

1999

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Repository Citation

Combs, Nancy Amoury, "Toward a New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal" (1999). *Faculty Publications*. 1503.

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TOWARD A NEW UNDERSTANDING OF ABUSE OF NATIONALITY IN CLAIMS BEFORE THE IRAN-UNITED STATES CLAIMS TRIBUNAL

*Nancy Amoury Combs**

I. INTRODUCTION

In January 1981, Iran and the United States adhered to the Algiers Declarations,¹ a treaty which secured the release of the American hostages who had been held in Iran for the previous fourteen months and which created the Iran-United States Claims Tribunal. The Tribunal was established, among other things, to arbitrate the claims of United States nationals against Iran,² and it has disposed of nearly 4000 cases in its nearly 20-year history.³ Among the most controversial of those cases have been those brought by dual Iranian-United States nationals; that is, by claimants who are nationals of both Iran, under Iranian law, and of the United States, under United States law.⁴ In its influential Case No. A18, the Full Tribunal⁵ determined that it had jurisdiction over the claims

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¹ The term Algiers Declarations refers to the Declaration of the Government of the Democratic and Popular Republic of Algeria [hereinafter General Declaration], Jan. 19, 1981, *reprinted in* 1 Iran-U.S. C.T.R. 3 and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran [hereinafter Claims Settlement Declaration or CSD], Jan. 19, 1981, *reprinted in* 1 Iran-U.S. C.T.R. 9.

² The Tribunal also has jurisdiction over the claims of Iranian nationals against the United States, CSD, *supra* note 1, at Art. II, para. 1; over claims of Iran and the United States "against each other arising out of contractual arrangements between them for the purchase and sale of goods and services," *id.* at Art. II, para. 2; and over disputes concerning the interpretation of the General Declaration, *id.* at Art. II, para. 3, and the Claims Settlement Declaration, *id.* at Art. VI, para. 4.

³ GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 1, n.2 (1996).

⁴ Of the approximately 450 non-bank claims of more than \$250,000 filed against Iran, more than 100 were claims brought by dual Iranian-United States nationals. *See id.* at 54.

⁵ The "Full" Tribunal refers to a panel consisting of all nine Tribunal arbitrators. Cases brought by Iran or the United States concerning the interpretation of the Algiers Declarations or concerning certain large contractual disputes between the two governments are heard by the Full Tribunal while cases brought by United States nationals or Iranian nationals — the "private" claims — are heard by one of the Tribunal's three chambers. *Id.* at 8. Each of the three Chambers consists of three arbitrators, one from Iran, one from the United States, and one from a third country. *Id.* at 7-8. *See also* REVOLUTIONARY DAYS: THE IRAN HOSTAGE CRISIS AND THE HAGUE CLAIMS TRIBUNAL, A LOOK

of dual Iranian-United States nationals against Iran so long as the claimant's dominant and effective nationality was that of the United States.⁶ At the same time, the Tribunal recognized the risk that certain dual-national claimants might attempt "to have their cake and eat it too." That is, they might bring their claims before the Tribunal on the basis of their United States nationality while, at the same time, seeking compensation for property that they had been able to acquire only on the basis of their Iranian nationality. Consequently, in Case No. A18 and in a series of cases decided by specific Tribunal chambers, the Tribunal developed an equitable principle known as "the caveat," which is an affirmative defense that can justify the dismissal of an otherwise meritorious claim.

In determining whether or not the caveat should apply, the Tribunal has historically focused on questions concerning (1) the property for which the claimant seeks compensation, and in particular, whether its ownership is reserved by law to Iranian nationals; and (2) the claimant's behavior, particularly in acquiring that property. The Tribunal's most recent decision in *Sabet and The Islamic Republic of Iran*,⁷ however, broke new ground by considering in addition the Claimants' "status" under Iranian law, that is, the capacities and incapacities Iranian law imposes upon claimants based on who they are, not what they have done. In particular, in *Sabet*, the Tribunal took note of the fact that Iranian law imposes Iranian nationality on broad segments of the population, and it prohibits many of those it deems to be Iranian from renouncing that Iranian nationality.⁸

As will be explained below, a claimant's inability to renounce Iranian nationality is highly relevant to the proper application of the caveat; thus, the Tribunal's incorporating that factor into its caveat analysis in *Sabet* is a welcome development. This article suggests, however, that the Tribunal should go further. The Tribunal has since 1993 utilized a two-pronged test to determine if the caveat should apply to a claim; according to the Tribunal, the caveat will apply if (1) the claim is for benefits which are reserved by law to Iranian nationals; or (2) the claimant has otherwise abused his nationality in such a way as to justify barring his claim. In

BACK 119-20 (Andreas F. Lowenfeld, et al. eds. 1999) (presentation of Gunnar Lagergren, first President of the Tribunal).

⁶ Case No. A18, Decision No. DEC 32-A18-FT (6 Apr. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 251, 265 [hereinafter Case No. A18]. For discussions of that decision, see Peter E. Mahoney, Comment, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 VA. J. INT'L L. 695 (1984); Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597 (1984).

⁷ *Aram Sabet and The Islamic Republic of Iran*, Award No. 593-815/816/817-2 (30 June 1999).

⁸ Individual judges have referred to the difficulties of renouncing Iranian nationality in concurring opinions, *see* Concurring Opinion of Richard M. Mosk to Decision in Case No. A/18 (10 Apr. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 269, 272-73; Concurring Opinion of George H. Aldrich, Award No. 544-298-2, n.1 (22 Jan. 1993), but before *Sabet*, the Tribunal had never expressly incorporated the factor into its caveat analysis.

Sabet, the Tribunal considered the Claimants' inability to renounce their Iranian nationality in its analysis of the second prong of the caveat test — the prong that has proven of limited application in Tribunal jurisprudence. However, both logic and equity demand a more central role for this factor; in particular, the Tribunal should consider a claimant's inability to renounce Iranian nationality in its analysis of the more-important first prong of the caveat test.

Part II of this article describes Case No. A18, its articulation of the caveat, and two concurrences to Case No. A18 that address and attempt to clarify the caveat. Part II concludes with a summary of the relevant provisions of Iranian nationality law. Part III traces the caveat's development in seven key cases that laid the foundation for the Tribunal's decision in *Sabet*: *Esphahanian*,⁹ *Schott*,¹⁰ *Saghi*,¹¹ *Khosrowshahi*,¹² *Karubian*,¹³ *Aryeh*,¹⁴ and *Davidson*.¹⁵ These cases reveal the concerns that motivated the Tribunal to create the caveat, and because they feature a variety of diverse claims and claimants, they show the caveat's doctrinal development leading to *Sabet*. Part IV describes *Sabet's* caveat analysis, and Part V argues that, while *Sabet* took a step in the right direction by considering the Claimants' inability to renounce their Iranian nationality even in a limited fashion, that inability is relevant in ways not considered by *Sabet*. Part V suggests an analytical framework for understanding that relevance and for applying it to future cases before the Tribunal and before other Tribunals faced with similar issues.

II. THE TRIBUNAL'S DECISION IN CASE NO. A18 AND ITS CAVEAT

The controversial question facing the Full Tribunal in Case No. A18 was whether it had jurisdiction over the claims of dual Iranian-United States nationals. The United States pointed to the relevant text of the Claims Settlement Declaration¹⁶ (the document establishing the Tribunal)

⁹ Nasser Esphahanian and Bank Tejarat, Award No. 31-157-2 (29 Mar. 1983), *reprinted in* 2 Iran-U.S. C.T.R. 157.

¹⁰ Robert R. Schott and Islamic Republic of Iran, Award No. 474-268-1 (14 Mar. 1990), *reprinted in* 24 Iran-U.S. C.T.R. 203.

¹¹ James M. Saghi and Islamic Republic of Iran, Award No. 544-298-2 (22 Jan. 1993).

¹² Faith Lita Khosrowshahi and Islamic Republic of Iran, Award No. 558-178-2 (30 June 1994).

¹³ Rouhollah Karubian and The Government of the Islamic Republic of Iran, Award No. 569-419-2 (6 Mar. 1996).

¹⁴ Moussa Aryeh and The Islamic Republic of Iran, Award No. 583-266-3 (25 Sep. 1997).

¹⁵ George E. Davidson (Homayounjah) and The Government of the Islamic Republic of Iran, Award No. 585-457-1 (5 Mar. 1998).

¹⁶ The Claims Settlement Declaration grants the Tribunal jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," CSD, *supra* note 1, at Art. II, para. 1, *reprinted in* 1 Iran-U.S. C.T.R. at 9, and it defines a "national" of Iran or of the United States," *inter alia*, as "a natural person who is a citizen of Iran or the United States" *id.* at Art. VII, para. 1, *reprinted in* 1 Iran-U.S. C.T.R. at 11.

to argue that the Tribunal's jurisdiction extended to the claims of all United States nationals, regardless of whether they were also nationals of Iran.¹⁷ Iran pointed to that same text to argue that it prohibited jurisdiction over dual nationals.¹⁸ Over the vehement dissent of the Tribunal's three Iranian arbitrators,¹⁹ the Tribunal adopted the "dominant and effective nationality" standard:²⁰ it held that the Tribunal "has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until January 19, 1981 [the date of the signing of the Algiers Declarations] was that of the United States."²¹ The Tribunal went on to conclude its decision with what it called "an important caveat": "In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim."²² The Full Tribunal said nothing further about the caveat, but Judge Mosk and Judge Riphagen each issued a concurring opinion addressing it.

Judge Mosk understood the Tribunal's rather mysterious caveat to indicate that "the use by a United States citizen of his or her Iranian nationality in a fraudulent or other inappropriate manner might adversely affect the claim by that person."²³ Judge Mosk went on to suggest, however, that a claimant's alleged misuse of Iranian nationality should be considered in light of the fact that "Iranian law imposes Iranian nationality on a broad spectrum of people, makes it very difficult to renounce that nationality and drastically penalizes persons who succeed

¹⁷ Case No. A18, *supra* note 6, reprinted in 5 Iran-U.S. C.T.R. at 256.

¹⁸ *Id.* at 254. Iran claimed, in addition, that international law on the exercise of diplomatic protection prohibits claims by persons who possess the nationality of both the claimant and the respondent states. *Id.* at 255-56.

¹⁹ See Dissenting Opinion of the Iranian Arbitrators in Case A/18 Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals against the Government of Iran (10 Sept. 1984), reprinted in 5 Iran-U.S. C.T.R. 275. Calling the decision "deplorable," *id.* at 277, the Iranian arbitrators maintained that the Tribunal had "fallen into the hands of a group of 'professional' arbitrators who are concerned, not with the quality of their decisions, or with the rights and wrongs of the parties, but with the quantity of their decisions, made to satisfy their political and materialistic inclinations," *id.* at 336. The Decision also sparked a vitriolic response from Iran's then-Prime Minister, Mr. Musavi, who alleged that the United States, because of "its treacherous nature, . . . tried to assert its arrogant influence on" the Tribunal and thereby corrupted it. Statement by the Prime Minister of Iran, Mr. Musavi, Regarding the Tribunal's Decision in Case A/18, (24 Apr. 1984) reprinted in 5 Iran-U.S. C.T.R. 428, 429 [hereinafter Statement of Mr. Musavi].

²⁰ In doing so, the Tribunal relied heavily on the *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 and on the *Mergé Case* (U.S. v. Italy) 14 R.I.A.A. 235 (1955), decided by the Italian-United States Conciliation Commission.

²¹ Case No. A18, *supra* note 6, reprinted in 5 Iran-U.S. C.T.R. at 265.

²² *Id.* at 265-66.

²³ Concurring Opinion of Richard M. Mosk to Decision in Case No. A/18 (10 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 269, 272.

in doing so.”²⁴ Judge Riphagen likewise suggested taking into consideration the “‘cause’ of dual nationality” and stated that “no international protection is given to a dual national as regards rights acquired by him through the use of his ‘other’ nationality, if such rights are validly reserved to its citizens by the other state.”²⁵

Before turning to the Tribunal’s development of the caveat, a brief summary of the Iranian nationality law to which Judge Mosk alluded provides a necessary background. Article 976 of the Iranian Civil Code imposes Iranian nationality on a wide range of individuals, including, among many others, women of foreign nationality who marry Iranian men and persons born to Iranian fathers, no matter where they are born.²⁶ Once Iranian nationality is imposed, Article 988 of the Iranian Civil Code makes it difficult to renounce. Under the least restrictive circumstances, an Iranian national seeking to renounce his Iranian nationality must meet several strict requirements.²⁷ Moreover, Iranian law prohibits certain Iranian nationals from renouncing their Iranian nationality under any circumstances. For instance, children under 25 years of age with Iranian fathers cannot renounce their Iranian nationality,²⁸ nor, apparently, can women who are married to Iranian men.²⁹ Further, Iranian law does not recognize dual nationality;³⁰ it considers a dual national’s foreign nationality to be “null and void” and therefore recognizes only the dual national’s Iranian nationality.³¹ Thus, a

²⁴ *Id.* at 272-73.

²⁵ Concurring Opinion of Willem Riphagen (11 Apr. 1984), *reprinted in* 5 Iran-U.S. C.T.R. 273, 274.

²⁶ THE CIVIL CODE OF IRAN, Art. 976(2) and (6) (M.A.R. Taleghany, trans., 1995).

²⁷ For instance, he must, among other things, obtain permission from the Council of Ministers and must undertake “in advance” to transfer all his immovable property in Iran to Iranian nationals within one year from his renunciation. *Id.* Art. 988(2) and (3).

²⁸ *Id.* Art. 988(1). A child under the age of 25 with an Iranian father might be able to renounce his Iranian nationality at the same time that his father renounces his own Iranian nationality, but only if the Council of Ministers’ permission for the father includes the child as well. *Id.* Art. 988(3).

²⁹ Article 986 of the Iranian Civil Code permits a “non-Iranian wife who becomes Iranian by marriage” to revert to her former nationality after the divorce or death of her husband provided that she notifies the Ministry of Foreign Affairs in writing. However, a widow who has children from her late husband cannot revert to her former nationality while the children are under eighteen years of age. *Id.* The provision gives no hint that a woman currently married to an Iranian man can renounce her Iranian nationality under any circumstances. Further, Article 988 of the Iranian Civil Code begins by stating that “Iranian nationals may not abandon their nationality except on the following conditions.” Although paragraph (3) indicates that a woman married to an Iranian man might be able to renounce her Iranian nationality at the same time that her husband renounces his, if the Council of Ministers’ permission for the husband includes the wife, none of the “conditions” referred to above suggests that a woman married to an Iranian man can individually renounce her Iranian nationality.

³⁰ *See* Leila Danesh Arfa Mahmoud and The Islamic Republic of Iran, Award No. 204-237-2, para. 20 (27 Nov. 1985), *reprinted in* 9 Iran-U.S. C.T.R. 350, 354.

³¹ THE CIVIL CODE OF IRAN, *supra* note 26, at Art. 989. That article provides in part: “Any Iranian national who has acquired foreign nationality after the solar year 1280 A.H. (1901-2) without observing the legal requirements, shall have his or her foreign nationality declared null and void and shall be regarded as an Iranian subject.” *See also* Zaman Azar Nourafchan and The Islamic Republic

dual national who seeks to transact business or acquire property in Iran must do so in his capacity as an Iranian national.

III. CAVEAT JURISPRUDENCE BEFORE *SABET*

A. *The Genesis of the Caveat*

The caveat had its origin in Case No. A18's precursor, *Nasser Esphahanian* and *Bank Tejarat*,³² in which Chamber Two adopted the dominant and effective nationality standard a year before the Full Tribunal considered the question. To its decision, Chamber Two, like the Full Tribunal, added "an important caveat," namely that

[t]here is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an individual disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him.³³

With this phrasing, the Tribunal expressed its concern as to both the kind of benefits for which the claimant was claiming — benefits available only by virtue of the non-dominant nationality — and with the claimant's behavior in obtaining those benefits — his disguise of his dominant and effective nationality.³⁴

Although the Full Tribunal decided Case No. A18 a year after *Esphahanian*, in 1984, it did not expressly apply the caveat until 1993.³⁵ In the meantime, however, it decided a few cases that, as it subsequently phrased it, contained "elements of the caveat."³⁶ One of these, *Robert R.*

of Iran, Award No. 550-412/415-3, para. 30 (19 Oct. 1993) (Iran "invok[ed] provisions of the Iranian Civil Code [to prove] that it does not recognize the foreign nationality of its nationals, whether acquired by naturalization or by birth on foreign soil").

³² Award No. 31-157-2 (29 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 157.

³³ *Id.* at 166. For a critique of *Esphahanian* and a discussion of various aspects of the caveat from the perspective of one of the Tribunal's Iranian arbitrators, see Mohsen Aghahosseini, *The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections*, 10 LEIDEN J. INT'L L. 21 (1997).

³⁴ Chamber Two also considered the caveat in *Ataollah Golpira* and *Islamic Republic of Iran*, Award No. 32-211-2 (29 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 171, which was filed the same day as *Esphahanian*. Golpira, a dual national, sought compensation for the expropriation of certain shares of stock. Golpira's share certificates included references to his Iranian ID card number; however, Chamber Two concluded that, because the shares were available to non-Iranians, "the mere fact that Golpira's Iranian ID card number appears on his share certificates does not mean that he concealed his American nationality in order to obtain benefits available only to Iranians." *Id.* at 174.

³⁵ In response to the Tribunal's decision in Case No. A18, the Government of Iran announced that it would "boycott any session" of the Tribunal involving dual national claimants. Statement of Mr. Musavi, *supra* note 19, at 430. The Tribunal thereafter delayed consideration of the dual national claims, and in time Iran decided to participate fully in those cases. ALDRICH, *supra* note 3, at 495-96. See also, Jamison M. Selby, *State Responsibility and the Iran-United States Claims Tribunal*, 83 AM. SOC. INT'L L. PROC. 224, 242 (1989) (noting in 1989 that "Iran's strength of feeling on the question of dual nationality" is shown by the fact that the Tribunal had not, as of that date, made any awards to dual national claimants).

³⁶ James M. Saghi and *Islamic Republic of Iran*, Award No. 544-298-2, para. 52 (22 Jan. 1993).

Schott and Islamic Republic of Iran,³⁷ illustrates well the Tribunal's understanding of the caveat as set forth in *Esphahanian*. The Claimant, Robert Schott, was a sole United States national who sought compensation for, among other things, the expropriated shares of an Iranian bank. The shares had been registered in the name of Schott's daughter until January 1982, when she transferred her interests to Schott.³⁸ Schott admitted that, at the time he purchased the shares, he could not have placed them in his own name because only 35% of the bank's shares could be held by foreigners, and this limit had already been reached.³⁹ So, Schott placed the shares in the name of his daughter, who was a dual Iranian-United States national, and she held the shares as an Iranian.⁴⁰ In addition, she signed a statement promising that if she were to surrender her Iranian nationality, she would transfer the shares to another Iranian.⁴¹ In fact, because she had acquired her Iranian nationality by marrying an Iranian man, she could not have surrendered her Iranian nationality while remaining married to her husband.

For the Tribunal to have jurisdiction over a claim against Iran, the claim must be "owned continuously" by a United States national from the date that the claim arose to the date of the Algiers Declarations;⁴² thus, Schott had to prove that his daughter — the owner of his expropriation claim at the time the claim arose — was a dominant and effective United States national. The Tribunal never mentioned the caveat by name, but it did cite its reference in Case No. A18 and in *Esphahanian* and held, on the basis of the above facts, that Schott was "estopped from arguing that [his daughter's] dominant and effective nationality was American for the purpose of the Tribunal's jurisdiction over this portion of the claim."⁴³

Although the Tribunal later clarified that the caveat *per se* could not be applied to the claims of sole United States nationals such as Schott,⁴⁴ *Schott* otherwise seems a textbook application of *Esphahanian's* understanding of the caveat. Schott wanted to purchase certain bank shares that were unavailable to him because they were reserved to Iranian nationals. To evade this restriction, he placed the shares in the name of his dual-national daughter, who owned them as an Iranian. In the words of *Esphahanian*, Schott therefore can be considered to have disguised both his own nationality (by placing the shares in his

³⁷ Award No. 474-268-1 (14 Mar. 1990), *reprinted in* 24 Iran-U.S. C.T.R. 203 [hereinafter Schott].

³⁸ *Id.* para. 19, *reprinted in* 24 Iran-U.S. C.T.R. at 208-09.

³⁹ *Id.*

⁴⁰ *Id.* paras. 4, 19, 43, *reprinted in* 24 Iran-U.S. C.T.R. at 205, 208-09, 218.

⁴¹ *Id.* para. 43, *reprinted in* 24 Iran-U.S. C.T.R. at 218.

⁴² CSD, *supra* note 1, at Art. II, para. 1, and Art. VII, para. 2, *reprinted in* 1 Iran-U.S. C.T.R. at 9, 11.

⁴³ Schott, *supra* note 37, at para. 44, *reprinted in* 24 Iran-U.S. C.T.R. at 218.

⁴⁴ Concurring Opinion of George H. Aldrich, Award No. 544-298-2, para. 4 (22 Jan. 1993).

daughter's name) and his daughter's nationality in order to obtain benefits reserved to Iranian nationals.

B. *Creation of the Two-Pronged Test*

It was not until three years later, in *James M. Saghi and The Islamic Republic of Iran*,⁴⁵ that the Tribunal expressly applied the caveat to the claim of a dual national.⁴⁶ After thoroughly canvassing the earlier cases as well as Judge Mosk's and Judge Riphagen's concurrences in Case No. A18, the Tribunal summarized its conclusions and, in the process, established the test that it would use henceforth to determine if the caveat should apply to a claim:

The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran. However, . . . the equitable principle expressed by this rule can, in principle, have a broader application. Even when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.⁴⁷

With this phrasing, the Tribunal established a two-pronged test: The caveat will apply to a claim if either (1) the dual national claimant seeks compensation for a benefit restricted by Iranian law to sole Iranian nationals or (2) the dual national claimant has otherwise abused his nationality in such a way as to justify barring his claim.⁴⁸

It was the second prong of the *Saghi* test that the Tribunal applied to the "exceptional circumstances" present in *Saghi*.⁴⁹ The *Saghi* Claimants were an American father and his two sons, all three of whom were born in Iran.⁵⁰ Iranian law imposes Iranian nationality on children born in Iran to foreign parents if one of the parents was born in Iran;⁵¹ so, because Mr. Saghi, Sr. had been born in Iran, his sons had Iranian nationality. However, Iranian law permits such children, when they reach 18 years of age, to petition the Iranian Ministry of Foreign Affairs for permission to take the nationality of their father.⁵² When both of the Saghi sons reached

⁴⁵ Award No. 544-298-2 (22 Jan. 1993) [hereinafter *Saghi*].

⁴⁶ See David J. Bederman, *International Arbitral Decisions*, 87 AM. J. INT'L L. 447 (1993).

⁴⁷ *Saghi*, *supra* note 45, at para. 54.

⁴⁸ Although the first prong of the *Saghi* test reiterates *Esphahanian* to the extent that it applies the caveat to claims for benefits reserved by law to sole Iranian nationals, it omits *Esphahanian's* reference to the claimant's behavior — that is, his disguise of his dominant nationality — in obtaining those benefits. Perhaps the Tribunal concluded that dual-national claimants who obtained benefits reserved to sole Iranian nationals must have disguised their United States nationality in order to do so.

⁴⁹ *Saghi*, *supra* note 45, at para. 59.

⁵⁰ *James M. Saghi and The Government of the Islamic Republic of Iran*, Award No. IITL 66-298-2, paras. 4-6 (12 Jan. 1987), *reprinted in* 14 Iran-U.S. C.T.R. 3, 4-5 [hereinafter *Saghi IITL*].

⁵¹ THE CIVIL CODE OF IRAN, *supra* note 26, at Art. 976(4).

⁵² *Id.* Art. 977(A).

18 years of age, they petitioned to take their father's United States nationality, and Iran granted their requests.⁵³ Soon after, Iran enacted the Law for the Expansion of Public Ownership of Productive Units ("Law for Expansion"), which the Saghis believed limited the percentage of shares in their company that could be held by foreigners.⁵⁴ Apparently in order to retain maximum ownership of the family's shares, one of the sons — Allan Saghi — applied for reversion to Iranian nationality, and his application was granted.⁵⁵ A few months later, the Saghi family executed several share transfers in preparation for the Law for Expansion's implementation.⁵⁶ The Saghis then submitted to the Iranian authorities shareholders' lists which listed Allan Saghi as an Iranian shareholder.⁵⁷

The Tribunal held that Allan Saghi had "consciously sought and obtained Iranian nationality solely for the purpose of having certain shares . . . placed in his name in order to minimize the adverse effects of the Law for Expansion."⁵⁸ That, according to the Tribunal, was sufficient justification for barring the claim pursuant to the second prong of the caveat test that the Tribunal had just articulated. That is, the Tribunal concluded that it did not need to determine whether Allan Saghi's shares were in fact restricted by law to Iranian nationals — pursuant to the first prong of the caveat test — because "fundamental considerations of equity" required that his claim be dismissed, even if the shares he held were not restricted to Iranian nationals.⁵⁹ To rule otherwise, according to the Tribunal, "would be to permit an abuse of right."⁶⁰

Judge Aldrich, Chamber Two's American arbitrator, issued a concurring opinion, which highlighted some of the factors that the Tribunal would later consider in *Sabet*. Judge Aldrich distinguished between "Allan Saghi's situation" — which he deemed to be "probably unique among claims presented to the Tribunal" — and that of "most, if not all," dual national claimants, who instead had Iranian nationality imposed upon them either by birth to an Iranian father or by marriage to an Iranian man.⁶¹ Judge Aldrich went on to note that "[w]hile abandonment of Iranian nationality is not, in theory, impossible under Iranian law for persons who are more than 24 years old," it involves numerous restrictions such that it "evidently rarely occurs in practice."⁶²

⁵³ Saghi ITL, *supra* note 50, at paras. 5, 6, 11, 13, *reprinted in* 14 Iran-U.S. C.T.R. at 4-7.

⁵⁴ Saghi, *supra* note 45, at paras. 6, 55.

⁵⁵ *Id.* at para. 59.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Concurring Opinion of George H. Aldrich, Award No. 544-298-2, para. 2 (22 Jan. 1993).

⁶² *Id.* at n.1.

C. Application of Saghi's Two-Pronged Test

1. Shares of Stock

The Tribunal's next opportunity to consider the caveat occurred in *Faith Lita Khosrowshahi and Islamic Republic of Iran*,⁶³ a case that is very similar to *Sabet* in that it featured dual-national claimants who, unlike Allan Saghi, not only did not seek their Iranian nationality but could not abandon it. The *Khosrowshahi* Claimants were a woman who had been born a sole United States national and had married an Iranian man, and the couple's four children,⁶⁴ all of whom were under 25 years of age when they acquired the property for which they claimed.⁶⁵ Although the Tribunal concluded that the caveat did not bar the *Khosrowshahis'* claims, their inability to renounce their Iranian nationality formed no part of the Tribunal's analysis.

The *Khosrowshahi* children sought compensation for their expropriated shares in the Development and Investment Bank of Iran ("DIBI"). DIBI's shares were divided into categories "A" and "B," with category A shares reserved for Iranians and category B shares both reserved for foreign shareholders and restricted to no more than 25% of DIBI's outstanding capital.⁶⁶ The *Khosrowshahis* owned category A shares.⁶⁷

Although the Tribunal did not apply *Saghi's* two-pronged test as methodically as certain later cases would,⁶⁸ the content of its analysis was completely consistent with that test: The Tribunal determined that the *Khosrowshahis* had not used their Iranian nationality to obtain benefits reserved to Iranian nationals because the 25% limit on DIBI's shareholdings reserved for foreigners had not been reached; rather, its category B stock reserved for foreigners constituted only 18.9% of its outstanding stock, so that the *Khosrowshahis'* "purchase of .008% of the total shares of DIBI could well have fallen within" the 25% limit on foreign ownership.⁶⁹ In other words, the Tribunal eschewed formalism and concluded that even though the *Khosrowshahis* had bought category A shares, which were reserved to Iranian nationals, they had not obtained

⁶³ Award No. 558-178-2 (30 June 1994) [hereinafter *Khosrowshahi*].

⁶⁴ *Faith Lita Khosrowshahi and The Government of the Islamic Republic of Iran*, Award No. ITL 76-178-2 (22 Jan. 1990), paras. 6-10, reprinted in 24 *Iran-U.S. C.T.R.* 40, 42-43.

⁶⁵ *Id.* paras. 7-10, reprinted in 24 *Iran-U.S. C.T.R.* at 42-43.

⁶⁶ *Khosrowshahi*, *supra* note 63, at para. 70.

⁶⁷ *Id.* para. 60.

⁶⁸ See *Edgar Protiva and The Government of the Islamic Republic of Iran*, Award No. 566-316-2, paras. 80, 89 (14 Jul. 1995) ("first address[ing]" whether the right to inherit real property "is a benefit limited by Iranian law to sole Iranian nationals" and then determining that the Claimants "did not conceal or otherwise abuse their Iranian nationality"); *Moussa Aryeh and The Islamic Republic of Iran*, Award No. 583-266-3, para. 62 (25 Sep. 1997) (describing *Saghi* as identifying "two separate situations where the caveat may come into play": first, "where the Claimant has enjoyed a benefit reserved to sole Iranian nationals" and second, "where there has been some other abuse of nationality that might invoke the caveat").

⁶⁹ *Khosrowshahi*, *supra* note 63, at para. 73.

a benefit reserved by law to Iranian nationals because category B shares, which were reserved to foreigners were still available. In this regard, the Tribunal also noted that, as dual nationals, the Khosrowshahis could not have purchased category B shares because Iran does not recognize the foreign nationality of dual nationals.⁷⁰ While that observation was certainly accurate, the Tribunal did not go on to note a second reason why the Khosrowshahis could not buy Category B shares: Iranian law prevented them from renouncing their Iranian nationality so as to become sole foreign nationals capable under Iranian law of purchasing category B shares. Finally, the Tribunal determined, pursuant to *Saghi's* second prong, that the Khosrowshahis had not behaved in any other way that would justify dismissing their claim. It noted, for instance, that Iran had submitted no evidence demonstrating that the Khosrowshahis had misrepresented or concealed their United States nationality.⁷¹

2. Real Property

The Tribunal further clarified *Saghi's* first prong by deciding several cases involving claims for real property in Iran. These cases show that *Saghi's* first prong is concerned with whether the property claimed is reserved by Iranian law to sole Iranian nationals.

In *Rouhollah Karubian and The Government of the Islamic Republic of Iran*,⁷² Chamber Two determined that the property for which Karubian claimed was reserved by law to Iranian nationals, and it barred Karubian's claim.⁷³ Karubian was an adult male dual-national who had acquired his Iranian nationality by his birth to Iranian parents.⁷⁴ He subsequently acquired United States nationality and sought compensation for real property in Iran that he purchased after acquiring United States nationality.⁷⁵ Chamber Two canvassed Iranian laws relating to foreign

⁷⁰ *Id.*

⁷¹ *Id.* In particular, the Tribunal noted that Iran had failed to submit any bank records which would have shown the way in which the Claimants acquired their shares and how they represented themselves to DIBI. *Id.* In this respect, the Tribunal distinguished *Khosrowshahi* from *Schott* because the record in *Schott* contained Schott's daughter's statement promising to transfer her shares to another Iranian national if she were to surrender her Iranian nationality. *Id.*

Iran also argued that the caveat barred the Khosrowshahis' claims for their shares in the Alborz Investment Company because, according to Iran, the Khosrowshahis had received tax benefits by owning the shares as Iranians. *Id.* para. 31. The Tribunal rejected Iran's argument, holding that, because the Khosrowshahis resided in the United States, their nationality was not relevant to the tax, which was the same for non-Iranians and for Iranians resident outside Iran. The Tribunal concluded that "there is no evidence that the Claimants concealed or otherwise abused their Iranian nationality when they purchased their Alborz shares or that they obtained any benefit available by law only to Iranian nationals." *Id.* para. 33.

⁷² Award No. 569-419-2 (6 Mar. 1996) [hereinafter *Karubian*].

⁷³ For a description of the Tribunal's caveat analysis in *Karubian*, see Bengt Broms, *The Caveat Ruling in Case A18*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 753 (Jerzy Makarczyk, ed. 1996).

⁷⁴ *Karubian*, *supra* note 72, at paras. 8, 95.

⁷⁵ *Id.* paras. 1, 16, 49, 68, 74, 82.

ownership of real property and concluded that, except for certain limited exceptions that were not applicable, the right to acquire real property in Iran by contract was a benefit reserved to Iranian nationals.⁷⁶ Consequently, Chamber Two determined that Karubian must have purchased his real properties “in his capacity as an Iranian national after he had acquired United States nationality.”⁷⁷ Karubian claimed compensation for those properties before the Tribunal as a United States national, however, and the Chamber determined that it “would be permitting an abuse of right” if it were to allow him to recover under these circumstances.⁷⁸ Consequently, it held the caveat to bar his claim.⁷⁹

In *Moussa Aryeh and The Islamic Republic of Iran*,⁸⁰ Chamber Three was faced with a virtually identical claim and claimant but interpreted the relevant Iranian laws differently. Chamber Three concluded that Iran had not been able to “point to a comprehensive provision in Iranian law that contains an express prohibition on the ownership of real estate by foreign or dual nationals”⁸¹ Nevertheless, because Iranian law was “generally averse to the ownership of real estate by foreign nationals,”⁸² Chamber Three held that the caveat must be applied to Aryeh’s claim.⁸³

In determining just how the caveat would apply, Chamber Three relied on Articles 988 and 989 of the Iranian Civil Code. Article 988 provides that persons who have renounced their Iranian nationality must, among other things, transfer their real property in Iran to Iranian nationals within one year from the date of their renunciation.⁸⁴ Article 989 of the Iranian Civil Code goes on to provide that the real property of an Iranian national who has acquired a foreign nationality “without observing the legal requirements” will be sold under the supervision of the local Public Prosecutor, and the proceeds will be paid to the owner after the expenses of sale are deducted.⁸⁵ Because Chamber Three interpreted Iranian law as

⁷⁶ *Id.* para. 159.

⁷⁷ *Id.* para. 161.

⁷⁸ *Id.*

⁷⁹ *Id.* Interestingly, by the time the Tribunal decided *Karubian* in 1996, the concern that it had expressed in *Esfahanian* as to whether the claimant had disguised his Iranian nationality in order to secure the relevant benefits was no longer apparent. Karubian had argued that the Iranian government had actively encouraged dual nationals to invest in Iran. *Id.* para. 150; *see* para. 152 (describing affidavit from Karubian’s son, who stated that he was invited by the Iranian Chamber of Commerce and Industries to participate in a committee established to encourage overseas dual nationals to return to Iran and participate in its development). Although Chamber Two determined that there was insufficient evidence to establish that Iranian government officials had encouraged him, as a dual national, to purchase real property in Iran, *id.* para. 153, the Chamber did not suggest that Karubian had disguised his nationality when purchasing the property or had engaged in any other such deceit.

⁸⁰ Award No. 583-266-3 (25 Sep. 1997) [hereinafter *Aryeh*].

⁸¹ *Id.* para. 75.

⁸² *Id.* para. 76.

⁸³ *Id.* para. 79.

⁸⁴ THE CIVIL CODE OF IRAN, *supra* note 26, at Art. 988(3).

⁸⁵ *Id.* Art. 989.

providing the claimant some compensation for his property (the proceeds of the forced sale), it determined that the caveat should not bar his claim entirely.⁸⁶ Rather, Chamber Three concluded that application of the caveat should result in a discount to the market value of the property that reflects the reduced price generated by a forced sale such as that envisaged by Article 989 as well as subtraction of the expenses attendant upon such a sale.⁸⁷

Finally, Chamber One's consideration of the caveat in *George E. Davidson (Homayounjah)* and *The Government of the Islamic Republic of Iran*⁸⁸ completes the discussion of the first prong of the *Saghi* test, particularly because it featured a dual national claimant who could not renounce his Iranian nationality. Davidson was a dual national who acquired his Iranian nationality by his birth to an Iranian father.⁸⁹ He obtained real property in Iran before he was 25 years old and before he acquired United States nationality.⁹⁰ Chamber One held that Iran had deprived Davidson of his property rights three months after he acquired United States nationality.⁹¹ In considering the first prong of the *Saghi* test, Chamber One pointed to Articles 988 and 989 of the Iranian Civil Code referred to above, which the Chamber understood as permitting Iranians obtaining a foreign nationality to hold their real property in Iran for up to a year after acquiring the foreign nationality.⁹² Because Iran deprived Davidson of his property rights less than a year after he acquired his United States nationality, his ownership of the property as a dual national was legal under Iranian law; thus, the Chamber held the caveat not to apply.⁹³

D. Summary

Before turning to *Sabet*, a brief summary is in order. According to the Tribunal, the caveat is an equitable principle intended to apply to a claim that constitutes an abuse of right. What is an abuse of right? The quintessential example can be found in the first prong of the *Saghi* test: A claimant abuses his Iranian nationality by acquiring property reserved by law to Iranian nationals and then seeking compensation for that property in the Tribunal as a dominant and effective United States national. The second prong of the *Saghi* test makes clear that a claimant

⁸⁶ Aryeh, *supra* note 80, at para. 84.

⁸⁷ *Id.* para. 85.

⁸⁸ Award No. 585-457-1 (5 Mar. 1998) [hereinafter Davidson].

⁸⁹ *Id.* para. 25.

⁹⁰ *Id.* paras. 26, 58-59, 61 (showing that the claimant was born in 1956, was naturalized as a United States citizen in 1980, when he was 24 years old, and acquired his shares of the properties in question before 1980).

⁹¹ *Id.* paras. 26, 111 (Davidson naturalized as an United States citizen on March 5, 1980 and deprived of his property rights, at the latest, on July 1, 1980).

⁹² *Id.* para. 77.

⁹³ *Id.*

may abuse his Iranian nationality in other ways that would justify dismissing his claim; in particular, the Tribunal held in *Saghi* that the intentional acquisition of Iranian nationality for the sole purpose of obtaining benefits reserved to Iranian nationals is, in itself, an abuse of right even if no benefits are actually obtained. That is the only example that the Tribunal has identified of “some other abuse of nationality,”⁹⁴ however, and, as Judge Aldrich pointed out, its occurrence in *Saghi* “is probably unique among claims presented to the Tribunal.”⁹⁵ Thus, the first prong of the *Saghi* test is by far the more important; if the caveat is to bar or impair a claim, it will almost certainly do so because the claim seeks compensation for benefits reserved by law to Iranian nationals.

IV. *SABET AND THE ISLAMIC REPUBLIC OF IRAN*

The Tribunal’s Award in *Sabet*⁹⁶ is important because it was the first time that a claimant’s inability to renounce Iranian nationality militated against application of the caveat. The Tribunal considered this factor in its analysis of *Saghi*’s second prong; however, as will be discussed in Part V, both logic and equity require that it be considered in the context of *Saghi*’s more-important first prong.

Sabet involved the claims of three brothers who sought compensation for their shares of several expropriated companies.⁹⁷ The brothers were dual Iranian-United States nationals from birth; they acquired United States nationality by their birth in the United States and Iranian nationality by having an Iranian father.⁹⁸ The brothers were well under 25 years old when they obtained the shares of stock for which they claimed.⁹⁹

At the start of its caveat analysis, the Tribunal reiterated *Saghi*’s two-pronged test, stating that the question before it was “whether ownership of the Claimants’ shares was reserved by Iranian law for Iranian nationals, and, if not, whether the Claimants have abused their dual nationality in such a way that they should not be allowed to recover on their claims.”¹⁰⁰ Iran argued that two laws — The Law Concerning the Attraction and Protection of Foreign Investments (“LAPFI”) and the Law for Expansion — prohibited the Sabets from owning their shares as foreigners.¹⁰¹ Iran also accused the Sabets of abusing their nationality by failing to disclose to Iranian authorities that their shares were held by

⁹⁴ Aryeh, *supra* note 80, at para. 62.

⁹⁵ Concurring Opinion of George H. Aldrich, Award No. 544-298-2, para. 2 (22 Jan. 1993).

⁹⁶ Aram Sabet and The Islamic Republic of Iran, Award No. 593-815/816/817-2 (30 June 1999) [hereinafter *Sabet*].

⁹⁷ *Id.* para. 1.

⁹⁸ *Id.* para. 32.

⁹⁹ *Id.* paras. 22, 27, 28. The Claimants were only fourteen, eight, and three, respectively, when Iran expropriated their shares of stock in 1979.

¹⁰⁰ *Id.* para. 110.

¹⁰¹ *Id.* para. 111.

United States nationals and by failing to pay certain taxes imposed on foreigners and on Iranians residing abroad.¹⁰²

The Tribunal determined that neither of the laws that Iran invoked restricted the foreign ownership of the Sabets' shares. The Tribunal rejected Iran's contentions with respect to LAPFI, citing *Kimberly-Clark Corp.*,¹⁰³ in which the Tribunal held that LAPFI granted special protection for foreign investments but that none of its provisions prevented foreign investors from owning shares outside the LAPFI regime, as the Sabets had.¹⁰⁴ Turning to the Law for Expansion — the law that had motivated Allan Saghi to reacquire Iranian nationality — the Tribunal noted that the law itself made no mention of any restrictions on foreign shareholdings but that regulations promulgated subsequently provided that a Council for Expansion of Ownership of Producing Units would determine the maximum percentage of shares that could be held by foreigners for each company falling within the scope of the Law for Expansion.¹⁰⁵ The Tribunal concluded, however, that Iran had "submitted not a single piece of evidence" indicating that the Council ever got around to limiting the foreign shareholdings of the companies in which the Sabets owned shares;¹⁰⁶ thus, the Tribunal concluded that Iran had not proven that the Law for Expansion restricted the ownership of shares in the companies to Iranian nationals.¹⁰⁷

Turning to the second prong of the *Saghi* test, the Tribunal determined that the equitable considerations that gave rise to the application of the caveat in *Saghi* were not present.¹⁰⁸ In particular, the Tribunal focused on the constraints imposed by Iranian nationality law and distinguished the facts of *Sabet* from those of *Saghi* by noting that unlike Allan Saghi, the Sabet children

did not actively seek Iranian nationality to minimize the adverse effects of the Law for Expansion. Quite the contrary, the Claimants' Iranian nationality was conferred on them by reason of their father's nationality, and under Article 988 of the Civil Code of Iran, under ordinary circumstances, they had no ability to renounce that nationality until they reached 25 years of age. And because only their Iranian nationality would be recognized in Iran, the Claimants had no choice but to hold their shares as Iranians. This fact also militates against the application of the A18 caveat in the present Cases.¹⁰⁹

The Tribunal advanced its caveat jurisprudence considerably by recognizing, even in a limited way, the relevance of a claimant's inability

¹⁰² *Id.* para. 112.

¹⁰³ *Kimberly-Clark Corp. and Islamic Republic of Iran*, Award No. 46-57-2 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 339.

¹⁰⁴ *Sabet*, *supra* note 96, at para. 124.

¹⁰⁵ *Id.* para. 120.

¹⁰⁶ *Id.* para. 125.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* para. 127.

¹⁰⁹ *Id.* para. 128.

to renounce Iranian nationality; however, if the Tribunal confines consideration of that factor to its analysis of *Saghi's* second prong, then it will render it largely irrelevant, for *Saghi's* second prong seems to be confined to the unique facts of that case.¹¹⁰ Moreover, the Tribunal should consider a claimant's inability to renounce Iranian nationality in its analysis of *Saghi's* first prong simply because it is highly relevant to that inquiry, as will be described below.

V. THE STEP BEYOND *SABET*

As noted above, Iranian law imposes Iranian nationality on children born of Iranian fathers, no matter where they are born, and on women of foreign nationality who marry Iranian men.¹¹¹ Iranian law, in addition, prohibits renunciation of Iranian nationality for such children if they are under 25 years old¹¹² and for such women who remain married to their Iranian husbands.¹¹³ These categories of persons, therefore, have no choice but to be Iranian nationals,¹¹⁴ and because Iran refuses to recognize a dual national's foreign nationality, they have no choice but to be treated as Iranian nationals by Iran for all purposes, including for property ownership. Thus, when acquiring property, persons in these categories have no choice but to acquire the kind of property that can or that must be held by Iranians.

With the first prong of the *Saghi* test, particularly as applied in *Karubian*, the Tribunal has held that acquiring property reserved by law to Iranian nationals and then claiming compensation for that property as a dominant and effective United States national is an abuse of right. While that conclusion may be justifiable when applied to claimants who had a choice as to the type of property they acquired, further analysis is necessary when the claimants are among those who had no such choice.

That is not to say that a claimant's inability to renounce Iranian nationality will be relevant to the first prong of the *Saghi* test in every case. Rather, whether it is relevant will depend on the kind of property

¹¹⁰ As noted above, the "exceptional circumstances" of *Saghi* are not apt to recur, *see, e.g.*, David Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 47, 86 (1998), and the Tribunal has identified no other circumstances that might constitute an abuse of right under *Saghi's* second prong. Further, a claimant's inability to renounce Iranian nationality would have little relevance to a case like *Saghi*, even if it were to recur, because a claimant like Allan Saghi who purposefully acquired Iranian nationality in order to secure the benefits available thereby can hardly complain that Iranian law prohibited him from subsequently renouncing that nationality.

¹¹¹ THE CIVIL CODE OF IRAN, *supra* note 26, at Art. 976(2) and (6).

¹¹² *Id.* Art. 988(1).

¹¹³ *See id.* Arts. 986 and 988, *supra* note 29.

¹¹⁴ The two groups are distinguishable, of course, because women can choose the men they marry while children cannot choose their parents. However, a woman's choice as to whom to marry is so fundamental and so unlikely to be deterred by the imposition of an unwanted nationality, that both women married to Iranian men and children born to Iranian fathers can be considered similarly situated.

for which the claimant is claiming. A claimant's inability to renounce Iranian nationality would appear to have no relevance when the claim is for a type of property that could not under any circumstances have been owned by foreigners, for example, certain kinds of real property in Iran.¹¹⁵ This is because the claimant could not have owned such "wholly restricted" property even if he had been capable of renouncing his Iranian nationality; thus, his incapacity to do so would have no bearing on the Tribunal's consideration of the caveat.

The same cannot be said, however, about property such as that which was at issue in *Khosrowshahi* and *Schott* and which Iran alleged to be at issue in *Sabet* — that is, shares of stock of which foreigners could own only a certain percentage. With respect to this "partially restricted" property, the distinction between those who could renounce their Iranian nationality and those who could not is significant. Whereas an adult male dual national could choose either to purchase shares reserved to Iranians or to renounce his Iranian nationality and purchase shares reserved to foreigners, a person under the age of 25 with an Iranian father or a woman married to an Iranian man had no such choice. These dual nationals were forced to remain Iranians, and, when purchasing shares of stock, they were forced to purchase those shares reserved to Iranians.

Of course, one might argue that a claimant's inability to renounce Iranian nationality is irrelevant even with respect to partially restricted property because either the ceiling for foreign shareholders has been reached or it has not been; that is, either all of the shares reserved to foreigners have been acquired by other foreign shareholders or some are still available. If some are still available, then *per Khosrowshahi*, the caveat will not in any event bar the claim because the Tribunal will not consider the claimant to have acquired property reserved by law to Iranian nationals.¹¹⁶ By contrast, it could be argued that if the ceiling for foreign shareholders has been reached, then the remaining shares — that is, the shares reserved to Iranians for which the claimant is claiming — are analogous to property that can under no circumstances be owned by foreigners so that the claimant's inability to renounce Iranian nationality would be irrelevant to the Tribunal's analysis.

However, to reason thus would be to presume an answer to a question the Tribunal has heretofore never asked. After determining that the claim is for benefits reserved by law to Iranian nationals, the Tribunal should ask why the claimant acquired such a benefit in the first place. When the claimant is one who could have renounced his Iranian nationality, the Tribunal can appropriately conclude that he voluntarily chose to retain it and to acquire the benefits made available thereby. His claim as a

¹¹⁵ See Karubian, *supra* note 72, at paras. 157-59; Aryeh, *supra* note 80, at para. 76.

¹¹⁶ Of course, *Khosrowshahi* suggests that if the number of shares that were available to foreign shareholders was less than the number of shares for which the claimant is claiming, then the caveat would apply to the difference.

dominant and effective United States national is therefore an abuse of right. However, when the claimant is one who could not have renounced his Iranian nationality, then the fact that he acquired property reserved by law to Iranian nationals does not indicate anything about the reason that he did so. It certainly is possible that he acquired property reserved to Iranian nationals because Iranian law allowed him to obtain only that category of property; that is, that he would have renounced his Iranian nationality had he been able to and would have negotiated with the company's existing foreign shareholders to purchase some of their shares.

The question thus becomes one of the burden of proof. Iran has the burden of proving that the caveat should apply to a claim;¹¹⁷ consequently, Iran should be required to prove not only that the claim is for property reserved by law to Iranian nationals but, in cases in which the claimant could not renounce Iranian nationality, that the claimant would have acquired the same property even if he had been able to renounce his Iranian nationality and acquire property available to foreign nationals. Absent such a showing, the claim cannot be considered an abuse of right. Iran should not be permitted to benefit from requiring claimants to act in a way that it later can deem to be abusive. As the Tribunal has held: "The *caveat* is essentially an equitable instrument, intended to remedy any bad faith use of nationality"¹¹⁸ A claimant who has no choice as to how he uses his nationality cannot be said to have used it in bad faith.

In attempting to make this showing, Iran might point to the fact that, as Judge Aldrich has noted, renunciation of Iranian nationality is apparently rare in practice because it results in a variety of restrictions, including, *inter alia*, restrictions upon visits to Iran.¹¹⁹ That is, Iran might point to the fact that very few people have ever renounced their Iranian nationality to prove that a particular claimant would not have either. However, that argument might be a two-edged sword. If the restrictions

¹¹⁷ The Tribunal has never expressly placed this burden on Iran, but it has impliedly done so. See Aryeh, *supra* note 80, at para. 75 (concluding that Iran was "unable to point to a comprehensive provision in Iranian law that contains an express prohibition on the ownership of real estate by foreign or dual nationals"); Sabet, *supra* note 96, at para. 125 (Iran "submitted not a single piece of evidence that indicates that the Council . . . made a determination to limit the [company's] foreign shareholdings"). This conclusion is further supported by Article 24, paragraph 1, of the Tribunal Rules, which provides that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." Final Tribunal Rules of Procedure, 3 May 1983, reprinted in 2 Iran-U.S. C.T.R. 405, 427. See also Vera-Jo Miller Aryeh and The Islamic Republic of Iran, Award No. 581-842/843/844-1 para. 157 (22 May 1997) (describing the "basic rule of burden of proof" in international tribunals as resting "upon him who asserts the affirmation of a proposition that if not substantiated will result in a decision adverse to his contention.") (quoting DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (1975)).

¹¹⁸ Aryeh, *supra* note 80, at para. 84; see also Davidson, *supra* note 88, at para. 76 (describing the caveat as "an instrument of equity intended to prevent abuses of right").

¹¹⁹ Concurring Opinion of George H. Aldrich, Award No. 544-298-2, n.1 (22 Jan. 1993). See also Davidson, *supra* note 88, at para. 31 (claimant contending that Council of Ministers rarely consents to renunciation of Iranian nationality).

that Iran imposes on those seeking to renounce Iranian nationality are so onerous that they deter virtually everyone, then one might question whether Iran has provided any of its nationals with a viable means of renouncing Iranian nationality.

To summarize, then, the Tribunal should expand its understanding of *Saghi's* first prong to consider, where relevant, a claimant's inability to renounce Iranian nationality. That factor will not be relevant when the claim is for wholly restricted property; because foreign nationals could not under any circumstances own that kind of property, it will be of no consequence that the claimant was prevented from renouncing Iranian nationality to become a sole foreign national. With respect to partially restricted property, Iran should be required to prove not only that a claimant who could not renounce Iranian nationality acquired property restricted by Iranian law to sole Iranian nationals, but that the claimant would have acquired the same property had he been able to renounce his Iranian nationality. If Iran cannot make that showing, the caveat should not apply.

Turning to the past, the fact that the Tribunal did not previously consider a claimant's inability to renounce Iranian nationality has fortunately not resulted in any misapplication of the caveat. Three cases — *Schott*, *Khosrowshahi*, and *Davidson* featured individuals who could not renounce their Iranian nationality, but that inability would have been potentially relevant only in *Schott* and *Khosrowshahi* because only those cases involved claims for partially restricted property. Although the Tribunal did not consider the inability to renounce Iranian nationality in those cases, it would have reached the same conclusions if it had. With respect to *Schott*, Iran would have had no difficulty satisfying its burden of proving that Schott's daughter would have obtained property reserved to Iranian nationals even if she had been permitted to renounce her Iranian nationality.¹²⁰ Indeed, the very reason that Schott placed the shares in his daughter's name was because Schott — a sole United States national — could not purchase them in his own name. Thus, far from desiring to renounce her Iranian nationality and thereby attaining the same status as her father, Schott's daughter purposefully made use of her Iranian nationality to obtain shares available only to Iranians. In *Khosrowshahi*, the Tribunal declined to apply the caveat because the maximum percentage of shares reserved to foreigners had not yet been reached. Because the *Khosrowshahis* could not be said to have acquired a benefit reserved by law to Iranian nationals, the Tribunal had no reason to ask why they acquired the shares that they did.

¹²⁰ Of course, as the Tribunal later clarified, the caveat itself was not strictly applicable in *Schott* since the Claimant, Mr. Schott, was himself a sole United States national. See Concurring Opinion of George H. Aldrich, Award No. 544-298-2, para. 4 (22 Jan. 1993).

VI. CONCLUSION

By developing the caveat, the Tribunal has created, for itself and for future tribunals, a sophisticated equitable principle capable of addressing justifiable concerns about the abuse of dual nationality. The Tribunal broadened its analysis of the caveat in *Sabet* by considering the Sabets' inability to renounce their Iranian nationality when applying *Saghi's* second prong. While that was a step in the right direction, a further step should be taken. The Tribunal should consider a claimant's inability to renounce Iranian nationality in its analysis of *Saghi's* first prong. The caveat should not apply simply because a claim concerns property reserved by law to Iranian nationals. Rather, the Tribunal should also consider the legal constraints imposed upon a claimant in his acquisition of the property to determine whether application of the caveat is equitable in a given case.