IRAN-UNITED STATES CLAIMS TRIBUNAL 103 دیوان داوری دعاوی ایران - ایالات متحده

[redacted]

ORIGINAL DOCUMENTS IN SAFE

Case No. 221 Date of filing: 24/8/1994

** AWARD - Type of Award ____

- Date of Award ____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision ____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of ____

- Date ____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Mr M. HOLTZMANN

- Date 24 Aug 1994

11 pages in English — pages in Farsi

** DISSENTING OPINION of ____

- Date ____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: ____

- Date ____

_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 221
CHAMBER ONE
AWARD NO. 559-221-1

MOHSEN ASGARI NAZARI,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF HOWARD M. HOLTZMANN,
DISSENTING IN PART AND CONCURRING IN PART

INTRODUCTION

The Award in this Case wrongly denies a claim for expropriation. In doing so, it ignores the realities of the business transactions that underlie the claim. Moreover, the Award fails to apply long-standing Tribunal precedents and misunderstands fundamental principles of corporation law.

While I dissent from the portions of the Award that deny the claim for expropriation, I concur in the Award's conclusions that the three other claims in this Case must be denied because the Claimant has failed to bear the burden of proving his allegations. I would, however, have written somewhat differently the descriptions and reasoning concerning these latter three claims.

I also write separately to call attention to the Tribunal's growing tendency to write Awards that are overly long and excessively detailed -- a tendency that, regrettably, this Award exemplifies.

I.

The basic circumstances that underlie the expropriation claim are largely uncontested and easily understood:

The Claimant and two Iranian businessmen formed a joint stock corporation based in Iran, known as SKBM.[1] The majority shareholder was Mr. Amir Hossein Amir Faiz, who owned 57.5% of the outstanding shares; the Claimant owned 33.75% and the other shareholder, Mr. Hassan Asgari Pour, owned 8.75%.

During the relevant period, SKBM provided consulting and recruiting services to an entity called ISIRAN which the Tribunal has repeatedly held was owned and controlled by the Iranian government.[2] ISIRAN was SKBM's only customer, and when ISIRAN failed to pay SKBM as required by their contract SKBM lost its only source of income.

Shortly after the Islamic Revolution, Iran expropriated all of the property of SKBM's majority shareholder, Mr. Amir Faiz, including his stock in SKBM.[3] Iran was thus in the dual position

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[1] The full corporate name of SKBM is Sherkat Khadamat Beinolmelali Mahat; the corporation was also sometimes referred to as Mahat International Services.

[2] ISIRAN's status as an entity owned and controlled by the Respondent is well settled. See, e.g., Ultrasystems, Inc. and Islamic Republic of Iran, Award No. 27-84-3 (4 March 1983), reprinted in 2 Iran-U.S. C.T.R. 100, 105; Computer Sciences Corp. and Islamic Republic of Iran, Award No. 221-65-1 (16 April 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 281-82; McLaughlin Enterprises, Ltd. and Islamic Republic of Iran, Award No. 253-289-1 (16 September 1986), reprinted in 12 Iran-U.S. C.T.R. 146, 149; Hidetomo Shinto and Islamic Republic of Iran, Award No. 399-10273-3 (31 October 1988), reprinted in 19 Iran-U.S. C.T.R. 321, 325.

[3] As proof of this expropriation, the Claimant has submitted a declaration of a Revolutionary Court issued on 12 April 1979 stating that "[t]he moveable and immoveable property" of Amir Faiz (and certain other persons) had been "confiscated by the Islamic Republic of Iran." Doc. 60, Ex. 16. It is undisputed that just prior to this revolutionary decree

(continued...)

of controlling both SKBM, the seller, and ISIRAN, the buyer.

It appears that at the time that Iran took the SKBM shares of Mr. Amir Faiz and thereby assumed control of that company, ISIRAN owed SKBM some U.S. $6,500,000 for services that had been rendered to it, but for which it had failed to pay. The existence of this debt to SKBM is not contested by Iran; Iran does not deny that the services were performed, nor does it submit any evidence that it paid for them. This $6,500,000 account receivable from ISIRAN was SKBM's largest asset.

Following the Islamic Revolution, ISIRAN decided that it no longer wished SKBM's services. A normal controlling shareholder of a business faced with the loss of its only customer and with few future prospects would have moved to collect the money owed to it, to wind up its affairs, and to distribute its remaining assets to all shareholders in proportion to their respective interests. Yet, Iran, the new majority owner of SKBM, took no steps to cause SKBM to collect the money owed to it by ISIRAN. By its inaction, Iran achieved a benefit for its wholly-owned entity, ISIRAN, at the expense of its partially-owned entity, SKBM. In short, Iran chose a course of keeping approximately $6,500,000 in one of its pockets in which it had a 100% interest,

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[3](...continued)
Amir Faiz owned 57.5% of SKBM's stock. There is absolutely no basis upon which to conclude that Amir Faiz's SKBM holdings were somehow spared from the sweeping decree affecting all of his "moveable and immoveable property." Indeed, after examining the very same evidence in a related 1988 case, Chamber Three concluded:

> "[T]he documentary evidence in the record establishes that Iran expropriated Mr. Amir Faiz'[s] shares in SKBM and that at the time of the expropriation he owned the majority of shares in the Company. It is well established in prior awards of the Tribunal that control exists where Iran has assumed a majority ownership interest in the entity at issue."

Shinto, supra note 2, at 329. The Respondent's general denial that it seized control of SKBM, therefore, is quite simply incredible.

rather than putting that money in another of its pockets in which it had only a 57.5% interest.

By failing to collect the approximately $6,500,000 due to SKBM and to arrange an orderly liquidation of the company, Iran deprived the Claimant of the benefit of his 33.75% interest, and thereby effectively expropriated that interest.[4]

"A deprivation or taking of property," this Tribunal has observed time and again, "may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even when legal title to the property is not affected." Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225; see also supra, at para. 121; W. Jack Buckamier and Islamic Republic of Iran, Award No. 528-941-3 (6 March 1992), at p. 26, reprinted in ___ Iran-U.S. C.T.R. ___; Starrett Housing Corp. and Islamic Republic of Iran, Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154. In the present Case, the Respondent did not issue an official decree vitiating the Claimant's legal title or dispatch Revolutionary Guards to seize his share certificates. Yet, it took from him the value of his investment just as surely as if it had resorted to such actions.

The Tribunal's jurisprudence is repeated and emphatic that Iran by seizing control of a corporation assumed the duty incumbent upon any controlling shareholder to manage the company prudently and to safeguard the investment of all shareholders. Thus, in the Foremost Case, this Chamber suggested that governmental management of a business enterprise following governmental assumption of majority share ownership can be said to amount to expropriation of minority share interests when

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[4] The Claimant would, of course, have been entitled upon liquidation of SKBM to 33.75% of whatever was left of the $6,500,000 and SKBM's other assets after SKBM paid its costs and expenses and its business was wound up.

"measures [are] adopted which [are] not only detrimental in their effect on [minority shareholders], but which [go] beyond the legitimate exercise by the majority of the shareholders . . . of their right to manage the company's affairs in what they perceive[ ] to be its best interests." Foremost Tehran, Inc. and Islamic Republic of Iran, Award No. 220-37/231-1 (10 April 1986), reprinted in 10 Iran-U.S. C.T.R. 228, 248. The Golpira and Schott Cases, stand for the same principle. While in Golpira the Tribunal held that Iran's expropriation of the holdings of the largest single shareholder of a medical company did not constitute an expropriation of the interest of the minority shareholders, it reached that conclusion only because it found that Iran had used its new controlling position to promote what could reasonably be viewed as the best interests of the company. Ataollah Golpira and The Government of Iran, Award No. 32-211-2 (29 March 1983), reprinted in 2 Iran-U.S. C.T.R. 171, 175-176. Likewise in Schott, this Chamber held that expropriation of the shares of a large shareholder did not amount to a taking of the claimant's minority interest only because it found that the corporate entity continued to operate for the benefit of all of its shareholders after Iran assumed effective control. Robert R. Schott and Islamic Republic of Iran, Award No. 474-268-1 (14 March 1990), reprinted in 24 Iran-U.S. C.T.R. 203, 215-216. Clearly, a State, once having seized effective control of a private enterprise, is not at liberty to use its newfound managerial power to enrich itself at the expense of minority shareholders, and at the same time to deny that in all reality a taking of their property has occurred.

The Tribunal's own precedent, set out above, is sufficient to establish the Respondent's duty as controlling shareholder in this Case. It is worth noting further, however, that the principle underlying the Tribunal's case law is also well grounded in municipal regimes of corporation law. The widespread recognition in the municipal law of many nations that controlling shareholders owe a duty of care to the corporations they control makes clear that the Tribunal's prior holdings in this regard are

entirely in line with broadly accepted concepts of corporation law. The essential doctrine recognized by many nations is that a controlling shareholder may not exploit its position of control over a corporation to enrich itself at the expense of minority shareholders. See Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 35 (Judgment of 5 February 1970); Company Law in Europe, at pp. B82-B83, D69, O68 (R. Thomas ed. 1993); Harry G. Henn & John R. Alexander, Laws of Corporations 651-56 (1983); Robin Hollington, Minority Shareholders' Rights, at p. 2-043 (1990); Geoffrey Morse, Company Law 433-434, 448 (14th ed. 1991); Joachim, The Liability of Supervisory Board Directors in Germany, 25 Int'l Law. 41, 57-58, 67 (1991); Torem & Focsaneanu, Minority Stockholders' Rights Under French Law, 15 Bus. Law. 331 (1960).[5] A distinguished United States jurist succinctly described the prevailing legal principle: the courts, he said, have recognized that majority shareholders have a

> "responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately . . . ."

Jones v. H.F. Ahmanson & Co., 460 P.2d 464 (Cal. 1969).

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[5] In this regard, I note that Iranian law clearly prohibits directors who control a corporation from "abus[ing] their authority contrary to the company's interests for their personal gain or for another establishment in which they have [a] direct or indirect interest" and holds them liable for such breaches. See Commercial Code of Iran, Articles 142, 258 & 269. By all logic, the same prohibition should apply to a party who controls a corporation by virtue of its ouster of the previous dominant shareholder-director and corresponding assumption of his corporate powers. Certainly, although the Claimant clearly argued for liability premised on the Respondent's conduct as SKBM's controlling shareholder, the Respondent has pointed to nothing in Iranian law suggesting that Iran is out of step with other nations in this regard.

The fundamental flaw in the Award's reasoning is its failure to recognize that the moment Iran became the majority shareholder of SKBM it thereby had the duty -- and the sole power -- to take the necessary affirmative action to safeguard SKBM and thereby protect the interests of the minority shareholders. That duty, of course, flowed from the basic principles of corporation law recognized in the Tribunal cases and by the other authorities discussed above. The Award purports to negate that duty by stating that there is no evidence that Iran "took part in the administration of SKBM" after it became the majority shareholder. Award, supra, at para. 122; see also supra at paras. 125, 130. Again, the Award misses the central point: Iran's liability in this Case arises for the very reason that it had a duty, as controlling shareholder, to take part in the administration of SKBM in order to collect the Company's debts and safeguard the Company's assets, and yet by its own admission made no effort whatsoever to do so. This failure by Iran to act is all the more egregious because, as already noted, it controlled both the buyer and the seller and had a financial interest in leaving the seller, SKBM, to languish unattended and unpaid while permitting the buyer, ISIRAN, to keep the approximately $6,500,000 that it owed SKBM.[6]

Tribunal precedents establish that the seizure of control and subsequent neglect of a corporation's assets constitute "unreasonable [State] interference in the use . . . . of

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[6] Although the Respondent denies that it acted deliberately to scuttle SKBM's financial viability, its motives ultimately are irrelevant. As the Tribunal often has noted, in judging whether an expropriation has occurred, "[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225; supra, at para. 121; W. Jack Buckamier and Islamic Republic of Iran, Award No. 528-941-3 (6 March 1992), at p. 26, reprinted in ___ Iran-U.S. C.T.R. ___; Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986), reprinted in 10 Iran-U.S. C.T.R. 121, 130.

property" amounting to a taking. See Golpira, supra, at 176-177. Iran's inaction rendered the Claimant's property rights in SKBM "so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property remains with the original owner." Starrett Housing Corp. and Islamic Republic of Iran, Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154. In callous disregard of both expropriation and corporation law, the Award describes the loss suffered by the Claimant as simply one of the calculated "risks which the promoters establishing a corporation must take into account and bear." See, supra, para. 129. Here, too, the majority skirts the essential reality of this Case: the danger that a government will seize control of a corporation and cause it not to collect the debts owed it from another governmental entity is not an ordinary risk of operating a business abroad and is not one that international law requires a foreign investor to bear.

In sum, it is amply demonstrated that Iran is liable because its inaction was a breach of its duty as a controlling shareholder and that inaction deprived the Claimant of the value of his investment. Even the majority concedes that liability can stem from an omission to act as surely as from affirmative acts. As the Award correctly recognizes:

> "[I]n international law of State responsibility and in the case law of international tribunals, the principle that the liability of a State can arise through an act or an omission, especially when the State has had a duty to act but has failed to do so, has long since been recognized."

Award, supra, at para. 125. It is unfortunate -- and unjust -- that the Award does not follow this uncontested rule of law to its logical conclusion.[7]

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[7] The majority awards all costs against the Claimant. As noted above, I believe that the expropriation claim should (continued...)

II.

A plea for brevity must, in principle, be brief.

The lengthy Award in this Case invites reconsideration of the Tribunal's practices in preparing its decisions. I write not in criticism of the draftsmen of this particular Award, but rather to point out a tendency that is growing throughout the Tribunal to prepare Awards that are overly long and unnecessarily detailed.[8]

The issue is not a choice of literary style. At stake is the efficient use of the Tribunal's limited time, funds and facilities -- resources which are, in my view, endangered by present practices in drafting awards. Also at stake is the usefulness of the Tribunal's Awards to readers generally, for too often the main points are obscured by a mass of needless detail. The Tribunal Rules -- which in this respect are identical to the UNCITRAL Arbitration Rules -- require only that "[t]he arbitral tribunal shall state the reasons upon which the award is based . . . ." Article 32, para. 3. There is no requirement in the

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[7](...continued)
have been granted, while the other claims were properly denied. Accordingly, in my view, the costs should have been apportioned between the Claimant and the Respondent in accordance with Article 40, paragraph 1 of the Tribunal Rules which provides that "the arbitral tribunal may apportion each of [the] costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."

[8] In contrast, it is instructive to note the brevity of the Tribunal's early Awards. For example, the first Full Tribunal Award, which decided a major issue of interpretation of the Algiers Accords, is less than three printed pages. Iran-United States, Case A-2 (13 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101. The second Full Tribunal Case is reprinted in ten pages. Iran-United States, Case A11 (Issue II) (14 May 1982), reprinted in 1 Iran-U.S. C.T.R. 144. The first Award by a chamber in a contested case is reprinted in three pages. White Westinghouse International Company and Bank Sepah-Iran, New York Agency, Award No. 7-14-3 (25 June 1982), reprinted in 1 Iran-U.S. C.T.R. 169. Similar brevity is found in all other Awards reprinted in the first two volumes of the Tribunal Reports.

Rules, or elsewhere, that Awards include a description of every step in the arbitral proceedings.[9] Nor is there any requirement to summarize virtually every submission of the parties on issues of fact and law.[10] Although I am aware that judicial practice in some fora favors such practices, I find no need for a profusion of detail in the arbitral process of a tribunal such as this.

I respectfully suggest that it is entirely possible -- and preferable -- in most Tribunal Awards to (i) shorten the description of the procedural history of the Case to include only the key events, and (ii) concentrate the description of the facts and contentions on matters that form the basis of the reasons for the decision. These steps would not only conserve the resources

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[9] A cursory review of the Awards in the first two volumes of the Tribunal Reports shows that a number contain no procedural history at all. Where a procedural history is included it is typically limited to a single paragraph, or no more than three paragraphs, mentioning only the filing of the main pleadings and the holding of the hearing. (None of the Awards includes a detailed procedural history such as encompasses 20 paragraphs in the present Award.)

[10] The Awards in the first two volumes of the Tribunal Reports typically include very succinct statements of the main opposing contentions of the parties. None is nearly as extensive or detailed as the 29 typewritten pages devoted to "Facts and Contentions" in the present Award. See, supra, paras. 25-90. While I recognize that some cases present more issues than others, and therefore statistical comparisons may not be entirely appropriate, nevertheless the density of detail in the present Award is in marked contrast to the earlier Awards.

of the Tribunal, but also would help readers to focus on the essential elements of the case.[11]

Dated, The Hague

24 August 1994

Howard M. Holtzmann
(signed pursuant to Article 13, para. 5 of the Tribunal Rules)

[11] The instructions given by the newspaper publisher Joseph Pulitzer to his reporters are useful to drafters of arbitral awards as well: "Put things before them briefly so they will read it, clearly so they will appreciate it, picturesquely so they will remember it and, above all, accurately so they will be guided by its light." See William Safire & Leonard Safir, Good Advice 44 (1982).