IRAN-UNITED STATES CLAIMS TRIBUNAL

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** DISSENTING OPINION of Mr Noori

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In the Name of God

Case No. 457
Chamber One
Award No. 585-457-1

In the matter of Arbitration between

George E. Davidson (Homayounjah),

Claimant,

-and-

The Government of the Islamic Republic of Iran,

Respondent.

DISSENTING OPINION OF ASSADOLLAH NOORI

I. INTRODUCTION

I.1. RECAPITULATING THE FINDINGS

1. In the present Award the Majority has accepted the allegations that: i) The dominant nationality of Mr. Homayounjah ("the Claimant"), an Iranian by birth to Iranian parents in Iran, was his United States nationality; ii) He possessed certain property rights arbitrable before this Tribunal; iii) Those property rights were interfered with to such an extent that they could be deemed as expropriated. As will be explained here, I dissent from all the above findings.

I.2. ANOMALIES SURROUNDING THE FILING OF THE CLAIM

2. I would like to briefly discuss some problems I have with the acceptance of an incomplete and late submission as the Statement of Claim in this Case. As one may also conclude from the Majority's Award (paragraphs 3-6), filing of the incomplete submission was refused on 14 January 1982. The reason expressly stated for the denial was that it was not accompanied by a Persian text, a basic requirement under Note 3 to Article 17 of the Tribunal Rules.[1]

3. The explanation given by the Claimant, or on his behalf, at the time was that the Persian text of the submission was sent together with the English text on 6 January 1982 and that it might have been misplaced (paragraph 4 of the Majority's Award). This was an afterthought explanation with little, if any, merit. Were we to consider the explanation plausible, one of the possibilities should have been to have two refusals,

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[1] For the text of the Tribunal Rules, see 2 Iran-United States Claims Tribunal Reports, published by Grotius ("Iran-U.S. CTR"), pp. 405, *et seq.* According to the above Note, all

one for the English text not being accompanied by the Persian text and another for the latter not being accompanied by the former.[2]

4. What contributes to the skepticism is the fact that the Claimant appears to have alleged that two other sets of the Statement of Claim were sent, one on 13 and the other on 18 January 1982. No trace of these could be found in the file. More surprisingly, the Claimant also filed, this time for himself and on behalf of his three brothers, a further submission titled "Statement of Claim" on 25 January 1982, after the Tribunal's jurisdictional cut off date. This submission was also denied filing by the Tribunal's Registry on 1 February 1982 on the valid ground that it was filed after 19 January 1982. Had the Claimant's explanation of the 6 January 1982 submission been correct, he would have called the 25 January submission a supplement or amendment to the Statement of Claim. The Claimant did not even allege this until after the Tribunal's request for a clarification on 2 May 1983 asking the Claimant to state whether the document filed on 25 January 1982 should be construed as an amendment to the previous submission. That was not done until 2 May 1983, or, more specifically, 25 January 1984.

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communications with the Tribunal, including the Statement of Claim, the Statement of Defence, and their annexes, must be submitted in both English and Persian.

[2] It should be recalled that the English and Persian texts of such submissions should have been filed in 12 copies. (Note 2 to Article 2 of the Provisionally Adopted Tribunal Rules, 1 Iran-U.S. CTR 57, p. 62. This requirement was increased to 20 copies by Note 2 to Article 2 of the Tribunal [Final] Rules, 2 Iran-U.S. CTR 405, p. 410.) Ironically, the Claimant appears to have been successful in alleging that he had sent 12 copies of the Persian text of the 6 January letter together with 12 copies of the English text and that all 12 copies of the Persian text were misplaced!

5. Strangely enough, there is nothing in the file--and for that matter in the Registry's records as searched--to indicate how, when, and based on what decision the Registry's refusal was reversed and the stamp marking the 6 January 1982 submission as filed on 18 January 1982 was placed on that submission. These events all happened in early 1982 and the Award fails to provide an accurate and plausible explanation for them.

II. CLAIMANT'S NATIONALITY

6. The Majority accepts in paragraph 42 of its Award that, in deciding on the Claimant's effective and dominant nationality,[3] it "must consider all relevant factors, including the Claimant's habitual residence, center of interests, family ties [and] participation in public life." However, there is little scrutiny of these topics in the award, particularly in connection with the "events and facts preceding the date on which "the claim arose, allegedly around 1 June 1980." This is of particular importance for a number of undisputed facts, *inter alia*, that: i) the Claimant was born to Iranian parents in Iran on 10 June 1956; ii) he traveled to the United States for studies at the age of 16 1/2 on 31 December 1972 (paragraphs 25 and 28 of the Majority's Award); and iii) remained a sole Iranian national until 5 March 1980, over one year after the success of the Islamic Revolution in Iran and "only about three months prior to the date his Claim [allegedly] arose and less than eleven months before entering into force of the Claim Settlement Declaration" (*ibid*,

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[3] I have repeatedly expressed my view in connection with the dominant and effective nationality issue under my signature in all awards involving so-called dual national claims. As I have stated, I believe that the Tribunal does not have jurisdiction over the claims of Iranians with alleged dual United States nationality, either according to the Claims Settlement Declaration or pursuant to the well-established principles of international law, particularly the principle of sovereign equality, which is rightly the applicable principle with regard to the claims of dual nationals. The action taken by the majority of the members of the Full Tribunal in *Case A/18*, in resorting to the theory of dominant and effective nationality, constitutes, so far as the Algiers Declarations are concerned, a disregard for both the letter and the spirit of those Declarations. Insofar as the principles of international law are concerned, especially the principle of the sovereign equality of States, that action is tantamount to disrespect for international law. In my opinion, just as the Iranian arbitrators have stated in their Dissenting Opinion in *Case A/18*, *reprinted in* 5 Iran-U.S. C.T.R. 275-337, the Tribunal should have ruled and should still rule, in all claims of dual Iran/United States nationals, that it lacks jurisdiction, and should have discontinued and should still discontinue proceedings, wherever it is determined that these claimants are of Iranian nationality.

paragraph 43).

7. The paucity of the reasoning in paragraphs 44 and 45 of the Majority's Award is illustrative of the weakness of its findings in favour of the Claimant's dominant United States nationality. I am thus obliged to elaborate more on the pertinent events and facts, while scrutinizing the findings on which the Majority based its determination of the Claimant's effective and dominant nationality.

8. First, the Majority finds that the Claimant's "parents, brothers and other close family members have all emigrated to the United Sates." He himself had moved to that country in 1972 on a green card, and prior to that he had spent lengthy summers there, beginning in 1964. I will consider these elements under a title dealing with the Homayounjah family's intention to emigrate to the United States, which was stated by the Claimant and his counsel in their pleadings. Second, the Majority finds that the Claimant studied computer science in the United States and was active in various extracurricular activities. The Claimant registered with Selective Service for potential conscription into the U.S. military in 1975. I will take up these points under another rubric treating the Claimant's public life and social ties. Third, nothing of substance is stated in the Award's short paragraphs about the Claimant's economic or financial ties. Playing down the Claimant's economic and financial ties with Iran by stating that he "also appeared to have some financial interests in Iran," the Majority states that he "has been employed in the United States" and "purchased real estates" there. I will treat these issues under a third title dealing with the Claimant's center of interests and economic ties.

9. A point of law and another of fact should be borne in mind

throughout the reading of the following arguments. The point of law is the rule that in these situations, it is incumbent on the Claimant to prove that he had acquired effective United States nationality and that, by weighing the facts of his life, his United States nationality is dominant when compared to his Iranian nationality. This is the law, and on that my colleagues forming the Majority do not depart from me.[4] The point of fact is that evidence proving the genuine link and real intention is extremely private in nature and almost exclusively available to the individual involved.

II.1. IMMIGRATION AND INTENTION TO EMIGRATE

10. One of the important indicia for establishing nationality and its dominance is that the ordinary and habitual residence has been adopted for settlement purposes. This would mean that the choice should not have been, for example, "instigated by the unusual situation in Iran rather than [the Claimant's] national allegiance."[5] The evidence should also support the fact that "the ties to the United States [are] evidenced by the [Claimant's] voluntary acquisition of United States nationality."[6] The Claimant's counsel were cognizant of the

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[4] Article 24 of the Tribunal Rules provides that: "Each party shall have the burden of proving the facts relied on to support his claim or defence." See, also, *Linda J. Motamed et al.* and *The Government of the Islamic Republic of Iran*, Award No. 414-770-2 (para. 6) *reprinted in* 21 Iran-U.S. CTR 28, p. 29; *David Harounian* and *The Government of the Islamic Republic of Iran*, Award No. 450-447-5, *reprinted in* 23 Iran-U.S. CTR 282, p. 284; and *Reza and Shahnaz Mohajer-Shojaee* and *The Government of the Islamic Republic of Iran,* Award No. 490-273-1 (paras. 8-9) *reprinted in* 25 Iran-U.S. CTR 196, p. 199.

[5] *Anita Perry-Rohani, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 427-831-3 (para. 16) *reprinted in* 22 Iran-U.S. CTR 194, p. 198.

[6] *Arakel Khajetoorians, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 504-350-2 (para. 19) *reprinted in* 26 Iran-U.S. CTR 37, p. 42. See, also, *Leila Danesh Arfa Mahmoud* and *The Islamic Republic of Iran*, Award No. 204-237-2 (para. 24)

fact that the Claimant was in the United States for his studies and his application for naturalization was not made until more than one year after the success of the Islamic Revolution. They thus tried to create the impression that the Claimant's family intended to emigrate to the United States since 1952, long before the Claimant's naturalization in March 1980. With this in mind, the Claimant alleged a basic reason for such an intention and resorted to certain evidence in support of that allegation.

11. The basic reason for such an intention--as alleged by the Claimant's father--was that being Jews, they always "felt uncomfortable" in the "Iranian environment." They allegedly "felt that the Iranians mistreated" them. The sole example offered by the Claimant's father of such mistreatment is the allegation that he had difficulty registering the deed of his house in his name in the 1950s.[7]

12. To prove the alleged intention to immigrate, the Claimant refers to the immigration of his uncle in 1963 and two of his aunts in 1970. In support of the same intention, the Claimant alleges that he spent lengthy periods in the United States during most of the summers of his childhood, starting in 1964. He also claims he had enrolled in Andisheh (a.k.a. Don Bosco) School because of that school's reputation in teaching the English language. He alleged that he traveled to the United States on a green card in December 1972, as did his other brother, Henry, in 1974. David, Robert and Jack, his other

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reprinted in 9 Iran-U.S. CTR 350, pp. 354 and 355.

[7] The Claimant later resorted to subjective concern about the post-revolutionary treatment of Jews, which totally undermines any allegation regarding the family's predetermined immigration plan (see, *e.g.*, Document 50, Exhibit G and Document 92, Exhibit D).

brothers, also traveled there in 1973, 1977 and 1978, respectively. Finally, the Claimant's parents moved to the United States on 20 July 1979. It is further alleged that, on arrival in the United States in 1979, the Claimant's father returned all their Iranian passports to the Iranian Interest Section at the Embassy of the Democratic and Popular Republic of Algeria. Regrettably, I am but constrained to say that the Claimant's contended basic reason for his family's intention to emigrate is fallacious, and evidence presented in support of that is replete with lies and misrepresentations.

II.1.a. ***Fallacious Basic Reason***

13. Concrete evidence refuting the alleged basic reason is varied and abundant. It is probably unnecessary to explore other evidence unexplored by the Majority in this Case. To begin with, a plausible justification as to why the Claimant's parents waited until after the success of the 1979 Islamic Revolution to move to the United States is wanting. However, the claim in this Case concerned five buildings acquired between the years 1946 and 1979. Title to these properties was acquired by the Claimant's father not only through inheritance (Jalleh building, Para. 52 of the Majority's Award and officially registered title deed No. 566381 dated 9 April 1946), but also through all sorts of officially registered transactions with no difficulty. He had either purchased the other estates, lands, and buildings on them as they were (Ahar and Manouchehri buildings, *ibid*, paras. 50-51), or purchased the land first and later constructed buildings on it by obtaining necessary governmental permits (Kamran building, *ibid*, para. 49). The Caravan Hotel was even acquired through the complex process of executing a conditional sale,[8] and title

[8] Generally speaking a "conditional sale" is a transaction wherein the parties agree that

to it was registered in the name of Jack (Claimant's brother) as late as 28 March 1979. A number of officially registered transactions were also executed--some as late as in 1978--among members of the family increasing or decreasing their shares in the buildings involved (*ibid,* para. 61). At least three long-term loans were secured by the Claimant, his parents, and brothers with their properties, including their place of residence, the Ahar building. At times, they also managed to increase the amount of loans granted by Bank Melli, a State-controlled bank.

14. The fact that the Claimant's father and all other members of the family could freely enter into all kinds of simple and complicated transactions is not limited to the five buildings at issue in this Case. The Respondent produced ample evidence showing numerous transactions carried out, directly or through agents, by the Claimant's father (for himself and on behalf of other members of the family, the Claimant included) at a single Notary Public Office (Office No. 64) in Tehran in 1978

"if the seller returns the whole equivalent of the price to the purchaser within a specified period, he has the option to rescind the transaction in regard to the whole subject-matter of the sale." (For a complete translation of Article 458 of the Iranian Civil Code, see M.A.R.Taleghany, "The Civil Code of Iran, Translated from the Persian," p. 65). This type of transaction is often used to conceal usury. In such situations, the property of a debtor is ostensibly sold to the creditor (lender), but is, in reality, offered as security for the payment of the borrower's debt to the lender. By the contract, the debtor is given the option to pay the principle amount of his debt with accrued interest within a specified period of time and to reacquire/re-lease the property. Otherwise, the property would be transferred to the lender if the debtor failed to pay any installment of the debt and accrued interest within that specified time. Because of this concealment under the guise of a conditional sale, the Iranian Civil Code provides (in Article 463) that: "If in a conditional sale it is found that the seller's intention was not a genuine sale, the rules governing sale will not apply to it." (*Ibid,* p. 65). Generally, conditions governing a contract for a secured loan would apply. For a detailed analysis of this, see, also, Sayyed Hassan Emami, "Civil Law," Vol. I (6th ed. 1977) pp. 566-577; Nasser Katoozian, "Civil Law", Vol. 1 (5th ed. 1373) § 112, pp. 163-165; and Nasser Katoozian, "Civil Law: General rules Applicable to Contracts," Vol. 5, § 930-938.

and 1979 (paras. 64 and 72 of the Majority's Award).[9] These sample transactions included the odious act of procuring and executing other people's rights to claim against their debtors as a champertor. They further included execution of a number of conditional sales. The Claimant's father was long able to execute and enforce all these champerties without any difficulty, notwithstanding the fact that the public finds the practice repugnant.

15. The Homayounjah family's freedom of activity and their unfettered right to engage in commercial business in Iran can be further proved by the fact that they entered the hotel business in late 1978 (at the peak of the Islamic Revolution). They had also been involved in the incorporation and operation of "Iran Steel Wool Factory, one of the most valuable" businesses they had in Iran.[10]

16. Fortunately, the Claimant has not implied any other specific restrictions on his family's, economic or political rights. Mention must also be made of the fact that the Claimant's father was an employee of the Iranian oil industry and was simultaneously engaged in commercial activities prior to his definitive move to the private sector. The family did enjoy freedom of movement inside and outside Iran. They admittedly traveled a great deal, for pleasure and business, inside and outside of the country.[11] They were free in choosing

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[9] The Respondent chose this Notary Public Office for the reason that the Claimant referred to it in these proceedings alleging that this Office had refused to "register the redistribution of ownership" interests of his children in the five properties involved (Para. 72 of the Majority' Award).

[10] The Claimant's father's Affidavit, Document 92, Exhibit A, para. 5.

[11] The entries in one of the passports of the Claimant's father underscores the fact that he traveled abroad and returned to the country prior to, during, and after the Islamic Revolution in 1977-1979. He obtained travelers' foreign exchanges on 25 October 1978 and 30 June

their schooling within and without the country, so much so that the Claimant and his brothers traveled for that purpose to the United States whenever they decided to do so, benefiting also from support granted by Iran to Iranian students abroad. While in the United States, the Claimant, his father, and other members of his family renewed their Iranian passports.[12] They were also able to execute powers of attorney, even in 1982 and 1984, to carry out their affairs in Iran, and managed to certify them at the Iranian Interest Section in the United States.[13]

II.1.b. ***Evidentiary Misrepresentations***

17. Turning now to the evidence introduced in support of the intention to emigrate, there is not a shred of evidence on file to support the allegation that the Claimant moved to the United States with a green card on 31 December 1972. Nor is there anything to prove that he had spent any summers in that country prior to his travel for studies on that date.

18. It appears to be true that one of the Claimant's uncles (Firooz Israel) had moved to the United States sometime prior to his naturalization in April 1973.[14] There is, however, nothing to support the allegation that any other members of the family, including the Claimant's two aunts, had emigrated to that country in the 1970s. Indeed, although the Claimant

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1979 (U.S. $8,500 and $5,000) which were exceptionally available to Iranians during and after the Revolution, when tight foreign exchange regulations were in force.

[12] To the extent made available to the Tribunal, the documents show that the Claimant and his father obtained and renewed Iranian passports valid until some time in 1987.

[13] See, *e.g.*, paras. 17, 18, 30, 36, 45 and 65 of the Majority's Award.

[14] The Claimant initially alleged that Firooz had emigrated to the United States in 1957. In an affidavit filed later in this Case, Firooz claimed that he had "moved from Iran to the United Sates in 1963."

initially alleged that his aunt, Josephine Israel, had emigrated to the United States in 1975, he later backed away from this position to support his expropriation claim, as we shall see in Section IV.3.a., *infra*. At the stage of the pleadings on the merits, the Claimant alleged that Josephine returned to Iran on an unspecified date prior to late 1980.[15] Setting these misrepresentations aside, were we to accept the Claimant's allegation regarding the immigration of his uncle and aunts, that fact could in no way affect the real intentions of the Claimant and his family, who had roots, settled long-term plans, and interests in Iran. Furthermore, the United States being a country primarily populated by immigrants and their descendents, most people usually have a relative there.

19. As to the allegations concerning the Andisheh (Don Bosco) School, the Respondent proved beyond any reasonable doubt that the school "was an Iranian school with an Iranian educational curriculum."[16] Although it was private, the school was under the supervision of the Ministry of Education, as were all other private and public schools. Every year, hundreds of ordinary Iranians would enroll at the School, and it would issue hundreds of ordinary diplomas certified and approved by that Ministry. The Respondent produced evidence proving further that English courses in this school were identical to those at ordinary Iranian schools.[17] Moreover, by producing the

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[15] The Claimant alleged further that his aunt later left Iran in 1980 and died in an unspecified place at an unknown date. Selected pages of Josephine Israel's Iranian passport produced by the Claimant bear two exit stamps from Iran dated 1 August 1978 and 4 September 1980.

[16] The Majority's Award, para. 35.

[17] English courses at the Andisheh School were limited to reading, writing, and dictation, which were part of the minimum obligatory curriculum offered by all secondary and

Homayounjah brothers' school records showing their poor marks in English, the Respondent seriously challenged the allegation that the school was selected for its English teaching reputation and for that matter for the purpose of eventual immigration to the United States. Were we to accept the Claimant's allegations, those marks should have been much higher.[18]

20. The Claimant's parents did not leave Iran until 20 July 1979. All evidence in the file points to the fact that their travel to the United States at that time--months after the establishment of the Islamic Republic of Iran--was intended to be temporary.[19] They did nothing to liquidate any assets in Iran. Rather, they appointed agents to manage some of their affairs, tellingly refraining from authorizing them to sell anything on their behalf.[20] They entered into long term transactions shortly before their departure and even after that through powers of attorneys given from outside Iran. They maintained ownership of shares in "Iran Steel Wool Factory, one of the most valuable" activities of the family in Iran.

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high schools around the country.

[18] Though most Iranian teachers were and still are, as a matter of practice, quite generous in marking English exams to avoid too many students failing, the marks dwelled around 10 and ranged to a maximum of 13 out of a possible 20.

[19] Before producing a copy of his passport, the Claimant's father had alleged an earlier date of departure from Iran, 18 June 1979. This passport (Document 126, Exhibit 6) also bears a stamp of admission by United States Immigration dated 12 November 1980.

[20] For example, on 16 July 1979, a few days prior to his departure from Iran, the Claimant's father (acting for himself and on behalf of his wife and children, the Claimant included) empowered a Mr. Mehraban to purchase real estate for them (Document 122, Exhibit 5, Attachment 16). Mr. Haim--whose role will be explored in more detail when we reach the expropriation issue--was empowered only to receive rent from tenants of the Kamran building.

21. The Claimant and his family have been very selective in this Case. Because of this, there is little information on the Claimant and his brothers' life-style and contacts with Iran or the United States. However, the scanty evidence made available denotes that, contrary to allegations made, Kamran, one of the Claimant's brothers--who had traveled out of Iran for studies in 1971 and not in 1970--returned to Iran at least twice, in 1973 and 1977. The Claimant and his father specifically admitted that the two youngest children of the family (Robert and Jack) "expressed a desire to remain or return to Iran after the political problems were over."[21]

22. Finally, the evidence produced by the Claimant proved that the allegation regarding the return of the passports to the Iranian authorities was untrue. To start with, the Iranian Interest Section was not yet in place at the Algerian Embassy in the United States in 1979, and for that matter not even in early 1980. As alluded to in paragraph 16, *supra*, the passports were never returned for cancellation. Rather, the evidence made available to the Tribunal shows that the validity of the Claimant's passport and those of his parents and brothers was extended beyond 1979, or new Iranian passports were obtained after their expiry dates, and their validity was repeatedly extended at least to sometime in 1987.

II.2. CLAIMANT'S PUBLIC LIFE AND SOCIAL TIES

23. My colleagues do not differ from me on the precedent established by the Tribunal that schooling in a given country (here, the United States) is not indicative of attachment by an individual to the country involved. The Majority also accepts that this precedent is reaffirmed, *inter alia*, in two

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[21] Document 92, Exhibit A, paras. 4, 5 and 8 and Document 90, pp. 36-37.

consecutive awards rendered in *Arakel Khajetoorians et al.*[22] and *Ardavan Peter Samrad et al.*[23] (paras. 35 and 44 of the Award). However, the Majority draws a line between those awards and this Case, stating that "in those cases the claimant submitted no further evidence in favor of dominant and effective United States nationality." As one may observe from the Majority's Award, the intended "further evidence" in this Case, appears to be the following: I) By obtaining his education "the Claimant laid the basis for an independent life in the United States [that] enabled him to start a career in computer technology." II) "During his studies he was elected class president and became active in various extra-curricular activities." (*Ibid*, paras. 28 and 44.) III.) The Claimant registered with Selective Service for potential conscription into the U.S. military in 1975" (*ibid*, paras. 28 and 45). I will now discuss these points, though in a slightly different order.

24. Except for a few lines in a self-serving affidavit, no evidence is adduced in support of the allegation that the Claimant was elected class president or that he was involved in any extracurricular activities. However, even if proved, it is hardly conceivable that such activities could have any bearing on the nationality that the Claimant had not then acquired or even thought of. These activities are an integral aspect of the schooling years and go in tandem with the nature of each individual student irrespective of his/her nationality or place of study.

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[22] *Arakel Khajetoorians, et al.*, footnote 6, *supra* (para. 20), pp. 42-43.

[23] *Ardavan Peter Samrad, et al.* and *The Government of the Islamic Republic of Iran*, Award No. 505-461,462,463,464 & 465-2 (para. 32) *reprinted in* 26 Iran-U.S. CTR 44, p. 54.

25. Documents on file indicate that the Claimant had received an Associate of Arts degree from a local college in Worcester in 1975. There is no evidence to indicate when the Claimant obtained a B.S. in computer science. The file as a whole demonstrates that, even if true, such a degree should have been obtained after January 1981 and thus after the relevant period. It is therefore disappointing to see that a degree ostensibly obtained after the relevant period is used as cardinal evidence proving that the Claimant's United States nationality was dominant during that period.

26. It cannot be challenged that those who pursue a degree generally intend to base their future independent life on that education. This is not unique to our Claimant in this Case. However, the irony is the proposition that by obtaining a degree in computer science--even assuming that it was sought and obtained during the relevant period--the Claimant's sole intention was to lay a basis for his future life in the United States. It is unclear whether or not my colleagues are hinting at this. Why should not the Claimant be taken to "simply have gone to the United States as did a great many Iranian students in order to study there, with the intention of returning to Iran where he ... maintained substantial property interests"?[24]

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[24] *Ibid* (para. 32), p. 54. Capitalizing on their late involvement in the work of this Tribunal, my colleagues appear to feign ignorance of the fact that all the big names in the then computer market and its related services (such as IBM, Control Data, Computer Sciences Corp., *etc.*) were active in Iran, directly or through their Iranian branches or associates. A cursory review of the Tribunal awards would have revealed that a substantial number of the claims before this Tribunal involved computer companies and services in Iran. Large Iranian companies, such as ISIRAN, were also in the competition. This name is not unfamiliar. ISIRAN was named in a large number of claims involving in particular the Iranian armed forces. Moreover, my colleagues are probably unaware that long before the time when many Europeans could venture into computerizing their operations because of the costs involved, a large number of Iranian entities (in particular those involved in the oil, gas and petrochemical industries and banking system) had computerized many of their operations. This dates back to the early times when huge card-punching computers were used, occupying large spaces.

27. Although the real reason behind the Claimant's act of registration with Selective Service for potential conscription into the U.S. military is not clear to me, this remains the only evidence that links, to some extent, the Claimant to the United States. I understand that a potential conscript is far from becoming a real soldier. However, whatever weight one might be prepared to give to this single fact, it cannot turn the Claimant's United States nationality into a dominant one. This nationality was obtained only three months prior to the date these claims arose and less than eleven months before the entering into force of the CSD. That fact must be weighed against all other circumstances of the Claimant's life (to be discussed here and in the next Section) including the fact that the Claimant was a sole Iranian national for 24 years until his naturalization in March 1980 and lived for about 7 years in the United States as an Iranian student on an Iranian passport.[25] No United States passport was issued to the Claimant until May 1981. Thus, he should be taken to have been managing all his affairs, moving around, and dealing with all institutions on the strength of his Iranian identity, at least until March 1980.

28. Contrary to what is asserted in the Majority's Award, this Case is much weaker than *Arakel Khajetoorians et al.* and *Ardavan Peter Samrad et al.* Like the present Case, those two

[25] Although it is alleged that the Claimant had moved to the United States on a green card in 1972, he postponed the acquisition of U.S. citizenship until March 1980, long after the establishment of the Islamic Republic of Iran. In *Albert Berookhim, et al.* and *The Government of the Islamic Republic of Iran, et al.* (Award No. 499-269-1) *reprinted in* 25 Iran-U.S, CTR 278, the Claimant had moved to the United States in 1973 and obtained his citizenship in September 1980. This Chamber found that such a postponement carried a negative impact on the dominant nationality of that Claimant who had been (as alleged by our Claimant here) in the United States with permanent residence status during that period (*ibid*, para. 15, p. 285).

Cases suffered from paucity of evidence.

29. In the first Case, Andranik was born in Iran in 1955 and went to the United States in 1971, at the age of almost 16, when he was about 6 months younger than our Claimant was. His move to the United States in 1971 was allegedly on an immigration visa, as alleged here. He attended high school and college in the United States and graduated in 1974, much earlier than the Claimant in this Case. He worked for a longer period in the United States, including, allegedly, at Security National Bank in Glendale. Like our Claimant here, he alleged that since his departure in 1971 he did not revisit or reside again in Iran. He was naturalized in March 1978, about one year prior to the success of the Iranian Revolution and two years earlier than the Claimant in this Case.[26] Similar to our case here, no certificate of attendance or graduation was introduced in evidence in that Case.[27] Asteghik, another Claimant in *Arakel Khajetoorians et al.*, was born in 1965, and in 1971, at the age of 6, she moved to the United States, allegedly on an immigration visa. Having spent most of her childhood and all her youth in the United States and having attended elementary school, high school, and college there, Asteghik was in a much better position to integrate into American society than our Claimant was. She also contended that she never revisited or again resided in Iran since her departure in 1971. She became a citizen of the United States in November 1978, about a year and a half earlier than our Claimant.[28] Notwithstanding the above, the Tribunal expressed its dissatisfaction with the evidence and pointed out that

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26 *Arakel Khajetoorians, et al.*, footnote 6, *supra* (para. 8), p. 39.

27 *Ibid*, para. 20, pp. 42-43.

28 *Ibid*, para. 10, p. 40.

virtually no evidence existed in the record to document those Claimants' ties with the United States. The Tribunal ruled in that Case that the Claimants "have failed to prove that their dominant and effective nationality at the time their claims arose was that of the United States." Before this, the Tribunal ruled that "schooling in the United States does not necessarily mean attachment by the individual to that Country."[29]

30. Ardavan Peter Samrad, a claimant in *Ardavan Peter Samrad, et al.*, was an individual born in 1957 in the United States to an Iranian father and a mother of German origin who had moved to the United States in 1951 and been naturalized in 1958. Unlike our Claimant here, Ardavan Peter had his United States nationality by birth, some 21 years prior to the date his claim arose. His sister, Gitty, was also a United States national by birth, and his other two sisters (Roya and Leila) were born in Tehran but naturalized as United States citizens in October 1976. Ardavan Peter "had grown up in an English-speaking household." Even when in Tehran he attended the Tehran American School, with an American-oriented curriculum, for four years. He spent one year studying in Connecticut and thereafter spent some five years studying in Switzerland, from 1970 to 1976. Then, from 1976, he continued his studies in the United States until the time of his graduation from universities in Ohio and New York, in 1979 and 1981, respectively. After spending another year studying French in Paris, he returned to the United States for good and started his real estate business in California.[30] In view of the paucity of evidence on genuine links, the Tribunal did not

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[29] *Ibid*, paras. 21 and 21, pp. 42-43.

[30] *Ardavan Peter Samrad, et al.*, footnote 23, *supra* (paras. 10-12 and 32), pp. 48 and 54.

find this background--substantially richer than that of the Claimant here--sufficient for Ardavan Peter to integrate into American society. The Tribunal acknowledged the fact that Ardavan Peter had spent several years studying in the United States and that he had the potential of becoming integrated in that society. It ruled, however, that it was not persuaded that he had done so and that his United States nationality had become a dominant one by the time his claim arose, in May 1979. The Tribunal pointed out the fact, as alluded to earlier, in para. 26, *supra*, that Ardavan Peter might simply have spent his time in the United States for studies with the intention of returning to Iran, like many other Iranians.

31. Likewise, except for a number of years studying in the United States, the file in this Case is neither indicative nor probative of the Claimant's genuine social link with the United States or integration into American society. In this connection, the Claimant has relied on two very short notes produced in evidence. One is signed by a lawyer and the other by one Francis J. Trapasso. They both state that they knew Mr. Homayounjah (George Davidson, the Claimant) since some time in 1974 or 1975, but both tellingly stop short of divulging anything about their relation and the nature and extent of their acquaintance. Both are silent on the important matter of the Claimant's life-style and contacts with American society. They only express the impression that George "is an individual of good moral integrity" or "of high moral esteem." These are hardly indicative of any link with American society, unless we were to take it for granted that good and high morality are qualifications by which only Americans are to be distinguished. There are two other certificates from a Jewish Community Center and a Synagogue in Worcester certifying that George and his other brothers were members. But such evidence serves to associate a given person with his/her faith rather

than with a particular society.[31]

32. Now it is appropriate to re-visit a precedent established by this Chamber in *Ninni Lajevardi*. There, the Claimant had acquired her United States nationality in 1952 because of her birth in that country. While in Iran she had registered as a United States citizen abroad at the United States Embassy in Tehran. She attended the Community School with an emphasis on the English language. She spent a substantial part of her life studying and working in the United States and produced more detailed affidavits in connection with her life-style there.[32] In refraining from qualifying the Claimant's United States nationality as dominant, and rightly so, this very Chamber noted that she had spent (as our Claimant here did) her childhood in Iran. The Chamber properly found that the record was "largely barren of evidence that would provide a more detailed picture of [the] period [of her stay] in the United States." In its quest for proof of the Claimant's integration into American society, the Tribunal stipulated that "minimal" evidence was produced to support the assertion that "socially and culturally her life was typically American and that her friends and interests were mainly American."[33]

33. Against the Claimant's failure to establish his social link with, and integration into, American society, one gets the strong sense that the Claimant and his family remained

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[31] Similar short certificates were produced in support of the dominant United States nationality of the Claimant's brothers. Interestingly enough, some of these certificates, issued by Congregation 'Beth Rambam', The Orthodox Sephardic Center of Houston, associated the Claimant's brothers with Iran by characterizing them as "Sephardic Orthodox Jew[s] from Tehran, Iran."

[32] *Ninni Lajevardi* and *The Government of the Islamic Republic of Iran*, Award 553-118-1 (paras. 10-20 and 41), *reprinted in* – Iran-U.S. CTR , pp. -.

[33] *Ibid*, paras. 42-44, pp. -.

isolated in the United States. They only socialized with the Iranian community there. Even in the 1990s, the Claimant's parents appeared to be able to converse only in Persian. It has not been alleged that the mother could speak any language other than Persian. The father testified in Persian at the Hearing held in February 1997. That the Claimant and his family lived a captive life in the United States is further proved by the fact that the Claimant and all his married brothers chose to share their future lives with Iranian wives.[34]

II.3. CLAIMANT'S CENTER OF INTERESTS AND ECONOMIC TIES

34. Parallel to the element of habitual residence and social ties, the element of financial interests and economic ties has played a crucial role in establishing the claimant's dominant nationality before this Tribunal. I will first summarize the evidence allegedly supporting the Claimant's financial and economic ties with the United States and then evaluate it against the Claimant's similar ties with Iran.

35. The Claimant contended that i) he bought a house with one of his brothers in the United States; ii) during and after his studies he was employed in the United States; iii) he filed tax returns there (Majority's Award paras. 30 and 32). The Majority appears to generally accept these allegations and relies on them in support of its finding in favour of the

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[34] Kamran married Minoo, George, Deborah Tehrani, David, Revital Muslavi and Henry, Mojgan, all admittedly of Iranian origin and with Iranian nationality. Nothing is produced to prove that these ladies ever held or acquired United States citizenship, and if so, when. Not being named as Claimants in these proceedings, no information is made available to the Tribunal in connection with the younger brothers' (Robert's and Jack's) personal status.

Claimant's United States dominant nationality (*ibid*, para. 44 and 45).

36. Concerning the Claimant's purchase of a house in the United States, it should be noted that the Claimant lived, at least until sometime in 1974, in a place rented and paid for from Iran by his father. The Claimant admittedly purchased no property in the United States until August 1979, when his parents had left Iran in the wake of the changes brought about there by the Revolution.

37. The Majority's Award shows (though indirectly and incompletely in paras 32 and 45) that most of the Claimant's work experience in the United States was during the time when he was still studying there as an Iranian national and not yet naturalized. Again, nothing is unique in this. Most students, whether local or otherwise, engage in such part-time or summer jobs to defray the cost of their studies. Interestingly, the only evidence regarding the Claimant's income and tax payments relates to this period (1977-1979) and is limited to three Wage and Tax Statements.[35] The other evidence in support of the Claimant's work experience is an IBM visitor card and a letter from a company called EG&G Information Systems. No clue is provided as to when and on what conditions the Claimant was employed by IBM and for how long. The certificate issued by EG&G is dated April 23, 1982 and, using the past tense, certifies that the Claimant "worked" with them "for a period of two and one half years." However, about 14 months of this work experience fell outside the relevant period and most, if

[35] Figures on the copies produced in evidence are hardly legible. The total gross income (before tax) reported for the year 1978, including wages, tips and other compensation, was less than U.S. $3,000. However, what appears to be clear is that the net wages received by the Claimant totaled U.S. $2,260.60 for that year. For the years 1977 and 1979, total gross income appears to be around U.S. $5,700 and $13,000, respectively.

not all of it, was before the Claimant's graduation. It has not been alleged, and nothing has been filed to show, that any tax return reflecting any income from these two companies was ever filed in the United States.

38. Against flimsy evidence of economic ties with the United States, evidence on file supports the Claimant's substantial interests in, and economic ties with, Iran. The Claimant lived and studied in the United States mainly on funds provided to him from Iran.[36] The Claimant and his brothers state that they received money from income earned in Iran until June 1980. From July 1979, the Claimant's parents joined them as recipient of such funds.[37]

39. I agree that ownership of real estate in a country is an element of attachment of the owner to that place. But many people find it more convenient to buy housing in the country wherein they stay, even though they consider that stay to be temporary. The Claimant's purchase of a house with his brother, and in August 1979 at that, should be weighed against the Claimant's ownership of real estate and other interests in Iran. For decades, the Homayounjah family owned a two-story home in Tehran. They also owned buildings purchased and constructed with the sole intention of carrying out the family business. Since childhood, the Claimant has had direct

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[36] During those periods, each Iranian student abroad was entitled to monthly receive seven hundred to one thousand United States dollar at a reduced favourable student's rate.

[37] The Claimant and his father contended that they had arranged that the balance of rent from the buildings they owned in Iran be remitted to them in the United States. It is further asserted that checks representing those rents were sent and received even after the departure of the Claimant's parents from Iran, "during 1979 through the middle of June 1980" (see, *e.g.*, Document 70, Exhibit A, paras. 1-4 and paras. 78 and 79 of the Majority's Award). As we shall observe later when discussing the Claimant's expropriation claim, the June 1980 date was selected by the Claimant and his father with the intention of matching that claim, otherwise they should have admitted receipt of rents for a much longer period.

ownership interests in at least three such buildings in Iran. These properties included a six-and-a-half-story building with two basements (the Kamran building), a three-story building with a basement (the Manouchehri building), and another three-and-a-half-story building (the Jalleh building). They generated income by being leased out as apartments, offices, shops, and warehouse space.

40. The Claimant's interests in Iran were not limited to the ownership of these three buildings. He had substantial interests in the family business, including the hotel business and manufacturing steel wool. In addition, he and his family were active in a variety of businesses, including the purchase and sale of properties and the leasing out of properties for residential and commercial purposes. They were professionally engaged as champertors, mortgagees, or mortgagers in numerous transactions. The Claimant could have taken up any or all of such family businesses after his graduation and eventual return to Iran.[38] Likewise, he had interests in all his parents' properties, which he would potentially inherit in the future.[39] It has not been alleged that the Claimant or any member of his family had any such activities or interests in the United States, prior to or during the relevant period, or, for that matter, even after that time.

41. Against the three tax returns produced in evidence by the Claimant for the years 1977-1979 (paragraph 37, *supra*), the Respondent produced ample evidence showing that the Claimant

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[38] See, *e.g.*, *Ardavan Peter Samrad, et al.*, footnote 23, *supra*, para. 32, p. 54; and *Albert Berookhim, et al.*, footnote 25, *supra*, para.15, p. 285.

[39] *Reza Nemazee, et al.* and *The Islamic Republic of Iran* (Award No. 487-4-3), para. 33, *reprinted in*, 25 Iran-U.S. CTR 153, p. 161.

filed tax returns with the Iranian Ministry of Finance during his stay in the United States and even after his naturalization. These tax returns show that the Claimant declared and actually paid taxes on his income in Iran from 1974 to June 1981.

42. In conclusion, had we followed the Tribunal's practice in the search for the Claimant's effective and dominant nationality in the Case before us, the Chamber should have ruled, in view of the above, that the Claimant has failed to satisfactorily carry out his burden of proving that his United States nationality was effective and dominant. The Tribunal should have ruled, based on the record, that the Claimant was not integrated into American society during the relevant period. Although these failures should be taken to be sufficient to deny the Claimant's standing to sue before this Tribunal, it is my considered view that the overall weight of the evidence also forces the balance to tilt heavily in favour of the Claimant's Iranian nationality.

III. CLAIMANT'S RIGHTS WERE NOT ARBITRABLE

43. The question to be discussed and answered hereunder is whether or not the Claimant possessed a legal right which can be made subject of a claim before this Tribunal against the Government of Iran, whose nationality the Claimant also possessed.

44. It is now general knowledge that by six votes to three the Full Tribunal in *Case A/18* hastily sacrificed well-settled principles of law to make certain wishes come true.[40] In that Case, the Full Tribunal, as it was then composed, followed the footsteps of Chamber Two's award in *Nasser Esphahanian.*[41] It set the precedent that the claim of a national could be prosecuted in the international arena against the Sovereign State whose nationality that national possesses, provided that his other nationality could be found to be effective and dominant.

45. Fortunately enough, the Full Tribunal could not but qualify its new version of the theory of "effective and dominant nationality" by adding an "important caveat" to it:

> 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.[42]

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[40] *Case A/18, reprinted in* 5 Iran-U.S. CTR 251. For criticism, see, *e.g.*, *Case A/18,* Dissenting Opinion of the Iranian Arbitrators, *reprinted in* 5 Iran-U.S. CTR 279 and Stern B., "Les questions de nationalité des personnes physiques et de nationalité et contrôle des personnes morales devant le Tribunal de différends irano-américains," 30 *Annuaire française de droit international* 425.

[41] *Nasser Esphahanian* and *Bank Tejarat*, Award No. 31-157-2, *reprinted in* 2 Iran-U.S. CTR 157. See, also, the Dissenting Opinion of Dr. Shafie Shafeiei, *ibid*, 178.

[42] Footnote 40, *supra*, pp. 265-266.

III.1. IMPORT AND APPLICATION OF THE *CASE A/18* "CAVEAT"

46. The addition of the "important caveat" was the least attempt to prevent dual nationals from unjustly benefiting from both nationalities by playing either of them as and when it pleases them. Unlike the new version of the "effective and dominant" nationality theory, the caveat was not an innovation. It has its roots not only in logic but also in international legal principles and precedents applicable to situations wherein the new theory may be found to be relevant. Relying on a Case decided 25 years earlier by the United States-Italian Conciliation Commission,[43] the award in *Nasser Esphahanian* also warned of the same:

> There 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.[44]

47. As alluded to above, the Full Tribunal's caveat is rooted in a number of well-settled doctrines and principles of customary international law that prevent the fraudulent or non-fraudulent execution of an individual's right against his/her national State in a variety of situations. These include, *inter alia*, the principles of good faith, abuse of

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[43] *Flegenheimer Case* (United States *v.* Italy), 14 RIAA 327, 378 (1958).

[44] *Nasser Esphahanian*, footnote 41, *supra*, p. 166. (*Flegenheimer* provided for a number of other examples based on "the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon institution of estoppel," such as when the injured party neglects "to indicate his true nationality," or conceals it, or invokes "another nationality at the time the fact giving rise to the dispute occurred .... "

rights, estoppel, and responsibility of States.[45]

48. The fact that the caveat applies to a variety of fraudulent or non-fraudulent situations was understood by the majority in *Case A/18* and has been recognized and consistently applied by all Chambers of the Tribunal in a number of awards.

49. To start with, the majority in *Case A/18* deliberately refrained from limiting the import and application of the important caveat by any qualification. In explaining his intention as a member of the majority, Judge Riphagen states in his Separate Opinion that "[i]t is also often admitted 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."[46] Judge Mosk, a United States-

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[45] The principle of good faith is a catchall principle that covers other theories and principles. Examples of instances wherein a claim is considered barred by the application of "estoppel" and "abuse of rights" are given by the awards of the Tribunal to be discussed here. As to the theory of the international responsibility of States, the result will be the same no matter whether we ground the theory on "culpa" or on "objective responsibility," the presence of a mere "wrongful act." First, a claim of a national against his/her national State is barred by the application of the rule that, absent an international treaty, no State can be made accountable in an international plane for injuries to its nationals, and, second, no knowledge of wrong could be presumed in a situation wherein the individual involved introduces himself/herself as a sole national of that State, and the State treats him/her as such.

[46] Concurring Opinion of Willem Riphagen, footnote 40, *supra* 273, p. 274. Thus, whether by the application of estoppel or other principles, he was of the view that the subjective element of *mens rea* or fraudulent behaviour is unnecessary in such circumstances. What was found necessary was proof that the right was available only to nationals of the Respondent State and that the given Claimant acquired the right in his capacity as a national of that State. The point to be made, however, is that estoppel is a well-settled principle of law applied by a number of international decisions, including those rendered by the World Court. See, *e.g.*, Cheng B., *General Principles of Law*, pp. 141-158 (1987); Virally M., "The Sources of International Law," in M. Sorensen (ed.) *Manual of Public International Law*, p. 148 (1968); Martin A., *L'estoppel en droit international publique*, pp. 139-172 (1979); and Mueller J.P. and Cottier T., "Estoppel," in *Encyclopedia of International Law, Vol. 7*, pp. 78-81 (1984).

appointed member of that majority, reads the Full Tribunal's decision to imply 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."[47]

50. A series of Tribunal awards issued after the award in *Case A/18* confirmed the above understanding. As early as in 1985, Chamber Two upheld, in the award rendered in *Leila Danesh Arfa Mahmoud*, the rule that a claim for rights available only to Iranian nationals is inadmissible before this Tribunal.[48] The rule that all circumstances of a given Case must be examined for this purpose was later confirmed by the same Chamber in *Edgar Protiva, et al.*[49] and *Faith Lita Khosrowshahi, et al.*[50] and was applied in *James M. Saghi, et al.* In the latter award, Chamber Two embarked on a thorough and detailed analysis of the Tribunal's precedents, including what I have discussed above. Differentiating between situations wherein a certain abusive element is present and

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47 Concurring Opinion of Richard M. Mosk to Decision in Case No. A/18, *Ibid* 269, p. 272 (emphasis added).

48 *Leila Danesh Arfa Mahmoud* and *The Islamic Republic of Iran,* Award No. 204-237-2 (paras. 19-25) *reprinted in* 9 Iran-U.S. CTR 350, pp. 354 and 355. To this award I will return later in the next Sub-section.

49 *Edgar Protiva, et al.* and *The Government of the Islamic Republic of Iran*, Award No. ITL 73-316-2 (para. 18), *reprinted in* 23 Iran-U.S. CTR 259, p. 263. (There, the Tribunal stated that it will have to "examine all circumstances" of the Case on the merits and, "for example," will have to "consider whether the Claimants used their Iranian nationality to secure benefits available under Iranian law exclusively to Iranian nationals or whether, in any other way their conduct was such as to justify refusal of an award in their favor in the present Claim filed before the Tribunal." Emphasis added.)

50 *Faith Lita Khosrowshahi, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. ITL 76-178-2 (para. 16), *reprinted in* 24 Iran-U.S. CTR 40, 45 (using language identical to that in *Edgar Protiva, et al.*)

those wherein the right involved is limited to Iranians, Chamber Two pronounced that:

> 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 ... [e]ven 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.[51]

Coming to the facts which obtained in that Case, the Tribunal ruled that one of the Claimants:

> [S]hould not be permitted to recover against Iran, even if the related benefits, *i.e.*, the shares in N.P.I. he acquired with the use of his Iranian nationality, were not limited to Iranians by Iranian law. To rule otherwise would be to permit an abuse of right.[52]

51. The award in *Rouhollah Karubian* cited with approval[53] the findings of the award in *James M. Saghi, et al.* and, after noting that the Claimant, in his capacity as an Iranian national, had acquired the right to real properties in Iran, which "is a benefit reserved for Iranian nationals," ruled:

> If the Tribunal were to allow him to recover against the Respondent in these circumstances, it would be permitting an abuse of right. Consequently, the *A18*

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[51] *James M. Saghi, et al.* and *The Islamic Republic of Iran*, Award No. 544-298-2 (para. 54), *reprinted in* - Iran-U.S. CTR -, p. -.

[52] *Ibid*, (para. 59), p. -. See, also, *Ataollah Golpira* and *The Islamic Republic of Iran*, Award No. 32-211-2, *reprinted in* 2 Iran-U.S. CTR 171, p. 173.

[53] *Rouhollah Karubian* and *The Government of the Islamic Republic of Iran,* Award No. 569-419-2 (para. 147), *reprinted in* - Iran-U.S. CTR -, p. -.

caveat must bar the Claimant's recovery.[54]

52. Chamber One's approach has not been any different from the above settled practice.[55] In *Robert R. Schott* the Tribunal first noted that the shares involved were assigned to the Claimant by his daughter (Mrs. Mostofi), an Iranian by marriage, who had obtained them with that nationality. Not needing to determine Mrs. Mostofi's effective and dominant nationality for the sake of establishing the continuous nationality of the claim, Chamber One ruled that:

> It is therefore clear that irrespective of her dominant and effective nationality Mostofi relied on her Iranian nationality when she acquired the shares. ... The Tribunal therefore finds that Schott is estopped from arguing that Mostofi's dominant and effective nationality was American for the purpose of the Tribunal's jurisdiction over this portion of the claim. Consequently, the Tribunal finds that for the purpose of determining its jurisdiction over this claim, Mostofi's nationality is Iranian.[56]

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[54] *Ibid*, para. 161, p. -. The claim could also have been denied, in my view, by the application of the principle of estoppel. The Claimant had acquired a right solely available to Iranians by representing himself as such, as in fact he was. However, it is also true that by bringing his claim for that property, he could be taken to have attempted to abuse the right granted to dual nationals before this Tribunal by *Case A/18*. A play with one of the nationalities (which gives him the right to claim) against the other nationality (which had allowed him to acquire a right that would not have been otherwise available to him), is barred by the important caveat of *Case A/18*.

[55] In several of its awards, Chamber One noted that subsequent proceedings remained "subject to the caveat added by the Full Tribunal in *Case No. A 18*." See, *e.g., Mohsen Asgari Nazari* and *The Islamic Republic of Iran*, Award No. ITL 79-221-1 (para. 19), *reprinted in* 26 Iran-U.S. CTR 7, p. 14; *Houshang and Catherine Etezadi* and *The Islamic Republic of Iran*, Partial Award No. 497-319-1 (para. 20) *reprinted in* 25 Iran-U.S. CTR 264, pp. 271 and 272; *Lilly Mythra Fallah Lawrence* and *The Islamic Republic of Iran*, Award No. ITL 77-390/301/302-1 (para. 14) *reprinted in* 25 Iran-U.S. CTR 190, p. 195.

[56] *Robert R. Schott* and *Islamic Republic of Iran, et al.*, Award No. 474-268-1 (paras. 43 and 44) *reprinted in* 24 Iran-U.S. CTR 203, p. 218. In support of the first part of the above quotation the Chamber relies specifically on the parts of the awards in *Case A/18* and *Nasser Esphahanian* that pronounce the important caveat.

III.2. APPLICATION OF THE *A/18* CAVEAT TO THE FACTS OF THIS CASE

53. The Majority in this case does not depart from the precedents established by the Tribunal on the import of the important caveat as understood and discussed in Section III.1, *supra*. It impeccably and unequivocally states that the caveat is "intended to prevent abuse of right" and that claims based on "benefits generally limited by relevant Iranian laws to persons who are nationals of Iran" are barred.[57] The problem is, however, that the Majority misunderstands the facts and misapplies the rules.

54. My colleagues do not differ with me on the fact that the Claimant could own and retain ownership of the real estate in question only as a national of Iran and that he did so for years. However, the Majority concludes that the Claimant's ownership of the property in question remained legal at the time of the alleged expropriation. The gist of their argument in support of this conclusion is that Iranian law permitted him, as an Iranian who obtained a foreign nationality, to hold his real property up to a year before being obliged to sell it.[58] The Majority's interpretation of the facts and applicable rules of law is erroneous.

55. It is no great revelation to state that the ownership of

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[57] Majority's Award, para. 76. In para. 77, the Majority shows that it would have been prepared to deny the claim, if the Claimant had "enjoyed his property rights by violating municipal law, [or] ... by abusing the Iranian nationality." I have to add that in phrasing this part of the Award my colleagues did not intend to imply that any abuse of the United States nationality would have been left unsanctioned.

[58] *Ibid.*

real property by a given Iranian is legal. Even in a case wherein dual nationality is alleged, the ownership will remain legal in the eyes of the Iranian authorities so long as Iranian nationality is not relinquished in accordance with the law or the acquisition of the second nationality is not made known to them. Iranian law regards such persons solely as Iranians, and, logically, their ownership of benefits only available to Iranians is perfectly legal and valid. In this Case, it has not even been alleged that any Iranian authority was made aware of the Claimant's acquisition of his second nationality. To the contrary, until the time of the filing of the Statement of Claim, the Claimant's moves--such as renewal and extension of the validity of his passports and the very act of keeping the real estates--can only suggest the opposite. Applying the *A/18* caveat, as interpreted and applied so far, to the facts here bars the Claimant from using his alleged dominant United States nationality against his Iranian nationality, without which he could not have legally enjoyed any such ownership interests in the first place.

56. The Majority also errs in its interpretation of applicable Iranian law to the effect that it allowed the Claimant to validly retain ownership of the real property in question for a year after his naturalization date. To explain the Majority's view in better terms, this means that since the Claimant had acquired his United States nationality in March 1980, and since his properties were expropriated in the month of June of the same year, he could not have had the time necessary to sell his properties in accordance with the requirements of Iranian law.[59] To be able to support such an argument, the Majority has to surmount a couple of

[59] As I will show in discussing expropriation issues, the suggestion of the June 1980 date is the outcome of misrepresentation of facts (see paragraph 80, *infra*).

insurmountable hurdles.

57. First, the Majority's reasoning carries an inherent, but unwarranted, element of good faith that cannot be sensed in the Claimant's behaviour. Nothing proves, and for that matter it has not even been seriously alleged, that the Claimant had, at any point in time, any intention to sell the real properties involved. Even accepting that the time for the sale was insufficient, nothing prevented the Claimant from thinking about or starting the process of selling of any of those properties. This was a reasonable expectation, particularly as it is alleged that the Claimant had emigrated to the United States in 1972 and intended to remain there as a United States national ever since that date. The evidence leads us to a different conclusion. Not only did the Claimant purchase a parcel of land in 1973 and start construction of the Kamran building on it in 1974, he and his family also entered into several different transactions involving real estates even after his parents' departure from Iran in 1979. (See, paras. 20 and 39-41, *supra*.)

58. The Claimant's postponement of his naturalization date helped him to continuously reap the fruits of his ownership of real property in Iran as an Iranian, even after his naturalization. The Tribunal's precedents bar such a person from reaping twice the harvest of his/her deliberate postponement of his/her naturalization: First by seeking support of the Iranian nationality to keep the right to own immovable property and then by invoking the other nationality to acquire the standing to sue the very nation that granted and protected the right at issue. Allegiance on the part of a national and protection by the State of his/her nationality are two faces of a single coin: nationality. In *Leila Danesh Arfa Mahmoud,* the length of the Claimant's residence in the

United States (since 1969) and the length of the relevant period were longer than those which obtained here. As in the present Case, the wrongly understood one-year respite "had not yet expired at the date of the alleged expropriation." Nonetheless, noting that the Claimant was able, "within that same period ... to benefit from another nationality with respect to the property at issue, a benefit that could not have otherwise been enjoyed," the Tribunal found itself unsatisfied that the Claimant's "dominant and effective nationality during the relevant period was that of the United States."[60]

59. The Majority wins the race by circumventing the next hurdle instead of surmounting it. The Majority confuses Articles 988 and 989 of the Iranian Civil Code, which govern different instances of lawful renunciation of nationality and unlawful acquisition of a new nationality. It is true that, as a proviso for renunciation of Iranian nationality, Article 988 of the Code requires that the national involved should undertake, beforehand, to transfer within one year all rights that he/she possesses in immovable property in Iran.[61] Such a respite is, however, totally wanting in Article 989 of the same Code. Under this Article, Iran does not recognize the individual's new nationality. Upon discovery of such unlawful behaviour the Public Prosecutor becomes invested with the

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60 *Leila Danesh Arfa Mahmoud*, footnote 48, *supra* (paras. 24-26), pp. 354 and 355.

61 See footnote 9 of the Majority's Award. I should, however, add the unanimous view that the conditions enumerated in this Article for renunciation/relinquishment of Iranian nationality are not interdependent, though all of them are to be established to yield that result. In other words, neither of them is a pre-requisite for the fulfillment of the other. For example, the individual's act of starting the process of transfer of ownership is not contingent upon his reaching the age of 25, just as the fulfillment of military service cannot be postponed until attainment of that age.

power to sell the property.[62] Thus, the question as to how and when the process will be carried out and what the relation between the individual and Iranian authorities will be are all matters governed by Iranian law.[63]

60. Indeed, as the unqualified language of the *A/18* caveat reveals, that one-year respite has no bearing on the admissibility or inadmissibility, before this Tribunal, of a claim pertaining to immovable properties. The Majority's undue delineation of the scope of the caveat can only be seen as an attempt to eviscerate and to rewrite the *A/18* award, which was in itself a gross injustice to the Iranian nation and all developing countries.

61. My conclusion under this Section is clear. Were we to accept the dominance of the Claimant's United States nationality despite the overwhelming facts pointing to the opposite direction, as discussed in the previous Section, the Claimant's claim would still be barred by the application of the "important caveat" of *Case A/18*. Actually, this conclusion could have relieved us of the burden of establishing the Claimant's effective and dominant nationality, because it would not have mattered whether it were that of Iran or the United States.

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[62] Article 989 of the Iranian Civil Code provides, in relevant part, that: "The foreign nationality of any Iranian national who has acquired foreign nationality after 1280 (1901-1902), without observing legal requirements, will be considered as non-existent, and he will be regarded as an Iranian national. Nevertheless, all his immovable properties will be sold under the supervision of the local public prosecutor and the proceeds will be paid to him after deduction of the expenses of the sale. ..."

[63] Interpreting Article 989 of the Iranian Civil Code, Chamber Three found that the power of the Public Prosecutor under "the Article is not self-executing but that a procedure for the sale of the real estate must be set in motion under [his] supervision...." (*Reza Said Malek* and *Government of the Islamic Republic of Iran*, Award No. 534-193-1 (para. 54) *reprinted in* - Iran-U.S. CTR -, p. -.

IV. EXPROPRIATION/DEPRIVATION CLAIM

IV.1. AN IMPORTANT OBSERVATION

62. It is true that three of the buildings involved in this Case were subjected to foreclosure in the years 1982 and 1984.[64] This is, however, an everyday experience around the world. Whether or not those foreclosures were executed by observing due process of law and in accordance with the underlying contracts or whether or not they were the result of unlawful intervention attributable to Iran after the Tribunal's jurisdictional cutoff date is beyond the concern of this Tribunal. This is so even though its members, as human beings, may sympathize with the hypothetically aggrieved party against whom the mortgage was unjustly foreclosed. The money deposited by Iran in the Escrow Account to secure payment of awards against Iranian respondents is not made available to the Tribunal as a charity fund. It is trusted that the Tribunal will act within the boundaries of its jurisdiction as demarcated by the Parties who created it. As arbitrators, we are obliged to respect those limitations. We are not allowed to stretch our jurisdiction beyond those bounds for any reason, including any sympathy we might feel for the Claimant. There are other avenues available to such claimants, and we have not been ordained to make right whatever might appear to us to be wrong.

IV.2. STATEMENT OF LAW

63. Accepting that no expropriation within the meaning of the term in international law has occurred, the Majority grounds

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[64] The Claimant possessed no ownership interest in the third (Ahar) building, which was also subjected to foreclosure during that period.

its finding on deprivation based on "other measures affecting properties rights," which forms part of the Tribunal's subject matter (*ratione materiae*) jurisdiction. However resolutely one might agree with a finding based on this part of Article II (1) of the CSD and the precedents of the Tribunal, it remains to be seen whether or not the contended facts and events can fit that frame. Embellishing an award with a façade of niceties and a number of precedents based on that Article cannot compensate for the weakness of its infrastructure.

64. The Majority accepts that the "government's control over property does not automatically and immediately justify a conclusion that the property has been taken, thus requiring compensation under international law." I agree with this. The Majority goes on to state that "such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[65] Setting aside the ambiguities surrounding the use of the word "deprivation," I have little problem with this conclusion, with the understanding that the so-called deprivative measure must be generically similar to "expropriation."[66] To culminate in governmental responsibility, the interference with the fundamental rights of ownership has to be "to such an extent that these rights must be deemed to have been expropriated," and it is the Claimant's "obligation to demonstrate the requisite government interference." [67]

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[65] Majority's Award, para. 106 (emphasis added).

[66] See, *e.g.*, *Lillian B. Grimm* and *The Islamic Republic of Iran*, Award No. 25-71-1, *reprinted in* 2 Iran-U.S. CTR 78, p. 79 and *International Systems & Controls Corporation* and *Industrial Development Renovation Organization of Iran, et al.*, Award No. 256-439-2, *reprinted in* 12 Iran-U.S. CTR 239, pp. 263-264.

[67] The Majority's Award, paras. 104 and 106 and the precedents cited in their support.

IV.3. EVIDENCE IN SUPPORT OF THE MAJORITY'S FINDING

65. The Majority has relied on the oral testimony of the Claimant's father and his father's old friend, one Mr. Haim, at the Final Hearing[68] and the affidavits of a number of the Claimant's relatives and close family friends in support of them.[69] The Majority's reliance on the so-called witness testimonies or affidavits is an extremely precarious approach with which I must strongly disagree. It is now a matter of public knowledge that, even at the risk of severe punishment for perjury, some people, including those who hold public offices, lie before courts and end up in jail or in serious trouble.[70] One should bear in mind that this Tribunal is neither an ivory tower nor an utopia. It is an earthly establishment wherein some interested or hostile witnesses might be tempted to make false statements free from any fear of subsequent punishment, which is not available to it.

66. Experience shows that most witnesses introduced by U.S.

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[68] Ironically, such testimonies and arguments, even though based on hard and convincing evidence, were denied by this Tribunal in a number of previous awards on the ground that, although "attractive," they were "*ex post facto* explanation[s]" (*TME International, Inc.* and *The Government of the Islamic Republic of Iran, et al.,* Award No. 473-357-1, para. 86, *reprinted in* 24 Iran-U.S. CTR 121, p. 141 and my Dissenting and Concurring Opinion in the same Case, para. 34, *ibid.*, p. 184); or that their admission "would expose the other party to the risk of real prejudice and would gravely undermine the orderly procedural foundations on which the Tribunal's decisions depended." (*Utterwyk Corporation, et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 375-381-1, paras. 22-29, *reprinted in* 19 Iran-U.S. CTR 107, pp. 113-116 and Judge Mostafavi's letter in the same Case, *ibid.*, pp. 162-165).

[69] *Ibid*, paras. 108 and 109.

[70] One may recall the recent and unfortunate case of Mr. Jonathan Aitken, a former British government minister, who received an 18-month prison sentence for committing perjury. (Michael Horsnell, "The single lie that destroyed a life," *The Times*, June 9, 1999. See, also *The Times,* June 21, 1999, Vol. 153, No. 3; and *Electronic Telegraph,* Issue 1475, Wednesday 9 June 1999).

Claimants are Iranians who reside in the United States or elsewhere outside Iran, possessing clear interests in the successful outcome of the case, and having serious and often conspicuous hostility towards Iran. To permit these people to unleash their hatred, greed, and avarice against Iran in the guise of witnesses, and under the mastery of professional U.S. attorneys--who are excellent in the drafting of affidavits and the examination of witnesses--is something that international law does not and should not allow.

67. Apart from the above considerations, the Majority's heavy reliance on the statements of witnesses is at odds with its declared intention that it has to evaluate "the probative value of this evidence with caution to protect the Respondent."[71] The Majority refrains from stating what other contemporary corroborative evidence satisfied this requirement of a cautious approach. In the following Sub-sections, I will first discuss the weakness of the affidavits on which the Majority's finding of deprivation is based. After that, I will analyze the evidence on file to show that contemporaneous evidence did not support the allegations therein. While

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[71] *Ibid.*, para. 109. This is a reference to Judge Virally's detailed and eloquent analysis cited with approval in *W. Jack Buckamier* and *The Islamic Republic of Iran, et al.* Award No. 528-941-3 (para. 67) *reprinted in* 28 Iran-U.S. CTR 53, pp. 74-76. (Before the conclusion borrowed by the Majority here, Judge Virally stated, *inter alia*, that "the value attributable to this kind of evidence is directly related not only to the legal and moral traditions of each country, but also to a system of sanctions in case of perjury, which can easily and promptly be put into action and is rigorous enough to deter witnesses from making false statements. Such a system does not exist within international Tribunals and recourse to the domestic courts of the witness or affiant by the other party would be difficult, lengthy, costly and uncertain. In the absence of any practical sanction ... oral and written evidence of this kind cannot be accorded the value given to them in some domestic systems.") It should be added that even common law-minded scholars and supporters of the admissibility of such oral or written testimony emphasize the requirement that they must be weighed according to each witness' "interest in the question, his relation with the claimant, and in short according to all the circumstances of the case." Sandifer, D. V., *Evidence before International Tribunals* (revised ed. 1975) p. 365.

discussing the evidence, I will also allude to the reasons why, in my view, the Majority is so reluctant to rely on it in support of its deprivation finding.

IV.3.a. ***Affidavits Forming the Basis of the Majority's Finding***

68. The Claimant's father not being a direct witness to the events in Iran, his affidavits are based on hearsay, namely, the assertions of a number of other affiants whose statements will be analyzed in this Sub-section. Mr. Haim's affidavit and testimony is the only evidence that is based on two (of three) groups of documentary evidence to be treated in Sub-section IV.3.b. Mr. Haim, "an old friend" of the family, was the representative appointed by the Claimant's father to manage the Homayounjahs' affairs in Iran with respect to the Kamran building.

69. The affidavits produced to corroborate the testimony of Mr. Haim and that of the Claimant's father were prepared in English for affiants whose knowledge of the language is highly doubtful.[72] They appear to be a set of pre-prepared texts. Not only do affidavits in each group employ identical wording, but they also suffer from similar flaws.[73]

70. The identical affidavits of Fred Muslavi and Josephine Israel are general, vague and based on hearsay, instead of direct observations or knowledge. Both claim that in the summer of 1980 they spoke to unknown "tenants of the ...

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[72] The affidavits lack original Persian texts. They were prepared in English and then translated into Persian.

[73] For example, in one group (affidavits of Fred Muslavi and Josephine Israel), two consecutive paragraphs are numbered "3," and in the other group (affidavits of Jahanbani Faraj and Ziba Faroozan) two consecutive paragraphs are numbered "6."

buildings and they informed [them] that they [the tenants] had been told by the Office of the Revolutionary Prosecutor General not to make any rent payment to the Davidson family" as they "no longer owned the these [sic] properties."[74] Both allege that the taking of properties "by the new Revolutionary Government" was confirmed to them by some unknown person at the Prosecutor General's Office. Paradoxically, until the filing of these affidavits in support of the expropriation claim in 1993, the Claimant and his father had alleged that Josephine emigrated to the United States in 1975.[75]

71. Except for references to certain names, most parts of the affidavits of Faraj Jahanbani and Ziba Faroozan are identical in their wordings. They, too, are full of hearsay. Mr. Jahanbani refers to the name of a tenant of the Manouchehri building and to four tenants of the Kamran building. He contends that in October 1980 the tenants informed him "that they had been told by the officials of the Office of the Revolutionary Prosecutor General not to pay rent money to Homayounjah or their [sic] representative." He goes on to allege that he "called the Government Officials by telephone # 791909 who confirmed to [him] that he [sic] properties had been confiscated."

72. I will discuss the issues related to the Kamran building

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[74] Both texts share this typographical error. It should be noted that the name "Davidson" is the Claimant's naturalization name adopted in the United States and no one in Iran knew the family by that name.

[75] To correct the previous inconsistent assertion, it is alleged that Josephine re-entered Iran, stayed there during the years 1979 and 1980, departed the country on an unspecified later date, and died on a date and in a place not divulged to the Tribunal. Josephine's affidavit appears to have been signed on an unspecified date in December 1992. The difficulty in reconciling these allegations and the ambiguities surrounding the dates raise the question of whether or not Josephine was still alive in December 1992.

in Sub-section IV.3.b. below and will show that no contemporaneous evidence corroborates the allegations contained in those affidavits. Rather, the evidence made available to us contradicts them all. As to the other buildings, including the Manouchehri building, nothing supports the allegation that any instruction had ever been issued to their tenants. However, with respect to the first allegation, the affidavit contradicts the Claimant's other evidence. It counters Mr. Haim's contention that he received the rents long after June 1980, albeit, allegedly, on behalf of the Prosecutor General's Office.[76] The allegation that the tenants were ordered not to effect any payment to the Homayounjah family's representative (namely, Mr. Haim) contradicts the affidavits of the other affiants, including that of a Mr. Kalimi Isfahani, whose affidavits will be discussed in paragraph 74, below. As to the alleged contacts with unnamed government officials at the telephone number mentioned, the Respondent filed documentary evidence and an affidavit that, in my view, satisfactorily rebut Mr. Jahanbani's assertion. Letters issued by the Telecommunication Company of Iran and the Ministry of PTT prove that telephone number 791909 has been registered in the name of a Mr. Marvasti since 1961. Mr. Marvasti's daughter testified in her affidavit that the telephone line in question was installed in a building leased by her father to a public school since 1963, and that at no time was the building used by the Revolutionary Prosecutor's Office or any of its subordinates.

73. Ziba Faroozan (the Claimant's cousin) contends, in terms virtually identical to those of Mr. Jahanbani, that in September 1980, she was informed by two tenants of the Jalleh

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[76] Majority's Award, para. 88.

building and Sion Okhovat of the Ahar building that "they had been told by the Governmental Officials, such as the Office of the Revolutionary Prosecutor General, not to pay rent money to Homayounjah or his representative in the name of Nejat." In paragraph 86, *infra*, I shall discuss the forged order allegedly written to Mr. Okhovat. However, Ziba Faroozan's assertions being identical to those of Mr. Jahanbani, they suffer, in this respect, from the same flaws discussed in the preceding paragraph. As with the situation concerning the other buildings, I should reiterate that no evidence exists in the file to corroborate Ms. Faroozan's allegations. Nor can anything be found to prove that any tenant of the Jalleh building had ever been instructed to pay or not to pay any rent to any person. An explanation is wanting as to why the Claimant failed to make mortgage payments on the Ahar building.

74. The last affidavit on which the Majority has relied is the one prepared for a Mr. Khalil Kalimi Isfahani. He represents himself as a former tenant of the Kamran building and claims that some time in June 1980, Mr. Safari instructed him "that in no event was I [Mr. Kalimi Isfahani] to pay any rent to the Davidsons,[77] but that I should pay the rent thereafter to Mr. Haim who now was collecting the rents on behalf of the Revolutionary Government."[78] This affidavit is irrelevant to the situation of the other buildings, and I will treat the matters related to the Kamran building in some detail in Subsection IV.3.b., *infra*. However, in a situation wherein Mr. Haim was already collecting rent money from Mr. Kalimi Isfahani, it is absurd that someone would go to the

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[77] See footnote 74, *supra*.

[78] Majority's Award, para. 87.

trouble of seeking out a tenant merely to instruct him to continue to pay his rent to the same person to whom he has always paid it. This is sheer sophistry, whether or not we accept the allegation that Mr. Haim was acting this time as a representative of the Prosecutor General's Office. The so-called arrangement with Mr. Haim to collect the rent and pay it to the "Revolutionary Government" was more than sufficient.

IV.3.b. ***Contemporaneous Evidence Related to the Kamran Building***

IV.3.b.i. **What is the Evidence?**

75. There are three groups of somewhat contemporaneous documentary evidence related to the Kamran Building: 1) a letter allegedly written in December 1980 by the Claimant to Senator Edward M. Kennedy (Majority's Award, para. 81); 2) two letters allegedly addressed by Mr. Haim (as representative of the Homayounjah family) to a Mr. Safari (at the Revolutionary Prosecutor General's Office) and to Bank Melli Iran (Karim Khan-e-Zand branch), on 25 November and 10 December 1981, respectively (*ibid*, paras. 95 and 98); 3) a few letters allegedly written in 1980 and 1981 by the Revolutionary Prosecutor General's Office to certain tenants of the Kamran building (*ibid*, para. 83).

76. In the letter addressed to Senator Kennedy, the Claimant states that he, like "many other americans, [sic] [has] invested a great portion of [his], and [his] childrens, [sic] (who are americans [sic] as well) assets in Iran including whatever [his] children have inherited from their grandfather." He goes on to state that "due to the crisis and the turmoil in that country [Iran], and because of the anti-american [sic] atmosphere, all our properties have been confiscated by the present Islamic regime without legal

justification."

77. To begin with, such a letter can at best be considered a formulation of a claim similar to any statement of claim and would itself require substantiation. Moreover, apart from a general reference to "turmoil" in Iran and anti-American sentiments, this letter does not allege any specific measure against the Claimant's properties involved. The letter's lack of specificity is hardly reconcilable with the Majority's specific finding that months before December 1980, Iranian authorities (the Revolutionary Prosecutor General's Office in Tehran in particular) had confirmed to those who had allegedly carried out investigations in Iran on the Claimant's behalf that the property of the Homayounjah family was taken (Sub-section IV.3.a., *supra*) and that they "no longer owned the property and that it had been taken over by the revolutionary Government."[79]

78. Moreover, the Majority knows that the letter was replete with lies and could not seriously support its finding of expropriation or deprivation. At the time of the letter, the Claimant was not yet married and, obviously, could not have had any children. Additionally, the Claimant's father being still alive, neither the Claimant nor any of his future children could have inherited anything from him. The Respondent pointed out these facts repeatedly, but neither the Claimant nor his father offered any explanation at any time in written or oral presentation.[80]

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[79] See, *e.g.*, paras. 85-88 and 108.

[80] The Majority tries to circumvent this problem with a reference to the Claimant's counsel's mumbling at the Final Hearing that the letter had originally been drafted by the Claimant's father, but was later signed by the Claimant. Neither the Claimant nor his father confirmed this explanation in any specific terms. Were we to accept such a late and after-thought explanation from a professional counsel, a few puzzles would still remain

79. The above letter being in itself a statement of claim, the other two groups of contemporary documentary evidence remain to be studied in greater detail. The second group of documentary evidence, namely two letters written in Persian by Mr. Haim in November and December 1981, is the cornerstone of the expropriation/deprivation claim in this Case. These letters are important for the simple reason that--as we shall see--all other oral and written evidence is manipulated, distorted, or canalized to corroborate them. The more important of the two is a letter dated 25 November 1981 by Mr. Haim to Mr. Safari. Mr. Haim's letter of 10 December is addressed to Bank Melli Iran, Karim Khan Zand branch, and is copied to Mr. Safari at the Revolutionary Prosecutor General's Office.[31]

80. The 25 November letter informs the recipient (Mr. Safari) of a notice issued by Bank Melli Iran with respect to the unpaid mortgage on the Kamran building. The letter goes on to state--as translated by the Claimant--that "[a]ccoring to your verbal instruction I have stopped payment of loan installment [sic] to the bank as from August 6th, 1980." The Iranian date

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unresolved. First, the name under the signature should have been that of the father (Edward) rather than that of the Claimant (George). Second, the consequence would have been that the Claimant's father was lying to Senator Kennedy about his U.S. nationality, at least at the time that the letter was being drafted. This was the reason for the change of heart, as was alleged by the counsel at the Final Hearing. Third, if the allegation was true, what prevented the Claimant from redrafting a single-page letter reflecting so many lies?

[81] I do not intend to address here the question of whether or not these letters were ever sent or received by the addressees. However, the Respondent produced a copy of the pages of the Revolutionary Prosecutor General's Office book for registration of incoming and outgoing correspondence covering the period from 21 November to 28 November and 8 December to 10 December 1981. They reflected no entry for these letters. In the Final Hearing, Mr. Safari "denied having received or seen the two letters" (Document 122, exhibit 14 and para. 99 of the Majority's Award).

in the original text is 15/5/1360, which corresponds to 6 August 1981, if properly converted. So, even if we were to accept that Mr. Safari had given such an order, the measure would fall seven months after the 19 January 1981, jurisdictional cutoff date. However, all of the Claimant's other allegations in this Case are constructed on the above misrepresented date. Thus, the Claimant and Mr. Haim alleged that, prior to that date (on or about 20 June 1980), Mr. Safari had verbally instructed Mr. Haim to cease payment of rent to the Homayounjah family.[82] Against this allegation Mr. Safari testified, and upon a request from the panel produced evidence in support of his testimony, that prior to 5 October 1980 he had not been "appointed to the Revolutionary Prosecutor General's Office."[83] The next important point is that the letter does not even allege that an intention to take the Kamran building was present on 25 November 1981. The letter shows that Mr. Haim was still of the opinion that he could, with the assistance of Mr. Safari, prevent the mortgagee bank from foreclosing the mortgage, thereby safeguarding the "ownership right of the owner."[84] Again, the

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[82] Founding his affidavit on this misrepresented date, Mr. Haim states that after this verbal instruction he was told "[o]n or about June 25, 1980, ... by the Prosecutor General's Office [Mr. Safari] not to make any mortgage payment to Bank Melli." This misconstruction is further noticeable from Mr. Haim's misuse of the wrongly-converted Persian date in his affidavit filed about 12 years after the event, on 14 January 1993. There, by quoting a part of his letter, he alleges that in his "letter dated November 25, 1981" he had stated to Mr. Safari that: "According to your verbal instruction I have stopped payment of loan installment [sic] to the Bank as from August 6, 1980." In connection with these allegations of oral instructions, I have to add also that by producing affidavits and oral testimony from knowledgeable high-ranking Judges, the Respondent proved that oral orders were never the practice of the Prosecutor's Offices in administering or expropriating properties. (See, also, para. 94 of the Majority's Award).

[83] See also Majority's Award, Para. 99.

[84] In the letter, Mr. Haim sought assistance from Mr. Safari, stating that if the mortgagee was to eventually foreclose the mortgage, there would remain "no ownership right for the owner nor [would] there remain anything" for the Prosecutor General's Office, if the Office

contents of this letter should be weighed against the Majority's finding that prior to that date the Claimant's witnesses were informed of the taking of the property by the Revolutionary Prosecutor General's Office (para. 77, *supra*).

81. As stated above, the 10 December 1981 letter was addressed to Bank Melli and copied to Mr. Safari. The letter claims that the Kamran building "has fallen under the supervision of the said Prosecutor General's Office" and that the writer (Mr. Haim, in his capacity as "the attorney of the Owner") was "instructed ... verbally not to do anything with respect to the payment of the said loan."[85] Thus, this letter adds nothing to the previous letter, except for confirming that on 10 December 1981 Mr. Haim, the bank, and other authorities still regarded the Homayounjahs to be the owners of the Kamran building and that the role played by the Revolutionary Prosecutor General's Office was merely of a supervisory nature.

82. I refer now to the third group of documentary evidence. These documents were outrageously altered to match the misrepresented date in the translation of the letter of 25 November 1981 and the contention that two months prior to that (on 20 June 1980), Mr. Haim and the tenants were instructed not to pay rent to the Homayounjah family (paragraph 80, *supra*). To achieve this goal, the Claimant went so far as to alter an order written by the Iranian authorities which was totally unrelated to the Claimant and his family. Cognizant of the fact that such malicious and fraudulent behaviour

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"wanted to legally express any view or to take the building."

[85] Document 70, Tab. B, Exhibit 3. The Majority quotes (in para. 95 of its Award) the Claimant's translation of the above-cited part of Mr. Haim's Persian letter, which, as may be readily observed, has minor inaccuracies.

undermines the expropriation/deprivation claim and any decision upholding it, the Majority closes its eyes to that group of evidence by qualifying it as evidence falling after the relevant period. I agree that the documents were all related to the period after 19 January 1981, but the fact remains that they were tampered with, distorted, and mistranslated to make it appear as if certain deprivative measures were taken against the Claimant's property prior to the closing date of the relevant period (on or about 20 June 1980) and that those measures were not ephemeral. By ignoring this group of evidence, the Majority appears to have felt at liberty to accept contentions not supported by any contemporary evidence.

83. Following the order in which the evidence is presented as exhibits to Mr. Haim's affidavit, the first document is a letter dated 26 December 1981 written by the Prosecutor General's Office to the "Employee Syndicate of Consulting Engineers," which is specifically named as a tenant of the Homayounjah's (Kamran building) property. The Persian date of the letter is wrongly converted by the Claimant to 26 December 1980. The letter refers to Homayounjah as "owner" and states that, until "the final clarification of the status of the leased property," the rent from 20 January 1982, together with any arrears, should be deposited to "the trustee account No. 1560" opened by the Revolutionary Prosecutor General. Again, the date 20 January 1982 is misconverted to 20 January 1981 in order to make it agree with the altered date of the letter.

84. Although the date of interference falls beyond the Tribunal's time matter jurisdiction, which ends on 19 January 1981, Mr. Safari stated the reason for it. He clarified that, when meeting with Mr. Haim on the Caravan Hotel problems, Mr. Haim told him about problems he had encountered with the

tenants of the Kamran building, and "Haim asked him to help make the tenants pay their rents."[86] Instructions to some tenants to pay arrears on rent owed by them support Mr. Safari's statement. There is another document on file showing that a Mr. Seif Mohammadi, specifically qualified as a "tenant of Mr. EDWARD HOMAYOUNJAH," had been obliged to deposit delinquent rent for the 5 months prior to 22 October 1982.[87]

85. The second document is a letter addressed to another tenant of the Kamran building, again naming Homayounjah as owner. The letter is dated 30 November 1982 and instructs the tenant to pay the rent from 21 December 1982 "until after clarification of the status of the property leased," to "trustee account No. 1560." The Claimant wrongly converted the Persian dates to 30 November 1981 and 21 December 1981, respectively.[88]

86. To prove the expropriation allegation, the Claimant has introduced in evidence a letter allegedly written to a tenant of the Ahar building on 19 May 1982. This letter was written by the Office of Restored Properties and not the Revolutionary Prosecutor General's Office. The letter purports that all

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[86] See, also, Majority's Award para. 99.

[87] Compare the Majority's finding here with that in *Otis Elevator Company*. In the latter award, the Tribunal found no liability for the Respondent because the appointment of the first supervisor was requested by the General Manager of Iran Elevator and the appointment of the second supervisor was prompted by the continued absence of the manager appointed by Otis Elevator. (*Otis Elevator Company* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 304-284-2, paras. 41-44, *reprinted in* 14 Iran-U.S. CTR 283, pp. 297-298.

[88] A translation of a virtually identical letter dated 26 December 1982 and allegedly sent to another tenant is also in evidence. The letter is apparently addressed to "Danial Bargh Co.," a tenant of the Kamran building. The tenant is instructed to pay rent to the "trustee account" as of 20 January 1982. The original Persian text of this letter was not made available. Thus, no comment is offered here regarding its authenticity.

property of the Homayounjah family was expropriated pursuant to ruling No. 20577 of the Islamic Revolutionary Court dated 24 April 1982. One need not be a forensic expert to notice that the document is riddled with alterations. It is apparent that, *inter alia*, the addressee's name, the name and address of the building, and the name of the person whose property is declared to have been expropriated were all altered by erasing or tampering with the original text.[89]

IV.3.b.ii. **My Conclusion on the Kamran Building**

87. The Claimant's expropriation or deprivation claim with respect to the Kamran building should have failed on a variety of grounds. Starting with the expropriation claim, there is no dispute that the Claimant's ownership title to the Kamran buildings remained intact. The Majority accepts this conclusion, and I need not expound on it any further.[90]

88. The evidence further proved that the tenants were only instructed to pay rent to a "trustee account" as of January 1982, at the earliest. Thus, even were we to assume that such a measure could be qualified as an expropriatory act or deprivative measure with impacts similar to expropriation, any claim in that respect would fall beyond the Tribunal's jurisdiction.

89. Moreover, the tenants were instructed to pay rent to a "trustee account." Assuming a very remote hypothetical situation wherein the instructions became effective around 20 June 1980 (an assumption which I vehemently reject), a finding

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89 Majority's Award, paras. 83 and 97.

90 *Ibid*, paras. 103-107.

of expropriation or deprivation would still have been unwarranted. Applying the law, as accepted by the Majority (paragraph 106 of the Award and Section IV.2., *supra*), nothing here warrants the Majority's contemplated conclusion that "the owner has been deprived of fundamental rights of ownership" and that the deprivation was final and conclusive or that any irreversible control was exerted by the Prosecutor General's Office.[91] A temporary order that rent be deposited in a "trustee account" cannot, by any stretch of imagination, be construed as deprivation of an owner's fundamental rights of ownership.[92]

90. Nothing in the file shows that the Claimant tried to exercise his other fundamental ownership rights--such as selling, assigning, or leasing out any part of the building premises--and that those attempts were frustrated by any interference attributable to the Respondent,[93] let alone

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[91] *Tippets, Abbett, McCarthy, Stratton* and *TAMS-AFFA Consulting Engineers of Iran, et al.* (*"TAMS-AFFA"*) Award No. 141-72-2, *reprinted in* 6 Iran-U.S. CTR 219, pp. 225-226; *International Technical Products Corporation et al.* and *The Government of the Islamic Republic of Iran et al.*, Award No. 196-302-3, *reprinted in* 9 Iran-U.S. CTR 206, p. 240; *Foremost Tehran, Inc. et al.* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 220-37/231-1, *Reprinted in* 10 Iran-U.S. CTR 228, p. 249; and *Harold Birnbaum* and *The Islamic Republic of Iran*, Award No. 549-967-2 (para. 32) *reprinted in* - Iran-U.S. CTR -, p. -.

[92] *Foremost Tehran Inc., ibid.* This award heavily relied on, and quoted with support, parts of the judgment of the European Court of Human Rights in *Sporrong and Lönnroth* (Judgment of 23 September 1982, paragraph 63, Series A, No. 52).

[93] *Catherine Etezadi* and *The Government of the Islamic Republic of Iran*, Award No. 554-319-1 (paras. 62 and 63) *reprinted in* - Iran-U.S. CTR -, -. In *Foremost Tehran Inc.*, the Tribunal found that measures preventing the payment of certain declared dividends amounted to expropriation of those dividends payable prior to 19 January 1981. The Tribunal, however, denied the claim that such interference could be considered to amount to expropriation or deprivation of the Foremost companies' ownership interests in Iran. (Footnote No. 91, *supra*, pp. 249-252). In *Seismograph Service Corporation, et al.* the Tribunal could not agree that the Claimant "was deprived of the effective use, benefit and control of its property," because, notwithstanding the Respondent's interference, the Claimant "remained able to exercise its

whether or not any such interference was unreasonable.[94] To the contrary, evidence made available by the Respondent shows that Mr. Haim was able to exercise certain rights in connection with the Kamran building on behalf of the Homayounjah family more than a year after 20 June 1980. For example, the Respondent showed that on 28 June 1981, Mr. Haim signed an amendment to a lease agreement with a tenant of the Kamran building, specifically referring to his power of attorney from the owners.[95]

91. That no expropriation or deprivation policy was pursued against the Homayounjah family is made obvious by some other evidence and facts. Tax returns filed by Mr. Haim on 17 November 1981 in connection with the Kamran building demonstrate that on that date he was still acting on the Claimant's behalf with respect to the Kamran building. This undermines any allegation that on an earlier date (on or about 20 June 1980) the tenants were instructed not to pay rent to Mr. Haim as representative of the owners.[96] The fact that no specific action could be proved against other properties not subject to any mortgage agreement further proves my conclusion. The Majority loses sight of the important fact

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other options, *i.e.*, to sell the property in Iran." (*Seismograph Service Corporation, et al.* and *National Iranian Oil Company, et al.*, Award No. 420-443-3, para. 301, *reprinted in* 22 Iran-U.S. CTR 3, p. 79).

94 *Harza Engineering Company* and *Islamic Republic of Iran*, Award 19-98-2, *reprinted in* 1 Iran-U.S. CTR 499, p. 504; and *Sea-Land Service, Inc.* and *The Islamic Republic of Iran, et al.*, Award No. 135-33-1, *reprinted in* 6 Iran-U.S. CTR 149, p. 167.

95 See also the Majority's Award, para. 95.

96 The Majority ostensibly accepts Mr. Haim's allegation that he was instructed to receive rents as representative of the Revolutionary Prosecutor General's Office as of 20 June 1980. Nothing is produced to prove the remittance of any such rents by Mr. Haim for the period from 20 June 1980 to January 1982, when the tenants were ordered to pay rent to the trustee account established by that Office.

that nothing has even been alleged regarding the family's most profitable business, Iran Steel Wool Factory (see, *e.g.* paragraphs 15 and 20, *supra*).

IV.3.c. ***Contemporaneous Evidence Related to Other Buildings***

IV.3.c.i. **What is the Evidence?**

92. Except for certain ambiguous and belated assertions at the Final Hearing about an oral arrangement,[97] the file lacks any evidence supporting the allegation that Mr. Haim was appointed to manage the affairs of the Homayounjah family in connection with any property other than the Kamran Building. As a matter of fact, the Claimant failed to produce any evidence proving Mr. Haim's authority in connection with any building, including the Kamran building. However, the Respondent produced a copy of the official power of attorney prepared and signed in June 1979 between Mr. Haim and Edward Homayounjah for himself and on behalf of other members of the family. This power of attorney is restricted to leasing out, wholly or partly, the Kamran building and to exercising the owners' rights under the lease agreements.[98]

93. Having made the important observation above, I would turn now to explore what contemporary written evidence, if any, is available to corroborate the allegation that other buildings were expropriated or that the Claimant's enjoyment of fundamental rights of ownership in them was impaired by the Respondent's interference to such a degree that they must be

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97 Majority's Award, paras. 88 and 108. See, also, footnote 68, *supra*.

98 Document 122, Exhibit 5, attachment 13. Both the Claimant's father and Mr. Haim referred to a power of attorney given in June 1979.

deemed expropriated.[99] Such evidence is virtually non-existent. The only so-called contemporaneous evidence presented by the Claimant is i) the general letter allegedly written to Senator Kennedy and ii) the letter of 19 May 1982, forged to make it appear as if the Homayounjahs' properties had been expropriated. I have already treated these documents in paragraphs 76-79 and 86, *supra*.

IV.3.c.ii. **My Conclusions on the Other Buildings**

94. Aside from the above general and falsified letters, not a shred of evidence is on file to show that Mr. Haim, or any other person acting on the Homayounjahs' behalf, took any action or wrote any letter in connection with the rents of those other buildings or the foreclosures involving the Ahar and Manouchehri buildings. Likewise, the file is completely silent on any action whatsoever on the part of any Iranian authorities, the Prosecutor General's Office included, interfering in any way with the affairs of the other buildings. Nothing corroborates the affidavits of some of the Claimant's relatives and family friends alleging contacts with a few tenants of the other buildings and reporting hearsay. No evidence exists to demonstrate, nor has it even been alleged, that 1) any tenant of the other buildings was ever instructed to pay any rent to any account--trustee or otherwise, 2) that any payment was ever made to any Iranian authority, or 3) that

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[99] See, *e.g.*, the awards in *Starrett Housing Corporation, et al.* and *The Government of the Islamic Republic of Iran*, Award No. ITL 32-24-1, *reprinted in* 4 Iran-U.S. CTR 122, p. 154; *TAMS-AFFA*, footnote No. 91, *supra*, pp. 225-226; *Mohsen Asgari Nazari* and *The Government of the Islamic Republic of Iran*, Award No. 559-221-1 (para. 121), *reprinted in* - Iran-U.S. CTR -, p. -; *Harold Birnbaum,* footnote No. 91, *supra*, para. 28, p. -; and *Vera-Jo-Miller Aryeh, et al.* and *The Islamic Republic of Iran*, Award No. 581-842/843/844-1 (para. 194) *reprinted in* - Iran-U.S. CTR -, p. -.

any instruction was issued preventing payment of loan installments in connection with the Ahar or Manouchehri buildings. In view of all these shortcomings, and in the absence of any contemporaneous corroborating evidence, I find the conclusion absolutely untenable that any of those other buildings were expropriated or that the owners were divested of their fundamental property rights in them, in particular the Manouchehri and Jalleh buildings, as they are relevant here.

V. VALUATION

95. Totally setting aside the valuation of the Claimant's father,[100] the Majority notes that the two valuation reports of Mr. Banayan and Mr. Abbasi state similar values for the buildings involved.[101] The Majority further acknowledges that Mr. Abbasi's valuation report reflects May 1983 prices rather than those of the date of the alleged deprivation, 1st July 1980. Then, noting the divergence of opinion in the reports of the appraisers of the Claimant and the Respondent on the value of the buildings and on the question of whether or not key money should have been taken to have a negative impact on their value, the majority resorts--as it did in *Vera-Jo Miller Aryeh, et al.*--to making "reasonable approximation within the limits of the given appraiser experts."[102]

96. Applying its approximation method, the Majority valuates the three buildings in which the Claimant had undivided shares (the Kamran, Manouchehri and Jalleh buildings) at rials 120,000,000, 7,000,000 and 10,000,000, respectively. The Majority considers these figures to represent the value of the property after deducting the appreciated mortgage debt. Applying the one-seventh, one-eighth and five thirty-sixths ownership interests of the Claimant to those values, the Majority arrives at rials 17,142,857, 875,000 and 1,388,889, respectively, as the value of the Claimant's interests in the

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[100] In addition to being a party in interest, the Claimant's father did not possess any valuation knowledge or expertise. What he tried to do in the circumstances was to confirm the evaluation of Mr. Abbasi, who allocated over 50 million rials to all five buildings originally involved by slightly decreasing the value of one or increasing the value of the other.

[101] This similarity could be taken as another reason for setting aside Mr. Banayan's valuation, in addition to what will be explained in paragraph 98, *infra.* As we shall see in paragraphs 99-100, *infra*, Mr. Abbasi's valuation did not represent fall 1980 prices.

[102] Majority's Award, para 118.

buildings.

V.1. ANALYZING THE MAJORITY'S APPROACH

97. I should make it clear that, except for the arbitrability of the rights involved (Section II.1., *supra*), I have no problem agreeing with the Majority's finding on the percentage of the Claimant's interests in the buildings involved. Actually, it is the Respondent that provided the Tribunal with copies of the official deeds supporting those ownership interests.[103] I have, however, great difficulty understanding how my colleagues in this Chamber reached their figures, even though, setting aside other serious problems of the Award, I do not qualify them as exorbitant or unreasonable. The practice adopted by my colleagues is the same as that used, against my objection, in their award in *Vera-Jo Miller Aryeh, et al.*, which yielded outrageous and astronomical amounts for compensation. [104]

98. Between Mr. Abbasi and Mr. Banayan, only the former was, at some point of time, an official appraiser. Mr. Banayan was, allegedly, a real estate agency worker with no valuation experience or expertise. As to his alleged experience in real estate consultancy, the Respondent produced a letter from the office of the Union of Real Estate Consultants certifying that Mr. Banayan has never been a member of that Union and that he has never been issued a permit authorizing him to practice that profession. These facts undermine both Mr. Banayan's qualifications and his valuation report. Additionally, Mr.

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103 *Ibid*, Sections 1.2. and 1.3.

104 Footnote 99, *supra*.

Banayan's assertion that the buildings were "built with top quality workmanship and materials," contradicts the "technical specifications" of the buildings provided by the Claimant's other expert, Mr. Abbasi.[105] Mr. Banayan's other assertion that the buildings were "located in very good locations," is challenged by the Respondent's experts based on factual explanations.

99. As stated earlier, Mr. Abbasi's valuation reflects the value of the buildings in May 1983. Irrespective of whether or not the values estimated by Mr. Abbasi correspond to the market value in 1983, the real estate market of May 1983, whatever it might have been, differed drastically from that of July 1980. Admittedly, at the time of the alleged taking in the summer of 1980, "no real estate market existed in Iran in an ordinary sense."[106] But it was the only market available. It is now an international principle established in the practice of international *fora* and this Tribunal that in allocating a price to any item of property, all circumstances of the case involved,[107] including political, social, and economic conditions of the time and place of valuation, must be taken

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105 Mr. Abbasi describes the old Jalleh and Manouchehri buildings as being constructed of bricks (ceiling and façade included) and with third-rate doors, windows, and plumming fixtures. He qualifies the newest building (Kamran) as being constructed with second-rate materials.

106 Majority's Award, para. 118.

107 See, *e.g., Kuwait v. American Independent Oil Company, ("AMINOIL') reprinted in* 21 ILM 976, para. 144; *Amco Asia Corporation, et al. v. Republic of Indonesia, reprinted in* V International Arbitration Report, # 11, Section D, paras. 196, 233, 236, 249 and 252-256. See, also, Schachter, Oscar, "The Question of Expropriation/Compensation in the United Nations Code of Conduct on Transnational Corporations" (Paper Presented at the Symposium on Transnational Corporations, The Hague, 15-16 September 1989, pp. 23-24) and Murphy, "Limitation Upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization," in Lillich (ed.) *The Valuation of Nationalized Property in International Law* (1975), pp. 416-417.

into account.[108]

100. The Majority shows some understanding of the above considerations when it sets aside Mr. Abbasi's valuation because it reflected May 1983 prices and not those of the valuation date. In rejecting Mr. Abbasi's valuation, the Majority appears to hesitate on the question of whether or not his report used 1980 or 1983 values. I concur with the Majority's conclusion, though I do not share in its hesitation. Not only does the report bear the date 31 May 1983, but its content and certain unambiguous passages in the Claimant's submissions also indicate that the values suggested by Mr. Abbasi were as of that date and that this was clearly understood by the Claimant.

101. The ages given to the buildings by Mr. Abbasi in his report indicate that he was considering their values in May 1983.[109] In his Memorial filed in 1993, the Claimant acknowledges in plain terms that "[t]he Abbasi estimates of

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[108] *American International Group, Inc., et al.*, and *Islamic Republic of Iran, et al.*, Award No. 93-2-3, *reprinted in* 4 Iran-U.S. CTR 96, pp. 107-108; *Thomas Earl Payne* and *The Government of the Islamic Republic of Iran,* Award No. 245-335-2 (paras. 35-36) *reprinted in* 12 Iran-U.S. CTR 3, p. 15; *Sola Tiles, Inc.* and *The Government of the Islamic Republic of Iran*, Award No. 298-317-1 (paras. 63-64) *reprinted in* 14 Iran-U.S. CTR 223, pp. 240-241; *Amoco International Finance* and *The Government of the Islamic Republic of Iran, et al.*, Award No. 310-56-3 (para. 246) *reprinted in* 15 Iran-U.S. CTR 189, p. 264; *Motorola, Inc.* and *Iranian National Airlines Corporation, et al.*, Award No. 374-481-3 (paras. 75-78) *reprinted* in 19 Iran-U.S. CTR 73, pp. 90-91; *CBS Incorporated* and *The Government of the Islamic Republic of Iran, et al.,* Award No. 486-197-2 (para. 52) *reprinted in* 25 Iran-U.S. CTR 131, pp. 148-149; *James M. Saghi*, footnote 51, *supra* (paras. 79, 99-100), pp. -; and *Faith Lita Khosrowshahi, et al.* footnote 50, *supra*, (paras. 48-52 and 87), pp. -.

[109] To give just one example, for the sake of brevity, Mr. Abbasi states that the Kamran building was "built about 8 years ago." The Chamber is fully aware that, as explained by the Claimant and his father, the land on which the Kamran building was built was purchased in 1973 and that construction began in 1974. Allowing one year for excavation and construction, the building would have been 8 years old in 1983. Under no circumstances could the building have been considered in 1980 as having been built 8 years earlier.

fair market value in May 1983, essentially validate the values estimated by Edward Davidson." To keep the valuation of Mr. Abbasi equally valid for the fall of 1980, the Claimant argues that it "is true that property values in Tehran had risen between the fall of 1980 and May 1983," nonetheless, Mr. Abbasi's estimates should be used because those given by official appraisers "are some twenty percent below what is generally thought to be fair market value."[110]

102. In contrast to the Claimant's experts, both the Respondent's experts were experienced and certified appraisers.[111] They appraised the buildings based on i) their conditions on the valuation date, ii) the quality of construction materials and workmanship used, and iii) the market, by applying the rule of supply and demand as affected by the then prevailing situation in Iran.[112]

103. It comes as a surprise that the Majority ignores the joint valuation of the Respondent's appraisers based solely on the excuse that it "states much lower values for the properties," totally forgetting its own conclusion a few lines earlier that at the time of the alleged expropriation, "no real estate market existed in Iran in an ordinary sense," due

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[110] See, also, the Majority's Award, para. 113. Not only did the Respondent and its official experts object to the implication that real estate prices experienced a mere 20 percent increase in 1983 as compared to 1980 (*Ibid*, para. 116), but considered the proposed under-valuation approach illogical and unethical. Official experts in Iran are under the oath to state the truth in their assessments, and if found in breach of this oath, they may be penalized, because their valuation would jeopardize one of the litigating parties if it formed the basis of a court judgment.

[111] Mr. Yazdi had a degree in engineering from a university in Germany and Mr. Azad Harf held a master's degree from an Iranian university.

[112] See, paragraph 99, *supra,* and footnotes thereto.

to the prevailing "general economic, political and social conditions." It is inconceivable that these conditions and their impact should have been neglected. They directly affect the property's marketability by completely disrupting the rule of supply and demand. In that period, many owners, unhappy with the revolution and its goals, were leaving the country and offering their property for sale, while people able and prepared to buy were, in comparison, few in number.

104. In the same vein, it is incomprehensible--and in fact constitutes remissness in the administration of justice--to leave the question of the key money unresolved based on the excuse that the parties disagreed over its impact on the commercial value of the property.[113] As a matter of practice, it is rarely, if ever, the case that litigating parties agree on the import and ultimate impact of issues. Especially in cases like the present one, where the point at issue can be easily resolved by recourse to a national law, namely that of Iran, it is the duty of an adjudicative or arbitral body to resolve questions presented to it based on applicable law, no matter how far apart the opinion of the litigating parties might be.

105. Based on the provisions of applicable Iranian laws and regulations, the Respondent and its experts argued that in lease agreements for commercial and business purposes the right to key money accrues to and is owned by the lessee. Being a right related to the business of the lessee, it does not matter whether or not the lessee has paid the lessor any key money when the lease agreement was concluded. Likewise, being a right independent from the lease agreement between the lessor and the lessee, the law provides that the right, "exclusively available to the lessee of the place," can be

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[113] The Majority's Award, para. 118.

transferred by the lessee (the owner of the right) to a new lessee "only through a notarized document."[114]

106. Unless the seller or buyer can persuade the lessee to sell his right to key money, the lessee's right will remain intact, no matter how many times ownership of the property might change hands. Unlike the situation with lease agreements covering places of residence, the lessee of a place of business cannot easily be evicted on the terminal date of the agreement. To be successful in an eviction petition, the lessor must satisfy a number of conditions under the law, that, too, only pursuant to a court order and after payment of key money to the lessee.[115] Hence, it is not difficult to conclude, based on the above, that key money has a substantial negative impact on the monetary value of commercial buildings. All three buildings involved (Kamran, Manouchehri, and Jalleh) had shops, offices, and warehouse space that were leased out for commercial purposes.

107. Had my colleagues been prepared to apply, for the sake of justice, the factual and legal matters related to valuation as discussed in this section, they would have found the valuation report of the Respondent's official experts to be the most

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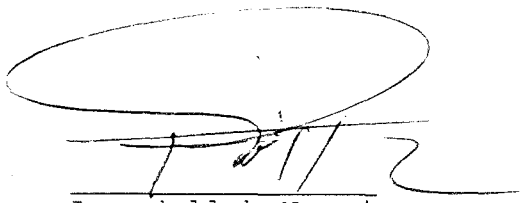
[114] The Lessor and Lessee Act of 1977, Article 19 and Note 2 thereto. To avoid any conflict of rights, the law requires that the transfer of the key money by the lessee be effected through an officially registered document, while for the original or subsequent lease agreements, notarization is not made a condition.

[115] Under Article 15 of the Lessor and Lessee Act, the owner of the property must show, *inter alia*, that the premises are required for reconstruction; or for his own business, trade, or profession; or for his residence or that of his first degree relatives, if the place is suitable for residential purposes. In the first situation, the owner should reserve a new place of business for the lessee in the new building if it is reconstructed for commercial purposes. In the eviction order, the court shall decide on the amount and payment of key money, which is determined based on the provisions of the by-law prepared by the Ministry of Justice and the Ministry of Housing and Urban Development, approved by the relevant committee of Parliament (*id.* and Article 18).

accurate and well-grounded valuation, supported by evidence and all pertinent circumstances of the Case. Thus, as with the award in *Vera-Jo Miller Aryeh, et al.*, I find the Majority's valuation approach in the present Case to be a failure.

108. Based on the foregoing, I dissent from the Majority's Award.

Dated, The Hague
2 February 2000



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