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# A Data Investigation of the Iran-US Claims Tribunal's Jurisprudence

Damien Charlotin (University of Cambridge) · Thursday, May 30th, 2019 · Young ITA

During its most active years, between 1982 and 1994, the nine members of the Iran-US Claims Tribunal (at all times 3 from Iran, 3 from the US, and three "neutral" arbitrators) ruled on hundreds of disputes, sometimes involving particularly fraught points of international law, all this while applying and interpreting the UNCITRAL Rules of arbitration (lightly amended) in ways that have informed their reception by countless other tribunals since.

Unfortunately, now that the Tribunal has entered its "long twilight", this impressive legacy is too often forgotten, while the value of the tribunal's experience is sometimes challenged on account of its allegedly "political" nature.

Crucially, many of the criticisms the Tribunal has attracted then and now (focusing for instance on the appointment of the Tribunal's members by the parties, or the arbitrators' practice of issuing concurring and dissenting opinions) have found echoes in the current criticisms aimed at investment tribunals.

Taking another look at the Tribunal's output, we find that the outcomes of the matters decided by the Tribunal (in some 581 decisions on jurisdiction or merits) were far from being stacked against Iran, as sometimes believed.

In particular, after the first few years of the tribunal's life, and therefore after the "easy" cases and decisions on jurisdiction (usually favourable to US claimants) have been rendered, disputes proved quite open to be won or lost by Iran or the US, and ultimately US claimants only won slightly more than 55% of all final awards on the merits.

This score is striking when one considers that the Tribunal heard substantially more disputes brought by US claimants than Iranian ones. In such asymmetrical circumstances, it would be a mistake to consider that a 50/50 outcome rate should necessarily be the proper benchmark – a fact often forgotten or overlooked by some current detractors of investment arbitration, in which the asymmetry is even greater. Besides, the bulk of Iran's financial liabilities ($1.5 out of an estimated total of $2 billion) stemmed from settlements endorsed by the Islamic Republic.

In a time of concerns about inconsistency among investment tribunals, it is also interesting to observe that the Tribunal's three chambers, ruling on roughly the same number of cases, did not display sharp differences on relevant metrics (e.g., success rate for Iranian and US claimants). A

network analysis of the decisions cited by each chamber and the Full Tribunal shows that no development of a chamber-specific jurisprudence, hinting at a great degree of coordination between Tribunal members.

A fairly large majority of the Tribunal's decisions, however, were accompanied by individual opinions, concurring or dissenting, penned by US and Iranian arbitrators (with the occasional opinion by a "neutral"). This reflects the fact that 320 out of the 581 decisions were adopted by majority. While some arbitrators hoped that, in writing a dissent, they would lessen the authority of the majority award and its role as a future precedent, it might have actually strengthened them: majority awards are nearly three times as long as unanimous ones, and cited twice as much in later cases.

Individual opinions were however also a way for every arbitrator to air their opinions and, together with votes, build coalitions. For instance, an analysis of the citations to individual opinions shows distinct blocs of US arbitrators citing other US arbitrators, and Iranian arbitrators citing their co-nationals – with limited engagement between the two blocks.

Apart from the Tribunal's own jurisprudence, the tribunal's members drew from a wide variety of sources in analysing and applying the law – with interesting patterns in this respect. For instance, the Tribunal's own precedents accounted for 85% of all citations in awards and decisions, against 63% of all citations in dissenting opinions and only 37.5% in concurring opinions – where doctrinal sources, ICJ precedents and other international arbitral awards played a significantly larger role.

Remarkably, these patterns differ little between Iranian and US arbitrators – although the exact sources cited differed greatly. Tellingly, however, US arbitrators were twice as likely to cite precedents from the few (but growing) existing ICSID cases as the Iranian arbitrators.

In order to probe further the main trends of the Tribunal's jurisprudence, a topic analysis over the awards and individual opinions is required. Here as well, the analysis revealed some interesting patterns:

- The Tribunal chose to move the discussion of certain topics to certain points in time, as when it decided to postpone controversial cases about dual nationals to the 90s;
- Opinions, whoever their author, are much more likely to focus on more "abstract" legal matters such as "interpretation" or "applicable law", whereas most discussions of nut-and-bolts contractual matters or counterclaims are found in awards and decisions;
- Questions of "evidence" (standard, weight, etc.), however, are quite prevalent in individual opinions, reflecting the fact that the Tribunal never really agreed on clear principles in this respect and this was one way for arbitrators to criticise the majority's findings; and
- Opinions by US and Iranian arbitrators differ in their centres of interest, with Iranian opinions more likely to discuss, for instance, notions of unjust enrichment, while US opinions gave a slightly stronger emphasis on questions of procedure.

Another point of discussion relates to the frequent claim that the tribunal has been a "political" organ due to its appointment method.

Certainly, there is a lot of empirical truth to back up the intuitions that party-appointed arbitrators, and notably the Iranian ones, (i) voted predominantly, if not always, for the party that appointed them; (ii) were somewhat more likely to cite precedents that favoured their appointing party; and

(iii) mostly cited opinions by arbitrators of the same nationality.

However, to go from these patterns to the idea that the Tribunal was "political", or to discount the legal value of the Tribunal's precedents, is a *non sequitur*. To the contrary, the frank divergence of views between the two blocks of arbitrators might have had the effect of strengthening the tribunal's majority decisions.

Ultimately, the fact that the tribunal handed down hundreds of awards, despite (or thanks to) the frequent and, sometimes, harsh individual opinions of its arbitrators, for an overall not-too-unbalanced outcome, strengthens rather than undermines the merits of the system of party appointment. It certainly should put the Tribunal on our radar as one successful experience of international and arbitral dispute-settlement, and prompt us to further study this experience and its legacy.

*This post is a summary of the paper on "A Data Analysis of the Iran-Us Claims Tribunal's Jurisprudence – Lessons for International Arbitration Today", authored by* ***Damien Charlotin****, Ph.D. candidate at Cambridge University, UK, and to be published in ITA in Review. The paper won the Young ITA Writing Competition and Award "New Voices in International Arbitration" (2018-2019). The Competition is supported by Wolters Kluwer.*

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