iran before the end of the contract period, and the measures taken to mitigate damages were heard by Chamber Three of the Tribunal. However, it should be added that, as some common law scholars have noted, there is little practical difference between distinguishing between giving testimony and making statements, and in reality, what matters is the very acceptance of the submission of written witness testimony or oral testimony by interested parties. In this regard, the analysis of the late Professor Michel Virally on the need to disregard the limitations of national legal systems in accepting evidence in international proceedings is particularly significant. His analysis (contained in an internal Tribunal memorandum in 1988, which was subsequently included in the 1992 award in the case of "W Jack Buckamier v. The Islamic Republic of Iran, Isiran/Army and others") and which was cited in subsequent Tribunal decisions, contains noteworthy points, which I will briefly outline below. Judge Virally made the following observations:

> *" The virtual absence of documentary support for Mr. Buckamier's claim raises the issue what the probative value is of the Claimant's affidavit. The importance of this question makes it appropriate to elaborate on the considerations the Tribunal must take into account in weighing this kind of evidence. In a memorandum dated 17 February 1988 the Tribunal's distinguished former member and Chairman of this Chamber, the late Professor Virally, expressed these considerations as follows. The Tribunal has often been presented with notarized affidavits or oral testimony of claimants or their employees. [Rare] are the cases where such an issue does not arise. The probative value of such written or oral declarations is usually hotly debated between the parties, each of them relying on the pecul[i]arities of its own judicial system. The U.S. parties insist that such evidence must be recognized with full probative value, as would be the case before U.S. courts. The Iranian parties contend that such declarations are not admissible as evidence under Iranian law, as*

1 *Alain Craig v Ministry of Energy of Iran and others*, Award No 71-346-3, 2 September 1983, 3 Iran-US CTR 280.

in many other systems of law, because they emanate from persons whose interests are at stake in the proceedings, or who are, or were, dependent upon the claimants.

.....

As an international Tribunal established by agreement between two sovereign States, the Tribunal cannot, in the field of evidence as in any other field, make the domestic rules or judicial practices of one party prevail over the rules and practices of the other, in so far as such rules or practices do not coincide with those generally accepted by international Tribunals. In this context, it can be observed that declarations by the parties, or employees of the parties, in the form of notarized affidavits or oral testimony, are often submitted as evidence before such Tribunals. They are usually accepted, but, apparently, their probative value is evaluated cautiously, in a manner generally comparable to the attitude of this Tribunal as just described."[1]

Ultimately, in the case at hand, Chamber Three of the Tribunal found the claimant's written witness testimony regarding the claim of payment insufficiently probative and, as a result, dismissed the claimant's $4,500 claim against Bank Mellat. In any event, the contents of Judge Virally's note, after being reflected in the Buckamier award, are considered to reflect the Tribunal's established practice regarding the acceptance of written witness testimony and testimony by interested parties.

2.4. Cross-Examination of the Opposing Party's Witness Regarding the Content of Their Written Witness Testimony

In previous discussions, it was noted that the preference for the *common law* approach to the admissibility of written witness testimony by interested parties over the approach of *civil law*, which impose varying degrees of prohibitions and limitations in this regard, ultimately amounts to a preference for a substantive standard for determining the probative value of written witness testimony over the procedural standard favored by civil law systems. One of the most effective ways to assess the reliability of the contents of written witness testimonies submitted to the Tribunal by interested parties is the legal mechanism of "cross-examination." Thus, by providing the opportunity to cross-examine a witness who, after submitting a written witness testimony during the exchange of pleadings, is now present before the Tribunal, the opposing party's lawyer is enabled to ask appropriate questions aimed at revealing any inconsistencies between the contents of the written witness testimony and other evidence, thereby undermining the probative value of the written witness testimony. Indeed, the legal mechanism of "cross-examination" has become so important in international arbitration practice that scholars have published articles aimed at teaching the practical aspects of this technique.[2] The audience for some of these articles is particularly lawyers trained in civil law systems, who typically have little experience in their professional backgrounds with techniques related to cross-examining opposing witnesses.[3]

1 *W Jack Bukamier v The Islamic Republic of Iran and others*, Award No 528-941-3, 6 March 1992, 28 Iran-US CTR 307, para. 67.

2 See, Rachael D Kent, 'An Introduction to Cross-Examining Witnesses in International Arbitration' (2006) 3(2) Transnational Dispute Management 1–9.

3 See, Philippe Pinsolle, 'Cross-Examination of Fact Witnesses: The Civil Law Perspective' in Stephen Jagusch KC and others (eds), *The Guide to Advocacy* (6th edn, Global Arbitration Review 2024) 105–118.

2.5. Issues Related to the Standard Applied by the Tribunal for Meeting the Burden of Proof and the Burden of Production

Another area in which participation in the proceedings of the Iran-United States Claims Tribunal enriched the legal knowledge of Iranian lawyers was their exposure to a different standard used in the common law system for determining the satisfaction of the burden of proof. Specifically, instead of the standard of the judge's personal conviction, which prevails in civil law systems, the common law system applies the standard of the balance of probabilities, and if, in weighing the probabilities between the claimant's position and the respondent's position, in light of the evidence presented, one party's position appears more probable, the judge will rule in favor of that party.[1] In British legal literature, the term "balance of probabilities" is used to refer to this process.[2] For example, the Investment Arbitration Tribunal in the case brought by the Dutch company Rompetrol against Romania stated that it would, in principle, apply the "balance of probabilities" rule as the standard of proof for factual issues in dispute:

> *" Therefore the Tribunal, while applying the normal rule of the 'balance of probabilities' as the standard appropriate to the generality of the factual issues before it, will where necessary adopt a more nuanced approach and will decide in each discrete instance whether an allegation of seriously wrongful conduct by a Romanian state official at either the administrative or policymaking level has been proved on the basis of the entire body of direct and indirect evidence before it."*[3]

Moreover, the concept of "reversal of the burden of proof" in Iranian law (as in other civil law systems) is used only in cases where the respondent alleges a fact that requires proof (such as a claim of payment of a promissory note). As Professor Sheikh Nia has explained, "the respondent, in making such a claim, is considered a claimant and must prove it with evidence. In this way, the burden of proof is reversed, and the positions of the claimant and the respondent are switched."[4] In this regard, Article 1257 of the Iranian Civil Code provides that "anyone who claims a right must prove it, and the respondent, if in defense alleges a fact that requires proof, must prove it." However, in the common law system, the shifting of the burden of proof is part of the normal process of adjudicating a case. Specifically, the claimant must initially establish a *prima facie* case by presenting evidence that their claim is not baseless. After this preliminary stage, and upon the satisfaction of the "burden of production" or "initial burden of proof" (as termed by the Tribunal's translation department) by the claimant, the respondent is required to present evidence, and ultimately, a ruling is issued based on the weighing of probabilities. Otherwise, the respondent, in defense, will simply submits that there is no case to answer, without presenting any counter-evidence.

For this reason, in the common law system, to refer to the concept of "burden of proof"

1 Neil Orloff and Jerry Stedinger, 'A Framework for Evaluating the Preponderance-of-the-Evidence Standard' (1983) 131 University of Pennsylvania Law Review 1159–1174, 1159.

2 Balance of Probabilities (British formulation); Preponderance of the Evidence (American formulation).

3 *The Rompetrol Group N.V. v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, para. 183.

4 Sheikh Nia, *Evidence in Litigation* (1994) 45; He further noted that the provisions of **Article 1257 of the Iranian Civil Code**, as cited in here, reflect the provisions of **Article 1315 of the French Civil Code**. These provisions exhibit greater complexity and richness compared to the traditional principle of "the burden of proof lies on the claimant."

in the strict sense (the burden of proof as understood in civil law systems), the terms "burden of persuasion," "legal burden of proof" (or simply "legal burden"), or "ultimate burden of proof" are used. In light of the aforementioned, it is clear that the burden of proof in the strict sense is never shifted, and the reversal of the burden of proof occurs only in the context of the claimant's initial proof of their claim (the burden of production), which requires the respondent to present evidence in turn.[1] Thus, the Investment Arbitration Tribunal in the "Apotex" case emphasized the need to distinguish between the persuasive burden or legal burden (which is never shifted) and the burden of production (which may shift from one party to the other during the proceedings, depending on the state of the evidence presented).[2]

Anyway, in numerous instances in the Tribunal's practice, we encounter the requirement of initial and prima facie proof of the claimant's claim. In particular, in two cases that we will briefly examine, due to the failure to satisfy the "initial burden of proof" and the claimant's inability to establish a prima facie case, the burden of proof was not shifted from the claimant to the respondent.

In the "Malek" case, the claim brought by the claimant, Mr. Reza Said Malek (a dual Iran and the United States national), against the Government of the Islamic Republic of Iran, concerned the alleged expropriation of his real estate located in Arak (agricultural lands) and Tehran (Shemiran), as well as his shares in Bank Mellat (formerly the Bank of Tehran) and the Bank of Industry and Mines (formerly the Bank of Industrial Development and Mining of Iran). Since the claimant had been residing in the United States since 1962 and had been continuously working there as a physician, the Tribunal, in its Interim Award of June 23, 1988, found that his dominant and effective nationality from November 5, 1980 (the date he acquired U.S. nationality) to January 19, 1981 (the date of the signing of the Algiers Accords, which is the benchmark for the Tribunal's jurisdiction) was U.S. nationality, and therefore, the Tribunal had jurisdiction over the claim.

On the merits, the claimant's claim was that during the aforementioned period, leading up to the signing of the Algiers Accords (January 19, 1981), the alleged expropriation of his properties had occurred as a result of actions by Iranian state authorities and paramilitary forces affiliated with the Iranian State. With respect to the part of the claim concerning the expropriation of bank shares, the Tribunal, based on considerations including the nationalization of banks prior to the claimant's acquisition of U.S. nationality on November 5, 1980, did not find that it had jurisdiction. With respect to the properties in Tehran, and in particular the residential property in Shemiran (the claimant's family home, which had been transferred to him as an inheritance following his father's death) and the adjacent property, the claimant's claim was that, among other things, due to the forced eviction of his mother from the residential property by Iranian state authorities and paramilitary forces affiliated with the Iranian State in early December 1980, it was clear that the expropriation of this property had occurred within the jurisdictional period relevant to the Tribunal (between November 5, 1980 and January 19, 1981), and therefore, there

1 See, Richard Garnett, 'Demystifying the Burden of Proof in International Arbitration' in Franco Ferrari and Friedrich Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts* (Kluwer Law International 2022) ch 4, 67–86, 70.

2 *Apotex Holding Inc and Apotex Inc v United States of America*, ICSID Case No ARB(AF)/12/1, Award, 25 August 2014, para. 8.8.

was no bar to the Tribunal's jurisdiction over this part of the claim. The Tribunal stated that with respect to the residential property in Shemiran, apart from one written document whose authenticity was seriously doubted, the claimant's claim that the expropriation and eviction of his mother from the property had occurred within the jurisdictional period relevant to the Tribunal, as outlined above, was based solely on seven written witness testimonies (and the oral testimony of one witness), and counter-witness testimonies had also been submitted by the respondent. Anyway, the Tribunal initially, in paragraph 111 of the Award, regarding the need for the claimant to satisfy the "initial burden of proof" before the burden of proof could be shifted to the respondent, stated:

> *"[T]he Tribunal believes the Claim for the Shemiran Properties is best decided by reference to Article 24, paragraph 1 of the Tribunal Rules according to which "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." It goes without saying that it is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the Claimant may be considered to have made a sufficient showing to shift the burden of proof to the Respondent."*[1]

What is noteworthy in the Tribunal's analysis is its common law-based interpretation of Article 24 of the Tribunal's Rules of Procedure and its reference to the need for the claimant to satisfy the "initial burden of proof" and the subsequent shifting of the burden of proof to the respondent. This is despite the fact that the provisions of paragraph 1 of Article 24 of the Tribunal's Rules are fully consistent with the rules of civil law systems. As noted earlier, in Iranian law, as in other civil law systems, the "burden of proof" is a unitary concept, and the distinction between the binary concepts of "initial" and "ultimate" burden of proof is unique to the common law system.

Subsequently, the Tribunal examined the probative value of the written witness testimonies submitted by the claimant's witnesses. The aim was to determine whether the claimant had been able to establish a prima facie case that the expropriation of the properties had occurred within the jurisdictional period relevant to the Tribunal (between November 5, 1980 and January 19, 1981). In assessing the probative value of the witness testimonies, the fact that the claimant had stated the alleged date of expropriation as February 28, 1981 in his statement of claim (which indicated that the claim had not arisen at the time of the signing of the Algiers Accords) had a significant negative impact. Ultimately, the Tribunal, in paragraph 123 of the Award, stated that, taking all factors into account, in light of the deficiencies in the claimant's presentation of evidence regarding the date the claim arose, and given the fundamental importance of this issue in light of the jurisdictional parameters set forth in the Partial Award, the Tribunal could not accept that the burden of proof regarding the need for the claim to have arisen (establishing unwarranted interference with the claimant's family home) between November 5, 1980 and January 19, 1981 had been shifted to the respondent. Therefore, with respect to the property in

1 *Reza Said Malek v Iran*, Award No 534-193-3, 11 August 1992, 28 Iran-US CTR 246, 287-288, para. 111.

Shemiran, the Tribunal, due to ambiguities about the existence of the claim at the time of the signing of the Algiers Accords, did not find that it had jurisdiction.[1]

Similarly, in the "Golshani" case, the claim brought by the claimant, Mr. Ebrahim Rahman Golshani (a dual national of Iran and the United States), against the Government of the Islamic Republic of Iran, concerned the alleged expropriation of his ownership interests in the Tehran Development and Renovation Company, as well as in other companies and properties. The claimant's claim was that, pursuant to a settlement agreement concluded between him and Mr. Rahman Golzar Shabestari on August 15, 1978, and in exchange for the payment of a settlement amount, he had become the owner of the properties at issue in the claim. In defense, the respondent's claim was that, due to Mr. Golshani's dual nationality, the settlement agreement in question, which had in fact been concluded several years after the stated date and in which it was merely stated that the settlement amount had been delivered to the settlor, was in fact a device to fraudulently create jurisdiction for the Tribunal to hear a claim by Mr. Golzar, who was the real party in interest.

Under the heading of the burden of proof, the Tribunal initially noted that "the claimant acknowledges that he bears the initial burden of proving the apparent authenticity of the settlement agreement. According to the claimant, once this is done, the burden of proving the falsity of the document shifts to the respondent."[2] Subsequently, the Tribunal, as in the "Malek" case, by providing a common law-based interpretation of Article 24 of the Tribunal's Rules of Procedure and referring to the need for the claimant to satisfy the "initial burden of proof," stated that despite the respondent's claim that the settlement agreement was forged, this would not relieve the claimant of the obligation to establish a prima facie case of the authenticity of the settlement agreement, and therefore, "it is first for the claimant to prove the apparent authenticity of the settlement agreement."[3] Subsequently, the Tribunal, taking into account considerations such as the claim that more than fourteen thousand apartments in the Ekbatan complex, along with many other properties, had been transferred pursuant to the settlement agreement in question, while merely stating that the settlement amount had been delivered to the settlor, stated that it was clear that this two-page document could not be considered an authentic and official document.[4]

Ultimately, the Tribunal examined the probative value of the written witness testimonies of Messrs. Golshani and Golzar and their oral testimony during the hearing in support of the authenticity of the settlement agreement. In the Tribunal's view, in light of the numerous inconsistencies in the witnesses' testimonies and statements regarding the date of the transfer, the motive for the transfer, the legal nature of the transfer, and the description of the settlement amount, it must be concluded that the claimant had not satisfied the initial burden of proving the apparent authenticity of the settlement agreement in question. Therefore, the Tribunal's final finding in paragraph 122 of the Award was as follows:

1 Ibid., 123.
2 *Abrahim Rahman Golshani v The Government of the Islamic Republic of Iran*, Award No 546-812-3, 2 March 1993, 28 Iran-US CTR 78, 92, para. 47.
3 Ibid., 49.
4 Ibid., 67-73.

> *" Taking into account all the considerations expressed in the foregoing, including TRC's statements made during the Paris Litigation, the Tribunal believes that the Deed and the affidavits of its signatories do not inspire the minimal degree of confidence in the Deed's authenticity required to shift the burden of proof to the Respondent. The Tribunal thus decides that the Claimant's presentation does not make out a prima facie case of authenticity and that, consequently, it need not address the question whether the Respondent has met its burden of proving that the Deed is a forgery."*[1]

Thus, the Tribunal dismissed the claim brought by the claimant, Mr. Ebrahim Rahman Golshani, for lack of evidence of ownership. In concluding this discussion, I hope that the combination of theoretical considerations, references to the awards of investment arbitration tribunals in the "Rompetrol" and "Apotex" cases, and in particular the case studies of the "Malek" and "Golshani" cases from the Tribunal's jurisprudence, could sufficiently communicate the subject matter within the limits of this lecture.

Conclusion

The above discussion of the differing views of the Iranian and American parties regarding certain aspects of the Tribunal's procedure primarily relates to the early years of the Tribunal's establishment and operation. Over time, and out of necessity, the Iranian parties came to understand that, in light of the Tribunal's practice and the principles and rules accepted in this practice, they should defend their claims accordingly. Today, Iranian parties also submit written witness testimonies, use cross-examination techniques, and, as appropriate, seek to prove their claims based on the balance of probabilities. However, it should be added that oral arguments and cross-examination of opposing witnesses are still conducted by foreign lawyers trained in the common law system, which, given the importance and complexity of the cases before the Tribunal, is entirely justified.

Finally, I hope that I have been able to some extent to highlight certain aspects of the Tribunal's performance at two different levels, both in terms of its contribution to the maintenance of international peace and security and in terms of its procedure.

1 Ibid., 122.

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