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PERSPECTIVES

CHARLES N. BROWER*

Evidence Before International Tribunals: The Need for Some Standard Rules**

International tribunals inherently are poorly equipped for the fact-finding task. For a variety of reasons, not the least of which is the lack of standard rules of evidence to govern the submission and evaluation of evidence in international proceedings, international tribunals frequently find it extremely difficult to establish facts.

I. The Lack of Standardized Rules of Evidence

International law has no hard and fast rules governing the character or weight of evidence in international arbitrations. Further, proceedings before arbitral tribunals are subject to no “international rules of evidence” that in any manner resemble the technical rules often followed in proceedings before domestic courts—in particular, courts of the Anglo-American tradition. Indeed, in the view of one commentator the ad hoc character of most international tribunals has contributed to the slow development of a definite body of rules relating to evidence, to the extent that “[e]ach tribunal tends to be a law unto itself, the rules adopted and applied for the occasion being to a considerable degree determined by the legal background of the members of the tribunal.”¹

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1. DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 6 (photo. reprint 1971) (1939).

Arbitral tribunals essentially refrain from adopting specific rules of evidence, particularly rules that restrict the form, submission, and admissibility of evidence. As a general proposition, therefore, "rules" of evidence followed by arbitral tribunals tend to be more liberal than those followed by domestic courts. The traditional practice of international tribunals is thus to admit virtually any evidence, subject to evaluation of its relevance, credibility, and weight. The liberal practice of international tribunals to admit almost anything results from such factors as the absence of appeal, the unavailability of the "best" evidence, and the inadequacies associated with deciding cases on the basis of mere technical rules.²

II. The Rules of Evidence That Guide Proceedings

Nevertheless, arbitral tribunals can and do draw on certain principles of evidence production and evaluation in determining substantive questions submitted to them for decision. For example, members of the Iran-United States Claims Tribunal are guided by the Rules of the United Nations Commission on International Trade Law (UNCITRAL), "in accordance with" which they must "conduct [the Tribunal's] business" except to the extent modified by the governments of Iran and the United States or by the Tribunal "to ensure that this [Claims Settlement Declaration] can be carried out."³

The UNCITRAL Rules provide a framework for the presentation and evaluation of evidence that guides the parties and gives ample discretion to the arbitrators. Article 24(1) of the UNCITRAL Rules provides that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence."⁴ Once a party offers its evidence to prove the facts it relies on, article 25(6) requires the Tribunal to "determine the admissibility, relevance, materiality, and weight of the evidence offered."⁵ The combined effect of these two provisions of the UNCITRAL Rules is nonetheless to offer parties to proceedings before the Iran-United States Claims Tribunal little guidance in meeting their burden of proof.

2. Jamison M. Selby, *Fact-Finding Before the Iran-United States Claims Tribunal: The View from the Trenches*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM* 135, 141-42 (Richard B. Lillich ed., 1992) [hereinafter *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS*] (citing generally *DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 1-45, 176-96 (U. Press of Va. 1975) (1939)).

3. 20 I.L.M. 225 (1981). The Claims Settlement Declaration refers to two "Declarations" by the Government of Algeria, also called the "Algiers Accords," which embodied the agreement reached between the governments of Iran and the United States in 1981 following the hostage crisis.

4. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES art. 24, para. 1, U.N. Sales No. E.77V.6 (1976), *reprinted in* 15 I.L.M. 701, 710 [hereinafter *UNCITRAL RULES*]. The United Nations Commission on International Trade Law adopted these Rules on Apr. 28, 1976.

5. *UNCITRAL RULES*, *supra* note 4, art. 25, para. 6.

III. The Burden of Proof

Burden of proof in international procedure is grounded on the general obligation of the parties to present evidence before the adjudicating tribunal that the parties deem sufficient to prove their claims. The lack of standard "international rules of evidence," and the fact that international tribunals are liberal in their approach to the admission of evidence in no way goes "as far as to waive the burden resting upon a claimant to prove his case."⁶ In international arbitral proceedings a party making an allegation of fact has an obligation to demonstrate that fact with sufficient evidence. This principle derives from the Roman law rule of burden of proof expressed through certain maxims such as *ei qui affirmat non ei qui negat incumbit probatio* (onus of proof is on he who affirms, and not on he who denies) and *actori incumbit probatio* (the claimant carries the burden of proof).⁷ Since each party is left to decide what it must offer as evidence to prove its allegations, the level of proof is not capable of precise definition and may be safely assumed to be close to what has been called the "balance of probability" (as distinguished from the concept of "beyond a reasonable doubt" required in the United States to prove guilt in a criminal trial).⁸

IV. The Presentation of Evidence⁹

A. INTERESTED PARTY TESTIMONY

Parties resort to a variety of methods to present their evidence in proceedings before international tribunals. Although not consistently acknowledged, a distinction has developed at the Iran-United States Claims Tribunal between testimony (whether written or oral) provided by nonparty witnesses and that provided by persons considered to have an interest in the proceedings. Witnesses give "testimony" while interested parties only provide "information."¹⁰ Substantively, the distinction frequently operates to discount (though not always perceptibly) the weight given testimonial evidence provided by interested parties.¹¹ The basis for

6. *The Smith Case* (U.S. v. Ger.) (1924), reprinted in MIXED CLAIMS COMMISSION UNITED STATES AND GERMANY 471 (1925).

7. V.S. MANI, INTERNATIONAL ADJUDICATION 202 (1980).

8. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 249 (1986).

9. Adapted in part from chapter 3 of Charles N. Brower, *The Iran-United States Claims Tribunal*, 224 RECUEIL DES COURS 133, 227 (1990-V).

10. See Michael Straus, *The Practice of the Iran-U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts*, 3 J. INT'L ARB., Sept. 1986, at 57, 58-63; Howard M. Holtzmann, *Some Lessons of the Iran-United States Claims Tribunal*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS § 16.04(4) (1987); Jamison M. Selby & David P. Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211, 231 (1984).

11. Procedurally, the distinction between "witnesses" and "interested parties" has three effects. First, parties are required to give notice of all witnesses who will testify at the hearing. See TRIBUNAL RULES OF PROCEDURE art. 25, para. 2, reprinted in 2 Iran-U.S. Cl. Trib. Rep. 428 (1984). In practice the rule is construed to refer only to nonparty witnesses. Second, witnesses are required under note

such a distinction lies in the divergent legal backgrounds from which the arbitrators come. Practices with respect to interested party testimony among legal systems (notably, the common, civilian, and Islamic systems) vary dramatically. According to a member of the legal profession from a European civil law state, in his country a witness who is an officer, director, or employee of a party would never be placed under oath when testifying because "[w]e would not think of putting a person in the position where he must choose between the truth and his employer."¹² Under the Iranian view an interested party's testimony carries no weight,¹³ while the American view, derived from the modern common law rule,¹⁴ is that such testimony is fully probative.

In practice the Iran-United States Claims Tribunal has quietly resolved the issue by allowing interested party testimony from "representatives" as "information" that can be weighed against other evidence in rendering its decisions. To be sure certain arbitrators may be likely to have an ingrained prejudice against such evidence. Therefore a claimant or respondent is unwise to rely solely on the statements of interested parties when statements from disinterested persons are also available. Nevertheless, interested party testimony indisputably has influenced the outcome of decisions and, on occasion, has provided the sole basis for establishing a *prima facie* case.¹⁵

B. AFFIDAVIT EVIDENCE

Affidavit evidence, as a substitute for oral testimony, has several advantages that make it especially attractive in international arbitration. First, it is cost effec-

6 to article 25 of the TRIBUNAL RULES OF PROCEDURE to recite an oath of truthfulness prior to giving testimony at the hearing; parties and their representatives are not. *See id.* art. 25 n.6, *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 429 (1984). Third, witnesses generally are allowed in the hearing room only when testifying and not at other times during a hearing. *See id.* art. 25, para. 4, *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 428 (1984). Again, parties and their representatives are not subject to this restriction. For a discussion of the significance of these distinctions to the arbitral process, see Straus, *supra* note 10, at 62-63.

12. Charles N. Brower, *The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS*, *supra* note 2, at 147, 149.

13. *See, e.g.*, *Economy Forms Corp. v. The Government of the Islamic Republic of Iran*, 5 Iran-U.S. Cl. Trib. Rep. 1 (1983) (Mahmoud M. Kashani, dissenting).

14. Although early common law disqualified a person as a witness if he had a legal, certain, and immediate interest in the result of the lawsuit, disqualification of witnesses for interest is now almost totally abolished. *See* JACK B. WEINSTEIN ET AL., *CASES AND MATERIALS ON EVIDENCE* 233 (7th ed. 1983). The basis for the change of the rule was articulated almost a century and a half ago:

Now, plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to the truth. . . . It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of English law, not only in cases actually brought into Court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which parties silently submitted to wrongs from inability to avail themselves of proof, which, though morally conclusive, was in law inadmissible.

Id. at 385 (quoting Second Report of Her Majesty's Commissioners for Inquiry into the Process, Practice and System of Pleading in Superior Courts of Common Law 10 (1853)).

15. *See, e.g.*, *Leonard & Mavis Daley v. The Islamic Republic of Iran*, 18 Iran-U.S. Cl. Trib. Rep. 232, 242 (1988).

tive. The essential elements of testimony can be conveyed at much less cost through affidavits than by oral testimony. The parties avoid travel costs and save valuable hearing time by presenting testimonial evidence in written form rather than orally at a hearing. Second, written testimony can be carefully studied—something to which the fleeting spoken word is not as readily subject. As a consequence, arbitrators can acquaint themselves in greater detail with the facts of a case and focus on any existing factual disputes that they will need to address at a hearing. Third, affidavits can reduce the time necessary to resolve a case by detailing facts early in the proceedings and shortening the time needed for testimony at hearings. Such economy is necessary where hearing and deliberation time are limited, as is the case at the Iran-United States Claims Tribunal.¹⁶

Affidavits are not without their disadvantages. First, insight into the affiant's demeanor and candor is sacrificed.¹⁷ Second, use of affidavits precludes cross-examination (unless, of course, the affiant is produced at the hearing for such examination). Nonetheless, under certain circumstances the use of affidavits may be considered a suitable or even a preferred substitute for oral testimony. Such circumstances exist at the Iran-United States Claims Tribunal where costs of arbitration would be much greater without them and where abbreviated proceedings are encouraged.

C. ORAL TESTIMONY

Due to the abbreviated nature of most hearings, the absence of transcripts,¹⁸ and the civil law tendency to consider documentary evidence more reliable than oral testimony,¹⁹ live testimony by witnesses at a hearing generally has less significance at the Iran-United States Claims Tribunal than it might in a similar case before municipal courts. Typically, oral testimony is offered only to support affidavit evidence already submitted.²⁰ Consequently, the Iran-United States Claims Tribunal rarely relies on oral testimony as the sole basis for finding facts.

The arbitrators receive oral testimony in an inquisitional fashion not unlike the

16. See 81 AM. SOC. INT'L L. PROC. 491 (1987) (remarks of Arthur Rovine) [hereinafter Rovine]. The typical hearing in any given case lasts only one day. In more complex cases, hearings have been scheduled for up to one week. Even in the most complex cases, hearings have rarely been scheduled for longer than a week.

17. See 6 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.22[1], at 56-735 (2d ed. 1988).

18. Although article 25, para. 3, of the TRIBUNAL RULES OF PROCEDURE allows for the making of a record of a hearing if "deemed necessary by the tribunal under the circumstances of the case" or if the parties to the case have agreed, see TRIBUNAL RULES OF PROCEDURE art. 25, para. 3, reprinted in 2 Iran-U.S. Cl. Trib. Rep. 428 (1984), in practice few stenographic records have been prepared.

19. See D.W. Shenton, *Explanatory Note to Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, 10 Y.B. COM. ARB. 145, 148-50 (1985).

20. The TRIBUNAL RULES OF PROCEDURE provide that evidence of witnesses may also be presented in the form of written statements signed by them. See TRIBUNAL RULES OF PROCEDURE art. 25, para. 5, reprinted in 2 Iran-U.S. Cl. Trib. Rep. 428 (1984).

usual practice in civil law courts. The Iran-United States Claims Tribunal Rules give the arbitrators wide latitude to examine witnesses.²¹ Direct and cross-examination, as understood in the common law sense, is unusual and generally ill-advised, although the Rules permit it.

D. DOCUMENTARY EVIDENCE

Underscoring the issues raised by interested party testimony, affidavit evidence, and oral testimony is the Iran-United States Claims Tribunal's decided preference for contemporaneous documentary evidence. Reflecting to some degree the civil law tradition,²² the awards of the Iran-United States Claims Tribunal exhibit a tendency to regard documentary evidence as being more reliable than verbal testimony. As a result the claimants must meet a higher burden of proof.²³

V. The Evaluation of Evidence

While parties may present whatever evidence they deem appropriate to prove their claims, the arbitrators determine the sufficiency of the evidence proffered and have the discretion to evaluate it however they wish. In a real sense then, as stated by a former president of the Iran-United States Claims Tribunal, "the burden of proof is that you have to convince me."²⁴

The inherent power of an arbitral tribunal to examine evidence as it sees fit is long recognized. In a case in which Nicaragua challenged an arbitral award rendered by the King of Spain, the International Court of Justice stated:

The instances of "essential error" that Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question.²⁵

The Iran-United States Claims Tribunal takes full advantage of its discretion to evaluate the evidence proffered by parties. Hearsay evidence, generally not admissible in the common law tradition, is customarily accepted. In most instances the Tribunal accepts documents without establishing the foundation customarily required in the common law system.

The fact that a tribunal is the evaluator of evidence does not help the parties to a proceeding decide what evidence they should offer. The value of the available

21. Note 6(b) to article 25 of the TRIBUNAL RULES OF PROCEDURE provides: "Witnesses may be examined by the presiding member and the other members of the arbitral tribunal. Also, when permitted by the arbitral tribunal, the representatives of the arbitrating parties in the case may ask questions, subject to the control of the presiding member." *Reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 429 (1984).

22. Shenton, *supra* note 19.

23. See Rovine, *supra* note 16, at 493.

24. Selby, *supra* note 2, at 144.

25. SANDIFER, *supra* note 2, at 22 (quoting Case Concerning the Arbitral Award Made by the King of Spain on Dec. 23, 1906 (*Hond. v. Nicar.*), 1960 I.C.J. 215-16).

evidence is only as good as the arbitrator, based on his or her own value system, determines it to be. The different nationalities and legal backgrounds of arbitrators of an international tribunal²⁶ make it difficult, in the absence of prescribed rules, for a party to decide what evidence it should offer. Indeed, the arbitrators often cannot agree among themselves about what evidence is admissible or relevant. As this author has noted elsewhere:

Anyone who has watched three arbitrators, each of a different nationality and none of them having the nationality of any of the arbitrating parties or their counsel, coming from both civil and common law systems, huddled in whispered conference over an objection interposed by counsel for a party to a question being put by his adversary to a witness, will recognize the distinct clumsiness, if not downright embarrassment, inherent in the process of trying to make evidentiary rulings in international proceedings.²⁷

Leaving the determination of what evidence to submit up to the parties without any guidance can work to the detriment of some parties. As Judge Holtzmann has described:

For me it is unsatisfactory to dispose of a claim or a counterclaim, on the stated ground that a party has failed to bear its burden of proof, when an order to produce specific documents would have permitted us to decide the issue on the basis of evidence rather than lack of evidence—or more fairly to have drawn adverse inferences against a party that failed to comply with the order. Counsel may, through inadvertence or incompetence, not realize what facts the Tribunal thinks are important, and we may never really know those facts unless we ask for them. As I once wrote in a dissenting opinion, “[i]t seems unfair at the late moment of writing the Award for the majority to indicate that [the claimant] is somehow suspect for not answering questions [that] were never asked.”²⁸

More than unfair, it is egregious that a tribunal can use the liberal evidentiary regime found in international arbitral proceedings to penalize a party for having satisfied the level of proof that the tribunal had indicated would be sufficient. The point is well illustrated by *Avco Corp. v. Iran Aircraft Industries*,²⁹ in which the claimant inquired, at a prehearing conference, how it should undertake to establish amounts due on hundreds of invoices upon which it based its claim. One alternative discussed at the prehearing conference was to submit the actual invoices. Another was to engage an independent auditor to certify the existence and the amounts of the underlying invoices. Judge Mangard, presiding over an unusual proceeding

26. For example, although the Iran-United States Claims Tribunal is bilaterally established, one-third of it comprises distinguished third-country members. A chamber is made up of a member from Iran, a member from the United States, and a member from a third country. Third-country members at one time or another have come from Sweden, France, the Netherlands, Switzerland, Finland, Italy, the Federal Republic of Germany, and Argentina.

27. Brower, *supra* note 12, at 149.

28. Howard M. Holtzmann, *Fact-finding by the Iran-United States Claims Tribunal in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS*, *supra* note 2, at 101, 109.

29. See *Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200, 235-36 (1988) (Brower, J., concurring and dissenting).

in which the respondents failed to appear, indicated that the Tribunal was not "enthusiastic [about] getting kilos and kilos of invoices"³⁰ and approved the alternative of using an auditor. Three years later, when the case had been heard and finally decided, however, the Tribunal rejected a substantial part of the invoice claims, stating that the claimant's use of affidavits from its officers and independent auditor, rather than providing the invoices themselves, was insufficient to prove its claim.³¹ Thus the respondents prevailed even though they had made only a general denial of the claim and did not specifically challenge any portion of the claimant's auditor's affidavit.³²

Recognizing the evidentiary problems faced by parties and the problems inherent in a liberal evidentiary regime used in international arbitral proceedings, the Iran-United States Claims Tribunal takes certain common-sense approaches to the evaluation of evidence. For example, the Tribunal routinely applies the following principles:

1. Contemporaneous written exchanges of the parties antedating the dispute are the most reliable source of evidence;
2. The actual course of conduct between the parties prior to the dispute arising constitutes the best evidence of the proper interpretation of their contract;
3. The failure of a party to object in writing to a writing (*e.g.*, an invoice) it has received at or shortly after the time of receipt is strong evidence of its acceptance;
4. Statements of a party contradicting the position it has taken in the proceedings are strong evidence against that position; and
5. When it reasonably should be expected that certain evidence exists and that it is in the control of a party, the failure of that party to produce such evidence gives rise to a justifiable inference that such evidence, if produced, would be adverse to that party.³³

Although arbitrators of different nationalities may agree on these and other principles for evaluation of evidence, the lack of a standardized body of rules or principles to be applied by international tribunals in evaluating evidence continues to puzzle parties as to the appropriate evidence to submit and leads to evidentiary decisions that are sometimes inconsistent.

VI. The Preference for Contemporaneous Evidence

Whatever the modes of proof to which parties may resort for substantiation of their respective claims, international tribunals, generally speaking, give greater probative significance to evidence contemporaneous to the events involved in the case. An analysis of the Iran-United States Claims Tribunal's decisions readily

30. *Id.* at 236.

31. *See id.* at 208, 214.

32. *See id.* at 233 (Brower, J., concurring and dissenting).

33. Brower, *supra* note 12, at 150-51.

reveals its preference for contemporaneous documentation over secondary means of proving the facts of a case. In *Woodward-Clyde Consultants v. Iran* the Tribunal dismissed a counterclaim filed by the respondent because the Tribunal found it impossible to reconcile one statement made at about the time of the events in question with another statement made in the course of litigation, and it concluded that the second statement was the less persuasive.³⁴

Most typically, the Iran-United States Claims Tribunal relies heavily on documents prepared in the ordinary course of business and not in contemplation of litigation. Contemporaneous documentation has proven difficult to find for many parties in cases brought before the Tribunal. As a result of the Iranian revolution and the ensuing chaos, many American individuals and companies left Iran quickly without an opportunity to take with them the documentation that would be vital to their eventual claims. Likewise, many Iranian litigants have asserted that they were incapable of providing documents because they had been either lost or destroyed during the revolution. The Tribunal has rendered opinions on the basis of "convincing, though uncorroborated" evidence where circumstances arising from the revolution made it difficult to "obtain[] corroborative evidence from those who might have witnessed the events described."³⁵ In *PepsiCo v. Iran* the claimant seeking payment for cola-concentrate that was shipped and delivered did not have access to documents confirming the exact date that the cola-concentrate arrived in port and was therefore unable to establish whether late charges applied. The Tribunal presumed that the cola-concentrate arrived at the port in the average time usually necessary to ship goods from the United States to Iran.³⁶ Dissenting Arbitrator Ameli urged that on the basis of article 24(1) of the UNCITRAL Rules, the claimant, to be able to demand payment for the cola-concentrate, should have been required to prove the dates of arrival of the shipments by contemporaneous documentary evidence rather than rely on assumptions based upon the average time usually necessary for goods to be transferred from the United States to Iran.³⁷

Where a party fails to maintain contemporaneous records that subsequently prove vital in litigation, or access to such records is obstructed, the party must find other ways to establish the facts upon which it bases its claim. In such circumstances, it is important that parties need to be able to anticipate to what extent they may rely on affidavit testimony to establish a prima facie case.

34. STEWART A. BAKER & MARK D. DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 115 (1992) (construing *Woodward-Clyde Consultants v. The Gov't of the Islamic Republic of Iran*, 3 Iran-U.S. Cl. Trib. Rep. 239, 249 (1983)).

35. *Leonard & Mavis Daley v. The Islamic Republic of Iran*, 18 Iran-U.S. Cl. Trib. Rep. 232, 242 (1988).

36. *PepsiCo, Inc. v. The Gov't of the Islamic Republic of Iran*, 13 Iran-U.S. Cl. Trib. Rep. 3, 24 (1986).

37. *Id.* at 55 (Ameli, Arb., dissenting).

VII. The Inferences That May Be Drawn

With the power to evaluate evidence however it sees fit, the Iran-United States Claims Tribunal, as is the case with other international arbitral tribunals, is free to make presumptions or inferences based on what the parties offer or fail to offer. An example would be the presumption of the Tribunal in *PepsiCo v. Iran* that cola-concentrate arrived in port in Iran in the average time it took goods to travel from the United States to Iran notwithstanding the absence of any evidence actually establishing the date of arrival of the cola-concentrate.

In many such situations the Iran-United States Claims Tribunal has been willing to infer a fact despite the lack of conclusive evidence. For example, the Tribunal only has jurisdiction over a claim by an American corporation if the corporation can prove that it was organized under the law of a state of the United States during the entire period from the time the claim arose until the date of the Claims Settlement Declaration—January 19, 1981. The corporation must prove the fact of organization by a certificate issued by officials of the state of incorporation.³⁸ The Tribunal has ordered, nonetheless, that

[i]f the certificate shows that the corporation was organized before the claim arose, if the date of the certificate is after January 19, 1981, and if no convincing rebuttal evidence is produced the [Tribunal] will draw the reasonable inference that the corporation was continuously in existence from the date the claim arose until at least January 19, 1981.³⁹

The Tribunal thus was willing to find a critical fact based on inferences from other facts, without requiring proof of every detail.

While the Iran-United States Claims Tribunal has drawn inferences in certain circumstances based on the unavailability of contemporaneous documentation, as a whole it has been hesitant to draw inferences or shift burdens of proof even when contemporaneous documentation was available but the party used other contemporaneous documentary evidence to fill in the gaps. For instance, in *Arthur J. Fritz & Co. v. Sherkate Tavonie Sherkathaye Sakhtemanie* (Cooperative Society of Construction Companies),⁴⁰ Chamber Three considered the issue of whether for jurisdictional purposes Iran controlled a purchasing cooperative of Iranian construction companies. The claimant asserted evidence of control in three ways: (1) the involvement of a Revolutionary Public Prosecutor in the cooperative; (2) Iran's control of a number of the cooperative's members; and (3) the requisitioning by the Iranian Ministry of Roads and Transportation of a number of trucks from the cooperative.⁴¹ In struggling with the first contention, the majority stated:

[T]he Tribunal's assessment of the facts would be facilitated had [the cooperative's] directors' reports over the period from 1979 through 1984 been submitted to the Tribu-

38. Holtzmann, *supra* note 29, at 114 (discussing *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, 1 Iran-U.S. Cl. Trib. Rep. 455, 458-59 (1982)).

39. *Flexi-Van*, *supra* note 38, at 458-59.

40. 22 Iran-U.S. Cl. Trib. Rep. 170 (1989).

41. *Id.* at 175-77.

nal. Although it did not preclude it from introducing the 1985 [Board of Directors] Report, the Claimant must be regarded as having been at a disadvantage in attempting to obtain such documents. As suggested by the Respondents' submission of the 1986 directors' report and meeting minutes for the years 1979 through 1987, it is likely that the Respondents were in a position to produce these reports.⁴²

The majority, clearly troubled by the failure of the respondents to produce evidence in its possession that might have clarified the issue, nevertheless passed up the opportunity to plug the evidentiary gap and refused to draw an inference against the respondents. Judge Allison dissented thus:

Although it seems obvious that the "reports of the previous years" referred to in the [cooperative's] Report would have provided the Tribunal with insight into what had taken place during and after 1979 when the Revolutionary Prosecutor took "control of the assets" of the [cooperative], Respondents did not provide the Tribunal with copies of these reports. This is all the more striking in light of the fact that the Respondent [cooperative] did file with the Tribunal copies of minutes of the [cooperative's] members. . . . These minutes were presented by [the cooperative] to indicate that during those years meetings of the members of the [cooperative] were being held and the members were taking the actions ordinarily taken at such meetings. . . . What Respondents failed to provide, however, were the reports of the Board of Directors that were presented to these same meetings. . . . The fact that Respondents saw fit to provide the Tribunal with copies of the [skeletal] routine minutes and to withhold the [Board of Director] informational reports that are incorporated in them by reference leads to a compelling inference that such materials would not have served the Respondents' purposes in this Case. When a party in possession of evidence that is clearly relevant and would be of assistance to the Tribunal opts to make a selective presentation apparently designed not to illuminate the facts but only to support its own arguments, that party assumes the risk that the Tribunal will reach its own conclusions as to the content of the material withheld.⁴³

The potential that adverse inferences may be drawn by the Tribunal is an effective tool in compelling the parties to produce evidence. In *INA Corp. v. Iran*, for example, the Iran-United States Claims Tribunal ordered the respondent to produce the data and underlying documents used to prepare an audit report.⁴⁴ The respondent disobeyed the order on the basis that the material requested was "too voluminous to be conveniently assembled."⁴⁵ The Tribunal accepted the audit report, but noted "the lack of supporting documentation" when it assessed the evidentiary weight of the report.⁴⁶ In another case the Tribunal found for the claimant on an evidentiary point when it learned that the respondent had falsely claimed not to have a document that it had been ordered to produce.⁴⁷

42. *Id.* at 180.

43. *Fritz, supra* note 40, at 189-90 (Allison, J., dissenting) (citations omitted). Judge Allison went on to conclude that even without making such an inference, sufficient evidence of control had been presented. *Id.* at 190-93.

44. *INA Corp. v. The Gov't of the Islamic Republic of Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373, 376-77 (1985).

45. *Id.* at 377.

46. *Id.* at 382.

47. *Hidetomo Shinto v. The Islamic Republic of Iran*, 19 Iran-U.S. Cl. Trib. Rep. 321, 325-28 (1988).

VIII. The Need for Standardized Rules of Evidence

As the issues addressed above illustrate, a need persists in international arbitration for some degree of standardization of rules of evidence. Although the flexibility of evidentiary regimes in the context of international arbitral proceedings allows arbitrators to tailor evidentiary requirements for a particular case, often those requirements are not communicated clearly to the parties who however unwittingly take comfort in the adequacy of their evidentiary submissions. Although some standard rules would be helpful, comprehensive rules are not necessary and probably would be unwise; a degree of simplicity and flexibility would be more desirable than the alternative. Yet, some form of standard rules could answer some basic evidentiary questions that far too frequently ensnare those upon whom burdens of proof are placed.

Steps in this direction have been taken since the establishment of the Iran-United States Claims Tribunal. The Council of the International Bar Association adopted Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration on May 28, 1983. Independently, a working party established by the International Council for Commercial Arbitration has been studying guidelines to be consonant with the UNCITRAL Rules. In this regard it is perhaps justified to entertain some hope that just as a *lex mercatoria* has developed to a certain extent to provide common principles of international commercial dealing, a *lex evidentiaria* is emerging that will embrace common principles for the submission of evidence by parties and for the evaluation of evidence by international tribunals.⁴⁸

48. Brower, *supra* note 12, at 150.