



ORIGINAL DOCUMENTS IN SAFE

Case No. 266

Date of filing: 25, 9, 97

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

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

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr Aghahossien
- Date 25 Sep 1997
85 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

IN THE NAME OF GOD

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
25 SEP 1997	
تاریخ ۱۳۷۶ / ۷ / ۲	

CASE NO. 266
CHAMBER THREE
AWARD NO. 583-266-3

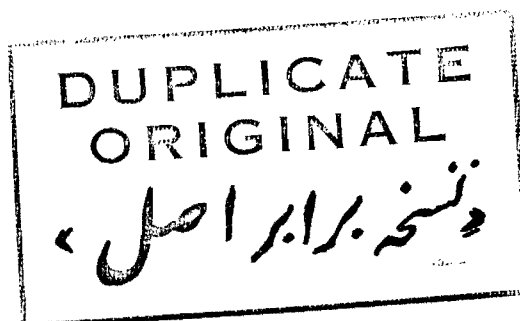
MOUSSA ARYEH,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.



DISSENTING OPINION OF MOHSEN AGHAHOSSEINI

The Award in the within Case reflects a matchless example of arbitrary adjudication. It finds the Respondent guilty of expropriating the Claimant's properties, where the evidence demands the opposite conclusion. But that is not the worst of it.

The wonder grows, by far, when the Award comes to front a principle most solidly established in international law and in the law of this Tribunal. Under that principle, which is represented in international law by a number of settled general

rules and in the law of this Tribunal by what has become known as *the important caveat*, the inequitable conduct of a claimant leads to the rejection of his claim before an international forum. The Award does admit, after a great deal of initial confusion, that the conduct of the Claimant in the present Case has been of such description, and thus subject to the said principle.

But then instead of coming to the conclusion, in line with every single case ever decided on the subject by any international forum, including our own, that the submitted claim is thereby barred --that it may not be heard on the merits proper-- the Award proposes, as a way out, a novel application for that principle of which no trace is to be found in the literature of international law. An application, further, of which the parties to this and to other similar cases before the Tribunal have had no idea. Nor could they have, for it is the product of the creative mind of the Chairman of this Chamber, Mr. Gaetano Arangio-Ruiz of Italy, first suggested in the present Award. An application, finally, which reveals, at best, an utter innocence of the very meaning and the very purpose behind the said principle and, at worst, an intention to make a mockery of it.

With the payment of the awarded sum, which well-nigh automatically follows the judgments of this Tribunal, the monetary damage to the present Respondent is plainly done. I write nevertheless to better reveal the nature of the Award, particularly its treatment of the pertinent law, and to suggest that, on the latter issue, the future awards would do well to turn from it in loathing.

PART ONE: THE ALLEGED EXPROPRIATION

It is my purpose to examine in this Part One the grounds on which the Claimant seeks to rely in support of his claim of

expropriation, and to demonstrate that the evidence adduced by him not only fails to establish the claim but, in proving the opposite, is deadly. Before that proposed examination, however, two preliminaries must be gone through.

First, the legal issue discussed in Part Two relates to the conduct of a party --here the Claimant-- and because of that it must be dealt with, as I have suggested elsewhere,¹ prior to the merits proper of a case. It is a threshold issue of admissibility, on the basis of which the trier of fact decides whether or not to proceed to hear the substance of the complaint. If that arrangement is not observed in this Dissent, it is only because the Award itself has adopted, in violation of the mandate of law and common sense, the very strange course of first examining, and pronouncing itself on, the merits of the Case before determining whether or not it is competent to hear the merits.

Second, the objective in this Part is, as just stated, to demonstrate that the evidence before the Tribunal leads to the inescapable conclusion that the Claimant's factual allegation of expropriation does not wear even the appearance of truth. If so, the question will arise as to how an opposite conclusion can be so readily advocated in the Award. The answer, I suggest, lies in that key word: the "evidence". It is the "evidence" that requires the rejection of the Claimant's assertion and, in order to see whether the Award is in the least concerned with the "evidence" before it, one of the grounds invoked by the Award in support of its conclusion may be here briefly visited. It provides a typical and sufficiently revealing example.

As will be seen presently, all the pieces of land here in dispute are un-partitioned. They were owned jointly by the

¹ See Dissenting Opinion of Mohsen Aghahosseini in Jahangir Mohtadi, et al. and The Government of the Islamic Republic of Iran, Award No. 573-271-3 (2 Dec. 1996), reprinted in ____ Iran-U.S. C.T.R. ____.

Claimant and certain other members of his family, including his cousins, whose properties have been expropriated by the Respondent government. Now, the Claimant does refer to this, but only to describe his interests in the lands and to suggest, in a passing remark, that these "common holdings were specifically targeted by the new revolutionary regime".

The Award, however, has its own idea. It first devotes a good number of its paragraphs to the task of establishing a fact on which the Parties have had no dispute; namely, the fact that the properties in question formed part of a common land holding by the Claimant and by some of his cousins whose names appear on the Respondent's expropriation lists. It then states, in black and white, that

the Claimant was a member of a prominent and wealthy Jewish family with close links to the former Shah. The Tribunal thus finds the notion that the Islamic Republic of Iran currently owns land jointly with the first cousin of those whose property it indisputably expropriated to be too improbable to require serious consideration.²

This is unequivocal enough. The emphasis on the prominence and wealth of the Claimant's family is uncalled for, but that is not the main point. It is, rather, this extremely disturbing and categorical ruling in the Award that if you are a member of a prominent and wealthy Jewish --or probably Christian, for that matter-- family in Iran, and you happen to jointly own property with a cousin of yours whose property has been expropriated by the government of Iran, this Chamber --this Majority-- will have no hesitation to conclude, without further ado, that your property has also been expropriated by that government.

² Award at para. 48, fn. 9. And again: "Given the high probability that the Respondent expropriated the land belonging to Mahindokht, Homa and Esther [all members of the Claimant's family], it is thus likely that it also expropriated the property at issue in this Case and thereby the Claimant's interest in the property." (para. 48.)

The fact that you happen to be an unknown member of that family in Iran, as the Claimant here admittedly was, does not matter. Nor does the fact that you, having lived outside Iran for some thirty odd years, have had no unacceptable political or economic activities in Iran, so as to give rise to the suspicion that these might have induced the authorities to interfere with your property. You still need no "evidence" to support the asserted expropriation of your assets, except the one that establishes your membership of the family and your joint ownership with another member whose assets have been expropriated.

And not only that. If the Respondent government should volunteer to carry the burden of proof which is by law on you to carry, and to undertake to prove that your property has not been expropriated, it will not be heard. To this Chamber --and to this Majority-- such a notion is "too improbable to require serious consideration".

This is how the Respondent government is here treated, and such is the way its actions are here judged: "Given the high probability that the Respondent expropriated the land belonging to Mahindokht... it is thus likely that it also expropriated... the Claimant's interest in the property." That being the standard to which the Respondent government is subjected, one is only left to wonder whether there is indeed any point in trying to examine the niceties of this or that piece of evidence. But it is a task which must be undertaken, I assume, if only for the sake of doing justice to the facts of the Case.

1.1. The Claimant's First Piece of Evidence

In his Statement of Claim submitted in January 1982, the Claimant asserts that his interests in some sixteen pieces of undivided land situated in the village of Vardavard in Karaj, a city northwest of Tehran, as well as in another piece of land

situated in Tehran itself, have been wrongfully expropriated by the government of Iran.

He, who must of course carry the burden of proving this assertion, explains that this was done by "a Decree of the Islamic Republic of Iran", published "[s]ometime in April or May 1979" in "Tehran newspapers". Although a copy of the Decree is not available to him, he continues, it does in substance provide that "members of certain families", including his family, could no longer own any property in Iran or transfer any such property owned by them. To the best of his knowledge, the Claimant concludes, the properties here in dispute have been "seized by local government officials" and "transferred... to third parties."

Some three years later, in March 1985, the Claimant submits a copy of the Persian text as well as the translation of

an article that appeared in the... 12 March 1980 edition of ETTELAAT, a Persian newspaper, reporting that the Islamic Republic of Iran had adopted a decree, which decree, in relevant part, constituted a full and complete expropriation of Claimant's real and personal property. This document fully supports Claimant's statements set forth in... his Statement of Claim... (emphases in original.)

A glance, however, at the Persian text of the reported news shows not only that it does not support the Claimant's assertion, but that it is deadly against it. In there, the director-general for legal affairs and public relations of Iran's Organization for the Registration of Deeds and Real Property officially announces that, based on the directives issued by the office of the State's prosecutor general, the assets of 209 persons closely associated with the former regime have been expropriated. These names, he declares, have been circulated to the offices of the notaries public through a circular of the Organization. There then follows the identities of the affected persons.

All are referred to by their family and first names and,

though fourteen of the listed individuals bear the family name "Aryeh", there is no trace of the Claimant's name, Moussa Aryeh. This is the original text of the document. In the translation of the same document submitted by the Claimant, on the other hand, there appears under number 199 the phrase "Aryeh brothers". This is concocted, for no such entry exists in the original text of the document and, that being the case, the insertion of the phrase in the translation of the document constitutes a clear act of misrepresentation, for which no explanation has been offered by the Claimant to this date.

To this filing of March 1985, however, the Claimant also attaches, without any explanation or reference, another news article, this time with no translation, from the 18 June 1979 edition of a Persian weekly tabloid, "Javanan-e-Emruz". In there, the weekly states that one of its reporters has succeeded in obtaining a copy of the list of persons whose properties have been seized or expropriated by the authorities. The list, asserts the tabloid, has been sent by Iran's Foundation for the Oppressed to Iran's Organization for the Registration of Deeds and Real Property, together with instructions that no transactions on the assets of the listed individuals should be effected by the offices of the notaries public throughout Iran.

Included in the list of persons whose properties have been seized, says a headline to the article, are fourteen members of Aryeh family. There then follows the list, on which the first fourteen, each also identified by his or her first name, are of Aryeh family name. Having identified the fourteen members mentioned in the headline, the list goes on to refer to individuals with other family names, and mentions, under item 19, one "Aryeh bardaran".

It is on this that the Claimant relies, in his later pleadings, as evidence of the expropriation of his properties by the Respondent government. He first translates "Aryeh bardaran" into "Aryeh brothers", and next argues that this is

meant to refer to the Claimant and his brothers. For a host of reasons which will now be briefly mentioned, this contention of the Claimant is utterly unfounded and must be rejected summarily.

First, the news item in the tabloid Javanan-e-Emruz does not say, contrary to the Claimant's assertion quoted earlier, that the properties of "members of certain families" have been seized; it reports the expropriation of the assets of identified individuals, including identified members of certain families.

Second, what the news item refers to, under item 19, is "Aryeh bardaran", of which the second word may be roughly translated as "lifters".³ The Persian word for "brothers", on the other hand, is "baradaran", a totally different term, both in spelling and in pronunciation. The Claimant's attempt to explain this discrepancy as a mere "typographical error by the newspaper", with which explanation the Award readily agrees, is simply unavailing.

A "typographical error by the newspaper" could have been made only if the word on the list available to the paper was in fact "baradaran" (brothers), and then mistakenly printed as "bardaran". But if that were the case, the paper would not have spoken, in the headline, of fourteen members of Aryeh family, each of which individually accounted for in the report. The very newspaper on which the Claimant relies, then, did not believe that "Aryeh bardaran" had anything to do with the members of Aryeh family. If it did, it would not have limited the number of those affected to "fourteen".

Nor was this the belief of those who prepared the list. If

³ The Tribunal has been told that the word Aryeh means "lion"; and hence the Respondent's submission that the phrase may be translated as "lion-lifters". The Award, however, finds fault with the Respondent for having "failed to provide an alternative explanation for the meaning of the disputed phrase, should it not mean 'Aryeh brothers'". It is of course a very tall order to require anyone to provide "explanation for the meaning" of family names in any culture or language.

they believed that there was any connection between "Aryeh bardaran" and Aryeh family, they would not have dealt with the family through the first fourteen items of the list, turned to individuals with other family names, and then returned to the family once more, this time under entry number 19. The asserted "typographical error" is, therefore, nothing more than a totally unacceptable theory.

Third, the word order in the phrase in question directly rejects the Claimant's suggested translation. In the Persian language --the language of the list-- the equivalent of the phrase "Aryeh brothers" is structured by placing the noun "baradaran" before the modifier "Aryeh", with an added vowel "e" at the end of the noun: hence, "baradaran-e-Aryeh", and not "Aryeh baradaran". This is a most basic rule of the Persian grammar, from which there can be no arbitrary deviation.⁴ The Claimant concedes, as he must, that his contended structure of the phrase is "unusual", but the Award has no qualms about dismissing this vital point as yet another "minor typographical error by the newspaper".

Fourth, the very assertion that the authorities in Iran would seek to expropriate the assets of certain individuals not by identifying them through their names but through such general description as "brothers" must be treated with great caution. True, as the Award correctly notes, a very few expropriation orders of the latter type were exceptionally issued after the Revolution. But these, as the Award conveniently chooses not to note, related to groups of brothers, prominent in business or industry, who jointly worked under their family names followed by the modifier brothers. These were "brothers", in other words, who could not have been mistaken for others, nor others for them, if so described in an expropriation order.

⁴ The Award itself refers, for other purposes, to three entries on another list, in each of which this rule is duly observed. Award at para. 35.

Where this is not the case --where persons intended to be affected are not exclusively known as such-- it would make no sense for the pertinent authorities to employ a general and imprecise description most likely to create confusion and uncertainty for every one concerned, including the enforcement agencies. The question is, then, whether there were at the relevant time individuals who were exclusively --or at least better-- known as "Aryeh brothers" in Iran.

The record before the Tribunal readily establishes that there were none. It shows, for one, that the Claimant's assertion at the Hearing that "the name Aryeh is unique", or that "there was only one Aryeh family in Iran", is a misrepresentation. Indeed, the evidence adduced by the Respondent reveals that, only in four sample cities in Iran, some one hundred and twenty eight Iranian nationals bore that family name at the time; that most of them, including some Muslims, were unrelated to the Claimant's family; and that they included many male groups who could be accurately described as "brothers".

The record shows, for another, that no male group in the Claimant's family acted under the title of, let alone being exclusively known as, "Aryeh brothers". Members of the Claimant's family, the Tribunal has been told, are all descended from one "Khakham Raphael who had three sons, Yahya Aryeh, Morad Aryeh and Ishagh Aryeh." This is one male group who could qualify for the term "brothers". But then two of them --Yahya and Ishagh-- had left Iran decades before the Revolution and had no known participation of any sort with the third in Iran, so as to lend any credibility to the assertion that they were known in Iran as "Aryeh brothers".

Next are the children of Yahya, the Claimant's father. They are eleven in number, of whom nine are males. But then again, eight of these males had left Iran for the United States in 1947, and though one of them had later returned, there is no evidence that he ever had any business association with his only remaining

brother in Iran. Morad's children are named in the seizure Order and are hence irrelevant to the present enquiry, but Ishagh's sons, some of whom apparently remained in Iran until late seventies, constitute another male group capable of being described as "Aryeh brothers". These being the facts, a decision by the authorities in Iran to issue an expropriation order against the properties of "Aryeh brothers" --a term equally applicable to groups both within and outside the Claimant's family-- would be quite illogical.

Fifth, there is before the Chamber an authenticated copy of the very list in question, through which the properties of 209 persons have been expropriated by the courts of the Islamic Revolution. It is dated 12 April 1979, and it reflects, on each of its four pages, the handwritten instructions and signature of the presiding judge, as well as the seal of the office of the prosecutor general of the Islamic Revolution of Iran. The list has been submitted to this Chamber time and again, not by the Respondent government, but by a number of American claimants. Indeed, it was offered to this Chamber on 24 June 1988 by the United States government itself. This was in the Shinto case⁵ where, significantly, the present issue of whether or not the list contained the asserted phrase "Aryeh brothers" was not in dispute. The list identifies fourteen individuals with the family name Aryeh, and does not contain the asserted phrase.

Finally, the Tribunal has before it, as noted before, the text of the press announcement in the daily Ettelaat. Unlike the tabloid Javanan-e-Emruz, this is a rather reliable, perhaps the leading, daily in Iran. More importantly, while the report in Javanan-e-Emruz speaks, on 18 June 1979, of one of its reporters having obtained access to the list received by Iran's Organization for the Registration of Deeds and Real Property, the article in Ettelaat reflects, on 12 March 1980, the officially

⁵ Hidetomo Shinto and The Islamic Republic of Iran, Award No. 399-10273-3, para. 27 (31 Oct. 1988), reprinted in 19 Iran-U.S. C.T.R. 321, 327.

released text of the very list received, and in turn circulated to the offices of the notaries public, by the said Organization.

It must be emphasized that it is that Organization which supervises, through the offices of the notaries public, the registration as well as the recording of any subsequent changes in the legal status of real properties in Iran and hence, any decision by the competent authorities affecting the status of any real property in Iran must be effected exclusively through that Organization. It is, therefore, exclusively through that Organization that the offices of the notaries public in Iran are properly informed of the names and identities of those whose properties have been taken by the competent authorities. And yet on the list presented by the Organization's director-general for legal affairs --the list which he says has been circulated to the offices of the notaries public throughout Iran-- there is no entry for "Aryeh brothers". As a subsequent and by far more definitive document, this must prevail over the article in Javanan-e-Emruz, had there been in the latter a reference to "Aryeh brothers". The document is by itself an ample proof, were there no others, that the Claimant's assertion that there existed an expropriation order against "Aryeh brothers" is without foundation.

Once again the Award's treatment of the evidence is most bewildering. The entry falsely added by the Claimant in the translation of the news item in Ettelaat is attributed to a mere "confusion" on the Claimant's part. With regard to the fact that the list as officially released makes no reference to "Aryeh brothers", the Award "does not consider this issue to be of any particular significance" because

there is no evidence that the extract from Ettela'at was intended to be a comprehensive statement of all expropriations; thus, the fact that the Claimant's name does not appear on the Ettela'at list establishes nothing more than that the Claimant was not specified

on this particular list.⁶

Now this is some argument. Over a year after the Revolution, Iran's Organization for the Registration of Deeds and Real Property convenes a press conference to disclose to the media the list of those whose assets have been expropriated "according to the directives of the office of the prosecutor general of the Islamic Revolution"; the list of those "whose names have been circulated by the Organization to the offices of the notaries public throughout Iran for appropriate action". In there, all the affected individuals with Aryeh family name are identified. The Award argues, nevertheless, that this is not intended to be comprehensive, not even with regard to those with Aryeh family name.

But why should the Organization want to release to the media an incomplete list of those who have been named in the directives of the office of the prosecutor general, and whose names have in turn been circulated by the Organization to the offices of the notaries public, remains unexplained. Why should the Organization want, indeed, to inform the press of the existence of expropriation orders against the assets of some fourteen individuals with Aryeh family name, but refrain from doing so with respect to only one such order against the assets of "Aryeh brothers", remains undivulged. Besides, what is here evidently forgotten by the Award is the fact that it is on this very list --received by the Organization and subsequently sent to the offices of the notaries public-- that the Claimant relies in asserting the existence of a seizure order against the assets of "Aryeh brothers".

Still, all these fall far short of what the Claimant must prove, namely, that his property --the property of Moussa Aryeh-- was expropriated. It will now be assumed, for the sake of argument, that the report in the weekly Javanan-e-Emruz of the

⁶ Award at para. 37.

existence of a reference on the list in question to "Aryeh bardaran" was accurate; and further, that the Persian word "bardaran" in the report was a typographical error for the word "baradaran" (brothers); and further still, that the incorrect word order in the phrase was yet another "typographical error". How does the Claimant come into this?

As mentioned earlier, it is the Claimant's assertion --or rather, it was his assertion before he replaced it with another one, to be seen shortly-- that the contended seizure order against "Aryeh brothers" was meant to cover him and his brothers. In support of this, he offers a theory, once again readily accepted by the Award.

He submits an affidavit by one of his brothers, one Raphael Aryeh, in which the affiant states that in the years before the Revolution there had remained in Iran only two groups of Aryeh family. These were "(a) Morad Aryeh and his children, in-laws and grandchildren, and (b) the Brothers Aryeh, that is the sons of Yahya Aryeh." The authorities, he says, "knew individually who the children of Morad Aryeh were and named them" in the seizure order. But they also wanted to seize the properties of "other Aryeh brothers, namely myself and my brothers, the sons of Yahya Aryeh." It was for this purpose, he testifies, that the convenient catch-all phrase "Aryeh brothers" was used in the seizure order. The testimony is not only unsupported, but directly refuted by the Claimant himself.

For one, the Tribunal has been told that of Yahya's nine sons, seven, including the Claimant, left Iran in 1947. Contrary to the affiant's representation, therefore, this group did not remain in Iran. More importantly, the representation is belied, on the vital issue of who were meant by "Aryeh brothers", by the Claimant's other submissions to the Tribunal. While the witness --the Claimant's brother-- asserts that the phrase was intended to refer to "myself and my brothers, the sons of Yahya Aryeh", the Claimant in his rebuttal memorial submitted in 1995 contends

that "the listing of the 'Aryeh baradaran'... was a convenient way to cover all the properties of the rest of Aryeh family, that is the brothers of Morad Aryeh and their sons."⁷

This scenario of the Claimant is, of course, less dubitable. As stated before, the evidence submitted by the Respondent shows that there were in Iran many Aryeh families unrelated to the Claimant's family, and that within those families there were male groups who could be accurately described as "Aryeh brothers". It may now be assumed, nevertheless, that the asserted reference was, not to any male group in those families, but to certain brothers within the Claimant's family. A vital question still remains for determination, namely, which of the male groups in the family was intended by the phrase? The answer must surely be, the group, if any, better suited for the description. And this, of course, could only be the three brothers in the first generation, namely, Yahya, Morad and Ishagh --or, as described by the Claimant, "the brothers of Morad Aryeh".

This clear admission by the Claimant and by one of his brothers must result, at once, in the rejection of the Claimant's claim, in so far as his first piece of evidence is concerned. Accepting, arguendo, that whatever he has said in this respect is true, the overall conclusion would simply be this --and nothing else-- that there existed a seizure order against the assets of "Aryeh brothers", which order, as the Claimant unequivocally concedes, was intended to cover the assets of the Claimant's father and uncles: the assets of "the brothers of Morad Aryeh...."

True, the Claimant, realizing that this would then leave him out of the picture, goes on to assert that "Aryeh brothers" also covered him and his brothers: "Aryeh baradaran... was a

⁷ And in this he is supported by another brother of his, one Gabriel Aryeh, who says in his affidavit that "my father's and brothers' interests are listed under no. 19 as the 'Aryeh brothers'". (emphasis added.)

convenient way to cover... brothers of Morad Aryeh and their sons." But for this grotesque interpretation of the phrase he does not even attempt to offer any justification. There is none. There is simply no imaginable ground on the basis of which the Persian word for "brothers" can be construed to mean "brothers and their sons".

The Award looks the other way. It is not disturbed by the Claimant's clear and significant admission that "Aryeh brothers" did at any rate cover his father and uncles. This does not lead the Award to ask itself the pertinent question that, if so, how can the phrase be extended to cover yet another male group in the family, the Claimant and his brothers? Instead of troubling itself by any of these, the Award offers its own scenario:

While the evidence on this point is not conclusive, the Tribunal finds it credible that the phrase would have been intended to apply to those Aryeh brothers who were known to be living outside Iran, but whose names were not necessarily known to the authorities at that time.⁸

What is to be said about this? The Claimant says that there existed a seizure order against the assets of "Aryeh brothers". That phrase, he says, referred to his father, his uncles, himself and his brothers. He must fail because the word "brothers" cannot possibly cover two male groups at the same time. The Award, however, finds itself in a better position to determine what "Aryeh brothers" meant in Iran: any of the Aryeh brothers who, just like the Claimant, was "known to be living outside Iran", but whose name was not "necessarily known to the authorities". If only this had not escaped the Claimant's mind!

1.2. The Claimant's Second Piece of Evidence

Some thirteen years into the proceedings --on 16 March

⁸ Award at para. 34.

1995-- the Claimant sought to support his position by another piece of evidence; a document first submitted by the Respondent in certain other cases before the Tribunal. It is a two-page extract from a consolidated list of decrees issued by the courts of the Islamic Revolution. The document, referred to in the Award as "the List of Decrees", is prepared by the Centre for Statistics and Information of Iran's Foundation for the Oppressed.

All affected individuals with "Aryeh" family name are identified in there by their first names, from entry No. 51 to entry No. 67. There is, however, one additional entry --entry No. 50-- which, having referred to "Aryeh" in the column for surnames, is blank in the next column, allotted to first names. This, argues the Claimant, reveals that there existed a "blanket seizure order" against "the entire Aryeh family". There is not a shadow of foundation for this.

It must be emphasized, primarily, that entry No. 50 says nothing about Aryeh "family", but "Aryeh", and nothing else. As such, the document is by itself a strong proof that the original decree, if any, reflected on the list through this entry could not have referred to Aryeh "family". And this for an obvious reason: if that word or any other modifier to the same purport had been used in the asserted decree, it would have been duly reflected in the extract. Thus, what the Claimant's document purports to establish, on the face of it, is that a court in Iran, or any other competent authority, issued a decree or seizure order against the assets of "Aryeh", with no further particulars of whatever sort.

The absurdity of this will not, of course, be overlooked. But let it be assumed that notwithstanding the contrary in the extract, the word "Aryeh" was in fact somehow qualified in the order mentioned under entry No. 50. The assumed qualifier could not have been the one suggested by the Claimant and accepted by the Award: "family".

It must be first noted that this second submission by the Claimant is directly refuted by his earlier submission, namely, that there existed a seizure order against "Aryeh brothers". The reason is obvious. Whether there existed one single seizure order, as the Claimant maintained for long during the present proceeding, or more than one, as he sought to argue on the basis of the extract in question, the asserted appearance of the phrase "Aryeh family" as well as the phrase "Aryeh brothers" in the assumed order or orders cannot be reconciled. This must be briefly explained.

For long during the present proceeding, the Tribunal was told that the Respondent's objective had been "to sweep up and gather the assets and properties of the entire Aryeh family". To achieve that, all the known members of the family were individually named in the seizure order. This left the unidentified members. The Respondent "then used a convenient catch-all phrase 'Brothers Aryeh' to cover the other members of Aryeh family...."

If so, where is the place in the asserted seizure order for any reference to the seizing of the assets of the Aryeh "family"? Assuming, on the other hand, that there existed more than one seizure orders, it would have likewise made no sense for a government which seeks to attain its objective by issuing an order against Aryeh "brothers" to issue yet another seizure order, either before or after, against Aryeh "family", or "Aryeh" blank. In short, one who asserts, as the Claimant does, that the method used by the Respondent to "sweep up and gather" the assets of all the remaining unnamed members of the entire family was the issuing of an expropriation order against Aryeh "brothers" may not be heard, not by any reasonable mind, to say that the Respondent sought to achieve its aim by issuing a seizure order against Aryeh "family", or Aryeh "blank".

The Award, however, is not prepared to see any conflict in these. Without a word of explanation, it simply states:

Finally, the Tribunal notes that although the Claimant's first piece of evidence, the article from Javanan-e-Emruz, refers to "Aryeh brothers" and his second piece of evidence... refers simply to "Aryeh," this difference in no way undermines the Tribunal's conclusion that both pieces of evidence support a finding that the Respondent expropriated the Claimant's property.⁹

In other words, the assets of the unnamed members of the family were seized through an order against Aryeh "brothers". This is the purport of the Claimant's first piece of evidence. His second, and the only other, piece of evidence reveals, on the other hand, that this was not the case, that the word "brothers" did not appear in the asserted order; for otherwise it would have been reflected in the extract. It further reveals, as contended, that the assets of the family were expropriated through a seizure order against the "family". And yet the two documents do not, in the Award's eye, contradict each other. On the contrary, they both "support a finding that the Respondent expropriated the Claimant's property"!

There is, indeed, very little that can, or should, be said about this impeccable reasoning. Except, perhaps, to ask whether the Award, having here come to the conclusion that there was a seizure order against the assets of Aryeh "family", recalls its earlier efforts to interpret the phrase "Aryeh brothers" in the asserted order. Whether it still maintains its conclusion in there that the reason why the phrase "Aryeh brothers" was used in the seizure order was the Respondent's intention to cover the assets of those members of the family "known to be living outside Iran, but whose names were not necessarily known to the authorities". Surely these members had already been adequately covered by the asserted seizure order against the "family"!

Second, the very assertion that an expropriation order could have been issued not against identified individuals, or identified individuals and their relatives of the first degree,

⁹ Award at para. 44.

but against a "family" as a whole, is absurd. And this for the reasons already noted with regard to the contended order against "Aryeh brothers". Those reasons are indeed applicable here with much greater force. An expropriation order against "Aryeh", or against "Aryeh family", would not only be unjudicial but quite impossible to enforce. No wonder that, as the records in other cases before the Tribunal clearly indicate, a wide-ranging order of this nature has never been issued by any authority in Iran throughout the post-Revolution period, not even against those families who were most closely associated with the former regime.¹⁰

In suggesting that Aryeh family was made a singular exception to this, the Claimant relies heavily on his misrepresentation that his family was the only Aryeh family in Iran; that his family was "unique". This has now been disproved, with the evidence before the Tribunal showing that multitude of families in Iran, including some Muslim families, bear the same family name. Would the authorities who issued the asserted order not have thought of the fact that many individuals not intended by the order would be affected by it, if the order was so generally worded?

The Award is ready, as ever, to offer a helping hand:

Even if there were other branches of Aryeh family in Iran, or other completely unrelated Aryehs, given the prominence of the Claimant's branch of the family, it is highly likely that this branch was the intended

¹⁰ In some cases seizure orders were issued by competent organs of the Respondent government against named persons and their "relatives of the first degree". But this happened in cases where the assets which were judged to have been illegally acquired were, pursuant to a commonly followed device, held not only in the names of the convicted persons, but also in the names of their wives and children. Such orders, seeking the expropriation of the assets owned, not merely in form but in fact, by the affected persons have therefore nothing to do with the expropriation of the assets of all the members of an extended family.

target of the expropriation decree.¹¹

In other words, from among many Aryeh families, "completely unrelated" to each other and scattered throughout Iran, only the "prominent" Aryeh family was the target. The asserted expropriation decree, nevertheless, ordered the seizing of the assets of "Aryeh family" with no further particulars, leaving it to the others to determine who are and who are not members of the intended family!

Still, what about the fact that in no other instance, and in relation to no other family, however "prominent" and however close to the former regime, has this asserted measure of seizing the assets of a "family" as a whole been ever adopted? It is a drastic measure, after all, under which the assets not only of the central and main figures in a family, but those of its very distant and obscure members would be affected; members who may have had nothing to do with the political or economic activities of the central figures.

The Award, once again:

While this might not have been the usual practice of the revolutionary authorities, in light of the identity of the family in question and in light of the noted inability of the Respondent to rebut convincingly the Claimants' position, this is by far the most plausible interpretation.¹²

The Award's reference to the Respondent's inability to "rebut convincingly the Claimant's position" need not be dealt with in any detail. It is the result not only of a most unjust view taken by the Award of a wealth of solid evidence offered in this respect by the Respondent, but of a flat disregard for a basic rule of law under which the respondent is not required to "convincingly rebut" the claimant's "position" until such time

¹¹ Award at para. 44.

¹² Id.

as that "position" is established by at least a prima facie standard of proof. He is not called upon to refute a "position" which, as in here, is not backed by a particle of evidence. He is under no duty to contradict a claim where, as in here, the claimant's two invoked documents directly contradict each other.

That leaves us with the "identity" of the family. What was this "identity" which, in the Award's view, separated this family from all others in Iran? Interestingly, the Claimant has tried hard in all his pleadings to establish that the treatment to which his family was subjected was precisely the same as that received by another family in Iran, the Elghanayan family¹³. The action of the authorities against each of these two families which, according to the Claimant, were "the two most prominent Jewish families" in Iran, amounted to a "bill of attainder", he has argued.

And yet a glance at the seizure orders against the affected members of the Elghanayan family shows, and the Claimant perforce admits, that these were made either against a fully identified individual, or against a fully identified individual and his relatives of the first degree. The assets of this allegedly "most prominent Jewish family", too, was therefore not taken with an expropriation order against the "family" as a whole. For the Award, however, the "identity" of the Claimant's family -- whatever that means-- remains an *open sesame*; a magical device to bring about the Award's desired end against all odds.

Third, the contended seizure order against "Aryeh" or "Aryeh family" would have suffered from yet another vagueness, directly hampering its enforcement. If it was to cover all those with "Aryeh" family name, then any member who might have acquired other family names --by marriage, for instance-- would have been

¹³ Whose claims before this Chamber have been amicably settled by the Parties. See Dora Sholeh Elghanayan, et al. and The Islamic Republic of Iran, Award on Agreed Terms No. 576-800/801/802/803/804-3 (10 Dec. 1996), reprinted in ____ Iran-U.S. C.T.R. ____.

left out; a result surely not intended when the assets of all the members of the family are the target. Assuming, on the other hand, that it was to cover all the members irrespective of their family names, many members not carrying the family name --or not being known under the family name-- could not have been easily identified. How, for instance, could a cousin of the third degree, married and acquired a different family name, be identified as a member of "Aryeh family"?

Fourth, the assertion that there existed an expropriation order against "Aryeh", or "Aryeh family", is directly belied by the fact that some fourteen members of the family were specifically named in the seizure order. If the intention was to deprive the whole of this family of all their possessions, and this was done by an order against the family as a whole, there would have remained no room for the naming of these members in the seizure order.

This is particularly so in light of the fact that the order reflected through item 50 of the extract --the one which the Claimant asserts to have been issued against his family as a whole-- is dated 14 May 1979, while the order against the named members bears the date of 22 May 1979. It is, then, the Claimant's interpretation of its second piece of evidence that the relevant organ of the Respondent government first decreed the expropriation of the assets of all the members of "Aryeh family" and then, some seven days later, issued another order for the forfeiture of the assets of only some of the members of that family. Hardly a credible scenario, except, of course, to the Award.

Fifth, the contention that the order referred to under entry No. 50 of the extract relates to the family as a whole is contradicted by the Claimant's and his witnesses' repeatedly made statement that those members of the family whose identities were known to the Respondent were first listed in the order, and then, "[w]hen it came to assuring the rest of the family was covered

as well, the order provided the catch-all listing 'Aryeh baradaran' 'or Aryeh brothers'." If so, the order reflected through entry No. 50, whose date precedes that of the order against the named members by seven days, could not possibly have been an order against the family as a whole.

Sixth, the reading of the entry at issue as one against "Aryeh family" is likewise contradicted by the Claimant's first document; the report in the weekly Javanan-e-Emruz. That document, readily invoked by the Award as a "contemporaneous evidence" in support of the Claimant's contention, bears the date of 18 June 1979. And yet it does not report a seizure order against "Aryeh family", supposedly issued on 14 May 1979. It speaks, on the contrary, of a seizure order against fourteen members of the family, all individually named, plus an entry for "Aryeh brothers", if the Claimant is to be believed. That document, the Award still maintains, supports the Claimant's contention that an order against the assets of the entire family was issued on 14 May 1979!

Seventh, the assertion that there existed a blanket seizure order against the family as a whole is defeated by another document submitted by the Claimant himself: the news report in Ettelaat which, it will be recalled, contains the list disclosed to the press by Iran's Organization for the Registration of Deeds and Real Property. It shows, again conclusively, that as late as 12 March 1980, the date on which the press conference was held, no seizure order against "Aryeh family" existed. What did exist was a seizure order against certain individuals with Aryeh family name.

Finally, the Claimant's contended interpretation of the blank space in entry No. 50 is negated by the very text of the list of 209 persons whose properties have been expropriated. The list, as stated earlier, is dated 12 April 1979. While it does refer to all the individuals with Aryeh family name whose assets have been taken, it makes no reference to an order against that

"family".

Yet the Award disregards all this. It disregards, in particular, the fact that the two documents on which the Claimant relies are directly contradicted by a host of evidence before the Tribunal, including the evidence submitted by the Claimant himself. Indeed, it disregards the fact that those two documents, and the two scenarios which the Claimant seeks to build upon them, are themselves irreconcilable. The submission that the assets of the entire family was taken by a seizure order against "Aryeh" or "Aryeh family" cannot be reconciled with the submission that this was done by an order in which the known members of the family were first mentioned and then, for the rest, the phrase "Aryeh brothers" was used. Nor can these be reconciled with the contention that a blanket seizure order against the properties of the entire family was issued seven days before some fourteen members of the family were individually identified in a seizure order. If, as the Claimant argues, the process of seizing the assets of the family was completed by the use of the phrase "Aryeh brothers", there could have remained no room for the issuance of yet another order against the "family".

It is in defiance of these facts and, as demonstrated before, by a curious readiness to accept without hesitation every fanciful contention of the Claimant that the Award comes to conclude that a non-existent seizure order against one "Aryeh bardaran" affected the properties of the Claimant, Moussa Aryeh. It is on those bases that the conclusion is made in the Award that a reference to one unidentified "Aryeh" in a consolidated list of decrees establishes the existence of an expropriation order against the assets of all the members of the Claimant's extended family; an extravagant and unenforceable measure which, as thousands of claims filed with and considered by this Tribunal sufficiently demonstrate, has not been adopted with respect to any other family in Iran, whatever the perceived faults of some of its members.

But perhaps all these are beside the point. Perhaps the determinative factor here has not been the pertinent evidence before the Tribunal, but that very outlandish argument so candidly made by the Award:

The Tribunal... finds the notion that the Islamic Republic of Iran currently owns land jointly with the first cousin of those whose property it indisputably expropriated to be too improbable to require serious consideration.¹⁴

There is, of course, no denial that the Claimant owned the lands in dispute jointly with some of his cousins who were members of Aryeh family and whose assets have been ordered seized. To the Award, therefore, the Claimant needed no more than to establish that this was so. Any notion that his properties have not been interfered with would then have been regarded by the Award as "too improbable to require serious consideration".

PART TWO: THE "IMPORTANT CAVEAT"

Attempts were made, in Part One, to show how two irrelevant, unreliable, and contradictory documents were seized on by the Award to conclude that the assets of every and all members of the Claimant's extended family have been expropriated by the Respondent government; an extravagant and impractical measure which, as the records before the Tribunal indicate, has never been attempted by the Respondent government against any other family in Iran.

Still, the mischief so done is dwarfed by the Award's outright disregard for a set of pertinent rules of law, most firmly established in the precedents of this Tribunal and in international law. It is to this latter point that the present Dissent must now turn. To avoid the confusions with which the Award is beset, the law and its application to the present Case

¹⁴ Award at para. 48, fn. 9.

must first be explained.

2.1. The Law of This Tribunal

The issue of whether a dual Iran-United States national may sue before this Tribunal one of the States of which he is a national, has been with us here nearly as from the date of the Tribunal's inception. On 6 April 1984, a full panel of the Tribunal gave its verdict, in a Decision issued in Case No. A18.¹⁵ It was there stated that since the Algerian Declarations --the Tribunal's constituent instruments-- were silent on the point, the answer had to be found in the general rules of international law. And on that basis

the Tribunal holds that it 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.¹⁶

This, however, was subject to a proviso:

To this conclusion the Tribunal adds 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.¹⁷

¹⁵ Islamic Republic of Iran and United States of America, Decision No. DEC 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251.

¹⁶ Id. at 265.

¹⁷ Id. at 265-66. The ruling is in line, save certain minor differences, with an earlier decision by Chamber Two of the Tribunal in Nasser Esphahanian and Bank Tejarat, Award No. 31-157-2, at 15 (29 March 1983), reprinted in 2 Iran-U.S. C.T.R. 157, 166:

There is precedent for denying jurisdiction on equitable grounds in cases of fraudulent use of nationality. Such a case might occur where an

In a series of cases which have since been decided by the three Chambers of the Tribunal, the meaning and the scope of this *important caveat* have been clearly and repeatedly defined. Here is one example in which the Tribunal, having first found that the dominant nationality of the claimants during the relevant period was that of the United States, turned to the *important caveat* and stated that:

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 further proceedings examine all circumstances of this Case also in light 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 or whether, in any other way, their conduct was such as to justify refusal of an award in their favor....¹⁸

individual disguises his dominant or effective nationality in order to obtain benefits with his secondary nationality not otherwise available to him. See Flegenheimer Case (United States v. Italy), 14 R.I.A.A. 327, 378 (1958) (*dicta*).

¹⁸ Edgar Protiva, et al. and The 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. See, to the same effect, Faith Lita Khosrowshahi, et al. and The 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. These were Interlocutory Awards. In the Final Awards in both Cases, this reference here to "in any other way" was said to include cases in which a claimant "conceals", "misrepresents", or "otherwise abuses" his nationality to secure benefits not otherwise available to him. Faith Lita Khosrowshahi, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 558-178-2, paras. 33, 73 (30 June 1994), reprinted in ___ Iran-U.S. C.T.R. ___; Edgar Protiva, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 566-316-2, para. 89 (14 July 1995), reprinted in ___ Iran-U.S. C.T.R. ___.

Yet another example is the Schott case,¹⁹ decided shortly thereafter. In there, one of the submitted claims related to certain shares in a bank in Iran. As the evidence showed, these shares were, prior to the bank's nationalization, owned by the Claimant's daughter, one Barbara Schott Mostofi, who was a dual Iran-United States' national. It was found that at the time the shares were purchased by Mrs. Mostofi, foreign nationals were not entitled to acquire any shareholding interest in the bank, since the bank's legal limit for foreign ownership had been already exhausted. As a result, "the only way in which Mostofi could acquire shares was by making use of her Iranian nationality". The claim was then dismissed because:

It is ... clear that irrespective of her dominant and effective nationality Mostofi relied on her Iranian nationality when she acquired the shares.... The Tribunal therefore finds that Schott is estopped from arguing that Mostofi's dominant and effective nationality was American for the purpose of the Tribunal's jurisdiction over this portion of the claim.²⁰

Of particular relevance is the Saghi case,²¹ in which the Tribunal found the occasion to make a thorough review of all the earlier pronouncements on the issue. These led the Tribunal to conclude:

Combining the discussions of the caveat in the A18 concurring opinions and in Chamber Two's interlocutory awards (as well as the anticipatory dicta in Esphahanian), the following conclusions can be drawn regarding the application of the caveat.... 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

¹⁹ Robert R. Schott and The Islamic Republic of Iran, et al., Award No. 474-268-1 (14 Mar. 1990), reprinted in 24 Iran U.S. C.T.R. 203.

²⁰ Id. paras. 43-44, at 218.

²¹ James M. Saghi, Michael R. Saghi, and Allan J. Saghi and The Islamic Republic of Iran, Award No. 544-298-2 (22 Jan. 1993), reprinted in ___ Iran-U.S. C.T.R. ___.

solely of Iran. However, as indicated by Chamber Two when it referred to other conduct that could justify refusal of an award in their favor... the equitable principle expressed by this rule can, in principle, have a broader application. Even when a dual national's claim relates to benefits not limited by law to Iranian nationals, the Tribunal may still apply the caveat when the evidence compels the conclusion that the dual national has abused his dual nationality in such a way that he should not be allowed to recover on his claim.²²

In there, one of the Claimants (Allan Saghi) had earlier renounced his Iranian nationality, but had subsequently applied for and acquired the said nationality in order to purchase certain shares which, as he believed, were not under Iranian law available to non-Iranian nationals. The Tribunal held that, whether or not the right to own the shares in question was in fact reserved for the sole Iranian nationals --whether or not Allan Saghi was correct in his belief-- he could not be compensated for the loss of those shares because his conduct in combination with his motive, amounted to an "abuse" of his dual nationality. The claim based on the shares so acquired was thus dismissed.

To the same effect is the recently decided case of Karubian,²³ in which the Claimant, originally a sole Iranian national, had purchased real estate in Iran after his acquisition of United States' nationality. The Tribunal found, unanimously, that save certain exceptions irrelevant to the case before it, the right to purchase real property in Iran was reserved, under Iranian law, for Iranian nationals only.²⁴ And then:

²² Id. at para. 54.

²³ Rouhollah Karubian and The Government of the Islamic Republic of Iran, Award No. 569-419-2 (6 Mar. 1996), reprinted in ____ Iran-U.S. C.T.R. ____.

²⁴ A finding supported by dicta in a number of earlier cases. See, e.g., Leila Danesh Arfa Mahmoud and The Islamic Republic of Iran, Award No. 204-237-2 (27 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 350, 354; Protiva, supra note 18, at paras. 82-83.

In seeking compensation for the alleged expropriation of his properties or for any recoverable damage sustained by other measures which affected his property rights, the Claimant, a dual national with dominant and effective United States nationality, brings his claims before the Tribunal as a United States national. The Claimant's use of his other nationality, *i.e.*, his purchase of real property as an Iranian national, is relevant to the merits of the Claims as envisaged by the A18 caveat.

As the Tribunal has concluded, under Iranian law, the right to acquire real property in Iran by contract, apart from certain limited exceptions, is a benefit reserved for Iranian nationals.... The Tribunal must therefore assume that the Claimant purchased all the properties that are the subjects of these Claims in his capacity as an Iranian national after he acquired United States nationality. He now claims in respect of those properties as a national of the United States. If the Tribunal were to allow him to recover against the Respondent in these circumstances, it would be permitting an abuse of right. Consequently, the A18 caveat must bar the Claimant's recovery....²⁵

All these may be summarized. Where the claimant is a dual national, he is required to satisfy two primary tests, namely, the test of dominant nationality, and the test reflected in the *important caveat*. Under the second one, with which alone the present discussion is concerned, enquiries will be made to see whether the claimant's conduct with regard to the asserted right has been such as to justify, on equitable grounds, refusal of an award in his favour.

Certain types of such conduct have been clearly identified in the Tribunal's precedents. One is where the right at issue is "acquired", however innocently, through a nationality other than the one now invoked before the Tribunal.²⁶ Another is where the claimant "makes use of" or "relies on" his non-dominant nationality in order to secure benefits not otherwise available to him. Of the same nature is the conduct of a claimant who, for similar purposes, "misrepresents", "conceals", or "disguises",

²⁵ Karubian, supra note 23, at paras. 160-61.

²⁶ Such as where the right in question is secured through inheritance, or prior to the acquisition of a second nationality.

his dominant nationality, or in general makes "fraudulent" use of his nationality.

Yet another is the conduct of a person who voluntarily seeks to revert to his Iranian nationality, previously renounced by him, so as to obtain benefits which he believes, at the time, not to have been available to non-Iranian nationals. The censurable conduct here is the very acquisition of Iranian nationality with an improper motive, irrespective of whether or not his belief turns out to have been justified. Finally, there is the case of a claimant who "unlawfully" retains --or, a fortiori, obtains-- the very right for the asserted breach of which he now seeks compensation.

These, however, are not exhaustive. As the Tribunal has made it repeatedly clear, the application of the rule expressed through the *important caveat* is broad enough to cover the conduct of a national who has in any way abused his nationality. It is, indeed, broad enough to include any case in which the "conduct" is such "as to justify refusal of an award" in favour of the national.

2.2. International Law

The Tribunal's law on the caveat and on the scope of its application contains nothing new; nothing that did not exist under the general rules of international law. Nor could this have been otherwise, for the Award in Esphahanian --in which the caveat was first stated-- and the Decision in A18 --in which the caveat was first authoritatively affirmed-- are both emphatic that what is expressed in the caveat is a reflection of general international law. It is here adopted, say both judgments, because the Algerian Declarations are silent on the point and, that being the case, the applicable rules of international law must govern. What the Tribunal has done, in other words, is to acknowledge that, as between the Parties to the Algerian

Declarations, the relevant rules of international law have the additional force of a treaty undertaking.

Now, it is a long and firmly established principle of international law that inequitable conduct of a claimant, when it is of certain descriptions, results in the barring of his claim by an international forum, whatever the merits proper of the claim. It results in the adjudicating body refusing to allow the claimant, on the threshold of the substantive admissibility stage, to proceed with his complaint, however meritorious it may otherwise be:

In numerous instances the Department of State has declined to espouse claims against foreign governments on account of the conduct of the claimant or the nature of the activities in which he was engaged at the time the loss was incurred. The conduct of the claimant may also constitute ground for rejection of a claim by an arbitral tribunal.²⁷

This general principle, universally upheld, is reflected through a number of rules, each related to a particular type of censurable conduct, though it often happens that a given conduct attracts the application of more than one of these rules. Here is not of course the proper place for any exhaustive treatment of the said rules, or of the support they have in state practice, in the decisions of the international tribunals, or in the writings of the publicists. Instead, a few samples from the literature of international law, with particular reference to the cases of dual nationality, will be offered.

First, the "estoppel" rule:

[A] representing party is barred (estopped or precluded) --without regard to truth and accuracy-- from adopting successfully different subsequent

²⁷ G.H. Hackworth, 5 Digest of International Law 709 (1943), referring to the practice of the United States Department of State.

statements on the same issue.²⁸

Thus, in relation to the use of nationality, where one is earlier invoked, another may not be subsequently relied upon. As stated in the Lacoste case:

It appears that the Claimant was naturalized as a citizen of the United States in Texas, but that during his residence in Mexico he presented himself... to be a French subject.... He must therefore have intended either to abandon his adopted country, or, for reasons which can easily be imagined, to let it be supposed that he was a subject of France. By such conduct the umpire thinks that he forfeited his right to consideration by this commission.²⁹

Second, the rule requiring that notice of nationality be given. As held, for instance, in the Zenea case:

That notice of citizenship is necessary in order to maintain a claim from violation of rights attaching to such citizenship has been expressly held by the umpire in the cases of J.O. Wilson... and Delgado.... We are of the opinion that the claimant can not recover in respect of the killing of her husband.³⁰

Here, the claim is disallowed not only because of the claimant's conduct, but also because the respondent, having been deprived of the knowledge of a relevant fact, may not be held accountable. No state responsibility may be engaged, in other

²⁸ Muller and Cottier, Estoppel, in 7 Encyclopedia of Public International Law (Bernhardt, ed.) 78 (1984).

²⁹ J.B. Lacoste v. Mexico (U.S.-Mexican Claims Commission, 4 September 1875) (Thornton, umpire), in J.B. Moore, 3 History and Digest of International Arbitrations 2561 (1898).

³⁰ Louisa M. de Zenea v. Spain (U.S.-Spanish Mixed Commission, 26 December 1882), in J.B. Moore, 3 History and Digest of International Arbitrations 2570, 2571 (1898) (in which the claim of a widow for damages resulting from the respondent's allegedly wrongful imprisonment and execution of her husband was dismissed because of the husband's failure to give notice of his true nationality to the respondent).

words, when the respondent state has been led, by the claimant, into believing that it is not dealing with an alien. As decided, for example, in the Casanova case:

[T]he duty of a foreigner when arrested, if he desires to protect himself by his citizenship, is to give notice of it and to claim the rights he may possess by virtue of his nationality.

The Spanish authorities had every reason to believe that the Claimant was a Spaniard....

On the ground that the claimant did not give notice of his being a citizen of the United States... he is not entitled to damages, and... his memorial should be dismissed.³¹

Third, the rule against concealment of a material fact, here the claimant's nationality:

Natives of Russia and Turkey who become naturalized in the United States, often return to their native countries, concealing their American naturalization.... The Department of State holds that a naturalized American citizen of Russian [Turkish] origin who returns to his native country... concealing the fact of his naturalization in order to evade Russian [Turkish] law, thereby... relinquishes the rights... to [be] protect[ed]....³²

The rules mentioned so far have all been referred to with approval in the famous dicta in the Flegenheimer case, the very source invoked by the Esphahanian case in support of the important caveat:

In international jurisprudence one finds decisions based on the non concedit venire contra factum proprium principle which corresponds to the Anglo-Saxon institution of estoppel; it allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the

³¹ Rafael C. Casanova v. Spain (U.S.-Spanish Mixed Commission, 12 May 1882), in J.B. Moore, 3 History and Digest of International Arbitrations 2571, 2572 (1898).

³² E.M. Borchard, The Diplomatic Protection of Citizens Abroad 721 (1927).

allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred....³³

Fourth, the rule requiring a claimant to come to court with clean hands:

Numerous claims have been disallowed on the equitable maxim that a claimant must come into court with clean hands, thus barring recovery by a claimant who was himself a wrongdoer.³⁴

Finally, the rule requiring the rejection of a complaint by a person who has acquired the right at issue unlawfully, here in breach of the domestic law of his country of origin:

The claim of the individual would... be inadmissible when he has breached the domestic law of the country where he is residing or when he has carried out an activity contrary to international law.³⁵

Such are the more important general rules of international law on the subject. The sameness of these rules and the Tribunal's law expressed through the *important caveat* will have been noticed. Both are grounded on equity, both set to reject a claim when the conduct of the claimant is judged to have been inequitable and, as to what constitute inequitable conduct, both speak of misrepresentation, concealment of material facts, breach of the law, or absence of clean hands. Both speak, further, of

³³ Flegenheimer case (United States v. Italy), 14 UNRIAA 327, 378 (1958) (emphases added).

³⁴ Borchard, supra note 32, at 718, and the cases cited there.

³⁵ Louis Delbez, Les Principes Généraux du Droit International Public 379 (3rd ed., 1964). ("La demande du particulier serait donc irrecevable quand il a violé la loi interne du pays de résidence ou quand il a manifesté une activité contraire au droit international.") See also the passages quoted earlier on the inadmissibility of a claim where the domestic law has been "evaded" (supra note 32), or the claimant has himself been a "wrongdoer" (supra note 34).

any conduct covered by the "estoppel" rule, including the claimant's reliance, in securing the benefits at issue, on a nationality different from the one invoked before the international forum. Indeed, the Tribunal's law emphasizes, as noted before, that the caveat is broad enough to cover any case in which the claimant "has abused his nationality in such a way that he should not be allowed to recover".³⁶ It does, by this, make certain that not only conduct rejected by the above-mentioned rules of international law, but any conduct censured by any other rule of international law is duly covered.

2.3. The Pertinent Laws of Iran

The Claimant in the within Case was born a sole Iranian national in 1927, and remained so for some thirty eight years. In January 1966 he was granted United States' nationality. The properties at issue in the Case were all purchased by him in between June 1966 and October 1977, well after his acquisition of a second nationality. To examine his conduct in the light of what has just been explained, the applicable laws of Iran must first be briefly reviewed.

As already noted, the Tribunal in Karubian made a most thorough review of all the laws of Iran pertinent to the issue of ownership of real property by foreign nationals. This led the panel to conclude, unanimously, 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.³⁷

Since the claimant in there was able to acquire the

³⁶ Saqhi, supra note 21, at para. 54.

³⁷ Karubian, supra note 23, at para. 159.

properties at issue only as an Iranian national, his attempts now to recover on the basis of his United States' nationality could not be allowed. Those parts of his claim which had not been dismissed for other reasons were therefore dismissed, unanimously, under the rule reflected in the *important caveat*.

That extensive review of the pertinent legislation in Iran might have been necessary for the Tribunal's broad, and absolutely correct, conclusion in that case that "foreign nationals" were not entitled to acquire real property in Iran. Such a detailed review, however, was not needed there, nor is it needed here, for the determination of the much narrower point at issue in that and in the present Case. The Claimants in both cases were not ordinary "foreign nationals", but Iranian nationals who had acquired a second nationality. And the law of Iran, as will now be seen, contains provisions specifically addressing the issue of ownership of real property by this second group and, in particular, by those whose acquired nationality is that of the United States. The limited point of enquiry in the present Case, mandated by the *important caveat*, is thus whether an Iranian national who has acquired United States' nationality is entitled to purchase real property in Iran. To that enquiry, the following provisions provide a clear answer.

First, Articles 988 and 989 of the Civil Code of Iran. The former sets the conditions to be met by Iranian nationals who wish to abandon their Iranian nationality:

Article 988- Iranian nationals may not abandon their nationality except where:

- 1- They have reached the age of 25 years.
- 2- The Council of Ministers has granted them permission to abandon their nationality.
- 3- They have undertaken 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 such ownership by foreign nationals....
- 4- They have completed their military service.

Article 989, on the other hand, addresses the case of those Iranian nationals who acquire a foreign nationality in violation of the requirements specified in Article 988:

Article 989- Any Iranian national who has acquired foreign nationality after the solar year 1280 A.H. (1901-2) without observing the legal requirements, shall have his or her foreign nationality regarded as nonexistent, and shall be regarded as an Iranian subject. But at the same time his or her immovable properties will be sold under the supervision of the public prosecutor of the place, and the proceeds shall be paid to him or her after the deduction of the expenses of the sale. Furthermore, he or she shall be barred from becoming a secretary or acting secretary of the state, a member of the legislative assemblies or of the provincial, district and town councils, and from attaining any position in the government.

Next, the Regulations of 4 May 1938, made by Iran's Ministry of Justice for the offices of the notaries public, on the basis of the authority delegated to the Ministry under the Law of the Offices of the Notaries Public, dated 5 June 1937.³⁸ According to Article 42 of these Regulations, the notaries public are duty-bound, before registering real property in the name of a foreign national, to examine his residence permit and to secure permission for the intended transaction from the local registration office. And then, under Article 44:

It is prohibited to draw up and register deeds of transaction of real property by nationals of Iran who have renounced their Iranian nationality and who, according to the laws of Iran, do not have the right to purchase real property in Iran. (emphasis added.)

Finally, the Treaty of Amity, Economic Relations and Consular Rights, concluded between Iran and the United States on 15 August 1955.³⁹ Article V(1) of this states, in pertinent part:

³⁸ Article 47 of which states that the notaries public and their deputies are required to comply with the rules and regulations to be determined by the Ministry of Justice.

³⁹ Entered into force 16 June 1957, 284 U.N.T.S. 93, 8 U.S.T. 899.

Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds....

It will be seen that under the clear terms of the Treaty, while the nationals of either High Contracting Party are permitted to purchase or otherwise acquire personal property of all kinds, they are only allowed to lease, and then only for limited time and purposes, real property within the territories of the other High Contracting Party.

In these quoted laws of Iran, a point which is of direct relevance to the present enquiry, and to which reference was made earlier, will have been noted. As far as the issue of ownership of real property in Iran is concerned, the case of an Iranian national who subsequently acquires United States' nationality is governed by specific provisions not necessarily applicable to foreign nationals in general. As a national of Iran who acquires a second nationality, the former is subject to the provisions of Article 988 of the Civil Code of Iran,⁴⁰ and those of the 1938 Regulations of Iran's Ministry of Justice.⁴¹ As a national of Iran who acquires United States' nationality, and not any other nationality, his case is subject to the relevant provisions of the Treaty of Amity.⁴²

And now to the central question of whether, with these provisions in force, an Iranian national who subsequently

⁴⁰ Under which he is required to dispose of his real property in Iran within a year of abandoning his Iranian nationality "even if Iranian law permits such ownership by foreign nations".

⁴¹ Under which it is prohibited to draw up and register deeds of transaction of real property by nationals of Iran who have renounced their Iranian nationality.

⁴² Under which he is permitted to lease, but not to purchase, real property in Iran.

acquires United States' nationality is entitled to purchase real property in Iran. The answer, I suggest, is too clear to require elaboration. Under the two quoted Articles of the Civil Code, an Iranian national who wishes to abandon his Iranian nationality must, inter alia, undertake to transfer to Iranian nationals his right to any real property that he may own in Iran and, should he fail to do so, his property shall be sold under the supervision of the local public prosecutor.

That being the case, the conclusion is inescapable that a national of Iran who obtains a second nationality, with or without observing the law's requirements, is a fortiori prohibited, by the terms of these Articles, from subsequently purchasing real property in Iran. To deny this is to advocate a manifestly absurd interpretation: reductio ad absurdum. For it is nothing short of sheer absurdity to suggest that although under these Articles a person who currently owns real property in Iran is deprived, because of his action, of his right to continue with his ownership, he is nevertheless not prohibited, under the same Articles, from newly acquiring ownership of real property in Iran.

A national of Iran who has, quite legitimately, secured ownership of real property in Iran is divested of that right, by the express terms of these Articles, where he acquires a second nationality. Those terms may not, for stronger reasons, be interpreted as allowing him to re-acquire such right. They may not, under any canon of interpretation, be conceivably construed as intending to turn the local public prosecutors in Iran into real estate agents; allowing dual nationals to purchase new properties, and requiring the prosecutors to supervise the sale of the same!

It is, indeed, precisely to disallow this type of reading of a text that a universal canon of interpretation requires the rejection of any construction leading to a manifestly absurd or

unreasonable result.⁴³

And this is so, even where an absurd result would be the outcome of giving the words in the text the meaning they normally have in their context:

It is a cardinal principle of interpretation that words must be interpreted in the sense they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.⁴⁴

Here, on the other hand, the words in Articles 988 and 989 of the Civil Code would not, if interpreted in the sense they normally have in their context, lead to any absurd result. To the contrary, they manifest a clear intention on the part of the Legislature to proscribe ownership of real property by dual nationals. The absurdity in the suggestion that dual nationals can nevertheless re-acquire real property in Iran would be the result, therefore, not of giving the words in those Articles the sense they normally have, but of depriving them of that sense; of depriving those words of an a fortiori meaning. It is a double absurdity which must be doubly rejected.

That proscription is further affirmed, if further affirmation is needed, by the Regulations of the Ministry of Justice, based on, and thus having the force of, a law approved by Iran's Parliament. It is to be noted that under the pertinent laws of Iran, no transaction on a real property will be officially recognized unless it is duly recorded by a notary public. And, as it has been seen, the Regulations expressly forbid the notaries public to register any real property in the

⁴³ See H. Waldock, Law of Treaties, II Yearbook of International Law Commission 57 (1964).

⁴⁴ Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11, p. 39. See, to the same effect, Article 32 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, 23 May 1969, reprinted in 8 I.L.M. 679 (1969), entered into force 27 January 1980.

name of an Iranian national who has renounced his Iranian nationality, a person who does not, in the words of the Regulations, "have the right to purchase immovable property in Iran".

Finally, in respect of the more limited group of Iranian nationals whose acquired nationality is that of the United States, the prohibition against the acquisition of immovable property in Iran is to be further found in the Treaty of Amity. By the clear terms of the Treaty, as we have seen, nationals of the United States are limited to leasing, and thus not entitled to purchasing, any real property in Iran; and that only for "suitable periods of time" and where this is needed "for their residence or for the conduct of activities pursuant to the present Treaty".⁴⁵ Now a person who, irrespective of how he is regarded by the pertinent laws of Iran, considers himself to be a national of the United States cannot possibly entertain the belief that he is entitled to rights greater than those granted to the nationals of the United States under the Treaty; a Treaty which, constituting as it does a special law of the parties, takes precedence over any other law in the relations between Iran and the United States.

2.4. The Application of All These to the Facts in the Present Case

As noted earlier, the Claimant was born a sole Iranian national in 1927, and remained so for some thirty eight years. In 1966 he acquired his United States' nationality without, as he freely admits, observing the requirements stipulated in Article 989 of the Civil Code of Iran. The properties here in dispute were then all purchased by him after his acquisition of

⁴⁵ The negotiating history of the Treaty reveals that it was the United States which, for reasons of its own internal laws, proposed this restriction on the acquisition of real property.

a second nationality. As such, his conduct is a prime example of behaviour regarded as censurable not only by every case ever decided by this Tribunal under the important caveat, but by almost any of the rules of general international law on inequitable conduct. This must now be explained.

First, he wished to become a United States' national. In order to do that, he acknowledged, as required by the United States' law, that:

It is my intention in good faith to become a citizen of the United States and take without qualification the oath of renunciation and allegiance prescribed by the Immigration and Nationality Act....

Appearing before a United States' court, again as was required of him, he renounced, under oath, his allegiance to his country of origin, Iran. This is the oath he took:

I hereby declare, on oath, that I 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....⁴⁶

Of this, and of the fact in general that he had become a citizen of the United States, he said nothing to his country of origin. As far as Iran was concerned and aware of, he therefore continued to owe allegiance to Iran, as Iran continued to owe him the duty of protection. By his action and omission, in short, he led Iran to believe that he remained a sole Iranian national.

He did not naturally take a few modest steps which his country of birth and upbringing required of him, if he wished to acquire a different nationality. One was the making of an

⁴⁶ "Oath of renunciation and allegiance requires more than mere recitation of words; there must be genuine breaking away from old allegiance and lack of such intent, even though conscious purpose of deception may be lacking, is legal fraud." United States v. Wurzenberger 56 F. Supp. 381 (D.C. Conn. 1944).

undertaking to transfer to Iranian nationals, within a year, any real property that he owned in Iran. A failure inter alia to make that undertaking, said the law, resulted in the forced sale of the property by the State.

He did not, at the time, have any real property in Iran. But knowing, or so presumed by law at any rate, that he was not legally entitled to own any real property in Iran --that he was required under the provisions of the Civil Code to end his ownership of any real property he owned in Iran-- he began, after his naturalization, to purchase pieces of property in Iran. It was in breach of those provisions that he did so.

Each time he, or his representative, went to the office of a notary public to purchase land in Iran, he knew, or is taken by law to have known, that the intended transaction could not be legally effected. He knew, or is taken to have known, that the notary public was prohibited from registering such transaction.

Each time he, or his representative, went there he knew, or is so judged, that not only as a person who had acquired a second nationality in violation of the law of his country of origin, but additionally as a person who regarded himself as a United States' national --as a person who had under oath declared that the only country to which he owed fidelity and allegiance was the United States-- he was not, under the relevant terms of the Treaty of Amity, entitled to purchase real property in Iran. He knew, or is so held, that as a United States' national --and this is what he at any rate believed himself to be-- he was limited by the terms of a Treaty, signed by his country of choice, to leasing immovable property in Iran, and that only for very specific purposes not present in his case.

Yet he chose to disregard all this, and for doing that he had an easy solution. Each time he, or his representative, called on a notary public to effect a transaction --and there were a good many of those transactions-- he or his representative simply

declined to reveal his true status; an Iranian national who had acquired a United States' nationality unbeknown to Iran. Indeed, each time he was positively presented, through his Iranian identity card, as a sole national of Iran entitled to purchase real property in there. He now appears before this Tribunal, seeking compensation for the alleged violation by Iran of his ownership rights in the purchased properties. This time, however, he presents himself as a national of the United States.

He may not do that, says general international law, reflected in this Tribunal's *important* caveat. Not that he is forever deprived of arguing the merits proper of his complaint before a competent court, for that is not what the law says. What it does say is this, that where any of the earlier-noted rules of law set to censure improper conduct is violated by a party, his grievances will not, because of his conduct, be heard by an international forum. Now what are those rules, if any, violated by the conduct of the Claimant here?

First and foremost, his very acquisition of the properties at issue was unlawful; they were secured, as suggested before, only in breach of the law of the situs, namely, the law of Iran. Indeed, in the eye of that governing law, his very title to the properties so purchased is suspect. In the words of the Civil Code of Iran "[a]n irregular transaction is of no effect in passing ownership".⁴⁷

His conduct is therefore a prime case, if there is ever going to be a case, for the application of the universally accepted rule that no one may be allowed to profit by his own wrong:

It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong,

⁴⁷

Article 365 of the Civil Code of Iran.

Nullus Commodum Capere De Sua Injuria Propria.⁴⁸

Second, the Claimant's conduct is a nonesuch example of a behaviour censured by the rules against "concealment of a material fact" and "misrepresentation". Every time he, or his representative, went to the office of a notary public to record the transfer of a property in his name, he concealed the material fact that he had acquired United States' nationality. Every time he, or his representative, went there, he misrepresented himself as a sole Iranian national. But for these "concealments" and "misrepresentations", the notary public would have refused, as required by law, to effect the intended transactions; but for these unlawful acts, the Claimant would not have been able to have the properties at issue registered in his name.

Third, his conduct was surely "fraudulent" in the sense described in the Esphahanian case. Fraudulent use of nationality is inter alia made, says the Award in that case, where an individual "disguises" his dominant nationality to obtain benefits not otherwise available to him. If so, the Claimant here did quite clearly "disguise" his United States' nationality before the notary public.

Fourth, his conduct is unmistakably covered by the principle of non concedit venire contra factum proprium (or the estoppel rule) upheld by, inter alia, the Flegenheimer case.⁴⁹ That principle applies, says the ruling, in cases in which the injured party "has neglected to indicate his true nationality" or "has invoked another nationality". Surely these are precisely what the Claimant has done. When it fitted him, he neglected to indicate

⁴⁸ Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA, et al., Award No. 141-7-2, at 15 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 228. See, further, the sources quoted above, declaring the inadmissibility of a claim where the claimant has "evaded" the law of his native country (supra note 32), or has himself been a "wrongdoer" (supra note 34), or has "breached the domestic law" (supra note 35).

⁴⁹ See, supra note 33.

his true status; he presented himself simply as an Iranian national. This was when he purchased the properties in question. When it did not suit him to do so, he presented himself as a national of the United States. This was when he appeared before this Tribunal. The rule of estoppel rejects this, "without regard to the truth or accuracy"⁵⁰ of the representations.

Fifth, the Claimant's case is decidedly one in which he, having failed to give notice of his nationality, is not entitled to recover against the Respondent state. It is well known that the law of the Respondent state does not recognize dual nationality. It further requires of any Iranian national who wishes to become a national of another state to secure the approval of the Respondent state. The Claimant, however, chose to disregard this requirement. The Respondent state, therefore, received no notice --it formed no knowledge-- that the Claimant had acquired the nationality of another state. Indeed, because of the Claimant's own conduct, the Respondent had, in the words of the arbitral panel in Casanova, "every reason to believe" that the Claimant continued to remain a sole Iranian national.⁵¹

Sixth, the Claimant's conduct is undoubtedly of the type of "abuse of nationality" which led to the dismissal of the claim in the Saghi case. There, it will be recalled, a mere belief on the part of the claimant that the rights which he wished to acquire were reserved for Iranian nationals was held to be sufficient to make his very acquisition of Iranian nationality an "abuse of nationality". Indeed, it was there made abundantly clear that whether or not those rights were in fact reserved for the nationals of Iran was utterly immaterial; it was the belief that counted.

Here, the Claimant knew, or must have known, that the right to purchase real property in Iran was reserved for the nationals

⁵⁰ See Muller and Cottier, supra note 28.

⁵¹ Casanova case, supra note 31.

of Iran. As a national of Iran who had acquired a second nationality, he knew, or must have known, that he was required to transfer to Iranian nationals any real property he had in Iran. He therefore could not have failed to realize that the law did not permit him to purchase new property in there. And yet that is precisely what he did. The "abuse" here was surely of a graver nature.

Finally, the conduct here is indisputably of the type of "abuse" for which the complaint in the Karubian case was rejected. On material facts, indeed, there is no distinguishing factor between the two. The Claimants in both had first acquired their United States' nationality and then proceeded to purchase real property in Iran. Hence, the admission by the Claimant in the present Case that:

If you believe that the precedent in Karubian is persuasive or binding, then you should dismiss this case.⁵²

Enough has been said so far to demonstrate the nature of the Claimant's conduct, and its being a prime case for the application of *the important caveat* and almost all the general rules of international law on inequitable behaviour. The law of Iran --the Claimant's native country for some thirty eight years-- required him not to obtain a second nationality before he received an approval to the same effect from the State, and not to own real property in there when he did obtain a second nationality. And yet he resolved to do exactly the opposite.

He sought and was granted United States' nationality without informing, let alone seeking the approval of, the Respondent state. And he began later to purchase real property in Iran by not revealing his true status. He now calls on this Tribunal to compensate him as a national of the United States. If there is any meaning to *the important caveat*, so repeatedly upheld in the

⁵² Quoted in Award at para. 60.

precedents of the Tribunal, here is the place for its application. If any censurable behaviour is ever going to lead to the dismissal of a claim under any of the general rules of international law on inequitable conduct, the behaviour of the Claimant in the within Case must be it. There is none more appropriate, that one can think of.

Yet the present Award refuses to dismiss the submitted claim. It does so by simply ignoring the Respondent's principal arguments; by failing to put to itself the right questions and hence to pursue the correct line of enquiry; by a most confused treatment of the law of Iran on the ownership of immovable property; by a contemptuous disregard for the decisions of this Tribunal and for the relevant rules of international law; and, finally, by inventing a new rule of which no one has ever heard before. These will now be briefly examined.

2.5. The Award's Treatment of the Case

The Award does note the Respondent's main submissions on the application of *the important caveat* to the facts of the present Case. These, as summarized in the Award at para. 68, are three:

First, with regard to the right of ownership or acquisition of real property in Iran, the case of an Iranian national who, like the present Claimant, first acquires a second nationality is not the same as that of an ordinary foreign national. The former is covered by additional and specific provisions not necessarily applicable to the latter.

Second, under these specific provisions, and in particular under Articles 988 and 989 of the Civil Code, the purchasing of real property in Iran by such national is illegal and, that being the case, any claim based on the alleged violation of the right to property so obtained is inadmissible under the rule expressed in *the important caveat*.

Third, and with respect to foreign nationals in general, there exist certain other pieces of legislation under which the right to own real property in Iran is reserved, save certain exceptions irrelevant to the facts here, for the nationals of Iran. This, too, calls for the application of *the important caveat*, and hence for the rejection of the claim, wherever the alleged violation, pursued by a claimant in his capacity as a United States' national, relates to such a right.

2.5.1. The Award Fails to Pursue the Right Line of Enquiry

These being the clear submissions of the Respondent, and the Case being one in which the Claimant purchased the properties in question after his acquisition of United States' nationality, the disputed points on which the Tribunal was required to pronounce itself could be readily identified: was the Claimant legally entitled to purchase the properties in question and, if not, can a right unlawfully secured be pursued before this international forum? Only if these two questions were first answered in the affirmative, would the consideration of the Respondent's third submission have become necessary.

Elementary as these points are, they do not lend themselves to the Award. It tells us that "an appropriate starting point for a discussion of the caveat" is the decision in the Saghi case⁵³. That case, notes the Award, identifies "two separate situations where the caveat may come into play". The first is "where the Claimant has enjoyed a benefit reserved to sole Iranian nationals", and the second is "where there has been some other abuse of nationality...". It was in this second category, says the Award, "that Saghi applied the caveat". Correct so far.

But while this calls for the examination of the Respondent's submissions in the light of that ruling, the Award immediately

⁵³ See, supra note 21.

concludes:

Unlike Allan Saghi, who deliberately manipulated his citizenship in an attempt to obtain certain advantages that he believed were reserved for Iranian nationals, the Claimant in the present Case has in no way abused his nationality. "Use" is not the same as "abuse." The Claimant's mere use of an Iranian identity card, even if he had not disclosed his second nationality, simply does not rise to the level of an "abuse of nationality" within the meaning of Saghi.⁵⁴

This is simply astounding. First, the "two separate situations" identified in Saghi are both instances of "abuse of nationality". This is made clear by that very case, which describes the second "situation" as where, to quote the present Award, "there has been some other abuse of nationality...." Hence, before one even begins to examine the facts of the Case in the light of the first "situation", one may not so hurriedly seek to oblige the Claimant with the conclusion that he "has in no way abused his nationality".

More importantly, the second "situation" identified in Saghi is not limited to the type of "manipulation of citizenship" by the claimant in that case. That was said to be only one example of it. The category itself covers all instances in which "there has been some other abuse of nationality". It extends to any instance in which the Claimant's conduct is judged to have been, to borrow from the decision in Protiva, "such as to justify refusal of an award in [his] favour."⁵⁵

That, then, is the extent of the category against which the Respondent's primary arguments should have been examined. These arguments were, it will be remembered, that the Claimant's case is not the same as that of an ordinary foreign national; that the Claimant was not legally permitted to purchase real property in Iran and did so only by breaking the law; and that his conduct

⁵⁴ Award at para. 62 (emphasis added).

⁵⁵ See, supra note 18.

as such was an instance of where "there has been some other abuse of nationality".

Now, without addressing these submissions in the light of that category, without paying at least a lip service to them, the Claimant may not be said to have "in no way abused his nationality". To come to such a conclusion, one must first examine and reject, with reasoning, the Respondent's basic argument that under the caveat, breach of the law by the Claimant is not allowed. There is no trace of this required examination in the Award.

The last two sentences in the passage just quoted reveal the extent of the familiarity of the Award with *the important caveat*, and with all the other pertinent rules of international law. There, one is told that "'use' is not the same as 'abuse'", and that "the Claimant's mere use of an Iranian identity card, even if he had not disclosed his second nationality, simply does not rise to the level of an 'abuse of nationality' within the meaning of *Saghi*". In other words, a mere use by a dual national of one nationality, together with not disclosing the other one, does not constitute "some other abuse of nationality".⁵⁶

True, "use" is not the same as "abuse". And there is nothing in the pleadings to indicate that anyone has suggested anything to the contrary. What has been suggested, by the Respondent, is that a party's "use" of one nationality, or his "failure to disclose" another, can, when combined with that party's other conduct or special status, constitute "abuse", both according to the *Saghi*'s category of "some other abuse", and under the general rules of international law.

That legally sound argument, however, is simply lost to the Award, which is evidently of the belief that a party's "use" or "misuse" of nationality may be determined on the basis of his one

⁵⁶ Award at para. 62.

single act, and in disregard of his other pattern of relevant conduct. Surely it is that belief which leads the Award to suggest that use is not the same as abuse, and that mere use of an Iranian identity card, even where the second nationality is not disclosed, does not meet the Saghi's test of "some other abuse" of nationality.

It is of course a mistaken belief. What is determinative is the totality of a party's conduct, including the position he chooses to adopt before an international forum. To give an example, when the pertinent part of the claim in Schott is rejected under the "estoppel" rule, this is not exclusively based on the conduct of the claimant's daughter at the time of acquiring the right in question, but on the basis of that conduct in combination with the legal posture adopted by the claimant before this Tribunal. In acquiring the said right, the claimant's daughter had merely "used" --as with the Claimant here-- her "Iranian identity card",⁵⁷ and nothing else.

When, to give another example, the decision in the Lacoste case speaks of the claimant forfeiting his right for having earlier presented himself as a French subject, this is not because any fault is found with that presentation alone, which presentation might have been wholly legitimate. It is that presentation combined with the claimant's position before an international forum that lead to the rejection of his claim.⁵⁸ The same is true, again, of the case of a claimant who "invokes another nationality", or "neglects to indicate his true nationality", referred to in Flegenheimer.⁵⁹

Closer to home, in Saghi itself the claimant had merely "used" his Iranian nationality --used his Iranian identity card-- to secure a right which, as the Tribunal found, might or might

⁵⁷ See, supra note 19.

⁵⁸ See, supra note 29.

⁵⁹ See, supra note 33.

not have been reserved for Iranian nationals.⁶⁰ In the Tribunal's eye, there was nothing wrong, therefore, with his securing the right in question. Nor was there anything wrong with his acquisition of Iranian nationality, to which he was legally entitled. Yet it was these actions in combination with a "belief" on his part that led to the dismissal of his claim; the belief that the right he wanted to secure was reserved for the nationals of Iran. It was, in short, the conduct of the claimant in the light of other relevant circumstances that counted.⁶¹

Here, too, it is not the Claimant's mere use of an Iranian identity card which is determinative of the issue of whether or not there has been an "abuse". What is determinative, on the contrary, is the use of that identity card in the light of all other relevant circumstances. One such circumstance, to give an example, is the fact that he was a national of Iran who had acquired a second nationality without observing the law of Iran and hence was not, according to the Respondent, legally entitled to purchase the properties. It was, in other words, his conduct in the light of his status, that amounted to an "abuse" of nationality. The Award tells us, without as much as bothering to even examine the pertinent circumstances, that "use" is not the same as "misuse"!

Back to the Award, and to its next sentence:

⁶⁰ "[T]he Tribunal need not decide whether some or all of the shares he owned beneficially were, by Iranian law, not lawfully so owned by a non-Iranian" (Saghi, supra note 21, at para. 59).

⁶¹ In his oral submission at the Hearing in the Karubian case, the transcript of which is available to the Tribunal's members, Professor Ian Brownlie states that when one refers to the conduct of a party it is to the conduct of the claimant in "cumulative terms", that is to say, "at the time of the original transactions" together "with the stance, the legal posture, the procedural posture" which he adopts before the Tribunal. This, he adds, "may seem obvious when it's stated". Not so, regrettably. To some, it will evidently not seem obvious, even if it is said a hundred times. Karubian, supra note 23, Transcript of the Hearing, at 63.

In addition, the Tribunal finds no evidence that would support the Respondent's contentions that the claim should be barred on the basis of the theories of clean hands, estoppel, misrepresentation, good faith or state responsibility....⁶²

This is plainly in flat violation of the law setting the requisites of a valid award by this Tribunal. In the present proceeding, each and every one of these rules of international law, and its relevance to the conduct of the Claimant, have been extensively pleaded. In detailed memorials submitted by the Parties, the precedents of this Tribunal and other international fora have been brought to the Tribunal's attention and thoroughly analyzed. Views of the publicists of diverse backgrounds as well as the established state practice have been exhaustively discussed. And quite rightly so, for the issue of whether or not any one or more of these rules are applicable here, has been one of the few decisive factors in the Case at hand.

There is, besides, Article V of the Claims Settlement Declaration. It reflects the common intention of the two Parties to the Algerian Declarations that the disputes they submit to this Tribunal should be resolved on the basis of law alone:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable....

Further, Article 32(3) of the Tribunal Rules provides that:

The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given....

No such agreement has been made in the present proceeding and, with these provisions setting the requirements for a properly issued Award, the Tribunal simply may not, in a single

⁶² Award at para. 62.

short sentence and without offering a word in justification, baldly declare the inapplicability of any of the rules in question to the facts of the present Case. With a wealth of evidence before the Tribunal, the issue simply may not be brushed aside by the factually incorrect assertion that "the Tribunal finds no evidence...."

Here is an Iranian national who has acquired a second nationality in flat violation of the law of his native country. Knowing that under that law he is required to undertake to dispose of any real property he may have in Iran, and knowing that if he should fail to do so his property would be sold by the State, he goes on to actually purchase real property in Iran. The Award states dismissively, however, that there is no evidence to support the Respondent's contention that this is a case covered, for instance, by the theory of "clean hands". Surely the Respondent is entitled to be at least informed of the grounds on which such a conclusion is made. Surely the Respondent is entitled to know how and for what reasons the evidence it has submitted in the form of the state practice, the writings of the publicists, and the precedents of international fora, including the precedents of this Tribunal, is regarded as no evidence. Surely it is entitled to be told that if these do not constitute "evidence", what else does.

There can at any rate be no denying that, when purchasing the properties, the Claimant "relied on", "made use of" or "invoked" his Iranian nationality. He now comes before this Tribunal as a national of the United States. Surely a word is due in support of the Tribunal's terse assertion that this is not a case covered by the rule of "estoppel". Surely the Respondent is entitled to ask the pertinent question that if this is not a case for the application of the rule of "estoppel", what case is?

It cannot be contested, again, that when the Claimant appeared before the notary public in Iran, he "concealed", or at any rate "neglected to disclose", the fact that he had acquired

a second nationality. He presented himself as a national of Iran, knowing that if he disclosed his true status, his intended transaction would not be registered. Surely this is a prime example of "misrepresentation" and, an Award that comes to a different conclusion owes it to the contending party to justify its conclusion with a word or two. So does, indeed, an Award which wishes to make belief that this is a case in which the requirement of "good faith" is met. If "good faith" is present here, where can it be said to have been absent?

Again, it is a fact freely admitted by the Claimant that at no relevant time did he give notice of his acquired nationality to the Respondent government. He did not do so when he acquired a second nationality, nor when he called on the notary public to register his intended transactions. Because of that failure alone, the Respondent government continued to believe, justifiably, that the Claimant was a sole Iranian national. The Award states, nevertheless, that the Respondent government is still responsible. That is a statement in defiance of the law on state responsibility as viewed not only by those who advocate the "fault theory", but equally by those who support the "objective theory" of responsibility.⁶³ It is a statement in stark contrast with a host of decisions invoked before the Tribunal. As such, should it not have been supported by at least a line or two in its justification?

Having thus concluded, in just two short and reasonless

⁶³ It is to be noted that one of the two members forming the majority in the present Award has elsewhere said this:

According to our understanding, particularly in view of the presence of Article 31... and of the commentary thereto, the Commission seemed rather to believe that fault was a sine qua non condition of wrongfulness and responsibility. (Gaetano Arangio-Ruiz, Special Rapporteur, Second Report on State Responsibility, Addendum, U.N. Doc. A/CN. 4/425/Add. 1, p. 3, para. 163 (22 June 1989).)

If so, what is the fault of the Respondent state in the present Case?

passages quoted above, that there has been nothing wrong with the Claimant's conduct so as to call for the application of any of the relevant rules of international law, and that this is not a case in which the Claimant has in any other way abused his nationality, the Award proposes to limit its enquiry to the issue of whether or not real property in Iran may be acquired by foreign nationals.

There goes the Respondent's primary submissions, noted in the Award, that the Claimant is not an ordinary "foreign national", but an Iranian national who has unlawfully acquired United States' nationality, and that, as such, he is subject to additional specific provisions of Iranian law prohibiting him from acquiring real property in Iran. There goes the Respondent's reference to, for example, the pertinent provisions of the Civil Code of Iran, under which the case of an Iranian national who acquires a second nationality is expressly distinguished from that of an ordinary foreign national: the former may not own real property in Iran "even if Iranian law permits such ownership by foreign nationals".⁶⁴ There goes the Respondent's submission, again noted in the Award, that the first and foremost enquiry in the Case at hand is thus whether the Claimant did not break the law, particularly Articles 988 and 989 of the Civil Code of Iran, by purchasing real property in Iran after his acquisition of United States' nationality.

It is in short the Award's position, though it says nothing in support of it, that despite those specific provisions, the case of an Iranian national who purchases real property in Iran after his naturalization as a United States' citizen is not different from that of an ordinary foreign national who acquires real property in there. It is a position expressly rejected by the earlier-quoted provisions of Iranian law. That, however, is not the end of it, for it will now be seen that even there the Award fails to be at least consistent in its findings.

⁶⁴ Article 988, Civil Code of Iran.

2.5.2. The Award Comes to Contradictory Conclusions on its Own Suggested Line of Enquiry

On that very issue which the Award wrongly believes to be before the Tribunal --the issue of whether ownership of real property in Iran is a benefit not available under Iranian law to ordinary foreign nationals-- there exists of course a direct precedent:⁶⁵ the award in Karubian⁶⁶. There, it will be recalled, a comprehensive review of all the pertinent pieces of legislation in Iran led the panel to conclude unanimously that, apart from certain limited and inapplicable exceptions, "the right to acquire real property in Iran by contract is reserved by relevant Iranian law to Iranian nationals".⁶⁷ It is a precedent which in the words of the present Claimant must, if found persuasive or binding, result in the dismissal of the Case at hand.

The Award is not convinced. It makes its own review of the pertinent laws of Iran and, having discarded every relevant piece of legislation on the shakiest of grounds, it comes to a conclusion supposedly at odds with the finding in Karubian. This, however, is followed at the next paragraph by an admission which, at least in so far as the enquiry pursued by the Tribunal is concerned, fully supports the ruling in Karubian, though perhaps unbeknown to the Award.

An exposition of how every piece of legislation in Iran on the prohibition of ownership of real property by foreign nationals is explained away in the Award is unnecessary, not only because the very enquiry is, as suggested before, secondary in the light of the facts in the present Case, but also because of

⁶⁵ As well as a number of indirect pronouncements, such as those made in Protiva (supra note 18), and Mahmoud (supra note 24).

⁶⁶ Karubian, supra note 23.

⁶⁷ Id. at para. 159.

the Award's final admission. Before coming to that admission, however, the Award's treatment of just one such piece --this one of direct relevance to the facts in the Case-- must be noted.

It is Article 44 of the 1938 Regulations prepared by Iran's Ministry of Justice. It forbids, it will be remembered, the notaries public in Iran to register transactions of real property by nationals of Iran "who have renounced their Iranian nationality and who, according to the laws of Iran, do not have the right to purchase real property in Iran".

This, the Award first admits, is "significant".⁶⁸ Yet in the very same passage the Award tries to argue that it is of no significance at all: "The effect and scope of these Regulations is unclear."⁶⁹ But what is unclear about the "effect" of a set of Regulations prepared by Iran's Ministry of Justice on the authority delegated to it by Iran's Parliament, the Award finds it unnecessary to explain.⁷⁰

As to the "scope" of these Regulations, the Award says:

[T]hey appear not to be directly^[71] applicable to the present Claimant, in that they apply to nationals of Iran who have "renounced" their Iranian nationality... [and not to] the Claimant [who] never formally renounced his Iranian nationality....⁷²

⁶⁸ Award at para. 72.

⁶⁹ Id.

⁷⁰ If this is intended to mean that regulations or by-laws do not have the effect of law, then that is simply an error in law. Besides, this very Chamber has recently found the Respondent government liable for expropriating the claimant's property because of a by-law prepared by its Ministry of Housing. See Mohtadi, supra note 1.

⁷¹ That implies that the Article is at least "indirectly" relevant. Though that, too, is quickly forgotten in the Award.

⁷² Award at para. 72.

The absurdity in the result of this interpretation is manifest. As we have seen, the law of Iran forbids any Iranian national to renounce his Iranian nationality unless he undertakes, inter alia, to dispose of his real property in Iran within a given period. If he obtains a second nationality in violation of this requirement, the law prescribes that his property "shall be sold" by the state. Article 44 of these Regulations then further expressly prohibits the notaries public from registering any transaction on real property by an Iranian national who has renounced his Iranian nationality.

The Award, however, seeks to interpret this Article as limiting the prohibition to those Iranian nationals who have, in acquiring a second nationality, observed the law's command. They alone do not have the right to purchase real property in Iran. The prohibition does not apply, in the Award's view, to those who have acquired a second nationality in violation of the law. They do have the right to purchase real property in Iran! If a person of this latter group should reveal his true status --a national of Iran who has become a naturalized subject of another state in violation of the law-- a notary public will not regard himself as being forbidden to register the intended transaction!

The Award evidently expects the Legislature in Iran to specifically name, whenever it proscribes a given act, any and all other acts which for stronger reasons will be understood to fall within the proscription. And yet it is elementary that this is not how laws are drafted. Take the simple example of a law which says that foreign nationals legally residing in the country are forbidden to accept employment unless they secure a work permit. Will it not be well understood that the stated prohibition applies a fortiori to those foreign nationals who are illegally residing in the country, and must the law expressly say so?

Here, too, the law seeks to make sure that no Iranian national who has acquired a second nationality, and who is

required to dispose of his real property in Iran, is given the opportunity to again purchase real property in Iran. And it says so in the Regulations addressed to the offices of the notaries public. If the law does not specifically speak of those who have unlawfully acquired a second nationality, this is simply because the application, for stronger reasons, of the prohibition to their case is readily understood. Besides, the acquisition of a second nationality by a person in violation of the law is not, by definition, recorded with the Respondent state. The offices of the notaries public would therefore have no means of ascertaining the true status of such a person and, for as long as the concealment continues, there is no means by which breach of the law may be stopped through the offices of the notaries public.

Such is the way the clear laws of Iran on the subject are read, and dismissed, by the Majority as inapplicable to the facts in the present Case. But be that as it may, for it is the result of the Award's review of those laws which is of more importance. And here it is:

After considering the foregoing legal provisions, the Tribunal concludes that the Respondent has been unable to point to a comprehensive provision in Iranian law that contains an express prohibition on the ownership of real estate by foreign or dual nationals, and that would therefore fully support its contentions. This fact is particularly significant in light of Article 961 of the Iranian Civil Code, which states that foreign nationals are entitled to the same civil rights as Iranian nationals except where the right is explicitly reserved by law to Iranian nationals or explicitly denied to foreign nationals.... Assuming that this provision applied to dual as well as to foreign nationals, the Tribunal finds it to be significant that the Respondent has not cited a provision containing an explicit denial or reservation of the right in question, such as seems to be intended by Article 961.⁷³

The assumption that Article 961 of the Civil Code also

⁷³ Award at para. 75.

applies to the case of an Iranian national who has acquired a second nationality is utterly unjustified. Such a case, as noted above, is subject to the specific provisions of, inter alia, Articles 988 and 989 of the Civil Code of Iran. It is there said that an Iranian national who acquires a second nationality must undertake to transfer his real property to nationals of Iran, and if he should fail to do so his property shall be sold by the state, "even if Iranian law permits such ownership by foreign nationals". The two cases having been so clearly and expressly distinguished from each other by the law, there is no place -- none whatsoever-- for the Award's assumption that Article 961 of the Civil Code is applicable in the case of a dual national, and hence for the "particular significance" which it seeks to attach to the terms of Article 961 in the Case at hand.⁷⁴

That wholly unjustified assumption leads the Award to yet another wholly unjustified and irrelevant observation, namely, that the Respondent has been unable to refer the Tribunal to a "comprehensive provision" containing "an express prohibition" on the ownership of real property in Iran by foreign or dual nationals. What is a "comprehensive" provision and where does this requirement, or the requirement for "an express prohibition", come from can only be explained by the authors of the Award. If that is meant to refer to Article 961 of the Civil Code, then that Article speaks of an "explicit" --and not of a "comprehensive" or "express"-- prohibition; a requirement which, as it has been seen, is inapplicable to the present Case.

All that the Respondent in the Case at hand has been

⁷⁴ Interestingly, the Award itself concludes, shortly thereafter, that these Articles of the Civil Code, rather than the provisions applicable to foreign nationals in general, are directly relevant to the facts in the present Case (Award at paras. 77-79). But the Award still refuses to retract from its earlier conclusion that Article 961 is "particularly significant" in a case governed by other provisions of the law; which provisions are emphatic that the two cases are to be treated differently.

required to demonstrate, under the Award's own suggested line of enquiry, is that foreign --and hence dual-- nationals may not acquire real property in Iran. And that is precisely the conclusion at which, surprisingly, the Award next arrives. A conclusion which readily contradicts, or at any rate demonstrates the otiose nature of, all the Award's earlier conclusions and observations:

What does emerge from the legislation produced by the Respondent, however, is that ownership of real property in Iran by foreign nationals was subject to a complex legal regime of limitations and conditions. These provisions suggest that ownership of land by foreign nationals was possible only for limited purposes and only upon the granting of the requisite permission by the relevant authorities.⁷⁵

This is with regard to foreign nationals in general. The Award then admits the existence of the same "complex legal regime of limitations and conditions on dual national ownership of land".⁷⁶ It further accepts, by necessary implication, that the Claimant's case --purchasing large pieces of land in Iran for later sale to the public or developers--⁷⁷ did not remotely meet those "conditions". It concedes, by necessary implication, that the claimant's case had nothing to do with those "limited purposes", and that he never sought, nor was he ever granted, "the requisite permission". The Award admits all these simply because it later states that the existence of those "limitations and conditions on dual national ownership of land leads the Tribunal to conclude that this is a case in which the caveat in Case No. A18 should be applied." Clearly, the caveat may not be held applicable to a case in which the Claimant's acquisition of the rights in question was unaffected by the said limitations and conditions.

⁷⁵ Award at para. 76.

⁷⁶ Id. at para. 79.

⁷⁷ This is the Claimant's own admitted purpose. Statement of Claim, Schedule A.

It is, therefore, the Award's own conclusion that the ownership of real property by dual nationals being subject to limitations and conditions, the Claimant in the present Case who did not meet the law's requirements was not legally entitled to own the lands at issue. If so, certain troubling questions, of direct relevance to the determination of the Case, will at once come to mind.

First, if the Claimant was not, under the pertinent laws of Iran, entitled to own the properties in dispute, what is the relevance of the Award's earlier conclusions, even if accurate, to the Case at hand? For an overall picture, those conclusions may be briefly recounted:

- The Respondent has been unable to point to a "comprehensive provision in Iranian law" containing an express prohibition on the ownership of real property in Iran by foreign or dual nationals.
- This is "particularly significant" in the light of Article 961 of the Civil Code of Iran, which must be assumed to be applicable to the case of a dual national, and which states that foreign nationals are entitled to the same civil rights as Iranians, unless where the right is explicitly reserved to Iranian nationals, or explicitly denied to foreign nationals.
- These lead to the conclusion that the Respondent has not been able to "fully support its contention".
- But then the pieces of legislation "produced by the Respondent" show that ownership of real property in Iran by foreign and dual nationals was subject to "a complex legal regime of limitations and conditions". They suggest that such ownership "was possible only for limited purposes and only upon granting of the requisite permission by the relevant authorities".
- The Claimant's case does not meet those conditions and hence, is subject to the caveat.

But what is the Respondent's "contention" here? It argues that the Claimant's conduct calls for the application of the caveat. To establish that, it contends --and it is required to prove no more-- that the right to own real property in Iran was not available to dual nationals, and hence to the Claimant. An

Award which comes to the same conclusion may not contradict itself by speaking of the Respondent's inability to "fully support its contention".

Second, if, as the Award admits, "dual national ownership" of real property in Iran was governed by a "complex legal regime of limitations and conditions"⁷⁸ under which the Claimant was not entitled to purchase the properties in question, what is the justification for the Award's refusal to even consider the Respondent's main submission that the Claimant did so only by breaking the law?

Instead of addressing itself to that submission, the Award asserts that this is a case in which the properties were purchased by the Claimant "in his capacity as an Iranian national".⁷⁹ This is a fundamental error by an Award which accepts the existence of a "complex legal regime of limitations and conditions on dual national ownership of land". Surely that "regime" either allowed or disallowed the purchasing of the lands in question by the present Claimant. There cannot possibly be a half-way house; nor can that central question be simply evaded. If it did allow, then there is no room for the application of the caveat; for the Claimant in that case may not be said to have enjoyed any right not available to him as a dual national. If it did not allow --and this is the conclusion at which the Award must have arrived-- then there is no escaping the result that this was a case in which the rights at issue were illegally acquired.

In other words, where a dual national is forbidden to purchase land, he may not lawfully purchase land by relying on one of his nationalities. He may only purchase land in violation of the law; by, for instance, concealing his true status as a dual national. The acquisition of a benefit by someone in one of

⁷⁸ Award at para. 79.

⁷⁹ Id.

his capacities, of which the Award mistakenly speaks here, has nothing to do with the present Case. It belongs to where the individual has more than one capacity, through one of which he can exercise a right, but is nevertheless prevented from exercising that right abusively. Where a dual national --not a foreign national, but a dual national-- is by a legal regime disallowed to acquire a right, that is the end of it. He is by definition a dual national, with no other capacity.

Third, and assuming arguendo that this was a case in which the properties in dispute were purchased by the Claimant "in his capacity as an Iranian national", there is no justification for the Award's assertion, in that same passage⁸⁰, that "the Claimant's actions do not rise to the level of an abuse of nationality".⁸¹ Before this Tribunal, the Claimant has changed that "capacity" into another one: he now seeks redress in respect of those same properties "in his capacity as a United States national." Is this not precisely what a wealth of earlier-noted international law materials, including the law of this Tribunal, have referred to it as an instance of "abuse of nationality"? And does an Award which seeks to disregard all these not owe it to the Parties and to the outside world, as required by the express language of the Tribunal Rules, to support its singular assertion by at least an explanation of sorts?

2.5.3. The Mysterious Caveat

As noted before, it is the Award's conclusion that the Claimant's conduct is not an instance of "abuse of nationality", nor is it covered by "the theories of clean hands, estoppel, misrepresentation, good faith or state responsibility". And yet

⁸⁰ Id.

⁸¹ Earlier, one was told that the Claimant's actions do not amount to an "'abuse of nationality' within the meaning of Saghi" (Award at para. 62). Here, one is told that they do not constitute "abuse of nationality" in general. As with the earlier instance, this finding, too, is accompanied by no word of explanation.

"the complex legal regime of limitations and conditions on dual national ownership of land" requires the application of the caveat to the Claimant's conduct.

This is hard to believe. What is this caveat which, as asserted in the Award for the first time in the history of this Tribunal and in clear disregard for all its precedents, has a character of its own, and may apply independently from all the rules of international law on inequitable conduct?

It has been shown earlier that both in Esphahanian --where the caveat was first formulated by this Tribunal-- and in A18 Decision --where the caveat was backed by a full panel-- it was expressly stated that the caveat was based on, and represented, general rules of international law on inequitable conduct. In the words of Esphahanian, "[t]here is precedent for denying jurisdiction on equitable grounds".⁸² In both, it was expressly stated that since the Algerian Declarations were silent on the issue of dual nationals' claim, resort had to be made to the relevant rules of customary international law, and hence the rule of dominant nationality and the caveat thereto.⁸³

Some of these rules have been specifically referred to in the Tribunal's decisions. Still others have been argued in the pleadings. The Award names them, one by one, and suggests that none is applicable to the Claimant's conduct. If that is correct --if none of the general rules of international law governs the conduct of the Claimant-- what is the ground on which this mystifying caveat is held to be applicable? Where does it come from? Surely not from the terms of the Algerian Declarations

⁸² Esphahanian, supra note 17.

⁸³ "In the absence of any specific provision in the Claims Settlement Declaration on this point, the Tribunal must determine the meaning of the text through use of the rules of the Vienna Convention. Paragraph 3(c) of Article 31 directs us to take into account 'any relevant rules of international law applicable in the relations between the parties'." Esphahanian, supra note 17, at 161. See also A18 Decision, supra note 15, at 260.

which, as just noted, were held by the Tribunal to be silent on the issue.

The fact is that this is yet another manifestation of the Award's lack of familiarity with the caveat, and with what it represents. The fact is that every conduct ever held by this Tribunal to be governed by the caveat --including the case of a person who enjoys a benefit not available to him through his currently invoked nationality-- is governed by at least one of the general rules of international law on inequitable conduct. Without these rules, the caveat has simply no legitimacy. The Award accepts that the Claimant's conduct requires the application of the caveat. That is only right. It argues, at the same time, that his conduct is not censured by any of those rules. That is only wrong.

2.5.4. The Claimant's Conduct Is Found Censurable Under At Least One Of Those Rules, After All

It is a wrong which the Award admits, albeit inadvertently, but which it regrettably refuses to rectify. First, and at the cost of repetition, the relevant part of a passage already quoted:

[T]he Tribunal finds no evidence that would support the Respondent's contentions that the claim should be barred on the basis of the theor[y] of ... good faith...."⁸⁴

Then:

[T]he complex legal regime of limitations and conditions on dual national ownership of land leads the Tribunal to conclude that this is a case in which the caveat in Case No. A18 should be applied.⁸⁵

⁸⁴ Award at para. 62.

⁸⁵ Award at para. 79.

And finally:

The caveat is essentially an equitable instrument, intended to remedy any bad faith use of nationality by a claimant with dual nationality....⁸⁶

In shorter terms, the Claimant's conduct is not censured by the rule requiring good faith, but is governed by the caveat, which is there to remedy any "bad faith" use of nationality! This is all very unfortunate.

2.5.5. Bar Does Not Mean Bar

In every case ever decided by this Tribunal on the issue of caveat, in every case in which the caveat was otherwise explained by the Tribunal, and in every decision ever made by any international forum on any of the general rules of international law on inequitable conduct, one thing has been made unmistakably clear: when the claimant's conduct is found censurable, his claim will be barred; when any of these rules is held to be applicable, the merits proper of the complaint will not be heard. To that, there has been no exception, either in the long history of international law, or in the now lengthening life of this Tribunal.

It was so said in Esphahanian, where the Award spoke of "denying jurisdiction on equitable grounds";⁸⁷ and in A18, where a member who offered to explain the caveat stated that, if it was found applicable, there would be "no international protection".⁸⁸ It was so said in Protiva⁸⁹ and Khosrowshahi,⁹⁰

⁸⁶ Award at para. 84.

⁸⁷ Esphahanian, supra note 17, at 166 (emphasis added).

⁸⁸ A18 Decision, supra note 15, at 274 (emphasis added).

⁸⁹ Protiva, Interlocutory Award, supra note 18 (emphasis added).

where the application of the caveat was stated to lead to the "refusal of an award" in favour of a claimant. It was so ruled in Schott,⁹¹ where the relevant portion of the claim was in fact dismissed under the caveat; and in Saghi,⁹² where this was done on the basis of the Tribunal's ruling that the caveat being applicable, the claimant "should not be permitted to recover against Iran". Finally, it was so held and applied in Karubian,⁹³ where on facts precisely the same as those in the present Case, it was ruled that the caveat in A18 was applicable, and that this "bars the claimant... from recovering against the Respondent".

The same has been the unanimously held view in international law outside this Tribunal. Wherever a claimant's conduct has been judged censurable, wherever any of the rules on inequitable conduct has been found applicable, the claim has been barred -- dismissed-- in its entirety, and without regard to the merits proper of the claim. Here is not the place for an exhaustive review of the literature. A few reminders, from the materials earlier cited, will suffice for the present purposes.

In Flegenheimer, an international law precedent specifically named in the Tribunal's awards, the various types of abuse of nationality identified in there were said to result in the rejection of the "admissibility of a legal action".⁹⁴ In Lacoste⁹⁵, the claimant's use of different nationalities calling for the application of the rule of estoppel led the tribunal to conclude that because of his conduct the claimant "forfeited his

⁹⁰ Khosrowshahi, Interlocutory Award, supra note 18 (emphasis added).

⁹¹ Schott, supra note 19.

⁹² Saghi, supra note 21, para. 59 (emphasis added).

⁹³ Karubian, supra note 23, para. 162 (emphasis added).

⁹⁴ Flegenheimer, supra note 33 (emphasis added).

⁹⁵ Lacoste, supra note 29 (emphasis added).

right to consideration". In Zenea⁹⁶, the failure to give notice of nationality meant that the claimant "can not recover".

The views of the publicists are in full accord. Thus, as noted before, Borchard⁹⁷ speaks of a claimant "relinquishing his right to protection" where he evades the law of his native country; Hackworth⁹⁸ refers to the inequitable conduct of a claimant constituting "grounds for rejection of a claim by an arbitral tribunal"; and the Encyclopedia of Public International Law tells us that under the rule of estoppel "a representing party is barred (estopped or precluded) -- without regard to truth and accuracy" of his different statements."⁹⁹

Indeed, this is not only a firmly established rule, but a rule which, as far as one knows, has never been questioned. Before this Tribunal, for instance, a mountain of pleadings have been submitted, in the present and in other cases, dealing with the issue of *the important caveat*. In there, the two Governments and individual parties have fought hard over the applicability or otherwise of *the important caveat* and the relevant rules of international law to given sets of facts. They have never suggested, however, that when found applicable, the effect of the *important caveat* and those rules would be anything but the rejection of the claim in its entirety.

Eminent scholars of international law, representing the parties to these cases, have orally discussed every aspect of the *important caveat*, and of the pertinent rules of international law. Again, they have widely differed as to whether this or that rule is sufficiently established, or should be applied to given circumstances. They have been unanimous, however, on one issue:

⁹⁶ Zenea, supra note 30 (emphasis added).

⁹⁷ Supra note 32 (emphasis added).

⁹⁸ Supra note 27 (emphasis added).

⁹⁹ Supra note 28 (emphasis added).

once any of these rules is found applicable, the Tribunal may not go further than the stage of considering the claimant's conduct.

Indeed, as recently as May 1997, the United States submitted to the Tribunal a brief devoted exclusively to the exceptions which the United States took to the findings in Karubian.¹⁰⁰ In there, all aspects of the Award which the United States found objectionable --including the finding that under the law of Iran the right to purchase real property was reserved for the sole nationals of Iran-- were extensively discussed. What was not found objectionable, again, was the finding in that case that the caveat, where applied, led to the barring of the claim in its entirety.

The present Award, however, proposes without scruple to be the only one in the history of international adjudication to violate that basic rule. It finds, as noted before, that the Claimant's conduct, namely, the purchasing of real property in Iran after the acquisition of United States' nationality, calls for the application of the important caveat. But instead of adhering to the consequence of its finding --instead of holding that the claim is thus barred-- the Award suggests that this does not put an end to the Tribunal's enquiry. It argues, in utter disregard for the Parties' own submissions, that it still remains to be seen whether and to what extent the Claimant's conduct is penalized by the law of the Respondent state. It is the result of that enquiry, suggests the Award, that would determine whether and to what extent the claim may be affected.

Based on this invented theory, the Award then turns to see if the law of Iran provides any sanction against the Claimant's conduct. As it happens, it does. Since the Claimant was not, as a dual national, entitled to purchase the properties in question,

¹⁰⁰ "Comments of the United States on the Doctrine of the Prohibition of Abuse of Rights as Applied to Dual United States-Iranian Nationals", filed on 20 May 1997 as Doc. 113 in Case No. 242 before Chamber Two of the Tribunal.

his transactions were, under Article 365 of the Civil Code referred to earlier, of no legal effect. He acquired no legal title to those properties and hence, under the Award's own theory, would not be entitled to any compensation in respect of them. But the Award, as we have seen, fails to at least correctly identify the real issue before the Tribunal. Instead of asking itself the only pertinent question of whether the Claimant was legally entitled, under inter alia Articles 988 and 989 of the Civil Code, to purchase land in Iran, it seeks to ascertain whether there exists any piece of Iranian legislation that "directly addresses the question of property acquired after an Iranian obtains a second nationality".¹⁰¹

Not surprisingly, it finds none. That answer to a wrongly put question must lead the Award, with its "theory of sanction", to the inevitable conclusion that, no sanction having been provided for the Claimant's conduct, he must be fully compensated. But the Award cannot even there remain faithful to its own theory. It looks for a sanction "most relevant" to the present situation, and it locates that in Article 989 of the Civil Code.

The sanction in that Article --forced sale of property-- is provided for a case in which the property is acquired prior to the acquisition of a second nationality; it is acquired, in other words, quite legitimately. It has nothing to do with, let alone being "most relevant" to, the present situation in which the very acquisition of the properties at issue has been unlawful. Still, this is found to be a good enough excuse for the Award to argue that the Claimant's case, too, is covered by the sanction in that Article.

And from there to the final conclusion. Since Article 989 of the Civil Code does not contemplate any sanction other than the sale of the properties in question by the state, and since

¹⁰¹ Award at para. 82.

other laws of Iran guarantee "recompense for the taking of property", one may not apply "the caveat in such a way as to deny compensation completely",¹⁰² "even to the extent that one... reads Article 989 itself as a prohibition on the purchase of property after the acquisition of a second nationality".¹⁰³ To do so, says the Award, would work "injustice" under the rubric of a principle --the caveat-- which is itself "grounded in equity". Instead, the caveat must be so applied as to result, not in barring the claim, but in applying a discount to the worth of the properties in question, so as to reflect their value under an assumed forced sale.

What can one say about this concocted theory, of which there is no trace in the law of this Tribunal, or in the literature of international law? About this suggested application of the caveat which shows, readily, that not only the nature and function of the caveat and those of the relevant rules of international law, but the very reason for their existence have simply not been comprehended?

The caveat, and each of the pertinent rules of international law, applies where a party has, but for his own conduct, a right to enforce; a right to be compensated. Where he has no such right, the question of his conduct does not arise in the first place. Because of the party's own conduct, however, he is precluded from pursuing his right before an international tribunal. The reason is simple enough: international adjudicating bodies cannot condone censurable conduct; they refuse to consider the complaint of a wrongdoer.

The Award, on the other hand, here assumes that Article 989 of the Civil Code of Iran forbids the purchasing of property by

¹⁰² Award at para. 84.

¹⁰³ Award at para. 83. This is the first and the only place where the Award belatedly and cursorily reminds itself of the Respondent's primary submission.

a dual national.¹⁰⁴ It assumes, therefore, that in purchasing the properties at issue, the Claimant breached the law. But it nevertheless proposes to compensate him because, it says, the laws of Iran do not permit "an uncompensated taking"; because, in other words, the Claimant has a right to enforce!

To get a better picture of what this novel theory leads to, it may, by way of example, be applied to some of the cases decided by this Tribunal. In Schott, it will be remembered, the claimant's daughter had purchased certain shares reserved for the nationals of Iran. Is there any sanction, under Iranian law, against the acquisition of such shares by a foreign or dual national? None whatsoever. As the United States has rightly observed:

It should be noted that Article 989 does not, under any circumstances... permit a government sale of properties other than land, such as shareholdings in Iranian businesses. It does not even require that shares of stock held as an Iranian citizen be re-registered as shares belonging to a foreigner.¹⁰⁵

As the present Award would have it, then, Mr. Schott should be invited back to the Tribunal to receive full compensation. The unanimous decision in that case to dismiss the pertinent part of his claim was an error in law, for it placed the claimant, in the words of the present Award, "in a worse position than Iranian law itself would".¹⁰⁶ So should Mr. Saghi, for he had done nothing except to acquire certain shares which he believed to have been reserved for the nationals of Iran; and the laws of Iran "guarantee recompense" for the taking of those shares. Mr. Karubian would not, if he comes back, receive full compensation.

¹⁰⁴ "[E]ven to the extent that one... reads Article 989 itself as a prohibition on the purchase of property after the acquisition of a second nationality...." (Award at para. 83).

¹⁰⁵ Memorial of the United States on the Issue of the Caveat in Case A18, at 18.

¹⁰⁶ Award at para. 84.

But the unanimous decision to bar his claim would be set aside in favour of a full compensation slightly discounted!

Likewise, all those views expressly stated in, for instance, Esphahanian, and Khosrowshahi to the effect that an award in favour of a claimant would be refused if he was shown to have secured benefits reserved for the Iranian nationals must now be discarded as legally unfounded. All those enquiries made in the said cases to determine whether or not the claimants had "abused", "concealed" or "misrepresented" their nationality were nonsensical. Whatever conduct a claimant may be found guilty of, he would still be entitled to receive the full value of his assertedly expropriated property because the laws of Iran do not permit the uncompensated expropriation of one's property!

Similarly mistaken were, under the Award's newly discovered theory, all the decisions on the subject by other international tribunals. To give but one example from the cases previously referred to, consider the Zenea case.¹⁰⁷ It will be remembered that there, a widow had sought damages for the wrongful imprisonment and execution of her husband by the Respondent state. The claim was dismissed because the widow's husband had failed to give the Respondent state notice of his nationality.

Now this too was wrong, according to the Award's theory. The Commission which decided the case should not have stopped there. Instead, it should have examined whether the sanctions imposed by the law of the Respondent state for the claimant's failure was "wrongful imprisonment" or "wrongful execution". And, on the safe assumption that the law of no civilized state would permit wrongful imprisonment or execution, the widow should have been compensated. What the Commission did was to place the claimant "in a worse position" than that which the law of the Respondent state would have!

¹⁰⁷ See, supra note 30.

The list of the decisions by international fora which, under the Award's un-heard of theory, must be henceforth disregarded, is a long one. So is the list of other sources of international law, including the state practice and the writings of the publicists. They need not be reviewed here if only because, those sources and the Award's theory being both clearly stated, little effort is needed to perceive the curious results which the application of the Award's theory in each case would yield. Before leaving the subject, however, one further example of the sheer absurdity to which the application of the Award's theory will lead must be given. It relates to Article 989 of the Civil Code, the very source invoked by the Award in support of its "sanction theory".

Under that Article, one of the things that an Iranian national who has in violation of the law acquired a second nationality may not do --he is expressly forbidden from-- is to become a Secretary of State or a Member of Parliament in Iran. Assume now that one such individual does attain one of these positions by whatever means; by, for instance, not disclosing his true status. Assume, further, that he now sues Iran before this international Tribunal for not having been remunerated. The Award's theory will have him fully compensated because, under that Article or any other laws of Iran no sanction is imposed against the conduct of our hypothetical claimant. To refuse compensation under the rubric of the caveat would be, the Award suggests, "inequitable"!

The fact is simple. Here is a theory which suggests that a claimant's censurable conduct does not bar his claim, and that what is determinative is whether and to what extent the respondent's action --here the alleged expropriation-- is justified in the face of that conduct. Such a theory does not only contradict all the cases decided by this Tribunal and other international fora on the caveat and the relevant rules of international law, it goes against the very why and wherefore of the caveat and those rules.

Under the caveat, and the general rules of international law behind it, the unjustifiability of the respondent's action -- expropriation, wrongful imprisonment, etc.-- is assumed. To show the international law's antipathy towards the claimant's inequitable conduct, those rules have been devised to entirely reject --to bar-- his otherwise meritorious claim. He who suggests that despite the application of the caveat or any of those rules the rights and wrongs of the respondent's action may still be examined, has not, with respect, realized what the caveat or those rules are all about. He who suggests, for instance, that a claimant who acquires a right by breaking the law must nevertheless be compensated for the expropriation of that right if the law of the respondent state does not permit expropriation, has failed to appreciate the underlying reasons for the caveat and those rules.

2.5.6. The Last Straw

The Parties, not being imaginative enough to anticipate the Award's creative mind, have said nothing, not a word, about compensation payable under a "forced sale" scenario; nothing about the ramifications of this notion. The Claimant has referred to it in his discussion of Article 989 of the Civil Code, but only to suggest that the Article does not forbid a dual national from acquiring real property in Iran, and that he must therefore be fully compensated. Not a word by either Party about the financial implications of a "forced sale" theory. And this, not only in the present Case, but in any other similar case before the Tribunal.

The Award admits that the Tribunal has had no arguments before it on the subject, but finds this to be of no significance:

In light of the fact that the pleadings do not address this point, the Tribunal must rely on its own

discretion to quantify a discount....¹⁰⁸

It was, of course, on the Claimant to satisfy the Tribunal of the justiciability of the amount of compensation he is to receive. It was on him, therefore, to offer evidence in support of the value of his properties under a "forced sale" scenario. He did not do that, for the obvious reason that the notion never occurred to him. It is, however, the Respondent who is criticized in the Award for not having pleaded the issue. The Respondent, whose position is that under the law of Iran the Claimant could not have lawfully purchased the properties in the first place, is blamed in the Award for failing to inform the Tribunal of the price which those properties would have fetched under a "forced sale" theory:

[T]he Tribunal is obviously hampered by the fact that Respondent has provided no evidence of any supervised sales pursuant to Article 989 in this or in any other similar Case.¹⁰⁹

The Award then goes on to apply a discount of %25 to the value of the properties in question, so as to reflect their worth under a "forced sale" scenario as well as the expenses associated with such a sale. The chosen figure of discount, asserts the Award, is based on "general principles of commercial practice".

What these "general principles" are, and how they relate to the "forced sale" of properties located in Iran, no one is told. This very step taken by the Award --allowing itself to adjudicate an issue not pleaded by the litigants-- is alone a sufficient

¹⁰⁸ Award at para. 86.

¹⁰⁹ Id. Surprisingly, the Award refers, in support of its above-mentioned statement, to the Respondent's submission that there has never been a "supervised sale" under that Article. Quoting from the Respondent's Rebuttal Memorial Brief on the Issue of Caveat in Case No. A18, at p. 35, it notes that: "('In none of the cases pending before the Tribunal has Iran sold a dual national's real estate in implementation of' Article 989.)" Award at para. 86.

ground for turning the Award into a nullity. The Parties have been given no opportunities to discuss this curious conception or its serious monetary ramifications. The Respondent, in particular, has been deprived of its fundamental right to defend itself under such theory. The precedents cited by the Award in support of its action all relate to the situation in which the parties have had the opportunity to brief the Tribunal on a given point, but the final determination of that point has required the reasonable use of discretion by the Tribunal. They have thus nothing to do with a case in which the Tribunal has found it convenient to substitute its own novel theory for the positions adopted by the Parties; a theory of which the Parties are going to hear only through the present Award.

* * * *

Without a particle of evidence and against all odds -- against common sense-- the Award at hand readily accepts the Claimant's wild contention that this was a case in which the Respondent government expropriated, by a seizure order issued in 1979, the assets of the Claimant's entire family; a draconian and impractical measure that no other claimant before this Tribunal has ever accused the Respondent government of adopting. The reason for making that contention, and for its acceptance, is not far to seek. As it happens, it is the only one under which the Claimant, who admits not to have been personally named in any of the Respondent's expropriation orders, could receive what he was after.

And yet on the very basics of that contention the Claimant refutes himself. On the central issue, for instance, of how this asserted step was taken, he maintains, in one breath, that the Respondent first individually named all the known members of his family --Aryeh family-- in the seizure order and then, in order to assure that the rest of the family was covered, the convenient catch-all phrase of "Aryeh brothers" was used. He devotes a great

deal of his pleadings to the task of defining the scope of this phrase, and of how it affected his assets.

In the next breath, however, he argues that what the Respondent did was to issue a seizure order against Aryeh "family", with no further particulars of any sort. And yet the Award finds no inconsistency in these. With a reaction typical of the Award's endeavours to explain away each and every discrepancy in the Claimant's submissions, it suggests that both arguments "support a finding that the Respondent expropriated the Claimant's property"! This much by way of example of how the Award sets to treat the facts in the Case.

It is, however, the Award's treatment of the legal issues which is by far more disturbing. There, the Award first notes, but then immediately forgets, the Respondent's primary arguments that the Claimant, being a dual national, was not entitled to acquire real property in Iran; that he did so only by breaking the law; and that, as such, his conduct calls for the application of the Tribunal's *important caveat*.

Instead of addressing itself to these submissions, the Award sets to pursue the utterly wrong line of enquiry of whether ordinary foreign nationals are prohibited from owning real property in Iran. It concludes, on the one hand, that the Respondent has failed to establish the existence of such prohibition and, on the other hand, that there exists in Iran "a complex legal regime of limitations and conditions" under which ownership of real property by foreign or dual nationals is "possible only for limited purposes".

Does the Award mean to say that in acquiring the ownership of the properties in question the Claimant has met the required "conditions"? Not at all. Those "limited purposes" to which the Award refers have nothing to do with the Claimant's case, and that is why the Award, fully aware of this, concludes that the Claimant's conduct calls for the application of the *important*

caveat. This latter conclusion does, of course, flatly contradict the Award's earlier conclusion that the Respondent has failed to establish its case.

Now, that *important caveat* is not a mysterious phenomenon, finding its way into the law of this Tribunal out of nowhere. As expressly stated by those who first upheld it here, it represents a number of general rules of international law devised to censure inequitable --wrongful-- conduct. Without those rules, the *important caveat* has no legitimacy. Yet the very Award that considers the Claimant's conduct --acquiring the properties at issue by illegal means --to be a case for the application of the *important caveat*, concludes at the same time that his conduct is not censured by any of the general rules of international law on inequitable conduct. As to how an illegal act --a prime example of censurable conduct-- can be regarded as not covered by any of those rules and, if it can, what would be the justification for the application of the caveat, the Award is dead silent.

This very conclusion by the Award that the Claimant's conduct is not of the type rejected by any of those rules, too, is shortly thereafter refuted by the admission in the Award that the caveat "is essentially an equitable instrument, intended to remedy any bad faith use of nationality". The censurability of any bad faith use of right, including any bad faith use of nationality, is of course one of the recognized rules of international law which the Award earlier suggests not to be applicable to the Claimant's conduct.

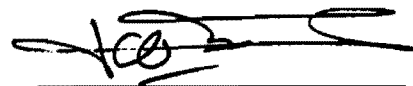
Still, in every case ever decided by this Tribunal on the caveat, or in which the caveat has been explained, and in every decision ever made by any other international judicial forum on inequitable conduct, one thing has been made unmistakably clear: censurable conduct of a claimant bars the consideration of his claim, irrespective of the claim's merits. It is a rule not only unanimously supported by judicial decisions, but by the uniform practice of states and writings of the publicists. It is a rule,

indeed, never questioned by any party in the history of this Tribunal.

The present Award proposes to be the only exception to all these. In utter contempt not only for those sources of international law, but for the very nature and the very function of the caveat and the relevant rules of international law, it suggests that whether and to what extent a claim is barred must be determined not by a claimant's censurable behaviour, but by the sanctions which the law of the respondent state may have provided for such behaviour. It is a theory never heard of before, and hence not pleaded by the Parties to the present Case. The Award nevertheless proceeds to apply it in the Case at hand, with the Parties having had no opportunity to at least discuss its financial ramifications.

Award of this nature --it is not one whit too strong to suggest-- does much to tarnish the reputation of this Tribunal. It is a singular Award, and one can only hope that it for ever remains so.

Dated, The Hague
25 September 1997



Mohsen Aghahosseini