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STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 129
CHAMBER THREE
AWARD NO. ITL 55-129-3

SEDCO, Inc., for itself and on behalf of
SEDCO INTERNATIONAL, S.A., and
SEDIRAN DRILLING COMPANY,

Claimant,

and

NATIONAL IRANIAN OIL COMPANY
and THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

INTERLOCUTORY AWARD

Appearances:

For the Claimant:

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Mr. Abdolhamid Bigdeli
Financial Representative
Mr. Mehdi Sadri
Technical Representative
Mr. Mohsen Shahrestani
Financial Representative
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Representative of the National Iranian Oil Company
Mr. Hossein Piran
Assistant to the Agent
Mr. Salimi
Mr. Shenyani
Representatives of Social Insurance Organization

Also present:

Mr. John R. Crook,
Agent of the
United States of America
Mr. Jose Alvarez
Assistant to the Agent

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I. Procedural History

Claimant, SEDCO, INC. ("SEDCO"), filed its Statement of Claim on 19 November 1981. SEDCO brought claims for itself and on behalf of SEDCO INTERNATIONAL, S.A. ("SISA") and SEDIRAN DRILLING COMPANY ("SEDIRAN") against the NATIONAL IRANIAN OIL COMPANY ("NIOC") and the ISLAMIC REPUBLIC OF IRAN ("Iran"). These claims were based on contract, some of which were concluded with the Oil Service Company of Iran ("OSCO"), the expropriation of drilling rigs, the expropriation of warehouse stocks, and additionally, in the case of SEDIRAN, the expropriation of fixed assets. SEDCO also brings contractual claims against NIOC allegedly assigned to it by IRAN MARINE INDUSTRIAL COMPANY ("IMICO").

On 30 April 1982 a preliminary Statement of Defense was filed by NIOC and Iran arguing that NIOC is not liable for the obligations of OSCO. Following the Full Tribunal's decision on this issue in Oil Fields of Texas and The Islamic Republic of Iran, Interlocutory Award No. 10-43-FT (9 December 1982), reprinted in 1 Iran-U.S. C.T.R. 347, the Tribunal ordered full Statements of Defense to be filed by the Respondents. Respondents filed their Statements of Defense and Counterclaim on 1 August 1983.

Claimant filed its submission in support of its claim relating to expropriation of drilling rigs on 31 August 1983. Respondent NIOC submitted a counter-memorial relating to "appropriation of properties" on 20 February 1984. The Parties were ordered to file any rebuttal submission relating to the issue of the expropriation of drilling rigs by 15 March 1984. Claimant filed its rebuttal submission on 19 March 1984. A Hearing to address the claims for expropriation of drilling rigs was held on 29 and 30 March 1984. In the course of the Hearing, the Parties agreed that that Hearing should be limited to the presentation of a

claim relating to expropriation of SISA drilling rigs, and jointly proposed a schedule for further proceedings in the Case. The proposal included filing dates for further memorials and envisaged two further hearings. The proposal was adopted by the Tribunal in its Order of 11 April 1984.

On 3 May 1984 Claimant submitted its memorial concerning the valuation of expropriated warehouse stock and SEDIRAN fixed assets. NIOC submitted its counter-memorial concerning the valuation of warehouse stock and fixed assets on 23 July 1984.

Respondents submitted their memorial and evidence concerning the allegedly expropriated drilling rigs on 5 March 1985. Claimant submitted an additional expert opinion by Mr. William Whitney on the valuation of the expropriated rigs on 10 May 1985. Likewise on 10 June 1985 Respondents filed an additional expert opinion by Mr. Harvey A. Davis relating to the valuation of SISA and SEDIRAN drilling rigs.

On 31 July 1984 Claimant filed its memorial addressing its invoice claims and the counterclaims of Respondents. Respondent NIOC submitted a memorandum concerning its tax counterclaim on 25 May 1984. Respondent NIOC filed its counter-memorial concerning Claimants' invoice claims and its counterclaims in part on 15 May 1985, with further filings on 10 June 1985. Claimant filed its rebuttal memorial and conclusion on 12 June 1985.

Under the scheduling proposal agreed to by the parties and set forth in the Tribunal's Order of 11 April 1984 two further Hearings were to be held in this case on 25 and 26 July 1984 and on 11 and 12 March 1985. Because of a death in the family of the United States-appointed Member of Chamber 3, the Hearing set for 25 and 26 July 1984 was cancelled and rescheduled for 11 and 12 September 1984. "In

implementation of the Presidential Order No. 27 of 5 September 1984," the Tribunal by its order of 6 September 1984 cancelled the Hearing scheduled for 11 and 12 September 1984. By its Order dated 31 December 1984 the Tribunal rescheduled the Hearing originally set for 25 and 26 July 1984 for 11 and 12 March 1985; the Final Hearing was rescheduled to be held on 15 and 16 April 1985. On 10 March 1985 the Iran-appointed member of Chamber Three informed the Chamber that for personal reasons he would not be available until 15 March 1985. With the agreement of the Parties the hearing to be held on 11 and 12 March 1985 was rescheduled for 14 and 15 May 1985 and the Final Hearing was set for 18 and 19 June 1985. On 14 and 15 May 1985 Respondents Iran and NIOC did not appear for the scheduled Hearing. Moreover, the Iran-appointed Member of Chamber Three was not present. The Tribunal proceeded on 15 May 1985 for the limited purpose of hearing Claimant's expert witness Mr. Whitney. The testimony and the simultaneous translation of such testimony, including all questions and answers, was tape recorded for use by the Tribunal and the Parties in this Case. At that Hearing Claimant requested that it receive in an Interlocutory Award its unnecessary costs of attending the 14 and 15 May 1985 Hearing. All remaining issues in the Case were scheduled for a Final Hearing to be held on 18 and 19 June 1985 with a possible continuation on 21 June 1985. The Final Hearing actually was held on 21, 22 and 23 June 1985 in the presence of all members of Chamber Three. All Parties appeared and presented oral argument.

Following the Final Hearing limited post-hearing submissions were authorized. On 30 July 1985 Respondent NIOC filed the final portion of its counter-memorial relating to invoices and counterclaims. On 31 July 1985 Claimant filed the "Rebuttal Affidavit of Lee A. Drake and Secretary's Supplemental Certificate of Robert S. Browning." A final rebuttal to the other Party's post-hearing

submission was filed by the Claimant on 17 October 1985 and by the Respondents on 21 October 1985.

II. Jurisdiction

A. Nationality of Claimant

Claimant asserts that it is a national of the United States within the meaning of Articles II(1) and VII(1) of the Claims Settlement Declaration, a position consistently contested by Respondent. Claimant has submitted to the Tribunal evidence in support of its contention that it is a corporation duly established and existing at all relevant times under the law of the State of Texas and owned more than 50% by United States citizens.

In particular, Claimant submits a Certificate of the Secretary of State of the State of Texas dated 13 September 1982 which indicates that Claimant was incorporated on 21 July 1950 and was still so incorporated as of the date of the Certificate. Respondents do not contest the Texas incorporation of Claimant.

As to the requirement that 50% or more of the capital stock of Claimant be owned by U.S. citizens, Claimant submits the proxy statements issued by the company for the annual meetings held in the years 1978, 1979, 1980 and 1981. Each of these proxy statements indicates that holders of 5% or more of the stock of SEDCO did not collectively hold 40% or more of the shares entitled to vote at any of the annual meetings mentioned. As stated in the Tribunal's Order of 15 December 1982 in Flexi-Van Leasing and The Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455, the Tribunal on the basis of the above described proxy statements may draw the inference that more than 50% of the stockholders of SEDCO are citizens of the United States "because even if as

much as 40% of all voting stock were owned by large shareholders [i.e., holding 5% or more of such stock] who are not citizens, the remaining shares held as 'portfolio investments' by small [non-U.S.] shareholders could not reasonably be expected to exceed 10%." In addition, the Tribunal notes that Claimant SEDCO has filed an affidavit of Walter W. Cardwell, III, Secretary of SEDCO, dated 6 June 1985 in which it is stated that as of 12 January 1981 "98% of SEDCO's voting stock was held by stockholders of record with addresses in the United States who were not registered aliens" and that as of 2 October 1978 97% of SEDCO's voting stock was so held. The Tribunal therefore concludes that Claimant SEDCO is a national of the United States within the meaning of Article VII(1) of the Claims Settlement Declaration.

Following 19 January 1981 Claimant SEDCO merged into Schlumberger Technology Corporation ("Schlumberger"). At the Final Hearing in this Case Respondent NIOC's representative objected to the jurisdiction of the Tribunal on the basis that Claimant had not established the U.S. nationality of SEDCO following its merger with Schlumberger. Claimant has filed evidence allegedly establishing that SEDCO, following its merger into Schlumberger, continues to be owned more than 50% or more by U.S. nationals. The Tribunal need not examine this evidence. Article VII(2) of the Claims Settlement Declaration requires only that a claim be owned by the relevant nationals "from the date on which the claim arose to the date on which this Agreement [the Claims Settlement Declaration] enters into force." As stated in Gruen Associates and The Islamic Republic of Iran, Award No. 61-188-2 at 12 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97 at 103, "the only relevant period for the purpose of jurisdiction is the period from the time the claim arose until 19 January 1981."

Respondent NIOC also requests that the Tribunal stay proceedings involving material proof of corporate nationality pending the Full Tribunal's decision in Case No. A20, a case specifically addressing the issue of proof of corporate nationality.

The argument that the determinations of nationality should not be made (and necessarily no awards made) pending the decision of the Full Tribunal in Case No. A20 is analogous to the request discussed in R. J. Reynolds and The Islamic Republic of Iran, Award No. 145-35-3 at 21 (6 August 1984) in which this Chamber held:

> Finally, the argument that interest must not be allowed pending the Full Tribunal decision in Case No. A19 should not affect the above conclusions. . . . When the issue of interest was previously raised informally in the Full Tribunal, the prevailing opinion was that pending an eventual decision on the subject by the Full Tribunal, each Chamber shall resolve issues of interest in cases before it according to its own best judgment. The three chambers have consistently done so. To act otherwise would have meant blocking the work of the Tribunal for an unforeseeable length of time, as interest is claimed in practically every case.

The same considerations apply even more in the instant case. Withholding decisions on interest would not prevent the rendering of awards on the merits (exclusive of interest at that time) but suspension of jurisdictional determinations would for an indeterminate time bring the work of the Tribunal to a halt as such determinations are necessary in every case. For these reasons, the three Chambers have consistently made determinations of corporate nationality notwithstanding the pendency of Case A20. Respondent's request is therefore denied.

B. Jurisdiction Over the Claims Relating to SISA.

Claimant SEDCO has filed indirect claims relating to SISA under Article VII(2) of the Claims Settlement Declaration. This Article provides that claims of nationals include claims which are "owned indirectly by such nationals [i.e., nationals of the United States or Iran as the case may be] through ownership of capital stock or other proprietary interests in judicial persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement."

Claimant submits a certificate dated 22 February 1983 from the General Director of the Public Registry of Panama certifying that SISA is a Panamanian corporation which was organized under the laws of Panama on 9 November 1957 and that SISA remained so incorporated as of the date of the certificate. A letter from Deloitte, Haskins and Sells, a firm of certified public accountants, dated 1 September 1982 states that for the five years ending 30 June 1982 SEDCO owned 100% of the stock of SISA. This evidence is not rebutted by Respondents. The Tribunal therefore agrees with Claimant's conclusion that "SEDCO, as the 100% shareholder of SISA, obviously controls that company . . . . [and] is, therefore, entitled to present indirectly the claim of SISA under Art. VII(2) because SISA, a Panamanian corporation, is not entitled to bring a claim in its own behalf."

Respondents argue fundamentally, however, that Article VII(2) of the Claims Settlement Declaration may not be used in a case such as this in order to allow a U.S. corporation to bring as its indirect claim a claim of a non-American corporation. Instead it is contended that Article VII(2)

read in combination with Article VII(1) reveals that the intention of Article VII(2) is to allow the claims of "U.S. nationals in the companies which although American they cannot themselves bring a claim before the Tribunal." Respondents argue that their conclusion is supported by (1) the fact that the United States may not diplomatically espouse claims for non-U.S. corporations; (2) the application of the rule of restrictive interpretation, allegedly applied by the Tribunal in Case No. A2, and the rule of contra proferentem; (3) the statements in Principle B of the General Declaration and in Article II of the Claims Settlement Declaration that the work of the Tribunal relates to claims of nationals of the United States or of Iran and not of any other country; and (4) the fact that any broader interpretation would subject Iran to multiple litigation on the same matter.

The Tribunal does not accept Respondents' interpretation of Article VII(2). Preliminarily, the Tribunal notes that it can conceive of no situation such as Respondents argument supposes, e.g., a U.S. parent corporation not jurisdictionally banned from pursuing a claim which its U.S. subsidiary is precluded from asserting. This very impossibility of practical application renders the proposition immediately dubious. Indeed, the Tribunal already has repeatedly allowed indirect claims to be filed relating to foreign subsidiaries. In R.N. Pomeroy and The Islamic Republic of Iran, Award No. 50-40-3 at 12 (8 June 1983), reprinted in 2 Iran-U.S. C.T.R. 372 at 377-78, this Chamber held that the Claimants, as owners of all the stock of a Liberian company, "indirectly . . . also own the claims of this corporation and are proper parties to assert them before the Tribunal under Article VII, paragraph 2 of the Claims Settlement Declaration." This Chamber held similarly in American International Group and The Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983) (wholly owned

Bermudian subsidiaries), reprinted in 4 Iran-U.S. C.T.R. 96; Dames & Moore and The Islamic Republic of Iran, Award No. 97-54-3 (20 December 1983) (a Venezuelan subsidiary owned 90% by Claimant with the remaining 10% held by two individuals (one American and one Venezuelan) each owning 5% as nominees of the Claimant), reprinted at 4 Iran-U.S. C.T.R. 212; Schering Corporation and The Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984) (wholly owned Swiss subsidiaries); R. J. Reynolds and The Islamic Republic of Iran, Award No. 145-35-3 (6 August 1984) (wholly owned Swiss subsidiary); and Hyatt International Corporation et al and The Islamic Republic of Iran, Award No. ITL 54-134-1 (17 Sept. 1985) (wholly owned Hong Kong subsidiary).

Nor are Respondents' arguments supporting their interpretation persuasive. The work of the Tribunal, at least in the jurisdictional category of claim involved in this Case, does not involve diplomatic espousal. See, The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT at 18-19 (6 April 1984). Moreover, as has repeatedly been held, the task of the Tribunal is to interpret the relevant provisions of the Algiers Accords on the basis of the Vienna Convention on the Law of Treaties, i.e., "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See, e.g., The United States of America and The Islamic Republic of Iran, Decision No. 12-A1-FT at 3 and 5 (3 August 1982), reprinted in 1 Iran-U.S. C.T.R. 189 at 190-91; The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT at 14 (6 April 1984); The United States of America and The Islamic Republic of Iran, Award No. 108-A16/582/591-FT at 15 (25 January 1984); and The United States of America and The Islamic Republic of Iran, Decision No. 37-A17-FT at 16 (18 June 1985). The Tribunal's practice concerning indirect claims does not contradict Principle B of the General Declaration or Article II of the Claims Settlement Declaration because the claim adjudicated is the claim of a

U.S. national; Article VII(2) merely serves to define what are "claims of nationals." Lastly, Respondents' argument that they may be exposed simultaneously to litigation in various forums appears not to be a real danger. Indeed, this Tribunal is not aware of any simultaneous litigation relating to an indirect claim. Certainly an award of this Tribunal to a U.S. claimant filing an indirect claim would be considered as total or partial satisfaction, as the case may be, of any claim of the foreign corporation in a different forum.

The claims filed are within the scope of Article II(1) of the Claims Settlement Declaration and are brought against Respondents within the meaning of Article VII(3) of the Claims Settlement Declaration. The Tribunal therefore concludes that it has jurisdiction over Claimant SEDCO's indirect claim relating to SISA.[1]

C. Jurisdiction Over the Claims Relating to SEDIRAN

Claimant SEDCO has also filed indirect claims relating to SEDIRAN under Article VII(2) of the Claims Settlement Declaration. Respondents present additional objections to

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[1]The Islamic Republic of Iran on 10 September 1985 filed an interpretative request, Case No. A22, with the Tribunal seeking an interpretation of the Claims Settlement Declaration provisions concerning indirect claims and requesting a suspension of proceedings in all cases involving indirect claims pending an interpretation by the Full Tribunal. No internal decision has been taken to stay proceedings as requested. Moreover, the Case No. A22 request is not per se before the Tribunal in this Case. Even if a request were made in this Case, the Tribunal sees no distinction between this issue and the issue presented by Case No. A20 discussed supra. The Tribunal therefore does not find suspension of its proceedings in this Case appropriate. The present decision is taken, however,
(Footnote Continued)

these indirect claims. Alternatively, Claimant presents a direct claim for its shareholder interest in SEDIRAN.

1. Indirect Claims Relating to Corporations Organized under the Laws of Iran

Respondents argue that even if Article VII(2) may be used in a case such as this to file as indirect claims the claims of foreign corporations, its use cannot be extended to authorize indirect claims for corporations established under Iranian law (as is SEDIRAN):

> Article VII of the Algiers Claims Settlement Declaration in no circumstances whatsoever permits bringing of claim by an Iranian firm or company against the Government of Iran or Iranian Governmental Agencies or instrumentalities.

The Tribunal first of all reiterates that the indirect claim involved in this case is the claim of a U.S. national, SEDCO. That claim arises from the indirect ownership interest of that U.S. national in a foreign corporation, which in this case was established under the law of Iran. It is true that in effect the direct owner of the claim being adjudicated is an entity established under Iranian law. However, as this Tribunal has held, the place of incorporation is not, in itself, determinative of corporate nationality. Indeed the test for indirect claims set forth in Article VII(2) requires the ownership interest of U.S. nationals in the Iranian corporation to be very significant.

2. SEDCO's Ownership Interest in and Control of SEDIRAN

The Parties agree that SEDIRAN is an Iranian joint stock company and is not itself entitled to bring a claim

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(Footnote Continued)
without prejudice to any decision of the Full Tribunal in Case No. A22.

before this Tribunal. Therefore in order to take jurisdiction over SEDCO's indirect claim relating to SEDIRAN the Tribunal must satisfy itself that, in accordance with Article VII (2) of the Claims Settlement Declaration, SEDCO's "ownership interest" in SEDIRAN was "sufficient at the time the claim arose to control" the latter corporation. The Parties disagree as to the extent of the ownership interest of SEDCO in SEDIRAN and as to whether such interest was sufficient at the time the claim arose to control the corporation.

Respondents argue that "control should be a financial one exercised through ownership of shares and stock or similar proprietary interests but not administrative control." The Tribunal, however, has taken a slightly broader view of interests sufficient to control and indicated that such a right of control may be demonstrated in various ways. In The Management of Alcan Aluminium Limited, on Behalf of its Shareholders who are United States Nationals and Ircable Corporation, Award No. 41-91-3 at 6 (3 May 1983), reprinted in 2 Iran-U.S. C.T.R. 294 at 297, it was stated, inter alia, that

> It may be shown that, at the appropriate time, such shareholders controlled the corporation in fact, regardless of the total proportion of their shares. Also it may be shown that such shareholders had sufficient voting strength or other rights to assert control; this would generally require ownership of 50 per cent or more of the shares.

The requirements necessary to establish "control" depend upon the context in which the examination is made. As stated in Anaconda Company v. OPIC:

> In general, "control" as applied to corporate operations is an elusive term, dealing as it sometimes does with the degree of influence in fact or potentially exerted by some persons within

> a complex structure over a multitude of actions taken by many others. In differing legal contexts different aspects of that influence can assume greater or lesser importance; sometimes actually exercised present control is more important than potential but dormant control and sometimes the reverse is true.

59 Int'l L. Rep. 406, 420 (Field, Sommers and Vagts, arbs., Award of 17 July 1975).

Article VII(2) seeks to determine when the ownership or other proprietary interests of a national are great enough to characterize a claim owned indirectly as a claim of a national. Therefore it is not de facto control as such which is important but rather the existence of ownership interests sufficient to control. Actual control may be evidence of such ownership interests, but care must be taken in evaluating factual control to distinguish between whether such control exists as a matter of right or as a result of the sufferance of another party which itself has sufficient interests to control. Claimant in the present case has based its control contention on a combination of alleged 50 per cent ownership and alleged managerial control by SEDCO over SEDIRAN.

As to the shareholding, the evidence before the Tribunal shows that following SEDIRAN's founding in 1973 SEDCO directly owned 48 out of SEDIRAN's 100 shares of equal value, two further shares being owned by Messrs. Amos L. Carter, the first Managing Director of SEDIRAN and a member of its Board of Directors designated by SEDCO, and Carl F. Thorne, likewise a SEDCO-designated member of the Board of Directors of SEDIRAN and later the successor to Mr. Carter as Managing Director. In Article 4 of SEDIRAN's Articles of Association this 50 per cent of the shares subscribed by non-Iranian parties are referred to as Class A shares. Article 3 of the Protocol of Agreement signed 19 May 1973 by

SEDCO, the Pahlavi Foundation and Bank Bazargani, which defined their respective rights in regard to the SEDIRAN joint venture, states that the Class A shares are to be "subscribed [to] by Sedco". Class B, comprised of the other 50 per cent, was subscribed to by the Iranian parties: 20 per cent by the Pahlavi Foundation and 30 per cent by Bank Bazargani.

There is further evidence that in 1975 SEDIRAN was recapitalized to reflect 1000 instead of 100 shares, whereby SEDCO came to own 498 shares or 49.8 per cent of the whole stock. This fact has been confirmed indirectly also by Respondent NIOC, which submitted as evidence a Letter No. 621/32 dated 3 December 1981 from the Ministry of Finance and Economic Affairs to Discussing Committee of the Algerian Declaration in which SEDCO is referred to as the owner of 498 out of the total of 1000 shares in SEDIRAN.

SEDCO claims further that at the relevant jurisdictional times it had also become the legal owner of 50 per cent of the shares, as Messrs. Carter and Thorne allegedly assigned their two shares to SEDCO on 12 April 1977.[2] Claimant submits a certification from Deloitte, Haskins and Sells stating that for the five year period ending 30 June 1982 SEDCO owned 50% of SEDIRAN stock. NIOC disputes the existence of a valid assignment, inter alia, on the ground that there is no evidence that the permission of the Board of Directors was sought for the assignment, as required by Article 11 of the Articles of Association.

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[2]The alleged assignments, copies of both of which have been submitted to the Tribunal, are virtually identical and read as follows: "FOR VALUE RECEIVED, the undersigned hereby sells and transfers to SEDCO, INC. his one Registered Share in SEDIRAN DRILLING COMPANY represented by Certificate No. ..."

The Tribunal finds particularly noteworthy the fact that the Iranian Class B shareholders likewise granted one share to each of their two members of the Board of Directors and that Article 107 of the Iranian Commercial Code requires that the members of the Board of Directors be shareholders. In this sense, it can be seen that discounting from both the Class A and Class B shareholders two shares, each category of shareholder owned fifty percent of the remaining shares.

The Tribunal does not believe, however, that in this Case it makes any difference whether SEDCO's ownership interest amounted to 49.8 or 50 percent. Even the latter degree of shareholding by Class A owners, without proof of further indicia of control, would not in itself be enough to fulfill the requirements of Article VII (2) of the Claims Settlement Declaration, as also the Class B owners had the same 50 percent amount of the shares. Although the Class B shares were divided between the Iranian entities - thereby making SEDCO by far the largest single shareholder - there is no indication of such a division of interest between the two Iranian groups as to make it possible for SEDCO to exercise control solely by virtue of its voting power.

On the other hand, the Tribunal is of the view that even a 49.8 percent of shareholding may be enough for the purposes of Article VII (2), provided SEDCO can show that it had the right to control SEDIRAN. Therefore attention has to be turned to SEDCO's allegation concerning its managerial control over SEDIRAN's affairs.

SEDCO argues that all of its business activity depends upon the maintenance of its reputation and that consequently SEDCO demanded and received the contractual right to control the operations of SEDIRAN and did in fact control such operations. Respondent NIOC replies that the documents establishing SEDIRAN clearly demonstrate that the Iranian

and United States joint venturers had the right only to control jointly SEDIRAN and indeed did so.

In the 19 May 1973 Protocol of Agreement, the basic constitutive instrument of SEDIRAN and in which the shareholders contractually define their respective rights, SEDCO and its Iranian partners

> agreed with a view toward the formation of SEDIRAN, a Private Joint-Stock Company, under Iranian law . . . . [that] the Company shall be to secure contracts from oil companies . . . for the drilling, completing, and working over of oil and gas wells . . . .

Article 5 of the Protocol of Agreement states:

> BOARD OF DIRECTORS
>
> The Board of Directors of the Company shall be composed of four members, two of whom shall be nominated by the Iran Group [Class B shareholders], and two of whom shall be nominated by SEDCO [Class A shareholders]. The Directors nominated by the Iran Group shall nominate a Chairman of the Board of Directors, and the Directors nominated by SEDCO shall nominate a Deputy Chairman.
>
> The Managing Director of the Company shall be nominated by SEDCO, and the Deputy Managing Director shall be nominated by the Iran Group. In accord with Article 36 of the Articles of Association, the Board of Directors shall delegate to the Managing Director all of the powers of the Board of Directors as more specifically defined in Article 39 of the said Articles of Association. The Managing Director shall not, however, take any decision involving, or resulting in, a capital expenditure of in excess of U.S. $250,000 without first securing the approval of the Board of Directors. (Emphasis added.)

Article 9 of that same Protocol provides:

> BANKING ARRANGEMENTS
>
> The Company shall initially open banking accounts with two banks, namely the Bank Bazargani Iran, Teheran, Iran, and the First National Bank in Dallas, Texas, U.S.A. The

> Company's initial authorized capital shall be deposited into the Company's account with the Bank Bazargani Iran. It is the expressed intent of the Iran Group and Sedco that, whenever possible, payments for work undertaken by the Company shall be made by the oil company in U.S. Dollars into the account of the Company with the First National Bank in Dallas. The Managing Director shall delegate signatory power to two senior officials of Sedco in Dallas, Texas. The purpose of this delegation will be to allow the said officials to operate the Company's banking account with the First National Bank in Dallas on behalf of the Managing Director . . . .

The Iranian Ministry of Justice Notice of the Foundation of SEDIRAN Drilling Company on 30 May 1973 states in paragraph 10:

> The President [i.e., Managing Director] has, under supervision of the Board of Directors all the authority of the Board of Directors, as mentioned in the Company Foundation Issue.

The relevant portions of Articles 36 and 39 of the Articles of Association, which evidently were agreed to contemporaneously with execution of the Protocol of Agreement, provide:

Article 36.

> The Board of Directors is authorized to delegate, partly or wholly, its powers to one or several Directors, or to one or several representatives, shareholders or not; but they shall fix in this event the term and the limits of each one's powers.

Article 39.

> The Company's Board of Directors shall be vested with fullest powers authorizing it to handle the Company's affairs, such as: . . . .
>
> The powers specified above are not limited and the Company's Board of Directors or the Managing Director within his powers, shall have unlimited

> authority to act on the Company's behalf in all matters relating thereto, ...

The Board of Directors of SEDIRAN, as mandated by Article 5 of the Protocol of Agreement and consistent with the Ministry of Justice Notice, resolved at a meeting held 22 May 1973 that

> The company's Managing Director, under the supervision of the Board of Directors, shall have all the powers of the Board of Directors stipulated in the Articles of Association.

The Board at the same meeting also decided that,

> All contracts, deeds and documents committing the company shall be signed jointly by Mr. Amos L. Carter, company's Managing Director, and Mr. Djavad Sadr, Chairman of the Board of Directors or Mr. Modjtaba Mahmoud Dehghan, Deputy Managing Director.

Mr. Amos L. Carter was named as Managing Director at the Board meeting held 22 May 1973, and Carl F. Thorne was named his successor as Managing Director at a Board meeting held 28 April 1975.

According to Claimant, the documents described clearly indicate that the Managing Director of SEDIRAN, an individual nominated by SEDCO, was delegated as required by Article 5 of the Protocol of Agreement "all the powers of the Board of Directors stipulated in the Articles of Association." Although it might appear theoretically possible that the Board of Directors could revoke the delegation of powers, it is argued that such an act would contradict the mandatory delegation language of Article 5 of the Protocol Agreement. Moreover, as a practical matter SEDCO, holding two of the four seats on the Board, had the power to block any such attempt. Respondents argue, however, that the documents nonetheless indicate two limitations on SEDCO's power to control SEDIRAN.

Respondent NIOC notes that Article 5 of the Protocol of Agreement states that the Managing Director shall not take any decision involving, or resulting in, a capital expenditure of in excess of US$ 250,000 without first securing the approval of the Board of Directors.

NIOC also argues that the Board of Directors at its meeting on 22 May 1973 specifically limited its grant of powers to the Managing Director by requiring that all "contracts, deeds and documents committing the company" be signed jointly by the Managing Director and either Mr. Sadr, Chairman of the Board of Directors, or Mr. Dehghan, Deputy Managing Director. The Minutes of the Board Meeting dated 28 April 1975, which among other things record the election of Mr. Thorne as the Managing Director, also provide for similar joint signing of contracts and other commitments by the Managing Director and one of the two Iranian Board Members as was the case earlier. Mr. Thorne testified at the March 1984 Hearing that this joint signature requirement was later dispensed with by the Board of Directors. This position, however, is disputed by Respondents.

It may be true, in the light of the evidence submitted to the Tribunal, that SEDCO through the Managing Director in fact controlled SEDIRAN at the time the claim arose. Moreover, it is arguable that the Protocol of Agreement and the Articles of Association can be interpreted as entitling SEDCO to such control. Given, however, the Tribunal's holding infra as to the continuous ownership of these indirect claims, the Tribunal need not decide whether SEDCO possessed sufficient interests to control SEDIRAN at the time the claim arose in accordance with Article VII(2) of the Claims Settlement Declaration.

3. Continuous Ownership of the Indirect Claim

Respondent also objects to Claimant's right to bring an indirect claim in view of the fact that "as the shares [of SEDIRAN] were taken over by the Government, SEDIRAN's claim on behalf of SEDIRAN . . . was not owned continuously by SEDCO."

Article VII(2) of the Claims Settlement Declaration requires that claims be "owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that State." The Tribunal has not previously addressed the continuous ownership requirement in the context of an indirect claim.[3] It is apparent, however, that Article VII(2) requires in such cases that the claim be owned indirectly and continuously, from the date on which the claim arose to the date on which the Claims Settlement Declaration entered into force, by nationals of the relevant State Party.[4]

The Tribunal concludes, infra, that the Government of Iran became the owner of all the "ownership interests" in SEDIRAN by the application of Clause C of the Law for Protection and Development of Iranian Industry to SEDIRAN on

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[3] As to the application of the continuous nationality requirement in the case of direct claims, see Lianosoff and The Islamic Republic of Iran, Award No. 104-183-2 (20 January 1984); and Marks & Umann and The Islamic Republic of Iran, Interlocutory Award No. 53-458-3 (26 June 1985).

[4] This holding is without prejudice to the possibility of a case where a claim is held directly by the nationals of one State Party but then, during the relevant jurisdictional period, is transferred to the foreign subsidiary of that national.

2 August 1980.[5] By assuming ownership of SEDIRAN, Iran succeeded to all assets and liabilities, one such asset being the claims of SEDIRAN against NIOC and Iran. This

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[5]The transfer of shares and not the taking per se is of prime jurisdictional significance for it is the loss of shareholder status that breaks the Claimant's ownership of the indirect claim. In this regard, the Tribunal notes that the shares of a company need not be transferred for expropriation to be found. In American International Group and The Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, de jure expropriation was involved in a situation where "all insurance companies operating in Iran . . . . were proclaimed nationalized . . . . by the Law of Nationalization of Insurance Corporations." The Law of Nationalization of Insurance Corporations did not cause the transfer of the shares of the insurance companies but rather ordered the liquidation of such companies. Likewise, in Tippetts, Abbett, McCarthy, Stratton and The Islamic Republic of Iran, Award No. 141-7-2 (29 June 1984), de facto expropriation of Claimants' interest in an Iranian entity was found despite the fact that their shares in the entity were not officially transferred. As stated by the Tribunal, "[a] deprivation or taking of property may occur . . . . even where legal title to the property is not affected." Tippetts at 10-11. "[T]he form of the measures of control or interference [with property] is less important than the reality of their impact." Id. Lastly, it must be seen that the shares also are not transferred when the assets of a company are taken, but not the company itself. See Dames & Moore and The Islamic Republic of Iran, Award No. 97-54-3 at 22 (20 December 1983), reprinted in 4 Iran-U.S. C.T.R. 212 at 223. The Tribunal's decision in this Case is without prejudice to the possibility that it might in other circumstances review the validity or lawfulness of an alleged share transfer. As previously stated in American International Group and The Islamic Republic of Iran, Award No. 93-2-3 at 9 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96 at 102, the act of state doctrine present in many municipal courts is not applicable before this Tribunal. Consequently the Tribunal may examine the validity of a transfer of ownership by the Government of either State Party. As to states refusing to recognize extraterritorial attempts of "public temporary administrators" to dispose of property of the administered corporation in third countries, see I. Seidl-Hohenveldern, "The Impact of Public International Law on Conflict of Law Rules on Corporations," 123 Recueil des Cours 1, 60-61 (1968).

transfer of ownership of SEDIRAN to Iran necessarily interrupted SEDCO's indirect ownership of the claim of SEDIRAN.

Therefore, SEDCO did not continuously own the indirect claim relating to SEDIRAN as required by Article VII(2) of the Claims Settlement Declaration. When a Claimant's indirect ownership of a claim directly owned by an foreign entity is interrupted by the taking of Claimant's property rights in that entity, the Claimant's indirect claim is superseded by its direct claim as shareholder for its expropriated interest.[6]

Respondents object to the Tribunal's jurisdiction over a direct claim by SEDCO for its shareholder interest in SEDIRAN on the ground that it involves "the presentation of a new statement of claim." The Tribunal finds that the claims of SEDCO, whether considered jurisdictionally as direct or indirect claims, rest essentially on the same facts, allegations and legal theories. It is also noted that the Tribunal accepted a change from an indirect to direct claim in a similar pleading context in Tippetts, Abbett, McCarthy, Stratton and The Islamic Republic of Iran, Award No. 41-7-2 (29 June 1984). Respondents' objection is therefore denied.

The claims filed are within the scope of Article II(1) of the Claims Settlement Declaration and are brought against Respondents within the meaning of Article VII(3) of the Claims Settlement Declaration. The Tribunal therefore

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[6]The Tribunal's jurisdictional conclusion does not foreclose the possibility as is the case here, see infra, that a de facto expropriation may be found to have occurred at a date earlier than that resulting from the transfer of shares.

concludes that it has jurisdiction over SEDCO's direct claim for its shareholder interest in SEDIRAN.

D. Jurisdiction Over Counterclaims.

The Tribunal will examine its jurisdiction over the counterclaims asserted by Respondents along with the merits of the claims to which they relate.

III. Expropriation of SEDIRAN

A. Facts and Contentions of the Parties

1. Events to the End of 1978

In the fall of 1978 SEDIRAN was operating ten land drilling rigs in Iran under two contracts and employed approximately 1900 people. SEDIRAN owned and operated a large support facility for its operations in Ahwaz. This facility also housed an industry training school operated by SEDIRAN.

Eight of the ten rigs were carrying out drilling activities for OSCO under Contract No. 3-75-270-359. The remaining two rigs were working under Contract No. 3R/D-1 concluded with NIOC and with Segiran acting as agent for NIOC. Claimant alleges that payments under these two contracts essentially ceased in November of 1978.

By 31 December 1978 SEDIRAN's expatriate personnel had departed Iran. Claimant contends that as a consequence of growing unrest OSCO ordered drilling activity suspended and requested the evacuation of expatriate personnel from Iran. Respondent disputes that OSCO made such a request and instead alleges that SEDCO abandoned its responsibilities to SEDIRAN.

2. Events from January 1979 through June 1979

As regards the rigs under contract to NIOC, NIOC's agent Segiran advised SEDIRAN via telex on 4 January 1979 that "NIOC HAS DECIDED TO SUSPEND DRILLING OPERATIONS . . . FOR A PERIOD OF FIFTEEN DAYS. YOU ARE THEREFORE REQUESTED TO REMAIN ON STAND-BY 'WITHOUT CREW'." Subsequently Segiran in a letter dated 18 January 1979 advised SEDCO that "NIOC has decided that a Force Majeure situation has existed as from (January 4th 1979) . . . ."

On 18 March 1979 SEDIRAN telexed NIOC and Segiran, inter alia, that:

> AS YOU ARE AWARE, RIGS 10 AND 11 ARE COMPLETELY STAFFED . . . . WE AGAIN COMMENCED OPERATIONS FOR OSCO ON FEBRUARY 24/25 AND WE WOULD SUBMIT FOR YOUR CONSIDERATION THAT IF A FORCE MAJEURE SITUATION DID EXIST, IT ENDED WHEN DRILLING OPERATIONS AGAIN STARTED IN IRAN.
>
> . . . .
>
> OUR STATEMENT OF ACCOUNT AT FEBRUARY 29, 1979 SHOWS AN ACCOUNT RECEIVABLE FROM SEGIRAN OF DOLLARS 4,054,204.

Claimant alleges NIOC continued to refuse SEDIRAN's demands for payment.

As to the eight rigs assigned to the OSCO contract during this same period, the number of rigs provided under the contract was reduced to seven at the request on OSCO in a telex dated 27 February 1979. The Head of Drilling for the National Iranian Drilling Company in a letter on OSCO stationary dated 28 March 1979 advised SEDCO "that this company desires for all drilling rigs stipulated under contract No. 359-270-75-3 to be equipped to start operations as soon as possible." Claimant alleges that by 31 March 1979 three of the eight SEDIRAN rigs under contract were restarted and that additional expatriate personnel were required to operate the two remaining rigs. On 31 March

1979 Mr. Dehgahn, the Deputy Managing Director of SEDIRAN, replied to the 28 March 1979 request stating,

> For the continuation of the work of eight drilling rigs . . . which have already started, there is an importunate necessity of two expatriate electricians. . . . In order to start operations of all SEDCO [i.e., SISA] and Sediran rigs which are 14 altogether, we would need the following expatriates. We would also like to add that none of these expatriates are American.

Claimant alleges that on 13 April 1979, NIOC cancelled the contract with respect to the five of the original eight rigs that had not recommenced operations but that NIOC nonetheless subsequently operated all eight rigs.

Allegedly without Claimant's knowledge, Mr. F. Farshtchi, Deputy Head of Drilling Operations for SEDIRAN, wrote to Mr. S. Fakhraie, Manager of Drilling for NIOC, on 6 May 1979 noting the need "to pay the salaries of our more than 1800 Iranian employees as well as other relevant expenses" and requested NIOC "to pay in Rials 100 oercent [sic] of the payable amounts, for Sedco and Sediran rigs which were operating during the month of Farvardin 1359."

3. Events from July 1979 to August 1980

"OILSERVCO AHWAZ (NIOC)" telexed SISA via "IROS LONDON" on 5 July 1979 stating that the operation of SISA rigs under Contract 3-75-322-339 "CANNOT CONTINUE WITHOUT PRESENCE OF YOUR AUTHORIZED REPRESENTATIVE IN AHWAZ. WE . . . RECOMMEND THAT YOU NOMINATE AND INTRODUCE YOUR REPRESENTATIVE TO THE COMPANY AS SOON AS POSSIBLE." On 7 July 1979, Mr. Thorne, as President of SISA and Managing Director of SEDIRAN, telexed OSCO stating that the "MANAGEMENT OF SEDIRAN DRILLING COMPANY CONTINUED TO LOOK AFTER THE INTERESTS OF BOTH SEDCO INTERNATIONAL [SISA] AND SEDIRAN DRILLING CO."

On 24 July 1979 SEDIRAN telexed NIOC concerning all ten SEDIRAN rigs inter alia stating:

> WE HAVE BEEN UNABLE TO SECURE ANY DEFINITIVE INFORMATION FROM NIOC OR OSCO CONCERNING THE NUMBER OF RIGS WHICH YOU WILL CONTINUE TO REQUIRE. . . . WE MUST . . . BE ALLOWED TO EXPORT ANY RIGS NOT REQUIRED . . . .
>
> . . . .
>
> WE SHOW ACCOUNTS RECEIVABLE FROM OSCO AT JULY 9, 1977 AS FOLLOWS:
> SEDIRAN DOLLARS 9,521,801
> . . . .
>
> AS YOU ARE AWARE OUR COMPANIES CONTINUE TO CARRY SOME 1900 PERSONNEL ON THE PAYROLL . . . .

Allegedly without Claimant's knowledge, Mr. M. Dehghan, Deputy Managing Director of SEDIRAN in Iran, wrote to Dr. Nabegh, Esq. of NIOC on 4 August 1979:

> Further to discussions held in meeting of 1.8.1979 and as it was explained in your presence, Mr. Moosavi, Supervisor of Sediran Drilling Company and Sedco in Ahwaz has resigned . . . . Consequently operation of the company in Ahwaz are left without supervisor . . . . We, therefore, request you to assign a Superintendent on behalf of N.I.O.C. to manage the affairs of the Company in Ahwaz to prevent ths [sic] shut-down of the drilling operations.

The Minutes of the Ordinary Annual General Meeting of SEDIRAN held on 15 October 1979 state:

> The shareholders or their representatives (representing 91% of the shares) were present as indicated in the enclosed list [not attached to submission].
>
> . . . .
>
> Mr. Amir Hossein Jalali, the Alavi Foundation representative, criticising strongly against Sedco's non-cooperation and the indifferent attitude of the American directors with respect to the Company's problems difficulties and complexities, stated that: during the past eight months, despite continuous requests by the Iranian members of the Board and the Deputy Managing Director, for holding a Board Meeting, the American Directors refused to come to Iran, and did not even give their proxies to other persons who could attend the Board Meetings . . . .

> Furthermore, they not only did not cooperate technically and financially, but were also asking for money to send the spare parts which were badly and immediately required, whereas they had full knowledge that the Company was so short of liquidity that it could not pay salaries and wages to its employees. No doubt the American directors of the Company were in contact by telephone and telex, but unfortunately, their contact was merely in order to obtain information and money if possible . . . .
>
> Furthermore, Sedco exported two of their rigs from Iran . . . during the most critical period of revolution, without informing the Iranian Directors of the date and details of export. . . .
>
> The above facts could be considered as the main reasons for the deterioration of relationship between Sediran management and its employees.
>
> . . . .
>
> Mr. Dehghan explained about the National Iranian Drilling Company, which is under consideration and the formation of which was requested by the employees of all the drilling companies. Its preliminaries and programme is being followed up by the National Iranian Oil Company authorities. He further stated that after the National Iranian Drilling Company is formed, all drilling activities in Iran will be taken over by this Company and therefore, there will be no job in Iran for Sediran. He added that coincidently with the formation of National Iranian Drilling Company, decisions will be made by NIOC with regard to Sediran.

Having allegedly received no satisfactory response to his telex of 24 July 1979, Mr. Thorne for SEDIRAN formally terminated the OSCO contract via telex on 8 November 1979. As Managing Director of SEDIRAN he also telexed Bank Barzargani Iran on 8 November 1979 stating:

> IT HAS COME TO OUR ATTENTION THAT YOU HAVE BEEN PAYING OUT FUNDS FROM ONE OR MORE OF THE ABOVE [bank] ACCOUNTS OF OUR COMPANY WITHOUT THE AUTHORITY OF PERSONS AUTHORIZED TO SIGN ON BEHALF OF OUR COMPANY . . . . YOU ARE HEREBY INSTRUCTED TO MAKE NO FURTHER PAYMENTS WHATSOEVER FROM THE ABOVE ACCOUNTS . . . .

The Iranian Ministry of Industry and Mines by three letters dated 22 November 1979 named respectively Mr. K. Mahdavi, Mr. F. Nazarnia and Mr. A. Sarrafi as provisional directors of SEDIRAN pursuant to Legal Bill No. 6738, entitled "Legal Bill Concerning the Appointment of Provisional Directors or Directors for Supervising Production, Industrial, Commercial, Agricultural and Service Units Whether in Public or Private Sector" ["Legal Bill Appointing Provisional Directors"], and Legal Bill No. 8780 dated 16/4/58.[7] On 29 November 1979 NIOC telexed "SEDIRAN TEHRAN STATUARY [sic] DIRECTORS OF SEDIRAN" with a copy to "SEDIRAN LONDON MR. CARL F. THORNE" stating:

> WE ARE IN RECEIPT OF TELEX [of 8 November 1979 whereby the OSCO Contract was terminated by Carl F. Thorne] SIGNED BY EX-MANAGING DIRECTOR OF YOUR COMPANY . . . . THE CONTENT OF THE TELEX DUE TO THE LACK OF INFORMATION OF THE SEHDER [sic] IS COMPLETELY UNREALISTIC . . . . AS A MATTER OF FACT YOU ARE AWARE THAT AMOUNTS COVERED BY SEDIRAN APPROVED INVOICES ARE ALREADY REMITTED TO YOUR LOCAL BANK ACCOUNT.

Mr. Thorne, as Managing Director of SEDIRAN, telexed on 4 December 1979, inter alia:

> CARL F. THORNE CONTINUES TO BE MANAGING DIRECTOR OF SEDIRAN DRILLING COMPANY.
>
> . . . .
>
> IN VIEW OF YOUR FAILURE TO EXPORT OUR RIGS, YOUR FAILURE TO PAY RECEIVABLES, AND OTHER BREACH OF CONTRACT, WE HAVE FOUND IT NECESSARY TO FILE A COMPLAINT AGAINST YOU IN UNITED STATES DISTRICT COURT. . . .

Claimant alleges it shortly thereafter learned of the appointment of provisional directors on 22 November 1979 and in a 12 December 1979 telex to NIOC stated:

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[7] Legal Bill No. 6738 dated 26/3/1358 (16 June 1979), Official Gazette No. 10012 dated 17/4/1358 (8 July 1979), (Footnote Continued)

AS THE MANAGING DIRECTOR SEDIRAN AND AS REPRESENTATIVE OF THE LARGEST SHAREHOLDER I HEREBY REJECT THIS ALLEGED "APPOINTMENT".

. . . .

THE DIRECTORS OF SEDIRAN HAVE NEVER ABANDONED THE COMPANY, NOR ARE THEY UNABLE TO MANAGE THE

COMPANY. THE DEPUTY MANAGING DIRECTOR OF THE COMPANY, AS WELL AS THE IRANIAN BOARD MEMBERS, HAVE ALWAYS BEEN IN IRAN PERFORMING THEIR DUTIES. INDEED, AS RECENTLY AS NOVEMBER OF 1979, A SHAREHOLDERS MEETING WAS HELD. ATTENDED BY THE HOLDERS OF 91 PERCENT OF THE SHARES INCLUDING ALL OF THE NON-IRANIAN OWNED SHARES.

. . . .

IT MUST ALSO BE NOTED THAT IT IS DOUBTFUL WHETHER THE VERY DECREE [Legal Bill Appointing Provisional Directors] WHICH PURPORTS TO AUTHORIZE THE APPOINTMENT OF DIRECTORS IS AT ALL VALID UNDER IRANIAN OR INTERNATIONAL LAW, OR THAT, EVEN IF THE DECREE IS OTHERWISE VALID, THAT THE "TEMPORARY DIRECTORS" WERE PROPERLY APPOINTED IN ACCORDANCE WITH ITS TERMS. WE POINT OUT THAT THE DECREE SPECIFICALLY REQUIRES THE APPROVAL OF THE REVOLUTIONARY COUNCIL BEFORE IT BECOMES EFFECTIVE. FURTHER, BEFORE TEMPORARY DIRECTORS MAY BE APPOINTED, THERE MUST BE A SPECIFIC FINDING AND DETERMINATION BY THE APPROPRIATE MINISTRY THAT THE CIRCUMSTANCES JUSTIFY THAT ACTION. NO EVIDENCE OF REVOLUTIONARY COUNCIL APPROVAL OF THIS DECREE, NOR EVIDENCE OF ANY MINISTRY DETERMINATION, HAS EVER BEEN PRESENTED TO SEDIRAN.

WE VIEW THIS APPOINTMENT OF "TEMPORARY DIRECTORS" AS SIMPLY ANOTHER STEP BY NIOC TO IMPROPERLY GAIN CONTROL OF SEDIRAN'S ASSETS.

(Footnote Continued)
replaced Islamic Revolutionary Council Decree No. 2326 dated 29/1/1358 (18 April 1979), Official Gazette No. 9950 dated 5/2/1358 (25 April 1979).

Respondents state that "Mr. Dehghan [the Deputy Managing Director of SEDIRAN], left Iran towards the end of 1979 . . . ."

On 2 August 1980 Clause C of the Protection and Development of Iranian Industries Act is alleged by Respondents to have been applied to SEDIRAN and ownership of the shares of SEDIRAN was thus transferred to Iran. Respondents allege that the 2 August order read:

> In the execution of paragraph (C) Article 1 of the Law for Protection and Development of Industries in Iran as well as Article 4 of Bylaws for enforcement of the said Law a photo copy of the order concerning application of paragraph (C) to SEDIRAN is forwarded herewith for information and action.
>
> National Industries Organization of
> Iran
> Coordinating Council for
> Mines and Industries Affairs

Claimant notes that a copy of such an official act has never been submitted to it or the Tribunal and argues that even if such an act occurred the clause was prima facie not applicable to SEDIRAN.[8] Respondents further allege that "after [SEDIRAN] was taken over by the Government, [the then government-controlled] SEDIRAN decided to exercise its right to purchase the equipment [i.e., the rigs]."

B. Conclusions of the Tribunal

1. The Applicable Law

Claimant contends that its claims of expropriation are governed by the Treaty of Amity between the United States

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[8] See, infra note 20.

and Iran ("Treaty of Amity")[9] or alternatively by customary international law.

Respondents argue that the Treaty of Amity is not applicable as a result of (1) the changes in U.S.-Iranian relations since the revolution, (2) the signing of the Claims Settlement Declaration and (3) the fact that the Treaty of Amity's protections allegedly do not extend to non-U.S. nationals.

The Tribunal notes that in a previous case (Sea-Land Service and the Islamic Republic of Iran, Award No. 135-33-1 at 26 (22 June 1984), the Tribunal has found that "[t]here is nothing in . . . . the Treaty [of Amity] which extends the scope of either State's international responsibility beyond those categories of acts already recognized by international law as giving rise to liability for a taking." The Tribunal in its present composition agrees.

As the Tribunal thus finds that the Treaty of Amity on the particular issue of what constitutes a taking incorporates the rules of customary international law, the Tribunal decides to defer its considerations regarding the Treaty to a later award, where the standard applicable to the compensation payable for a taking will be dealt with, and where the validity and applicability of the Treaty may be relevant issues.

2. The 1980 Application of Clause C as a Taking

Noting Respondents' assertions that Clause C of the Law for the Protection and Development of Iranian Industries

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[9] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 899.

("Clause C") was applied to SEDIRAN, resulting in the transfer of the shares of SEDIRAN to Iran, Claimant argues that its shareholder interest in SEDIRAN must be regarded as having been expropriated at least by the date of the alleged application of that clause, i.e., 2 August 1980. Respondents contend that the application of Clause C cannot be regarded as a taking, expropriation or measure affecting property rights because (1) SEDIRAN was an Iranian legal entity "with nothing but large amounts of debt" and that Clause C "is somehow to be assimilated to a law that is enacted to cover Iranian companies in a state of bankruptcy . . . ," and (2) SEDCO abandoned SEDIRAN, thereby forfeiting any rights in SEDIRAN.

It must be seen preliminarily that Clause C is not per se a formal decree of nationalization or expropriation. The relevant portion of the Law for the Protection and Development of Iranian Industries, Article 1, provides:

> Article 1
> Existing industry will be divided into four categories according to conditions, and each category will be dealt with in a specific manner:
> a) In addition to oil, gas, railway, electricity and fisheries which have already been nationalized, the following industries will be nationalized:
> a1) Industries manufacturing metals with great consumption in industry . . . .
> a2) Manufacturers and assembly of ships, airplanes and automobiles.
>
> b) Large scale industry and mines whose owners (some of whom have fled the country) have amassed great wealth through illegal relations with the past regime, unlawful abuse of position and trampling of public rights, and whose management the government, by Legal Bill No. 6738 dated 26/3/1358 (16/6/1979), has taken over. The shares of such individuals will revert to government ownership. . . .
>
> c) Factories and institutions who have received substantial loans from banks for

> establishment or expansion, will be owned by the government in the event that their total debt exceeds net assets. . . .
>
> d) Factories and manufacturing institutions owned by the private sector, whose financial and economic status is good and which are not covered by Paragraph (b), Article 1. Based upon acceptance of lawful conditional ownership, their ownership will be legally recognized by the government and will be placed under protection of the law.

Clause A presents a classic formal decree of nationalization. Such a formal decree was present in American International Group and The Islamic Republic of Iran, Award 93-2-3 at 14 (19 December 1983) ("all insurance companies operating in Iran, including Iran America, were proclaimed nationalized effective June 25, 1979 by the Law of Nationalization of Insurance Companies"), reprinted in 4 Iran-U.S. C.T.R. 96 at 105. In contrast to Clause A, Respondents argue that:

> the reason for government's intervention in the affairs of companies and units subject to Clause (c) is that these companies and units had obtained substantial loans from banks for construction or development purposes (like SEDIRAN), and in certain cases their net assets were not sufficient to pay for their total debts. As the banks were nationalized, the government intervened on behalf of the banks and the people and acted as their locum tenens.

In other words, it is argued, the Government of Iran as the representative of the nationalized banks and the people (i.e., the "ultimate" creditor) would take possession of the property of debtors in poor financial condition.

It is an established principle of international law that an act of expropriation does not require a formal decree of nationalization. As this Tribunal stated in Tippets, Abbett, McCarthy, Stratton and The Islamic Republic of Iran, Award No. 141-7-2 at 11 (29 June 1984):

> The 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.

See also Harza Engineering and The Islamic Republic of Iran, Award No. 19-98-2 at 9 (30 December 1982) ("[A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation"), reprinted in 1 Iran-U.S. C.T.R. 499 at 504; Christie, "What Constitutes a Taking of Property Under International Law?," 38 Brit. Y.B. Int'l L. 307, 311 (1962) ("[A] State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention").

It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide "regulation" within the accepted police power of states. See American Law Institute, Tentative Final Draft-Restatement, Foreign Relations Law of the United States (Revised), Comment G to § 712 (15 July 1985) ("A state is not responsible for loss of property or for other economic injury that is due to bona fide general taxations, to regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, that does not discriminate against aliens. . . ."); Kugele v. Polish State, [1931-32] Ann. Dig. 69 (Upper Silesian Arbitral Tribunal) (series of license fees forcing closure of brewery held not to be taking). See also Weston, "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'," 16 Vir. J. Int'l L. 103 (1975).

When an action, as is the case with the application of Clause C, results in an outright transfer of title rather than incidental economic injury, however, a taking must be presumed to have occurred. The one exception to this rule,

forfeiture for crime, is distinguishable because in such cases the person(s) effected do not rightfully possess title to the property in question.[10] In the present case Respondents concede, indeed forcefully argue, that the application of Clause C resulted in the transfer of SEDCO's shares in SEDIRAN to Iran. In this sense, SEDCO's property interest clearly was taken.[11] Respondents' arguments concerning the financial condition of SEDIRAN, although not relevant to the issue of whether a taking occurred, may yet bear on the question of the value of what was taken.

As to Respondents' argument that their actions may not be regarded as expropriatory because SEDCO in December of 1978 abandoned SEDIRAN and SEDCO thereby lost its property interest in SEDIRAN, the evidence simply does not support a finding of abandonment. Claimant submits a letter from SEDIRAN to OSCO stating in part that the "Company [OSCO] suspended Contractor operations during the last week of December, 1978, and verbally instructed Contractor to remain on Standby Rate and be ready to recommence operations at any

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[10]Other possible bases for determining whether an act should be regarded as a "taking" or as "regulation" include inter alia (1) examining whether the "regulating" agency is acting more as an enterpriser than as a mediator, see, e.g. Sax, "Takings and Police Power," 74 Yale L. J. 36, 61-67 (1964); and (2) ascertaining whether the "regulation" has damaged the property to a substantial or excessive degree - sometimes called the "dimunition of value" or "gravity of loss" test, see, e.g., Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1201 (1967).

[11]Claimant argues extensively that under the implementing Iranian regulations Clause C was not applied "bona fide" to SEDIRAN. Claimant contends that this point "has certain important implications with respect to the proper measure of damages due SEDCO under international law." The Tribunal will consider this argument, if appropriate, when it considers the standard of compensation required.

time." This letter was "[a]cknowledged and agreed" to on behalf of OSCO on 17 January 1979 by Mr. H. Bush. The Tribunal also can not help but take note of the grave political unrest present in Iran in December of 1978, the assassination of Paul Grimm (the American Managing Director of OSCO) on 24 December 1978 and the anti-Americanism then present generally and in the Iranian oil industry specifically. In such circumstances giving rise to a reasonable apprehension of danger, the departure of expatriate personnel and their families was legally justified regardless of OSCO authorization. In addition, the Tribunal finds that SEDCO did all that reasonably could be expected to resume SEDIRAN's drilling operations in the first half of 1979 and throughout 1979 did not abandon its position within SEDIRAN.

3. The Events of Fall 1979 as a Taking

Claimant argues that although "[t]he respondents have admitted that the Iranian government has 'taken over' Sediran under the ostensible authority of the Act Concerning the Protection and Expansion of Industries. . . . SEDCO would date the actual 'taking' somewhat earlier, as the actual letters of appointment of Sediran's 'temporary directors' are dated in late November of 1979." The Tribunal agrees that by 22 November 1979 SEDCO's shareholder interest in SEDIRAN had been taken by Iran.

The evidence before the Tribunal suggests that during the summer and early fall of 1979 SEDCO, contrary to the Protocol of Agreement, was denied access to SEDIRAN funds and deprived of its ability to participate in the management and control of SEDIRAN, circumstances potentially evidencing a taking.

The circumstance focused upon by the Tribunal, however, occurred on 22 November 1979 when Iran appointed, by

identical letters, Messrs. Mahdavi, Nazarnia and Sarrafi as "provisional director[s]" of SEDIRAN pursuant to "legal bill nos. 6738, dated 26/3/58 and 8780, dated 16/4/58."

Article 2 of this law provides that through the appointment of government directors "the earlier directors and persons in charge will be stripped of their competence" and that unless the appointments are nullified the shareholders have no right "in any way to appoint directors in their stead." According to Article 3, the government appointed directors "shall have all the authorities necessary for managing the current and routine affairs."

The Tribunal previously has held on numerous occasions that the appointment by Iran of temporary managers is prima facie evidence that the entity involved is an Iranian controlled entity within the meaning of Article VII(3) of the Claims Settlement Declaration. See Raygo Wagner Equipment and Star Line Iran, Award No. 20-17-3 at 6 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411 at 413; Rexnord and The Islamic Republic of Iran, Award No. 21-132-3 at 8 (10 January 1983), reprinted in 2 Iran-U.S. C.T.R. 6 at 9-10; Cal-Maine Foods and The Islamic Republic of Iran, Award No. 133-340-3 at 9-11 (11 June 1984); and Kimberly-Clark Corp. and Bank Markazi Iran, Award No. 46-57-2 at 9 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334 at 338.

In addition, the Tribunal has regarded the appointment of such managers as an important factor in finding a taking. See Starrett Housing and The Islamic Republic of Iran, Interlocutory Award No. 32-24-1 at 52 (21 December 1983) ("There can be little doubt that at least at the end of January 1980 the Claimants had been deprived of the effective use, control and benefits of their property rights. . . . . [b]y that time the Ministry of Housing had appointed [a] Temporary Manager. . . ."), reprinted in 4 Iran-U.S. C.T.R. 122 at 154; see also Tippetts Abbett, McCarthy, Stratton and The Islamic Republic of Iran, Award

No. 141-7-2 at 8-10 (29 June 1984). The appointment of conservators, managers or inspectors, often has been regarded as a highly significant indication of expropriation because of the attendent denial of the owner's right to manage the enterprise. See Sohn & Baxter, "Responsibility of States for Injuries to Aliens," 55 Am. J. Int'l L. 545, 558-59 (1961) (Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Comments on paragraph 3(a)); American Law Institute, supra, Reporters' Note 6 to § 712; OECD Draft Convention on the Protection of Foreign Property, Comments to Article 3, reprinted in Haight, "International Organizations OECD Resolution on the Protection of Foreign Property," 2 Int'l Law. 326 (1968); Board of Editors, "The Measures Taken by the Indonesian Government Against Netherlands Enterprises," 5 Nederland Tijdschrift voor International Recht 227, 242 (1958) ("Thus the taking over of the rights of control over the property from the owners of the enterprises in itself constitutes confiscation"); Christie, supra at 337 ("the most fundamental right that an owner of property has is the right to participate in its control and management").

When, as in the instant case, the seizure of control by appointment of "temporary" managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking. The choice of the date of taking is not without significance because the value of the shareholders' expropriated interest may change dramatically during the surrounding time. Selection of the earlier date of the appointment of government managers as the time of taking is equitably most appropriate given that the Government of Iran and not SEDCO became the chief architect of SEDIRAN's fortunes at that point. For similar reasons, when Germany sequestered property during the First World War and that property was mismanaged it was held that such mismanagement constituted a

"liquidation of the business" for which claimant was entitled to compensation. See 2 M. Whiteman, Damages in International Law 1526-28 (1937) (relying upon Stanislas-Alfred de Montebello (France v. Germany), II Recueil des décisions des tribunaux arbitraux mixtes 463 (1923), and Lallier, van Cassel et Cie (France v. Germany), III Recueil des décisions des tribunaux arbitraux mixtes 124 (1924)). It is legally the most appropriate date because valuation must discount the effect of expropriatory acts. See American International Group and The Islamic Republic of Iran, Award No. 93-2-3 at 17-18 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96 at 107.

When, as in the instant case, it also is found that on the date of the government appointment of "temporary" managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date. Christie, supra at 337. The Tribunal notes that Legal Bill No. 6738 does not prescribe the length of government control and does not detail "provisions calling for judicial or administrative determination of whether the property should be returned to its original owners." Id. As stated by this Tribunal in Starrett Housing and The Islamic Republic of Iran, Interlocutory Award No. 32-24-1 at 53 (21 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122 at 155, "it is notorious that at least after 4 November 1979, the date when the hostage crisis began, all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel." Furthermore, as noted by the Deputy Managing Director of SEDIRAN at its Ordinary Annual General Meeting on 15 October 1979, Iran's intention to form the National Iranian Drilling Company necessarily meant that "all drilling activities in Iran will be taken over" and that "there will be no job in Iran for Sediran." The appointed managers were thus "temporary" not in the sense

that control would be returned to SEDCO but only in the eventuality of SEDIRAN becoming utterly defunct.

The Tribunal thus concludes that Claimant was deprived of its shareholder interest in SEDIRAN by the Government of Iran on 22 November 1979.[12]

IV. Award of the Tribunal.

For the foregoing reasons,

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

SEDCO, Inc. is a national of the United States of America within the meaning of Articles II(1) and VII(1) of the Claims Settlement Declaration.

The Tribunal possesses jurisdiction over the indirect claims of SEDCO, Inc. relating to SEDCO International, S.A. and the direct claim of SEDCO, Inc. for its shareholder interest in SEDIRAN Drilling Company.

SEDCO, Inc.'s indirect claims relating to SEDIRAN Drilling Company are dismissed for lack of jurisdiction.

SEDCO, Inc.'s shareholder interest in SEDIRAN Drilling Company was expropriated by the Islamic Republic of Iran on 22 November 1979.

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[12] The finding of the Tribunal as to the date of taking of SEDIRAN does not preclude the possibility that during the Tribunal's valuation of SEDIRAN, assets of SEDIRAN may be found to have been taken at an even earlier date.

Dated, The Hague
24 October 1985

Nils Mangård
Chairman
Chamber Three

In the name of God

Charles N. Brower
Concurring Opinion

Parviz Ansari Moin
Dissenting Opinion