IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده ۱۰۳

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 193
CHAMBER THREE
AWARD NO. 534-193-3

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 11 AUG 1992
تاریخ ۱۳۷۱/۵/۲۰

REZA SAID MALEK,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

FINAL AWARD

Appearances:

For the Claimant:	Mr. Reza Said Malek, Claimant; Mr. Sheldon Vance, Counsel; Mr. Hamid Sabi, Co-Counsel; Mr. Hossein Vossough, Witness.
For the Respondent:	Mr. Ali H. Nobari, Agent of the Government of the Islamic Republic of Iran; Mr. N. Mokhtari, Legal Adviser to the Agent; Mr. Mostafa Nadimi, Legal Adviser to the Agent; Prof. Brigitte Stern, Legal Adviser to the Agent; Mr. Nozar Dabiran, Legal Adviser to the Agent; Mr. M. Hossein Zahedin Labbaf, Legal Assistant to the Agent; Mr. Mostafa Katiraie, Expert Witness; Mr. Jafar Vaez-Zadeh, Witness; Mr. Hassan Babaie Saleh, Witness; Mr. Ali Fatehi-Pour, Representative of Bank Mellat; Ms. Jaleh Naimi, Representative of Bank Mellat; Mr. S. Jalal Sayyedi, Representative of the Bank of Industry and Mines.
Also present:	Mr. Michael F. Raboin, Deputy Agent of the Government of the United States of America.

10. On 1 August 1990 the Respondent as well as the Bank of Industry and Mines and Bank Mellat filed their Memorial and evidence in rebuttal.

11. On 3 December 1990 the Claimant submitted a Hearing Memorial. This submission included a summary of the Claim and the relief requested by the Claimant and additional evidentiary material. In this Memorial the Claimant also announced that he intended to present Mr. Hossein Vossough as witness at the Hearing in order to testify on the circumstances surrounding the alleged seizure of the properties in Shemiran, Tehran. The Respondent in its submission of 10 December 1990 objected to the summary of the Claim and relief requested and the additional evidence contained in the Claimant's Hearing Memorial on the ground that it amounted to the filing of a new brief and evidence contrary to the Tribunal Rules. In its Order dated 12 December 1990 the Tribunal determined that it would consider the admissibility of the Claimant's Hearing Memorial at the Hearing but that, in any case, the Respondent should submit its reply thereto by 15 January 1991, a deadline later changed to 22 January 1991.

12. The Claimant filed his Hearing Memorial invoking Article 24 of the Tribunal Rules.[1] That Article, however, does not apply to that submission since the latter contains new evidence previously not introduced in the Case. Therefore, in considering the admissibility of the Hearing Memorial, the Tribunal will take into account the general criteria outlined in Harris International Telecommunications, Inc. and Islamic Republic of Iran et al., Award No. 323-409-1, paras. 61 and 62 (2 Nov. 1987),

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[1]Article 24 states "[t]he arbitral tribunal may, if it considers appropriate, require a party to deliver to the tribunal and to the other party, within such period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence."

reprinted in 17 Iran-U.S C.T.R. 31, paras. 61 and 62. The Tribunal notes that the Claimant introduced three new pieces of evidence in his Hearing Memorial. The first two documents are photocopies of the Certificate of Probate No. 2364 dated 27 September 1972 and the Certificate of Payment of Inheritance Tax No. 2271 dated 15 April 1974, both issued after the death of the Claimant's father by the District Court of Tehran and the Iranian Ministry of Finance, respectively. These documents are offered to prove that the Claimant inherited 2/7 of his father's home in Shemiran, Tehran[2] (see paragraph 20, infra). In view of the Claimant's explanation that "these documents were recently found in the files of a sister of Claimant" and of the fact that the Respondent has had the opportunity to discuss these documents in its filing of 24 January 1991 (see paragraph 14, infra) and thus was not prejudiced by their late introduction, the Tribunal regards these documents as admissible. The third piece of evidence contained in the Claimant's submission of 3 December 1990 is a second affidavit by his mother.[3] The Claimant could easily have introduced the second affidavit earlier in the proceedings at the time he filed his Memorial and evidence in rebuttal. However, since the Respondent has had the opportunity to reply to this affidavit in its filing of 24 January 1991, again it was not prejudiced by its late submission. The Tribunal therefore considers this evidence to be admissible as well. Finally, the Tribunal notes that the Claimant's Hearing Memorial contains a summary of Claim amounting to no more than a reiteration of the arguments previously advanced by the Claimant.

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[2]According to the Claimant, the Certificate of Payment of Inheritance Tax proves that his father's home measured 2,400.00 m^2 instead of 2,000.00 m^2, as he believed initially. In view of these additional square meters, the Claimant increased his claim for the portion he allegedly inherited by U.S.$80,000.00 (see paragraph 23, infra).

[3]An affidavit by the same person had already been submitted on 28 October 1988.

That being the case, the Tribunal sees no reason to not admit this document into evidence.

13. On 11 January 1991 the Respondent submitted the list of witnesses which it would present at the Hearing. These witnesses and their subjects of testimony were the following.

(a) Mr. Mostafa Katiraie, Engineer, on the status of the Claimant's properties located in Shemiran;

(b) Mr. Hassan Babaie Saleh, Deputy Chief, Islamic Revolution's Public Prosecutor's Office for Narcotics Control and Enforcement of Islamic Injunctions, on the circumstances surrounding the alleged taking of the properties in Shemiran; and

(c) Mr. Jafar Vaez-Zadeh, on the alleged forgery of letter no. 85169 dated 16 April 1983 attributed to Notary Public Office No. 328.

14. On 24 January 1991 the Respondent submitted its Hearing Memorial containing, inter alia, a response to the Claimant's submission of 3 December 1990.

15. On the same day the Respondent also filed a letter indicating that it "intend[ed], if necessary, to introduce Mr. Abbas Alour, Cook at the Islamic Revolution's Public Prosecutor's Office for Narcotics Control and Enforcement of Islamic Injunctions, as its rebuttal witness."[4]

16. A Hearing took place at the Tribunal on 12 February 1991.

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[4]Mr. Abbas Alour did not testify at the Hearing.

17. In his submission of 15 February 1991 the Claimant requested the Tribunal to issue an award of costs in his favor. A similar request was filed by the Respondent on 6 March 1991.

II. FACTUAL BACKGROUND

18. The Claimant was born on 22 August 1940 as the son of Mrs. Roghieh Rais Malek and Dr. Said Malek. The Claimant's parents had one other son, Issa Parviz Malek (sometime Iran's ambassador to Sweden under the Shah's regime) and three daughters, Saideh Mehri Malek (married name Rousta), Hamideh Homa Malek (married name Fassa) and Parvin Malek (married name Motamed). Dr. Said Malek, who died in early 1972, was a well known medical doctor who had also enjoyed a successful political career in Iran. He was Minister of Health from 1944 to 1948 and thereafter either an Elected Senator or Senator Appointed by the former Shah until the end of his life. According to the Respondent, several members of the Claimant's family belonged to Iran's Free Masonry Lodge.

19. The Claimant left Iran at the age of 17 to study medicine in England. In December 1966, at the age of 26, he moved to the United States to accept a position at the Mayo Foundation and Graduate School of Medicine in Rochester, Minnesota. He is now a senior member of the Clinic's Department of Urology. He became a permanent resident of the United States on 6 July 1972 and was naturalized a United States citizen on 5 November 1980.

20. It follows from the record that the Claimant's father purchased two parcels of land in Shemiran, an expensive suburb of Tehran, in 1930 and 1932 respectively. Parts of the property apparently were transferred by the Claimant's father to a Ms. Bushehri in 1948 and 1950. In 1954 he transferred another parcel to his daughter Parvin Malek. Until 1967 he remained the owner of the rest of the property (approximately 16,000m^2) which he had developed as a walled compound with a large elaborate garden on which several buildings were erected. In 1967 he donated parts

of this property to each of his two sons and three daughters while retaining a central portion on which his house was located. The Claimant states that a wooded parcel measuring 3,930.50 m^2 was given to him at that time.[5] The property lines dividing the parcels within the compound between Dr. Said Malek's children were never marked by walls because of the family relationship of the title holders. The Claimant also alleges that, upon the death of his father in 1972, he inherited a 2/7 interest in the central portion of the compound which his father had retained when making the above-mentioned gift conveyances in 1967.

21. The Claimant further asserts that in 1974 eleven pieces of farmland in Anjirak totalling 20,685.00 m^2 were purchased in his name with some of the monies he received pursuant to the settlement of his father's estate.

22. Finally, the Claimant maintains that he was the owner of 4,720 shares in Bank Mellat and 516.1 shares in the Bank of Industry and Mines. According to the Claimant, the former were purchased around 1974 from his share of the proceeds of the sale of a house in the center of Tehran inherited from his father. Regarding the shares in the Bank of Industry and Mines, he claims that his father initially purchased a number of such shares on his behalf and that "the dividends paid on these [initial] shares were left in the bank for the purchase of additional shares, finally reaching the total of 516.1."

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[5]According to the Respondent, the beneficiaries of this transaction were, at least until Dr. Said Malek's death, only entitled to the ground but not to the erections constructed on it. The Respondent further asserts that the Claimant's father also retained the right to cancel the transaction and the right to such profits as the land would produce during his life.

III. ELEMENTS OF THE CLAIM

23. According to his last submission, the Claimant seeks compensation in the amount of U.S.$3,550,847.00[6] for the alleged expropriation by the Respondent of the properties described above (hereinafter collectively referred to as the "Properties") which comprise:

(a) A 2/7 interest in the house and gardens in Shemiran, Tehran constituting part of the central portion of the compound which the Claimant's father retained in 1967 (the "Parental Home") and which the Claimant maintains he inherited upon his father's death in 1972 and which he values at U.S.$537,143.00;

(b) The 3,930.50 m^2 of garden real estate adjacent to the above property (the "Wooded Land") which the Claimant values at U.S.$2,751,350.00 (together with the Parental Home, the "Shemiran Properties");

(c) The 20,685.00 m^2 constituting eleven parcels of farmland in Anjirak, Arak (the "Farmland") which the Claimant values at U.S.$86,000.00;

(d) The 4,720 shares in Bank Mellat which the Claimant values at U.S.$158,972.00; and

(e) The 516.1 shares in the Bank of Industry and Mines which the Claimant values at U.S.$17,382.00 (together with the shares in Bank Mellat, the "Shares").

The Claimant additionally requests an award in his favor for expenses and interest at the rate of at least 12 percent.

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[6]In his Statement of Claim, Claimant originally sought an award in the amount of U.S.$3,576,670.00.

IV. GENERAL JURISDICTIONAL CONSIDERATIONS

24. Where a claim is instituted by a dual Iran-United States national, the Tribunal has jurisdiction over such claim "when the dominant and effective nationality of the Claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States." Case No. A18, Decision No. DEC 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251.

25. In the Interlocutory Award the Tribunal found that the Claimant's dominant and effective nationality was that of the United States of America as from 5 November 1980 to 19 January 1981. Under the Full Tribunal's ruling in Case No. A18, supra, however, it is a further jurisdictional requirement that the Claim arose during that period. This requirement is reflected in the Interlocutory Award, which, in pertinent part, states the following.

> [T]he Claimant was naturalized on 5 November 1980. Therefore, any claim which arose before this date would be outside the jurisdiction of the Tribunal, as well as any claim arising after 19 January 1981. These two dates delimit a very short span of time for a claim to be admissible.

(Interlocutory Award at para. 17, reprinted in 19 Iran-U.S. C.T.R. 48 at para. 17)

26. As the Interlocutory Award notes, however, the Statement of Claim mentions 28 February 1981 as the date on which the Properties were taken.

> The actual expropriation of my properties took place on 28 February 1981 (9, Esfand, 1359). Armed guards and authorities of the Government of the Islamic Republic of Iran forcibly occupied and expropriated my parental home in Shemiran (polé Roomi) near Tehran ... My land [i.e. the Wooded land] was also forcibly expropriated (and remains so to this day) at the same time when my parental home was expropriated. The original deed to this property was confiscated. At the time when my parental home was expropriated the originals of the deeds and certificates of shares pertaining to my other properties [i.e. the Farmland] and holdings in two

> Iranian banks [i.e. Bank Mellat and the Bank of Industry and Mines] were also confiscated.

Furthermore, the Claimant in his Statement of Claim calculates the interest on the amount of relief sought from 28 February 1981. Given the jurisdictional requirement that the taking of the Properties must have occurred between 5 November 1980 and 19 January 1981, the Statement of Claim as such would mean that the Tribunal lacks jurisdiction over the Claim. However, in a letter filed 30 August 1982, the Claimant's attorney, Mr. Sheldon Vance, wrote that his client "wishe[d] to elaborate on the statements made ... in his Statement of Claim" and that the "Claimant [would] produce conclusive evidence that the expropriation in question effectively took place between the dates of November 5, 1980 and January 19, 1981."

27. In the Interlocutory Award the Tribunal considered this letter to be an admissible amendment to the Statement of Claim under Article 20 of the Tribunal Rules. At the same time the Tribunal found that the question on which date the Claim arose was not sufficiently briefed by the Parties in their submissions filed prior to the Interlocutory Award and that, therefore, this issue was not ripe to be decided at that stage of the proceedings. The Tribunal consequently "reserve[d] its right to decide upon its jurisdiction in relation to this date" and proceeded with the determination of the dominant and effective nationality of the Claimant "without prejudice to its future decision [on the date the Claim arose]", which issue was joined to the merits.

28. Given the record, the Tribunal finds it appropriate initially to deal in this Award with the question of whether the Claim arose during the relevant jurisdictional period from 5 November 1980 until 19 January 1981.

V. THE ALLEGED TAKING OF THE SHARES

A. The Parties' Contentions

29. The Claimant initially asserted that the expropriation of the Shares occurred when the Revolutionary Guards invaded the compound in Shemiran and confiscated the originals of his share certificates on 28 February 1981. The Respondent denies that this is the case. It argues that the Claimant's filing of photocopies of the certificates proves that he is still in possession of the originals. Furthermore, the Respondent maintains that the seizure of the certificates is immaterial because they do not incorporate any title to the Shares as the latter are in the registered form.

30. The Respondent acknowledges that the Claimant has lost title to the Shares. However, according to the Respondent, this was not due to a confiscation of the share certificates by the Revolutionary Guards but was the result of Act No. 7/2287, entitled Law on Nationalization of Private Banks in Iran, passed by the Revolutionary Council on 11 June 1979 and published in the State Official Gazette No. 10012 on 8 July 1979 (the "Bank Nationalization Law"). The Respondent argues that, according to Tribunal precedent, a claim for compensation resulting from a nationalization arises at the date of approval of the law on nationalization. Since the Bank Nationalization Law was passed on 11 June 1979, the Respondent concludes that the Claim for compensation of the value of the Shares arose prior to 5 November 1980 and therefore is outside the Tribunal's jurisdiction. The Respondent also maintains that legislation further implementing the Bank Nationalization Law such as the Legal Bill on the Administration of Bank Affairs (passed on 24 September 1979), the Legal Bill Authorizing the Provision of Capital for the Purpose of the Continuation of Activities of Nationalized Banks and Credit Institutions (passed on 25 June 1980) and the Legal Bill Concerning the Protection of Iranian Small Shareholders in Nationalized Iranian Banks and Credit Institutions (passed on 3

July 1980) were enacted before the Claimant became a United States citizen. The Respondent claims that pursuant to this last enactment every nationalized bank was required "to protect Iranian shareholders in such banks under certain criteria approved and declared by the Bank's General Meeting, by paying the price of shares of such group of Iranians who previously bought and now possess the shares of nationalized banks and credit institutions." On 15 June 1979 the Iran Times, a newspaper published in the United States, reported that "[t]he Iranian government has ... reassured the owners that they would be compensated for their investments." According to Bank Mellat, domestic as well as foreign shareholders would receive compensation for their nationalized shares. The Respondent maintains that Bank Mellat has credited the Claimant's account with "the price of his shares" and that he always could and still can collect this money either personally or through a power of attorney. The Respondent further asserts that all these banking operations took place prior to 5 November 1980. Bank Mellat confirms that an amount of 4,101,789.00 Rials has been credited to the Claimant's account. The Bank of Industry and Mines also states that it is prepared to pay the value of the Claimant's shares, but does not specify how much such value would be.

31. The Claimant does not dispute that the Shares were nationalized pursuant to the Bank Nationalization Law. He nonetheless maintains that his Claim for their value arose only on 5 November 1980 and offers the following explanation for his position.

> As Christie states in his "What Constitutes a Taking of Property" ... "When a seizure which is not originally deemed to be an expropriation ripens into one, the date of 'taking' should not be held to go back to the time when the property was originally seized, but the 'taking' should, rather date from the time at which it is determined that there was no reasonable prospect that the property would ever be returned." ... Claimant asserts that "any reasonable prospect" that the [Iranian Government's] promise of compensation would be implemented ended when Claimant became naturalized a

> citizen of the United States and that, therefore, it is on that date that "taking" of these shares occurred.
>
> ...
>
> Claimant wishes to point out that he was indeed still an Iranian when the banks were nationalized June 11, 1979. At that time, he no longer owned shares but had a claim on the Bank's books for the value of those formerly held shares. Therefore, the bank shares were not transferred to a non Iranian and, as the bank itself states in its submission, "the value" is still on the bank's books. As Claimant has proven above, Respondent constructively took this value when Claimant became naturalized a United States citizen, because Respondent's laws and regulations thereafter prevented him from obtaining same. This occurred, exactly as with the value of Claimant's former Bank of Tehran shares, precisely when his claim qualified pursuant to the Algiers Declaration.

32. The Claimant develops a number of arguments in support of his position that his acquisition of United States citizenship effectively prevented him from obtaining payment of the values of the Shares, even though such value may have been put at his disposal by the respective banks. First, the Claimant argues that since 4 November 1979 (the date of the seizure of the 52 U.S. nationals in Tehran), United States passports were not valid for travel to Iran. Second, he invokes article 60 of the Civil Procedure Code of Iran regarding powers of attorney which, he alleges, requires powers of attorney given outside of Iran to be certified by one of the Iranian political agents or the Iranian Consulates. The Claimant asserts that the Iranian Interests Section in the Embassy of Algeria, the political representative of Iran in the United States at the time he became a citizen of that country, had issued a regulation according to which it would authenticate powers of attorney only for Iranians who had a green card or an "I 94" but that he no longer had such documents since he had obtained United States citizenship. Finally, the Claimant alleges that, according to other regulations, powers of attorney were only valid for amounts not exceeding one million Rials. In connection with the shares in the Bank of Industry and Mines, the Claimant advances two additional arguments why it became impossible for him to obtain their value once he was naturalized

a United States citizen. Firstly, he points to the fact that the share certificates state on their face that they may be owned only by Iranians. Secondly, he argues that article 989 of Iran's Civil Code should be applied by analogy to these shares.

33. The Respondent denies that there are any laws or regulations which effectively prevented the Claimant from obtaining the value of the Shares. It states that at the time when the 52 U.S. nationals were seized in Tehran, the Claimant had not even become a United States citizen, so as to enable him to receive a United States passport. The Respondent further argues that the Claimant never applied for an authentication of a power of attorney by the Iranian Interests Section in the Embassy of Algeria and that the regulation regarding authentication which he cites "is a photocopy prepared in another case, irrelevant to the Claimant." The Respondent maintains that Article 989 of the Iranian Civil Code is only concerned with real estate and cannot be applied to shares. The Respondent regards as especially important the fact that the Claimant had ample opportunity to request the respective Banks to pay him the amounts which they had credited to his account, but that he had neglected to do so. The Respondent stresses that the Claimant took no action to collect the value of the shares during the period when he held solely Iranian nationality (i.e. between 11 June 1979 and 5 November 1980). The Respondent maintains that this Tribunal has repeatedly found it lacks jurisdiction "in cases where the Claimants have taken no action with regard to claiming the cash deposited in banks or claiming the amounts of bills and drafts and documentary credits after their expiry up to 19 January 1981." In reply, the Claimant states that the Bank Nationalization Law was never served on him and that the Banks should have contacted him and not vice versa.

33. The Respondent does not deny that the certificates of the shares of the Bank of Industry and Mines state that transfer of such shares to non-Iranians is forbidden. It argues, however, that any dispute regarding the possibility of the Claimant owning

such shares since he became a United States citizen on 5 November 1980 was mooted by the effect of the Bank Nationalization Law.[7]

B. The Tribunal's Findings

34. Article II, paragraph 1 of the Claims Settlement Declaration states that this Tribunal was established for the purpose of deciding claims arising, inter alia, "out of ... expropriations or other measures affecting property rights." Both the Claimant and the Respondent agree that the nationalization of Bank Mellat and the Bank of Industry and Mines resulted in the "expropriation" of the Shares as understood under the Claims Settlement Declaration. This is in accordance with Tribunal precedent stating that the Tribunal's jurisdiction over "expropriations" applies equally to "nationalizations" and other forms of takings by virtue of Article II, paragraph 1, of the Claims Settlement Declaration. American International Group, Inc. et al. and Islamic Republic of Iran et al., Award No. 93-2-3, p. 9 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 101. It is therefore clear that this Claim, as far as its subject matter is concerned, falls within the Tribunal's jurisdiction. The disagreement between the Parties relates to the question of whether or not the Claim arose during the relevant jurisdictional period from 5 November 1980 to 19 January 1981.

35. In addressing this issue the Tribunal needs to consider first the Bank Nationalization Law. This Law was ratified by the Revolutionary Council on 11 June 1979 and reads as follows.

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[7]In connection with this issue the Bank of Industry and Mines states that, assuming the shares were not nationalized on 11 June 1979, quod non, the Claimant would have divested himself of the ownership of the shares by becoming a dual national. According to the Bank such divesture, however, would not have prevented the Claimant from being entitled to the value of the shares.

ARTICLE 1 - In order to safeguard the national rights and capital, set the wheels of the country's industry in motion and ensure the people's bank deposits and savings, while accepting the principle of qualified legitimate ownership, and also in view of:

- the manner in which banks obtain their revenues, and the illegal transfer of capital abroad;

- the banks' fundamental role in the nation's economy, and the natural relationship between the nation's economy and the banking institutions;

- the banks' indebtedness to the Government, and their need for Government supervision;

- the need to coordinate the banks' activities with the nation's other organizations; and

- the need to steer the banks' activities towards an Islamic administrative and profit-making path,

as from the date of ratification of this Act all banks are declared to be nationalized, and the Government is required to appoint bank directors immediately thereupon.

ARTICLE 2 - As from the said date, only the signatures of the directors appointed to the banks by the Government have legal validity.

36. It follows from the above Law that all banks established in Iran, including Bank Mellat and the Bank of Industry and Mines, were nationalized on 11 June 1979.[8] Legislation further implementing the Bank Nationalization Law was enacted on 24 September 1979 (the Legal Bill on the Administration of Bank Affairs), 25 June 1980 (the Legal Bill Authorizing the Provision of Capital for the Purpose of the Continuation of the Activities of Nationalized Banks and Credit Institutions) and 3 July 1980 (the Legal Bill Concerning the Protection of Iranian Small Shareholders in Nationalized Banks and Credit Institutions).

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[8]The Tribunal's finding that the Shares were nationalized as early as 11 June 1979 disposes of the Claimant's argument that they were expropriated when the Revolutionary Guards allegedly confiscated the originals of the share certificates during their intrusion into the compound in Shemiran.

37. In considering when the Claim resulting from the taking of the Shares pursuant to the Bank Nationalization Law arose, the Tribunal is guided by its precedent in American International Group, supra, p. 15, reprinted in 4 Iran-U.S. C.T.R. at 105. In that Case, involving legislation similar to the Bank Nationalization Law (the Law of Nationalization of Insurance Corporations of 25 June 1979), the Tribunal held that the date of action giving rise to the claim is the date of nationalization. Consequently, the Claim based on the Bank Nationalization Law arose on 11 June 1979. Given the jurisdictional requirement that any claim in this Case must have arisen between 5 November 1980 and 19 January 1981, the Tribunal finds that the Claim for compensation of the value of the Shares is outside its jurisdiction in so far as it is based on the Bank Nationalization Law.

38. The Claimant himself seems to recognize that his Claim for expropriation founded purely on the Bank Nationalization Law is not within the Tribunal's jurisdiction. Nonetheless he maintains that the Tribunal should award him compensation for his loss of the Shares. In support of his position he relies on an article published in the Iran Times of 15 June 1979 in which the then Iranian Minister for Planning and Budget, Mr. Ali Akbar Moinfar, is quoted as saying that the shareholders of the nationalized banks would receive compensation for their investments and, more importantly, on the Legal Bill Concerning the Protection of Iranian Small Shareholders in Nationalized Iranian Banks and Credit Institutions (the "Bill of 3 July 1980"). That the Government of Iran established a scheme to compensate such shareholders is denied neither by the Respondent nor by Bank Mellat or the Bank of Industry and Mines. To the contrary, they explain that this precisely was the purpose of the Bill of 3 July 1980. According to the Respondent and both Bank Mellat and the Bank of Industry and Mines, the amounts to which the Claimant was entitled pursuant to this statute were credited to his account on the books of the respective banks (see paragraph 30, supra). The essence of the Claimant's argument is

that any reasonable prospect that the Respondent's "promise of compensation", foreshadowed in the Iran Times and subsequently implemented in the Bill of 3 July 1980, would be fulfilled "ended when Claimant became naturalized a citizen of the United States and that, therefore, it is on that date [5 November 1980] that the "taking" of the [Shares] occurred." The Claimant concludes that the jurisdictional requirement discussed in paragraph 25, supra is met and that he is entitled to an award for the value of the Shares.

39. The Tribunal considers that the Claimant's above line of argument confuses what are in fact two different grounds for the Claim: on the one hand, the "taking" of the Shares pursuant to the Bank Nationalization Law and on the other hand, the Respondent's alleged failure to perform its "promise to compensate" as embodied in the Bill of 3 July 1980. In so far as the Bank Nationalization Law constitutes the basis of the Claim, the Claimant's request for compensation must be dismissed for lack of jurisdiction for the reasons set out in paragraph 37, supra. What remains as an alternative foundation for the Claim is the Bill of 3 July 1980. A claim based on this Bill, however, cannot be argued convincingly to arise out of an expropriation or other measures affecting property rights provided for under Article II, paragraph 1 of the Claims Settlement Declaration. This results directly from the purpose of the Bill which was not to expropriate assets but, to the contrary, to compensate the banks' shareholders whose stock had been nationalized. A jurisdictional basis other than "expropriations or other measures affecting property rights" would need to be found in the Claims Settlement Declaration for the Claim based on the Bill of 3 July 1980 to be arguably within the Tribunal's jurisdiction.

40. Given the limitation of the Tribunal's jurisdiction to "claims arising out of debts, contracts [and] expropriations or other measures affecting property rights" and that neither "contracts" nor "expropriations or other measures affecting property rights" form a suitable jurisdictional basis for a claim

founded on the Bill of 3 July 1980, the Tribunal would need to be satisfied that a claim based on the Bill can be viewed as arising out of "debts" as envisaged under Article II, paragraph 1 of the Declaration.[9] This raises the general question of whether national legislation of the State Parties to the Claims Settlement Declaration following which a person is entitled to compensation creates a "debt" of the nature contemplated by the Declaration.[10] The Tribunal, however, need not decide this matter here because, as will be explained in paragraphs 44 and following, infra, it is, in any case, not satisfied that the Claim based on the Bill of 3 July 1980 arose during the relevant jurisdictional period.

41. The Bill of 3 July 1980 reads as follows.

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[9]The Claim based purely on the Bill of 3 July 1980, if deemed successful, would obviously not entitle the Claimant to the value of the Shares as at the date of nationalization but to the amount of compensation provided for in the Bill.

[10]In connection with this issue, it is worthwhile noting that the Tribunal has held that "[w]hile the Tribunal's jurisdiction is limited to claims which "arise out of debts, contracts ..., expropriations or other measures affecting property rights, "it nevertheless extends to all acts which give rise to such claims, irrespective of their nature." Arthur Young & Company and Islamic Republic of Iran et al., Award No. 338-484-1, para. 43 (1 Dec. 1987), reprinted in 17 Iran - U.S. C.T.R. 245, para. 43; Alfred L.W. Short and Islamic Republic of Iran, Award No. 312-11135-3, para. 11 (14 July 1987), reprinted in 16 Iran - U.S. C.T.R. 76, para. 11. The Tribunal has denied jurisdiction for claims based on a national court judgement of a State Party in Burton Marks and Harry Umann and Islamic Republic of Iran, Award No. ITL 53-458-3, p. 8 et seq. (26 June 1985), reprinted in 8 Iran - U.S. C.T.R. 290, 294 et seq. and on an arbitration award issued by the I.C.C. Court of Arbitration in Bendone-Derossi International and Government of the Islamic Republic of Iran, Award No. 352-375-1, para. 11 et seq. (11 Mar. 1988), reprinted in 18 Iran - U.S. C.T.R. 115, para. 11 et seq.; compare Concurring Opinion of Howard M. Holtzmann in id. (11 Mar. 1988), reprinted in 18 Iran-U.S. C.T.R. 120; and in Bendone-Derossi International and Government of the Islamic Republic of Iran, ITM No. 40-375-1, p. 4 et seq. (7 Jun. 1984), reprinted in 6 Iran - U.S. C.T.R. 130, 132 et seq.; compare Concurring Opinion of Howard M. Holtzmann in id. (8 June 1984), reprinted in 6 Iran - U.S. C.T.R. 133.

> Article 1- In order to assist and ameliorate the situation of those Iranian small shareholders who had previously bought shares in nationalized banks and credit institutions and currently possess them, and where according to the audited financial statements of the said banks and institutions as at 7 June 1979 the book value of their shares (the amount of capital and deposits after deduction of annual losses) is less than their nominal value, the general assemblies of banks are hereby authorized, in acting on behalf of the Government, to pay the difference up to a maximum of those shares' nominal value.
>
> NOTE 1- It shall be up to the general assembly of the banks to determine who is a small shareholder, and what amount is payable to each shareholder.
>
> NOTE 2- The credit needed for implementing this Act shall be obtained from Bank Markazi Iran. Within the following five years the Government is required to repay claims of Bank Markazi Iran arising from the provision of this credit.

42. The Tribunal notes that Article 1 of the Bill states that the banks "are ... authorized" to pay the compensation to the shareholders. Taken as such this language could be read to mean that whether a shareholder would receive any compensation is a decision within the banks' discretion and that, therefore, Article 1 cannot be construed as imposing an obligation to pay the compensation. However, on the basis of the general posture of the Bill and of the Respondent's own interpretation thereof, according to which each nationalized bank was bound to pay the compensation, the Tribunal believes it is fair to consider that the Bill of 3 July 1980 did incorporate such obligation. That the payment of the compensation to the shareholders was a burden to be borne ultimately by the Respondent is evidenced by Article 1 and Note 2 of the Bill of 3 July 1980. According to Article 1, the payments by the general assemblies of the banks would be made "on behalf of the Government." Note 2 states that "[t]he credit needed for implementing this Act shall be obtained from Bank Markazi Iran [and that] [w]ithin the following five years the Government is required to repay claims of Bank Markazi Iran arising from the provision of this credit." In light of these considerations, the Tribunal views the Bill of 3 July 1980

as a general undertaking by the Respondent to arrange for compensation benefitting the shareholders of the nationalized banks, which arrangement was to be put into effect via the banks.

43. The Tribunal is satisfied that the Claimant qualified as a "small shareholder" under the Bill. The fact that Bank Mellat and the Bank of Industry and Mines maintain that compensation was carried to the Claimant's account implies that the general assemblies of both banks, in accordance with Note 1, regarded him as a "small shareholder."

44. The Tribunal now turns its attention to the issue of whether the Claim arising out of the Bill of 3 July 1980 became "outstanding" within the meaning of Article II, paragraph 1 of the Claims Settlement Declaration between 5 November 1980 and 19 January 1981. The record does not contain any evidence that the Claimant demanded compensation for the taking of the Shares from the Respondent or from Bank Mellat and the Bank of Industry and Mines. The Respondent argues that the Claimant's failure to do so puts his Claim outside of the Tribunal's jurisdiction. In support of its position the Respondent relies, inter alia, on a number of Tribunal precedents regarding claims for the alleged expropriation by the Respondent of account deposits with Iranian banks. These Cases require that a demand for such monies was made prior to 19 January 1981 for the claim to be outstanding on that date. See e.g. Ronald Stuart Koehler and Islamic Republic of Iran, Award No. 223-11713-1, paras. 28-32 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 333, paras. 28-32; Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al., Award No. 141-7-2, p. 7 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 223. The Tribunal does not believe, however, that the above precedents apply to the Case at hand since a claim for compensation for the value of the nationalized Shares based on the Bill of 3 July 1980 cannot be equated to a claim arising out of the expropriation of funds deposited in bank accounts. In this regard it must be noted that the Tribunal has previously held that debts owed and payable prior to 19 January

1981, unlike bank accounts, constitute outstanding claims, even though payment of the debts had not been demanded prior to that date. Sedco, Inc. and Iran Marine Industrial Company et al., Award No. 419-128/129-2, paras. 28-32 (30 Mar. 1989), reprinted in 21 Iran-U.S. C.T.R. 31, paras. 28-32. The lack of any demand on the part of the Claimant for compensation is therefore not necessarily fatal to the Tribunal's jurisdiction over the Claim based on the Bill of 3 July 1980 provided it is established that the compensation envisaged in that Bill became owed and payable between 5 November 1980 and 19 January 1981.

45. Three dates come to mind when considering at which time the compensation referred to in the Bill may have become owed and payable: the date of the entry into force of the Bill, the date on which the general assemblies of the Banks determined the exact amount due to the Claimant or the date on which such amount was credited to his account. Since the Bill entered into force as early as 3 July 1980 and nothing in the record suggests that these further steps were taken during the period from 5 November 1980 to 19 January 1981, the Tribunal is not satisfied that the compensation envisaged in the Bill became owed and payable during that period. The Tribunal therefore determines that it is not established that the Claim based on the Bill of 3 July 1980 became outstanding between 5 November 1980 and 19 January 1981.

46. In the light of its finding that the Claim, based either on the Bank Nationalization Law or on the Bill of 3 July 1980, did not arise between 5 November 1980 and 19 January 1981, the Tribunal determines that the Claim for compensation for the expropriation of the Shares must be dismissed for lack of jurisdiction.

VI. THE ALLEGED TAKING OF THE FARMLAND

A. The Parties' Contentions

47. The Claimant initially maintained that the Farmland was expropriated on 28 February 1981 as a result of the confiscation of the original deeds pertaining thereto at the time the Respondent allegedly seized his parental home. Although the Claimant has amended his Claim on this issue (see paragraph 26 and 27, supra), the Respondent maintains that this should be regarded as an admission on the part of the Claimant that the Claim did not arise between 5 November 1980 and 19 January 1981 and that, consequently, the Tribunal should declare that it has no jurisdiction over this Claim.

48. The Statement of Claim asserts that "the Government of the Islamic Republic of Iran effectively stopped transactions of land within city limits." The Respondent submits that, even if these limitations on the transactions of land alluded to by the Claimant[11] were regarded as "other measures affecting property rights" under Article II, paragraph 1 of the Claims Settlement Declaration the Tribunal would lack jurisdiction over this Claim since these laws were all enacted prior to 5 November 1980, in the course of 1979. The Claimant denies that any of the above laws ever applied to the Farmland because "[it was] utilized by locally resident peasants, with permission of the owner, and therefore not "never utilized" and it was also located not in an urban center, but in Anjirak, a farming area in the vicinity of Arak."

49. To prove the alleged expropriation the Claimant relies on Article 989 of the Civil Code of Iran with regard to which he writes the following.

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[11]The Act to Abrogate Ownership of Never-Utilized Urban Lands (Mawat lands) and the Manner of Development Thereof and other laws relating to "currently unutilized urban lands" (Bayer lands) in Tehran and provincial cities).

> The Claimant does not have direct evidence of the physical seizure of [the Farmland]. [It was] simply taken into the domains of the Government, in effect confiscated by operation of Article 989 of the Civil Code of Iran ... when Claimant naturalized [sic] a United States citizen November 5, 1980, without having observed the provisions of Iranian Law.

Article 989 of the Civil Code of Iran provides, in pertinent part, as follows.

> In case any Iranian subject acquired foreign nationality after the solar year 1280 (1901-1902) without the observance of the provisions of the law, his foreign nationality will be considered null and void and he will be regarded as an Iranian subject. Nevertheless, all his landed properties will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to him after the deduction of the expenses of sale.

The Claimant maintains that a forced sale of property, as contemplated under the above Article, amounts to a confiscation.

50. The Claimant additionally invokes the Amendment of 15 April 1980 to the Islamic Land Reform Act of 16 September 1979 in support of the contention that his Claim for expropriation of the Farmland arose between 5 November 1980 and 19 January 1981. According to the Claimant, this Amendment provides that non-urban utilized lands (Dayer lands) which are not personally worked by an owner who has other sources of income "will belong to the government" and that "the government will pay the value of such lands as compensation." The Claimant asserts that this legislation applied to the Farmland because he had other sources of income, the land was located outside the local boundaries of a city and was worked on by local farmers and not himself. The Claimant argues that he consequently lost title to the Farmland due to the enactment of the Amendment of 15 April 1980. The Claimant further argues that his Claim to compensation arose only on 5 November 1980 when he became a United States citizen because at that date Iranian law and regulations prevented him from acquiring the values to which he claims to be entitled. The Claimant relies on the same arguments as in connection with the

alleged expropriation of the Shares (see paragraph 31, supra) to explain how he was prevented from receiving compensation.

51. In reply to these contentions the Respondent asserts that the Farmland has remained untouched and registered in the name of the Claimant. The Respondent submits a letter No. 10496 dated 31 August 1988 from the State Organization for the Registration of Deeds and Real Estates of Arak stating that "no record of expropriation, attachment or confiscation of his real estates was found in the registration file and the real estate registry." The Respondent alleges that this is also confirmed by letter No. J/43927 dated 10 March 1990 from the Director of Legal Affairs of the Urban Land Organization, letter No. 23308 dated 28 December 1989 from the Director of the State Organization for the Registration of Deeds and Real Estates in Arak and letter No. 13347 dated 31 January 1990 from the Director General, Natural Resources Department, Central Province. The Respondent finally argues that, in any case, the Tribunal cannot have jurisdiction over this Claim because any claim based on the Amendment would have arisen on the day of its enactment, 15 April 1980.

B. The Tribunal's Findings

52. The Tribunal's jurisdiction over the Claim based on the alleged taking of the Farmland depends upon it being established that the land was expropriated between 5 November 1980 and 19 January 1981. The Respondent initially submitted that, to the extent the Claimant relies on the Act to Abrogate Ownership of Never-Utilized Urban lands (Mawat lands) and the Manner of Development Thereof and other laws relating to "currently unutilized urban lands" (Bayer lands) in Tehran and provincial cities, the above jurisdictional requirement is not met since these laws were all enacted in 1979. The Claimant denied that these statutes applied to the Farmland and that the expropriation had occurred as early as 1979. In the later course of the proceedings the Respondent agreed that the cited enactments were not applicable to the Farmland. Since that is the case, the

Tribunal no longer needs to deal with the impact of these enactments on the status of the Farmland.

53. The Claimant relies firstly on Article 989[12] of the Civil Code of Iran to prove that the expropriation of the Farmland occurred during the relevant jurisdictional period. He argues that, due to the operation of this Article, the Farmland was confiscated as of the day "when [he] naturalized [sic] a United States citizen November 5, 1980, without having observed the provisions of Iranian Law."

54. Article 989, in pertinent part, states that if an Iranian subject acquires a nationality different from the Iranian nationality "without the observance of the provisions of the law ... all his landed properties will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to him after the deduction of the expenses of sale." The Claimant appears to assume that Article 989 triggered an automatic expropriation of his alleged landed properties as soon as he became an American citizen. The Tribunal finds that this interpretation of the Article is not consistent with its text. It follows from the language of the provision[13] that the Article is not self-executing but that a procedure for the sale of the real estate must be set in motion under the supervision of the local Public Prosecutor. The Claimant, however, has not submitted any evidence purporting to prove that this procedure was ever implemented in relation to the Farmland between 5 November 1980 and 19 January 1981.

55. As an alternative foundation for his Claim the Claimant invokes Article 4 of the Amendment of 15 April 1980 to the

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[12]See paragraph 49, supra for its text.

[13]Especially the phrase "all his landed properties will be sold under the supervision of the Local Public Prosecutor."

Islamic Land Reform Act of 16 September 1979 which he describes as follows.

> Article 4 provides that owners of utilized dayer lands may continue to own a portion of their land equal to three times the land which was required to meet the living costs of a farmer and his family, provided, however, that such owners have been personally working on their lands. If, however, the owners of such lands did not personally work on their lands, the law authorized them to keep a portion of their land equal to twice the land which was required to meet the living expenses of a farmer and his family, provided, however, that such owner did not have any other source of income. The owners of these lands must transfer the remaining portion of their lands to the farmers of the same area, if the said farmers did not have agricultural lands and could not acquire any agricultural land unless by acquiring the excess land of such owners; otherwise, such lands were taken from owners thereof and distributed among such farmers who were in need of such lands. The government will pay for the value of the utilized (dayer) lands.

(Emphasis added) According to the Claimant, this provision means that "dayer lands which are not personally worked by an owner and that owner has other sources of income will belong to the Government ... [and that] the government will pay the value of such lands as compensation." The Claimant argues that, as a result of the Amendment of 15 April 1980, "[n]o longer did he have title [to the Farmland]." At the same time, however, he maintains that his Claim for the compensation envisaged in the same Act arose on 5 November 1980 because only on that date Iranian regulations "effectively prevented him ... from acquiring those values."

56. The Tribunal finds that the underscored portion of the Claimant's description of the Article at issue does not accurately reflect the original Persian text stating the following.

> If [the owner] does not voluntarily act to carry out this duty, such lands shall be taken from him by order of the magistrate, as local conditions may require, and shall be placed in the possession of the needy farmers and the

> Government will pay him the value of the tilled lands, once his obligations to the Treasury have been deducted.

(Emphasis added) Whereas the words "were taken" appearing in the description offered by the Claimant suggest that the properties falling under the application of the Amendment had effectively been expropriated, the original Persian text conveys a different picture. According to that text[14], the expropriation of such properties is dependent upon an "order of the magistrate." For the Claim to be within the Tribunal's jurisdiction it would need to be established that such order was issued in relation to the Farmland between 5 November 1980 and 19 January 1981. However, there is no evidence in the record that this occurred during that period.

57. Considering the above, the Tribunal finds that neither Article 989 of the Iranian Civil Code nor Article 4 of the Amendment of 15 April 1980 warrants the conclusion that the Claim for expropriation of the Farmland arose between 5 November 1980 and 19 January 1981. Since the Claimant does not rely on any other legal basis to prove the expropriation of the Farmland by the Respondent during the relevant period, the Tribunal dismisses also this Claim for lack of jurisdiction.

VII. THE ALLEGED TAKING OF THE SHEMIRAN PROPERTIES

A. The Parties' Contentions in General

58. With regard to the Shemiran Properties the Parties initially exchanged arguments based on the Act to Abrogate Ownership of Never-Utilized Urban Lands (Mawat Lands) and the Manner of Development Thereof and other laws relating to "currently unutilized urban lands" (Bayer lands) in Tehran and

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[14]Particularly the words "such lands shall be taken from [the owners] by order of the magistrate, as local conditions may require."

provincial cities analogous to those advanced in connection with the Farmland. (see paragraph 48, supra) Here too they finally agreed that these statutes did not apply to the Shemiran Properties.

59. In order to prove that the Wooded Land was expropriated by the Respondent during the relevant jurisdictional period, the Claimant submits the original of a letter in Persian dated 16 April 1983 which he allegedly received from a Mr. Djafar Vaez-Zadeh, Official Notary Public No. 328.[15] According to the Claimant, this letter constitutes firm proof that the de jure expropriation of the Wooded Land occurred between 5 November 1980 and 19 January 1981.

60. The Respondent claims that this letter is a forgery. In support of this allegation the Respondent submits two affidavits respectively by Mr. Djafar Vaez-Zadeh himself and Mr. Rahman Hajiri Azar, Assistant Notary Public at the same office. The fact that the letter submitted by the Claimant bears the number 85169 is, according to the Respondent, further proof that it is forged because in a notary public's office outgoing letters are numbered as of 21 March of a given year to 20 March of the next year. The Respondent maintains that it would be impossible that 85,169 letters were sent from Office No. 328 between 21 March 1983 and 16 April 1983. The Respondent also submits a letter apparently emanating from Notary Public Office No. 328 in which it is claimed that only two letters were issued by that office on 16 April 1983 and that those had nothing to do with the Claimant's property. The Respondent further argues that the signature of Mr. Djafar Vaez-Zadeh appearing on his affidavit bears no resemblance to the signature appearing on the letter invoked by the Claimant. Finally, the Respondent submits two documents bearing the seal of Notary Public Office No. 328. Comparing these seals with the seal appearing on the disputed letter, the Respondent concludes that the patterns do not correspond.

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[15]For the full text of this letter, see paragraph 84, infra.

61. The Claimant replies to these allegations of forgery by stating that "this notarized letter was obtained in a totally straight-forward way, by inquiry addressed to the notarial office." He further asserts that "Respondent ... can, of course, arrange any redisposition of official records in its Country that would serve its purpose" and that "[the] unfortunate notary, who may now have been threatened into changing his story, had no reason when he wrote the letter to avoid disclosing the seizure of this plot because he knew that the local press had published a report of the initial invasion of the Dr. Said Malek compound by Revolutionary Guards October 6, 1980." The Respondent strongly objects to the Claimant's allegation that the Notary Public has been put under pressure.

62. The Claimant argues that, even if the letter dated 16 April 1983 of Notary Public Office No. 328 does not prove the de jure expropriation of the Wooded Land during the relevant jurisdictional period, there is sufficient proof to hold that the Wooded Land as well as the Parental Home were effectively taken by the Respondent between 5 November 1980 and 19 January 1981. In support of this allegation, the Claimant invokes a newspaper article published in the Kayhan Daily Newspaper published 6 October 1980. This article describes a search of Issa Malek's house by the Revolutionary Guards. Issa Malek's house was located on the land which he received from his father in 1967 (see paragraph 20, supra). Together with the Parental Home, the Wooded Land and the parcels of land donated by Dr. Said Malek to his other children in 1967, it formed part of the Malek walled compound measuring 16,000 m^2. According to the Claimant, "the Iranian authorities soon turned Issa Malek's house into a [narcotics tribunal (the "Narcotics Tribunal")] and then, two months later, expanded their occupation into the [Parental Home] and the [Wooded Land], for use as office and parking space for their tribunal."[16] In support of this allegation, the Claimant

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[16]According to the Respondent, Issa Malek's house was used as an Islamic Revolutionary Prosecutor's Office for Narcotics Control and Enforcement of Islamic Injunctions as of late

invokes several affidavits, the contents of which can be summarized as follows.

Affidavit of Mr. Khalil Boini.

> Mr. Boini is an Iranian citizen who was an aircraft service manager at Iran Air and left Iran for the United States on 8 November 1981. He and his family purportedly were patients of the Claimant's father for many years. He claims that he personally "witnessed in the first week of December 1980 the seizure of Dr. Reza Malek's parental home ..., that this house later in the month of December was turned into offices for the detention center [and] ... that in [the] first days of December 1980, [the] authorities seized and began utilizing [the Claimant's] land as a parking area for their official use."

Affidavit of Mr. Abe Ashcanase.

> Mr. Ashcanase is a United States citizen who worked formerly for the United States Foreign Service in Tehran. He states that during this period, he came to know Issa and Reza Malek and was familiar with the family compound. In his affidavit, he recorded a statement made under oath by an Iranian who preferred not to be identified. According to Mr. Ashcanase, this man claims that he personally saw that in December 1980, the Parental Home and Wooded Land were converted respectively into offices and a parking lot to serve the Narcotics Tribunal.

Affidavits (two) of Mrs. Roghieh Malek.

> Mrs. Roghieh Malek is the Claimant's mother. She asserts that during the first days of December 1980 she was evicted from the Parental Home which was converted into offices. She further maintains that, at the same time, the Wooded Land was converted into a parking lot.

Affidavit of Mr. Farhad Massoudi.

> Mr. Massoudi is an Iranian citizen, who left Iran for England on 2 January 1979. The Claimant states he was the publisher of one of the largest and oldest newspapers in Iran and lived in the same neighborhood as the Maleks. The affiant states that he has been informed by his sources in Iran that the Parental Home

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February 1981.

was converted into offices and the Wooded Land into a parking lot during December 1980.

Affidavit of Mr. Kay-Khosro Zafar.

Mr. Zafar is an Iranian citizen who left Iran for the United States in December 1978. He claims his father owned a major architectural firm in Tehran employing 420 people. He states that his family had known the Maleks for many years. He maintains that he was informed by his sources in Tehran that towards the end of 1980 the authorities converted the Wooded Land into a parking facility and that, during the same period, they "gradually and forcibly" took possession of the Parental Home.

Affidavit of Mr. Hossein Vossough.[17]

Mr. Vossough is an Iranian citizen who left Iran for England in July 1987. He states that, for a period just before her death, his mother lived in the Parental Home with the Claimant's mother and that the latter was evicted soon thereafter. He claims that "in early December 1980, [he] personally saw that the ... authorities seized the [Parental Home] and the [Wooded Land] at that time in early December 1980."

63. The Respondent maintains that the Claimant's own file is inconsistent with his position that the Shemiran Properties were expropriated during the relevant jurisdictional period (see paragraphs 99 and following, infra).

64. In its Memorial in rebuttal filed 1 August 1990 the Respondent maintains that "[t]he truth of the matter is that [the Government of Iran] has neither expropriated the property claimed by Claimant nor has caused the taking of his property either effectively or by ratifying the laws invoked by Claimant." In its submission filed 24 January 1991 the Respondent again declares that the "property claimed by the Claimant" has never been expropriated and states that the Narcotics Tribunal was established in Issa Malek's house as late as 28 February 1981. In support of that allegation the Respondent submitted the affidavits of Mr. Abbas Alour, the former gardener of the Malek

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[17]Mr. Vossough appeared as a witness for the Claimant at the Hearing.

compound and presently the cook in the Narcotics Tribunal and of Mr. Hassan Babaie Saleh, Deputy Chief of this institution.[18] The Respondent also submits an affidavit by Mr. Mostafa Katiraie, a Justice Department Official Expert, and a letter from the Mayor of Tehran's District One Municipality in support of this position.

65. The Respondent further maintains that the affidavits submitted by the Claimant have limited or no probative value.

Affidavit of Mr. Khalil Boini.

> The Respondent argues that the affiant's account in his affidavit dated 28 July 1983 of facts which allegedly occurred 3 years before is so detailed that it defies credibility. The Respondent questions the origin of his detailed knowledge of the family compound. The Respondent also questions whether the affiant could have been a witness to the alleged taking of the Shemiran Properties and to the seizure of the family documents because he lived some 6 kilometers away and because only the Revolutionary Guards and the occupants would be allowed to be present at the alleged taking.

Affidavits of Messrs. Abe Ashcanase, Farhad Massoudi, Kay-Khosro Zafar.

> The Respondent argues that no probative value should be granted to these affidavits because they are nothing more than recordings of statements made by others (hearsay). Furthermore, the Respondent states that Farhad Massoudi is the son of Abbas Massoudi, manager and concessionaire of the Daily Ettelaat Newspaper which was opposed to the revolutionary forces in Iran. The Respondent maintains that the affiant fled from Iran as an enemy of the revolution and asserts that he should not be regarded as an impartial witness. The Respondent claims that the same is true of Kay-Khosro Zafar whom it assumes to be the son of Keyghobad Zafar, an engineer who had close links to the Shah and an alleged member of the Free Masonry Lodge in Iran. The Respondent asserts that the older Zafar profited by virtue of his political influence, during the Shah's regime. According to the Respondent, he departed from Iran carrying "away what he had plundered."

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[18]Mr. Saleh appeared as a witness for the Respondent at the Hearing. Mr. Alour did not.

Affidavit of Mrs. Roghieh Malek.

> The Respondent points to the fact that the affiant uses the words "my house" and "my documents" when talking about what happened to the Parental Home. The Respondent argues that these words prove that she owned the Parental Home as a result of which she is "a beneficiary in the Claim ... [which] in itself is sufficient for refusing the affidavit as evidence." The Respondent further argues that "no forum would admit the statements of a mother in favor of her son against a respondent." Furthermore, the Respondent claims that this affidavit is in contradiction with Khalil Boini's. The Claimant's mother states that the Revolutionary Guards encircled the Parental Home in early December 1980. The Respondent argues that since Khalil Boini testified that Issa Malek's house was converted into the Narcotics Tribunal soon after 6 October 1980, the Parental Home must have been besieged shortly after 6 October 1980.

66. The Respondent also states that the Wooded Land is still registered in the name of the Claimant. In support of this allegation, the Respondent submits (a) a letter No. 60527 of 15 October 1988 from the Chief of Shemiran Estates Registration Department, (b) a letter No. 75505 of 29 November 1988 from the same institution indicating that the Wooded Land "does not show any attachment" , (c) a letter No. 140/17446/440 of 29 January 1989 from the Representative of the State Public Prosecutor to the Bureau for Algiers Declarations Affairs asserting that "through the investigations made up to now there is no record of any lawsuit or file against [the Claimant]" and (d) a letter No. 33-1-5/36328 of 25 February 1990 of the Director General of Urban Land of the Central Province stating that "there exists no record and file concerning [the Wooded Land] as well as [the Claimant] with this Department-General." The Respondent consequently affirms that the Wooded Land is at his disposal and that he may take possession of it.

67. As further proof that the Shemiran Properties were not expropriated, the Respondent argues that the Claimant's sister Parvin Malek and her husband, Mr. Karim Motamed, lived, until 1984, on the plot deeded by the Claimant's father to Parvin in 1967. The Respondent submits a copy of a deed indicating that

in 1984 this property was sold to Messrs. Nematollah Ghassemi Kharateh and Hassan Haerizadeh. According to the Respondent, it would have been impossible for the Claimant's sister to live there until 1984 if the expropriation of the family compound as alleged by the Claimant had actually occurred; the Respondent stresses that there are no walls separating the parcels of land deeded by the Claimant's father to his children in 1967.

68. The Claimant disputes the Respondent's rejection of the affidavits which he submitted in support of his Claim and points to the fact that the Respondent did not address Mr. Hossein Vossough's affidavit. The Claimant further explains that probably his sister Parvin's house was not seized because its title was in the name of her husband, a distinguished medical doctor, and because they built a wall around it shortly after the first invasion into the compound.

69. As a final argument to prove the taking of the Shemiran Properties during the applicable jurisdictional period, the Claimant invokes Article 989 of the Iranian Civil Code (for its text, see paragraph 49, supra). On the basis of this Article, the Claimant argues that "[the Shemiran Properties] were taken from him by operation of Iranian Law when [he] became a United States Citizen."

70. The Respondent's reply is, in essence, that Article 989 does not automatically deprive an Iranian subject of his land in the event he acquires a foreign nationality contrary to Iranian Law, but that the authorities can set in motion a procedure which ultimately leads to the sale of his real estate. The Respondent maintains that this procedure has never been initiated vis-à-vis the Claimant and that, consequently, he cannot rely on this provision to support his Claim.

B. The Tribunal's Findings

71. The only points of agreement between the Parties regarding the date of the events of late 1980 are that Issa Malek's house was searched by the Revolutionary Guards on 6 October 1980 and that the Narcotics Tribunal was stationed in Issa Malek's house by 28 February 1981. Apart therefrom, the stories of the Parties diverge. The Claimant maintains that "the Iranian authorities soon [after 6 October 1980] turned Issa Malek's house into a tribunal and then, two months later, expanded their occupation into the [Parental Home] and the [Wooded Land], for use as office and parking space for their tribunal." The Respondent asserts, however, that Issa Malek's house was converted into a tribunal only on 28 February 1981 and that the "property claimed by the Claimant has not been taken by it and has never been expropriated."

1. Review of the Claimant's arguments and evidence

(a) Article 989 of the Iranian Civil Code

72. The Tribunal notes that the Claimant here again relies on Article 989 of the Iranian Civil Code to prove that the alleged taking of the Parental Home and Wooded Land occurred during the relevant jurisdictional period. However, as with the Farmland, there is no evidence in the record that the procedure envisaged by that Article was ever implemented in relation to the Parental Home and Wooded Land between 5 November 1980 and 19 January 1981. Article 989, without more, does not support the conclusion that these properties were taken during the relevant period.

(b) The reasons offered by the Claimant for his mistake

73. The fact that the Statement of Claim mentions 28 February 1981 as the date of the taking of the Shemiran Properties

demonstrates that the Claimant was not familiar with the terms of the Claims Settlement Declaration at the time he filed his Claim. Had he been aware of the Declaration's requirement that any claim must be outstanding on 19 January 1981, he either would not have mentioned 28 February 1981 as the date of the taking or would not have submitted any claim at all. There is therefore little doubt that the Claimant was convinced when he filed his Claim on 6 January 1982 that the taking of the Shemiran Properties had occurred on 28 February 1981. A crucial question in this regard is whether this conviction was based on exact information that the Claimant had received regarding the status of the Shemiran Properties or was the result of a mistake. In other words, did the Claimant amend his Claim on 30 August 1982 merely because, by that time, he had become aware of the jurisdictional requirements affecting his Claim or, rather, because he discovered a genuine factual error in his Statement of Claim? The Claimant maintains that he had made a mistake and that the alleged expropriation really took place between 5 November 1980 and 19 January 1981. The persuasiveness of the Claimant's explanation for his alleged error plays an important role in the Tribunal's assessment of its jurisdiction in this Case.

74. The Claimant's explanation for his alleged mistake was contained in an affidavit signed 11 December 1985 and filed 21 April 1988. This affidavit reads as follows.

> To Whom It May Concern:
>
> I, Reza Said Malek, swear to the truth of the following:
>
> Sometime during the latter part of April 1981, I received a telephone call from a friend then still living in Tehran. The person does not wish to be identified because property this person owns in Iran might be threatened.
>
> This person spoke in English and used very indirect language during that conversation, exercising great care in case the conversation was being overheard.

> The message I derived was that my properties in my late father's former compound in Shemiran, Tehran had recently been confiscated by the Iranian Revolutionary authorities. This person told me of having seen personally that my late father's house had been seized and made into part of a tribunal and my plot of land adjacent to that house in the same compound, turned into a parking lot for the officials of that Iranian Government Tribunal.
>
> The date when this seizure of my parents' home and my plot of land occurred was mentioned in this telephone conversation as being "three weeks before New Year." The speaker was talking in English cryptically for self protection. As the person was talking to me from Iran, I mistakenly interpreted what was said as meaning three weeks before Iranian "new year."
>
> My mistake led me to state in the claim I filed with the U.S. - Iran Claims Tribunal December 21, 1981 that my properties in Shemiran were confiscated February 28, 1981. This would have been three weeks before Iranian New Year which is March 21.
>
> As soon as I began to gather the affidavits of eye witnesses to this confiscation, I realized that the confiscation had, in fact, occurred three weeks before Western New Year, or during the first week of Decemer [sic] 1980. My caller had the Western New Year date in mind while talking to me.

75. It follows from the Claimant's explanation that his alleged mistake was due to confusion regarding the term "New Year." Although such confusion might well be possible, it is odd that the Claimant's friend, an Iranian living in Iran, would spontaneously use the term "New Year" in its Western sense, even if the conversation was held in English.

76. The Claimant's position is that he drafted his Statement of Claim on the basis of the information which he had received pursuant to the aforementioned conversation.[19] While the information received from the friend in Iran was rather vague on the date of the alleged taking ("three weeks before new year"), the Statement of Claim is very precise on this point: "The actual

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[19]The Statement of Claim does not refer to the telephone conversation.

expropriation of my properties took place on 28 February, 1981 (9, Esfand, 1359)." At the Hearing the Claimant was asked to explain why he mentioned exactly 28 February 1981 if the telephone message was as obscure as he claims it was. He answered that at that time he was in disarray about the events and that he had read in the newspapers that he could file a claim against Iran but that this had to happen quickly. He further explained that he needed to put the date of his loss on a form for the filing of his Claim and that he therefore counted backward three weeks from the 1981 Iranian New Year, 21 March, and thus ended up with 28 February 1981. He also stated that, had he been more familiar with legal language, he would have written "on or about 28 February 1981."

77. In the last sentence of his affidavit the Claimant writes that "[a]s soon as [he] began to gather the affidavits of eye witnesses to this confiscation, [he] realized that the confiscation had, in fact, occurred three weeks before Western New Year." The Tribunal notes that chronologically the first two affidavits submitted by the Claimant are those of Mr. Kay-Khosro Zafar and Mr. Massoudi dated respectively 24 November 1982 and 1 December 1982[20], whereas already in a letter dated 17 August 1982 (filed 30 August 1982) the Claimant wrote to the Tribunal that he "[would] produce conclusive evidence that the expropriation in question effectively took place between the dates of November 5, 1980 and January 19, 1981." A possible explanation for this is that the Claimant may have had contacts with both affiants in early August 1982 but that the latter waited until the end of the year to put their version of the events on paper.

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[20]The remaining affidavits submitted by the Claimant are dated as follows: Mr. Ashcanase: 15 July 1983; Mr. Boini: 28 July 1983; Mrs. Malek: 23 October 1984 and 7 November 1990 and Mr. Vossough: 13 September 1983.

78. For the first time at the Hearing the Tribunal learned from the Claimant that, between the beginning of October 1980 (the date of the search of Issa Malek's house by the Revolutionary Guards) and 6 January 1982 (the date of the filing of the Statement of Claim) he in fact had telephone conversations with persons residing in Iran, other than the one referred to above. More specifically, the Claimant recounted that his aunt was killed on 17 November 1980 when she was hit by a truck in front of the entry to the Malek compound and that he called his mother on that occasion to ask her to convey his condolences to his cousin. The Claimant also said that his cousin, sometime after his mother's death in November 1980,[21] called him and told him cryptically that there were "guests in [his] brother's home and that they were gradually inviting themselves here." It thus appears from the Claimant's own statements at the Hearing that, prior to the advent of the Western New Year and months before the April 1981 phone call from his friend in Iran, he was informed that the Shemiran Properties were of interest to certain intruders. If that is so, it is difficult to understand how the Claimant could have interpreted his friend's reference to New Year as a reference to Iranian New Year. At a minimum one would have expected him to ask his friend to clarify what he meant by that term.

79. The Claimant's explanation for his mistake assumes, firstly, that he did not make a single telephone call to his mother in the period from early December 1980 to late February 1981. Otherwise, he would have realized that she no longer was

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[21]At the Hearing the Claimant was asked precisely when this telephone conversation with his cousin took place. He answered that he could not put an exact date on that conversation but that he remembered that it occurred sometime after his aunt's death in November 1980. Since it is the Claimant's position that his brother's house was seized in the beginning of October 1980 and the Parental Home in the beginning of December of the same year, and in view of the message of his cousin, this telephone conversation must have occurred between 17 November and early December 1980.

residing in the Parental Home during those months, because she simply would not have picked up the phone. It assumes, secondly, that the Claimant did not have the occasion to learn more about the taking of the Shemiran Properties either from his mother or from anybody else during the period from December 1980 to December 1981 (the date of the signing of his Statement of Claim).

80. Given the relatively short period between early December 1980 and late February 1981, the Tribunal believes that it is plausible that the Claimant did not call his mother during those months. The Tribunal finds it more difficult to accept that he would not have talked to her (or to anybody else) about her alleged eviction from the Parental Home during the much longer period from December 1980 to December 1981, especially given that he was prompted to phone her at the occasion of his aunt's death (the period during which the invasion of the Malek compound is alleged to have occurred). This is particularly problematic for the period from the date of the telephone conversation with the friend in Tehran in late April 1981. One would expect a person, who has been informed cryptically that the house in which his elderly mother was living has been confiscated by revolutionaries, to do everything possible to find out exactly what has happened. The Claimant, however, has made no mention of any such attempts.

81. Once the Claimant had become aware that the date mentioned in his Statement of Claim was a mistake, he must have realized that he carried the particular burden of proffering a convincing explanation for his error. The most obvious way to do precisely that was to present the caller as a witness to confirm his version of the events or, alternatively, to have him submit an affidavit to that effect. The Claimant did not do so. His explanation was that "[the caller did] not wish to be identified because property this person owns in Iran might be threatened." The Tribunal finds this explanation rather hard to

square with the fact that the Claimant ultimately did identify the caller as Mr. Diba at the Hearing.

82. Even if one were to give the benefit of the doubt to the Claimant by believing that Mr. Diba genuinely was not in a position to testify or submit an affidavit in support of the Claim, this is not necessarily the end of the problem. It would have been a normal reaction for the Claimant to get back in touch with Mr. Diba as soon as he was informed by his affiants that the taking occurred in December 1980 in order to obtain the former's confirmation that he indeed had the Western New Year in mind during the April 1981 conversation. In that case, one would have expected the Claimant himself to submit an affidavit in which he declared that he had done so and that the latter affirmed that he indeed had referred to Western New Year during the April 1981 conversation. However, nothing in the file suggests that the Claimant ever attempted to inquire from Mr. Diba what he really had intended to say during the April 1981 conversation.

(c) The letter allegedly issued by Notary Public Office No. 328

83. In order to prove that the alleged taking of the Wooded Land occurred between 5 November 1980 and 19 January 1981, the Claimant relies on a letter allegedly issued by Notary Public Office No. 328.

84. This letter dated 16 April 1983 reads as follows.

> Dear Mr. Malek:
>
> Pursuant to your inquiry with regard to the Plot No. 2920/1, located at Tadjrish, Eleventh District of Shemiran, After [sic] the necessary inquiry from the Central Bureau of Registration of Documents & Deeds, and [considering] the situation and price of the said plot of land, you are hereby advised that the said property No. 2920/1, located at Shemiran, with an area of 3930 1/2 square meters, has been put at the disposal of the entities of the Islamic Republic of Iran, as from Azar

> 1359 (solar calendar) (November 22-December 22, 1980 A.D.)
>
> The price of land in this area of Pole Roomi is between tomans seven thousand and ten thousand per square meter, depending on the situation and desirability of the property.
>
> Presently, no transaction on this property is possible.

85. Rarely could a Tribunal come across a piece of evidence which so clearly supports every aspect of a claimant's case. This letter not only places the taking of the Wooded Land in the relevant jurisdictional period but it also values the same between U.S.$820.00 and U.S.$1170.00 per square meter whereas the Claimant claims U.S.$700.00 per square meter.

86. It is interesting to note that this letter is a completely isolated piece of evidence in relation to the rest of the file. Nothing in the record suggests that the Claimant or his family ever had any dealings with Notary Public Office No. 328.[22] There is no evidence in the file of any correspondence between the Claimant and the Notary contemporaneous to the letter of 16 April 1983. More specifically, no trace can be found of any written inquiry by Mr. Malek (or somebody acting on his behalf) directed to Mr. Vaez-Zadeh regarding the Wooded Land. Given these circumstances and in light of the Respondent's allegation that this letter is forged, it was important that the Claimant clarify the origin of this letter at the Hearing.

87. At the Hearing the Claimant stated that, at one time, he discussed the loss of the Shemiran Properties with an Iranian patient who offered to attempt to obtain more information about their current status and value. After the Claimant had asked him to look into the issue, this person allegedly contacted someone in Iran. As a result of these contacts, the letter from Notary

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[22]The title deed relied upon by the Claimant to prove his ownership of the Wooded Land dated 11 October 1967 refers not to Notary Public Office No. 328 but to Notary Public Office No. 3.

Public Office No. 328 surfaced.[23] According to the Claimant, the letter was carried out of Iran to the United States by hand and then sent to him by mail. The Claimant also stated that he had just asked his patient to document the matter and that he had never attempted to learn the precise history or origin of the letter. Finally, the Claimant said that he did not pay any money to his patient in whose honesty he firmly believed.

88. The Tribunal notes that the explanation regarding the letter offered by the Claimant at the Hearing is in sharp contrast with the statements contained in his brief according to which "this notarized letter was obtained in a totally straightforward way, by inquiry addressed to the notarial office." Given the obscurity surrounding the true origin of this letter and the fact that not even the Claimant knows whether a genuine request for information was ever addressed to Notary Public Office No. 328, the Tribunal cannot accord any evidentiary value to this document. In view of this determination, the Tribunal need not address the arguments advanced by the Respondent in support of its position that the letter is forged.

(d) The affidavits submitted by the Claimant and the hearing testimony of Mr. Vossough

89. Apart from the letter allegedly issued by Notary Public Office No. 328, the Claimant also relies on affidavits of six persons and the testimony of Mr. Vossough.

90. Mr. Ashcanase's affidavit recounts a statement of an unidentified person who claims to have personally seen the taking of the Shemiran Properties by the Islamic authorities in December 1980. Similarly, Messrs. Kay-Khosro Zafar and Massoudi assert that they were informed by their "sources in Tehran" that the taking occurred during the relevant jurisdictional period.

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[23]The Claimant said that he had not advised his patient to contact that particular office.

91. A common feature of these affidavits is that they do not relate the personal experience of the affiants regarding the events which allegedly took place between 5 November 1980 and 19 January 1981 but recount what others have witnessed. Since the affiants only have second-hand knowledge of the alleged events, the Tribunal can give little, if any, evidentiary weight to these affidavits.[24]

92. In his affidavit signed 28 July 1983 Mr. Boini[25] writes that he "witnessed in the first week of December 1980 the seizure of [the Parental Home] ... by the representatives of the Revolutionary Government ... [and] that this house later in the month of December was turned into offices for [the tribunal established in Issa Malek's house]." He further declares that "in [sic] first days of December of 1980, these authorities seized and began utilizing [the Wooded Land] as a parking area for their official use." In assessing the credibility of this affidavit one may wonder whether an acquaintance of the Claimant would remember 2 years and 8 months after the facts that certain events not involving his own or his family's property occurred precisely during "the first week" or "in the first days" of December 1980. Mr. Boini also declared in his affidavit that "[i]n October 1980 the newspapers in Tehran announced the expropriation and confiscation of Mr. Issa Malek's (Dr. Reza Malek's older brother) property." The Tribunal notes that this statement does not accurately reflect what was reported in the

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[24]See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgments, I.C.J. Reports 1966, p. 14, at para. 67; Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania), Merits, Judgments, I.C.J. Reports 1949, p. 4, at pp. 16-17; McCurdy Case, Opinions of Commissioners Under the Convention concluded September 8, 1923, as extended by the Convention signed August 16, 1927 between the United States and Mexico, September 26, 1928, to May 17, 1929, Washington, 1929, p. 137, at p. 141.

[25]Mr. Boini left Iran in November 1981 and, according to the information in the file, now lives in the State of California. He did not testify at the Hearing.

Kayhan Daily, assuming that he had that particular newspaper in mind when making that statement. The Kayhan Daily of 6 October 1980 mentions a search conducted in Issa Malek's house, not a confiscation or expropriation of that property.

93. The affidavits of the Claimant's mother are more persuasive because she links the alleged events to the Islamic holy day of Ashura. For example, in her first affidavit submitted on 28 October 1988 she writes.

> [T]wo or three weeks after Ashura - an Islamic holy day for mourning - (early December 1980 A.D.), they also invaded [the Parental Home] ... At the same time [the Parental Home] was seized about two or three weeks after Ashura (first days of December 1980 A.D.), I also personally saw these same authorities seize Reza's section of the compound which was adjacent to my home, and convert it into a parking lot for their official vehicles.

The Respondent urges the Tribunal to disregard these affidavits because "no forum would admit the statements of a mother in favor of her son against a respondent." The Tribunal believes, however, that the fact that the affiant is the Claimant's mother does not render these affidavits valueless. Rather, it is a factor which must be taken into account when weighing the overall persuasiveness of the evidence presented by the Claimant.

94. Finally, the Claimant also relies on the affidavit and testimony of Mr. Vossough.[26] In order to describe his relationship with the Claimant, Mr. Vossough initially stated in his affidavit signed 13 September 1988 that "[his] parents were close to [the Claimant's] parents" and that his mother for a while lived with the Claimant's mother in the Parental Home. However, on 3 December 1990, when the Claimant informed the Tribunal that Mr. Vossough would testify at the Hearing scheduled for 12 February 1991, the Tribunal was notified that he was in

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[26]Mr. Vossough left Iran in July 1987 and is presently residing in London. Of the six affiants relied upon by the Claimant he alone testified at the Hearing.

fact the Claimant's cousin and that Mrs. Malek was the sister of Mr. Vossough's mother.

95. In his affidavit Mr. Vossough states that "Mrs. Malek was evicted from [the Parental Home] by the authorities of the Government of the Islamic Republic of Iran in early December 1980. He also maintains that "[he] personally saw that the said authorities seized Said Malek's house and Reza Malek's adjacent garden plot at that time in early December 1980."

96. At the Hearing Mr. Vossough recounted a much more detailed version of the alleged events. He declared that after his mother had moved in with her sister, Mrs. Malek, he regularly visited the Malek compound. He claims that during these visits he became aware that Issa Malek's house had been seized and turned into a tribunal. He further said that some weeks after Issa Malek's house was seized, his mother was killed in a road accident on 17 November 1980 and that she was buried on 19 November 1980. According to Mr. Vossough, the representatives of the Respondent who occupied Issa Malek's house during that period approached the other plots in the compound including the Parental Home and the Wooded Land. Mr. Vossough stated that, although he was not present in the compound at the date of the taking of the Parental Home, he knew it had been seized after 17 November 1980 but before 19 January 1981 because the third and seventh day of mourning for his mother's death were held in the Parental Home whereas the fortieth day of mourning was held in the house of the Claimant's sister Saideh Malek.[27] He also said that he could see from Saideh Malek's house that the Iranian authorities used the Wooded Land as a parking and garage facility.

97. The linkage between the eviction of Mrs. Malek from the Parental Home and the location of the mourning ceremonies at the

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[27]According to Mr. Vossough, a German diplomat who was living in this house moved out in order to accommodate the Claimant's family.

occasion of the death of the Claimant's aunt is one of the most appealing aspects of the Claimant's presentation. It is therefore surprising that neither Mr. Vossough nor Mrs. Malek made any mention thereof in their affidavits.

2. Review of the Respondent's arguments and evidence

98. The Tribunal notes that there are two distinct phases in the Respondent's defence. The first phase covers the period from the beginning of this Case up to and including the date of the filing of its Memorial in rebuttal on 1 August 1990. A major part of the Respondent's efforts during this period was devoted to arguing that the letter allegedly issued by Notary Public Office No. 328 was a forgery and undermining the credibility of the affidavits submitted by the Claimant.

99. During the same period, the Respondent also asserted that the Claimant's own file contradicts his position that the alleged taking of the Shemiran Properties occurred during the relevant jurisdictional period.

100. In support of that contention the Respondent relied, firstly, on the fact that the Statement of Claim mentioned 28 February 1981 as the date of the taking. The Respondent argued that this should be regarded as an admission on the part of the Claimant that the Claim for the Shemiran Properties arose too late to meet the jurisdictional requirement particular to this Case. The Tribunal, however, is unable to agree with that proposition. As was already noted in the Interlocutory Award, the Claimant wrote on 30 August 1982 that he would prove conclusively that the alleged expropriation occurred during the crucial jurisdictional period from 5 November 1980 to 19 January 1981. The Tribunal, having found in its Interlocutory Award that this letter properly amended the Statement of Claim, cannot now reject the Claim for lack of jurisdiction based upon the unamended submission. Nonetheless, the fact that the Claimant

initially mentioned this date and his explanation for this fact are important elements to be considered by the Tribunal in deciding whether the Claimant has met his burden of proving that the Claim arose during the relevant period.

101. Secondly, the Respondent observed that the Claimant himself had stated that, due to the geographic configuration of the Malek compound, the Revolutionary Guards had to pass through the Wooded Land to reach Issa Malek's house in early October 1980. It follows, according to the Respondent, that, if the interference complained of by the Claimant amounted to a seizure, the Tribunal would have to conclude that the Wooded Land was expropriated in early October 1980. However, the fact that the Revolutionary Guards may have trespassed upon the Wooded Land in order to conduct a search in Issa Malek's house does not by itself warrant the conclusion that the Wooded Land was expropriated. More persuasive is the Respondent's argument according to which it would be logical to assume that the visitors and staff of the Tribunal would have already used the Wooded Land as a parking lot prior to 5 November 1980, if Issa Malek's house was converted into such tribunal soon after 6 October 1980 but prior to 5 November 1980, as alleged by the Claimant.

102. The second phase in the Respondent's defence starts at a very late stage in the proceedings with the filing of its Hearing Memorial on 24 January 1991. In that submission, the Respondent recognized that the Revolutionary Guards searched Issa Malek's house in October 1980 and stated that these Guards put the house under surveillance from that period onwards without immediately taking possession thereof. In the same filing, the Respondent admitted for the first time in this Case that Issa Malek's house was indeed expropriated and converted into the Narcotics Tribunal but maintains that this occurred as late as 28 February 1981, precisely the date of the taking mentioned in the Statement of Claim. Considering that it is the Claimant's position that the Parental Home was taken two months after the

expropriation of Issa Malek's house, this contention is intended to contradict the Claimant's thesis that the Parental Home was taken in December 1980. Given the obvious relevance of these statements with regard to the timing of the events which occurred in the Malek compound, it is surprising that the Respondent waited until the very end of the proceedings to make them.

103. In support of its latest position the Respondent submitted, together with its Hearing Memorial, the affidavits of Messrs. Abbas Alour and Hassan Babaie Saleh. The latter also appeared as a witness at the Hearing. Mr. Alour, formerly a gardener in the Malek compound and now a cook at the Narcotics Tribunal, writes that "[i]n Esfand 1359 - to be precise, on 8 or 9 Esfand [27 or 28 February 1981] - the officials came and stationed themselves in the residence of Mr. [Issa] Malek." The Tribunal finds Mr. Alour's precise recollection of the exact date of the events, nine years after their alleged occurrence, even more problematic than that of Mr. Boini. The Tribunal also notes that Mr. Alour, who has been "residing [in the premises] ever since 1353 [1974-1975]" and thus seems to be ideally placed to comment on the alleged eviction of Mrs. Malek out of the Parental Home and its purported conversion into offices supporting the Narcotics Tribunal, does not address these issues in his affidavit.

104. Mr. Saleh is, inter alia, Deputy Chief for Administration and Finance at the Narcotics Tribunal. He states in his affidavit that "[t]he real property belonging to Mr. [Issa] Malek was taken over by the [Narcotics Tribunal] [which was thereupon] stationed there, in early Esfand 1359 [late February 1981]." Mr. Saleh offers a more persuasive basis for his recollection of this date than Mr. Alour since, at the Hearing, he linked the date of the establishment of the Narcotics Tribunal in Issa Malek's house to the time of his initial employment by that Tribunal in early February 1981. Furthermore, he indicated that he had verified the date of the transfer of the Narcotics Tribunal by talking to his colleagues and looking at the financial documents concerning

the expenses for rearranging the building (see also paragraph 106, infra). It appeared at the Hearing that Mr. Saleh could not have observed what had happened in the Malek compound during the relevant jurisdictional period because he was transferred to the Narcotics Tribunal only in late February 1981.

105. Mr. Saleh also hardly mentions the Parental Home in his affidavit and Hearing testimony. This could, in part, be attributed to the fact that he gained access to the Malek compound only in late February 1981 so that he had no opportunity to observe the events which took place in the area prior to that date. Nevertheless, it seems reasonable to assume that he would have been able to see, from late February 1981 onwards, the Claimant's mother's coming and going in and out of the Parental Home, had she still resided there during that period. It seems equally reasonable to assume that, if he had observed her coming and going, he would have mentioned that fact in his written or oral testimony since it would support the view that the Parental Home was not taken. However, the only comment which he made regarding the Parental Home was that "the building [assuming he thereby referred to the house in question] was too old to be used."

106. In the course of cross-examination, Mr. Hassan Babaie Saleh was asked how he was able to remember the exact date of the transfer of the Narcotics Tribunal. He answered that his statements were based on a number of discussions with his colleagues and a review of certain documents. He later specified that those documents were financial records of the expenses incurred for the conversion of Issa Malek's house. The Tribunal finds it difficult to comprehend why these records, to which the Respondent must have had direct access, were not submitted as evidence. In this connection, it is to be noted that the Tribunal has had recourse, on a number of occasions, to the principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal. See e.g. William J. Levitt and Islamic Republic of Iran et al., Award

No. 520-210-3, para. 65 (29 Aug 1991), reprinted in __ Iran-U.S. C.T.R. __, __ ; Arthur J. Fritz & Co. and Sherkate Tavonie Sherkathaye Sakhtemanie, et al., Award No. 426-276-3, para. 42 (30 June 1989), reprinted in 22 Iran-U.S. C.T.R. 170, 180.

107. The Respondent has repeatedly asserted during the proceedings that the Wooded Land is still registered in the name of the Claimant with the relevant administrative authorities. According to the Respondent, this proves that this property in reality was not expropriated. The fact that the Claimant may still have title to the Wooded Land, however, does not necessarily imply that he has not been deprived of that property. A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al., Award No. 141-7-2, p. 10-11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225; See also Starrett Housing Corporation et al. and Government of the Islamic Republic of Iran et al., Award No. ITL 32-24-1, p. 51 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154.

108. The Respondent has also stated on several occasions that the Claimant is free to take possession of the Wooded Land.[28] No such statement was made, however, with respect to the Claimant's interest in the Parental Home. The question arises to what extent the lack of such offer is to be interpreted as an indication that the Parental Home was expropriated. As of the date of its Hearing Memorial, the Respondent no longer disputed

[28]The Respondent's offer, made presumably in an attempt to bolster its contention that the Wooded Land was never taken, does not as such justify the conclusion that the Wooded Land was never expropriated.

that the Claimant was the heir of an undefined part[29] of the Malek estate, but argued that it was not established that, as a result of the inheritance, the Claimant obtained title specifically to the Parental Home. Under these circumstances and having regard to the Respondent's stance on the Wooded Land, one indeed would have expected that Party to offer to return the Parental Home, if not to the Claimant individually, then at least to the heirs jointly.

3. Conclusions

109. The Tribunal notes that, except for the letter allegedly issued by Notary Public Office No. 328, the entire evidence relating to the alleged physical interference by the Respondent with the Shemiran Properties takes the form of either affidavits or oral testimony. The Claimant relies on seven affidavits[30], including one by Mr. Vossough who appeared as a witness. The Respondent invokes the affidavits of Messrs. Abbas Alour and Hassan Babaie Saleh. The latter person also testified at the Hearing.

110. It is not an easy task to reconstruct whether the activities of the Revolutionary Authorities in the Malek compound, which began in early October 1980 with the search in Issa Malek's house, ultimately developed into an unreasonable interference with the Wooded Land and the Parental Home precisely during the relevant jurisdictional period from 5 November 1980 to 19 January 1981. The nature of the act alleged to give rise to the liability of the Respondent - a gradually expanding interference with a family compound claimed to have ripened into

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[29]The certificate of probate submitted by the Claimant states that "after the reductions of fees and dues from the estate, one eight of moveable property and the value of buildings and trees will go to the wife and the rest to the children, on the basis of son receiving twice as much as daughter."

[30]Two of those affidavits were by his mother, Mrs. Roghieh Malek.

an irreversible taking of parts thereof - the fact that the relevant events all took place more than 10 years ago, the form of the evidence presented by both Parties on the basis of which the Tribunal is to decide the issue and the sparsity of details in that evidence all contribute to the problem.

111. That being the case, the Tribunal believes the Claim for the Shemiran Properties is best decided by reference to Article 24, paragraph 1 of the Tribunal Rules according to which "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." It goes without saying that it is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the Claimant may be considered to have made a sufficient showing to shift the burden of proof to the Respondent.

112. In considering whether the Parties have met their respective burdens of proof, the Tribunal is guided by the reflections of the late Professor Virally, former Member of the Tribunal and Chairman of Chamber Three as reflected in W. Jack Buckamier and Islamic Republic of Iran, et al., Award No. 528-941-3 para. 67 (6 Mar. 1992), reprinted in __ Iran-U.S. C.T.R. ____, ____.

(a) The Wooded Land

113. Having decided to set aside the letter allegedly issued by Notary Public Office No. 328, the Tribunal must now determine whether the Claimant's remaining evidence, namely the several affidavits and the hearing testimony of Mr. Vossough, is sufficient to shift the burden of proof to the Respondent on the question of whether the alleged de facto expropriation of the Wooded Land occurred during the relevant jurisdictional period.

114. According to Tribunal precedent, an interference with the use of a property may amount to a taking if such interference is considered unreasonable. Harza Engineering Company and Islamic

Republic of Iran, Award No. 19-98-2, p. 9 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504; see also Ataollah Golpira and Government of the Islamic Republic of Iran, Award No. 32-211-2, p. 10 (29 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 171, 176-178 Such is deemed to be the case when the events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al., Award No. 141-7-2, p.11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225; see also International Systems and Controls Corporation and Industrial Development and Renovation Organization of Iran et al., Award No. 256-439-2, para. 97 (26 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 239, para. 97. Furthermore, the Tribunal has held that, where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events. International Technical Products Corporation et al. and Government of the Islamic Republic of Iran et al., Award No. 196-302-3, p.49 (28 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 206, 240-241; see also Foremost Tehran Inc. et al., and Government of the Islamic Republic of Iran et al., Award No. 220-37/221-1, p.29-30 (11 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 228, 249.

115. In her first affidavit, Mrs. Malek wrote as follows.

> At the same time my home was seized about two or three weeks after Ashura (first days of December 1980 A.D.), I also personally saw these same authorities seize Reza's section of the compound which was adjacent to my home, and convert it into a parking lot for their official vehicles. Issa's house had been turned into a tribunal and detention center and my home was then apparently made into offices to support these governmental activities. When I left Iran, these same authorities were still in total control of these properties and were continuing to use them for their own

> purposes. During this time, they had also built two new buildings and put in asphalt roadways on Reza's land.

116. In her second affidavit she stated that " [she] saw revolutionary authorities, in a day or two after [she] moved, seize [her] son, Reza's, section of the compound, which was adjacent to my home" and that "[t]hey promptly made it into a parking lot for their many vehicles ... [and] soon even put in paving and some new sheds." Mr. Khalil Boini declared in his affidavit that he "observed that, in first [sic] days of December of 1980, [the] authorities seized and began utilizing Dr. Reza Malek's land as a parking area for their official use." Similar assertions appear in the affidavits of Messrs. Ashcanase, Massoudi and Zafar.

117. Mr. Vossough also proclaimed in his affidavit that "[he] personally saw that the [Iranian] authorities seized ... Reza Malek's ... garden plot ... in early December 1980." In the same document he further declared the following.

> From the time they seized the said properties and until I departed from Iran in 1987, I saw the authorities of the Iranian Government had continued to construct and maintain a number of buildings and roads on Reza Malek's plot to accommodate the personnel and cars of the Tribunal they had made of the Issa Malek's house on the same compound.

118. At the Hearing, Mr. Vossough testified that he saw that the Wooded Land was used mainly as a parking and garage facility by the Iranian Authorities and that the property had been flattened and paved.

119. It is worthwhile to focus on the terms used by the Claimant's affiants to describe the actions taken by the Revolutionary Authorities in December 1980 regarding the Wooded Land. The terms most frequently used are that the Authorities had "seized" the Wooded Land, "used" it as a parking area, "converted" or "made it" into a parking lot for their official use. Only two of the Claimant's witnesses explicitly describe - albeit briefly - the alleged conversion of the Wooded Land by

the Revolutionary Authorities. Mr. Vossough stated at the Hearing that he saw that the Wooded Land had been flattened and Mrs. Malek wrote in her affidavits that, after the Revolutionary Authorities made her son's plot into a parking lot, they "soon even put in paving and some new sheds" and that "during this time[31], they had built two new buildings and put in asphalt roadways on Reza's land. The Tribunal finds these statements to be rather vague, especially on whether this alleged work was performed during the relevant period. A more elaborate declaration on the subject was made by Mr. Vossough in his affidavit.[32] In that declaration, however, Mr. Vossough also did not clearly place the alleged construction of the buildings and the roads between 5 November 1980 and 19 January 1981 but in a broad period stretching from the date of the alleged taking of the Wooded Land (December 1980) until his departure from Iran in 1987.

120. Although the Claimant's above evidence suggests that the Iranian Authorities were parking their cars on the Wooded Land during the relevant jurisdictional period, the Tribunal does not believe that such activity implies sufficient interference to be deemed a taking. It probably amounts to trespassing or, at most, the initial steps in a series of events which ultimately may have ripened into a more or less irreversible deprivation of the Wooded Land. The physical alteration of that property by the construction of roads and buildings, on the other hand, would entail a degree of interference that is more than sufficient to find a taking. The Claimant's evidence, however, is unclear on the question of whether this alteration occurred during the relevant jurisdictional period. The Tribunal therefore concludes that, on its face, the Claimant's evidence is insufficient to hold that the Wooded Land was unreasonably interfered with during

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[31] It is not clear exactly which period Mrs. Malek is referring to by those terms.

[32] The text of that declaration is to be found in paragraph 117, supra.

the relevant jurisdictional period. Consequently, the Claim for its value must be dismissed for lack of jurisdiction.

(b) The Parental Home

121. The most persuasive aspects of the Claimant's presentation undoubtedly are the affidavits of his mother and, particularly, Mr. Vossough's hearing testimony linking the eviction of Mrs. Malek from the Parental Home to the location of the mourning ceremonies held at the occasion of his mother's death. Considered in isolation of the Claimant's file, this evidence arguably might be sufficient to shift the burden of proof to the Respondent, despite the observations made in paragraphs 94 and 97, supra. However, for the purpose of deciding whether the burden has shifted, not only that evidence should be taken into account but also the fact that the Claimant did not maintain throughout the proceedings a consistent story regarding the date of the taking. The Claimant's position that the Parental Home was invaded and taken over by the Revolutionary Authorities in December 1980 is in contradiction with his Statement of Claim in which he asserts that "[a]rmed guards and authorities of the Government of the Islamic Republic of Iran forcibly occupied and expropriated the parental home [on 28 February 1981]."

122. The Claimant contends that the initial reference to that date was a mistake and has attempted to explain that error. The Tribunal, however, is not convinced by the Claimant's explanation for several reasons, the most important of which can be summarized as follows.

a. The Claimant's explanation assumes that he did not have the occasion to learn more about the taking of the Parental Home from either his mother or from anybody else during the period stretching from December 1980 to December 1981. Since he had two telephone conversations with his family in late November or early December 1980 (when the taking of the

Parental Home is alleged to have occurred), the Tribunal is not satisfied that this was the case.

b. The fact that the Claimant had been informed that certain intruders displayed an interest in the Shemiran Properties in late November or early December 1980 is hard to reconcile with his contention that he misinterpreted Mr. Diba's reference to New Year.

c. Assuming Mr. Diba was not in a position to testify (either orally or by way of affidavit), the Tribunal would have expected the Claimant at least to have gotten back in touch with Mr. Diba once the error was discovered to confirm that he indeed had the Western New Year in mind during the April 1981 conversation. Nothing in the record suggests, however, that the Claimant has ever done so.

123. On balance, the Tribunal believes that the deficiencies in the Claimant's presentation concerning the date on which the Claim arose - an issue, which, in light of the jurisdictional parameters laid down in the Partial Award, is central to this Case - are too important to accept that the burden of proof with regard to the issue of whether the Parental Home was unreasonably interfered with between 5 November 1980 and 19 January 1981 has shifted to the Respondent. The Tribunal, therefore, believes that the Claim for the interest in the Parental Home also should be denied for lack of jurisdiction.

VIII. Costs

124. Each Party shall bear its own costs of arbitration.

IX. AWARD

125. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) All the Claims of REZA SAID MALEK are dismissed for lack of jurisdiction.

(b) Each Party shall bear its own costs of arbitration.

Dated, The Hague
11 August 1992

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the Name of God

Richard C. Allison
Concurring and
Dissenting Opinion

Mohsen Aghahosseini
Concurring in
dismissal of the
claims. See Separate
Opinion