10273-57

ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 10273 Date of filing: 30 Jan 1989

** AWARD - Type of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of Mr Ansari

- Date 23 Dec 88 P filed on 23 Dec 88

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- Date _____

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In the Name of God

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CASE NO. 10273
CHAMBER THREE
AWARD NO. 399-10273-3

HIDETOMO SHINTO,
a claim of less than US$250,000
presented by THE UNITED STATES
OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

Persian version
Filed on 23 Dec.1988

DISSENTING OPINION OF JUDGE PARVIZ ANSARI

Preliminary matters

1. A private company named Sherkat Khadamat Beynolmelali - MAHAT (private, joint-stock) ("SKBM") was formed in Tehran by four individuals, Amir Hossein Amir Faiz, Mohsen Asgari Nazari, Afren Olana and Antonio Avlida, and was registered with the Corporate Registration Bureau on 18 Ordibehesht 1354 [8 May 1975]. Pursuant to its Articles of Association, SKBM's purpose was to perform computer services; its capital consisted of one hundred ten-thousand rial bearer shares, only 35% of whose face value was paid up. Its Board of Directors and Managing Director were elected from among the

shareholders, and enjoyed the full and necessary authority to run the company, including hiring, firing and appointing staff, setting the employees' salaries and emoluments, engaging in all manner of transactions, taking receipt of monies owed the company and paying its debts.

2. In the course of its commercial activities in providing computer services, SKBM succeeded, together with another Iranian company, in becoming a subcontractor to Information Systems Iran ("ISIRAN") and undertaking activities relating to computerization of available stock records. This project of ISIRAN was known as "CALS."[1] In order to be able to carry out its duties, SKBM decided on its own to recruit a number of foreign personnel, and towards the end of Azar 1355 [December 1976], it recruited Mr. Hidetomo Shinto (the Claimant in the instant claim). After obtaining a work permit, Shinto served SKBM for 18 months in Tehran as a stock control specialist.[2]

3. On 23 Ordibehesht 1357 [13 May 1978], a new employment agreement was concluded between SKBM and Shinto. Pursuant to this contract, Shinto was, in exchange for a monthly salary of $2,550, plus $800 in relocation allowance and a return air fare entitlement, to continue working for SKBM as a stock control specialist for a further 18-month period. The company also undertook the responsibility for all taxes.

4. Beginning in Azar 1357 [December 1978], SKBM was overdue in payment of its employees' monthly salaries.

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1 Computerized Automated Logistics System Conversion Project.

2 The Claimant has not provided the Tribunal with his first contract with SKBM.

Ultimately, on 4 Bahman 1357 [24 January 1979], the President of SKBM, invoking the terms of Shinto's contract, informed him by letter that all of SKBM's employment contracts were being terminated as of that date, due to force majeure. That letter, which was signed by SKBM's Vice-President, Mr. Hassan Asgari Pour, states that the contract was being terminated owing to the prevailing civil unrest in Iran and the company's inability to meet its financial obligations. Attached to the letter of termination was a computation sheet providing a detailed statement of the salary and benefits to which Shinto was entitled, whereon the total amount owed him by the company was calculated at $5,987.11. In a further letter of the same date, SKBM confirmed that the monies due Shinto would be paid in dollars, and it emphasized that the company's obligation would be "in no way dependent upon receiving payment from ISIRAN."

5. After the passage of nearly three years following that development, during which time he did not make any demand whatsoever upon SKBM, a private company, for the monies owed him, Shinto brought claim before this Tribunal following the promulgation of the Algiers Declarations.[3] And then, the amount of the remedy sought in the original Statement of Claim was even

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3 As I have previously stated, all of the relevant claims for less than $250,000 filed with the Tribunal have in reality been brought by the United States Government in exercise of diplomatic protection of its nationals, and there is no legal justification for any subsequent change in the named claimant . See: Separate Opinion of Judge Ansari in Picker International and The Islamic Republic of Iran, Award No. 229-10173-3 (1st May 1987); Theodore Lauth and The Islamic Republic of Iran, Award No. 233-10335-3 (8 May 1986); and Separate Opinion of Judge Khalil Khalilian in Lord Corporation and Iran Helicopter Support and Renewal Company, Award No. 346-10973-2 (29 January 1988).

$35,190 more than the above-stated amount due, and the Claimant demanded it from the Iranian Government under the heading of lost wages owing to termination of his employment contract. The Claimant also sought $300 in connection with property he had left behind in Iran.

The cause of action, control, and evidence thereof

6. In the Claimant's Statement of Claim, the grounds and cause of action are asserted to be acts of the Iranian Government in breaching the contract, preventing Shinto from continuing with his work, and forcing him to leave Iran. However, the sole cause of action asserted in the Claimant's Reply to the Respondent's Statement of Defence is that SKBM, which is purported to be an entity under the control of the Iranian Government, breached the employment agreement.

In view of Articles II and VII (3) of the Claims Settlement Declaration, before the instant claim can fall within the Tribunal's jurisdiction, it must be established that SKBM is controlled by the Government of Iran. On the basis of the record in this Case, the Claimant has not succeeded in proving this point; the evidence submitted by him fails to give the slightest impression of control over SKBM, a private company, by the Government of Iran. Not only is the Claimant's assertion that SKBM was under the direct operational control of ISIRAN unfounded, but it is controverted by the evidence as well. Contrary to the Claimant's position, the limited security checks carried out by ISIRAN with respect to SKBM's employees when they worked at the electronics depot were, given that the CALS project was related to certain military installations, an entirely normal matter that cannot constitute

evidence of control. On the other hand, the Respondent has submitted to the Tribunal the company's Articles of Association (attached to its Statement of Defence), thereby establishing that SKBM is an independent private company. In this same connection, and in order to prove that there was no Government control over SKBM, the Respondent has provided the Tribunal with the response of the Corporate Registration Bureau to a query by the Director of Computer Industries and Services (Doc. 42). In reliance on this response of the Corporate Registration Bureau, and also in order to buttress and corroborate that defence which it had maintained from the very beginning, the Respondent proved to the Tribunal that pursuant to the latest corporate changes on 26 Khordad 1356 [16 June 1977], the company's Board of Directors consisted of Amir Hossein Amir Faiz, Mohsen Asgari Nazari, and Hassan Asgari Pour; it also noted that the Government has never provided SKBM with a Government-appointed director.

The Hearing, and the Claimant's new positions

7. Right at the start of the Hearing conference, the Claimant proceeded to change his legal positions as well. This time, the Claimant based his claim on the statement of accounts submitted to him or, alternatively, unjust enrichment; he also added thereto a theory of direct and indirect expropriation. At the Hearing, the Claimant alleged for the first time that the Iranian Government had expropriated all of the assets of Amir Hossein Amir Faiz, SKBM's majority shareholder, and asserted that the Government had thereby assumed control over the company. The only evidence adduced by the Claimant in proof of this new allegation was an article clipped from the 22 Esfand 1358 [12 March 1980] issue of Ettelaat, wherein it was reported that the property of 209 persons with

connections with the former regime had been expropriated.

8. In my opinion, the Claimant was not entitled to set forth new grounds of action at the Hearing, or to adduce new evidence.[4]

The Claimant's new grounds, arguments and evidence were submitted in such an untimely manner that the Tribunal should have barred him from even distributing the new evidence or invoking it at the Hearing. The Tribunal's departure from its normal procedure of refusing to accept new evidence at the hearing cannot be justified,[5] and the Tribunal's findings in paragraph 28 of the Award

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4 While it is true that international tribunals are generally lenient in accepting evidence, and that the Agents of the two Governments should cooperate with one another in informing the Tribunal of the existence of relevant evidence, it ought not to be forgotten that these principles must never be applied in such a way as to lead to abuses by either Party and to prejudice to the rights of the other. Mani writes that "[T]he Tribunal must guarantee the parties observance of their procedural rights, eliminating thereby the element of surprise that may be involved in every instance of late submission of evidence." Mani, International Adjudication: Procedural Aspects 242 (1980). Sandifer holds as follows: "But Tribunals in the exercise of their discretion reject evidence submitted so late as to make its admission unfair or inexpedient." Sandifer, Evidence before International Tribunals 74-75 (1975).

5 In paragraph 20 of Award No. 294-181-1 (4 March 1987) issued in Bechtel, Inc., et al and The Government of the Islamic Republic of Iran, et al, the Tribunal concluded, after examining the Respondent's "Hearing Statement " distributed at the Hearing, that "This 'Hearing Statement' contains a detailed, partly new outline of IDRO's factual assertions and legal arguments, the acceptance of which for filing would prejudice the Claimants, who did not have sufficient opportunity to comment on the document as a whole. The Tribunal therefore does not admit the 'Hearing Statement'..."

are based on error and are inconsistent with the facts. Nor can its justification, in agreeing that the shift in the Claimant's arguments resulted from Iran's submission of Doc. 42, and in stating that he had "little choice but to address this filing at the Hearing," be accepted. The fact of the matter is that on principle, the Claimant had no need whatsoever to obtain Doc. 42, in order to resort to the pretexts advanced by him at the Hearing. As stated above, the Respondent had filed SKBM's Articles of Association, along with its first Statement of Defence, well before that time. Moreover, Doc. 42 (which merely contains a reply by the Corporate Registration Bureau to a query concerning the latest changes in the company) only further buttresses the Respondent's earlier defences, and it cannot in any sense be deemed to constitute new evidence. Since the name of Amir Faiz appears in the company's Articles of Association, attached to the Statement of Defence and submitted to the Tribunal at an early stage of the present proceedings, it was the Claimant's duty to inquire into this major shareholder at once, and not to wait with folded arms until the Respondent produced Doc. 42.

The Claimant could -- and indeed should -- have raised the points set forth at the Hearing long before that time, namely when he received a copy of Iran's Statement of Defence. Consequently, the statement that in itself, the Respondent's Doc. 42 contained new material that prompted the Claimant to undertake further investigations, is totally unfounded and erroneous.

9. Even supposing, in arguendo, that the Claimant might be permitted to change his arguments, and to present new evidence at the Hearing and submit a newspaper clipping that was already available to the public, the allegation

that SKBM is controlled by the Government of Iran has nonetheless not been proved. Since the Claimant bears the burden of proving those new arguments, his new evidence must be able to prove his assertion. At the Hearing the Claimant alleged, in reliance on the article from Ettelaat dated 22 Esfand 1358 [12 March 1980], that the name appearing as number 170 on the list was that of Amir Hossein Amir Faiz, SKBM's major shareholder, whose assets had thus been expropriated by the Government. Objecting to submission of this new evidence, at the Hearing the Respondent promptly drew the Tribunal's attention to the point that in the original Persian text of the said newspaper article, the name in question was not that of SKBM's major shareholder, but rather that of someone else, and that it had been intentionally altered to read "Amir Faiz" in the Claimant's incorrect translation.

Given that the Claimant's sole documentary evidence in proof of Government control and expropriation of the shares of the company's major shareholder was merely that same newspaper article whose invalidity and irrelevancy the Respondent established at the Hearing; and given as well that the Claimant has failed to prove those facts upon which he relied -- at the last moment -- in support of his claim, the Tribunal ought to have rejected the claim of control. Regrettably, however, the Tribunal did not do so, and after closure of the Hearing, despite objections on my part and in violation of the accepted principle of determining jurisdiction on the basis of the available evidence, it issued an Order whereby, without justification, it directed the Respondent to submit to the Tribunal the order by the

Prosecutor's Office expropriating the assets of 209 individuals.[6]

In its Award, the majority states at least twice, that "[p]ursuant to its oral directive at the Hearing," the Tribunal issued an Order on 5 January 1988 directing the Respondent to file with it certain documents, inter alia the original copy of the order by the Prosecutor's Office. Yet, on principle, the discussion at the Hearing centered on the article in Ettelaat, which is available to the public, as well as on Doc. 42 -- and not on the order by the Prosecutor's Office. Orally, the Tribunal gave the Respondent the option of submitting an English translation of the document submitted by the Claimant, if it so desired, and the issuance of the Order dated 5 January 1988 was totally unexpected and contrary to the rules of procedure. At any rate, following the Hearing the Respondent proved once more, by submitting a true translation of the article in Ettelaat dated 22 Esfand 1358 [12 March 1980], that the name at issue was not that of Amir Hossein Amir Faiz. As a result, the Claimant has failed to prove his new claim, namely that the majority of the company's shares have been expropriated, which claim was based on the aforementioned newspaper article.

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6 Referring to Witenburg's L'Organisation Judiciaire, La Procedure et La Sentence Internationales 258-59 (1937), Mani maintains that "The essential consequence of the closure of hearings is the irreceivability of any further documents, proofs and testimonies which either party might like to proffer.... the closure demonstrates the double necessity of a final termination of the proceedings and maintaining a fair balance of procedural rights of the parties in terms of the principle of equity. Moreover, it enables the Tribunal to exercise with finality its adjudicative responsibility." (Mani, supra, 246)

10. A point worth pondering is that the Claimant's documentary evidence at the Hearing did not include the order by the Prosecutor's Office at all; rather, the Claimant's evidence in proof of expropriation was merely a newspaper article containing no trace or mention of Amir Faiz's name. What is more important still, in his Affidavit filed with the Tribunal as Exhibit C to the Supplemental Statement of Claim, Amir Faiz himself, who made a deposition under oath on behalf of the Claimant on 19 March 1985, does not make the slightest reference to any expropriation of his assets and shares in SKBM by the Prosecutor's Office. Notwithstanding this evidence, and contrary to Article 24, paragraph 1 of the Tribunal Rules, which places the burden of proof on the Claimant, the Tribunal directed the Respondent to produce the order by the Prosecutor's Office. This time the Claimant, who had contrary to all rules of procedure gained the opportunity to alter his position at the last moment at the Hearing and to submit new evidence as well, found a further opportunity (after failing to prove his new claim) to witness the Respondent's efforts to refute the Claimant's untimely-brought claim.

SKBM's status, and control

11. Even supposing, in arguendo, that the Tribunal was entitled to issue the aforesaid Order and to demand new evidence, and even to accept the Claimant's memorial (which was an unauthorized submission and was filed some six months after the Hearing); and also assuming that the Prosecutor's Office really did expropriate Amir Faiz's assets (concerning which the latter does not make the slightest reference in his Affidavit), Iranian Government control over SKBM can still not be proved. The key reason which comes to mind for the silence of Amir Faiz's Affidavit on the issue of expropriation of his shares in SKBM, as well as for the Claimant's failure to submit a further affidavit from Amir Faiz, is

that on principle, as of 12 April 1979 SKBM was no longer a viable concern and it has in effect become a defunct company.

In addition to the numerous financial difficulties which beset SKBM in late 1978, owing to which it was unable to pay its employees, the Claimant stated at the Hearing that in January and February 1979 (i.e., at least two months prior to the alleged expropriation of Amir Faiz's shares), a labor court rendered an award in favor of SKBM's employees and paid them their back wages by auctioning off SKBM's assets and building. Bearing in mind that SKBM was a service company which depended entirely upon its employees' expertise rather than on its insignificant corporate capital (of which only 350,000 rials was paid up), it is hard to imagine that it could have had any assets left once its obligations had been deducted therefrom. At any rate, however, any presumption that some small amount was left over after the company's assets were auctioned off cannot negate the fact that even before the labor disputes court auctioned off the company's assets, SKBM had, due to the departure of its shareholders and foreign experts from Iran, in practice become insolvent and, owing to its inactivity, essentially a defunct corporation. In this connection, it is also worth noting that in the Affidavit which he deposed under oath on behalf of the Claimant on 19 March 1985, Amir Faiz never makes the slightest reference to any of these important matters. From a merely superficial and legalistic point of view, it might be possible to characterize SKBM's formal status as one where the company's assets had been liquidated, but where the company itself had not been wound up and dissolved. How, however, if one looks at the matter realistically and fairly, can he expect a Government embroiled in conditions of war and revolution to be mindful of the apparent dissolution of an insigni-

ficant and disintegrated company such as SKBM, whose shareholders had abandoned it and left the country, and to set out to have it legally wound up and dissolved?

Statute of limitations

12. Furthermore, even assuming in arguendo that a company named SKBM was in existence as at the date of issuance of the order by the Prosecutor's Office, whereby Amir Faiz's assets were (allegedly) expropriated; and assuming as well that upon expropriation of his assets, which included 57.5% of SKBM's stock, the company came under control of Iran as from 12 April 1979, the claim is nonetheless subject to the contractually - specified statute of limitations and is therefore inadmissible.

Under Article XVIII of the employment agreement dated 13 May 1978, the employee was expressly barred from bringing any claim against the company more than 60 days after the date of termination of his contract. SKBM terminated the contract by invoking Article XI.A.1(b) thereof and declaring a state of force majeure, as from 4 Bahman 1357 [24 January 1979]. Therefore, no claim against the company for payment of monies will be admissible if brought more than 60 days thereafter, i.e., after 5 Farvardin 1358 [25 March 1979].

There is a clear logic in having such a provision in an employment contract (particularly in the instant agreement which made provision for numerous contingencies and even, in Article XIV.E, anticipated the disposition of the employee's remains in the event of death, and provided that the company was not responsible for payment of the cost of his casket). In this way, the company sought to ensure that its accounts could be completely closed after a reasonable period of time had passed, as well as to protect its interests against

claims, sometimes trivial, which might be brought by employees years after their contracts were terminated and their employment records obliterated. Therefore, if the Government of Iran is held to have succeeded to SKBM's obligations, it should also enjoy the company's contractually-provided rights, inter alia the right set forth in Article XVIII.

13. Unfortunately, the majority failed to acquaint itself with the provisions of the employment agreement, and it passed over the provisions of Article XVIII, relating to the statute of limitations clause, without any discussion whatsoever. Yet Article XVIII of the agreement cannot be correctly understood without taking into consideration the Article which precedes it. These two Articles contain important provisions, and should thus be cited here in full:

"XVII. DISPUTES

SKBM and the Employee mutually agree that any dispute arising from the contents of this Agreement may be referred to an Investigation Committee consisting of (1) SKBM Employee Relations Manager as chairman, (2) Manager of Work Section involved, and, (3) Employee and/or his representative. Any decision reached by the Committee and subsequently approved by the Managing Director will be considered final and binding on both parties.

"XVIII. CLAIMS

It is agreed that no claims in regard to this contract will be made against the person or individual representing SKBM, but that any and all claims regarding the contract will be against SKBM solely. All claims filed against SKBM must be filed in Iran as SKBM has no affiliate doing business in its behalf, nor does SKBM conduct business in any country other than Iran. Any claims by the Employee against SKBM arising out of compensation or benefit due under this Agreement shall be made within sixty (60) days from the termination hereof. No claim shall be considered for payment after sixty days from the date of termination." (emphasis added)

The clear distinction made by the agreement between "disputes" and "claims" shows that the letters dated 4 Bahman 1357 [24 January 1979] deal with an understanding between SKBM and the Claimant over the amount to be paid the employee, and nothing else. In view of the text of his employment agreement, the Claimant should have made an effort to bring claim and recover any monies due him. the Claimant could have done so up to two months after termination of the agreement, i.e., well before the order was issued by the Prosecutor's Office allegedly expropriating Amir Faiz's assets. Instead, however, he chose of his own volition to remain silent for three years, up to the time the Algiers Declarations were promulgated. As a result, the Claimant should bear the adverse consequences of his failure to take steps to recover the monies due him. See: Houston Contracting Company and National Iranian Oil Company, et al, Award No. 378-173-3, Separate Opinion of Judge Parviz Ansari, para. 4 (29 September 1988); Carolina Brass, Inc. and Arya National Shipping Lines, et al, Award No. 252-10035-2 (12 September 1986); and Harnischfeger Corporation and Ministry of Roads and Transportation, et al, Award No. 144-180-3 at 46 (13 July 1984).

14. Unfortunately, the majority skirted these issues and arguments without any discussion, and passed over in silence the examination of the effects of the statute of limitations, as set forth in Article XVIII of the agreement. In itself, this very silence on the part of the Tribunal with respect to making a final determination of the legal effects of the statute of limitations indicates the latent importance of this Article.

15. As to interest, I see no need to reiterate my previously stated opinion. See: McCollough & Company and The Ministry of Post, Telegraph & Telephone, et al, Award No. 225-89-3 (22 April 1986), Separate Opinion of Judge Parviz Ansari.

The Hague,
Dated 23 December 1988/2 Deymah 1367

Parviz Ansari Moin