

ORIGINAL DOCUMENTS IN SAFE

154

Case No. 284Date of filing: 29.4.87

** AWARD - Type of Award Final
 - Date of Award 29.4.87
24 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
 _____ pages in English _____ pages in Farsi

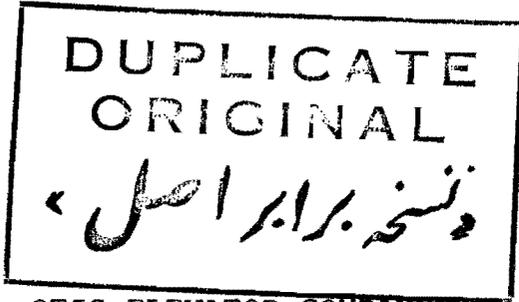
** CONCURRING OPINION of _____
 - Date _____
 _____ pages in English _____ pages in Farsi

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

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

** OTHER; Nature of document: _____

- Date _____
 _____ pages in English _____ pages in Farsi



154

CASE NO. 284

CHAMBER TWO

AWARD NO. 304-284-2

OTIS ELEVATOR COMPANY,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

and BANK MELLAT

(formerly FOREIGN TRADE

BANK OF IRAN),

Respondents.

IRAN UNITED STATES
CLAIMS TRIBUNAL
دادگاه داری دعوی
ایران-ایالات متحدہ

ثبت شد - FILED

Date 29 APR 1987 تاریخ
۱۳۶۶ / ۲ / ۹
No. 284 شماره

AWARD

Appearances:

For Claimant:

Mr. David E. McGiffert,
Mr. Steve Swigert,
Mr. Stephen H. Marcus,
Ms. Jane Chalmers,
Mr. François Jaulin,
Representatives of the
Claimant,
Mr. Kenneth W. McGraw,
Expert witness from Standard
Research Consultants.

For Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Islamic
Republic of Iran,
Mr. Saifollah Mohammadi,
Legal Advisor to the Agent,
Mrs. Navabeh Espahbodi,

Mr. Faramarz Zia Tabari,
Representatives of the
Ministry of Commerce,
Mr. Hossein Ali Farzad,
Representative of Bank Mellat,
Mr. Abbas Hadian,
Assistant to Bank Mellat.

Also Present:

Mr. John R. Crook,
Agent of the United States of
America.

I. INTRODUCTION

1. The Claimant, OTIS ELEVATOR COMPANY ("Otis" or "the Claimant"), seeks compensation for its 40% equity share in Iran Elevator Company Ltd. ("Iran Elevator"), a private Iranian corporation incorporated to establish an elevator manufacturing factory in Iran, which it alleges was expropriated by the Respondent, THE ISLAMIC REPUBLIC OF IRAN and its Government including specifically the Ministries of Commerce and Labour. The Claimant also named BANK MELLAT, formerly the Foreign Trade Bank of Iran, as a Respondent.

2. A Hearing in this Case was held on 9 September 1986.

II. THE FACTS

3. In 1974, the Claimant's parent company, an American corporation, joined with a group of Iranian nationals headed by a Mr. Eskandar Arjomand to form an Iranian corporation, Otis Elevator Company Iran Ltd. ("Otis Iran"), to engage in the importation, marketing, sales, installation, and service of elevators in Iran. The Otis group held a 60% shareholding in Otis Iran and the Iranian investors group owned the remainder.

4. In 1975, the Government of Iran introduced a new policy to promote the development of an indigenous elevator manufacturing industry. To ensure that it could continue to protect the market it had established for its elevators, Otis obtained official approval pursuant to Cabinet Decree 7410 of 22 June 1975 under the Law for the Attraction and Protection of Foreign Investments in Iran to import capital into Iran for investment in a new company. Otis and the Arjomand group formed a joint venture company, Iran Elevator, to establish a manufacturing plant in Iran. This company was registered on 7 December 1975. As Iranian law prohibited foreign nationals from holding the majority

interest in such manufacturing concerns, the ownership percentages in Iran Elevator were the reverse of those in Otis Iran, with Otis holding a minority 40% interest (the Class B shares) and the Iranian investors a majority 60% interest (the Class A shares). The Claimant's capital contributions to Iran Elevator, made in two installments in 1976 and 1977, totalled approximately U.S.\$800,000. The present Claim relates solely to the alleged expropriation of the Claimant's interest in Iran Elevator (claims relating to Otis Iran being the subject of Case No. 228 which is assigned to Chamber One). However, analysis and decision of the present Claim necessitates investigation into the factual background of both companies which had common shareholders, coincident directors, and shared offices and other facilities. However, the Tribunal's findings in this Case are restricted to the evidence presented relating to Iran Elevator.

5. The Articles of Association of Iran Elevator gave Otis the right to elect two of the five members of the Board of Directors and required the approval of one of its Directors for a number of important decisions, including designation of the company's authorized signatories, disposal of assets in excess of 20 million rials, obtaining loans in excess of that amount, mortgaging or otherwise encumbering any of the assets of the company, guaranteeing the obligations of third parties, and appointing the Managing Director. Mr. Kamel Fayek, a long-time employee of Otis, was appointed as one of the Otis Directors and also as Vice-Chairman of the Board of Iran Elevator. (Mr. Fayek was also contemporaneously Managing Director of Otis Iran.) In May 1976, the Board of Iran Elevator delegated extensive management powers to Mr. Fayek including the right to delegate his broad powers to another.

6. During 1976-77, Iran Elevator obtained marketing, engineering, and tooling studies in preparation for the establishment of the factory. Plans were finalized and a

list of necessary tools was developed and submitted to the Government for import approval. Land was purchased as a factory site for the rial equivalent of U.S.\$316,000, site preparation began, and a pre-fabricated factory building was ordered. However, work on the project was halted as a change in market demands prompted an investigation into modification of the plant to enable the production of faster larger elevators with automated doors. A debate developed between the Claimant and Mr. Arjomand's group as to the scope and cost of the modified project. The Iranian investors attempted to raise capital in Iran for enlargement of the project to enable much greater local input in the production of the components of the final product. Otis sought to retain the original capitalization of the project by limiting its scope and increasing the proportion of elevator components imported from its overseas affiliates.

7. By January 1979, the project was further hindered by the uncertainties and changes in the economic environment caused by the Iranian Revolution. Iran Elevator had obtained a permit for the erection of the factory but had done little else and remained inactive. The Respondent states that in August 1979 the Iranian group, with a majority shareholding, proposed a 50% reduction in the capital of Iran Elevator because of the unfeasibility of the project. The Claimant states that the issue of the partial decapitalization of the project arose because the Iranian shareholders wished to obtain funds for other purposes. In any event, on behalf of Otis, Mr. Fayek refused to agree, noting "the exposure Otis will have in case of decapitalization of the Company" and pointing out that remittance of dividends for 1978 had not been permitted, presumably as a result of foreign exchange controls. At this time the Respondents assert that the necessary permits for Iran Elevator to construct a factory had already expired. Otis argues in response that continued formal extensions of the permit were not required. Whatever the merits of these arguments, it seems clear that Iran Elevator remained totally inactive.

8. During 1979, Otis Iran also was experiencing difficulties in continuing its operations. In February 1979, Otis Iran employed approximately 140 production workers and 45 non-production workers, including 35 expatriates. By mid-1979 all foreigners except Mr. Fayek had left Iran. A group of the Iranian workers formed a workers' syndicate which acted to protect its members' interests with respect to severance payments and indemnities required by Iranian labour law. In November 1979, Mr. Fayek left Iran after he and his family were subject to harassment and threats. Thereafter, Mr. Fayek remained in communication with Iran Elevator by telephone and telex, especially with a Mr. Naeeni.

9. Mr. Naeeni had been hired by Otis Iran in 1977, and was appointed Financial Manager of both Otis Iran and Iran Elevator in early 1979 when an expatriate previously holding these positions left Iran. In June of 1979 he was named Assistant General Manager of Otis Iran and in October of 1979 the Board of Directors of Iran Elevator appointed him General Manager.¹ In addition, Mr. Naeeni had been designated by Mr. Fayek as an authorized signatory over Iran Elevator's bank accounts at the Foreign Trade Bank of Iran, which bank was nationalized in mid-1979 and ultimately became part of the Respondent, Bank Mellat. Mr. Naeeni's authority was sufficiently broad to cover both the current account and the time deposit accounts, although as noted above, two signatories were required to operate the accounts, one representing the Class A Directors and one representing the Class B Directors. In late 1979 and early 1980, the authorized Class A signatories were apparently Mr. Arjomand and a Mr. Shafei, who was replaced in January 1980

¹Mr. Naeeni is referred to in the evidence as either Managing Director or General Manager. It is clear that Mr. Naeeni was never a member of the Board of Directors of Iran Elevator.

by a Mr. Pourzand. The Class B signatories were Mr. Fayek and Mr. Naeeni.

10. Because of the upheavals associated with the Iranian Revolution, the downfall in business, and the absence from Iran of its expatriate employees, Otis Iran, in mid-1979, considered reducing its operations and applied to the Ministry of Labour for permission to reduce the company's workforce. This was followed by demands from the workers' syndicate for severance pay and indemnities which the Claimant states were greater than the minimum required by law. During late 1979 and early 1980, the Claimant states that various officials of Otis Iran were under pressure from the workers' syndicate to guarantee a fund for the settlement of workers' claims. The syndicate was apparently aware of the existence of the comparatively large untapped financial reserves of Iran Elevator. The syndicate sought initially to obtain Otis's approval for the use of those funds to satisfy the demands of the Otis Iran workers. It appears that these demands were accompanied by threats of violence. The Claimant states members of the Otis Iran workers' syndicate held Mr. Naeeni and Mr. Shafei hostage and forced them at gunpoint to sign blank checks on Iran Elevator's account and undated instructions to transfer funds from time deposits to the current account. Mr. Shafei's signature on the blank checks and the transfer instructions was obtained in mid-October 1979. The signature of Mr. Naeeni on one of the checks and on a transfer instruction was obtained on 14 January 1980. In the meantime, Mr. Arjomand cancelled the signature authority of his delegate Mr. Shafei by letter dated 31 October 1979 and later appointed Mr. Pourzand in his place. Mr. Pourzand supplied a signature sample to the bank on 15 January 1980. Unable to cash a check made out for 30 million rials with the invalid signature of Mr. Shafei, the Claimant states the workers took Mr. Pourzand hostage and forced him to countersign the check.

11. This check for 30 million rials represented approximately one half of Iran Elevator's cash reserves. It was drawn on Iran Elevator's current account at the Foreign Trade Bank on 16 January 1980 under the signatures of Mr. Naeeni and Mr. Pourzand and was paid into an account in the name of Mr. Naeeni and three Otis Iran workers. For there to be sufficient funds in the current account, the Foreign Trade Bank made on 16 January 1980 an internal transfer of 60 million rials from Iran Elevator's fixed deposit account to its current account. Mr. Naeeni advised Otis by a telex dated 14 January 1980 that he was "forced" to sign the 30 million rial check and advised that the "management [of Iran Elevator] has lost control of the operation of the company". On 18 January 1980, subsequent to the honouring of the 30 million rial check, Mr. Fayek telexed the Bank informing it that the signatures were obtained under duress, instructing non-payment of the check and stating that the Bank would be indemnified against any possible losses resulting from these instructions. In this telex he mistakenly stated that Mr. Naeeni was not an authorized signatory for Iran Elevator. The Bank responded on 23 January 1980 stating that any instructions as to Iran Elevator accounts held with the Bank must be issued jointly by two Directors and that such instructions should be sent by authenticated and certified telex, preferably through a correspondent bank. The Bank also stated that it held a Power of Attorney issued by Mr. Fayek for Mr. Naeeni. On 28 January 1980, by a certified telex through a French bank, Mr. Fayek and Mr. Arjomand withdrew the authorization for Mr. Naeeni and Mr. Pourzand to act as signatories, reiterated Mr. Fayek's earlier communication that the checks, including the one for 30 million rials, had been signed under duress, protested at what Otis has characterized as an unauthorized internal transfer from an interest bearing fixed deposit account to the non-interest bearing current account, and instructed the Bank to return all Iran Elevator funds to interest bearing accounts. This instruction was not followed.

12. In the meantime there continued increased agitation and pressure for the settlement of the Otis Iran workers' claims for which Otis Iran's funds were not sufficient. Mr. Naeeni reported to Mr. Fayek on 19 January 1980 that he and a number of the Iranian shareholders of Otis Iran had agreed with the workers' syndicate of Otis Iran to levels of severance pay for as many of Otis Iran's employees as chose to leave. Mr. Naeeni's telex stated that the agreement was signed by the shareholders present and by the Ministry of Labour. Otis advised Mr. Naeeni that it did not consent to the levels of the payments as these would exceed the cash reserves available in Otis Iran.

13. On 22 January 1980, Mr. Naeeni, as Managing Director of Iran Elevator and Deputy Managing Director of Otis Iran and, reputedly acting on behalf of Iranian Iran Elevator shareholders, wrote to the Ministry of Commerce requesting the appointment of a supervisor for both Iran Elevator and Otis Iran. The letter stated:

Respectfully, the undersigned, Mahmood Naeeni, Managing Director of Iran Elevator Company and Successor to the Managing Director "Iran Otis Elevator", hereby brings to your notice: Mr. Kamel Fayek, Managing Director, "Iran Otis Elevator" who has also been appointed as the Managing Director of "Otis Kuwait Company" and was scheduled to divide his time between these two countries and to administer these two companies, has not come to Iran practically now for nearly 2½ months.

Also, one of the members of the Board of Directors too is not in Iran. The Company's Directors have decided to repurchase the services of the personnel of "Iran Otis Elevator" and to reduce the number of workers. The workers too, in line with the Labor Act have requested the payment of their severance pay and benefits. "Iran-Elevator Company" is not engaged in any operations at all for a long time. The undersigned, who is successor to Mr. Fayek of "Otis Iran", is practically faced with certain problems, and the company's shareholders too state that in case the Government dispatches a supervisor, it would prevent the collapse of the companies and the joblessness of a number of personnel. Therefore, I hereby request that for the sake of preserving the rights of the shareholders and their interests, you should appoint a supervisor so that he could oversee the administration of

affairs of the companies and resolve their current problems.

14. However, Mr. Naeeni subsequently, on 28 January 1980, stated in a telex to Mr. Fayek in Paris that the appointment of a

Managing Director from the Government is not suggested by me but due to Company problems has been suggested and dictated by the Government.

15. The following day, a quorum of Otis and the Arjomand group Directors met in Paris and took various actions regarding both companies. At the Paris meeting the Board revoked Mr. Naeeni's appointment as General Manager of Iran Elevator (but not his position in Otis Iran) and appointed Mr. Reynolds for a one-year term as General Manager. The Board attempted to have the minutes of this meeting formally recorded and gazetted. The Ministry of Justice, through its Bureau for Corporate Registration, advised that in accordance with Iran Elevator's Articles of Association, the company should first proceed to elect a new Board of Directors as the current Board's term had expired. It appears that no attempt was made to comply with this request. At least until 1984 Mr. Naeeni apparently retained his position as Managing Director, as is evidenced by his affidavit filed in the present Case by the Ministry of Commerce on 6 July 1984.

16. On 15 February 1980, the Ministry of Commerce, acting pursuant to Decree No. 6738 enacted in June 1979² issued a notice of appointment of a Mr. Shahali as "Financial

²Legal Act Regarding - Provisional Appointment of Manager or Managers to Head Manufacturing, Industrial, Commercial, Agricultural, Service Units belonging either the Public or Private sector issued on 16 June 1979 as Decree No. 6738 by the Prime Minister of the Provisional Government of the Islamic Republic of Iran. The Decree was published in the Official Gazette on 8 July 1979 as Law No. 7/2571 of 19 June 1979.

Supervisor" of Iran Elevator. The notice stated that "[a]ll correspondence and documents creating an obligation for [Iran Elevator] shall bear the joint signature of Financial Supervisor, and Deputy Managing Director or Managing Director". It appears that Mr. Shahali was given an identical and simultaneous appointment with Otis Iran.

17. Meantime the agitation of the Otis Iran workers for settlement of their demands continued. Mr. Naeeni, along with the Iranian shareholders of the two companies remaining in Iran, continued to negotiate for resolution of the problems. On 10 March 1980, Mr. Naeeni telexed Mr. Fayek concerning the negotiations and reported that an agreement had been reached with the workers' syndicate. The settlement which was outlined envisaged using the 30 million rials formerly withdrawn from the Iran Elevator account by Mr. Naeeni and the workers. According to the evidence produced, Mr. Naeeni subsequently, on 15 April 1980, requested Otis to ratify the agreement. Otis responded with a qualified approval on 17 April 1980 stating that Mr. Arjomand was also required to give his approval. This was not forthcoming. However, this did not prevent Mr. Naeeni from writing to the Ministry of Commerce on 20 April 1980 in his capacity as Deputy Managing Director of Otis Iran and informing the Ministry that the foreign and Iranian shareholders had approved the settlement charges. Apparently in response to this communication the Ministry of Commerce revoked Mr. Shahali's appointment on 23 April 1980.

18. Mr. Naeeni maintained close contact with the Claimant during this time through continuing communications with Mr. Fayek concerning the proposed settlement. According to the series of telexes exchanged between Mr. Naeeni and Mr. Fayek during early 1980, the Ministry of Commerce refused to take responsibility for the proposed settlement or its consequences.

19. Evidently the agreement as to payment of the workers' syndicate demands was carried out in late April and early May of 1980. On 5 May 1980, Mr. Naeeni advised Mr. Fayek that some employees had been terminated and given severance payments and that another group would be processed that week using funds from the account established with the 30 million rial check. It appears that from May of 1980 communication between Mr. Naeeni and Otis was quite limited. No further Board of Directors' or shareholders' meetings of Iran Elevator were held. There is evidence that some of the Iranian shareholders requested a general meeting in 1983 which failed because of lack of a quorum.

20. Subsequent to the revocation of the appointment of the financial supervisor and after an interim period of some seven months without a supervisor, the appointment of a Mr. Baseije as Financial Supervisor of Iran Elevator was gazetted on 26 November 1980. He was succeeded by another supervisor appointed on 4 July 1982.

III. PROCEDURAL ISSUES

(i) Witnesses

21. On 20 August 1986 the Claimant filed a notification of three witnesses: Mr. Jaulin, Mr. Fayek, and Mr. McGraw. Pursuant to Article 25 of the Tribunal Rules, the Claimant was required to file this notification at least thirty days before the Hearing. The Tribunal ruled that Mr. Jaulin and Mr. Fayek, both officers of Otis at the relevant times, would be permitted to give evidence but that Mr. McGraw, from Standard Research Consultants who had prepared a valuation report, could not be presented as a witness except to the extent, if any, justified in rebuttal to the presentations made by the Respondents at the Hearing. The Claimant presented only Mr. Jaulin as a witness and Mr. McGraw was called on briefly in rebuttal.

(ii) Admissibility of Late-filed Evidence

22. The Tribunal accepted several documents filed by the Respondents on 22 and 25 August 1986, considering them to be within the scope of rebuttal evidence previously authorized by the Tribunal and noting that the Claimants had not objected to their late filing. The Tribunal refused to accept a filing of evidence by Bank Mellat submitted one week before the Hearing. The Tribunal noted that no request to accept such a late filing had been made, and no explanation had been offered to justify it.

IV. JURISDICTION

23. The Claimant has submitted evidence showing that it is a United States company, incorporated in Delaware, that at all relevant times it has been the wholly owned subsidiary of Otis Elevator Company (a New Jersey corporation) which in turn is a wholly owned subsidiary of United Technologies Corporation ("UTC"), and that over 95% of UTC's voting stock was registered in the name of stockholders having U.S. addresses. The Tribunal is satisfied that the Claimant is a national of the United States within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration and is entitled to bring its Claim.

24. While there is an indication in the pleadings that, at some time subsequent to 19 January 1981, the Claimant received an insurance payment with respect to its investment in Iran Elevator from the Overseas Private Investment Corporation ("OPIC"), an agency of the United States Government, it is clear, for the reasons stated in Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran, Award No. 217-99-2 dated 19 March 1986, that such a payment cannot affect the jurisdiction of the Tribunal. In the present Case, OPIC has not attempted to become a Co-Claimant.

25. The Claim is directed against the Government of the Islamic Republic of Iran, including its Ministries, and Bank Mellat (formerly the Foreign Trade Bank of Iran), all proper Respondents under Article VII, paragraph 3, of the Claims Settlement Declaration.

26. The Claim is within the jurisdiction of the Tribunal as it arises out of an alleged expropriation or other measure affecting property rights pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

27. The Tribunal therefore is satisfied that it has jurisdiction over this Claim.

V. THE MERITS

28. For Otis to be successful in its Claim before this Tribunal, it is necessary for it to prove, firstly, that its property rights had been interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected and that it suffered a loss as a result, and, secondly, that the interference was attributable to the Government of Iran. See Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al., Award No. 141-7-2, pp. 10-12 (22 June 1984); Thomas Earl Payne and The Government of the Islamic Republic of Iran, Award No. 245-335-2, pp. 10-12 (8 August 1986).

29. The Tribunal must therefore examine the acts of interference Otis complains of and determine whether any or all are attributable to the Government of Iran and whether any or all, by themselves or collectively, constitute a sufficient degree of interference to warrant a finding that a deprivation of property has occurred. In this connection, the Tribunal must distinguish between those acts which relate to Iran Elevator and those which relate to Otis Iran,

which is the subject of a separate claim before the Tribunal.

30. Otis argues that its expatriate personnel were subject to harassment and were forced to depart from Iran because of a general climate of xenophobia and antagonism towards foreign nationals. This climate, Otis alleges, was fostered by the Government of Iran and culminated in the forced departure of its officials from Iran which in turn deprived Otis of its management rights in Iran Elevator. Here the Claimant's argument fails to distinguish between Iran Elevator and Otis Iran. The Tribunal notes that although some 45 expatriate workers involved in the Otis group's operation departed from Iran during the turbulence associated with the revolution, they were Otis Iran workers. The Tribunal notes that in early 1979 a small number of expatriate Otis Iran officers (who doubled their functions as officers of Iran Elevator) left Iran. They were replaced by Iranian personnel. Subsequently, the Tribunal has only evidence of the departure of one Iran Elevator employee, Mr. Fayek (whose main function was that of Managing Director of Otis Iran), who left Iran in November 1979. The Tribunal notes that the new General Manager, Mr. Naeeni, remained in close contact with Mr. Fayek from November 1979 through to early 1980 and intermittently thereafter. Therefore the Tribunal holds that Mr. Fayek's departure, whether voluntary or involuntary, could not in itself be regarded as sufficient interference in the Claimant's rights of management in Iran Elevator on which to base a finding that a taking had occurred.

31. The Claimant also relies on allegations that members of the workers' syndicate, formed from the personnel of Otis Iran but who received the direct benefit of the funds of Iran Elevator withdrawn by Mr. Naeeni, were revolutionary guards and that their coercive actions are attributable to the Government of Iran. The Tribunal notes that the only evidence of the involvement of revolutionary guards in the

workers' syndicate before the Tribunal in this Case is Mr. Fayek's affidavit in which he states that "several members of the syndicate told me at various times that they were members of the Revolutionary Guards." The Tribunal notes that this issue is perhaps more relevant to a consideration of the claim relating to Otis Iran; as it is peripheral to a consideration of the merits of this Case, and in the absence of a sufficient evidential basis presented here, the Tribunal declines to make a finding on this point.

32. As to the actions of the workers' syndicate, the Claimant argues that the Ministries of Labour and of Commerce condoned and actively encouraged the actions of the workers' syndicate by supporting the demands for severance pay well beyond the legal limits and requiring that such severance pay be paid from the funds appropriated from Iran Elevator's bank account. The Ministry of Commerce denies any involvement in the workers' syndicate. It states that the service redemption of Otis Iran employees was carried out by duly appointed officers of Otis Iran.

33. The Tribunal notes that the workers' syndicate was comprised of employees of Otis Iran not Iran Elevator. The negotiations were held with Mr. Fayek and subsequently Mr. Naeeni in their respective capacities as management personnel of Otis Iran. For the Claimant to be successful on this point it would need to prove not only the involvement of the respective Ministries in the workers' syndicate but also, more specifically, that the Ministries encouraged and/or participated in an unauthorized dissipation of Iran Elevator's funds. This it has not done. The evidence points to control over the funds withdrawn from the Iran Elevator account being with Mr. Naeeni and the three workers of Otis Iran. Mr. Naeeni withdrew the funds when he was a duly appointed official of Iran Elevator and continued to administer the fund and negotiate with the workers' syndicate as an officer of Otis Iran. The impropriety associated with the withdrawal of the funds occurred in January 1980 and

there is no evidence before the Tribunal that either Ministry was involved in the establishment of this separate fund.

34. In addition, the Ministry of Commerce, in its letter of 23 April 1980 which revoked the appointment of the financial supervisor, stated:

since decision taking on service redemption of the employees falls without the scope of authority of the Ministry, your assignment [] as financial representative in [Otis Iran] and [Iran Elevator] will be nullified as from the above date. (emphasis added).

35. The Claimant furthermore contends that Bank Mellat, a government controlled bank, acted improperly in its operations concerning Iran Elevator bank accounts in permitting the withdrawal of the 30 million rials from the current account, in effecting the necessary antecedent internal transfer from the interest bearing deposit account to bolster the current account, and by refusing the Board's request to return the residual funds to an interest bearing account.

36. An examination of the powers of attorney executed by Mr. Arjomand and Mr. Fayek in favour of Mr. Pourzand and Mr. Naeeni respectively and deposited with Bank Mellat shows that the authority delegated was comprehensive and included an authority for "opening current and savings accounts, and depositing and withdrawing from those accounts". This authority encompasses the internal transfer made from the deposit account to the current account. It also was sufficient authorization for Bank Mellat to honour the 30 million rial check signed by the authorized signatories, Mr. Pourzand and Mr. Naeeni, which withdrawal formed the basis of a separate and distinct account.³ The Tribunal notes

³This transaction also satisfied the requirements of Article 28 of the Articles of Association, requiring documents creating a financial obligation to be signed by two members of the Board or their delegates.

that both of the above-described banking transactions were completed before Bank Mellat received the telex from Mr. Fayek attempting to cancel the transactions and notifying the Bank of the alleged coercion and impropriety associated with the transfers. In the Tribunal's view, the Bank was justified in advising Otis that, in accordance with its standing instructions from Iran Elevator, it could not act on Mr. Fayek's instructions alone. Bank Mellat subsequently received an authenticated and certified telex on 28 January 1980, issued jointly by Mr. Fayek and Mr. Arjomand, revoking the signature authorities of Mr. Naeeni and Mr. Pourzand. In the meantime, however, the funds had been transferred and the separate account had been established in accordance with proper banking procedures. The Tribunal accepts Bank Mellat's contention that it was not its responsibility to initiate action to vitiate the transactions.

37. At this juncture, Mr. Fayek and Mr. Arjomand also issued instructions directing that all funds in the current account should be transferred to interest bearing time deposit accounts. This instruction the Bank should have followed but did not as is evidenced by the financial statement of Iran Elevator which shows that the balance remained in the current account as of 30 November 1980. The wrongful refusal of the Bank to transfer the funds from one account to another, on its own, without any other evidence of actions by Bank Mellat subsequently to interfere or restrict the withdrawal or operation of the accounts is not a sufficiently significant interference on which to base a finding that a deprivation of property has occurred.

38. The Claimant argues that the Government of Iran is responsible for the refusal by the Ministry of Justice to register and publish the minutes of the Board of Directors meeting on 29 January 1980 which purported to remove Mr. Naeeni from his position as General Manager of Iran Elevator. The prerogative of hiring and firing management personnel, the Claimant argues, was an essential element of

its interest in Iran Elevator. The Tribunal notes that the letter from the Bureau for Corporate Registration, dated 4 March 1980, does not contain an outright refusal to register the minutes. Rather the notification directs the officers of the company to instigate the appropriate procedure to elect a new Board of Directors as its present tenure had expired. It is not disputed that the two year term of the Board had expired. The letter reads in part:

... Since the Board of Director's tenure of office has ended on 24 Jan. 1980 according to the notice No. 6/28135 dated Jan. 25, 1978 issued by the Department, therefore first, please take action in electing the new board members through formation of an ordinary general meeting so that later changes in the Board of Directors can be registered and published.

39. It is evident from Article 18 of the Articles of Association⁴ and Article 136 of the Commercial Code of Iran⁵ that the powers and functions of directors whose term has expired continue until new directors are appointed. However, there is no evidence that the Board or the shareholders either attempted to comply with the directive from the Bureau for Corporate Registration or insist upon registration of the minutes pursuant to the Articles of Association or the Commercial Code. Furthermore there is no evidence that this notification was issued for the purpose of thwarting the Claimant's rights of participation in the management of Iran Elevator or was in any way discriminatory or anything other than a routine administrative response.

⁴Term of Office. The term of office of Directors shall be two (2) years. However, each of the directors shall hold office until such time as his successor is duly elected.

⁵In the event of expiry of the terms of office of directors, their responsibilities for the affairs and management of the company shall continue until such time as new directors are appointed. If the authorities responsible for calling general meetings fail to discharge their functions, any interested person may request the office of the Registrar of Companies to arrange the convening of a general meeting for the purpose of electing directors.

40. The next matter for consideration is the Claimant's argument that the appointment by the Ministry of Commerce of Mr. Shahali as Financial Supervisor for Iran Elevator constituted a fundamental interference with its rights. Whereas according to the practice of this Tribunal the appointment of a government supervisor or manager has usually been accompanied by a finding of deprivation of fundamental rights of ownership sufficient to make the Government liable to pay compensation⁶, there are two important elements which, when considered with the unusual factual background to this Case, distinguish it from previous decisions of the Tribunal.

41. The conflicting communications of Mr. Naeeni, who on 22 January 1980 invited the Ministry of Commerce to appoint a government supervisor for both companies, and on 28 January 1980 stated in a telex to Mr. Fayek that the appointment of a supervisor for Otis Iran "is not suggested by me, but due to company problems has been suggested and dictated by the Government", make it difficult to establish the facts, especially as neither Mr. Fayek nor Mr. Naeeni were presented as witnesses at the Hearing. In any event it can be assumed that it was Otis Iran's problems (and not those of Iran Elevator), which primarily motivated the persons involved in the events to consider it useful to have a government supervisor. No other evidence was produced according to which the Government of its own initiative appointed a supervisor whose specific role it would have been to control Iran Elevator.

⁶Starrett Housing Corporation et al. and The Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 32-2-1 (19 December 1983); Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (29 June 1984); SEDCO, Inc. et al. and National Iranian Oil Company, Interlocutory Award No. ITL 55-129-3 (28 October 1985); Phelps Dodge Corp. et al. and The Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986); and
(Footnote Continued)

42. Although the notice of the appointment of Mr. Shahali as Financial Supervisor of Iran Elevator stated that documents creating an obligation for the Company should be co-signed by him there is, however, no other evidence that the government appointed supervisor assumed control of Iran Elevator's operations. There was in fact no activity to be supervised. Iran Elevator was not involved in negotiating severance pay for its workers: it did not have workers. Nor was it involved in the normal commercial transactions associated with an active company. There is no evidence linking the actions of the Financial Supervisor with the appropriation of the 30 million rials originally part of the cash reserves of Iran Elevator and utilized to make payments to the workers of Otis Iran. This transaction was completed on 16 January 1980 some three weeks before the appointment of the Financial Supervisor on 15 February 1980.

43. As stated above, Mr. Shahali was contemporaneously appointed as a government supervisor for Otis Iran. The Tribunal notes that both the request of Mr. Naeeni for the appointment of the financial supervisor to both companies and the notice of revocation of his appointment emphasize more the status and problems of Otis Iran which further reduces the significance of the appointment of a supervisor to Iran Elevator. Any linkage between the actions of the financial supervisor and the unlawful utilization of Iran Elevator's funds is further refuted by the record which shows that Mr. Shahali's appointment was withdrawn on 23 April 1980 for the stated reason that decisions as to termination payments of employees were not within the scope of his authorization (see paragraph 34 supra).

(Footnote Continued)

Thomas Earle Payne and The Government of the Islamic Republic of Iran, Award No. 245-335-2 (8 August 1986).

44. The record shows that after the revocation of Mr. Shahali's appointment in April 1980, another financial supervisor was appointed in November 1980. Although there is no evidence of any request for this subsequent appointment, the Tribunal notes the continuing absence of Mr. Fayek, which was one of the bases for the original request for a supervisor. There is no evidence that Mr. Shahali or his successors interfered with or exercised ultimate control over Iran Elevator's funds in any other respect or that the remaining funds have been utilized for any irregular purpose.

45. The Claimant contends that Mr. Naeeni's continued involvement in the affairs of the company and his apparent retention of the post of General Manager despite the Board's action to remove him is a further indication that its rights as owner had been interfered with in a significant manner. The Tribunal notes that despite the importance Otis appears to attach to the implementation of the Board's resolution to replace Mr. Naeeni, it continued to communicate with Mr. Naeeni concerning the affairs of both companies, subsequent to its frustrated attempt to register the minutes of the Board meeting and seemed to continue to consider him as its local representative.

46. The Claimant also argues that it has not received any further information on the status or operation of Iran Elevator or any similar notifications to which it is entitled as a shareholder. The Claimant, however, has not produced any evidence showing that it had attempted to request such information or to assert its rights as a shareholder according to the Articles of Association. The Tribunal furthermore notes that there is no evidence that the company has engaged in any activity, except for the minimum of administrative and accounting work, since its inception.

Nor is there any evidence that the Claimant was specially denied access to any company matters. The unaudited financial statements of Iran Elevator of 30 November 1980, which Mr. Naeeni forwarded to Mr. Fayek on 4 February 1981, indicate that the financial position of Iran Elevator had not changed substantially since the end of January 1980 and that the company apparently continued to earn revenue on its deposits.

47. In order to find that a deprivation or taking had occurred, the Tribunal would have to be satisfied that there was governmental interference with the Claimant's shareholding interest in Iran Elevator which substantially deprived the Claimant of the use and benefit of its investment. On the balance of the evidence before it, the Tribunal holds that a multiplicity of factors affected the Claimant's enjoyment of its property rights in Iran Elevator, among them its position as a minority shareholder in an inactive company and the changed circumstances of the Iranian elevator market. However, the Tribunal is not convinced that the Claimant has established that the infringement of these rights was caused by conduct attributable to the Government of Iran. The acts of interference determined by the Tribunal as being attributable to Iran are not sufficient in the circumstances of this Case, either individually or collectively, to warrant a finding that a deprivation or taking of the Claimant's participation in Iran Elevator had occurred. The Claim is therefore dismissed.

VI. COSTS

48. Each Party shall bear its own costs of arbitration.

VII. AWARD

49. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

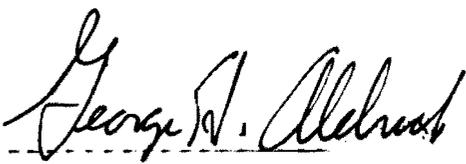
- a) The claim of OTIS ELEVATOR COMPANY is dismissed on the merits.
- b) Each of the Parties shall bear its own costs of arbitration.

Dated, The Hague
29 April 1987



Robert Briner
Chairman

In the name of God



George H. Aldrich
Dissenting opinion



Hamid Bahrami-Ahmadi
Concurring