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THE APPLICATION OF THE RULES OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

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INTRODUCTION

I have been asked to comment on the application of the Rules of the Iran-United States Claims Tribunal. The Tribunal's constituent instrument, the Claims Settlement Declaration, provides in Article III, paragraph 2, that 'the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out.' From its inception on 1 July 1981, the Tribunal began its revision of the UNCITRAL Rules; it issued the Provisionally Adopted Tribunal Rules on 10 March 1982,[1] and issued the Final Tribunal Rules of Procedure on 3 May 1983,[2] without adopting any significant changes as compared with the Provisional Rules.

The Tribunal Rules consist of an Introduction and Definitions, together with 41 articles which are grouped in three sections, namely, Introductory Rules, Composition of the Arbitral Tribunal and Arbitral Proceedings. To these are added Presidential Order No.1 of 19 October 1982, and Internal Guidelines of the Tribunal, adopted on 28 January 1982 and amended on 13 February 1982, 6 December 1983 and 17 January 1984.[3] Presidential Order No.1 concerns the composition of the three chambers, the distribution of the cases among the Full Tribunal and the chambers, the transfer of cases from one chamber to another and the relinquishment of chamber cases to the Full Tribunal, while the Internal Guidelines mainly provide a checklist of topics that might be discussed at preparatory or 'pre-hearing' conferences to be held at the discretion of the Tribunal in each case. Tribunal Rules, Article 15, Note 4.

In the space allotted, I will briefly address the application of the Tribunal Rules in connection with provisions regarding the establishment of time-limits for the submission of written pleadings, pre-hearing conferences, amendment of claims, production of documents and burden of proof.

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[1] Reprinted in 1 *Iran-US CTR*, p. 57.

[2] Reprinted in 2 *Iran-US CTR*, p. 405.

[3] Presidential Order No.1 and Internal Guidelines, as amended on 13 February 1982, reprinted in 1 *Iran-US CTR*, pp. 95, 98.

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1. TIME-LIMITS FOR SUBMISSION OF WRITTEN PLEADINGS

Article 18, paragraph 1, of the UNCITRAL Rules provides that the period within which the Claimant shall file the Statement of Claim is to be determined by the Tribunal, unless the Statement of Claim has already been included in the Notice of Arbitration. Under Article 23 of the UNCITRAL Rules this period should not exceed forty-five days, unless the tribunal finds its extension justified. The deadline for the filing of claims has been determined by treaty and the Tribunal has recognized that it does not have the power to change or extend it, which for most of the claims is the deadline of 19 January 1982, that is, one year after the entry into force of the Claims Settlement Declaration, as provided under Article III, paragraph 4 of the Declaration.[4] Thus, the provision for the period within which to file the Statement of Claim does not appear in Article 18 of the Tribunal Rules, save for the date 20 October 1981, before which no claims could be filed, as provided in Note 1 to Article 18 of the Tribunal Rules.[5] In practice, the Tribunal has adhered to the treaty deadline of 19 January 1982 for the filing of statements of claim and has refused a number of them, which reached the Tribunal Registry some time after the date 19 January 1982.[6] The treaty had already extended the 45 day period for the filing of claims, provided in Article 23 of the UNCITRAL Rules, to one year which gave the claimants sufficient notice to prepare their statements of claim in time. The Tribunal Rules, Article 3 also provides that '[n]o Notice of Arbitration pursuant to Article 3 of the UNCITRAL Rules is to be given,' that is, prior to and separate from the statement of claim.

The only disputes that may be filed after the date 19 January 1982 are those arising with regard to the interpretation or performance of the Algiers Dec-

[4] Art. III, para. 4 of the Declaration provides: 'No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of 19 January 1981.' President Lagergren was appointed on 9 June 1981. Tribunal Annual Rpt. 1983, Annex 2. Thus, the later date is 19 January 1982. See also, Tribunal Administrative Directive No.1, para.3, (4 July 1981), reprinted in Iranian Assets Litigation Reporter, p. 3382 (17 July 1981).

[5] This determination was made in Tribunal Administrative Directive No.1, para.2 (4 July 1981), ('the two governments having extended the period for settlement of claims by the parties directly concerned to 19 October 1981, as provided under Article I of the Claims Settlement Declaration.') Tribunal Administrative Directives Nos. 1 to 4 were issued early in the process of modification of the UNCITRAL Rules, and were incorporated with certain modifications in the Final Tribunal Rules, as provided in the Introduction and Definitions, para. 2, of the Tribunal Rules. The Administrative Directives No. 1 (4 July 1981), No. 2 (19 September 1981), No. 3 (24 October 1981) and No. 4 (21 November 1981) have been reprinted in Iranian Assets Litigation Reporter, p. 3382 (17 July 1981), p. 3720 (2 October 1981), p. 3811 (6 November 1981) and p. 3986 (4 December 1981), respectively.

[6] See, e. g., In Re *Cascade Overview Development Enterprises*, – DEC.-Ref. 1-FT (4 May 1982) and In Re *Mohammad Sadegh Jahanger*, – DEC.-Ref. 2-FT (4 May 1982), reprinted in 1 *Iran-US CTR*, pp. 127-128, respectively.

larations by either Iran or the United States against the other as provided in Article III, paragraph 4 of the Claims Settlement Declaration. Because of this treaty provision and its institutional framework, the Tribunal found it unnecessary even for this category of disputes to maintain a provision in Article 18 of its Rules to determine in each case the period within which the Statement of Claim shall be filed. For the same reason, the Notice of Arbitration, referred to in Article 3 of the Rules was also found unnecessary for this category of claims.

As to the Statement of Defence, the UNCITRAL Rules, Article 19, paragraph 1, similar to the provision for the Statement of Claim in its Article 18(1), provides:

> 'Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.'

However, because of the absence of a treaty deadline for the submission of the Statements of Defence, Article 19, paragraph 1, was modified to read as follows:

> 'Within a period of time to be determined by the arbitral tribunal with respect to each case, which should not exceed 135 days, the respondent shall file his Statement of Defence. However, the arbitral tribunal may extend the time-limits if it concludes that such an extension is justified.'

And Note 1 to Article 19 of the Tribunal Rules provides:

> 'In determining and extending periods of time pursuant to this Article, the arbitral tribunal will take into account
> (i) the complexity of the case,
> (ii) any special circumstances, including demonstrated hardship to a claimant or respondent, and
> (iii) such other circumstances as it considers appropriate.
> In the event that the arbitral tribunal determines that requirement to file a large number of Statements of Defence in any particular period would impose an unfair burden on a respondent to a claim or counter-claim, it will in some cases extend the time periods based on the above-mentioned factors or by lot.'

In a case recently filed with the Tribunal, I had the opportunity to recall the drafting history and practice of the Tribunal under Article 19 of the Tribunal Rules.[7] As I observed there, '[e]arly in its operation, the Tribunal considered the unique situation faced by Iran in having to respond to some 4000 cases filed against it at approximately the same time, as well as Iran's post-Revolution chaos

[7] *Case concerning United States Intervention in Iranian Affairs*, (*Iran* v. *USA*), Case No. A30, filed on 12 August 1996.

and the on-going defense against a ravaging war imposed by Iraq, and consequently agreed to Iranian requests for flexible granting of 3 to 4 extension requests for the filing of principal pleadings by Iran. On the other hand, the United States government and US private claimants, which faced none of these problems, were continuously urging the Tribunal to deny Iranian requests for extension of the filing deadlines, admission of late submissions and evidence, and postponement of the scheduled hearings. Later, however, the United Sates also found it useful to seek similar extensions of filing deadlines in at least some of the 100 cases that had been filed against it at the same time, and the Tribunal found it difficult to refuse such requests in the absence of Iran's objection and also in view of the Tribunal's own backlog resulting from the completion of written pleadings in a growing number of cases that by the time had queued for hearing and decision.'[8]

In the revision of Article 19, the Tribunal was convinced from the outset that the 45 day period for the filing of the statements of defence, referred to in Article 23 of the UNCITRAL Rules, was unreasonable. While unlimited extensions also seemed unreasonable as a means of engaging the Iranian parties into the arbitration process by the filing of their statements of defence, the Iranian parties were also uncertain of the outcome of any future requests for extension necessitated by the sheer volume of the cases against them. Thus, in its earlier modification of Article 19, the Tribunal also added a catch-all provision that stated:

> 'All Statements of Defense shall be filed within a maximum period of six months following the date on which the Statement of Claim is filed. Administrative Directive No.3, para.2(a),(24 October 1981).'

Note 1 to Article 19 of the Tribunal Rules, quoted above, was also adopted by the Tribunal on 16 November 1981 as a response to the situation faced by Iran. Thus, soon after the deadline for the filing of claims had passed, the Tribunal realized that in view of the actual number of claims filed the provision for a maximum period of 6 months for the submission of all statements of defence was simply impractical. Therefore, at its 33rd meeting on 27 January 1982 the Full Tribunal deleted this provision from Article 19, paragraph 1, in view of Iran's situation at the time.[9]

[8] *Idem*, dissenting opinion of Koorosh H. Ameli to the Order of 23 May 1997 (Doc.13), para.18.

[9] As noted in my opinion, *idem*, para. 18, n. 7: 'At the time, Iran faced a considerable number of Statements of Claim filed against it within the three-month period of 19 October 1981-19 January 1982 under the Claims Settlement Declaration, Articles I and III, paragraph 4. Iran's frequent opposition to this six-month limitation and Judge Holtzmann's "strong disapproval" of the Tribunal's decision to delete this provision indicate that the provision was viewed as having considerable impact on the ultimate time limit for the filing of Iran's Statements of Defence. In Judge Holtzmann's view, "the decision had been taken in direct contravention of paragraph 2(a) of Administrative Directive No.3 dated 24 October 1981 and the representations made to claimants thereby" and "that the Tribu-

As to further written statements that under Article 22 the Tribunal may require or allow the parties to present, Article 23 of UNCITRAL Rules provides that:

> 'The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.'

The Tribunal Rules revised Article 23 as follows:

> 'The periods of time fixed by the arbitral tribunal for the communication of written statements (excluding the Statement of Defence) should not exceed 90 days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.'

Thus, the Tribunal Rules in Article 23 modified the 45-day period to 90 days, while also deleting the references to the time-limits for the filing of the statements of claim and statements of defence, which are treated in Articles 18 and 19 of the Tribunal Rules.

Although not mentioned in the Tribunal Rules, the submission of the reply by the Claimant and the rejoinder by the Respondent usually falls under 'further written statements' and the extension practice of Article 23. As the US claimants began to file hearing memorials and extensive written evidence shortly before the hearings, resulting in the disruption of the proceedings, the Tribunal found it necessary to direct the parties to file evidence and brief in chief and evidence and brief in rebuttal, and stating in the order scheduling the hearing that no new documents shall be filed within the two or three months before the hearing begins in the case.

In practice, the provision of 135 days for the submission of the Statement of Defence in Article 19 or 90 days for the submission of further written statements in Article 23, for the reasons noted above, quickly resulted in four extensions of

nal should, at the very least, issue a new Administrative Directive informing the public of the decision,as one that substantially amended Administrative Directive No. 3." Minutes of the Tribunal's 33rd Meeting, para. 7, 27 January 1982. Iran in its letter of 16 November 1981 had emphasized that the filing of thousands of statements of defense by it to the statements of claim within the short period of maximum six months was simply impossible and in contravention of its right to a fair chance of defense during a civil strife and ravaging war situation, that it regarded as crucial to the arbitration process its right of preparation and submission of counterclaims that should be filed with the statements of defense under Art. 19, para. 3 of the Tribunal Rules, that this problem would become more acute if, as expected, the United States and its nationals were to file more than 3000 claims against Iran within the next two months, that the time periods for Iranian statements of defense must be established on the basis of the complexity of the issues of each case and the workload of the Tribunal, and that the time-limits so established then be extended on the request of Iranian respondents as their requests are evidently justifiable and needless of any further examination of their reasons for the request.'

90 days each for both sides unless one or both parties were prepared to expedite the pleadings. Yet there has been no impediment to the grant of additional extension requests if made by a claimant. The Tribunal has also granted the respondent the same number of extensions for the sake of symmetry with the claimant even in the absence of actual need of the respondent and despite objection of the claimant. Both governments have benefitted from this practice in their claims against each other in such a way that a number of cases are still in the process of written pleadings after 17 years.

The routine grant of four extensions of 90 days each for the consecutive written pleadings, while not provided in the Tribunal Rules, was necessitated by circumstances that were vital to the rights of the Iranian parties and operation of the Tribunal, especially in the earlier years. In the first year, the Tribunal also gradually scheduled submission of the statements of defence in the cases, so that the pressure on the respondents was to some extent distributed time wise. Despite the occasional dissents of some US judges[10] in the first or second year, the Tribunal has been rightly convinced of the necessity of the earlier extensions, hence the Tribunal's productive operation and contribution to the settlement of international disputes and international law in the subsequent years without any actual default proceeding by the Iranian parties. However, there is a question whether such a practice of multiple routine extensions should still continue in the same way after 17 years. The earlier situation and difficulties of the parties have been considerably diminished for some time by the resolution of the bulk of the cases, the end of the war imposed by Iraq and consequent Iranian civil strife. By now, the number of cases remaining in the course of written proceedings is only 16, though some of them are huge. I recognize that it is neither easy to suddenly stop this long practice nor prudent to deny justifiable extension requests; however, the Tribunal should also live up to the expectation that it will resolve the remaining cases with some reasonable date in mind.

2. PRE-HEARING CONFERENCES

Not foreseen in the UNCITRAL Rules, is a provision for holding pre-hearing conferences with the parties. The Tribunal has maintained unchanged the UNCITRAL Rules, Article 15 on General Provisions, dealing with hearings, while it has also added five notes thereto. Note 4 provides:

[10] H.M. Holtzmann, Dissent from Decision Granting Second Extension of Time for Filing Statement of Defence, *PepsiCo, Inc.* and *Zamzam Bottling Co. Azerbaijan, et al.*, Case No. 18, (9 July 1982), reprinted in 1 *Iran-US CTR*, p. 174; R.M. Mosk, Dissent from Order Extending Time for Filing Statement of Defence, *R.J. Reynolds Tobacco Co.* and *Iran, et al.*, Case No. 35 (5 April 1982), reprinted in 1 *Iran-US CTR*, p. 119; see also H.M. Holtzmann, Dissent from Decisions Refusing to Set Times Promptly for Filing Statements of Defence (8 July 1981), reprinted in *1 Iran-US CTR*, p. 178.

'The arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference. The pre-hearing conference will normally be held only after the Statement of Defence in the case has been received. The order will state the matters to be considered at the pre-hearing conference.'

The Internal Guidelines of the Tribunal, paragraph 2, as adopted on 28 January 1982 (Minutes of 34th Meeting, Ann. III) and remaining unchanged in subsequent revisions, provides a checklist of 11 topics that might be discussed at pre-hearing conferences held pursuant to the Tribunal Rules, Article 15, Note 4. The 'illustrative' list begins with clarification of the issues in the case, identification of the issues to be decided as preliminary questions, status of settlement discussions, desirability of exchange of further written pleadings, documentary evidence, witness lists, type and method of presentation of evidence, appointment of experts, translation of documents, fixing of a schedule for all this and the hearings. The list ends with 'other appropriate matters.' As both the concept of the pre-hearing conference and its list of topics were familiar to the Tribunal members, and the value of such meetings had already been recognized in international arbitration, Note 4 to Article 15 and paragraph 2 of the Internal Guidelines were adopted by the Tribunal without much difficulty. The list was a modest attempt at what 15 years later developed in UNCITRAL Notes on Organizing Arbitral Proceedings, published in June 1996,[11] which has been considered a crucial tool for every arbitration. The roots of Notes 9 to 17 of the UNCITRAL Notes are discernable in the Internal Guidelines of the Tribunal.

In Tribunal practice, however, the pre-hearing conferences were soon found of little use for various reasons, not only because of the sheer number of cases and the limitation of the Tribunal resources, but also due to the unfamiliarity of some of the parties with the factual and legal problems of their case. A pre-hearing conference is useful for planning the proceedings where each party is adequately familiar with his case. However, as the problem became more apparent, the Tribunal limited the holding of pre-hearing conferences to complex cases in the hope of more usefulness, and some time later, the pre-hearing conferences lost their momentum and fell in virtual disuse,[12] although by then the written pleadings indicated that the parties had thoroughly prepared their cases. While the earlier pre-hearing conferences were useful to the parties, especially in the beginning, in getting to know The Hague and the Tribunal, and in opening the way for a number of settlements, other pre-hearing conferences actually had turned into mini-hearings on preliminary questions, which the Tribunal would shortly decide by orders or interim awards following the conference – a practice which raised questions. After many years of disuse, in 1993 the Full Tribunal

[11] Reprinted in 9 *World Trade & Arbitration Materials* (No. 4, July 1997) p. 231.

[12] See Tribunal Annual Report for the period ending 30 June 1994, Annex XI, for the number of pre-hearing and hearings held in each year from the beginning of the Tribunal operation in 1981.

held a pre-hearing conference in an intergovernmental case,[13] aiming at the clarification of certain procedural issues. However, the schedule so established[14] soon fell apart by the Tribunal practice of routine extensions under Article 23 and by other requests not foreseen in the conference. Nevertheless, certainly pre-hearing conferences can be very helpful, even for the present remaining cases of the Tribunal, so long as both parties cooperate in a serious and efficient planning of the rest of the proceedings and maintain the time schedule so established.

3. AMENDMENT OF CLAIMS

Under Article 20 of the UNCITRAL Rules, '[d]uring the course of the arbitral proceedings either party may amend his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.' The Tribunal revised the last sentence to read: 'However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal.'

I am not aware of any problem arising from amendment of a 'defence.' Amendment of a defence has not been at issue in our practice, so far as I can recall. Principally, defence is an argument or evidence against a claim or counterclaim, whose presentation is usually subject to the schedule of the proceedings, although new legal arguments are normally allowed also at the hearing, which may result in inviting the adverse party to submit a post-hearing brief.

The revision made it clear that this Rule must be read in conjunction with the provision in Article III, paragraph 4, of the Claims Settlement Declarations, concerning the treaty deadline of 19 January 1982 for the submission of new claims and other jurisdictional limitations of the treaty. However, the Tribunal has not been able to maintain a uniform practice on this issue, which has been more dependent on the changing attitudes of the chairmen in the definition of the 'amendment' and 'new claim' for each case, than on giving the treaty deadline the precedence due over a Tribunal Rule which itself is expressly subject to the jurisdictional limitations of the treaty. This attitude is discernable in a number of cases, where the facts and circumstances are similar but the Tribunal rulings are different. One does not find even a reference to the treaty deadline of the Claims

[13] Full Tribunal Order of 30 December 1992 (Doc. 187), scheduling the pre-hearing in consolidated Cases Nos. A3, A8, A9, A14 & B61.

[14] Full Tribunal Order of 8 April 1993, in the cases just noted, establishing the schedule of the pleadings after the pre-hearing was held.

Settlement Declaration and its other jurisdictional limitations in *Rockwell*[15] and *Harris*,[16] that are often cited in favor of admission of requested amendments. Even quotation of Article 20 in those cases leaves out its last sentence.

However, in other cases, the Tribunal has adhered to the overriding provisions of its treaty mandate. For example in *Fazeli*, the Tribunal held:

> 'In his Statement of Claim the Claimant raised a claim for expropriation of parcels of land and a savings bank account. No reference was made to any ownership interest in the Fars and Khuzestan National Cement Co. The Request for Amendment thus concerns property different from those mentioned in the Statement of Claim and therefore does not relate to the initial Claim. As such, it cannot be considered an amendment to the Claim within the meaning of Article 20 of the Tribunal Rules, but is tantamount to the filing of a new claim after the jurisdictional deadline prescribed by the Claims Settlement Declaration. Cf., *St. Regis Paper Company* and *The Islamic Republic of Iran*, Award No. 291-10706-1 (29 Jan. 1987), para. 26, reprinted in 14 *Iran-US CTR*, pp. 86, 91 (substitution of Claimant tantamount to filing of a new claim). For this reason the Request for Amendment is denied.'[17]

It should be noted that *St. Regis*, cited in the above quotation, is also based on the same principle elaborated in a Full Tribunal decision in *Raymond International*.[18] In *Westinghouse*, when dealing with a counter-counterclaim presented as amendment to the claim and submitted in the Reply, the Tribunal held:

> 'It is true that Article 20 of the Tribunal Rules allows amendments of claim by a party in the absence of prejudice to the other party. Nevertheless, the Tribunal concludes that to allow an amendment in this instance would be inconsistent with the deadline for filing of claims with the Tribunal contained in Article III, paragraph 4, of the Claims Settlement Declaration.'[19]

While the jurisdictional limitations of the claims under the Claims Settlement Declaration, Article II and their time limitation in Article III, paragraph 4, do not apply to the submission of intergovernmental disputes as to the interpretation and performance of the Algiers Declarations under paragraph 17, I am not sure that for the amendment of the claim in such cases[20] the Tribunal would adopt even the flexibility and judicial economy that it asserted in *Rockwell* and *Harris*, where their application seems questionable in view of the treaty limitations.

[15] *Rockwell International Systems, Inc.* and *Islamic Republic of Iran (Ministry of National Defence)*, Award No. 438-430-1, para. 71-76, reprinted in 23 *Iran-US CTR*, pp.165-167.

[16] *Harris International Telecommunications, Inc.* and *Islamic Republic of Iran, et al.*, Award No. 323-409-1, paras. 79-87, reprinted in 17 *Iran-US CTR*, pp. 55-57.

[17] Case No. 270, Order of 16 July 1991 (Doc. 90).

[18] Decision DEC 18-Ref 21-FT, p. 3 (8 Dec. 1982), reprinted in 1 *Iran-US CTR*, pp. 394- 395.

[19] *Westinghouse Electric Corporation* and *The Islamic Republic of Iran Air Force*, Award No. 579-389-2 (26 March 1997), para. 320, reprinted in – *Iran-US CTR* –.

[20] See, e.g., Full Tribunal Order of 18 March 1998, paras. 7&10 (Doc. 274) in consolidated Cases Nos. A3, A8, A9, A14 and B61.

4. BURDEN OF PROOF

The Tribunal Rules, Article 24, which does not deviate from the UNCITRAL Rules, provides in paragraph 1 that '[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.' In this connection, it should also be noted that Article 25, paragraph 6 of the Tribunal Rules, maintained unchanged from the UNCITRAL Rules, provides that '[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.' However, the rules of evidence are generally matters of substantive law, which for most of the issues before the Tribunal is international law and general principles of law, under Article V of the Claims Settlement Declaration, also incorporated in Article 33 of the Tribunal Rules.[21] The provision of Article 25, paragraph 6 of the UNCITRAL Rules is intended to avoid the intervention of the court of the place of arbitration in the course of the proceedings as well as other difficulties by the court of the place of enforcement of the foreign arbitral award. Thus, while evaluation of the evidence may be the province of the arbitrator, the rules by which he does so are subject to the applicable law.

Burden of proof in principle consists of two burdens, one of adducing evidence, satisfactory to the tribunal, of an asserted fact, and the other of persuading the tribunal that the alleged fact is true, that is, the probity or relevance, materiality and weight of the evidence. In this way it becomes important what standard of persuasion the Tribunal applies in accordance with international law or the general principles of law. However, in practice the Tribunal has generally not articulated the standard of persuasion it has required for most important issues. In various cases, the Tribunal has simply concluded from its interpretation of the evidence what in its view should be the fact, without reference to any standard of proof and justifications for it. Thus, an independent examination of the evidence, even as presented in some of the awards, may allow a different conclusion from what the award has reached. The prevailing practice seems to have, in effect, required the proof that the existence of the contested fact is more probable than its nonexistence, that is, the proof by a 'preponderance of evidence' rule of municipal law in civil cases. However, the proof by 'clear and convincing evidence,' requiring persuasive evidence that the truth of the contention is 'highly probable,' has been limited to the defence that the private claimant's evidence of ownership is not credible or authentic, as if it were a charge of fraud in municipal law by a person other than the victim of the fraud. The finding of a *prima facie* case has been made when a party has carried his principal burden of proof on the issue.

[21] Art. 33, para. 1, of the Tribunal Rules, replacing the UNCITRAL provision, provides that '[t]he arbitral 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 arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.'

In some cases, the Tribunal has accepted a private claimant's statement alone as evidence of the international responsibility of the state,[22] or very easily and without any prior notice, has drawn adverse inference from the lack of presentation of documents assumed to be in the possession of the respondent state or related organs that might prove the claimant's case, usually in the absence of a prior order or even the claimant's request for the production of the document.[23]

In the cases before it, the Tribunal has made various presumptions for shifting the burden of proof to the other side, some of which may seem questionable. A presumption is an assumption of fact that the law allows to be made from another fact established in the action and yet it only shifts the burden of evidence and not also the burden of persuasion of the truth of the asserted fact, which remains upon the party on whom it was originally cast.[24] Inference is also a deduction of fact that may logically and reasonably be drawn only from another fact established in the action, provided that it leaves no room for reasonable doubt or at least the causal connection and essential link have been established between the two facts. A presumption or inference may not be made on the basis of another presumption or inference. It is also unclear where the presumption of non-responsibility of the state in international law and the presumption of legality of conduct – which should apply with even greater force to the acts of a government than those of a private person – have been taken into account by the Tribunal in deciding the private claims. The nature of factual and legal issues of most of these cases is similar to the case in *ELSI*[25] before a chamber of the International Court of Justice, while the treatment of the burden of proof, reasonings and conclusions between them seem quite different.

One area of discomfort has been the US parties allegations of their lack of access to the evidence left in Iran or to the records of the Iranian parties, while the Iranian parties have also complained of their lack of access to their own records left in the United States or to the records of US parties in that country. The Iranian parties have indicated that, as experience has shown, more often US parties have had better access to the favorable and unfavorable evidence and records in Iran than have the Iranian state parties, and that since the revolution did not occur overnight the US parties or their agents in Iran, both before and

[22] See, e.g., *Daley* and *The Islamic Republic of Iran*, Award No. 360-10514-1 (20 April 1988), para. 32, where the Tribunal granted the claim on the basis of the claimant's statement alone, stating that 'the Tribunal is satisfied that there is sufficient evidence to make a judgment on the possession of Mr. Daley's watch. A specific brand, Rolex, is mentioned and the Tribunal finds that it is probable that Mr. Daley, like the majority of business people, would possess and wear a watch in the normal course of events, as he stated in evidence that he was in the habit of doing.' Reprinted in 18 *Iran-US CTR*, pp. 232, 242.

[23] See, e.g., *Birnbaum* and *The Islamic Republic of Iran*, Award No. 549-967-2, paras. 80, 106, 115, 124, 139 (6 July 1993), reprinted in *Iran-US CTR* .

[24] See, e.g., US Federal Rules of Evidence, Rule 301.

[25] *Case concerning Elettronica Sicula S.p.A. (ELSI) (USA* v. *Italy)*, Judgment of 20 July 1989, *ICJ Rep.* (1989) p. 15.

after the victory of the revolution, have mostly destroyed or taken out the evidence. In *Buckamier*,[26] the Tribunal attempted to bring a balance to only one aspect of this problem concerning the parties' evidentiary burden by incorporating in it a memorandum of the late Chairman Virally who had earlier presided over the hearing in the case. Thus, Chairman Virally's efforts were left for consideration by other members of the Tribunal. As cited in *Buckamier*,[27] he noted that although a US party who departed from Iran under the revolutionary conditions might be considered to have left behind in Iran some documentation that might have proved his case, the Tribunal must be extremely careful not to expose Iranian parties to claims not properly evidenced. This caution, however prudent, has been frequently overshadowed by other factors.

The claim granted by the Tribunal in *Williams*[28] subsequently turned out to be bogus. As found in a US court proceeding, certain individuals in the United States had used the identity of a dead Mr. Gordon Williams, and by an elaborate scheme, including the innocent participation of a Dutch law firm, had procured the award.[29] The fiasco was uncovered only because the 'award creditors,' having disagreed on the portion of their individual 'reward' and each having asked the Federal Reserve Bank of New York for the whole amount on behalf of Mr. Gordon Williams, the Bank applied to the US court to decide to whom it should pay the amount. The Federal Reserve Bank distributes the awarded sums to US claimants, which it receives from Iran's Security Account in accordance with the instruction of the Tribunal in each case. While the awarded sum has eventually been returned to the Security Account pursuant to the US court order in that proceeding, the Tribunal Award in *Williams* remains a clear proof that the strategy of circumstantial evidence employed by private parties against a government can easily lead to abuse of the Tribunal process, which in this case was discovered only because the beneficiaries were subsequently engaged in a dispute and were unwise enough to approach the Federal Reserve Bank separately for the whole amount of the awarded sum.

In *Ram International*,[30] the Tribunal in 1983 awarded the claim on the basis of a document which was found not authentic in an award rendered in 1991 in another case brought by the same claimants.[31] Both claims had been filed at the

[26] *Buckamier* and *The Islamic Republic of Iran, et al.*, Award No. 528-941-3, para. 67 (6 March 1992), reprinted in 28 *Iran-US CTR*, pp. 53, 74-76.

[27] *Idem.*

[28] *Williams* and *Islamic Republic of Iran, Bank Sepah, and Bank Mellat*, Award No. 342-187-3 (18 December 1987), reprinted in 17 *Iran-US CTR*, p. 269.

[29] *Federal Reserve Bank of New York* v. *Gordon Williams, Husband & Harris, Leonard H. W. van Sandick and Loeff & van der Ploeg* (SDNY 1989), reprinted in Iranian Assets Litigation Reporter, pp. 17185-17201 (28 April 1989).

[30] *Ram International Industries, Inc. et al.* and *The Air Force of the Islamic Republic of Iran*, Award No. 67-148-1 (19 Aug. 1983), *reprinted in*, 3 *Iran-US CTR*, p. 203.

[31] *Ram International Industries, Inc., et al.* and *The Islamic Republic of Iran, et al.*, Award No. 511-147-1, paras. 30-31 (9 May 1991), reprinted in 26 *Iran-US CTR*, pp. 228, 230-240.

same time, but had been given different priorities in the scheduling of the proceedings by the Tribunal and thus the awards in the two cases were rendered at different times and under different compositions of the Tribunal. In both cases, the validity of purchase orders and payments therefor depended on the extension of the stated delivery dates. In both cases, the claimants had presented a letter, dated 15 February 1978 on Iranian Air Force stationary, which extended all delivery dates to 30 June 1980 and was signed on behalf of the Air Force Purchasing Mission in New York. And similarly, in both cases, the respondent had questioned the authenticity of the letter, while in the first one it had been unable to present evidence to substantiate it. As observed in the second case, the Tribunal in the first case 'accepted the extension of the delivery dates until 30 June 1980 and based its conclusions on this fact.'[32] But based on a variety of evidence, including the 'convincing' testimony of the alleged signatory of the letter that it 'is not authentic,' in the second case, the Tribunal found that it 'cannot rely on the letter as a basis for granting the claim.'[33] Consequently, the respondent sought revision of the earlier award. But in a decision on revision the Tribunal – as composed in the earlier case, except for the Iranian judge – found it difficult to acknowledge that the document was a decisive factor in its award.[34] It is clear that in the earlier case the Tribunal had given undue credence to the claimants' proffered evidence without requiring them to present the original letter for examination by the respondent who had questioned the authenticity of the letter, despite the fact that the authentication rule has been generally recognized[35] and is commonplace in most national legal systems. It is also obvious that in the absence of the second case, the lack of authenticity of the basic document would not have been discovered.

However, the Tribunal efforts in the allocation of the burden of proof in two areas, other than the one in *Buckamier* referred to above, are noteworthy. On the proof of US nationality of corporate claimants, the Tribunal in the first year of its operation identified in *Flexi-Van*[36] the type of evidence it required in order to find a *prima facie* case, shifting the burden of rebuttal evidence to the respondent, so that from the totality of such evidence it would draw reasonable inferences and reach conclusions as to the US nationality of the claimant. Despite a well-reas-

[32] *Idem*, para. 30.

[33] *Idem*, para. 31.

[34] *Ram International Industries, Inc. et al.* and *The Air Force of the Islamic Republic of Iran*, Decision No. DEC 118-148-1 (20 Jan. 1994), reprinted in – *Iran-US CTR* –.

[35] The Tribunal has directed production of original documents for inspection, but it has done so under Article 24(3) of the Tribunal Rules concerning production of documents when it has been persuaded of its necessity. The rule of verification of authenticity of evidence obtained out of court has also been adopted in Rule 89(E) of Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia.

[36] *Flexi-Van Leasing, Inc.* and *The Islamic Republic of Iran*, Order of 15 Dec. 1982, Case No. 36, Chamber 1, reprinted in 1 *Iran-US CTR*, p. 455.

oned dissenting opinion in that case, which I also shared, the majority opinion at least provided a reasoned guideline as to the type of evidence it required, although it did not elaborate on the burden of persuasion or on the type of rebuttal evidence.

In connection with the allocation of the burden of evidence and persuasion concerning the meaning and scope of Iranian land legislation that allegedly resulted in the expropriation of the claimant's property, the Tribunal in *Hakim*[37] has recently cited an acceptable passage from *Mohtadi*,[38] that

> 'The Tribunal normally would view the responsibility for providing a complete and persuasive explanation of Iranian legislation as falling upon the Respondent. This is because the respondent is surely better positioned than a claimant to explain the meaning and effect of its own laws. Especially where the legislation is confusing and its scope ambiguous, as in the case of the Lands Grant Act, the Respondent may not confine itself to the mere assertion that particular legislation does not apply.
>
> On the other hand, it falls to the Claimant to demonstrate with clarity the facts that bring his property within the scope of the legislation that allegedly expropriated his property. Where, as here, there is no evidence of physical interference attributable to the Respondent ... the Claimant must take particular care to demonstrate that the subject property is, as a factual matter, of the type apparently covered by the Lands Grant Act. In that event the burden would shift to the Respondent to demonstrate that the scope of the Act was in fact narrower than the Claimant suggests.'

It would have been helpful to all concerned if in the course of preparing its Rules of Procedure and Internal Guidelines the Tribunal had also drafted a set of rules or guidelines on evidence in order to give a sense of uniformity and predictability to its practice in various cases. Tribunal's attempt at proof of United States nationality of corporate claimants in *Flexi-Van*[39] was helpful and well received.

5. PRODUCTION OF DOCUMENTS

The Tribunal Rules, Article 24, which has been maintained unchanged from the UNCITRAL Rules, provides in paragraph 3 that '[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.'

[37] *Hakim* and *The Government of the Islamic Republic of Iran*, Award No. 587-953-2, para. 82 (2 July 1998), reprinted in – *Iran-US CTR* –.

[38] *Mohtadi, et al.* and *Islamic Republic of Iran*, Award No. 573-271-3, paras. 82-83 (2 Dec. 1996), reprinted in – *Iran-US CTR* –.

[39] *Flexi-Van Leasing*, Inc. and *The Islamic Republic of Iran*, Order of 15 Dec. 1982, Case No. 36, Chamber 1, reprinted in 1 *Iran-US CTR*, p. 455.

In practice, the Tribunal has not found the occasion to apply this provision for the stated authority of its own, perhaps because the parties have frequently taken advantage of this provision to request the Tribunal to direct the other party to produce documents favorable to the requesting party. It is obvious that such a provision does not grant a party the right of discovery. A party request for production of documents may be acceptable under this Rule by the Tribunal in order to strike a balance between the duty of a party to prove the asserted facts and the duty of the other party to cooperate with the Tribunal in resolving the dispute without necessarily carrying the burden of his adversary.

Thus, in practice the Tribunal has required that the request for the production of documents must identify the documents with sufficient specificity and demonstrate the prior due diligence of the applicant to acquire the document independently, or from other sources. More recent practice has also required demonstration of the relevance of the document to the party's case to prove or disprove an assertion in dispute,[40] and that the document does not contain any admission, proposal or statement of a similar nature prepared for or used in settlement negotiations of the case, or that it has not been generated in the preparation of the other party's case.[41] The sanctity and protection of efforts at amicable settlement of disputes do not allow divulgence of matters of negotiation, positions, admissions of facts or terms of settlement, whether communicated in the course of negotiation or prepared for the purpose of negotiation. Similarly, the sanctity of a party's right of defence does not allow a tribunal to require the party to present its own internal studies made in the preparation of its case. This is of course different from the production of surveys made in the performance of a contractual or treaty obligation, especially before the arbitral proceedings are initiated.[42] However, when the survey has promised confidentiality to third parties, the Tribunal has allowed deletion of that part of the document. But if a party's defense rests on its own confidential evidence, which it does not wish to share, the Tribunal has allowed the claim as *prima facie* established.[43]

In many cases the Tribunal has not actually directed a party to produce the requested document, but has stated that the party may consider including the document in its next basic written pleading and evidence or comment on the

[40] Orders of 31 July 1997 and 16 September 1997, para. 2, *Gulf Associates, Inc.* and *Islamic Republic of Iran, et al.*, Case No. 385 (Docs. 274 & 292) Chamber 2; Order of 12 August 1993, para. 1, *Malekzadeh* and *Islamic Republic of Iran*, Case No. 356 (Doc. 103) Chamber 1.

[41] Order of 26 September 1997, para. 3, *Lerner* and *Islamic Republic of Iran*, Case No. 242, Chamber 2. For a rule of customary international law in this domain see *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*) Jurisdiction and Admissibility, Judgment of 1 July 1994, para. 40. *ICJ Rep.* (1994) pp. 125-126.

[42] Full Tribunal Order of 24 May 1994, Case A15 (I:D & I:H), Doc. 1231, para. 4.

[43] *Atomic Energy Organization of Iran* and *United States*, Award No. 132-B7-1 (8 June 1984), reprinted in 6 *Iran-US CTR*, pp. 141, 145.

request. In some cases, the Tribunal has directed a party to produce the document or comment on the request. Rarely has the Tribunal given notice of adverse inference in the order directing production of the requested document. In the absence of a clear indication as to the consequence, it is obvious that misunderstandings can arise for the party expected to produce the document, especially in the first type of orders. In international arbitrations involving parties from different legal cultures and backgrounds, it is helpful for a tribunal to be clearer in its directions. Diplomatic language should not allow misunderstandings or vagueness.

As this Rule entitles the Tribunal '[a]t any time during the arbitral proceedings' to direct a party to produce evidence, it has also been misused by requesting parties for getting in late evidence they already had for some time but for lack of due diligence or foresight did not present in time with their pleadings. If the Tribunal orders the production of such a document the adverse party will either produce it or explain its inability to locate it, which in effect entitles the requesting party itself to present the document as 'only recently found.' In such a situation the Tribunal would naturally not be looking for evidence of the date when the requesting party actually found the document it allegedly did not have before. Sometimes a party might withhold a basic document throughout the course of submission of its written pleadings and evidence, thereby prompting the other party to take certain positions, while before the hearing it presents the basic document by way of a production of document request, as just indicated. While these abusive tactics are played by one party against the other at any stage of the proceedings, they are obviously more prejudicial when the request is made after the written pleadings and evidence are closed, that is, within the 2 or 3 months before the hearing, or when the document is presented by the requesting party at the hearing and characterized as 'recently found.'[44] While it may not be easy for the Tribunal to detect these abuses by private claimants, it has not attempted to do so, even as to the timing of the requests. It is obvious that such requests should principally be limited to the course of the written pleading and evidence of the requesting party, as the requested evidence is supposed to enable it to present its case, including its rebuttal evidence, in that phase and under the schedule of written pleadings established by the Tribunal in advance.

CONCLUSION

The application of the Tribunal Rules should be a rich source of jurisprudence for international arbitration, whether under UNCITRAL Rules or other arbitration rules, despite certain reservations one may have concerning the Tribunal practice.

[44] See, e.g., *Hakim* and *The Islamic Republic of Iran*, Award No. 567-953-2 (2 July 1998), paras. 5-16, reprinted in – *Iran-US CTR* –.

UNCITRAL Rules of 1976, like the International Law Commission's Model Rules on Arbitral Procedure of 1958, could have fallen in abeyance had they not been adopted and developed in the arbitration of the Iran-United States Claims Tribunal. I doubt if many people even knew of the UNCITRAL Rules before 1981, except those who had worked on them in the UNCITRAL Commission, or those who had a glance at them for educational purposes, such as myself. The UNCITRAL Model Law on International Commercial Arbitration of 1985 was drafted with our earlier experience of the UNCITRAL Rules very much in mind. This has similarly been the case not only with the preparation of the UNCITRAL Notes of 1996, but also in the drafting by the Permanent Court of Arbitration of four sets of Optional Rules, in which I was privileged to participate. These Optional Rules have closely followed the UNCITRAL Arbitration Rules. They are: (1) Optional Rules for Arbitrating Disputes between Two States (1992), (2) Optional Rules for Arbitrating Disputes between Two Parties of which only one is a State (1993), (3) Optional Rules for Arbitration Involving International Organizations and States (1996), and (4) Optional Rules for Arbitration between International Organizations and Private Persons.

The fact that the records of our decisions, from the revision of the UNCITRAL Rules to our procedural orders and awards, are public and accessible, even at WESTLAW, makes it possible for users of international arbitration of every kind to share our experience or avoid our shortcomings, some of which I have noted above.