

IRAN—UNITED STATES
CLAIMS TRIBUNAL REPORTS

Volume

23

EMANUEL TOO, *Claimant*
v.
 GREATER MODESTO INSURANCE ASSOCIATES, and
 THE UNITED STATES OF AMERICA, *Respondents*

(Case No. 880)

Chamber Two: Briner, Chairman; Aldrich, Khalilian,^[1] Members

Signed 29 December 1989^[2]

AWARD NO. 460-880-2

The following is the text as issued by the Tribunal:

APPEARANCES

For the Claimant:	Mr. Emanuel Too Claimant
For the Respondent:	Mr. Michael F. Raboin Deputy Agent of the United States
Also present:	Mr. Ali H. Nobari Deputy Agent of the Islamic Republic of Iran Mr. M. Asbaghi Legal Assistant to the Agent Mr. Timothy E. Ramish Agent of the United States

AWARD

1. Emanuel Too (the "Claimant") has brought a claim against Greater Modesto Insurance Associates ("GMIA") and the United States of America. The Claimant seeks (1) the proceeds of an insurance policy, written by GMIA, for commercial property allegedly owned by the Claimant in Turlock, California, which was destroyed by fire, and (2)

^[1] Separate Opinion, see p. 389 below.]

^[2] Filed 29 December 1989.]

compensation for acts of the United States, allegedly including (a) the cancellation of the Claimant's visa, (b) the failure to protect his property, (c) the expropriation, by the State of Arizona, of a van owned by the Claimant, and (d) the sale, by the Internal Revenue Service ("IRS"), of the Claimant's hotel business, liquor permit, and home, along with a lien placed against a bank account held by the Claimant.

I. FACTS³

2. The Claimant has shown that he is an Iranian citizen by birth. He held a multiple-entry visa for the United States, issued at the United States Consulate in Tehran on 13 December 1978, and valid until 12 December 1982. The Claimant was an international businessman, engaged in a number of different enterprises. Among these, he alleges he was the owner of a fifty-room motel and restaurant, known variously as Paul's Hotel, the Dixie Pancake House, Sabrina's or the Golden Knight, located in Turlock, California. The ownership of this commercial property is subject to some uncertainty, which will be dealt with in Section III, *infra*.

3. On 17 November 1979, the Claimant took out an insurance policy for his commercial property. The writer of this policy was GMIA. The actual insurer was the New Hampshire Insurance Company. According to the Declaration of John R. Kirk, the insurance agent, GMIA is owned solely by him and is "itself . . . not an insurance company". The policy provided for U.S. \$425,000 of coverage for the motel, and U.S. \$350,000 worth of coverage for the restaurant and bar. In an amendment issued on 11 January 1980, coverage at the restaurant was increased by U.S. \$135,000. The policy included no less than four mortgage clauses, naming as beneficiaries the previous owners of the complex, a private creditor of the Claimant's, and the Bank of America.

4. On 16 March 1980, the restaurant was all but destroyed by fire. The cause of the fire was immediately identified as arson. The Claimant contends that he had been previously threatened, and believed that the structure was destroyed by "unknown prejudiced Americans". The police and fire departments in Turlock subsequently investigated the incident without arriving at any final conclusions, and the case has remained open.

³ More detailed consideration of certain facts is given, as appropriate, in connection with the jurisdiction and merits of the Claim, set forth in Parts III and IV below.

5. The New Hampshire Insurance Company apparently did not pay out the proceeds of the insurance policy to the Claimant. On 4 March 1981, Claimant brought a suit against GMIA and the New Hampshire Insurance Group in Stanislaus County Superior Court in California. This suit was, it seems, later dismissed for lack of prosecution. On 7 August 1981, the New Hampshire Insurance Company interpleaded into the same court the proceeds of the insurance policy. The stated liability under the policy, which was interpleaded into the court, was U.S. \$133,344. This same pleading mentioned that the mortgage holders on the property had either foreclosed or placed liens against it.

6. The Claimant alleges that the motel-restaurant was the subject of a forced sale, an act that the Claimant attributes to the United States. The Claimant's home, located in Modesto, California, was sold when a commercial United States bank foreclosed on it. The Claimant alleges, however, that this was a government confiscation. A liquor permit, held by the Claimant's corporation, was sold at public auction by the IRS and the proceeds used to pay a portion of overdue employment taxes owed by Sammy Joseph, Inc., the Claimant's company for the operation of the motel-restaurant. The Claimant seeks the recovery of this license and also argues that a bank account was expropriated, but he has not elaborated on this other Claim.

7. The Claimant contends that he traveled to Europe in early March 1980, prior to the fire. He also alleges that he was unable to investigate and act upon the loss of this property in California because he was denied re-entry into the United States. The United States had ceased honoring visas issued in Tehran, unless they had a subsequent endorsement, apparently because of concerns that the visa plates were being used by unauthorized individuals after the embassy in Tehran was seized in November 1979. The Claimant apparently made no attempt to seek an endorsement for his visa, although he states that he tried unsuccessfully to obtain a new visa while in Europe. The Claimant has acknowledged that he ultimately obtained a tourist visa and returned to the United States on 25 December 1980.

8. Another business that the Claimant was engaged in was the importation and sale of cold storage vans. He alleges variously that either six or eight of these vans were expropriated by the United States. The documentary evidence supports the existence of some of the vans. One of the vans located in Turlock, California, was apparently the subject of yet another arson. The only documentation that the

Claimant provides concerning an expropriation are communications from the Arizona Department of Motor Vehicles with respect to one trailer that was abandoned in that State. Arizona authorities discovered the trailer in early December 1979. Sammy Joseph Co. Ltd., the registered owner, was sent communications from the Arizona DMV, Abandoned Vehicles Section. No reply was made, and it is unclear whether the Claimant ever received them. The Claimant has not alleged that he made any attempt to recover his property. The notices that were returned unanswered provided that

[i]n the event the vehicle is not claimed and is sold at public auction any surplus occurring from said sale, after deducting costs arising from the sale of such vehicle i.e., towing, storage, advertising, and selling same, will be held for the owner for a period of thirty (30) days after such sale, thereafter to be disbursed according to law.

On 4 November 1980, the trailer was, in fact, sold at public auction. The total sale price was U.S. \$5.00.

9. The Claimant seeks U.S. \$2,000,000 from GMIA "for losses caused by the motel fire, and cold storage van as well as loss of delay in payment from the date of the fire upto [sic] the time of affecting payment for the losses incurred" and U.S. \$2,500,000 from the United States for losses "caused by the sale and auctioning of the Claimant's burnt building of the motel and his six vans". In a subsequent pleading, filed on 13 July 1983, the Claimant added an additional ground for recovery that the United States had failed to protect his property in Turlock. In an even later filing, on 9 January 1984, he added an altogether new claim that the Internal Revenue Service had expropriated his home, liquor license, business, and bank account, property together valued in excess of a half million dollars. Finally, the Claimant has requested attorneys' fees, prosecution costs and traveling expenses in the amount of U.S. \$500,000.

10. The Respondents have replied with a number of defenses. GMIA chiefly relies on the fact that it is a private commercial entity, not controlled by the Government of the United States, and that a claim against it is, therefore, outside of the jurisdiction of this Tribunal. It alternatively argues that it was a broker, not an insurer, and was not responsible for providing the Claimant with the proceeds of his insurance policy, and, at any rate, such proceeds were properly interpleaded into a court in the United States by the insurer. The United States also relies on jurisdictional grounds concerning the claim

that the suspension of the Claimant's visa prevented his return to the United States and the protection of his property. But the United States also asserts that the Claimant's travel was not seriously hindered by that restriction, and, at any rate, State responsibility would not attach for failure to honor the visa. Likewise, the United States denies that a State is responsible under international law for the sale of abandoned property carried out according to its laws and regulations or tax foreclosures against the Claimant. Nor would the United States be responsible, it argues, for the foreclosures on the Claimant's business and home by private parties. The United States denies any knowledge of a bank account allegedly expropriated by the IRS. Finally, the United States argues that it fulfilled its duty to protect the Claimant's property in California. No counterclaims have been presented in this case.

11. A Hearing was held on 30 May 1989.

II. ADMISSIBILITY OF CLAIMS

12. The Claimant substantially added to his claim after its date of filing. Both on 13 July 1983 and 9 January 1984, the Claimant articulated additional grounds for relief and included the United States Internal Revenue Service as an entity responsible for the alleged expropriation of his property.

13. Amendments of claims are governed by Article 20 of the Tribunal Rules of Procedure:

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal.

The Tribunal has previously held that this provision affords wide latitude to a party who seeks to amend a claim and the Tribunal's practise is in accord with this liberal approach. See *International Schools Services Inc. v. The Islamic Republic of Iran, et al.*, Award No. ITL 57-123-1, at 10-11 (30 Jan. 1986), reprinted in 10 IRAN-U.S. C.T.R. 6, 12. In view of its decision on the merits, *infra*, the Tribunal, however, need not reach a final decision as to whether the amendments made in this Case are permissible under Article 20 or should be construed as new claims, which would thus render them inadmissible.

III. JURISDICTION

A. Nationality of Claim

14. There is no dispute that Emanuel Too is an Iranian national. There is, however, some uncertainty about the extent of his property interest in the motel-restaurant in Turlock, California, and the four cold-storage vans. The record shows that the motel-restaurant was deeded to Sammy Joseph, Inc., a California corporation created on 7 May 1979 by the Claimant. The evidence in this Case does not precisely indicate the extent of the Claimant's interest in this entity. The Claimant has provided a stock certificate for Sammy Joseph, Inc., but the number of shares allocated to him is not shown. The certificate does, however, bear the number 3 in sequence, thus implying that there might be other shareholders. Another entity with the same name was created under Iranian law on 17 May 1978. The capital of this corporation was rials 20,000,000, of which the Claimant provided all but rials 1,000,000. The Claimant's signature appears on all significant documents relating to both of these concerns.

15. Although the Claimant has not conclusively shown his ownership interest in this California company, it does seem manifest that he was either the sole shareholder or the majority owner, and the United States does not contest this. The Tribunal notes that the Claimant's signature appears on the Articles of Incorporation for this entity, the Board resolution authorizing the purchase of the motel-restaurant, the sales agreement for that purchase, and the individual grant deed. As for Claimant's ownership interest in the cold storage vans, these were apparently owned by an Iranian corporation called Sammy Joseph Co. Ltd., established 17 May 1978. The Claimant owned a 95 percent interest in this entity. The Tribunal therefore holds that the Claims in the present Case are claims of an Iranian national.

B. Identity of Respondents

16. This Tribunal has already determined that it does not have jurisdiction over direct claims against United States nationals. *Iran v. United States*, DEC. A/2-FT, reprinted in 1 IRAN-U.S. C.T.R. 101, 104 (13 Jan. 1982). The Claimant is thus obliged to prove that Greater Modesto Insurance Associates is an "agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof". Claims Settlement Declaration, Art. 7, para. 4. He argues that "GMIA is reinsured with U.S. Government insurance Agencies, and is therefore ultimately included in the U.S. Government

budget". John R. Kirk, sole proprietor of GMIA, disputes this assertion and notes that Greater Modesto is not even an insurance company, only an insurance broker. He says that he is "in no way employed by or affiliated with the Government of the United States and in operating my business have never acted as an agent or representative of the Government of the United States. Furthermore, Greater Modesto Insurance Associates is in no way insured through the Government of the United States." Likewise, the United States denies that it "reinsures" GMIA, and suggests that even if such a contractual relationship were present, it would not rise to the level of "control" as required by the Claims Settlement Declaration.

17. The Tribunal holds that the Claimant has failed to show that GMIA is an entity controlled by the Government of the United States. None of the indicia of control, as articulated in past decisions of the Tribunal, are presented in this case. GMIA was not administered by persons appointed by some public authority. *Cf. Ray Go Wagner Equipment Co. v. Star Line Iran Co.*, Award No. 20-17-3, at 5-6 (15 Dec. 1982), 1 IRAN-U.S. C.T.R. 411, 413 (1982); *Rexnord Inc. v. Islamic Republic of Iran*, Award No. 21-132-3, at 7-8 (10 Jan. 1983), 2 IRAN-U.S. C.T.R. 6, 9-10 (1983); *DIC of Delaware Inc. v. Tehran Redevelopment Corp.*, Award No. 176-255-3 (26 Apr. 1985), 8 IRAN-U.S. C.T.R. 144 (1985). Nor was the stock of GMIA owned entirely, or in controlling part, by the government. *Cf. Ultrasystems Inc. v. Islamic Republic of Iran*, Award No. 27-84-3, at 8-9 (4 Mar. 1983), 2 IRAN-U.S. C.T.R. 100, 105-06 (1983); *Blount Brothers Corp. v. Ministry of Housing & Urban Development*, Award No. 74-62-3, at 11-12 (2 Sept. 1983), 3 IRAN-U.S. C.T.R. 225, 230-31 (1983); *Time, Inc. v. Islamic Republic of Iran*, Award No. 139-166-2, at 3-4 (29 June 1984), 7 IRAN-U.S. C.T.R. 8, 9-10 (1984). Finally, there was no evidence that GMIA's operations were supervised or controlled by the government. *Cf. Hyatt Int'l Corp. v. Islamic Republic of Iran*, Award No. ITL 54-134-1, at 27-31 (17 Sept. 1985), 9 IRAN-U.S. C.T.R. 72, 91-94 (1985); *DIC of Delaware*, 8 IRAN-U.S. C.T.R. at 155. The Tribunal has, therefore, no jurisdiction over GMIA.⁴

18. There is no dispute that the State of Arizona, the entity responsible for the alleged expropriation of one of the Claimant's vans, is a "political subdivision" of the United States and therefore is included in the term "United States" as defined in Article VII, paragraph 4, of the Claims Settlement Declaration.

⁴ Hereinafter, the United States shall be referred to as "the Respondent".

C. Subject Matter of Claims

19. The Respondent argues that the Tribunal lacks jurisdiction over the claim that the suspension of the Claimant's entry visa into the United States resulted in a property loss. The Respondent argues that claims of this sort were explicitly excluded in Article 2, paragraph 1 of the Claims Settlement Declaration, by its reference to "claims arising out of the actions of the United States in response to the conduct described in" paragraph 11 of the General Declaration of 19 January 1981. The Tribunal has already held that it lacked jurisdiction over actions taken by the United States in response to such conduct, including an Iranian national's claim for damages relating to his expulsion from the United States pursuant to the Presidential Order of 17 April 1980, the date on which the U.S. broke diplomatic relations with Iran. *See K. Haji-Bagherpour v. United States of America*, Award No. 23-428-2, at 3 (26 Jan. 1983), 2 IRAN-U.S. C.T.R. 38, 39-40 (1983); and *Mohammad Moussavi v. United States of America*, Award No. 163-949-3, at 6 (31 Jan. 1985), 8 IRAN-U.S. C.T.R. 24, 26-27 (1985).

20. It seems clear that the United States suspended visas issued in Tehran in application of the Presidential Order issued in response to the seizure of its embassy. Consequently, the Tribunal holds that the suspension of the Claimant's visa was an act which arose directly "out of the actions of the United States in response to the conduct described in" paragraph 11 of the General Declaration, namely the seizure of the United States embassy in Tehran. Therefore, the Tribunal has no jurisdiction over this claim.

IV. MERITS

A. Auction of Motel-Restaurant

21. The Claimant argues that the Respondent is obliged to pay U.S. \$2,500,000 for "losses caused by the sale and auctioning of the Claimant's burnt-building of the motel . . .". However, the Respondent did not auction this structure. Instead, the private mortgages on the property foreclosed. Plainly, the Claimant had financed the purchase of the motel-restaurant partly with a loan from the original owners. This loan was secured by a mortgage on the property. When he failed to meet his payments, they foreclosed. Because the Claimant can prove no attribution of this foreclosure to the Respondent, this claim must fail.

B. Failure to Protect Claimant's Property

22. The Claimant argues that the Respondent failed to protect his

property in Turlock, California, from the depredations of anti-Iranian Americans. The Claimant suggests that a State is responsible for injuries resulting to a foreign national or his property from the State's failure to provide police protection. Nevertheless, the State cannot guarantee the safety of an alien or of alien property. Responsibility is incurred only when police protection falls below a minimum standard of reasonableness. See *Kennedy Case* (U.S. v. Mex.), *Opinions of Commissioners* 289 (1927), 4 R. Int'l Arb. Awards 194 (1927). What constitutes reasonable police protection depends on all the circumstances, including the State's available resources. Ordinarily, the standard of police protection for foreign nationals is unreasonable if it is less than is provided generally for the State's nationals. See International Law Comm'n, Revised Draft on Responsibility of the State for injuries caused in its territory to the persons or property of aliens, art. 7, para. 1, U.N. Doc. A/CN.4/34/Add. 1 (11 Dec. 1961), reprinted in [1961] 2 Y.B. Int'l L. Comm'n 46, and in F.V. Garcia-Amador, L. Sohn & R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 130 (1974); see also *Almaguer Case*, (U.S. v. Mex.), *Opinions of Commissioners* 291 (1929), 4 R. Int'l Arb. Awards 523, 525 (1929).

23. By these standards, the Claimant has failed to show that local police and fire authorities failed to exercise due diligence in the protection of his property. By the Claimant's own admission, local police authorities investigated a number of instances where he had made a complaint. These included occasions where he had complained of vandalism, embezzlement, and the arson of one of his vans. In each case, the police authorities investigated and, in one instance, began a prosecution which was later dropped when the Claimant declined to press charges. Nowhere does the Claimant contend that he requested special protection from the local authorities in Turlock. Nor does he suggest that such protection would have been denied because of his Iranian nationality. Finally, the circumstances surrounding the arson of the motel-restaurant were investigated by the Turlock Fire Department. Indeed, the local fire chief noted that "this presumed arson case has been investigated as thoroughly as any other case [he had] been involved with in . . . 19 years with the Turlock Fire Department". The Claimant has failed to prove that local authorities failed to exercise due diligence in protecting his property or investigating the circumstances under which it was destroyed. Consequently, the Tribunal rejects this claim.

C. Claims Against the IRS

24. The Claimant argues that the Internal Revenue Service ("IRS") of the United States wrongfully expropriated his liquor license, his home in Modesto, California, and a New York bank account. The Respondent replies that the IRS indeed auctioned the Claimant's liquor license, in order to satisfy a tax levy amounting to U.S. \$70,157.17. Proper public notice was given, and communications made with the Claimant and his attorney, and the license was sold for U.S. \$19,026.00. As for the foreclosure on the Claimant's home in Modesto, the Respondent has submitted documentation that this property was foreclosed upon by a mortgagee, the Bank of America National Trust and Savings Association. This apparently resulted when the Claimant failed to make payments on the home. The Respondent denies any knowledge of a bank account expropriated by the IRS, and the Claimant has not identified this account or given any evidence of its expropriation.

25. The Tribunal holds that the Respondent was not responsible for the foreclosure on the Claimant's home. No attribution to the Government of the United States can be shown for that act. The bank account claim must also be rejected for failure of proof.

26. With respect to the liquor license, the Respondent has conceded that the IRS did, in fact, seize the Claimant's California general eating place liquor license in order to satisfy over U.S. \$70,000 worth of overdue withholding taxes. Nevertheless, a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price. See 2 *Restatement (Third) of the Foreign Relations Law of the United States* §712, comment g (1987); *Kügele v. Polish State*, 6 Ann. Dig. 69 (1931-32) (Upper Silesian Arb. Trib. 1930) (dismissing a claim that a series of license fees imposed by Poland had forced the claimant to close his brewery, and that Poland had therefore taken that property); *Brewer, Moller & Co. Case* (Ger. v. Ven.), 10 R. Int'l Arb. Awards 423 (1903) (taxes legally levied and without discrimination may not be recovered).

27. The IRS's action was a result of the Claimant's failure to pay taxes withheld by him on his employees' salaries. Nowhere does the Claimant suggest that this tax levy was imposed against him because he was an Iranian national. Nor has the Claimant proved that the IRS deliberately intended to cause him to abandon the property to the State or to sell it at

a distress price. It appears that, under United States law, the Claimant could have repurchased the license for its auction price. Also, a letter signed by a Revenue Officer was mailed on 8 December 1980, to the Claimant in Zürich and to his attorney in the United States about the auction. The letter stated *in fine* that if the district director did not hear from him within 5 days from the date of the letter, it would be assumed that he agreed with the established minimum bid price. No answer seems to have been made to this letter. This claim is dismissed because the Claimant has failed to show that the IRS's action was anything other than a lawful levy for overdue taxes, for which there is no State responsibility.

D. *The Abandoned Van*

28. The only cold-storage trailer with respect to which the Claimant has provided evidence of a taking was the one found in the State of Arizona. That the trailer was sold at auction by the State of Arizona is uncontested. It is also uncontested that the trailer in question had been abandoned in Arizona, that the Arizona authorities made efforts to inform the owner of that fact and of its impending auction, and that the Claimant made no efforts to recover the trailer prior to its auction. It is uncertain whether the Claimant was aware of the location of the trailer. The letter sent by the Arizona Department of Transportation was returned, and the Claimant contends that the address given on the envelope was incorrect. There is no question that the disposition of abandoned property is commonly accepted as a lawful action within the police power of States, again provided that such a disposition does not discriminate against aliens.

29. There is no evidence that the regulations of the State of Arizona for the handling of abandoned motor vehicles discriminated against the Claimant, or that the Arizona Department of Transportation acted contrary to its established regulations when it made all necessary arrangements for the sale of the van. As noted above, the Claimant does not assert that he made any efforts to recover the trailer during the eleven months between its discovery by the Arizona authorities and its auction, although the Claimant was evidently in the United States at least three of those months. Finally, and most importantly, the Claimant has failed to rebut the Respondent's contention that the property was abandoned in Arizona. The Claimant has provided no explanation of how the trailer came to be left in Arizona and why he failed to make an attempt to search and locate it. Without proof by the Claimant that the property was abandoned owing to events beyond his

control, the Tribunal need not decide whether adequate notice was given or whether the sale price of the trailer was justified. This claim is also rejected.

V. COSTS

30. Each of the Parties shall bear its own costs of this arbitration.

VI. AWARD

31. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Claim against Greater Modesto Insurance Associates is dismissed for lack of jurisdiction.
- (b) The Claim against the United States for the suspension of the Claimant's visa is dismissed for lack of jurisdiction.
- (c) The remainder of the Claims are dismissed for failure of proof.
- (d) Each Party shall bear its own costs of arbitration.

SEPARATE OPINION OF SEYED KHALIL KHALILIAN^[1]

1. Mr. Emanuel Too was the owner of an Iran-Europe shipping company named "Sammy Joseph Co. Ltd.". In early 1979, he moved to the United States and bought a house in California. Later, he registered "Sammy Joseph Inc." in the United States, in which company he was himself the sole shareholder. On 22 May 1979, he purchased a motel-restaurant in Turlock, California, and in that same year he imported into the United States eight of the trucks engaged in his Iran-Europe shipping company.

2. The Claimant has asserted that he was engaged in commercial activities with Swiss companies and travelled frequently to Switzerland. He held a commercial visa for the United States, which was valid until 1982. Mr. Too was actively engaged in commercial matters in the United States, and according to the Case file, on certain occasions he gave substantial assistance to United States charitable institutions. Notwithstanding this, Mr. Too has lodged a vehement complaint

[¹ Signed 30 January 1990; filed 30 January 1990.]

before this Tribunal against harassment by United States nationals. Following the events at the U.S. Embassy in Iran in November 1979, he too was not safe from the wave of anti-Iranian sentiments. Among other things, his house and restaurant were burglarized, and one of his trucks was burned. He asserts that the local police and judicial authorities failed to give him the necessary assistance. Mr. Too also asserts that following upon these wrongs, his wife became paralyzed due to emotional stress. In early 1980, he leased the motel and restaurant and left the United States in order to seek treatment for his wife and to negotiate with a Swiss company. However, the U.S. authorities refused to readmit him to the United States. On 16 March 1980, his restaurant was burned down. Mr. Too alleges that due to his absence from the United States, his home, restaurant, motel, liquor license and trucks were all put on auction and sold for a negligible price, and that when he finally succeeded in obtaining a three-month tourist visa from the U.S. Embassy in December 1980 (owing to the fact that he was a Christian), and returned to the United States, he learned that he had been stripped of all his property.

3. The Tribunal has dismissed all of the Claimant's claims in this Case, and the main reason that can be given for his unsuccessful suit is that those claims failed for lack of proof. Nonetheless, fairness requires consideration of the fact that notwithstanding all its deficiencies and shortcomings, this Case does have a number of strong points where the Tribunal could have shown greater leniency in weighing the evidence in support of the claim. Unfortunately, however, no such leniency was exercised with respect to this Iranian claimant, and this is what has led me to set forth the present Separate Opinion.

4. In this Opinion, I will take up the following points:

- The claim that the United States acted illegally in cancelling the Claimant's visa;
- The United States' failure to exercise protection;
- The Claim regarding the truck that was auctioned off in Arizona;
- The auctioning off of the Claimant's property; and
- The amendment to the Statement of Claim.

A. *The claim that the United States acted illegally in cancelling the Claimant's visa*

5. Invoking *K. Haji-Bagherpour v. United States of America*, Award No. 23-428-2,⁽²⁾ the Tribunal argues in paragraph 19 that the suspension of

[² 2 IRAN-U.S. C.T.R. 38.]

the Claimant's visa was a measure taken by the United States in response to Iran's seizure of the hostages, and thus that pursuant to Paragraph 11 of the General Declaration, the Tribunal lacks jurisdiction over said action. This is a debatable point, and in my opinion, the Tribunal could have found that grounds did exist for holding the United States responsible, if it had considered the Claimant's claim realistically. The United States alleges that the Claimant's visa was invalidated pursuant to the *Executive Order* dated 17 April 1980 by the President of the United States, and it has appended the said Order to its Memorial. However, nothing in this Order relates to suspension of the visas of Iranian nationals. At the Hearing conference, the United States Government's representative stated that the Order invalidating visas, which has been invoked in this Case, is unrelated to the Executive Order of 17 April 1980 which has been filed in the instant Case. He added that upon telephoning the [United States] Embassy, he learned that United States Embassies had been sent a telex stating that visas issued in Iran to Iranians were invalid. To become valid, such visas had to be revalidated outside of Iran. According to the United States' representative, the purpose of revalidating the visas was to prevent the entry into the United States of persons who might have made unauthorized stamps in their passports with the visa plates, following the occupation of the Embassy.

6. In response to my question as to whether he had the said Order in his possession, the United States' representative stated at the Hearing that he did not, and that the Embassy staff could merely recall something of the sort. Therefore, it is to be noted that so far as the evidence in the present Case is concerned, the Claimant was illegally and improperly deprived of his right to return to the United States and supervise his property. Furthermore, even assuming that such an Order actually existed (which has not been proved), it would certainly not have covered persons such as Mr. Too, because he obtained his visa long before the seizure of the hostages, and it would thus be totally out of the question to suppose that his visa was issued through improper use of the visa stamp obtained at the Embassy. After all, Mr. Too had lived and worked in the United States for a substantial period on the strength of that same visa. In paragraph 10, the Tribunal states that the United States alleges that Mr. Too was not categorically prevented from travelling to the United States. However, what bar can be more categorical than that the Claimant was not permitted to enter the United States until late in 1980, even though he held a valid visa and had travelled back and forth repeatedly? The fact that he was granted a

three-month tourist visa in 1980 is in itself evidence that the United States categorically barred the Claimant from entering that country on his commercial visa, a visa that was valid until 1982.

7. In my opinion, there can be no doubt that most of the injuries suffered by the Claimant in connection with the lost truck and the auction of his property arose from his absence from the United States, and further that the United States Government acted improperly in barring him from that country, thereby causing Mr. Too to be deprived of his property. However, the Award has been unfair in its presentation of this fact.

B. The United States' failure to protect the Claimant

8. In paragraph 22 of the Award, the Tribunal holds that the State cannot guarantee the safety or property of foreign nationals. The Case file indicates that Mr. Too suffered harassment as a result of anti-Iranian sentiments in the United States, and that he repeatedly resorted to, and sought help from, the police. He states that on one such occasion when he had recourse to the police, he was told that "only God can help you". Mr. Too had hired a private guard to watch his property, but despite this fact, his carpets, household furnishings, and restaurant appliances were all stolen.

9. In connection with the arson, the local Turlock newspaper reported that:

The truck was *one* of three parked on a vacant lot near the Pixie Restaurant. All three bore signs indicating they were from Iran, leading investigators to believe the fire may have stemmed from anti-Iranian sentiments over the siege of the U.S. Embassy in Tehran. *Doc. No. 1, Exhibit 1.*

The reports of the United States authorities regarding the arson are somewhat questionable. In those reports, an attempt has been made to show that the arson was perpetrated by an Iranian named Abdi, who had worked for Mr. Too and was owed one month's wages. According to the evidence in the Case file, however, Abdi did not work for the Claimant. Rather, he was one of Mr. Too's tenants, and had rented his motel and restaurant and signed a number of commercial instruments setting forth his debts to Mr. Too. Apart from this, the principal witness for the scenario which the Turlock Fire Department officials attempted to suggest was a woman named Nancy, who was Mr. Too's cashier and about whom Mr. Too had filed a complaint with the police, charging her with embezzlement. What is still more remarkable is that according

to the report by the Chief of the Turlock Fire Department, which constitutes one of the Respondent's major pieces of evidence, the arson took place on 13 March 1980, whereas according to the police report, it occurred on 16 March 1980.

10. At any event, the foregoing matters raise serious doubts as to the probity of the California State officials, in connection with the arson at Mr. Too's motel-restaurant. Despite this, the Tribunal has correctly concluded that even in such circumstances, and despite the Treaty of Amity — which the United States holds to be in force — the State cannot be held responsible for injuries to the property of foreign nationals.

11. In paragraph 23 of the Award the Tribunal adds, after reaching its finding, that the Claimant has failed to prove that the local authorities did not exercise due diligence in connection with the arson at the restaurant. In view of the brief account given above, there are serious doubts as to the conduct and probity of the police and the Fire Department. Nonetheless, such circumstances cannot, as was stated above, constitute grounds for State responsibility. In that same paragraph, the Tribunal repeats the words of the Chief of the Fire Department, who stated that the investigations into the fire had been among the most thorough of any [he had seen] over the past 19 years! It so happens, as noted above, that there are serious doubts surrounding the report and investigation by the Fire Department. The Chief of the Fire Department has related the events of Saturday night, 12 March 1980, and the morning of 13 March 1980, precisely and moment by moment, as having occurred on the night before the arson, whereas the fire took place three days later.

12. In that same paragraph, the Tribunal states that the Claimant admits that the local police authorities investigated whenever he made a complaint, whereas what Mr. Too actually said was:

In several cases I along with the eyewitnesses, called on governmental authorities including justice department and Police asking them to help me stating that my only sin was investment in the United States. But it was of no avail except certain communications. Now I have come to know that they only intended to discourage and tire me. Document 75, para. 10.

In another paragraph of his Memorial, he quotes a friend, who had gone to the United States in order to assist him during the period when he did not have permission to enter the United States, as saying that the police were against Mr. Too. Given that the burglaries of Mr. Too's

home and restaurant, the arson of his truck, and then the arson of his restaurant and motel, all arose from anti-Iranian sentiments, there would not seem to be any doubt that the non-cooperation of the United States police stemmed from this very same reason as well.

C. The Claim regarding the truck that was auctioned off in Arizona

13. In paragraph 8 of the Award, it is stated that another of the Claimant's occupations was the importation and sale of cold-storage vans. Apparently, Mr. Too had an international shipping company in Europe, and after deciding to move to the United States he brought eight of his trucks there in order to continue with those same activities. One of the trucks was found in the State of Arizona, although the Claimant did not explain to the Tribunal why it had been abandoned in such a place. At any event, however, the Arizona State authorities recovered the truck and then, after holding it for eight months without informing the owner, they abruptly gave a five-day notice of auction and then sold it for \$5.00. In commenting on these events, the Award states in paragraph 8 that in early December 1979, the Arizona Dept. of Motor Vehicles sent communications to Mr. Too's address. However, in my opinion, the United States authorities acted improperly, and even committed a flagrant injustice, with respect to their duty of protecting the property of Mr. Too as an Iranian national residing on United States soil, because *firstly*, the Arizona State police authorities allege that they found the truck in December 1979, and according to the Case file, Mr. Too was sent only one letter, dated August 1980 at that — i.e., eight months after the truck was found. *Secondly*, the letter was incorrectly addressed. The letter was sent to an address which included neither a street name nor a house number. The address on the Arizona police letter reads, "Sammy Joseph, Turlock, CA 95380", whereas Mr. Too's correct address was:

Sammy Joseph Inc.
1350 N. Golden State, Turlock, CA 95380,
& 2632 Lester Rd., Turlock, CA.

14. Of course, the Tribunal was also confronted with the question of what action, if any, Mr. Too himself took during this months-long period, in order to find his truck. Nonetheless, the Respondent has no doubt whatsoever that the truck belonged to the Claimant, and it was taken over by the Arizona State authorities as abandoned property. The issue of State protection of the property of foreign nationals within

United States territory now arises; it must be seen whether or not the United States Government was in violation of the *Treaty of Amity* — which, it has always held, both that Government and the Government of Iran were required to enforce — in respect of its protection of this Iranian claimant's property. One of the Claimant's claims relates to this same truck, which the Arizona police found and sold at auction for \$5.00. This truck was one of eight trucks which the Claimant had shipped from Europe to the United States, and for which he paid a large sum of money for the relevant shipping and customs costs.

15. In paragraph 29 of the Award, the Tribunal states that the Claimant has not shown that the Arizona Highway Patrol authorities acted in violation of the regulations, and it concludes by implying that the truck was of no value. At the Hearing conference, the Claimant showed a picture of the truck; he had also previously placed in evidence the pertinent shipping papers and customs payment records. This evidence indicates that contrary to the suggestions made in the Award, this truck was worth as much as an average truck (of that sort). While Mr. Too was being prevented from entering the United States due to the illegal action taken by the United States Consulate in Zurich in invalidating his visa, the Arizona police sent him a letter stating that his truck had been found — a letter which was, however, improperly addressed, since it bore neither his street name nor the house number. As a result, the Claimant never learned of the contents of that letter. Subsequently, the truck was sold off at an auction for the astonishing price of \$5.00. In addition to the evidence in this Case which proves that the truck had a normal value, the double standard applied by this Tribunal in its treatment of Iranian and United States claimants is astonishing. Whereas in one place this Tribunal has gone to such lengths to be generous that in one Case it has awarded against the Iranian Government for payment of \$800 in compensation, merely on the strength of an American claimant's verbal assertion (unsupported by any evidence whatsoever) that he had had a wristwatch which the authorities at the Mehrabad Airport in Tehran took from him when he left Iran,³ here, quite the contrary, seemingly since it seems that it is the Iranian Claimant's *foot* that is involved, the Tribunal accepts the American Respondent's word for it that an 18-wheeler trailer van — as

³ See *Daley v. Iran*, Award No. 360-10514-1, reprinted in 18 IRAN-U.S. C.T.R. 232, at 242.

described by the Claimant himself, together with a photograph and documentary evidence presented by him to the Tribunal — was worth no more than \$5.00.

D. The auctioning off of the Claimant's property

16. With regard to the auctioning off of the motel-restaurant, the Award states that this act was not attributable to the Government, and was instead taken by the mortgagees. The United States Government certainly cannot be held responsible for this auction, but at the same time, there can be no doubt that the United States Government's illegal refusal to let Mr. Too return and supervise his property caused him to incur the injuries arising from the auction, as well as other onerous losses. Mr. Too seems to have been a successful businessman throughout his life. At the Hearing conference, he stated that if he had been able to be in the United States, he would surely not have lost the savings which he had accumulated over 35 years of his life, in a period of less than one year. Paragraphs 24-27 of the Award relate to the auction of the liquor license by the Internal Revenue Service (IRS). The Claimant has asserted that a Mr. Cash, of the United States IRS, seized his liquor license and auctioned it off among his friends. I concur in the majority's finding that:

... a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States ... (para. 26)

However, the evidence filed by the Respondent gives rise to doubts as to the good faith of Mr. Cash and the IRS.

17. The taxes claimed consist of four items relating to three-month periods, the last of which ended on 31 March 1980. One of those items was levied in 1979, but the remaining four were suddenly levied on 24 November 1980. Then, immediately thereafter on the following day, i.e., 25 November, a notification was sent, to be received by the tax debtor. Immediately thereupon, on 8 December 1980, Mr. Cash notified Mr. Too, who was in Switzerland, that his liquor license had been seized and would shortly be auctioned, and that if he had any objections thereto, he must state them within five days. In actuality, Mr. Cash seized the liquor license a mere 14 days after levying the taxes, and he allowed Mr. Too (who was in Switzerland) only five days, following the date on which the letter was issued, within which to state any objections he might have. Yet, it is common knowledge that it would

have taken at least one week for the letter to reach Mr. Too in Switzerland.

18. Although the Award states in paragraph 27 that the letter was sent both to Mr. Too in Zurich and to his attorney in the United States, this is not correct; no letter was ever sent to Mr. Too's attorney. At any event, Mr. Too's license, which he states had a current value of \$300,000, was put on auction by Mr. Cash, an IRS official, and sold for less than \$20,000!

E. The amendment to the Statement of Claim

19. Finally, it is worth mentioning one point in connection with the amended Statement of Claim. In paragraph 13 of the Award, citing *International School Services Inc. v. The Islamic Republic of Iran*, Award No. I.T.L. 57-123-1, reprinted in 10 IRAN-U.S. C.T.R. 12, the Tribunal states, regarding the amended Statement of Claim, that the Tribunal has previously held that under Article 20 of the Tribunal Rules, a party who seeks to amend his claim is afforded wide latitude to do so.

20. After stating the above, the Tribunal holds that in light of the Award's finding in this Case, it sees no further need to reach the issue of whether it regards the Claimant's amended Statement of Claim as a new and therefore inadmissible claim, or as a permissible amendment. The fact is that the Tribunal does not grant the parties to a claim anything like the wide latitude alleged in the Award, to amend their Statements of Claim. In its Award in *Cal-Maine*, the Tribunal rejected the amended claim, even on the grounds of *likely* prejudice to the other party:

A claim for accounts receivable was not raised at the 7 February 1983 Pre-Hearing Conference and was not in any of Cal-Maine's pleadings until its Memorial of 14 July 1983. It did not seek a formal amendment of its claim. Even assuming that the claim for accounts receivable could be deemed a request for amendment, in this case, the delay in asserting such a claim and the likely prejudice to Respondents of such a delay would preclude the acceptance of such an amendment under Article 20 of the Tribunal Rules. In view of this fact and the fact that no such amendment was proposed, the Tribunal does not consider Cal-Maine's claim for accounts receivable. (*Cal-Maine Foods, Inc. v. Iran*, Award No. 133-340-3, reprinted in 6 IRAN-U.S. C.T.R. 60.)