IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

CASE NO. 271
CHAMBER THREE
AWARD NO. 573-271-3

JAHANGIR MOHTADI
and JILA MOHTADI,
Claimants,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF MOHSEN AGHAHOSSEINI

In order to attain its objective of rewarding the Claimant with a substantial sum of money, the majority in the present Case has had to defy both the law of this Tribunal and a number of well-established facts. It has done so, and with no qualms. In this Dissenting Opinion, I propose to deal with some of the more important instances of this, so as to show the gravity of the injustice to which the Respondent is thereby subjected.

1. THE CAVEAT

In its leading decision in Case No. A18, the full panel of this Tribunal held that:

> [I]t has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.[1]

To this, however, the Tribunal added an important Caveat:

> In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.[2]

In a host of cases subsequently decided, the Chambers of the Tribunal further explained the meaning, and determined the scope of the application, of the Caveat. Its prime application, one is told time and time again, is where the claimant acquires rights, or continues to enjoy benefits, not available to him through his dominant nationality. A claimant, for instance, whose dominant nationality is determined to be American may thus not resort to this Tribunal to enforce rights which he could not have obtained as an American.

Here is but one example:

> This jurisdictional determination of the Claimants' dominant and effective nationality remains subject to the caveat added by the Full Tribunal in its decision in Case No. A18 ... that "the other nationality may remain relevant to the merits of the Claim." The Tribunal will therefore in the future proceedings examine all circumstances of this Case also in light

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[1] Case No. A18, Islamic Republic of Iran and United States of America, Decision No. DEC 32-A18-FT, at 25 (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 265.

[2] Id., at 265-6.

> of this caveat, and will, for example, consider whether the Claimants used their Iranian nationality to secure benefits available under Iranian law exclusively to Iranian nationals ....[3]

A more recent reference to this will be found in Saghi Case, where it was stated that:

> The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran.[4]

Of those "benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran", one has already been identified by the Tribunal: the right to acquire or retain immoveable property in Iran. This was the ruling in Karubian[5], in which Chamber Two of the Tribunal, having reviewed all the pertinent laws of Iran, concluded that:

> The foregoing legislation indicates that, except for certain circumstances which do not exist in the present Case, the right to acquire real property in Iran by contract is reserved by relevant Iranian law to Iranian nationals. Accordingly, the Tribunal finds that the Claimant could only have acquired the properties in question as an Iranian national.[6]

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[3] Edgar Protiva, et al. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 73-316-2, para. 18 (12 Oct. 1989), reprinted in 23 Iran-U.S. C.T.R. 259, 263 (emphasis added). See also Faith Lita Khosrowshahi, et al. and Government of the Islamic Republic of Iran, et al. Interlocutory Award No. ITL 76-178-2, para. 16 (22 Jan. 1990), reprinted in 24 Iran-U.S. C.T.R. 40, 45.

[4] James M. Saghi, et al. and Islamic Republic of Iran, Award No. 544-298-2, para. 54 (22 Jan. 1993), reprinted in __ Iran-U.S. C.T.R. __, __.

[5] Rouhollah Karubian and Government of the Islamic Republic of Iran, Award No. 569-419-2 (6 Mar. 1996), reprinted in __ Iran-U.S. C.T.R. __.

[6] Id., para. 159.

Such, then, is the clear law of this forum on the subject. Where, in a case against Iran, a national of both Iran and the United States is able to prove that his dominant nationality at all relevant times was that of the United States, the Tribunal is jurisdictionally competent to hear his complaint. Yet the Tribunal will not proceed further if it is shown that what is complained of is the asserted interference with the claimant's right of ownership of real property in Iran --a right which, by the relevant laws of Iran, is reserved for the nationals of Iran.

Turning now to the Case at hand, what was before the Tribunal was an assertion by such a dual national that two pieces of land in Iran, purchased by him some years before his naturalization as a United States' citizen in 1978, were expropriated by Iran after his naturalization. Having first determined that the Claimant's dominant nationality during the relevant times was that of the United States, it was incumbent upon the Tribunal to immediately turn to that threshold issue of the admissibility of the claim on the merits and, on the basis of its clear precedent, reject the complaint. The Claimant had acquired the benefit --the ownership of land in Iran-- exclusively by virtue of his Iranian nationality. He could not now rely on his United States' nationality to seek redress for the alleged breach of that right.

But the majority refuses to do so. First, it declines to consider the Claimant's use of his nationality --which point belongs to the admissibility of a claim on the merits-- as a preliminary issue. Instead, it takes the very strange course of examining, and pronouncing itself upon, every issue related to the merits proper of the claim before turning to the enquiry mandated by the Caveat.

Now this is an error in law, likely to result in gross injustices. In order to appreciate the preliminary nature of the inquiry under the Caveat, and the reason why it should be undertaken prior to the examination of the merits proper of a

case, one need only recall the fact that when a claim is rejected by an international forum due solely to the claimant's improper use of his nationality, the claimant is not then necessarily prevented from raising his claim before other fora competent to hear his complaint. Indeed, the claimant in such a case may still refer his claim to a national forum, before which his reliance on a given nationality --proper or improper-- may well be of no relevance.[7]

And yet the course of action adopted by the majority is capable of leading, where the claim is judged to be inadmissible because of the operation of the Caveat, to a situation in which a forum competent to hear the merits finds that another forum has already pronounced itself on the subject; and that, obviously enough, cannot be right. It cannot be right for a forum dealing with the issue of whether or not a claim is admissible to pass judgement on the merits of that claim.[8]

Next, even when the majority, belatedly and after a tour of all the issues belonging to the merits of the claim, reverts to

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[7] It is true of course that the exercise of this right is, as far as the claimants before this Tribunal are concerned, severely curtailed. But that is the result of certain provisions in the Algerian Declarations, and hence wholly irrelevant to the point under discussion.

[8] The International Court of Justice, too, has noted the antecedent character of the inquiry under discussion:

> On all these matters, the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicant's standing in the present phase of the proceedings,--not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim.... South West Africa, Second Phase, Judgement, I.C.J. Reports (1966) 6, 18.

the Caveat, it refuses to apply it in the Case. The precedent of the Tribunal on the subject is, as suggested before, too clear for the majority to ignore. What it does, instead, is to try to distinguish the present Case on the basis of a most unsatisfactory argument.

When read together, says the majority, Articles 988 and 989 of the Civil Code of Iran permit an Iranian national who in violation of the law acquires a second nationality to retain for a period of one year any real property he owns in Iran. And since the measures for which the present claim is pursued were adopted by the Respondent State in less than a year after the Claimant's acquisition of the United States' nationality, the question of the Caveat need not be addressed here. In other words, since the Claimant was entitled, according to the majority, to legitimately continue to own his real property in Iran within that one-year grace period, the issue of whether or not he improperly used his nationality of origin does not fall for decision.

This argument is based not only on a misinterpretation of the pertinent laws of Iran, but on a misrepresentation of the facts of the Case. The first will be dealt with here, and the second in the next section of this Dissent, where factual issues are addressed.

Under Article 988 of the Civil Code:

> Iranian nationals may not abandon their nationality except on the following conditions:
>
> 1- They should have reached the age of twenty-five.
>
> 2- The Council of Ministers allow them to abandon their nationality.
>
> 3- They undertake in advance to transfer in one way or another to Iranian nationals, within one year from the date of abandoning their nationality, their rights to immovable property they own in Iran or may come to own by inheritance, even if Iranian law permits their ownership by foreign nationals....

The Article, it will be readily seen, lays down the conditions which must be met by any Iranian who wishes to lawfully abandon his Iranian nationality. These are three. He must have attained the age of twenty-five, received the consent of the Council of Ministers, and given an undertaking in advance to transfer to Iranian nationals his immovable property in Iran within one year from the date of abandoning the Iranian nationality. The Article then goes on to provide that if these prerequisites are properly met by the national, he will no longer be regarded as an Iranian; his acquired foreign nationality will be recognized by Iran; and the one-year grace period for disposing of the immovable property, undertaken by the national, will be respected.

It will be further observed from the provisions of the said Article that, with regard to the ownership of immovable property in Iran, the case of an Iranian national who with full observance of the law abandons his nationality may be more restricted than that of a foreign national (there will be no such right for the former "even if Iranian law permits [such] ownership by foreign nationals"); and that the national may continue to enjoy ownership of his property for one year only if he fulfills the necessary conditions referred to in the Article, including the making of a specific commitment to dispose of his property within that period. The one-year period is, in other words, clearly an incentive for compliance with the law.[9]

There is then Article 989, which deals exclusively with an utterly different --indeed the very opposite-- case of an Iranian national who acquires a new nationality in defiance of the requirements set by the law. Here, the national's acts of abandoning his Iranian nationality and acquiring a new one will not be recognized by Iran ("he shall be regarded as an Iranian

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[9] An example of such incentive can be found in many taxation laws which provide for reduced tax rates when a tax payer chooses to pay his dues prior to a given date.

subject" and "the acquired nationality shall be regarded as void". His immovable property, however, will nevertheless be sold under the supervision of the public prosecutor of the place:

> Any Iranian national who has acquired foreign nationality after the solar year 1280 A.H. (1901-2) without observing the law's requirements shall have his foreign nationality declared null and void and shall be regarded as an Iranian subject. At the same time, however, his immovable property shall be sold under the supervision of the Public Prosecutor of the place and the proceeds shall be paid to him after the deduction of the expenses of the sale....

Such being the simple and unambiguous terms of the said two Articles --the first dealing with a lawful act and its consequences and the second with an unlawful act and its wholly different consequences-- there can be no justification, none whatsoever, for any attempt at importing the one-year grace period provided under Article 988 into Article 989, in which there is no mention of such period. In the case covered by Article 988, the national undertakes, in conformity with the law's requirements, to dispose of his property within one year, and the law naturally respects its promise not to interfere with the property throughout that period. In the case covered by Article 989, the national makes no such undertaking, despite the law's mandate.

It would, therefore, be a very strange law if it still provided the national with a similar respite. Indeed, once this notion of a one-year grace period is artificially introduced into Article 989, the very purpose of the two Articles would be entirely defeated. That purpose, invariably adopted by the lawmakers all over the world, is to differentiate between a lawful and an unlawful act, to encourage the former and to discourage the latter, by providing different consequences for each. The proposed introduction of a grace period into Article 989 would mean this, that under the Iranian law, as reflected in Articles 988 and 989 of the Civil Code, a national of Iran who wishes to abandon his Iranian nationality in favor of a foreign

nationality must fulfill certain conditions, in which case he would be allowed to retain his immovable property in Iran for a maximum of one year. However, if he refuses to do so, he would likewise be allowed to retain his property for the same length of time! Such a policy cannot lightly be attributed to any sane legislator.

Besides, a glance at the subjects with which Article 989 exclusively deals will at once demonstrate the untenability of the majority's interpretation of the Article. That Article, unlike Article 988, does not address the issue of the required undertaking by the national to dispose of his real property in Iran, so as to allow one to speculate about the existence in there of a grace period. What Article 989 speaks of is the law's refusal to recognize the subject's acts of abandoning his Iranian nationality and acquiring a foreign nationality, together with the duty of the local public prosecutor to sell the national's immovable property.

The only way, therefore, that this notion of a one-year grace period can be introduced into Article 989 is by placing a time restriction on the prosecutor's duty to sell, so as to make the Article read: The national's acts of abandoning his Iranian nationality and acquiring a foreign nationality shall not be recognized, and yet his immovable property shall be sold by the local public prosecutor <u>after one year from the date the foreign nationality is acquired</u>. This is so, simply because once it is admitted, as it must, that the prosecutor's authority to sell is vested in him as from the date of the national's unlawful acquisition of a foreign nationality, the existence of any grace period may no longer be advocated. And yet the placing of such a restriction, under Article 989, on the prosecutor's duty to sell cannot, I suggest, be justified by any known canon of interpretation.

There is yet another equally strong reason why the one-year grace period may not be read into Article 989. It is to be found in Proviso "A" to Article 988, added in February 1970:

> Those who, in accordance with this Article, seek to abandon their Iranian nationality and to acquire a foreign nationality must, in addition to implementing the provisions of Clause 3 of this Article, leave Iran within three months from the date of the issuance of the certificate of abandonment of nationality. If they do not leave Iran within the said period, competent authorities shall issue order for their expulsion and the sale of their assets....

The relevance of this to the present enquiry will not be missed. As already explained, Article 988 determines the requirements for a lawful abandonment of Iranian nationality, while Article 989 addresses itself to the consequences of a failure to meet those requirements; and the question before us is whether a one-year grace period, granted in a case in which the requirements <u>are met</u>, may be extended to a case in which those requirements <u>are not met</u>.

To this question, the Proviso provides a negative answer, as will now be explained. Adding a fourth requirement --the national having to leave Iran within three months-- to the three requirements laid down in the text of Article 988, the Proviso proceeds to itself determine, as against leaving it to Article 989, the consequence of a failure: the issuance of an order by competent authorities for the expulsion of the national and the sale of his property. The reference to a single order, and the absence of any reference to a grace period, make it abundantly clear that both sanctions will be applied simultaneously and immediately upon the national's failure to leave the Country. There is, in other words, no room in the Proviso for a piecemeal imposition of the sanctions: by an order for the immediate expulsion of the national, and by another, issued a year after, for the sale of his property.

If, then, the result of a failure to meet only one of the four requirements --to leave Iran within three months-- is the issuance of an order for the immediate sale of the national's immovable property, the consequence of a failure to meet all of the law's other requirements cannot possibly be a permission granted to the national to retain his property for a year.

Indeed, the national who fails to leave Iran within three months after the issuance of "the certificate of abandonment of nationality" has already complied with the requirement to undertake to sell his property within one year; for, otherwise, "the certificate" would not have been issued to him in the first place. Yet the order for the immediate sale of his property will be issued if he nevertheless fails to leave Iran within three months. Hence, even where the national undertakes to, and is duly granted, a one-year respite, this will be withdrawn at once if he fails to meet a further requirement of the law: to leave Iran within three months. He cannot possibly enjoy the respite, if he fails to meet the very requirement of undertaking to sell his property.

Interestingly enough, the majority seems to be itself fully aware of the fact that the one-year grace period, granted by Article 988 for those who observe the law, cannot be read into Article 989, which deals with those who do not observe the law. That is evidently why for arriving at a contrary conclusion the majority offers no reasoning -- none whatsoever-- of its own. What the majority does, instead, is to simply attribute its desired conclusion --the existence of a one-year grace period under Article 989-- to two other sources, namely, the submission by the representative of the Respondent, and a passage in an earlier Award issued by Chamber Two of this Tribunal.[10] Neither provides any justification for the majority's misreading of the Iranian law in the present Case.

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[10] Leila Danesh Arfa Mahmoud and Islamic Republic of Iran, Award No. 204-237-2 (27 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 350.

It must be noted, first, that what was at issue here was the correct interpretation of a piece of legislation before the Tribunal. And it can hardly be disputed that where it befalls on an adjudicating body to interpret the law at issue --as against where it is required to determine the pertinent facts-- it is for that body alone to use its independent judgment and to satisfy itself of the correctness of the interpretation it is called upon to make. Such a body may not, in other words, pronounce itself on a point of law, and apply the law so pronounced, simply by relying on the position taken in that respect by this or that party to the dispute.

Besides, what the majority asserts to have been the position taken in this regard by the representative of the Respondent is not, in fact, the Respondent's position. As the majority is fully aware, the Respondent has, subsequent to the representation on which the majority readily relies, stated quite clearly that its reference to a grace period under Article 989 --made earlier and where this was not a central issue-- is untenable and hence no longer maintained by the Respondent, and that the clear wording of Article 989 rejects any such interpretation.

The Respondent has said so in its most comprehensive dealing with the issue, namely, in the "Brief of the Islamic Republic of Iran on the Issue of the Caveat in Case A18 (A Response to the U.S. Memorial)", submitted to all Chambers of the Tribunal on different dates, including to this Chamber on 16 September 1994. Following an exhaustive discussion on the issue of a dual national's retention of immovable property in Iran after the acquisition of a foreign nationality, the Respondent there concludes:

> In Article 989, unlike 988, there is no one year time limit for the Iranian citizen to sell his immovable property. Under Article 989, the dual national is not supposed to own any real estate from the day he acquires a foreign nationality. This distinction is grounded on the lawful approach of an Iranian citizen abandoning his Iranian nationality under Article 988, before taking a foreign nationality, as compared to

> one who ignores the Iranian law requirements for the acquisition of another nationality.

Such, and not what the majority wishes to make believe, is the clear position of the Respondent State on the meaning of Article 989. Two further points in this respect must be briefly mentioned. First, it is of course quite proper for a party to subsequently adjust its submission on a point of law --here the correct meaning of an Article-- where that party comes to realize the error in its earlier view. Secondly, the majority may not be justifiably heard to assert that although it was made aware of the Respondent's final position on the issue, it has invoked the Respondent's earlier stance because the Memorial setting forth the Respondent's final position has not been submitted into the record of the present Case. This cannot be accepted not only because the majority in this very Award has relied, time and time again, on the Respondent's submissions in other Cases before the Tribunal[11], but also because, as the Respondent has since quite correctly pointed out:

> Iran, in a Memorial prepared on the basis of a comprehensive analysis of Iranian law, has fully discussed the import of Articles 988 and 989 of the Iranian Civil Code. That Memorial, filed in a large number of cases in response to the United States Memorial on the Issue of A/18 Caveat under Note 5 to Article 15 of the Tribunal Rules, represents Iran's position on Iranian law; and it was this submission which was expected to be considered as a statement of Iranian law on the issue at hand. Memorials of this kind (amicus curiae) intended to assist the Tribunal in carrying out its task need not, naturally, be filed in every given case to be referred to.[12]

So much for the first ground invoked by the majority in justification of its misreading of Article 989 of the Civil Code

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[11] See, for instance, the majority's extensive reliance at paras. 62 and 68 of the Award on evidence submitted by parties to other cases before the Tribunal.

[12] From the Respondent's letter of 6 January 1996, objecting to the majority's mischaracterization of the Respondent's position on the pertinent Iranian law.

of Iran. And now to the second, and last, ground: the Decision by Chamber Two of this Tribunal in the Mahmoud Case.[13] There, the real estate at issue had come to the Claimant by way of inheritance sometime in 1970. She had become a United States' citizen in August 1979, and had alleged that the expropriation of her real estate had taken place sometime in March/April 1980, within less than a year from the date of the Claimant's acquisition of the United States' nationality. The Chamber observed that the question of the Claimant's enjoyment of property rights contrary to the Iranian law, or that of her fraudulent use of nationality, did not fall for decision because:

> According to Article 988 of the Civil Code, Iranian nationals who had abandoned the Iranian nationality had to undertake "to transfer, by some means or other, to Iranian nationals, within one year from the date of the renunciation, all rights that they possess on landed properties in Iran or which they may acquire by inheritance...". A failure to comply with the above provision entitles the local Public Prosecutor under the terms of Article 989 of the Civil Code to sell all the landed property.... Article 989 applies also in case such as that of the Claimant where a second nationality was acquired but no effort was made to renounce Iranian nationality.
>
> According to Iranian law, therefore, the Claimant could only have kept the property for one year from the date of her naturalization.[14]

The cursory treatment of the issue, and the total absence of any reasoning by the Chamber, will not escape attention. Under Article 988, says the Chamber, a national of Iran who observes the requirements of the law for abandoning his Iranian nationality is given a one-year respite to dispose of his real property in Iran. If he fails to comply with the requirements, his case falls within the ambit not of Article 988, but that of Article 989, under which his property will be sold by the local public prosecutor. Hence, the Claimant, whose case was covered

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13 Supra note 10.

14 Mahmoud, supra note 10, at 354.

by Article 989 because of her failure to observe the law, could, under the Iranian law, "have kept the property for one year from the date of her naturalization". Some reasoning indeed.

What one is not told, of course, is the justification for this strange reading, and how it can be reconciled with either the text of the Article or with any sound policy of the Iranian legislature. What about the fact, for instance, that this grace period is specifically mentioned in the former, but not in the latter Article? And what about the point that the said legislature may not, in the absence of at least some reasons, be taken to have provided an equal treatment for those who abide by the law and those who do not?

The absence of any words on these points, and indeed the failure of the Chamber to offer any justification in support of its conclusion on the grace period, is, though highly unsatisfactory, perhaps understandable. This was an issue not briefed by the Parties and, as it turned out, quite irrelevant to the determination of the Case. What was determinative, according to the Chamber, was the fact that, irrespective of whether or not the Claimant had violated any Iranian law, or made fraudulent use of her nationality, she had, with respect to the property in question, benefitted from her Iranian nationality; a nationality which, in the words of the Chamber, "allowed her to continue to enjoy her rights as an owner of the real estate which she [had] inherited from her mother in 1970."[15]

That being the case, the Claimant had failed, in view of the Chamber, to establish "that her dominant and effective nationality during the relevant periods was that of the United States."[16] In other words, she had failed to satisfy the

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[15] Id., at 355.

[16] Id. This is an approach later adopted by the Tribunal in Robert R. Schott and Islamic Republic of Iran, et al., Award No. 474-268-1 (14 Mar. 1990), reprinted in 24 Iran-U.S. C.T.R. 203. Under this approach, instead of two separate enquiries, one

Tribunal of a preliminary jurisdictional test --that of her dominant nationality. The issue of her use of nationality in securing the rights in question --an issue to be considered at the threshold of the merits of the case-- would not therefore come for the Tribunal's decision. What was said on the issue was therefore at most a dictum.

Besides, on the same page that the said dictum appears in the Mahmoud Case, it is stated that:

> With respect to the real estate, it was only as an Iranian national that the Claimant was able to inherit the property in 1970 and to continue to enjoy the benefits as landowner.... The Claimant continued to own her interest in the property after her U.S. naturalization until the date of the alleged expropriation. [17]

This appears to directly contradict the dictum in question. There, we were told that a one-year grace period had to be read into Article 989; that, as a result, the Claimant, whose case was covered by the said Article, could "have kept the property for one year after her naturalization; and, finally, that since the "period of one year had not yet expired at the date of the alleged expropriation", she "continued to legally enjoy the ownership of her interest" in the property. If so, what is the Chamber's justification for referring, as a ground for the rejection of the Claimant's case, to the fact that she "continued to own her interest in the property after her U.S. naturalization

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into the claimant's dominant nationality in general and the other into the claimant's use of nationality with regard to the benefits in question, a single search is made for the "most relevant nationality" of the claimant within the specific context of each case. That is to say that the dominant nationality of a claimant will be determined not in general, but with reference to the nationality through which the rights at issue have been secured. Where these rights have been secured by reliance on a given nationality, that nationality will be regarded, for the purposes of the case, as the claimant's dominant nationality, even though his other nationality may, in general, be the claimant's dominant nationality.

[17] Supra note 10, at 354.

until the date of the alleged expropriation"? Was she not said, in the Award, to have been entitled to do that?

The discussion so far may now be summarized. First, where the meaning of a piece of legislation --here Article 989 of the Civil Cod of Iran-- is at issue before a court of law, it is for that body alone to independently examine the disputed text and to offer its own justifications for what it comes to hold as the text's correct interpretation. In order not to apply the Caveat to the present Case, however, the majority chooses to perform this task not by offering its own view based on recognized rules of interpretation, but by invoking a party's reading of the legislation in question and, more strangely still, not by reference to that party's current reading of the legislation, but by reference to its earlier, and subsequently withdrawn, reading. And all this, despite the fact that the position taken by the said party on many other issues in other cases before the Tribunal are readily noted and invoked by the majority against that party.

Once this legally unjustified resort to the Respondent's withdrawn position is set aside, once the task of defining the meaning of Article 989 is assumed by the Chamber, as it must be, it becomes immediately clear that there is no room -- nonewhatsoever-- for the artificial imposition of a one-year grace period upon that Article. For the reasons stated above, and particularly because of the clear and straightforward wording of Article 989, the short dictum in Mahmoud Case must also be considered for what it is: a misinterpretation of an unambiguous text of the law.

This being the clear law of the Tribunal on the subject, the facts in the present Case may now be turned to. Here is a Claimant who alleges that he had as early as 1961 decided to immigrate to the United States. He did at any rate take all the necessary steps in this respect in 1967, when he applied for and was granted a United States' residence permit. Yet, having

obtained the residence permit, he, instead of gradually severing his ties with Iran, actually sought to create new ties with Iran through purchasing the two pieces of land at issue in the present dispute, one in late 1967 and another in 1974.

In 1978, the Claimant acquired his United States' nationality. To do that, he appeared, as required by law, before a United States' court and declared, on oath, that he would "absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen". The Claimant thereby abandoned his Iranian nationality by renouncing, under oath, his allegiance to Iran.

While the Claimant could, in conformity with the laws of his country of origin, inform Iranian authorities of his intention to abandon his Iranian nationality, and make a commitment to sell his landed property within one year, he refused to do so. He resolved to acquire a second nationality without observing a few modest requirements set by the laws of Iran for doing so.[18] His case, therefore, falls squarely within the terms of Article 989 of the Civil Code, under which his property was to be sold by the judicial authorities in Iran. It was, indeed, because of his violation of the laws of Iran, and of representing himself as a solely Iranian national, that he avoided that risk, and continued to own his real property in Iran. The Caveat in A18, and a host of subsequent Awards by this Tribunal, determine that he should not be allowed to seek redress for the alleged breach of that benefit by presenting himself, this time, as a national of the United States. The majority's decision to ignore all this is both unfounded and regrettable.

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[18] Practically, the Claimant would have been able to sell, personally or through a representative, his land even after his acquisition of a second nationality. This is because, having not disclosed his acquisition of a foreign nationality to the authorities in Iran, he would have been regarded by them as an exclusively Iranian national. But this, too, he declined to do.

2. THERE HAS BEEN NO INTERFERENCE WITH THE CLAIMANT'S PROPERTY RIGHTS

Even assuming, as the majority unjustifiably does, that under the Iranian law a person who in violation of its mandatory provisions acquires a second nationality may still retain his real property in Iran for a period of one year, the Respondent Government has done nothing in the present Case to make it liable for payment of any compensation to the Claimant. The majority's opposite conclusion is, as will be seen, wholly unwarranted.

The majority admits, as it should, that during the jurisdictionally relevant period there has been no physical interference on the part of the Respondent Government with either of the Claimant's two pieces of property --one situated in Velenjak, now within the limits of the city of Tehran, and the other in Shahsavar, north of Iran. Turning next to the land reform policies adopted by the Respondent Government after the Revolution, the majority finds, however, that although these, as implemented, do not amount to the expropriation of the Claimant's property, they do constitute measures affecting his ownership right to the Velenjak, though not to the Shahsavar, land. This finding, as will shortly be explained, is the result exclusively of the misapplication of an asserted rule of law and of misrepresenting the facts of the Case. But before that, two preliminary points.

First, land is, for the present purposes, divided by the Iranian law into three categories: that which is not currently developed and has no history of having been ever developed (mavat or "never-utilized"); that which is not currently developed, but has a history of development (bayer or "currently unutilized); and that which is currently developed (dayer or currently utilized).

Secondly, the Claimant's Velenjak land which, according to the testimony of the Respondent's expert witness, has had a

history of development, is accurately described in its official title deed as bayer, and the majority rightly accepts this description of the property.

2.1. The Only Measure Adopted by the Respondent Government During the Relevant Period Does not Constitute Interference with the Claimant's Right of Ownership

As previously noted, the Claimant acquired his United States' nationality on 24 July 1978. Reading a one-year grace period into Article 989 of the Civil Code of Iran, he was required to sell or otherwise dispose of his real property in Iran by 24 July 1979, at the latest. The retention of the property by him as from that date would, therefore, have been in violation of the laws of Iran and, as the majority concedes, a matter for consideration under the terms of the Caveat.

It thus remains to be seen whether the Respondent Government has, in between 24 July 1978 and 24 July 1979, adopted any measures affecting the Claimant's right of ownership over the Velenjak property; a bayer land.

What were the measures taken during that period? Of all the legislative and other actions invoked in this Case by the Claimant, there is one, only one, which falls within the period of enquiry: the approval by the then Revolutionary Council of Iran, acting as the State's legislative body, of the "Act Concerning the Abolition of the Ownership of mavat Urban Lands and the Manner of their Development (the Abolition Act), for which the majority designates the date of 26 June 1979.[19] It is,

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[19] Strong reservations must be expressed with regard to this date, artificially adopted in the Award. Under the Civil Code of Iran, laws come into force in the Tehran area fifteen days after their publication in the Official Gazette. The Abolition Act, which was adopted by the Revolutionary Council on 26 June 1979, was published on 24 July 1979. It became binding, therefore, on 9 August 1979. Thus, even this single measure was quite clearly adopted well after the asserted one-year respite, though the majority will have none of this.

therefore, necessary to briefly remind ourselves of what this piece of legislation was all about.

The Act, consisting of only four Articles and one Proviso, exclusively dealt, as reflected in its title, with urban mavat land. It did not define mavat land, simply because its definition was already well known under both the Iranian and the Islamic laws: undeveloped land with no history of development. The Act stated, in its preamble, that in accordance with the rules of Islam, mavat land could not be owned by any person and was at the Government's disposal:

> Whereas according to the canons of Islam, mavat land does not belong to anyone but is at the disposal of the Islamic Government, and whereas all title deeds which have been issued under the former regime with respect to mavat lands located within or outside urban boundaries are contrary to the tenets of Islam and the interest of the people, therefore, [this] Act is enacted....

It must be here emphasized that there was absolutely nothing legally new in what was said in the Act's preamble: mavat land, as clearly stated in the Iranian Civil Code, could never be owned as such, but was there to be owned by anyone who utilized it and thereby changed its character to dayer land.[20] The same prohibition of ownership of mavat land will be found in two pieces of legislation passed in 1952, and later reaffirmed in

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[20] Iranian Civil Code, Book Two, On the Means of Acquiring Ownership:

Article 140: "Ownership is acquired: (1) By reclaiming mavat land and by taking possession of unowned things...".

Article 141: "What is meant by the reclamation of land is the making of mavat and unowned lands exploitable, by means of taking measures which are customarily regarded as constituting development, such as cultivation, planting tress, constructing buildings, etc".

1955.[21] What the Nullification Act did in its preamble, therefore, was no more than to note that, contrary to these existing laws, certain people had laid hands on mavat lands and had in fact acquired ownership thereof.

Still, the Abolition Act did not seek to cancel these unlawfully acquired titles. What it did, instead, was to require the Government, under Article 1, to call upon "the owners of such lands" to take measures to develop or to reclaim their lands "within a given period"; a most modest measure, directed against those owners who had allowed their lands to be idly left within the cities' boundaries. If they refused to take this simple step, "they shall not be given any priority" over the land, which will then be "possessed by the Government without any compensation."

That "given period" was not determined by the Act, except with respect to the owners who did not have a residential home and had acquired a "small" mavat land for that purpose. The "given period" in such cases was determined, under the Proviso to Article 1, to be "at least three years".

Articles 2 and 4 of the Act are irrelevant to our present purposes. Under Article 3, the task of defining the term "small", the identification of a land as mavat, the method of notifying those who had been recognized under the previous regime as owners of mavat lands, and any other issue related to the implementation of the Act were left to the "Implementing Regulations", which were to be prepared by the Ministry of Housing and Urban Development and approved by the Council of Ministers.

In light of this, the case with the Claimant's land during the relevant period of enquiry, to wit, between 24 July 1978 and

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[21] The Act Concerning the Registration of mavat Land in the Vicinity of Tehran, dated 25 August 1952; and The Act Concerning the Urban bayer and mavat Land Not in the Vicinity of Tehran, dated 19 August 1952. These two Acts were reaffirmed by the Joint Judicial committee of the then Two Houses of the Iranian Parliament on 16 July 1955.

24 July 1979, may be examined. Up until 26 June 1979, he had over eleven months to dispose of a property which he by law was only allowed to retain for a maximum of twelve months. He refused to dispose of the property throughout that period. From 26 June 1978 to 24 July 1979 --a period of less than one month-- there existed the Abolition Act. Did the Act affect the Claimant's ability to perform his legal obligation? Not, I suggest, in the slightest.

First, the Act dealt, exclusively, with mavat land, the definition of which, not provided by the Act itself, was to be found in the then existing Iranian law. The Claimant's land, on the other hand, had been expressly described in the title deed as bayer land; a description which the majority readily accepts as accurate. Up until 24 July 1979, therefore, the Claimant was in a position to sell his bayer land, unhindered by the passing of a legislation dealing with mavat land.[22]

Assuming, therefore, that there existed under Article 989 a one-year grace period for the sale of the property by the Claimant, nothing was done by the Respondent Government to prevent the Claimant during that period from doing what he was by law required to do: to dispose of his Velenjak property by 24 July 1979. But the majority arrives at a different conclusion.

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[22] The majority's reading of the Act, however, is quite revealing:

> Article 1 of the Abolition Act, read in conjunction with the Act's preamble, evinces a clear policy by the new Government against the private ownership of undeveloped urban lands... At the same time, Article 1 appears to hold out the possibility that the formerly-recognized owners of undeveloped urban lands might be able to regain their ownership by developing the land. (Award, para. 42. Emphases added.)

First, the word mavat is translated into "undeveloped", so as to include bayer. Second, the Act and its preamble are said to evince a certain policy, of which there is no trace in either. Third, certain qualifying words ("appears", "possibility", "might") are introduced into Article 1 of the Act, of which the Article is wholly innocent. And fourth, the expressly recognized ownership of mavat land by the Act is referred to as "regained" ownership.

It does so, however, simply by misusing an asserted rule of law in order not to confine itself, as it must, to the measures adopted by the Respondent within the relevant period of enquiry. That misuse of the asserted rule will be dealt with here, though it will be shown in the next section that even this device will not do.

Fully aware of the fact that the Abolition Act --the only measure taken by the Respondent throughout the relevant period-- may not be regarded, by any stretch of imagination, as anything affecting the Claimant's property rights, the majority first seeks to simply regard the issue of the relevant period as non-existent. That done, it sets to consider all the events which have occurred not only after 24 July 1979 --the end of the period of enquiry-- but after 19 January 1981-- the Tribunal's jurisdictional cut-off date. Reading all these "together", the majority comes to the conclusion that the Claimant's ownership rights have indeed been infringed.

It is only after arriving at that conclusion that the majority reminds itself of the existence of a relevant period in the present Case. And there, relying on an asserted rule of law which has nothing to do with the Case at hand, it comes to the conclusion that the Claimant's rights were interfered with during the relevant period, by the passage of the Abolition Act itself.

Under that rule of law, says the majority, in examining whether a claimant's rights are infringed, the totality of the actions taken by the respondent must be examined but, when an infringement is established, the date of the initial action must be taken as the date of the infringement. This, suggests the majority, is consistent with the Tribunal's law, under which:

> [W]here a series of actions has resulted in a deprivation of property rights, the date of the

> deprivation should be taken to be the date on which the initial interference took place.[23]

This asserted rule of law, followed by some, though not by all, the Tribunal cases,[24] is not any widely recognized.[25] But that is not the central point. It is, rather, that any asserted similarity between the issue here and that of determining a date

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[23] Award, para. 71.

[24] See, for the latter, Reza Said Malek and Government of the Islamic Republic of Iran, Award No. 534-193-3, para. 114 (11 Aug. 1992), reprinted in 28 Iran-U.S. C.T.R 246, 288-89:

> 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, 240-41; 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.

The majority's reliance, at para. 71 of the Award, on Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran U.S. C.T.R. 219, 225, in support of its view is misplaced. Tippets Case is correctly cited in International Technical Products, in support of the opposite proposition: "[T]aking of property through various acts of interference deemed to have occurred, not when first interference occurred, but later, with the consequence that interest was calculated from that later date of the taking or deprivation." 9 Iran-U.S. C.T.R. 241 (Fn 36).

[25] "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 initially 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." G.C. Christie, What Constitutes a Taking of Property Under International Law, 38 Brit. Y.B. Int'l L. 307, 337 (1962)

in a case of expropriation involving a series of actions, is a serious misapplication of the law.

In a case of expropriation in which not a single action or measure but a series of them is asserted to have constituted the taking, all the actions or measures complained of will be taken into consideration, but only if they fall within the forum's jurisdiction --within the forum's period of enquiry. Where the cumulative effect of these actions or measures is judged to amount to a taking, a further and quite separate question naturally arises as to the date on which the taking has taken place. Here, one theory, or rule, followed by some but rejected by other cases before this Tribunal, holds that since the totality of the measures shows that the measure initially adopted was not "ephemeral", the date of that initial measure must be regarded as the date of the taking, even though that measure does not by itself constitute a taking.

Two prerequisites for the application of the asserted rule will have been noted. First, only measures falling within the forum's jurisdiction --within its period of enquiry-- may be considered. If a measure is adopted outside that period, it will not be taken into account. Thus, in Karubian[26], for instance, where the Respondent Government admitted that one of the Claimant's pieces of land had been formally expropriated in 1982, the Tribunal refused to take note of this conceded fact, simply because it fell outside the Tribunal's period of enquiry. Having examined only those measures adopted by the Respondent within the relevant period, the Tribunal concluded that they did not amount to the expropriation of the Claimant's land.

Secondly, for the rule to find relevance, the forum must first come to the conclusion that not the initially adopted measure but the effect of the totality of the measures in question --their cumulative effect-- has amounted to a taking,

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[26] Karubian, supra note 5, emphasis added.

or an interference. For, otherwise, if the measure initially adopted is judged to have itself amounted to a taking, there would be no room for "backdating" the asserted expropriation to the time of the initial act. Indeed, there would be no reason for considering the cumulative effect of the subsequent events. Thus, in the recent Case of Kiaie,[27] this Chamber first noted that there was insufficient evidence to conclude that the appointment of a first manager by the Respondent amounted to a taking of the Claimant's company. Having then concluded that a series of subsequent events established a permanent control by the Respondent over the Claimant's entity, the Chamber came to hold that the date of the expropriation was that of the appointment of that first manager.

Neither of these is present here --indeed, the reverse is the case-- and the majority's invocation of the said theory, or rule, is, for that reason, wholly unjustified. First, the relevant period of enquiry in the present Case ends on 24 July 1979. True, the Tribunal's jurisdictional period continues until 19 January 1981. But that is not relevant. What is relevant is the fact that even assuming the existence of a one-year grace period, the Claimant was under a legal obligation to dispose of his land by 24 July 1979. His continuation of the ownership of that property as of that date was unlawful. The question, the only question, is whether or not he was prevented, prior to that date, from doing what he was legally required to do.

In answering that question, one may not take note of the measures adopted after 24 July 1979, just as, in a case of expropriation within a given jurisdictional period, one may not take into account the events occurring after that period. This is simply because, if the Claimant had disposed of his land by 24 July 1979, assuming that he had not been prevented from doing so by that date, any and all measures taken by the Respondent

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[27] Jacqueline M. Kiaie, et al. and Government of the Islamic Republic of Iran, Award No. 570-164-3, paras. 31-42 (15 May 1996), reprinted in __ Iran-U.S. C.T.R. __, __.

with regard to the like of his land after that date would have been of no consequence. To put it differently, the Claimant may not be heard to argue that he was not able to sell his land --to perform his legal duty-- within the prescribed period because the Respondent adopted measures sometimes after that period. Thus, what the majority does --relying, as will be seen shortly, on measures which belong to post 24 July 1979 in order to conclude that the Claimant was prevented from disposing of his property by 24 July 1979-- is a misapplication of an asserted rule, invoked by the majority to unjustifiably assist the Claimant.

Next, whereas the theory, or the rule, applies in cases in which the asserted expropriation is held not to have been materialized by the respondent's initial action, but only by the totality of its actions --by the cumulative effect of its adopted measures-- the majority seeks to invoke the rule in a case in which, according to the majority itself, the reverse is true. Quoting extensively the relevant passages in Karubian, the majority first comes, in line with Karubian, to the conclusion that the "cumulative effect" of "the relevant land reform legislation" and "other governmental action detailed in contemporaneous newspaper reports" constituted an interference with the Claimant's property rights:

> The Tribunal therefore finds that, while the interference created by the cumulative effect of the land reform legislation and related governmental action did not rise to the level of an expropriation... it has been established that the interference was of such a degree as to constitute "other measures affecting property rights"....[28]

But then realizing, evidently, that what is needed in the present Case is a holding of interference by 24 July 1979 --that an interference based on measures adopted after that date will

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[28] Award, para. 69 (emphasis added). See also para. 68: "The Tribunal is persuaded that the effect of the adoption of the Abolition Act, together with its Regulations and amendments, was to impair the right and real possibility of the Claimant to transfer his property." (emphasis supplied).

not do-- the Award swivels. It is then that all references to the "cumulative effect" in Karubian and on the Award's earlier pages are forgotten; and we are told, this time, that the interference took place by the passage of the Abolition Act alone; that the measures assertedly taken after the period of enquiry "merely aggravated an existing interference with the Claimant's property rights".[29]

The total baselessness of the assertion that the Abolition Act by itself amounted to an interference with the right of the owner of a bayer land has already been demonstrated. The text of the Act is fortunately before us and, as stated before, it says no more than this, that the owner of a mavat land is required to develop or reclaim his land within "a given period". If the land is small, that "given period" is three years. How can this possibly have affected the Claimant's right to a bayer land is for the majority to explain. But that is not the point here. It is, rather, that if the very passage of the Abolition Act constituted an interference with the Claimant's rights, why then all those efforts in the Award to examine the measures adopted by the Respondent after the relevant period?

If the Abolition Act did by itself constitute an interference, and the Act's Implementing Regulations and Amendments, adopted after the Tribunal's period of enquiry, "merely aggravated" that "existing interference", why the pronouncement in the Award that "the effect of the adoption of the Abolition Act, together with its Regulations and amendments, was to impair the right... of the Claimant"? Why the earlier conclusion in there that the interference was the "cumulative" or the "combined" effect of all those measures? And, indeed, why all those references to, and reliance on, the rule of putting back the date of the interference to that of the initial act? It is, is it not, the Award's suggestion that the very initial step by the Respondent Government constituted an interference. If the

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[29] Award, para. 70.

Award is true to its finding, what is the justification for its resorting to the said rule?

All this, too, may now be summarized. Under the invoked rule, assuming it to be a rule, the "cumulative effect" of the measures taken, or events occurred, within the forum's period of enquiry is first assessed. That period of enquiry in normal cases is, of course, the jurisdictional period, as to which alone the forum concerned is competent to express itself. Any measure taken, or event occurred, outside that period may not be taken into account.

In the present Case, however, that period of enquiry is the one-year grace period which, according to the majority, is granted by the Iranian law to the national to dispose of his property; ending, in the Claimant's case, on 24 July 1979. Because the Claimant was required to dispose of his real property in Iran by 24 July 1979 --because his retention of the land after that date was unlawful-- the only relevant enquiry before the Tribunal was whether anything had been done by the Respondent Government up to that date to affect the Claimant's right of ownership. What was, in other words, irrelevant to the Tribunal's enquiry was whether there had or had not been any interference with an unlawful ownership; with a non-existent right.

The majority's attempt to disregard this simple point, its attempt to take account of the events after the period of enquiry, is unjustified. The asserted rule on which the majority seeks to rely in this has nothing to do with the Case at hand. Indeed, the very invocation of the asserted rule by the majority readily reveals the fact that the majority itself does not believe that the only measure adopted by the Respondent State within the period of enquiry did constitute an interference with the Claimant's right of ownership.

2.2. The Measures Adopted by the Respondent Government After the Period of Enquiry Do not Constitute Interference with the Claimant's Right of Ownership

Based on a faulty premise, the majority allows itself to take into account steps taken by the Respondent Government outside the period of enquiry, and to conclude that the "cumulative effect" of these steps amounted to "measures affecting the property rights" of the Claimant. The untenability of that premise has been demonstrated. Attempts will now be made to show that even if one were legally justified to consider the "cumulative effect" of these steps, they do not in fact constitute any interference with the Claimant's right of ownership.

Of the justifications offered by the majority in support of its conclusion, one may be summarily rejected:

> Evidence that supports the Claimant's contention that his property rights were infringed includes several reports appearing in Tehran newspapers and other media during the months of May to November 1979.[30]

The majority proceeds to cite, extensively, the reports in the newspapers of the comments made by the then Minister of Housing and Urban Development of Iran on the contents of a bill (later the Abolition Act) then "being debated in the Council of Ministers...". The majority "finds it particularly significant that the word used in these early reports for unutilized land is '<u>bayer</u>'."[31]

Now this is most amazing. Apart from the question of whether and to what extent such reports may be relied upon, here is a piece of legislation which, as approved by the Revolutionary Council --acting as the State's legislative body in the absence of a parliament-- expressly states that it is solely concerned

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30 Award, para. 62.

31 <u>Id.</u>

with the mavat land. The majority concludes, however, that the Act also intended to affect bayer land because, in his interviews with the media, the then Minister of Housing spoke of a debate in the Council of Ministers on a bill dealing with bayer land. And yet, whatever the subject of that debate, the fact remains that what the Government presented to the competent legislative body was a bill --and what was legislated was an Act-- which by the testimony of its title, its preamble, and its text, had nothing to do with bayer land. The majority nevertheless suggests that the true intention of the Act may be discerned not from the text of the presented bill or that of the approved legislation, but from the reports of how the issue was first debated in the Government.

The majority next relies on the Act's "Implementing Regulations". These were to be prepared, it will be recalled, by the Ministry of Housing and Urban Development and approved by the Council of Ministers. The Council's approval was received on 13 August 1979, months after the expiry of the period of enquiry in the present Case. The Regulations accurately defined mavat land as land "which has been left idle and on which no development or improvement has been made." It went on, however, to describe "acceptable development" in a way that one type of traditionally defined bayer land --on which no trace of earlier development appeared-- could be left out of the bayer category.

This, suggests the majority, was the nature of the Claimant's land, brought thereby within the expropriatory scope of the Abolition Act. The majority's suggestion is unjustified. The facts that the Abolition Act did not seek to expropriate any land but simply required the owners of mavat lands to develop them, as required by the then existing laws, has already been noted. So has the fact that the Regulations were approved much later than the relevant period of enquiry in the present Case. These meant, of course, that the Regulations, whatever their nature, were utterly irrelevant to the only question before the Tribunal, namely, whether the Respondent Government had done

anything within the relevant period to prevent the Claimant from disposing of his land.

Still, and setting aside all these for the sake of argument, the fact remains that the Regulations did not amount to any measure on the basis of which the Respondent could be held liable. It is true of course that the definition of "acceptable development" by the Council of Ministers --the executive branch of the State-- was such that it brought into the category of mavat one type of bayer land. But this, as will now be explained, was simply an act of ultra vires by the executive branch for which the State had provided adequate remedies, and was, because of that, wholly innocent of any international wrong.

First, this narrow definition of "acceptable development" by the Council of Ministers was ultra vires because it violated the definition of mavat as envisaged by the legislature --the Revolutionary Council.[32] True, the legislature did not define mavat in the Abolition Act, but since the definition of the term had already been clearly provided by the existing laws, the legislature must be taken to have that definition in mind when it refrained from providing a different one.

Strong support for this, if support is needed, will be found in the fact that very shortly after the approval of the Regulations by the Council of Ministers on 13 August 1979, the same legislature which had passed the Abolition Act --the Revolutionary Council-- enacted on 16 September 1979 another piece of legislation in which the three categories of land were again defined in their traditional senses. This was the Law Concerning the Manner of Grant and Reclamation of Lands within the Jurisdiction of the Islamic Republic of Iran, whose Article 1 states:

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[32] Indeed, it violated the definition of mavat, noted earlier, in the very text of the Regulations: land which has been left idle and on which no development or improvement has been made.

> (a) mavat land is land which has never been utilized or cultivated and has remained in a natural state; (b) dayer land is reclaimed land which has been continuously utilized;... (d) bayer land is land which has been previously utilized but, due to not being utilized for five consecutive years without any justifiable excuse, has returned to, or remained in, a state of being unutilized.

Any definition of mavat land by the executive which would give it a meaning other than the one provided by the Civil Code, by the earlier legislation, and by the Revolutionary Council would have been unlawful and, as such, unenforceable. Principle 89 of the Supplement to the former Constitution of Iran, in force in 1979, provides that:

> The Ministry of Justice and the courts shall enforce the general, provincial and city by-laws and regulations only if they are in conformity with the laws.[33]

Any affected person would have been able, therefore, to resort to this established mechanism to set aside the Regulations for not being in conformity with the laws. The State's responsibility, of course, is limited to making sure that effective remedies are provided for those who may suffer from an ultra vires act of the State's organs or officials, and does not call for the virtually impossible task of seeing to it that no ultra vires act is ever committed.

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[33] The same rule will now be found in the Constitution of the Islamic Republic of Iran, adopted in November 1979. Principle 170 of which states:

> Judges of the courts are in duty bound to refrain from implementing any Governmental decree and by-law which is in violation of the laws, the rules of Islam, or is outside the authority of the executive branch. Anyone may seek the cancellation of such decrees or by-laws from the Administrative Justice Tribunal [Conseil d'Etat].

And Principle 173 of the Constitution further provides that: "In order to hear the complaints of people against... governmental decrees and by-laws... an Administrative Justice Tribunal [Conseil d'Etat]... is hereby established."

In fact, sometime later, on 3 February 1981, when the Guardian Council[34] found the occasion to examine the legality of the Regulations, it opined that the attempt by the Regulations to extend the scope of mavat land to bayer land through a narrow definition of "acceptable development" was "unconstitutional, in violation of the Islamic law, and unenforceable."

Shortly thereafter, in March 1982, the by then established Iranian Parliament (Majlis) passed the Urban Lands Act. The Act once again defined the three categories of land in terms of their traditional senses. It then went on to provide that urban mavat land belonged to the Government; and so did the urban bayer land without any known owner. As for the urban bayer land with a known owner, the Act authorized the Government to make compulsory purchase where it needed the land, and where the land exceeded certain surface area (Article 9).[35]

The majority is fully aware of these facts, but in line with its general approach to the Case, it tries to either ignore or else use them discriminately. It says, for example, that since the Opinion of the Guardian Council was rendered after the Tribunal's jurisdictional cut-off date, the fact that the Opinion disallowed the narrow definition of "acceptable development" in the Act cannot be recognized by the Tribunal. And yet it says, on the other hand, that the Opinion is "significant merely in

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[34] Under the Constitution, all enactments of Parliament (Majlis) must be placed before the Guardian Council. Within a maximum period of twenty days from the date of the receipt of an enactment, the Council must examine the same to see whether or not it conforms to the principles of Islam and the Constitution. If the Council finds any contravention in the same, it will return it to Parliament (Majlis) for reconsideration.

[35] And once again the Guardian Council found that certain provisions of the Act did not conform to the Islamic principles. But since these were related to the issue of how the "needed lands" were to be determined by the Government, the point is irrelevant to the present discussion.

that it confirms that the scope of the Abolition Regulations extended to urban bayer land."[36]

In other words, an authoritative Opinion expressed outside the Tribunal's jurisdictional period may be resorted to in order to determine the true intention behind an step taken outside the relevant period of enquiry, but not for any other purposes; not even for revealing the fact that whatever the force of the Regulations, they were cancelled as from February 1981, the date the Opinion was rendered. And yet this is a most relevant point, considering the fact that throughout the short life of the Regulations nothing was done, as will be seen shortly, to apply them to the Claimant's land.

Another example is provided by the majority's mischaracterization of the 1982 Urban Lands Act, so as to provide an asserted ground for the attribution to the Respondent Government the intention to seize bayer lands. This is what the majority says in this respect:

> It is significant that more than one year after the Guardian Council declared the government's first attempt to expropriate urban bayer land to be unconstitutional, the 1982 Urban Lands Act explicitly authorized the expropriation of urban bayer lands in certain circumstances.[37]

This is not true at all. The 1982 Act did not go against the Opinion of the Guardian Council, but fully complied with it. What the Council had found unenforceable was the taking of people's bayer lands without due compensation. The Act saw to it that this was not done. As expressly provided under Article 9 of the Act:

> The owners of bayer and dayer urban lands are required to sell the lands needed by the Government or Municipalities at the Government valuation, and the Government may, in exchange for the lands with an area

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[36] Award, para. 46.

[37] Award, para. 60.

> more than 3000 square meters, and with due regard to the applicable standards, transfer to the seller a parcel of land from other Government's lands which has the same market value as that of the land transferred to the Government as consideration thereof. (emphases added.)

3. THE CLAIMANT HAS SUFFERED NO DAMAGES

As suggested above, the Claimant's retention of the property as from 24 July 1978, when he was naturalized a United States' citizen, was unlawful. Indeed, the very purchasing of land in Iran by someone who says that he had, prior to the date he acquired the property, decided to become a United States' citizen, and had been granted an immigrant status, was wrongful. He should not have acquired that property in the first place. And he should have undertaken to dispose of it prior to his naturalization, in the second place. Had he had in him the slightest respect for the laws of the country of which he was a national, there would have been no question of "interference with his property rights" by the Respondent Government. But this was not the case, and the question before the Tribunal is whether he suffered any damages, having violated the laws of his native country.

In what follows, however, it will be assumed that despite the Claimant's violation of the pertinent laws of Iran, he was entitled to retain his property in Iran for a period of one year after his naturalization and, further, that the Abolition Act came into force within that one-year period and, further again, that the terms of the Act's future Regulations were all known at the time of the passage of the Act, and, finally, that all these affected the Claimant's property rights.

In the Karubian Case[38], noted earlier, Chamber Two of this Tribunal came to the conclusion that the "cumulative effect" of

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[38] Karubian, supra note 5.

all the land reform measures adopted by the Respondent Government up to 19 January 1981 was, at least for sometime, to restrict or impair the right of the Claimant in there to transfer his mavat lands. The Chamber hastened to add, however, that this did not mean that the Claimant in that Case suffered damages, or that the Respondent was liable to him for any damages in fact suffered.

As to the first, Chamber Two stated that "[i]t remains to be determined whether the interference of the type described above caused damage to the Claimant".[39] As to the second, the Chamber noted that the restrictions imposed by the Respondent were not "the only hinderance the Claimant faced in relation to transactions in his Iranian properties". This was because there were, the Chamber noted, similar restrictions imposed by the Government of the United States. In the event, however, the Chamber found it unnecessary to pronounce itself on either of these two issues because of its prior decision to dismiss the pertinent parts of the claim under the Caveat.

The majority, which asserts to have applied these holdings, simply refuses to even consider the second point, the possible effects of the restrictions imposed by the Government of the United States. On the first, it comes to the conclusion that the "chilling effect" of the measures adopted by the Respondent Government did result in damages to the Claimant. It remains to be seen whether there is any justification for this conclusion.

First, the Claimant's case during the relevant period, the only pertinent issue before the Tribunal. He was, as stated before, under a duty to dispose of his land during that period, and his continued ownership of it after 24 July 1979 was illegal. His counsel says, quite unequivocally, that:

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[39] Karubian, supra note 5, para. 145.

> We acknowledge that [the Claimant] did not take any affirmative steps to sell his property. We believe, one, that he had no obligation to do so....[40]

The majority affirms, of course, that the Claimant did have such an obligation and, that being the case, this very acknowledgement by the Claimant should at once put an end to the present enquiry. The owner of a property which must by law be disposed of within a given period admits that he took no steps to fulfill his obligation. And for this failure he offers a legally wrong justification: that he was under no duty to do so.

It is interesting to note further that both in his Civil Action before a United States' Court[41] and in his Statement of Claim before this Tribunal,[42] the Claimant asserted that the expropriation took place in late 1979 or early 1980, months after the end of the asserted one-year grace period. Thus, as far as he was concerned --as far as he knew-- the one-year respite had come and gone, with no measures taken against his property. And yet no steps on his part to dispose of his property.

Against these admissions, the artificiality and otiose nature of the enquiry, extensively pursued in the Award, as to whether the actions taken by the Respondent resulted in actual damages to the Claimant by affecting "the transferability and salability of his property", will at once reveal itself. Here is a Claimant who says that he did not take any steps to transfer his land throughout the relevant period because he was not legally required to do so. The Award concedes that it was indeed the Claimant's duty to dispose of his land within that period.

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[40] Transcript, at 174.

[41] Civil Action No. 80-74501 filed with the United States District Court for the Eastern District of Michigan in the Southern Division on November 28, 1980.

[42] Filed on 14 January 1982.

Yet the Award then proposes to measure the damages that the Claimant suffered because of the asserted restrictions imposed by the Respondent on "the salability" of the land; or, to put it more accurately, the amount of damages which the Claimant would have suffered, had he not been wrong with regard to his legal obligation, and had he tried to dispose of his land. The Claimant says that up to the time his ownership became unlawful he looked for no potential purchaser. The Award, nevertheless, seeks to valuate the amount of damages he suffered as a result of the difficulty he faced in finding a buyer for his property!

But be that as it may. Eleven months into the one-year grace period, and while the Claimant has neither sold nor has any intention to sell the land, comes the Abolition Act. It is an Act which, being exclusively concerned with mavat land, cannot possibly cause any damage to the owner of a bayer land; the description given to the Claimant's land in the title deed, with which description the majority "is disinclined" to take issue.

The majority's contrary conclusion that the very passage of the Abolition Act caused damage to the Claimant is based, mainly, on the majority's assertion that as from that date it was the public's knowledge that restrictions had been placed on the enjoyment and transfer of bayer land. But that "public" which the majority has in mind must be a very extraordinary public indeed. It is a "public" which has before it only the Abolition Act and the then existing traditional definition of mavat under the Iranian law. It nevertheless somehow forms the knowledge that the Ministry of Housing would, in the Regulations which it is required to prepare in future, define the term "acceptable development" in such a way as to bring into the category of mavat land a certain type of bayer land; a definition which would later be declared unlawful by the Guardian Council!

Throughout this period, then, no damages could have been conceivably suffered by the Claimant; he could have retained or transferred his bayer land unaffected by the measures directed

at mavat land. Assume now, again exclusively for the sake of argument, that the contents of the future "Regulations" were somehow magically known on 26 June 1979. That meant that there assertedly was a possibility --though a very remote one-- that the Claimant's land would, against its very description in the title deed, be regarded as mavat land.

What measures, by 24 July 1979, had been taken against such land so as to cause the Claimant any damages? An invitation, as demonstrated above, to the owners to take steps to develop or reclaim their lands: within at least three years, if the land was small, and within "a given period", if it was not. All that was required of the Claimant to dispel any possible doubt in the mind of his potential purchaser, or was required of his potential purchaser to fully enjoy the ownership of the land as bayer, was, to give a few examples, to cultivate the land, or to turn it into a flower garden, or to plant a few trees in it, so as to bring the land within the definition of bayer under the Regulations.

The Claimant, of course, took none of these steps either. Living in the United States, it was his desire, as he freely admits, that his land, situated within the present boundaries of the capital city of Tehran, remain idle for years, so as to appreciate in price. The fact that the land, as left, might turn into a dumping place for polluted materials and generate diseases was apparently no concern of his, or of the majority. The requirement by the Regulations that certain elementary steps be taken by the Claimant to improve the intolerable status of his land is invoked by him, and accepted by the majority, as a measure causing damage to the Claimant's property rights. If so, almost all the regulations routinely adopted and enforced by the municipalities all over the world must be regarded as such.

Besides, and as noted before, there was yet another course of action available to the Claimant not to suffer any damages as a result of the narrow definition of "acceptable development" in the Regulations. It was open to him, under a mechanism provided

by the Iranian law, to challenge the validity of any regulations or by-laws not in conformity with the laws of Iran. It was open to him to demonstrate before the judicial authorities of Iran that the relevant provision of the Regulations was of such a nature; and for that he had ample evidence to rely on. Indeed, the Respondent State, by providing adequate remedies for cases in which the executive had ultra vires violated the rights of individuals through the implementation of rules not in conformity with the intent of the legislature, had precisely sought to prevent the suffering of those who might be adversely affected. The Claimant admits, however, that he never sought to resort to this course of action either.

Finally, any uncertainty over the Claimant's title to his land was at any rate removed by the Opinion rendered by the Guardian Council on 3 February 1981. That Opinion held, it will be recalled, that the Regulations, in so far as they sough to cover bayer land, were in violation of the Islamic Law and the Constitution of Iran and, hence, unenforceable. All that the Claimant had to do afterwards, therefore, was to show that his land was not mavat in the traditional sense of the term: with no history of development ever.

So was the case after the passage of the Urban Lands Act of 1982, the next pertinent measure adopted by the Respondent. First, the Act once again insisted on the traditional definitions of the terms mavat and bayer. Urban mavat land, it said in its Article 3, is an urban land which has had no history of development or reclamation, and Urban bayer land, it said in its Article 4, is an urban land which has had a history of development and reclamation, but has gradually fallen into the status of a mavat land.

Second, the Act provided, under its Article 12, for a procedure for the determination of the nature of the land according to the Act's definitions. For that purpose, there was to be an Assessment Committee composed of the representatives of

the Ministers of Housing and Justice as well as the local mayor. The findings of the Committee could be challenged in the local courts, which courts would examine the complaints on an expedited basis.

Third, and equally important, the Act made it quite clear, in its Article 9, that no bayer land with a known owner may ever be taken without the payment of due compensation, either in cash, if the area is less than 3000 square meters, or by offering other pieces of land owned by the Government with equal market prices. Considering the facts that the Velenjak property, as part of a suburban village, had a clear history of development, and that it had been described in its official title deed as bayer, the Claimant could not have faced any difficulty in demonstrating the bayer nature of his land.

The foregoing discussion on the issue of damages may now be put in a nutshell. The important point to remember is the fact that the Claimant's land has never been physically interfered with. Equally important is the fact that the Claimant had no intention, as he admits, to sell his property during any of the relevant periods. What he wanted to do was to leave the land for long to appreciate in price. Now, if for a short period a "cloud" --to use the majority's term-- appeared over his title to the land, this was subsequently and shortly thereafter removed, allowing the Claimant to do with the land what he, right from the beginning, had planned to do. Under such circumstances, he could not have possibly been damaged by the measures adopted by the Respondent, assuming, as the majority does, that there had been any. On 3 February 1981, in other words, he had resumed an "unclouded" title to a land appreciated in price. Yet the majority, despite all this, comes to the conclusion that the Claimant not only did suffer damages, but suffered heavily. This latter conclusion, the amount of the asserted damages, will now be addressed.

4. THE AMOUNT OF DAMAGES AWARDED IS WHOLLY UNJUSTIFIED

4.1. The Value of the Claimant's Land

The Claimant asserts that in late 1979 and early 1980, his Velenjak property was worth U.S.$1,195,751. He offers no figure for the value of the property on 26 June 1979, the date on which, according to his later pleadings, the alleged expropriation took place.

There are occasions on which one marvels at the ease with which some parties seek to misinform this Tribunal. But then, on reflection, one realizes that this is not as strange as it might first appear to be. It would not be very extraordinary for a not quite scrupulous party to entertain the thought, for instance, that if the value of his land in the suburb of Tehran in some seventeen years ago is going to be determined by a Tribunal who happens to have no notion of the subject, why not suggest a price ten times, or twenty times, its real value? There is, after all, always the possibility that the tactic might work. It has, I suggest, worked in the present Case.

The starting point in evaluating the property in question is its title deed. In there, the land is said to have been purchased by the Claimant for Rials 180,000, or roughly $2600. Now, although this may not be the exact purchase price in 1967, it is a very good indication of it. This needs explaining.

In order not to allow the parties to a transaction to falsely agree with each other on an artificially low price, and thereby escape the payment of due transfer taxes, the Iranian law has provided for the establishment of a "Lands Valuation Committee", which annually determines the transactional values of real properties throughout Iran on the basis of their fair market values of the year before:

> The determination of the transactional value of lands inside or outside the cities shall be vested with a

> Lands Valuation Committee which shall be convened once each year, and shall consist, for the Tehran area, of a representative of the Ministry of [Economic Affairs and] Finance, an assessor of the Department of Deeds and Real Estate Registration, and a representative of the City Council... The functions of the Lands Valuation Committee shall be: (1) To determine the transactional value of lands once a year on the basis of the average value during the last six months....[43]

Since it is on that basis that a Notary Public in Iran accepts or rejects the value which the parties to a land transfer suggest for the transacted property and, more significantly, since it is on that basis that the Government assesses and collects its transfer taxes, the value determined by the Committee for real estate in each area cannot possibility be much below the true value. In other words, when in the present Case the Notary Public accepted in 1967 to record the transaction in question for the stated value of roughly $2600, it must have made sure that this was in full conformity with the value of land in the Velenjak area, as determined by the Committee for that year; and the Government must have made sure that the transactional value reported by the Parties did not deprive it of its due taxes.

Against all this, the Claimant offers an "explanation", and the majority readily accepts it. He says that he purchased the property for the amount of $200,000 (or, roughly, Rials 14,120,000). There was, however, a broker who wrote "the number in". In Iran, he adds, it is the "responsibility of the brokers" to determine the value to be recorded in each transaction.[44] This is worth repeating. A piece of property with the real value of $200,000 is transacted. A broker involved in the transaction,

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[43] Note 2 to Article 23 of the Direct Taxation Act, 1974.

[44] Here is one example of what the Claimant's counsel says on this: "[The Claimant] paid the amount of money which he had stated. The amounts stated in the deeds in terms of rials; if you were to convert them into the amounts which he has stated would not agree. And the reason they would not agree is because the brokers are the ones that write in the amounts of money and it does not agree with the amount...."

on the other hand, decides that only $2600 should be recorded in the title deed as the value of the property. Meanwhile, the Notary Public keeps out of all this, collecting the Government's due taxes on the basis of what the broker has decided to be the recorded value of the property. So much for the Government of Iran's method of collecting taxes, and for the role of the Lands Valuation Committee! This is, of course, nothing but a contemptuous "explanation".

The suggestion here that $2600 is roughly the price paid in 1967 by the Claimant for the land in question is supported by another fact reflected in the title deed. The deed reveals that right up to the time of the Claimant's acquisition, the land had been given by its previous owner in mortgage for Rials 160,000, or roughly, $2300. According to the deed, again, the Claimant pays this amount to the mortgagee to release the land, and the rest to the seller. If the Claimant is to be believed, a property worth $200,000 had been given in mortgage, with the owner deprived of many of the rights associated with ownership, for some $2300 only. A rather unlikely scenario.

So much for the value of the property in 1967, when the property was acquired by the Claimant. As for its value in 1979, again there is, fortunately, a highly relevant piece of evidence before the Tribunal. It is to be found not in the record of the present Case, but in the Award of Chamber Two in Karubian. As reported in there, two pieces of land at issue in that Case are situated in Shemiran, the same district of Tehran in which the present Claimant's land is situated.

The Award in Karubian states[45] that the Claimant in there, a Mr. Karubian, had originally asserted that, based on purchase offers made to him, the value in 1979 of his Farahzad property in Shemiran, totalling 20,250 square meters, was $5,062,500, and that of his Ahmad-Abad land, again in Shemiran and totalling

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[45] Karubian, supra note 5, para. 92.

2,726.9 square meters, was $879,000. Yet, says the Award, in the final pleadings and following the valuation of these lands by the Claimant's own appraiser, the Claimant offered "a considerably lower estimate of the 1979 value of the properties". Thus, for his Farahzad property he suggested a value of $1.880,357, and for his Ahmad-Abad property, a value of $167,510. In terms of Rials per square meter, says the Award, the Claimant's asserted value was 6,500 for the Farahzad and 4,300 for the Ahmad-Abad properties. Converted, roughly $90 (Farahzad) and $60 (Ahmad-Abad) were therefore suggested by Mr. Karubian and his appraiser as the 1979 value per square meter of properties located in the same district in which the land before this Chamber is located.

The Claimant in the present Case, however, would still insist that his property in 1979 was worth some $600 per square meter, and he has no appraiser to try to moderate his view. He has, of course, offered the views of two "experts", but not of the type bothered with details and, indeed, with realities. One is a Mr. Akbar Vaghei, whose qualification in the field of appraising is limited to his asserted prior involvement in the purchase and sale of certain pieces of real property. Even for that, he provides no evidence. In his first submission, he asserts, in an unexplained and unsubstantiated one-line statement, that the property in question had, in 1979, a market value of Rials 91,780,000 or $1.300.000.

In his second submission, he refers, again in a general, unexplained, and unsubstantiated short paragraph, to the asserted value of the property in 1992. Not having lived in Tehran in between 1979 and 1992, he bases his valuation on his "consultation" with a "real estate broker who, for fear of reprisal from the Government of Iran, wishes to remain unnamed".[46] That broker has told him, Mr. Vaghei reports, that

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[46] Mr. Vaghei's first affidavit was submitted to the Tribunal in February 1991 and, according to his own testimony, he returned to Iran in April 1992 without, evidently, any "fear of reprisal".

in 1992, the entire property was worth more than 100 million Toomans. In 1992, adds Mr. Vaghei, "the official rate of exchange for Toomans is seven Toomans for one U.S. dollar and the black market exchange is about 100-140 Toomans for one U.S. dollar."

That gives the Tribunal three figures to choose from! With the official rate, the property was worth, in 1992, $14,285,714. Applying the "black market" rate of exchange, the value was $1 million or, if one happens to prefer the 140 rate of exchange, $714,285.71. So much on the quality of Mr. Vaghei's testimony.

The second is a Mr. Mansour Anvari, who seeks to enlighten the Tribunal on the value of a piece of mavat land, but, as revealed at the Hearing, his total innocence of the most elementary issues of the subject can hardly be matched: "[M]avat are the defunct or dead lands which cannot be cultivated and cannot be converted to residential areas.... If one projects that there is no future to that piece of land, it is considered mavat or dead, but if you make use of today's technology and for example dig a well in it and start irrigating, it would be different"; "[m]y understanding of bayer is that it is a piece of land that can be converted to dayer... the meaning of bayer is that no development took place on the land. If there were, it would have been called dayer". Such is the degree of the affiant's "expertise"; an affiant who nevertheless, and incredible as it may sound, is described by the majority as having "had substantial exposure to land issues."[47]

Further, it is the Claimant's assertion, as we have seen, that in Iran the value of a transacted property to be reflected in its title deed, and on the basis of which taxes are levied, is determined by the involved "broker" who, in the case of the Claimant's land, decided on a value not more than almost one tenth of the actual price of the land; and the majority readily accepts this "explanation". Mr. Anvari, who asserts that from

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[47] Award, para. 97.

1970 to 1979 he bought or sold more than seventy pieces of real property, knows nothing about this:

> Q. In your experience in buying and selling properties, were you ever aware that the prices listed in the title deed was not the actual price paid for the land?
>
> A. I have no accurate knowledge about this. In all honesty, I cannot answer that question accurately....

Further still, the majority seems to have been greatly impressed by Mr. Anvari's "plausible explanation for fluctuations in property prices around the time of the Revolution".[48] Yet a glance at Mr. Anvari's testimony at the Hearing will at once reveal that he is simply unable to take <u>any position</u> on this most pertinent issue, let alone give a plausible explanation:

> Q. And do you agree with [the Respondent's expert's] statements that the value of property in Iran dropped during 1979?
>
> A. Naturally, during the Revolution and the period of transformation, the market was inactive and after a period of two to three months, when everything returned to normal, the prices again found their natural course. So there was a stagnation.

This bewilders the Claimant's counsel who knows that there is a difference between a value "stagnated" and a value "dropped":

> Q. Did the sale prices in the property actually drop during 1979, actually go down or was there simply a lull in the activity, a quiet period where nothing was going on...?
>
> A. In my opinion and from what I have heard, the people who lived in Tehran wouldn't sell their property,... at a lower price because of the economic stagnation. There were people who wanted to leave the country... they sold their property at 10% of the normal price, but the people who wanted to stay in Iran and had no plans to leave the country, were not

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[48] Award, para. 98.

> nervous, and did not sell their properties.... I confirm that there was a stagnation at that time.

To a simple and most pertinent enquiry, a most confused answer: people who lived in Tehran did not sell their properties because there was a stagnation (a lull and not a drop in the value), but then there were people who did want to leave, and they sold their properties at 10% of the normal price (an actual drop, and not merely a lull). The transcript of the Hearing reflects that the questioning counsel, who simply wants his witness to tell the Tribunal whether there was a "lull" or "an actual drop" in the 1979 value of land in Iran, gives up, leaving it to the majority to find all this "particularly persuasive". This is indeed a very odd complement paid to the testimony of an "expert" witness who, on the one hand, agrees with the Respondent's submission that the value of land in Iran "dropped during 1979", and, on the other hand, confirms that there was merely "a stagnation at that time".

As quoted earlier, Mr. Anvari once implies a decrease of 10% in the value of land in Tehran for a period of "two to three months" after the victory of the Revolution. His testimony on that is directly contradicted by, among others, expert witnesses presented by the claimants in other cases before the Tribunal, who have testified that the figure was 30%, and lasted much longer. Here is the testimony, as an example, of a Mr. Vahman, presented by the Claimant in Karubian as an expert valuer of land in Tehran. Mr. Vahman says that he has "appraised over eight thousand (8,000) properties in Iran",[49] and that he has "direct, solid and personal" knowledge of the land market in Tehran at the relevant time:[50]

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[49] Karubian Case, supra note 5, Hearing Transcript at 16.

[50] "My knowledge of this condition is direct, solid and personal because I remained in Iran during and almost one year after the Revolution happened in Iran and because of the nature of my profession, which forced me to carefully and closely watch the real estate market before, during and after Revolution." Id., at 17.

> The values I have assigned are what I believe to be fair and reasonable market value for these properties in the summer of 1979. At the time the real estate market in Iran was suffering from the effect of the Islamic Revolution. I estimate in general that the market was slow and values for real estate in the summer of 1979 were some thirty per cent (30%) below the value of a year and a half earlier in late 1977 or early '78.[51]

It should be repeated that Mr. Vahman is there offering his views on the value of pieces of land situated in the Tehran's district of Shemiran, where the land in the present Case is situated. As to how long this reduced value lasted:

> I believe the low point was 1980. The lowest point was 1980, not 1979, because 1980 the situation was somehow... some people, they didn't adjust themselves with the regime and they wanted to leave Iran and sell property. They offered lots of property in the market.

Indeed, there is before this very Chamber the evidence submitted in the Elghanayan Cases.[52] There, a report in the daily Ettela'at speaks of the price of land in Tehran having decreased in August 1978 up to 50% of its earlier price. Another report in the same daily states that "although in some cases the value of land has dropped by 50%, no customer for it can be found".

A report in the daily Keyhan, again submitted in the Elghanayan Cases, speaks in June 1979 --the time most relevant to our present enquiry-- of a decrease in the value of houses and apartments of up to 50%, and of there being still no willing buyers. Finally, a three-volume valuation report submitted in those Cases contains a host of evidence, including the statistics published at the time by the Central Bank of Iran. It provides

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[51] And further: "But again, the market to my belief was about twenty-five to thirty, thirty-five per cent (25-30, 35%) below one and a half year earlier." Id., at 19, 20.

[52] Cases Nos. 800-804 (Dora Sholeh Elghanayan, et al. and Islamic Republic of Iran).

the Chamber with details of the economic conditions then prevailing in Iran, and with the reasons for the sharp decrease in the value of real property throughout 1979.

These contemporaneous pieces of evidence show that the premises on which Mr. Anvari relies for the valuation of the Claimant's land are all faulty and unreliable; and so must be the value which he, in his unexplained and unsubstantiated testimony, puts on the land.[53]

In contrast with the Claimant's evidence on the value of his land, the Respondent has provided the Chamber with the detailed testimony of a well-qualified expert, a Mr. Kamal Majedi Ardakani. He has personally visited the property and, in his valuation, refers to two very important facts ignored by the Claimant's witnesses: that in 1979 there was, due to the Revolutionary events, a sharp decline in the real estate market in Iran, and that the Claimant's land was outside the then legal boundaries of the city of Tehran.[54] Based on these and other explained factors, he comes to the much more realistic figure of Rials 3000 to 3500 (roughly $42 to $50) per square meter; a figure which is rather in line with the valuation of similar properties by other Claimants and their expert witnesses before this Tribunal.

The Respondent's evidence, however, is lightly rejected by the majority. First, Mr. Majedi is subjected to a treatment quite different from that extended to the Claimant's witnesses. His credibility is questioned by the majority on the ground that he

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[53] As shown earlier, the majority readily searches for and invokes newspaper reports filed in other Cases in order to establish the asserted intention of the Respondent Government in its land reforms. Regrettably, however, the majority refuses to note that those very reports directly belie the testimonies of the Claimant's witnesses on the then value of land in Tehran.

[54] Which meant of course that the municipality would not be required to provide water, electricity, communication, etc., for the area.

is not a "broker" but an expert assessor; and that he has for thirty years appraised properties not for tax purposes but for the Bureau of Registration of Documents and Title Deeds. What the relevance of these gratuitous observations is, and how these would affect the ability of the expert to determine the value of the land in question, is anybody's guess.

More regrettable is the majority's readiness to attack the expert's "candidness" because of his statement at the Hearing that the large size of a land can be "a contributing factor to the decrease in its value." The expert means, of course, that this is so in terms of the land's value per square meter. Apparently, however, even a shortcoming in translation is sufficient for the majority to seek to discredit the testimony of this reliable and knowledgeable witness.

Secondly, while the majority speaks of "deficiencies" in the "evidence proffered by both Parties", and while this must, under the basic rules on the burden of proof, be taken as a failure on the part of the Claimant to establish an essential element of his claim, the majority prefers to criticize the Respondent for not having "remedied" those deficiencies.

In justification of this, the majority refers to the Claimant's "weaker position" in collecting the relevant material. Not true at all. As the claimants in a number of cases before this Tribunal have shown, the task of offering evidence in support of an asserted value of a piece of property in Iran is not all that difficult. It was done, for instance, by the Claimant in Karubian, where, as stated before, the value of properties situated in the very district of Tehran in which the land of the present Claimant is located was at issue; and the majority has referred us to no reason why the Claimant in the present Case should have been excused from doing the same.

Having dismissed, for being "deficient", all the evidence in the record on the value of the land, the majority feels free

to offer its own "reasonable and equitable" price --a task not for the Tribunal, but for the Claimant to perform. And as to how the "reasonable and equitable" value, in some seventeen years ago, of a piece of land then situated in a suburb of Tehran can be credibly determined by a panel sitting in The Hague and with admittedly no knowledge of the subject, we are told not a word.

* * *

And so it is in the arbitrary manner described that the majority comes to place the wholly unjustifiable value of $600,000 on the Claimant's land, and to further conclude that eighty-five percent of that figure --some $510,000-- plus interest should be paid to the Claimant for the damages he assertedly suffered.

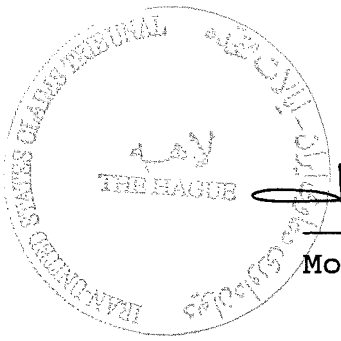
A Claimant who boasts that it was, as early as 1961, his resolve to abandon his Iranian nationality, and yet, instead of trying to sever his ties with Iran, he goes on to purchase real property in there in 1967 and 1973. A Claimant who, under the laws of his country of origin, was required to undertake to dispose of his property in Iran when he, in 1978, applied for and was granted the United States' nationality, but he declines to do so. A Claimant who, even if the majority's position is to be accepted, was required by the same laws to dispose of his property within a period of at most one year after his naturalization, but he again refuses to do so.

A Claimant whose property is officially certified in the title deed as bayer, while the only measure --the Abolition Act-- adopted by the Respondent Government within the asserted one-year period exclusively dealt with mavat land. A Claimant who, even assuming that the Abolition Act did affect his land, was only required to take a few modest steps to develop his land, but he holds out against that. A Claimant who, even assuming that the measures adopted after the relevant period affected his ownership right, had been provided by the Respondent Government with a

well-establish mechanism to defend his right, but he chooses not to avail himself of the same. A Claimant, finally, who states unequivocally that at no time during any of the relevant periods was it his intention to sell or otherwise dispose of his land; that what he wanted to do throughout was simply to leave the property to appreciate in price.

The majority nevertheless rewards him with this staggering figure for damages he assertedly suffered because of "the difficulty" which he, for a short period of time, would have faced in "finding a buyer". Damages, in other words, which he might have suffered, had it not been his decision not to sell his land! All these are, not only violative of the law of this Tribunal, but of the rules of equity and fairness, I suggest.

Dated, The Hague
25 February 1997



Mohsen Aghahosseini