IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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[redacted]

ORIGINAL DOCUMENTS IN SAFE

Case No. 193 Date of filing: 11 Aug '92

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Aghahosseini

- Date 11 Aug '92
6 pages in English — pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

Case No. 193
Chamber Three
Award No. 534-193-3

REZA SAID MALEK
Claimant,

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN
Respondent.

Separate Opinion of Mohsen Aghahosseini

I concur in the present Award which dismisses the Claims for lack of jurisdiction. I write separately, however, to refer to two points which, although of great importance not least to the future work of the Tribunal, are nowhere addressed in the Award.

But first a few words on the background:

I

In his personally signed and submitted Statement of Claim, filed on 6 January 1982, the Claimant, Dr. Reza Said Malek, asserted more than once that his properties in Iran had been expropriated by the Respondent State "on 28 February 1981 (9,

Esfand, 1359)". The Claims, as presented, would have been outside the Tribunal's jurisdiction, which does not extend to claims not outstanding as of 19 January 1981, the date on which the Algerian Declarations were adhered to.

Attempts to overcome the problem were initiated some seven months later, by an attorney who then represented the Claimant for the first time. Writing on 17 August 1982 to ostensibly object to an extension request by the Respondent, the attorney further sought to incidentally inform the Tribunal that his client wished "to elaborate" on the previously admitted date of the alleged expropriation. The Claimant would, said his attorney, "produce conclusive evidence" that the asserted interference with his properties took place within the Tribunal's jurisdictional period, in this Case between 5 November 1980, when the Claimant became a United States citizen, and 19 January 1981, when the Algerian Declarations came into force.

That promised evidence later came, essentially in the form of a letter,[1] bearing the signature and the seal of a Notary Public in Tehran. In it, the Notary Public officially certifies that Mr. Malek's main property -- a real estate on which the Notary Public places a value of over 4 million dollars -- "has been put at the disposal of [the Respondent State] as from Azar 1359 (22 November to 22 December 1980)". This document, asserted the Claimant,

> "is confirmation <u>by an appropriate official of the present Iranian Government</u> that that Government took over Claimant's plot of land in his family compound... during the period asserted by Claimant. This is official evidence by an Iranian Government authority of what appears to be <u>de jure</u> taking or confiscation ... by the Iranian Government for its own use... This document states that the 1983 market value of that plot of land was U.S. $820 to U.S. $1170 per square meter." Doc. 50, pp. 13-14. Emphases original.

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[1]. The rest consists of a few affidavits by some of the Claimants's close relatives and acquaintances. The affidavits have been dealt with and rejected in the Award.

The Respondent State submitted that the letter was a forgery, designed to counter the Claimant's earlier admission and to force the Claims into the Tribunal's narrow jurisdictional period. In support of this submission, the Respondent produced a host of evidence, including the written and oral testimonies of the Notary Public himself.

The Tribunal, having considered the Respondent's evidence on the issue, concludes in the Award that it "cannot accord any evidentiary value" to the submitted letter.

II

And now to the two points:

1. The first concerns the nature of the purportedly notarial document. The letter is, beyond doubt, a fabrication. This is the inescapable result of the circumstances surrounding the production of the letter, and of a wealth of evidence in the record, to some of which the present Award refers. Indeed, this must be the only conclusion at which the Tribunal has arrived. Otherwise, how could a notarial letter which, if genuine, would, in the words of the Tribunal itself, "so clearly support[] every aspect of [the C]laimant's case"[2] be so utterly rejected? It must be noted, moreover, that as far as this document was concerned, the Respondent's only defence was that of forgery, and its evidence exclusively related to that defence. The document could not, therefore, have been rejected on any other grounds.

The argument, sometimes heard, that as a rule a higher standard of proof is required for a finding of forgery, is misplaced. A higher standard may be needed to prove forgery as a criminal offence before a criminal court, where the finding

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[2]. Present Award, paragraph 85.

entails different, and invariably severer, consequences. The rule has no application in a civil proceeding, where the standard of proof remains the "preponderance of evidence" throughout. At any rate, the Respondent in the present Case has, in my view, fully satisfied its burden even if a higher standard of proof is held to be applicable. Indeed, as the record shows, the Respondent's submissions and evidence in this respect, particularly those which convincingly demonstrate the forged nature of the number, the seal and the signature on the letter, have not even been challenged. They therefore remain unrebutted.

Whether the Claimant himself played any role in the fabrication of the document is uncertain, though it was he, it will be recalled, who promised to provide the Tribunal with "conclusive evidence" showing that he had originally misidentified the date of the alleged expropriation, and that the asserted interference with his properties had taken place within the extremely short period of the Tribunal's jurisdiction. This document was his main, indeed the only, "conclusive evidence". Yet the point is, I think, rather immaterial, for whatever the answer, there can be little doubt that the Claimant is at any rate guilty of the equally serious wrong of using a fabricated document knowing that it is a fabrication[3]. He refused to withdraw, and continued to rely on the document not only after he was presented with the defence of forgery and its supporting evidence, but also after he, at the Hearing, personally heard the Notary Public demonstrating how the letter had, from head to tail, been fabricated.

2. The second point relates to the Tribunal's regrettable disinclination to call a fabricated document by its proper

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[3]. See, for instance, Article 105 of the Penal Code of Iran (now Article 28 of the Islamic Penal Code of Iran). The offence carries a penalty of 6 months to 3 years imprisonment.

name[4], and to deal with the Claimant's lamentable conduct.

There is a world of difference between a party who genuinely believes, albeit wrongly, that he has a case to pursue, and another party who, aware that he has no case, attempts nevertheless to make one by some unsavory means, including forgery, or use of forged documents, if it comes to it. Clearly enough, the latter threatens the very foundation of the judicial process to which he resorts. That is precisely why every domestic judicial system has found it necessary to safeguard the integrity of its civil proceedings against abuses of this nature by providing for sever penal sanctions which may be additionally obtained through its criminal courts.

The integrity of the proceedings before the Iran-United States Claims Tribunal cannot, unfortunately, be so protected. The Tribunal has, however, available to itself a means which, although by far less effective than criminal sanctions, may still prove to work as a disincentive to unconscientious parties: it can be unequivocal in its findings on such abuses, and it can pronounce in clear terms its firm disapproval of the like practices.

Yet there is a difficult-to-understand pattern of reluctance, in this and in other Chambers, to employ this only available measure; and this in spite of a recent letter by the President of the Tribunal to the Agent of the Islamic Republic of Iran in which, in response to the Agent's complaint against a similar conduct, it is stated that:

> "no Tribunal could countenance conduct of the type you describe, and would, when such conduct is shown to exist.. use such means as are available in order to end such conduct, to prevent its recurrence,

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[4]. "I cannot say a crow is white, but needs must call a spade a spade". Humphrey Gifford, A Posie of Gilloflowers (1580).

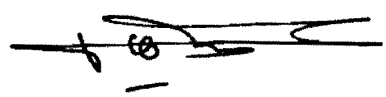
to avoid its effects and to afford such other relief as the Tribunal may deem proper."[5]

The temptations to unscrupulous parties not to refrain from resorting to such devious means or, if they have already done so, not to retract, must be great indeed. They are told in effect that the worse they can expect is to have their evidence "not accorded any evidentiary value". This is not a risk that many unconscienced parties would not be willing to take. The proof of that, if proof is needed, may be found in the already growing number of claims dismissed by the Tribunal on the basis of its findings that "no evidentiary value" may be accorded to the supporting evidence! But for how much longer the Tribunal would be willing, or able, to tolerate this alarming prospect is a different matter.

III

One final comment. Mr. Malek is a dual national who sought redress for the alleged breach of rights he possibly acquired by reliance on his Iranian nationality. Whether or not claims of that description would be entertainable is for the Tribunal's future decisions. The fact that the issue is not dealt with in the Award is due, only, to the finding that his Claims have failed to pass through an earlier stage.

Dated, The Hague,
11 August 1992



Mohsen Aghahosseini

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[5]. Letter dated 19 September 1991 from the President of the Tribunal to the Agent of the Islamic Republic of Iran.