128-462

ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 128 Date of filing: 12 May 89

** 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 _____
- Date _____
_____ pages in English _____ pages in Farsi

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

** OTHER; Nature of document: Dis & Concurring opinion of Mr Khalilzad
- Date 12 May 89
26 pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL
Persian text of this Opinion
filed on 14 April 1989.

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

462

CASE NO. 128/129
CHAMBER TWO
AWARD NO. 419-128/129-2

SEDCO, INC., for itself
and on behalf of SEDCO
INTERNATIONAL, S.A.

Claimant,

and

IRAN MARINE INDUSTRIAL COMPANY,
NATIONAL IRANIAN OIL COMPANY, and
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

DISSENTING AND CONCURRING OPINION OF
SEYED KHALIL KHALILIAN

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1. SEDCO was the largest shareholder in IMICO, an Iranian company which had installations at the port city of Bushehr for repairing ships and port equipment. SEDCO's claim against Iran in this Case was for approximately $30 million, which amount it sought for the value of its shares in IMICO, recovery of accumulated past loans, and certain other claims. After examining the Case and setting off IMICO's claims, the Tribunal rendered an Award for $16,773,400.90.

My legal views on this Case -- which I took up with my colleagues in this Chamber in the course of our many deliberative sessions and in our exchanges of memoranda -- focus on several principal points:

First, I dissent to this Award on its very basis, because the Tribunal held that it had jurisdiction, even though no cause of action had arisen therein as of the date of the Declaration, and awarded against the Respondent for the face value of promissory notes that were in fact time notes -- and at that, before they fell due. Second, is a discussion of state control over independent private companies, a matter which is the subject of Article IV, para. 3 of the Declaration. In my opinion, the most incorrect aspect of the majority's decision (coming in para. 42 of the Award) is that it has negated certain fundamental rules of private law and public international law dealing with responsibility. Third, having found against the Respondent in this way, the Tribunal deducted two of the Claimants' confirmed debts -- viz. the taxes on interest and the price of the barges -- from the amount awarded. The Respondents did not file any counterclaim in this connection, having only requested that this amount be deducted from any award, by way of set-off. While the Tribunal did correctly carry out this set-off, it did not adequately set forth its legal reasoning for doing so. Finally, the interest granted in the Award constitutes a further point where I disagree with the majority. In addition, I have set forth some brief remarks in connection with the issue of nominal and beneficial ownership of the shares, since this matter was addressed in the Award itself.

2. For this reason, I have written this Opinion in six separate parts, under the following headings: "Lack of a cause of action, since the promissory notes were not outstanding"; "The Iranian Government does not have

unlimited responsibility for debts of companies under its control"; "Withholding taxes on interest"; "Set-off of the value of barges"; "Interest"; and "Beneficial and nominal ownership of the shares." The issue of control is dwelt on at greatest length in this Opinion; my analysis relates primarily to the Tribunal's interpretation and understanding of this concept, and its general practice thereon.

LACK OF A CAUSE OF ACTION, SINCE THE PROMISSORY NOTES WERE NOT EXIGIBLE

3. SEDCO has brought two kinds of claims in this Case: the expropriation claim, and the contractual claims. From among the contractual claims, only the claim relating to the two promissory notes was granted. There are two major problems in this connection, which the majority has ignored: (a) according to the governing law, the promissory notes did not constitute debts that were exigible as of the date of the Declaration (Nonfulfillment of the condition of the Tribunal's jurisdiction); and (b) the notes were signed by a person who did not have a right of signature (Nonfulfillment of the condition of valid issuance).

(a) Nonfulfillment of the condition of the Tribunal's jurisdiction:

4. First of all, it is worth noting that as to the law governing the promissory notes, the Tribunal has properly accorded respect to the rule of private international law, whereby an instrument is governed by the law of the venue where it was drawn up. [1] Invoking the laws of the State

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1 Lex loci actus, or locus regit actum. See: Article 3 of the Geneva Convention (7 June 1930) on conflict of laws in connection with bills of exchange and promissory notes. See also: Loussouarn & Bredin, Droit du commerce international, Sirey, 1969, No. 456; Cheshire, Private International Law, 11th edition, p. 508. See also, on the rule of lex loci contractus, International Encyclopedia of Comparative Law, vol. III, ch. 24, p. 24.

of Texas and the provisions of the Iranian Commercial Code, the Tribunal held that the promissory notes were governed by the laws of their place of issuance -- viz. Texas. Paragraph 29 of the Award.

The majority accepted two important points in respect of these notes. First, at the time the promissory notes were issued, SEDCO and SISA had no intention of collecting upon them in the foreseeable future. Paragraph 32 of the Award. Second, prior to November 1981, neither SEDCO nor SISA "made a call on" the promissory notes which they have now claimed on before this Tribunal. Paragraph 28 of the Award. Quite astonishingly, however, the majority has held that these two points are immaterial to the jurisdictional issue. In my opinion, the majority has committed a major error as a result of having disregarded the legal ramifications of these two matters -- i.e., it held that it had jurisdiction over debts that were not outstanding, and made an award thereon in favor of the Claimant.

5. It is true that no specific due date was set in these promissory notes. It is also true, however -- as the majority itself has acknowledged in paragraph 32 -- that neither SEDCO nor SISA had any intention of making a call on those notes in the foreseeable future (i.e., not, at least, until such time as IMICO's situation improved).[2]

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2 There are two ways of setting a term for the performance of obligations: either a calendar date is fixed for that purpose (die certus quando, or fixed term), or else the due date depends upon the occurrence of some event (dies incertus quando, or relative term). For a discussion of this subject, see: Gauch, Schluep & Tercier, Partie générale du droit des obligations, Tome II, Nos. 1302, 1307. Among those facts left unmentioned in the Award are the following: IMICO, a shipbuilding company, had already fallen into a deplorable state well before the (footnote continues)

Under such circumstances, pursuant to United States law, a demand note is treated as a time note, and its due date shall be that date on which the beneficiary "calls on" it.[3]

6. There can be no doubt that where a time note fell due after the date of the Declaration, it does not lie within the Tribunal's jurisdiction.[4] Under United States law too, a claim ripens -- i.e., grounds for bringing the claim before the courts accrue -- after the date on which it falls due. [5] If a promissory note is issued on an

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(footnote continued)

occurrence of the Iranian Revolution. There was loss after loss, as indicated by the Deputy Managing Director in his letter of 13 December 1977 to IMICO's American Managing Director, i.e. Mr. Thorne (the signatory of the promissory notes, who was simultaneously the Chairman of SISA's Board of Directors and the Deputy Managing Director of SEDCO in the United States); after describing the company's desperate situation, he concluded his letter with the words, "Smile, everything looks darkest before it becomes completely black." In addition, in his report of 4 July 1978 (the month when the promissory notes were executed in Texas), IMICO's American Financial Director informed the Managing Director that losses for 1977 and 1978 were $2.75 million and $3 million, respectively. Then, since he was discussing the possibility of selling IMICO, he stated that it would be difficult to find a buyer for it. This situation continued to deteriorate for some months, until IMICO was confronted by the unrest surrounding the Revolution as well. Under such circumstances, the foreign directors and SEDCO's officers decided to relocate a number of their specialists elsewhere, and to ship out a large amount of property from IMICO's yard to Dubai on several barges. The available evidence in the Case shows that through its American personnel, SEDCO stripped IMICO of virtually all its useful assets, and that its American director, who was living in Texas, issued two promissory notes, whereby he made IMICO liable to SEDCO and SISA for an amount of more than $20 million.

3 See: Williston on Contracts, Section 1149, Note 3, vol. 10, p. 478.

4 Schering, Award No. 122-38-3, 5 Iran-U.S. C.T.R. 373.

5 UCC, §3-122.

"on-demand" basis, there is no need to have made a call on it, before being able to bring claim before the courts for a recovery thereon, because the cause of action arises on the date the promissory note is issued. Paragraph 29 of the Award. Nonetheless, if the demand note contains anything indicating that the beneficiary did not intend to collect on the promissory note immediately, or if the circumstances governing the relations between the parties signify something to this same effect, the mere issuance of a demand note will not give rise to a cause of action thereon. Rather, there must first be a "demand," before a cause of action can accrue. This is a well-settled rule of United States law, and the majority has accepted it in footnote No. 6:

> "This rule [non-requirement of a prior demand to maintain a suit] may not apply, however, where there is something on the paper, or in the circumstances under which it was given, to show that it was not the intention that it should become due immediately ... in which case an actual demand or call is necessary."[6]

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6 10 C.J.S. Bills and Notes, §247, b.

> "An underwriting contract whereby plaintiff guaranteed the payment of $3500 or so much thereof as became necessary to discharge obligations incurred by a Lloyds association if its earnings and assets were not sufficient to meet its obligations, contemplated that demand note executed by plaintiff would not become due until the condition arose making it necessary to call on plaintiff to pay, and the holder of the note was obliged to make demand within a reasonable time after that condition arose as affecting the question of limitations." McCorkle et al. v. Hamilton (1941 Tex. civ. app.), 150 SW2d 439.

Of course we note that the period of limitations runs from the date on which the debt or obligation falls due:

> "Thus, it has been held that where there is something on the face of a demand note or in the circumstances under which it was given showing that actual demand

(footnote continues)

7. Here, anyone who has read the Case will agree that if, as IMICO's largest shareholder, SEDCO -- which claims to hold 81% of IMICO's shares -- had had any intention of "making an immediate call on" the promissory notes after their issuance in July 1978, this would have driven IMICO bankrupt. It can, therefore, not be believed that as a reasonable businessman and IMICO's largest shareholder, SEDCO would have acted to its own detriment by calling the monies under the promissory notes. Apart from this, the available evidence in the Case, as conceded by the majority in paragraph 32, demonstrates that these promissory notes were regarded as long-term loans, and that SEDCO never had any intention of calling them in the foreseeable future. This fact has been stated very explicitly in the Award.[7] The Award has also expressly stated that no call on the promissory notes was ever made by SEDCO or SISA. How, then, on the basis of these established facts, can it possibly be said that a cause of action had accrued for SEDCO or SISA in connection with the promissory notes as of the date of the Declaration (19 January 1981)? According to the laws of Texas, which the Tribunal has held to be the law governing the notes, no cause of action would have accrued as of that date, because as expressly stated

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(footnote continued)
or delay for payment was contemplated by the parties, then the rule that limitations run from the date of the note does not apply." 71 ALR2d, 1960 p. 289.

For other decisions affirming the above-mentioned view, see: Daniels v. Daniels (1906) 3 Cal. App. 294 85 pac. 134; Lyndon Sav. Bank v. International Co. (1905) 78 vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50; Shapeleigh Hardware Company v. Jonas Spiro (1925) Miss. 10650. 209; Eggers v. Eggers (SD) 110, NW. 2d 339. For still further decisions, see 71 ALR2d, 1960, §8.

[7] "Indeed, the evidence suggests that the debt represented by the notes was regarded as a long-term liability of IMICO and that SEDCO had no intention at the time of demanding payment of the notes in the foreseeable future." Para. 32 of the Award.

in the final line of paragraph 45 of the Award, the said promissory notes were first called on 19 November 1981; and at that, through the filing of a Statement of Claim, rather than by a direct demand upon the Respondent.

Having recourse to Williston's interpretation (footnote 3, supra), it must be said, in connection with the promissory notes at issue, that because the condition for their maturation, i.e., that they be called, had not materialized as of the date of the Declaration, the notes were therefore not due as at that date. It is thus clear that SEDCO and SISA would not have had a cause of action, in the absence of an outstanding debt at that date.[8] Notwithstanding this fact, the majority found Iran liable

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[8] Apart from the issue of promissory notes and the manner in which, under United States law, they fall due, broadly speaking a cause of action accrues when a party has refused to perform on his obligation (how can someone be taken to court ab initio, without having refused to perform?). To prove that the debtor has refused to perform on his obligation, the creditor must have made a demand, even if only informally. Where a debt is payable on demand and was not called prior to the date of the Declaration (19 January 1981), how can the obligor be deemed to have refused to perform on his obligation? For this same reason, it is logical and obvious why the Declaration provides that only claims that were outstanding (unresolved) as of the date the Declaration was executed, fall within the Tribunal's jurisdiction. Then, in view of the legal meaning of the word "claim," which includes "to demand... as one's right" (Black's Law Dictionary), and also in light of the meaning of "outstanding," which is used in the Declaration as an attributive of "claim," there can be no doubt that on-demand debts must have been called by a claimant prior to the date of the Declaration, in order to come under the heading of an "outstanding claim." In general, until it is called, an on-demand debt is merely a "right" -- a right in favor of the creditor and against the debtor -- and not a cause of action. The existence of a right is not ipso facto a "cause of action," on whose basis to bring a claim. One of the concocted interpretations of this Tribunal is that it has substituted "rights" for "claims" in order for on-demand debts that have not been called to qualify as "outstanding claims"; and in this way, it has extended the scope of its jurisdiction.

for payment of the amount of the promissory notes, and in actuality assumed jurisdiction over unripe debts.

(b) Nonfulfillment of the condition of valid issuance of the notes:

8. According to IMICO's Statutes the promissory notes, which its Managing Director merely signed and issued in Texas without the knowledge of IMICO's officials (since they were not reflected in the company's books), were invalid, because at that date Thorne, who signed the notes in his capacity as IMICO's Managing Director, did not enjoy the right of signature. Pursuant to Article 31 of IMICO's Statutes, "All documents committing the Company shall be signed by the Managing Director or by person or persons designated by the Board."

To determine whether or not Thorne was authorized to sign the notes, we must obviously refer to the resolutions of the Board of Directors. The Minutes filed in this Case indicate that while Thorne was expressly named in the annual resolutions of the Board of Directors as a holder of the right of signature, his name was omitted from the resolutions of the General Assembly and Board of Directors for the period 1977-78 (the period when the notes were issued). Yet, the Award disregards this fact and, still more astonishing, it states in para. 43, in fine, that even if Thorne was not authorized, an award for recovery on the notes could still be granted!

THE IRANIAN GOVERNMENT DOES NOT HAVE UNLIMITED RESPONSIBILITY FOR DEBTS OF COMPANIES UNDER ITS CONTROL

9. The Respondent argues that because IMICO had a negative worth, the Iranian Government is not responsible

for paying on all of the Claimant's claims. This argument is rejected in the Award, para. 42. However, the majority's finding in this legal discussion is subject to criticism, because it takes the position that the issue of whether a controlled entity is solvent or insolvent has no bearing upon the responsibility of the Iranian Government. Such a sweeping finding is inconsistent with legal reasoning; nor did Iran undertake any such obligation in the Declaration.

In order to find support in the Declarations for its position, the majority has cited two passages therefrom, in the first footnote to paragraph 42. One of these passages is from Article VII, para. 3 of the Claims Settlement Declaration (viz. the term "Iran" also includes entities controlled by Iran), which relates to the ratione personae jurisdiction of the Tribunal and thus does not specify the extent of the Government's responsibility as regards the merits of a claim. The other is a passage from the Undertakings (viz. Iran intends to pay all of its debts, as well as those of its controlled institutions), which is a highly erroneous and misleading invocation. For the Undertakings were entered into only with respect to the U.S. banking institutions claims and have no bearing upon the other claims, such as that of SEDCO in the instant Case. A sense of curiosity thus impels one to ascertain the majority's purpose in presenting this misleading citation in the footnote to para. 42. Had the majority simply intended to give a correct interpretation of the term "controlled entities," it would have noted the express language of Paragraph B of the General Declaration, which holds the key to an understanding of this term, stating that the United States' agreement to establish this Tribunal was predicated on the idea that the Tribunal would entertain claims brought against Iran and "Government" entities. Thus, what is meant by a "Government-controlled entity" is, an entity over which the Iranian Government has taken ownership -- and not

every entity over which it has merely selected a supervisor or appointed a provisional manager.

I shall now give a general analysis of previous Awards on the issue of control, in order to demonstrate the deficiencies in the majority's finding in para. 42.

10. The Tribunal's ratione personae jurisdiction is set forth in Article VII of the Claims Settlement Declaration, while its ratione materiae jurisdiction is set forth in Article II; the governing law, which determines the limits of responsibility with respect to the merits of a claim, is discussed in Article V thereof. Article VII deals with two kinds of control. The first is, control by Iranian or United States companies over their non-Iranian and non-United States subsidiaries, Article VII, para. 2. The second relates to entities under the control of either the Iranian or United States Government, Article VII, paras. 3 and 4.

Until now, the majority has taken the position, in its past Awards, that the term "control" in Article VII (paras. 2, 3, 4) involves a qualitative predominance and, in the words of Chamber Three, "control over management."[9] In those cases covered by Article VII, paras. 3 and 4, and

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[9] Interlocutory Award No. ITL 55-129-3, reprinted in 9 Iran-U.S. C.T.R. 261. On managerial control over subsidiary companies, taken as a criterion, see: Award No. 41-91-3 in Alcan Aluminum Limited and Ircable Corporation, reprinted in 2 Iran-U.S. C.T.R. 298; Award No. 353-196-2, para. 10, in Modern Film Corporation and Iran (although jurisdiction was denied in those Cases). On administrative control over a firm by the Government (the subject of Article VII, para. 3), see: Award No. 20-17-3 in Raygo Wagner Equipment Company and Star Line Iran Company, reprinted in 1 Iran-U.S. C.T.R. 413.

involving government control over an entity, the majority has still made a finding of "control over management" even where such control came about because the Government had appointed a provisional manager in order to put a firm's affairs in order.

I will not deal here with the first alternative, namely Article VII, para. 2. Nor is it my primary objective, in the present Opinion, to address the issue of whether or not the Tribunal has been essentially correct in that meaning for "control" to which it has to date resorted, for the purpose of interpreting Article VII, para. 3 in the framework thereof.[10] Nonetheless, it is

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[10] Pursuant to the Declaration, 'Iran' means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof" (Article VII, para. 3).

Seizing upon the phrase "entity controlled by ... Iran," the Tribunal has held a whole series of private Iranian companies (which were disrupted following the Revolution owing to social conditions or over-all economic circumstances in the country, and which had also been abandoned since their owners and shareholders had left Iran) to be Iran-controlled entities, since the Government was compelled, in order to rescue those entities, to appoint a provisional manager over them. And yet, the Government did not assume ownership over those entities; it merely took over their management, since they had been abandoned by their original managers. This is why the pertinent legal Act declared that those establishments were firms "whose managers or owners had abandoned the said entities and their worksites or stopped work or else could not, for whatever reason, be reached..." Article 1 of the Act Regarding Appointment of Provisional Managers (16 June 1979/ 26.3.1358). In view of the Government's purpose, and of the social necessity brought about by the original managers of those entities themselves, it can be easily perceived that the Tribunal's finding that Iran is the successor to their owners and is responsible vis-à-vis their creditors, is erroneous and even contrary to the Declaration. For pursuant to the Declaration, this Tribunal was established for the purpose of adjudicating claims against the Government and state enterprises (General Declaration, Paragraph "B"); whereas the mere (footnote continues)

worth noting, as a digression, that this same Tribunal has elsewhere correctly given the meaning of "control" as set forth in paragraph 3, since it has held that two condi-

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(footnote continued)
appointment of a provisional manager does not necessarily make a firm a "state" enterprise. Rather, it merely gives rise to a degree of control amounting to provisional supervision and guidance. Therefore, in its past Awards, the majority's interpretation of "control" failed to conform to the terms of the General Declaration. The General Declaration contains principles which govern the Claims Settlement Declaration, and the latter must therefore not be interpreted in a way that violates those general principles. In other words, control over establishments not taken over by the state signifies that under conditions of crisis, such as in the abrupt and swift-moving course of a Revolution where the society is in the grip of unsettled and extraordinary conditions, especially with respect to its economic sectors, the Government will have no alternative but to impose certain special, braking regulations. To this end, the state must, under circumstances where management is either weak or nonexistent, appoint managers over such establishments on a provisional basis as well.

The French legal system also makes provision for measures such as those taken by Iran. At the same time, we see that the managers thus appointed by the state do not serve on behalf of the state; rather, they take up the task of running a private company in place of its previous, non-Government managers. Under United States law, an institution known as "receivership" applies not only to bankrupt persons, but also to companies where they become insolvent, in that a temporary receiver is appointed over the company in order to prevent its financial situation from deteriorating, and in order to get it running again. This person corresponds exactly to the provisional manager under Iranian law, an instance of whom we see in the Act Regarding Appointment of Provisional Managers over disrupted companies. The provisional manager endeavors to save the company from its state of disruption and near-collapse. Under United States law such a manager is temporary as well, but he has such broad powers that he can, at least for a time, manage the company's affairs and take decisions in place of its original directors. Despite all this, the state does not regard him as the successor to the company's owners. For further study of this subject, see the Dissenting Opinion of Kashani in Economy Forms (Award No. 55-165-1), 5 Iran-U.S. C.T.R. 1 et seq.; Dissenting Opinion of Kashani in Starrett (Award No. ITL 32-24-1), 7 Iran-U.S. C.T.R. 162-171; Dissenting Opinion of Bahrami in Phelps Dodge, 10 Iran-U.S. C.T.R. 142-147.

tions must be met, before there can be a finding of control. In Pepsico, Inc. and Iran, Award No. 260-18-1, the Tribunal found, in reliance on its own prior interpretation in Foremost, that "majority share ownership and control of the board establish control within the meaning of Article VII, paragraph 3 of the Claims Settlement Declaration." 13 Iran-U.S. C.T.R. 21. This interpretation is consistent with the principles which govern this Tribunal's jurisdiction, as set forth in the General Declaration.[11] For there, the stated objective of the Iranian and United States Governments in establishing the Tribunal was, to adjudicate claims against the Government and state enterprises -- and that is all -- and since the majority of the shares of a state enterprise are necessarily owned by the state, non-state enterprises that merely have a provisional Government-appointed manager do not fall within the Tribunal's jurisdiction. Nevertheless, despite the Declaration's express language, which leaves no room for interpretation, the Tribunal arrived at a different definition of "control," and thereby allowed numerous claims against Iran.

11. Returning to the issue at hand, in a case where, upon appointing a provisional manager over an establishment, the state takes possession over it as well, a claim of expropriation can be brought. Tippets, Award No. 141-7-2, 6 Iran-U.S. C.T.R. 229; Starrett, Award No. ITL 32-24-1, 4 Iran-U.S. C.T.R. 154-56.

In such instances the state's responsibility is limited, according to the prevailing principles of international law, to the net value of the expropriated enterprise, even if this value is less than that of all the

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[11] See the preceding footnote.

claimant's rights and claims with respect to the expropriated company.

However, in Cases where no expropriation has taken place but, in the words of Chamber One, "a lesser degree of interference with [proprietary] rights"[12] has occurred, the state has been found liable for compensating the injury inflicted by it upon the injured party.

12. The legal rationale for a finding against the state in these two instances is clear. In the first case, where a total expropriation of the establishment is involved, according to principles of law, the state should not pay an indemnity which is greater than the amount by which it was enriched as a result of the expropriation. In the second case too, where the state is guilty of "injury," it should at most pay the injured party compensation equivalent to the amount of the loss caused by it. Two important points apply, however, where the state is not guilty of injury [13] and has not expropriated a company. Firstly, the claim should not, on principle, fall within the Tribunal's jurisdiction, since neither state ownership of such a company is involved, nor has any injury taken place. Notwithstanding this fact, however, in previous Awards the majority made an arbitrary interpretation of "control" whereby it so broadened its scope as to embrace these claims as well. Secondly, the state's liability vis-à-vis creditors should not exceed that of the company's shareholders. That is, in the ordinary course of

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12 Foremost Tehran, Inc. and Iran, 10 Iran-U.S. C.T.R. 252.

13 Cases No. 227 and 12384 were the instances where the Tribunal found for neither expropriation nor control and instead foresaw the possibility of liability solely owing to injury. Eastman Kodak Company and Iran, Award No. 329-227/12384-3, 17 Iran-U.S. C.T.R. 168.

events, if a court action is maintained against a company by its creditors, but its assets fail to meet its debts, the court never awards the claimant an amount greater than the company's assets -- i.e., by drawing upon the shareholders' personal assets. [14] In Blount Brothers Corporation, Chamber One correctly acknowledged that the Claimant "should not be entitled to recover more in these proceedings than [his Iranian subsidiaries] would have received had normal contractual relations between the parties continued." (Emphasis added) Award No. 215-52-1, reprinted in 10 Iran-U.S. C.T.R. 78. Elsewhere too, the Tribunal is correct in expressly stating that where a provisional manager has been appointed over a company but there is no expropriation, the company does not lose its independent personality.[15] Therefore, why should the law governing

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[14] Iranian Commercial Code, Joint-Stock Companies, Article 1; Henn, Law of Corporations, West Publishing Co., 1970, p. 96.

[15] See footnote 4, supra; Article 3.1 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States of America; American Bell, Award No. ITL 41-48-3, 6 Iran-U.S. C.T.R. 82, 83. The rule of the separation of the personality of the Iranian Government from that of nationalized banks or expropriated companies was the reason behind the rejection of the expropriation claims in certain Cases: International Technical Products, Award No. 196-302-3, 9 Iran-U.S. C.T.R. 238-9; Flexi-van, Award No. 259-36-1, 12 Iran-U.S. C.T.R. 350-51; Amoco, Award No. 310-56-3, para. 162, on the separation of the personality of the Petrochemical Company, a state enterprise, from that of the Iranian Government, 15 Iran-U.S. C.T.R. 238. In the claims relating to companies controlled by the Government of the Islamic Republic of Iran, the Supreme Court of [the Federal Republic of] Germany, guided by the decision of the Supreme Court of Switzerland, took the following principle as its starting-point in reaching its decision: Respect for state sovereignty compels us, on principle, to accept the juridical independence of state enterprises just as desired and prescribed by those states themselves. This independence is, moreover, to be respected even as to their responsibility for their debts. See: Khadjavi-Gontard, Hauftungsdurchgriff auf ausländische Staaten, Recht der Internationalen Wirtschaft, Jan. 1983.

corporations, which expressly states that joint-stock companies have limited liability, be violated on the pretext of a casuistic interpretation of the Declaration?

In his Concurring and Dissenting Opinion in Kodak, Charles Brower attempted to add a further element to those concocted ideas[16] which have grown up around the Declaration to date, on the basis of the notion that the Iranian Government had an unlimited liability with respect to unexpropriated companies in general. However, he failed to come up with anything from this Tribunal's judicial precedents, apart from twisting the wording of the Award in Flexi-van in footnote 14 to his Opinion, and citing two irrelevant precedents, i.e. Rexnord and Time. It is astonishing that while the Iranian Government's responsibility for a company expropriated by it is limited to that company's assets, for a company over which it has merely appointed a supervisor, this responsibility should surpass this level, and even exceed that of the managers who have abandoned their company. Mr. Brower is stating, in effect, that the less the state interferes, the greater will be its responsibility! Where in the Declaration has the Iranian Government undertaken such an unlimited responsibility? If Iran has accepted its debts and those of establishments controlled by it, the manner of payment of those debts, and the quantum of such payment, should be determined by the governing law (Article V of the Declaration), which the majority has forgotten in the present Award.

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[16] By "concocted ideas", I intend derivative interpretations not founded upon legal principles and logic, which have come into being as the need arises, mainly in order to protect the interests of United States claimants before this Tribunal. Again see, e.g., footnote 8 in connection with the interpretation of the term "claims."

13. Perhaps the majority holds -- where a company's owners have been expropriated and the Government has taken the place of its shareholders -- that the Government should, as an "heir," be liable for the claims of the creditors, just as the shareholders would be. Perhaps too, this is the majority's sole legal justification for the position adopted by it in paragraph 42. In other words, the finding in paragraph 42 is restricted to expropriated companies; it does not embrace every company with a Government-appointed provisional manager. In my opinion, however, the majority's opinion is flawed even in this instance as well, because if the state becomes the successor to the previous shareholders after expropriating a company, but preserves the latter's independent personality and does not change it into a state agency, there is no justification for piercing that company's corporate veil. Even the Eastern Bloc countries respect the rule of the separation of a state enterprise's personality from that of the state. [17] Therefore, the Government's responsibility should be confined to those limits fixed by the law on commerce and corporations.

The other point, the state's responsibility to pay compensation under international law, is based on the theory of unjust enrichment. As for what the state could possibly have acquired by taking over a company with a net negative value, the extent of the former's responsibility should be determined on this same basis.[18]

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[17] International Encyclopedia of Comparative Law, vol. XVII, ch. 16 (Socialist Enterprises), No. 32. Also, in the awards of the British Court of Appeal in Playa Larga and Rolimpex [(1978) 2 Lloyd's Rep. 305, House of Lords (E); (1983) 2 Lloyd's L.R. 171 (Court of Appeal 1982)]. Also: Merchantime Case, 26. I.L.R. 306.

[18] See the following sources: Jimenez de Arecheaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U.J. Int'l L. & Pol. 179, 182 (1978); Weigel & Weston, Valuation Upon the Deprivation (footnote continues)

14. In the present Award, the majority has not taken a clear position on the matter of expropriation. In the sixth section (Part F), however, it concludes, following a series of detailed calculations, that IMICO has a negative value; it then dismisses the claim of expropriation, on the basis of that same finding. Yet, the correct legal conclusion would have been, to dismiss the claim of expropriation by reason of the Government's noninterference in SEDCO's proprietary interests. It would seem as though the majority -- as emerges from the dispositive part of the Award as a whole -- believed at heart that there had been an expropriation, but the impulse to award in favor of recovery on the promissory notes led it to take the approach of addressing only the issues of control and the appointment of individuals over IMICO, in order to leave the way clear for the contractual claim.

WITHHOLDING TAXES ON INTEREST

15. There can be no doubt that the Claimants have admitted their debt of $1,954,000 for taxes due on the loans.[19] Pursuant to the Direct Taxation Act, before paying the accrued interest on the loans obtained from SEDCO and SISA, IMICO was required to deduct the taxes thereon, and pay them to the Tax Office. Article 44 of the Direct Taxation Act. While these taxes were to be paid through IMICO, the beneficiaries of the interest, viz. SEDCO and SISA, were the actual taxpayers.

(footnote continued)
of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law, in 1 Lillich Valuation Series 3, p. 37; Sornarajah, The Pursuit of Nationalized Property, Nijhoff, 1986, pp. 210-212.

[19] The Award states, in para. 53, that "Therefore, the Tribunal interprets SEDCO's silence as acknowledgement of the validity of the Malone memorandum and of its calculation of IMICO's tax liability." The Claimants' silence in the face of the Respondents' assertion that the said taxes constitute a debt owed by them and should be set off, can also be interpreted as an admission of the debt.

Of course, it is true that the Respondents did not bring any counterclaim in this connection; it is also true that no specific contractual arrangements which might indicate that it had been the Parties' past practice to withhold taxes on interest, were submitted to the Tribunal. Nonetheless, since the Claimant admitted his debt, the Tribunal has deducted this sum from the amount of the award. Paragraph 56 of the Award. In my opinion, the Tribunal's finding, whereby in a contractual claim -- i.e., over the promissory notes -- it has deducted the said withholding taxes from the amount of the award, is justified on the basis of a specific principle of law.[20]

16. I have already dealt with this principle, namely the principle of set-off, and the difference between it and the counterclaim, in another Opinion.[21] Here, I shall only note, in brief, that because the Respondent and Claimant have a liquidated debt against one another, a sum equal to the Claimant's debt to the Respondent is automatically discharged from the debt owed by the latter. The nature and conditions of a set-off are very different from those of a counterclaim,[22] and this distinction has been accepted in the different legal systems of a number of nations.[23] On this basis, and as a marginal comment to the

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20 See: paras. 50-56 of the Award.

21 Separate Opinion of Seyed Khalil Khalilian re. Decision No. 83-202-2, reprinted in Iranian Assets Litigation Reporter (14/10/88), pp. 16392-3, 16426 et seq.

22 Ibid, p. 16427, Part I.

23 The English term "set-off," and the French "compensation légal," mean the same thing as "tahātur" in Persian, and these concepts are distinct from the counterclaim. A set-off is a defence -- and not a claim, which latter must, to be accepted, meet all of the requirements of a counterclaim. See: Article 294 of the Iranian Civil Code; Articles 30 and 508 of the Iranian Code of Civil Procedure; Article 120 of the Swiss Code on Obligations; Article 1290 of the French Civil Code; Gauch (op cit, footnote 2, supra); and also § 1156 re. United States law (80 C.J.S., Set-off and Counterclaim, §§35-36).

finding by the Tribunal in Para. 54, which declares that the Parties have authorized an adjustment of the amount of the award on the basis of the mutual debts of IMICO and the Claimants, I must point out that the Tribunal did not need any request or permission from the Parties in order to apply the rule of set-off. It is the Tribunal's inherent duty to apply the law in all instances.

I note as well that in this respect the award by the Tribunal, like those rendered by other courts in enforcement of the principle of set-off, constitutes a declaratory award, and not an award which gives rise to rights. This is because that amount of the Respondent's debt represented by the exigible debt owed him by the Claimant had already -- i.e., before this Award was rendered -- been discharged by force of law. In light of these points, I can surely state, with respect to Mr. Aldrich's Separate Opinion, that in view of the abovementioned reasons, his Opinion cannot rest on sound grounds; he has dissented to the Tribunal's finding whereby it deducted the withholding taxes.

SET-OFF OF THE VALUE OF BARGES

17. Beginning in 1978, SEDCO began plundering IMICO, a company that had begun to stagnate and suffer losses well before the first signs of the Revolution began to appear over Iran's horizon. That is to say, the company's foreign directors commenced to strip its assets and to satisfy the interests of SEDCO, its major shareholder. The company's American Managing Director went to Texas in the summer of that year, and issued two promissory notes for over $20 million in favor of SISA and SEDCO, without informing the company of his actions or even having a right of signature. And on the excuse of having concluded

a contract in Dubai aimed at improving IMICO's situation, IMICO's Manager of Operations also removed a number of barges from the company, and never returned them. According to the evidence filed in this Case, out of the barges that were removed from IMICO in this manner, only three were entered against the Claimant's account in the company's financial records. IMICO's ledgers recorded the book value of these barges at $1,455,622, which was listed as a debt on SEDCO's part. The Tribunal also deducted this entire sum from the amount of the award, as a set-off. Admittedly, the market value of the barges might have been less than that reflected in the books, but since the barges had been sold for a specific amount, their actual value was immaterial; rather, the price of goods of the same sort as those involved in the transaction should be taken as the criterion for the award. The Tribunal has proceeded along these very lines, and it was correct in so doing.

18. SEDCO's admission of its debt, in the very amount entered in the books, constitutes the legal basis of this award. The Respondent, however, brought this amount as a set-off, and not as a counterclaim. Para. 7 of the Award. Here it is to be noted that the Tribunal once more respected the principle of the set-off, and deducted SEDCO's exigible debt for the barges from the amount of the promissory notes. Para. 49 of the Award. In this part of the Award too, the Tribunal's finding is declaratory in nature. See para. 16, supra.

INTEREST

19. In its Award, the majority has granted the Claimants interest on the amount of the promissory notes, to run

from the date on which the Statement of Claim was filed.[24] It is a valid rule that on debts payable on demand, the debtor will not be liable for payment of interest until such demand has been made, and he has refused to pay the debt. In the instant Case, however, the Tribunal should not, on principle, have granted the Claimants any interest, for two reasons. This is because firstly, the words "zero percent interest" are expressly stated on the face of the notes. And secondly, taken as a whole, the special circumstances of this Case demonstrate bad faith on the part of the directors affiliated with SEDCO, and would thus have dictated that the Claimants not be granted any award of interest. It is sufficient, as proof of SEDCO's bad faith in its relations with IMICO, to take the following factors into account: IMICO's negative financial situation and insolvency starting from two years prior to the Revolution, the misfeasance of the foreign directors affiliated with SEDCO, their abandonment of the company and removal of its barges and other property, the obligation imposed upon IMICO through issuance of two promissory notes in Texas, without the other company officials having been informed, the fraudulent transfer to SEDCO of IMICO's claims due from NIOC (which transfer was later admitted by the Claimants to have been invalid and unauthorized -- paras. 1 and 46 of the Award), and the illegal transfer of Esphahanian's shares to SEDCO (paras. 21-22, infra) -- all these facts point to the Claimants' bad faith in their relations with IMICO, following the deterioration of the latter's economic situation. We have before us Tribunal precedent, whereby on occasion, owing to special circumstances, no award of interest has been

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[24] Apparently, under United States law, filing a statement of claim for recovery on a promissory note is deemed, of itself, to constitute a "call" thereon.

made in the claimant's favor.[25] In this Case too, where the majority has awarded for recovery on the promissory notes despite all the legal defects relating thereto, it was at the very least inequitable to award against the Respondent for payment of 9% interest as well.

20. As for the rate of interest awarded, we know that in the past, the Tribunal has, as a matter of principle, accorded respect to the will of the Parties to the contract. That is, where they have themselves specified a rate for such interest, the Tribunal has awarded interest at the same rate. Moreover, the promissory note is a sort of contract; and thus, if the majority had wanted to be guided by the Parties' will regarding the interest rate agreed upon therein, it should have applied a rate of zero percent. In other words, if the Parties had specified a rate of interest such as 7% in these notes, could the Tribunal -- at least in the light of its own practice -- award a higher rate than 7%?[26]

BENEFICIAL AND NOMINAL OWNERSHIP OF THE SHARES

21. IMICO's shareholders consisted of the following: SEDCO 46 shares, Esphahanian 32 shares, three foreign directors with 1 share each, and other Iranians with a total of 19 shares. SEDCO has alleged that in reality, it paid for Esphahanian's 32 shares and for the 3 shares held by IMICO's directors; and on the basis of this statement,

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25 Isaiah and Bank Mellat, Award No. 35-219-2, 2 Iran-U.S. C.T.R 239; Cal-Maine Foods Inc. and Iran, Award No. 133-340-3, 6 Iran-U.S. C.T.R. 63; Sea-Land Service, Inc. and Iran, Award No. 135-33-1, 6 Iran-U.S. C.T.R. 173.

26 In R.J. Reynolds Tobacco Co. Chamber Three set the rate of interest at 13.54%, on the basis of the Parties' contractual agreement. 7 Iran-U.S. C.T.R. 191, 193.

it has claimed that it actually owned 81 of IMICO's shares. Para. 4 of the Award. In response, invoking Iranian law, the Respondent rebutted SEDCO's assertion on two grounds. First, it relied on Article 40 of the Commercial Code (Joint -stock companies), which provides that:

> "Transfers of registered stock must be recorded in the share register, and the transferor or his agent or legal representative must sign the transfer in the said register... Any transfer effected without observance of the aforesaid conditions is without validity as to the company and third persons."

Furthermore, in a previous Award (McHarg), the Tribunal rejected the evidence that the shares had been transferred informally, and consequently dismissed the claim based on such transfer, "bearing in mind that WMRT/Iran was incorporated in Iran and therefore that any transfer of its shares is governed by the laws of Iran..."[27] Thus, even if the legal system of the United States does find a relevant distinction between the beneficial and nominal owner of shares, no such distinction exists in Iran; and there, naturally, an undisclosed beneficial owner cannot play any legal role as a shareholder in an Iranian company.[28]

22. The Respondent's second argument for rejecting SEDCO's ownership of 81 of IMICO's shares is founded upon the Iranian Maritime Code, which provides that vessels may be owned only by Iranian citizens or by companies whose

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[27] Chamber One, Award No. 282-10853/10854/10855/10856-1 (17 December 1986), 13 Iran-U.S. C.T.R. 302.

[28] The law governing a company's shares is the law of the country where the company is domiciled, and any transfer of shares must comply with that nation's regulations. Cheshire, Private International Law, 11th ed., pp. 482, 821.

shares are at least 51% - owned by such Iranian citizens. Iranian Maritime Code, Article 1 (a). The Tribunal has also found the evidence in the Case to be a sufficient basis for stating this point. Para. 4 of the Award. Therefore, as SEDCO itself asserts, it purchased shares in the name of Esphahanian, one of its Iranian employees, because it could not hold more than a 49% interest in IMICO (since the latter owned ships). This constitutes an act of fraud. Esphahanian is one of the Iranian dual nationals, and pursuant to Award No. 31-157-2 (29 March 1983) of this Tribunal, his United States nationality was found to prevail over his Iranian nationality. Thus, he must also have concealed his United States nationality at the time of buying IMICO's shares; for otherwise, he could not have bought them. In itself, this constitutes a further act of fraud, and the Tribunal ought therefore to have declared in this Award that it could not cause someone to benefit from his own wrongdoing.[29] For it is manifest that Esphahanian's abuse of his Iranian nationality, and his collusion with SEDCO in the purchase of more than 49% of IMICO's shares by foreigners, deprive SEDCO of the protection of the law.

Dated, The Hague,
12 May 1989/22 Ordibehesht 1368

Seyed Khalil Khalilian

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[29] In the instant Case, the Tribunal did not reach this issue, deeming it unnecessary to enter into it since the claim of expropriation had been dismissed.