COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ABOLALA SOUDAVAR, Plaintiff, vs. ISLAMIC REPUBLIC OF IRAN, BONYAD-E MOSTAZAFAN VA JANBAZAN, SABT-E AHVAL-E KOLL-E KESHVAR, and HOJJATOL-ISLAM NAYERRI Defendants.	)	Civil Action No. 00-02506 (HHK)

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure, Defendants move the Court for an order dismissing the suit for lack of subject matter and personal jurisdiction.

In support of the motion, the Court is respectfully referred to the annexed Memorandum of Points and Authorities.

Dated: December 27 , 2000

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATEMENT

In this suit, plaintiff, Abolala Soudavar ("Soudavar"), asserts a claim for compensation against the Islamic Republic of Iran, Bonyad-e Mostazafan Va Janbazan, an Iranian non-profit organization, Sabt-e Ahval-e Koll-e Keshavar, an agency of the Government of Iran, and Hoajjatol-Islam Nayerii, Chief Judge of the Revolutionary Courts for the 1993 taking of several parcels of land in Iran owned by him and members of his family.[1] Soudavar is an Iranian national

[1] Soudavar commenced a parallel suit in this Court on July 19, 2000 (Case No. 00-CV-02506 (HHK)) against Iran and one of its agencies for compensation for the 1979 nationalization of his shares in an Iranian company. Iran's motion to dismiss that suit is pending.

An identical suit was brought in the Southern District of Texas by Soudavar in 1988 which was dismissed by Fifth Circuit on appeal from the lower court for lack of subject matter-jurisdiction. *Soudavar v. Islamic Republic of Iran, et al.*, 186 F.3d 671 (5th Cir. 1999).

who became a resident of the United States in 1983. He invokes the subject-matter jurisdiction of the Court under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1605(a)(2), the Treaty of Amity between the Unites States and Iran[2] and the Alien Tort Act, 28 U.S.C. §1350.

The gravamen of the complaint is that on November 15, 1993 the Revolutionary Islamic Court of Tehran ordered the title to some 10 parcels of real-estate transferred to co-defendant Bonyad-e Mostazafan Va Janbazan ("Bonyad"), an agency of Iran that administers and liquidates seized properties. The judgement of the lower court was affirmed by co-defendant Hojjatol-Islam Nayerri ("Nayerri"), Chief Judge of the Revolutionary Courts, and the title transfer was allegedly registered by co-defendant Sabt-e Ahval-e Koll-e Keshvar, a government agency that registers and issues birth, death and identification certificates.

ARGUMENT

A. The Court Lacks Subject-Matter Jurisdiction

1. Plaintiff's Taking Claim Does not Meet the Statutory Prerequisites of § 1605(a)(3)

The law is settled that the Foreign Sovereign Immunities act of 1976 provides the sole basis for obtaining jurisdiction over a foreign state in United States courts. *Argentina Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The *Amerada* Court explained that sections 1604 and 1330(a) of the FSIA work in tandem: §1604 bars United States courts from

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[2] *Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran*, June 6, 1957; 8 U.S.T. 899, T.I.A.S. No. 3853.

exercising jurisdiction when a foreign state is entitled to immunity[3], and §1330(a)[4] confers subject-matter jurisdiction on district courts to hear claims against a foreign state when the foreign state is not entitled to immunity pursuant to §§1605-1607, 488 U.S. at 433-35.

Section 1605 enumerates te exceptions to foreign sovereign immunity. The only exception that could arguably apply to this case is the "international takings exception" in §1605(a)(3). That section provides:

> **General exceptions to the jurisdictional immunity of a foreign state**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . .
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United states in connection with a commercial activity carried out in the United States by the foreign state; or that property ir any property exchanged for such property is owned and operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a

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[3] §1604 provides as follows:

> **Immunity of a foreign state from jurisdiction**
> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of te United States and of the States except as provided in sections 1605 to 1607 of this chapter.

[4] Section 1330(a) provides as follows:

> **Actions against foreign states**
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.

commercial activity in the United States. (Emphasis added).

Soudavar states that he is an Iranian national (Compl. at 1). The real estate that was taken is located in Iran (Appendix 1 to Comp.) and Soudavar does not claim that any property exchanged for the confiscated property "is present in the United States in connection with a commercial activity carried on in the United States by [Iran]," §1605(a)(3). Finally, Soudavar does not meet the prerequisite of §1605(a)(3) that the property be taken is "in violation of international law" because the taking of property by a sovereign from its own nationals does not involve principles of international law. The international taking exception was analyzed by the Fifth Circuit in *De Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1395-96 (1985), affirming the dismissal of a suit for the taking of property brought by a Nicaraguan national against Nicaragua. The court stated:

> . . . With few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens. Thus, even if Banco Central's actions might have violated international law had they been taken with respect to an alien's property, the fact that they were taken with respect to the intangible property rights of a Nicaraguan national means that they were outside the ambit of international law.
>
> In applying Section 1605(a)(3), our inquiry is narrowly circumscribed. The question is not whether a foreign state's actions are consistent with United States law or United States conceptions of public policy. Nor are we concerned with whether, on the merits, we should recognize or assist the taking of property by the foreign state. Instead, the question is solely whether any generally accepted norm of *international* law prohibits the defendant's actions. If not, then unless another exception to sovereign immunity applies, the foreign state is immune from suit and we lack jurisdiction to inquire into the validity of its conduct. (Emphasis in original).

See also, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992) (international taking exception to sovereign immunity does not apply where a sovereign state

expropriates property of its own nationals because such taking does not implicate international law), *cert. denied,* 113 S.Ct. 1812 (1993); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990) (same).

Even though Soudavar does not list §1605(a)(3) as a basis for jurisdiction, the facts alleged by him establish incontestably that his claim is based on a governmental taking, and nothing else. As we show below, Soudavar's Procrustean effort to turn the taking in Iran into a commercial activity in the United States is futile.

Subject-matter jurisdiction is also lacking under §1605(a)(3) against the named co-defendants that are "agencies and instrumentalities" of Iran within the definitions of §1603(b). Soudavar has made no showing that the property taken is "owned or operated by an agency or instrumentality of the foreign state and that the agency or instrumentality is engaged in a commercial activity in the United States".

In consequence, this Court lacks subject-matter jurisdiction over the takings claim which Soudavar seeks to assert against his own country, Iran.

2. Plaintiff's "Direct Effect" Assertion Does not Meet the Statutory Prerequisites of § 1605(a)(2)

Soudavar insists that subject-matter jurisdiction may be vested in this Court pursuant to the commercial activity exception to sovereign immunity, codified in §1605(a)(2). (Compl. 8-9). That section reads in relevant part as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> . . .
>
> (2) in which the action is based upon . . . an act

> outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

Soudavar asserts that the taking of his property pursuant to an Iranian court order is commercial in nature and confers jurisdiction upon U.S. courts. The contention does not bear scrutiny. The courts have consistently held that the nationalization or taking of property by a foreign state within its territory is a quintessentially governmental act; in consequence, the "direct effect" clause of §1605(a)(2) provide no jurisdictional predicate for the Soudavar's suit. *See Alberti v. Empresa Nicaraguese de La Carne*, 705 F.2d 250, 256 (7th Cir. 1983) (suit involving nationalization concerned public governmental act for the purposes of FSIA); *see also Carey v. National Oil Corp.*, 453 F.Supp. 1097, 1102 (S.D.N.Y. 1978) (nationalization is the quintessentially sovereign act, never viewed as having a commercial character).

Iran's taking of Soudavar's property was clearly a governmental act, in the terminology of the restrictive doctrine of sovereign immunity an act *jure imperii*, and thus outside the reach of § 1605(a)(2)'s "direct effect" clause.

3. Subject-Matter Jurisdiction Will Not Lie Under the 1957 U.S./Iran Treaty of Amity

Article III of the Treaty on which Soudavar relies, (Compl. 12) assures access by nationals and companies of a signatory state to the courts of the other signatory on terms no less favorable than those imposed on local nationals. Article III says nothing about subject-matter jurisdiction of the courts of the signatory states nor does it identify any claims that may be asserted in the courts of one signatory state against the other signatory state. 488 U.S. at 442. The Treaty nowhere

contains a waiver by Iran of sovereign immunity within the purview of §1604.

The *Amerada Hess* Court considered the treaty exception and stated that "This exception [§1604] applies when international agreements expressly conflict with the immunity provisions of the FSIA." (Emphasis added, internal quotation marks omitted). This is not the case here. Soudavar can also derive no comfort from Article IV of the Treaty since that Article does not identify any substantive provisions vesting jurisdiction in United States Courts. Article IV deals with the taking of property without just compensation, "but solely in terms of the property of nationals of one country within the other's territory. There is no hint of protecting either country's nationals against their *own* sovereign." *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209, 214 n.7 (N.D. Ill. 1982). (Emphasis in original).

Therefore, the Treaty of Amity cannot serve as a source for this Court's subject matter jurisdiction to hear Soudavar's claim against Iran.

4. Subject-Matter Jurisdiction Will Not Lie Under the Alien Tort Act

Soudavar refuses to acknowledge that the FSIA is the exclusive avenue for gaining jurisdiction over a foreign sovereign in a United States court, although we have argued the point extensively on two prior occasions. (*See* n.1 *supra*). The Alien Tort Claims Act, 28 U.S.C. §1350, which confers upon district courts jurisdiction over torts committed in violation of international law or a treaty of the United States not permit suit against foreign states. In *Amerada Hess*, *supra*, a Liberian company complained that Argentina had illegally destroyed its vessel in the South Atlantic during the Falkland Islands War. The *Amerada Hess* Court ruled that a suit against

a foreign state may only be brought under the restrictive rules of the FSIA. The Supreme Court could not have been any clearer that a foreign state, like Iran, is subject to suit only under by the FSIA.

The dispositive provision in § 1604 declares that foreign states and their agencies and instrumentalities are *immune* from the adjudicatory jurisdiction of U.S. courts, unless one of the exceptions to immunity set forth in §1605 is satisfied.[5] *See also Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 805 n.13 (D.C. Cir. 1984) (Libya dismissed from suit under the Alien Tort Act because FSIA "plainly deprives us of jurisdiction over Libya." Bork, J. concurring).

Finally, §1350 confers jurisdiction on federal courts to hear tort claims by aliens only if the law of nations or a treaty of the United States provides for a cause of action.[6] In *Jafari, supra,* the court held that the "law of nations" does not prohibit a government from expropriating property of its own nationals. The court noted:

> It may be foreign to our way of life and thought, but the fact is that governmental expropriation is not so universally abhorred that its prohibition commands the "general assent of civilized nations (*Filartiga,* 630 F.2d at 881)-- a prerequisite to incorporation in the law of nations. As noted by our Supreme Court in another context in *Banco National de Cuba v. Sabbatino,* 376 U.S. 398, 428-30 (1964), a sharp conflict of views exists in the world as to such expropriation .... We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all civilized nations.

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[5] In this case the foregoing reasoning also extends to co-defendant Nayerii as subjecting him to this suit is an indirect suit against Iran. As the Chief Judge, he was acting in his judicial capacity as an agent of the Judiciary in affirming the decision of the lower court. Nayerii has no contacts whatsoever with the United States *See Chuidian v. Philippine Nat. Bank,* 912 F.2d 1095 (9th Cir. 1990)(Member of Philippine commission acting in official capacity was entitled to immunity under FSIA).

[6] For the reasons already discussed above, it is clear that the Treaty of Amity may not be relied upon by Soudavar.

539 F.Supp. at 215. (Internal quotation marks omitted).

Consequently, Soudavar may not rely on the Alien Tort Act may not be used as a jurisdictional predicate for a suit against Iran and its organs.

B. The Court Lacks Personal Jurisdiction Over the Defendant

Section 1330(b) provides:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under 1608 of this title.

The legislative history to section 1330(b) explains:

> (b) *Personal jurisdiction*.- Section 1330 (b) provides, in effect, a Federal long-arm statute over foreign states (including political sub-divisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1946), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, section 1330(b), 1608, and 1605-1607 are all carefully interconnected.

H. R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) at 19-20, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6601, 6613-14 (emphasis added).

In the instant suit, there is not even an attenuated connection between the taking claim asserted by Soudavar, and the United States. The constitutionally mandated connection in the instant suit is t said to be he incidental residence of Soudavar in the United States. Residence alone, however, does not satisfy the due process standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) or its progeny for the maintenance of a personal action against a non-resident defendant. The dispositive questions are always what is the nonresident defendant's connection with this country, or, what did the nonresident defendant do, or promise to do, in this country? The answer in this case is a resounding "nothing".

The law is clear that a plaintiff's residence or acts performed by the plaintiff in the forum in relation to the taking of his property in Iran are not "contacts' that Iran or its organs have established with the forum. For due process purposes, it is the defendant's contact with the forum, and his contacts alone, that must furnish the statutory and constitutionally required affiliating contacts. The focus is solely on the "relationship among the defendants, the forum, and the litigation". *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (emphasis added); *see also Rush v. Shavchuk*, 444 U.S. 320, 332 (1980).

The complaint in the instant suit alleges no affiliating contacts by any of the named defendants with this forum. Consequently, this Court lacks the statutory and constitutional jurisdiction over any of the defendants and the suit should be also dismissed on this independent ground.

CONCLUSION

For the foregoing reasons, the Court should enter an Order dismissing the instant suit for want of subject-matter and personal jurisdiction.

An appropriate Order is annexed hereto.

Dated: December 27, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December 2000, I served a true copy of the foregoing motion to dismiss together with the memorandum of points and authorities in support thereof by first-class mail, postage prepaid, on the plaintiff Abolala Soudavar (*pro se*) at the following address:

Abolala Soudavar
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